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Back to the Future: The Case for Allowing Citizens to Sue for Wholly Past Violations of the Emergency Planning and Community Right-to-Know Act

Adam Biegel†

Although the Emergency Planning and Community Right-to-Know Act ("EPCRA") only recently marked its tenth birthday, environmental, political, and academic leaders praise the law as a regulatory success. EPCRA requires facilities that use or store significant amounts of hazardous and toxic substances to inform government agencies and make information available to the public about the presence and release into the environment of such substances. The reporting requirements have increased awareness about dangerous chemicals and facilitated emergency planning with relatively minimal costs.

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2 For environmental perspectives, see Robert W. Shavelson, EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-to-Know, 2 Albany L Envir Outlook 29, 29-30 (Fall 1995) (calling EPCRA "one of the most important and far reaching environmental laws ever enacted"). For political praise, see statement by President Clinton's EPA Administrator Carol Browner quoted in Sidney M. Wolf, Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act, 11 J Land Use & Envir L 217, 220-21 (1996). For academic perspectives, see Richard H. Pildes and Cass R. Sunstein, Reinventing the Regulatory State, 62 U Chi L Rev 1, 106 (1995) (stating there is "reason to believe that the public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation"). Toxic chemical releases have been reduced by nearly 43 percent since 1988. Environmental Protection Agency, EPA Releases 1993 Toxics Release Inventory Data, <http://www.epa.gov/doca/PressReleases/1995/March/Day-27/pr-257.html> (March 27, 1995).

3 Although some small businesses have criticized EPCRA's compliance costs, the law's overall information collection and dissemination system remains relatively uncomplicated. See generally Wolf, 11 J Land Use & Envir L 217 (cited in note 2). The EPA released the first compilation of EPCRA data in 1989, and observers were shocked to learn that billions of pounds of toxic emissions were released in 1987. Id at 280-84, 307-11. See also Henry A. Waxman, An Overview of the Clean Air Act Amendments of 1990, 21 Envir L 1721, 1731 n 28 (1991). This reaction led "an orgy of voluntary emissions cuts," expansion of EPCRA's usage, and the Bush Administration's emission reduction program.
Courts, however, disagree about the boundaries of the citizen suit enforcement of the statute. Under EPCRA, a would-be citizen enforcer must notify the alleged violator, state authorities, and the federal Environmental Protection Agency ("EPA"), and then wait 60 days before filing suit. The legal dispute concerns whether facilities that have failed to file the required disclosure documents can avoid liability from citizen suits if they come into compliance during this 60-day period. In other words, can citizens sue for past violations of the act? Every court that confronted the issue prior to 1995 answered this question in the affirmative, but two circuit courts considering the issue since then have split on the question.

This Comment weighs the merits of the conflicting positions on EPCRA and explains the rationale for a broad private right of action for past violations. Part I examines EPCRA's provisions, the use and interpretation of citizen suit mechanisms in other environmental statutes, and the debate over EPCRA citizen suits. Part II then looks to the text, structure, origins, and practical use of EPCRA to argue for private enforcement for past violations. The Comment concludes that EPCRA's essence is timely disclosure enforced by community vigilance, which would erode if past violations were not actionable.

I. EPCRA AND ITS CITIZEN SUIT PROVISIONS

The Emergency Planning and Community Right-to-Know Act represents a concise legislative response to environmental concerns. The statute aims to increase both local planning for emergencies involving toxic chemicals and citizen awareness of the substances in their communities through mandatory report-
EPCRA CITIZEN SUITS FOR PAST VIOLATIONS

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ing requirements. EPCRA permits "citizen suits," private actions against those who violate the statute or the government for inadequate enforcement. Courts have differed, however, over what actions these "private attorneys general" can prosecute.

A. EPCRA and Its Origins

Congress enacted EPCRA as a response to the perception that the nation was not adequately prepared for an accidental release of hazardous chemicals into the environment. Its requirements and mechanisms were designed with the understanding that communities and citizens would benefit from information about hazardous substances.

1. Emergency planning.

On the emergency planning side, EPCRA requires community planning and industry communication about releases. EPCRA first provides for the establishment of emergency response commissions and emergency planning committees at the state and local levels, respectively. The local committees must work with facilities at which minimum quantities of "extremely dangerous substances" are present and develop plans to respond to catastrophes. When a facility that produces, uses, or stores certain

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11 See, for example, Clean Water Act, 33 USC § 1365(a) (1994); Solid Waste Disposal Act, 42 USC § 6972(a) (1994); Clean Air Act, 42 USC § 7604(a) (1994).
12 42 USC § 11046.
17 42 USC § 11001.
18 EPCRA requires that the EPA publish a list of these substances. 42 USC § 11002(a)(2).
19 42 USC §§ 11002-11003. Emergency plans must include certain elements and be
amounts of these or other chemicals\textsuperscript{20} releases\textsuperscript{21} them outside the facility, the statute requires the facility's owners or operators to inform the emergency planning bodies immediately.\textsuperscript{22} As soon as possible after the emergency, the facility must update its report, detail its response to the release, and describe the health risks of the release.\textsuperscript{23}

2. The right-to-know.

EPCRA's "right-to-know" requirements mandate an unprecedented regimen of information collection and dissemination prior to emergencies.\textsuperscript{24} Facilities that house "hazardous chemicals"\textsuperscript{25} must file and update Material Safety Data Sheets with the planning groups and local fire departments detailing the names and hazardous components of these chemicals.\textsuperscript{26} The EPA may modify reporting thresholds, but Congress intended EPCRA data sheets to parallel OSHA data sheets.\textsuperscript{27} These documents are available to the public through local planning committees.\textsuperscript{28}

In addition, the statute requires companies to file annual chemical inventory and toxic release forms.\textsuperscript{29} The chemical inventory form must include the type, location, and maximum and average daily quantities of the chemicals identified in the data

\textsuperscript{20} Releases of some substances not labeled "extremely dangerous" under EPCRA, 42 USC § 11002(a), are governed by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 USC § 9601 et seq (1994), and also trigger emergency notification requirements. 42 USC § 11004(a)(3). CERCLA also determines relevant release thresholds for trigger of EPCRA's notice provisions. 42 USC § 11004(a)(1)-(2).

\textsuperscript{21} EPCRA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment... of any hazardous chemical, extremely hazardous substance, or toxic chemical." 42 USC § 11049(8).

\textsuperscript{22} 42 USC § 11004.

\textsuperscript{23} 42 USC § 11004(c).

\textsuperscript{24} Wolf, 11 J Land Use & Envir L at 220-21 (cited in note 15).

\textsuperscript{25} Hazardous chemicals are generally defined by the Occupational Safety and Health Act, 29 USC § 651 et seq (1994), and its regulations. 42 USC § 11021.

\textsuperscript{26} 42 USC § 11021. In August 1993, President Clinton signed an executive order subjecting federal facilities to EPCRA's requirements. Exec Order No 12856, 3 CFR 616 (1993).

\textsuperscript{27} 42 USC § 11021. EPCRA exempts products used by consumers and in most research, medical, and routine agricultural capacities. 42 USC § 11021(e). Parallels to OSHA requirements exist for EPCRA inventory forms as well. 42 USC § 11022.

\textsuperscript{28} 42 USC § 11021(c)-(d). For public availability and notice requirements of EPCRA documents generally, see 42 USC § 11044.

\textsuperscript{29} 42 USC §§ 11022-11023. The statute requires the filing of the preceding year's information on specific dates, March 1 and July 1, respectively. Id. The EPA can adjust the frequency of toxic release forms. 42 USC § 11023(i).
sheet. Companies must file this form with the planning groups and local fire departments.

The toxic release form requires facilities using or manufacturing specified "toxic chemicals" to detail the amount and method of disposal during the previous year. Companies file this "release form," commonly known as "Form R," with the EPA and state officials, who must make it available to the public. In addition, the EPA must maintain a public database with reported release information accessible via computer. As with all documents required by EPCRA, a facility may withhold information such as a specific chemical identity that the EPA deems a bona fide trade secret.

3. Enforcement.

The law includes two primary enforcement mechanisms. First, the government can use civil, administrative, and criminal penalties. The second enforcement section, the subject of this Comment, involves citizen suits. Generally, any person or organization can bring these actions. EPCRA provides that:

[A]ny person may commence a civil action on his own behalf against the following:
(A) An owner or operator of a facility for failure to do any of the following:

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30 42 USC § 11022(c), (d).
31 Two different "tiers" or methods of presenting this information can fulfill this requirement. 42 USC §§ 11022(c), (d). The public can compel the more detailed version, called "Tier II," to be filed. 42 USC § 11022(d), (e)(3).
32 The statute references a list of these chemicals published by the Senate Committee on Environment and Public Works and authorizes the EPA to add substances based on health effects. 42 USC § 11023 (c), (d)(2). See 40 CFR § 372.85 (1995).
33 42 USC § 11023. This provision was not intended to require new monitoring requirements, but instead to overlap with other regulatory requirements. 42 USC § 11023(g)(2).
35 42 USC § 11023(a), (h).
36 42 USC § 11023(j). The EPA Toxic Release Inventory is available through the National Library of Medicine’s TOXNET system.
37 42 USC § 11042. EPCRA includes provisions concerning the determinative factors, exemptions, and availability of information regarding trade secrets. 42 USC §§ 11042(b), (f), (h), 11043.
38 42 USC § 11045. Penalties can include fines of up to $25,000. Id. Criminal penalties apply only to emergency reporting requirements and disclosure of trade secrets. Id.
39 A person is defined as "any individual, trust, firm, joint stock company, corporation ... partnership, association, State, municipality, commission, political subdivision of a State, or interstate body." 42 USC § 11049(7).
(i) Submit a follow-up emergency notice under section 11004(c) of this title.
(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.
(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

Citizens can also sue the EPA for failing to promulgate regulations and publish documents,\(^4\) and state officials and the EPA for not making information publicly available.\(^5\) State and local governments may also sue owners and operators and the EPA.\(^6\)

Although EPCRA limits a citizen's ability to file and profit from a suit, legal actions can lead to substantial litigation expense awards or settlements for citizens.\(^7\) The only limitations on citizen suits are requirements of minimal geographic ties for venue; a 60-day waiting period after notifying the EPA, state authorities, and the alleged violator; and an exclusivity order when the United States "has commenced and is diligently pursuing" a penalty or order for the same alleged violation.\(^8\) In suits against facility owners and operators, citizens may seek court orders requiring compliance and imposition of "any civil penalty provided for violation of that requirement."\(^9\) Violators must deposit these amounts in the United States Treasury because all liability is to the federal government.\(^10\) However, courts may award litigation costs, including attorney and expert witness fees.\(^11\) These awards can encourage plaintiffs to invest in monitoring and identifying violations.\(^12\) Settlements have included

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\(^4\) 42 USC § 11046(a)(1).
\(^5\) 42 USC § 11046(a)(1)(B).
\(^6\) 42 USC § 11046(a)(1)(C). State officials are also liable for not seeking requested Tier II information. 42 USC § 11046(a)(1)(D).
\(^7\) 42 USC § 11046(a)(2).
\(^8\) 42 USC § 11046(f).
\(^9\) 42 USC § 11046(b), (d), (e).
\(^10\) 42 USC § 11046(c).
\(^11\) 42 USC § 11045.
\(^12\) 42 USC § 11046(f).
\(^13\) Steel Co., 90 F3d at 1244. ("EPCRA creates a structure that encourages private
substantial environmental auditing, compliance agreements, public awareness campaign commitments, and charitable contributions to local environmental groups.50

B. Citizen Suit Provisions in Other Environmental Statutes

The use of citizen suit provisions in environmental law surfaced more than two decades ago,51 and Congress has continued to use them widely. Most statutes in this area, including EPCRA, include similar provisions concerning standing, requirements, and relief.52 Given the typically parallel goals and language of citizen suit provisions in environmental statutes, litigants and courts often look to apply common principles or analysis within this area's case law.53

One element originally shared by several citizen suit provisions allows citizens to bring suits against those "alleged to be in violation" of statutory or regulatory requirements.54 Under the Clean Water Act ("CWA") a conflict developed over whether this language allowed suits for past violations.55 In Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation, the Supreme Court resolved this conflict finding the statute to allow suits for continuous and intermittent violations, but not wholly past ones.56

The Court deemed this interpretation the "most natural reading" of the words because Congress appeared to have deliber-

50 See Wolf, 11 J Land Use & Envir L at 277-280 n 357 (cited in note 15).
52 For a good overview of this area of the law, see Karl S. Coplan, Private Enforcement of Federal Pollution Control Laws: The Citizen Suit, in ALI-ABA, Environmental Litigation 1033 (1996).
55 Pawtuxet Cove Marina, Inc. v CIBA-GEIGY Corp., 807 F2d 1089 (1st Cir 1986); Chesapeake Bay Foundation, Inc. v Gwaltney of Smithfield, Ltd., 791 F2d 304 (4th Cir 1986); Hamker v Diamond Shamrock Chemical Co., 756 F2d 392 (6th Cir 1985).
56 484 US 49, 57 (1987)
ately used the present-tense phrase in most environmental statutes. The Court suggested Congress could have used the words “[alleged] to have violated” if it meant to include past violations. The Court also noted that Congress used a similarly specific phrase when it amended portions of the Solid Waste Disposal Act in 1984 previously added by the Resource Conservation and Recovery Act (“RCRA”). Congress replaced the “to be in violation” language with a provision creating liability for one “who has contributed to or who is contributing” to a “past or present” act. The Court argued the amendment created a negative implication regarding the CWA.

Moreover, the Court found the “pervasive use of the present tense throughout” the CWA’s citizen suit section made it “primarily forward-looking.” The Court noted that without requiring an ongoing or likelihood of future violation, the notice provision would not make sense because violators would not be able to use the period to come into compliance and citizens could supplant the government’s decision to forgo litigation.

Finally, the Court emphasized congressional characterizations of the suit provisions as “abatement” methods modeled after those in the Clean Air Act (“CAA”), which provided for injunctive relief. Thus, the Court held that requiring a “good-faith allegation of continuous intermittent violation” would allow reasonable claims to go forward while protecting defendants from moot actions.

_Gwaltney_ marked an important point in citizen suit jurisprudence. In its aftermath, courts closely scrutinized and often rejected citizen suits for wholly past violations of the CWA and CWA-like statutes. In addition, Congress amended the CAA in

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57 Id.
58 Id.
59 484 US at 57 n 2.
61 484 US at 57 n 2.
62 Id at 59.
63 Id at 59-61. See also _Hallstrom v Tillamook County_, 493 US 20, 29, 31 (1989) (60-day notice provisions for RCRA citizen suits are “mandatory conditions precedent”).
64 484 US at 61-62.
65 Id at 64-67.
67 For use of the _Gwaltney_ “continuing or intermittent violation” formulation, see _At-
1990 in response to Gwaltney. The prior "alleged to be in violation" language was changed to allow a citizen suit against anyone "alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation" of an emission standard or order. Courts have allowed citizen suits for wholly past violations under this provision.

C. EPCRA and Past Violations

EPCRA serves as the latest battleground over past-violation suits. While many trial courts have found EPCRA analytically different from the CWA, circuit courts have disagreed about whether Gwaltney should be extended to prohibit citizen suits for past violations under EPCRA as well.

1. The district court cases.

Once citizens began filing suit under EPCRA during the 1990s, one of the common objections to the citizen suits involved the right of a private litigant to recover for wholly past violations.

The first case on this issue, Atlantic States Legal Foundation v Whiting Roll-Up Door Manufacturing Corporation, interpreted EPCRA's language and history to allow suits for past viola-


42 USC § 7604(a)(1).


Few suits were filed in the 1980s, partly because EPCRA's first deadlines were in 1988. 42 USC §§ 11003(a), 11022(a)(2), 11023(a). For a discussion of common objections, see Robert W. Shavelson, EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-to-Know, 2 Albany L Envir Outlook 29, 33-35 (Fall 1995).

72 772 F Supp 745 (W D NY 1991) (involving a door manufacturing facility in Akron, New York, that filed delinquent data sheets, inventory forms, and release forms after receiving notice but before the plaintiff filed suit).
tions. The court held that the reporting deadlines were mandatory requirements, the violation of which could result in a "failure" actionable under EPCRA. The court noted that EPCRA's authorization of civil penalties against "any person . . . who violates any requirement" of the statute reinforced this reading. Further, the court held that filing delays undermined Congress's "two fundamental objectives" of increasing publicly available information and developing emergency response plans, noting that achieving these objectives "depends on accurate and current information." In addition, the court distinguished EPCRA's citizen suit provision from the CWA provision analyzed in Gwaltney. The court noted that the plain language of EPCRA's citizen suit provision leads to a different "natural reading" than that of the CWA because of the statutes' different uses of verb tenses. EPCRA also did not include "pervasive use of the present tense," which might limit suits only to ongoing violations. The court further held that Congress's amendment of the CAA to authorize some past violation suits "undercuts the importance of the Supreme Court's discussion in Gwaltney that Congress would not have placed such a notice provision in a statute where it also intended authorize [sic] citizen suits for past violations."

Subsequent district courts echoed this analysis and result. In Williams v Leybold Technologies, Inc., the court found Whiting Roll-Up Door's reasoning "sound and fully applicable" to a case involving data sheets filed after they were due but before a citizen filed suit. The court distinguished EPCRA from the CWA and emphasized that timely data sheets are "a critical first step"
in information dissemination and emergency planning.\(^{86}\) EPCRA's legislative history and plain language compelled the court to recognize citizen suits for past violations.\(^{87}\) Similarly, the court in *Delaware Valley Toxics Coalition v Kurz-Hastings, Inc.* relied on this line of cases to permit a suit concerning wholly past violations involving release forms.\(^{88}\) In *Kurz-Hastings*, the court again distinguished *Gwaltney* by saying the CWA and EPCRA language "differ."\(^{89}\) The court also pointed out that after the CAA amendments, notice requirements are "not at odds" with past violation suits.\(^{90}\)

2. *The Sixth Circuit's approach.*

In 1995, the Sixth Circuit disrupted the prior unanimous agreement on the availability of citizen suits for wholly past violations. In *Atlantic States Legal Foundation, Inc. v United Musical Instruments,*\(^{91}\) the court held that EPCRA does not allow citizen suits for past violations cured before the suit.\(^{92}\) First, the Sixth Circuit held that although EPCRA sets filing deadlines, the phrase "failure to . . . complete and submit" a release form prevents citizens from prosecuting late submissions: "The form is completed and filed even when it is not timely filed."\(^{93}\) According to the court, only the EPA, which Congress empowered to seek civil penalties, could file suit in such cases.\(^{94}\) Second, the court found that *Gwaltney* supported this interpretation.\(^{95}\) As with the CWA, allowing suits for past violations would not permit the alleged violator to come into compliance during the notice period and would risk supplanting the EPA's enforcement role.\(^{96}\)

The Sixth Circuit also rejected arguments the plaintiff and others had made successfully in previous EPCRA cases. The court dismissed the *Whiting Roll-Up Door* court's "natural reading" interpretation of EPCRA's tenses as "hypertechnical

\(^{86}\) Id.

\(^{87}\) Id.


\(^{89}\) Id at 1141.

\(^{90}\) Id.

\(^{91}\) 61 F3d 473 (6th Cir 1995) (involving a musical instrument manufacturer's facility in Eastlake, Ohio, that filed late release forms for 1988 through 1991 after receiving a notice of suit but prior to a suit being filed).

\(^{92}\) Id at 475.

\(^{93}\) Id, citing 42 USC § 11046(a)(1)(A)(iv).

\(^{94}\) Id, citing 42 USC § 11046(c)(4).

\(^{95}\) 61 F3d at 475.

\(^{96}\) Id at 476.
parsing.\textsuperscript{97} It relied instead on the Supreme Court's statement in \textit{Gwaltney} that "Congress could have phrased its requirements in language that looked to the past" but did not.\textsuperscript{98} The Sixth Circuit also ruled that although the post-\textit{Gwaltney} CAA amendment might diminish the significance of notice periods, Congress's failure to amend EPCRA could mean that EPCRA limited citizen suits to those for ongoing violations.\textsuperscript{99} Finally, the Sixth Circuit noted that its interpretation satisfied Congress's intent to provide the public information: "Once the forms providing the information have been filed, this congressional goal has been achieved, and an enforcement suit is unnecessary."\textsuperscript{100}

In late 1995, an Illinois district court in \textit{Citizens for a Better Environment v Steel Co.}\textsuperscript{101} held that the Sixth Circuit's decision "cast doubt" on the earlier cases.\textsuperscript{102} The court agreed that EPCRA emphasized the "completion and submission" of forms over specific deadlines and distinguished between citizen and EPA enforcement privileges concerning past violations.\textsuperscript{103} The district court also approved of the Sixth Circuit's application of \textit{Gwaltney} to EPCRA and its interpretation of the CAA amendments, noting that the plaintiff's "attempt to uncover a flaw in the \textit{Musical Instruments} court's reasoning is . . . unavailing."\textsuperscript{104}

3. The Seventh Circuit's approach.

In the only other EPCRA decision by an appellate court, the Seventh Circuit reversed the Illinois court's decision in \textit{Steel Co.}, thereby creating a circuit split.\textsuperscript{105} Although recognizing that the case was "factually indistinguishable" from \textit{United Musical Instruments}, the court rejected the Sixth Circuit's reasoning in favor of the logic of the \textit{Whiting Roll-Up Door} line of cases.\textsuperscript{106}

The Seventh Circuit faulted the Sixth Circuit's decision for applying the "literal holding" and not the "interpretive methodol-

\begin{itemize}
\item \textsuperscript{97} Id at 477.
\item \textsuperscript{98} Id, quoting \textit{Gwaltney}, 484 US at 57.
\item \textsuperscript{99} 61 F3d at 477.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} 1995 US Dist LEXIS 18948 (N D Ill) (involving a manufacturer and picker of steel on the South Side of Chicago that had not filed any inventory or release forms between 1988 and 1995).
\item \textsuperscript{102} Id at *7.
\item \textsuperscript{103} Id at *7-*9.
\item \textsuperscript{104} Id at *9-*10.
\item \textsuperscript{105} \textit{Citizens for a Better Environment v Steel Co.}, 90 F3d 1237 (7th Cir 1996).
\item \textsuperscript{106} Id at 1241-43.
\end{itemize}
ogy" of Gwaltney to EPCRA. According to the court, EPCRA's language differs from that of the CWA because it “contains no temporal limitation; ‘failure to do’ something can indicate a failure past or present.” In addition, the Seventh Circuit ruled that the Sixth Circuit's emphasis on the words “complete and submit” was misplaced. Rather, the court argued, the ensuing phrases such as “under section 11022(a),” which includes filing requirements and deadlines, expressed Congress's intent to incorporate reporting deadlines into the right of action. Likewise, legislative history reflecting the need for timely reporting and disclosure supported this argument.

The Seventh Circuit went on to distinguish the structure and notice provisions of EPCRA and the CWA. Noting that “[n]owhere does EPCRA contain the ‘is occurring’ language of the CWA to indicate that citizens must allege an ongoing violation,” the court interpreted EPCRA's phrasing as a deliberate congressional choice. The court also claimed that Gwaltney's conception of the notice period was “no longer as compelling” after the CAA amendments allowed past violation suits while preserving the notice period provision. The court also offered logical alternative uses for the notice period: allowing a defendant to correct a plaintiff's information or limit its exposure by filing late reports, maintaining an opportunity for the EPA to take enforcement action, or encouraging settlement negotiations. Finally, the court observed that litigants could rarely recoup the costs of compliance monitoring under the Sixth Circuit's approach, making citizen suits "virtually meaningless."

In the only cases decided after the circuit split, district courts in Arizona, Idaho, and Colorado sided with the Seventh Circuit. In Don't Waste Arizona, Inc. v McLane Foods, Inc., an Arizona court reviewed the caselaw and concluded that the Seventh Circuit "has embraced the better reasoned approach to

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107 Id at 1242.
108 Id at 1243.
109 90 F3d at 1243.
110 Id at 1243, citing 42 USC § 11046(a)(1)(A)(ii).
111 Id at 1243 n 2.
112 Id at 1243-44.
113 90 F3d at 1244.
114 Id at 1244.
115 Id.
116 Id.
117 90 F3d at 1244.
118 950 F Supp 972 (D Ariz 1996).
statutory construction." The court held that EPCRA did not need to be amended like the CAA to allow past violation suits, the statute did not implicitly restrict courts' jurisdiction over such suits, and no words in the statute were inconsistent with past-violation suits. In addition, the District Court echoed the Seventh Circuit's incentive-based policy arguments, concluding that past violation suits provide the only effective citizen supplement to EPA enforcement. Similarly, in *Idaho Sporting Congress v Computrol, Inc.* and *Neighbors for a Toxic Free Community v Vulcan Materials Co.*, Idaho and Colorado courts endorsed the Seventh Circuit's reading of EPCRA.

II. RESOLVING THE CIRCUIT SPLIT OVER EPCRA

As noted in Part I, courts that have examined the EPCRA past violation issue have given starkly different answers. On one hand, the Sixth Circuit applied the Supreme Court's restrictive interpretation of the CWA's citizen suit provisions to prohibit private actions under EPCRA for purely historical violations. On the other hand, the Seventh Circuit distinguished EPCRA from the CWA and allowed past violation suits.

After weighing the merits of the conflicting circuit court positions, this Comment argues for the broad private right of action for past violations endorsed by the Seventh Circuit. This Comment expands on the Seventh Circuit's arguments in *Steel Co.* concerning language, structure, congressional intent, and incentives and then blends them with a perspective on the usefulness of citizen enforcement, a policy view of EPCRA's enforcement, and other supporting views.

A. The Text Authorizing Citizen Suits Under EPCRA

As both the Sixth and Seventh Circuits noted, statutory interpretation begins with an analysis of plain language. They disagreed, however, on what that plain language meant. A

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119 Id at 976.
120 Id at 978-79.
121 Id at 979.
125 *Citizens for a Better Environment v Steel Co.*, 90 F3d 1237 (7th Cir 1996).
126 *Steel Co.*, 90 F3d at 1242; *United Musical Instruments*, 61 F3d at 475.
common-sense reading of EPCRA, however, must allow actions for past violations because of its phrasing, especially in comparison to differently worded environmental statutes. Without such an interpretation, EPCRA's mesh of deadlines and mandatory notice periods would prevent most citizen suits.

Consider a typical EPCRA "past violation" suit. Assume that (1) Citizen A discovers Facility X did not file a required chemical release form by July 1, 1998, (2) the citizen properly notifies Facility X and others on August 1 of his intent to sue, (3) Facility X files the form on September 15, and (4) Citizen A files suit against Facility X on October 15 after the Environmental Protection Agency decides not to act. Thus, the violator is in compliance when the suit is filed. Does EPCRA authorize this suit?

A single EPCRA provision governs the viability of such a citizen suit. The statute provides that "any person may commence a civil action on his own behalf against... an owner or operator of a facility for failure to... [c]omplete and submit a toxic chemical release form under section 11023(a) of this title."[127]

EPCRA's words, best understood, give meaning to each other. Although the word "failure" might "indicate a failure past or present,"[128] it does not carry a conclusive meaning. An ordinary use of the word, as in "I failed to do something," can easily carry the logical connotation that that failure continues. Thus, a natural reading of "failure" does not resolve the issue. Nor does emphasizing the words "complete and submit a toxic chemical release form"[129] end the analysis because the sentence does not end there. It continues with "under section 11023(a) of this title."[130] This citation is crucial because the referenced section includes the due date for the form.[131]

A plain language reading suggests that the deadline date is an integral part of the statute. The Seventh Circuit reached this conclusion, saying that "under" means "in accordance with the requirements of."[132] Thus, the deadlines are "essential elements of the provisions citizens have authority to enforce."[133]

[129] See United Musical Instruments, 61 F3d at 475.
[131] 42 USC § 11023(a).
[132] Steel Co., 90 F3d at 1243.
[133] Id.
Furthermore, the reference to "under section 11023(a)" serves as more than a means of identifying the type of form. If Congress meant to omit past violation actions, it could have referenced a definition of the form elsewhere. The functional definitions of a release form included in Section 11023(a)—Sections 11023(c), (g), and (f)—could have been included in the citizen suit section without additional verbiage. Or a definition of the form could have been included in the statute's definition list without mention of a due date. Congress took neither of these steps, each of which would have avoided including the deadline by reference. The detailed assignment of the EPA's liability for not complying with other portions of this section adds weight to this theory.

In addition, plain language does not function in a caselaw vacuum. Congress included citizen suit provisions in environmental laws for sixteen years prior to EPCRA, and most were essentially identical. They included references to violators "alleged to be in violation." The Supreme Court ruled after EPCRA's passage that this language did not cover wholly past violations, saying, "Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option." The Sixth Circuit ignored the timetable of these legal developments and incorrectly applied the Court's Gwaltney holding in a mechanical fashion to preclude past violation suits. Given the consistent phrasing of the pre-EPCRA citizen suit provisions, EPCRA's new terminology—"failure to do" instead of "be in violation"—can be seen as an attempt to permit the retrospective application to which the Court referred. The circuit split re-
garding past violations of the CWA at the time EPCRA was enacted adds to this logic. EPCRA's authors in 1986 could not presage the exact words of the 1987 *Gwaltney* opinion. Every court that confronted this issue between *Gwaltney* and *United Musical Instruments* observed this difference in EPCRA. These conclusions did not represent "hypertechnical parsing." Additionally, this historical understanding of EPCRA undercuts the Sixth Circuit's interpretation of the 1990 Clean Air Act amendments, which added past violations to the "in violation" language. Instead of showing "Congress intended to limit EPCRA's citizen suit provision" to ongoing violations by not amending EPCRA, the amendments left a backward-looking statute untouched.

B. The Structure of EPCRA's Citizen Suit Provision

The next logical inquiry involves other provisions of EPCRA related to citizen suits, including words within the section itself and those referenced by it. An analysis of these provisions in light of Supreme Court decisions, other statutes, and congressional activity bolsters the conclusion that EPCRA authorizes citizen suits for past violations.

The linguistic evidence that the *Gwaltney* court cited to bar citizen suits for past violations of the CWA does not exist in EPCRA. In *Gwaltney*, because the party alleged the "to be in violation" language was not dispositive, the Supreme Court observed that "[o]ne of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense" throughout the relevant section. The Court cited four present-tense phrases in the CWA's citizen suit section beyond the "to be in violation" clause. No such pattern exists in corresponding portions of EPCRA.

First, EPCRA consistently uses language that includes retrospective violations when it authorizes public enforcement. In the

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144 *United Musical Instruments*, 61 F3d at 477.

145 Clean Air Act Amendments of 1990 § 707(g), Pub L No 101-548, 104 Stat 2574, 2683, codified at 42 USC § 7604(a)(1), (3).

146 *United Musical Instruments*, 61 F3d at 477.

147 484 US at 59.

148 Id.
CWA, states may file civil actions for a violation “which is occurring in another state and is causing an adverse impact on the public health . . . .”\(^{149}\) In EPCRA, provisions authorizing civil actions by state and local governments parrot the “failure to complete and submit” language from the statute’s citizen suit provisions and refer to sections containing temporal references.\(^{150}\) The statute authorizes citizen suits against the EPA and state officials with similar language.\(^{151}\)

Second, EPCRA defines who can sue differently from the CWA. The CWA defines a citizen as “a person or persons having an interest which is or may be adversely affected.”\(^{152}\) EPCRA defined a person without including any temporal elements,\(^{153}\) implicitly limiting standing qualifications to the minimal constitutional requirements.\(^{154}\)

Third, while other statutes deal with complex problems concerning environmental degradation, EPCRA is aimed at information dissemination. The simplicity of EPCRA’s demands could logically support more rigid enforcement of its requirements, including past violations. The CWA and the CAA, for example, concern complex caps on ongoing waste discharges and air pollution.\(^{155}\) In contrast, EPCRA requires paperwork filing.\(^{156}\) One could fairly observe that these goals lead to different enforcement mechanisms—including not only the ubiquitous injunctions, but, more importantly, broad monetary penalties.

Fourth, since Gwaltney, Congress has altered the context in which courts interpret each act’s notice provision. Gwaltney noted that under the CWA citizens must notify the EPA, the alleged violator, and the state “in which the alleged violation occurs” of their intent to sue 60 days before a suit is filed.\(^{157}\) EPCRA contains the same disputed language.\(^{158}\) The Gwaltney Court ruled that (1) the notice provision would become “gratuitous” if violators were not allowed a period to come into compliance without liability, and (2) permitting past violation suits would “change

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\(^{149}\) 33 USC § 1365(h).

\(^{150}\) 42 USC § 11046(a)(2). Compare 42 USC § 11046(a)(1).

\(^{151}\) 42 USC § 11046(a)(1)(B)-(D).

\(^{152}\) 33 USC § 1365(g).

\(^{153}\) 42 USC § 11049(7).

\(^{154}\) See John E. Nowak and Ronald D. Rotunda, Constitutional Law § 2.12(f) at 71-90 (West 5th ed 1995).

\(^{155}\) See 33 USC § 1251 (CWA); 42 USC § 7401 (CAA).

\(^{156}\) 42 USC §§ 11021(d), 11022(a)(2), 11023(a).

\(^{157}\) Gwaltney, 484 US at 59, citing 33 USC § 1365(b)(1)(A)(ii).

\(^{158}\) 42 USC § 11046(d)(1).
the nature of the citizens' role from interstitial to potentially intrusive.\textsuperscript{159}

Still, Congress's 1990 Clean Air Act amendments, as noted earlier, explicitly permitted past violation suits while keeping notice requirements, rendering Gwaltney's logic a less "compelling" interpretation of congressional intent.\textsuperscript{160} The realistic view that a notice period represents a period for not only federal pre-emption but litigation coordination, investigation, settlement negotiation, and liability mitigation\textsuperscript{161}—and not merely amnesty—carries common-sensical weight.\textsuperscript{162} While Congress can grant safe harbors, post-1990 courts would err in assuming that Congress implicitly created one in EPCRA simply by making a citizen wait to sue. Further, little risk exists that citizens—who must allow government agencies first crack at any suit, have fewer resources, and are always subject to federal intervention in their legal dispute—will usurp state power. As the next Part discusses, citizen suits exist largely because the government needs, not fears, their assistance.

Two additional structural points merit discussion. First, as the Seventh Circuit has noted,\textsuperscript{163} EPCRA uses the past tense in its venue section in referring to the district where "the alleged violation occurred."\textsuperscript{164} In comparison, the CWA's venue provision refers to actions being brought where the source of excess pollution "is located."\textsuperscript{165} The CWA's choice of venue does not necessarily imply that all violations are ongoing, but the distinction between it and EPCRA adds credence to the arguments for allowing past violation actions.

Additionally, the Sixth Circuit's insistence that the EPA can address past violations while citizens cannot,\textsuperscript{166} can be rebutted. The court based its conclusion on the language of EPCRA's civil and administrative penalty provision.\textsuperscript{167} This argument is entirely misplaced. First, the Sixth Circuit referred to sections of the statute that are irrelevant to the past violations question. They refer to the civil liability of any person "who violates any

\textsuperscript{159} 484 US at 60-61.
\textsuperscript{160} Steel Co., 90 F3d at 1244.
\textsuperscript{161} This is especially relevant under EPCRA since civil penalties for reporting violations are assessed daily. 42 USC § 11045(c)(3).
\textsuperscript{162} See Steel Co., 90 F3d at 1244.
\textsuperscript{163} Id.
\textsuperscript{164} 42 USC § 11046(b)(1).
\textsuperscript{165} 33 USC § 1365(c)(1).
\textsuperscript{166} United Musical Instruments, 61 F3d at 475.
\textsuperscript{167} 42 USC § 11045(c)(1), (4).
requirement” of the law and the imposition of administrative penalties equal to “any civil penalty for which a person is liable.” But “violates” does not refer only to ongoing violations. That liability is ongoing does not transform the past nature of the violations. In addition, the Sixth Circuit ignores the fact that the EPCRA citizen suit provision incorporates all of the civil penalty provisions by reference. Thus, EPCRA does not deny “broad power” to citizens while granting it to the EPA.

In sum, no basis exists to undermine application of EPCRA’s citizen suit provision to past violations. No “pervasive use” of the present tense can be found, and the preponderance of clauses that refer to past acts urge support for the Seventh Circuit’s conclusions.

C. The Social Origins and Policy Justifications of EPCRA

Congress passed EPCRA to increase the nation’s ability to respond quickly and effectively to emergencies and to enable citizens to become aware of dangers. Allowing courts to excuse violators’ failures to comply with deadlines does not comport with this intent.

Omnipresent during EPCRA’s development was the Bhopal tragedy. The statute’s first incarnation appeared only months after the Indian chemical accident. Throughout EPCRA’s consideration, its supporters described the accident not as “an aberration of Third World management and technology” but as a realistic possibility in the United States. Congress designed EPCRA to “improve our ability to respond to these incidents.”

Thus, every section of EPCRA related to emergency planning. EPCRA established planning groups, required the development of plans, and mandated immediate notification of officials—even via 911—in the case of emergencies. Each of

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168 Id.
169 42 USC § 11046(c) (“The district court shall have jurisdiction . . . against an owner or operator of a facility . . . to impose any civil penalty provided for violation of that requirement . . . .”).
172 Statement of Senator Lautenberg, 131 Cong Rec S 18388-89 (Dec 19, 1985).
173 Statement of Senator Lautenberg, 131 Cong Rec at S 11664 (cited in note 170).
174 42 USC § 11001.
175 42 USC § 11003.
176 42 USC § 11004.
EPCRA's required documents had to be filed by fixed dates, regularly updated, and made available to the public. And the most important type of reported information—concerning amounts of chemicals released into the environment—had to be available on-line.

The historical background leading to EPCRA does not justify interpreting congressional intent to endorse grace periods for violators, a necessary consequence of abrogating citizens' ability to sue for past violations. The Sixth Circuit nonetheless concluded from EPCRA's legislative history only "that Congress thought it important that the public receive the required information." Even if this objective was delayed, the Sixth Circuit reasoned, citizens eventually received the information, and the EPA could use its discretion to decide whom to punish. This view devalues Congress's aims and turns a blind eye to the realities of environmental enforcement.

First, filing forms is not equivalent to filing timely forms. The former act imposes impediments on planners and emergency officials similar to those imposed by a non-filer. As discussed in Part I.A of this Comment, Congress referred to the dates for required documents in the citizen suit authorization section. This reference is strong evidence of the importance of timely compliance. Moreover, as district courts have noted, delays in filing forms can prevent a community from having the up-to-date emergency response plans Congress envisioned.

Such a scenario is not fanciful. Recall Facility X. The local fire department and emergency planners know little about the current nature, amount, location, or disposal of chemicals used by Facility X. Would it thus come as a surprise when officials omit Facility X from, or fail to alter their treatment of it in, their emergency plans and drills? When Facility X calls 911 for the first time, the community may indeed face a Bhopal-type situation.

177 42 USC § 11004(b).
178 42 USC §§ 11021-11023.
179 Id.
180 42 USC § 11044.
181 42 USC § 11023(j).
182 United Musical Instruments, 61 F3d at 477.
183 Id.
In addition, without timely filed information, citizens would not have swift access to information about their communities. The required computer database and public documents would not represent the full picture. Citizens could not research, lobby, or speak out on environmental issues intelligently without these facts. Eventual filing does not cure these delays. Congress intended citizens to have ready access to information.\textsuperscript{165} To that end it allowed only for limited departures from reporting deadlines.\textsuperscript{165}

Further, the Sixth Circuit erred in suggesting that EPCRA "leaves to the EPA, with its broad perspective on the entire spectrum of enforcement of compliance, discretion to determine those violators whose conduct warrants such penalties."\textsuperscript{187} Putting aside this statement's inaccuracy as a matter of statutory interpretation,\textsuperscript{188} it ignores the valid purposes leading to the inclusion of citizen suits in EPCRA.

EPCRA authorized citizen suits precisely because Congress did not expect the EPA to find all violators. As one federal environmental official described, there are simply too many violations "out there" for the government to prosecute.\textsuperscript{189} Thus, statutes such as EPCRA create a web of enforcement among governments and private citizens. Every document is filed at different levels of government,\textsuperscript{190} governmental entities can sue each other,\textsuperscript{191} the EPA can assess fines and file its own actions,\textsuperscript{192} and citi-

\textsuperscript{185} See, for example, Statement of Representative Edgar, 132 Cong Rec H 9595 (Oct 8, 1986):

Frankly, my concerns rest with the families that live in the shadow of those chemical and manufacturing plants. I have put myself in their shoes and have fought for a program that looks after their needs. This legislation gets us well on the path to the full disclosure they deserve.

\textsuperscript{186} See 42 USC § 11023(i) (allowing the EPA, under very limited circumstances, to modify frequency of release form filings).

\textsuperscript{187} United Musical Instruments, 61 F3d at 477.

\textsuperscript{188} See discussion in Part II.B.

\textsuperscript{189} Statement of William Cohen, Chief of the General Litigation Section of the Land and Natural Resources Division of the US Department of Justice, quoted in Donald R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?, 54 Md L Rev 1552, 1560 n 36 (1995). Senator Muskie specifically observed that governments were not adequately enforcing environmental laws when he supported the first citizen suit provisions in the Clean Air Act. Statement of Senator Muskie, 116 Cong Rec S 42382 (Dec 18, 1970).

\textsuperscript{190} 42 USC §§ 11021-11023.

\textsuperscript{191} 42 USC § 11046(a)(2)(C).

\textsuperscript{192} 42 USC § 11045.
zens can sue violators.\textsuperscript{193} Governmental actors retain preemption rights, but few obstacles lie in the path of a citizen who discovers a violation. This path may increase costs,\textsuperscript{194} perhaps raising questions about the wisdom of methods provided by Congress, but not their validity. Thus, especially in a statute such as EPCRA involving a national scope and observable paperwork deadlines, citizens properly play an important role in enforcement.

D. Additional Perspectives on EPCRA

Courts should consider practical reality alongside text, structure, and policy in interpreting EPCRA. Unless courts permit broad private actions for past violations, EPCRA citizen suits will disappear. If citizens can only sue for ongoing violations, EPCRA would offer no financial incentives or practical possibility of success.

Although EPCRA's opponents predicted the statute would explode the toxic tort industry and cause sensationalism, the result has been different.\textsuperscript{195} Few citizen suits were filed under EPCRA during its first decade.\textsuperscript{196} The suits filed were instituted by small environmental groups that, as the statute intended, discovered that companies in their own backyard had not filed documents.\textsuperscript{197}

To understand the economic realities, the example of Facility X remains helpful. The example assumed Citizen A "discovered" the facility had not filed EPCRA documents. But such a discovery does not come without costs. In Delaware Valley Toxics Coalition v Kurz-Hastings, for example, the plaintiff completed a computer study of Philadelphia-area EPCRA compliance, purchased items, and invested more than 250 hours of time to find violators.\textsuperscript{198} EPCRA seeks to promote information dissemination, but gather-

\textsuperscript{193} 42 USC § 11046(a).
\textsuperscript{194} See Harold J. Krent and Ethan G. Shenkman, Of Citizen Suits and Citizen
\textsuperscript{195} Sidney M. Wolf, Fear and Loathing About the Public Right-to-Know: The Surpris-
ing Success of the Emergency Planning and Community Right-to-Know Act, 11 J Land Use
& Envir L 217, 244-46, 277-80 (1996).
\textsuperscript{196} Id at 277-80.
\textsuperscript{197} Id.
\textsuperscript{198} 813 F Supp 1132, 1135 (E D Pa 1993).
ing such information requires substantial research\textsuperscript{199} because the EPA's database does not identify non-filers.\textsuperscript{200}

On the other side of the coin, prior to a suit, what incentives does Facility X have to file EPCRA forms? Criminal penalties apply only to emergency and trade secret provisions.\textsuperscript{201} As discussed in Part II.C, an overworked EPA or state agency will not likely begin proceedings against Facility X for paperwork violations unless Facility X's failure is egregious. According to one early estimate, 30 percent of American companies required to comply with EPCRA fail to do so each year.\textsuperscript{202}

Thus, what does allowing citizen suits, past or present, add to this mix? The answer is financial fear. Although the EPA may not have the resources or desire to prosecute Facility X's violations after they are discovered, citizens may. Facility X filed its release form two and a half months late—one and a half months after Citizen A gave notice. That makes them potentially liable under EPCRA for up to $3.75 million.\textsuperscript{203} The EPA has developed a policy that can reduce the penalties they seek in EPCRA actions,\textsuperscript{204} but without the EPA as a party, the potential liability remains enormous.

This potential mega-penalty has a beneficial impact on citizen suits. Congress very likely included not only injunctions and orders, but penalties, as relief under EPCRA to create an ex ante incentive for timely compliance. First, the liability gets the attention of violators. Although an EPCRA trial may not lead to a verdict for these maximum amounts, the possibility often facilitates settlement negotiations.\textsuperscript{205} Second, settlements can include many positive elements for the plaintiff. In addition to assuring compliance and extracting penalty payments, settlements often impose extra compliance requirements for viola-

\textsuperscript{199} See Robert W. Shavelson, \textit{EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-to-Know}, 2 Alb L Envir Outlook 29, 35 (Fall 1995).
\textsuperscript{200} Id.
\textsuperscript{201} 42 USC § 11045(b)(4), (d)(2).
\textsuperscript{203} 42 USC §§ 11045(c), 11046(c). This total incorporates violations for failing to file with either the state or the EPA, each carrying fines of $25,000 per day. Moreover, this estimate may be conservative. A company not filing release reports may not have filed inventory reports, adding liability.
\textsuperscript{205} Wolf, 11 J Land Use & Envir L at 271 (cited in note 195).
and demand contributions to environmentally beneficial entities including EPCRA-monitoring groups. Moreover, courts can use the "costs of litigation" recovery provision under EPCRA to award enforcement, research, and discovery costs. Thus, citizen groups, especially those that make local EPCRA research part of their mission, can achieve environmental as well as financial rewards from citizen suits.

But consider the impact on this hypothetical if United Musical Instruments was correct in precluding suits for past violations of EPCRA. The release form in the example, filed on September 15, was "completed and submitted" prior to the earliest date on which Citizen A could have filed suit. Thus, no citizen suit would be allowed. As a result, Citizen A's costs could not be reimbursed, and Citizen A could not seek punishment or additional compliance measures. Furthermore, it is unlikely that the EPA would choose to spend its limited resources on a violation already cured.

This hypothetical suggests the disastrous consequences of the Sixth Circuit's approach. If the notice period provision gives violators a window of opportunity to escape liability, there is no incentive to file on time. In fact, compliance costs create a disincentive for timely filing. This cannot be what the authors of the law wanted.

Thus, the Seventh Circuit's practical observations carry great weight. In Steel Co., the court noted the Sixth Circuit's view would render citizen suits "virtually meaningless":

EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act . . . . If citizen suits could be fully prevented by 'completing and submitting' forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply,
if citizens can’t sue, they can’t recover the costs of their efforts.\textsuperscript{211}

The result of the Sixth Circuit’s decision, the Steel Co. court asserted, would be to shift the cost of EPCRA compliance from Facility X to Citizen A. This would cause private enforcement to “drop off,” an idea “impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provisions.”\textsuperscript{212}

If these consequences materialized, private enforcement of EPCRA would no longer exist. In combination with Supreme Court interpretations of other environmental statutes,\textsuperscript{213} citizens would often be without recourse. Thus, absent the redrafting of relevant statutes, only governmental entities would remain to enforce environmental laws, which they have admitted is a monumental and likely impossible task in today’s budget-conscious and violation-filled world.

\textbf{CONCLUSION}

EPCRA represents a novel and important tool in environmental law. It attempts to harness local citizens and public opinion to encourage widespread environmental planning, awareness, and, ultimately, safety. In accordance with these goals, a careful reading of EPCRA leads to the conclusion that citizens must have the right to sue for not only ongoing, but also wholly past, violations. The statute’s language differs from that used in other environmental citizen suit provisions by not using present tense verbs. EPCRA specifically includes references to provisions with fixed deadlines for compliance that, given the context of the statute’s intent, must be given meaning through adequate enforcement. Furthermore, permitting citizen suits for past violations preserves the statute’s effectiveness and practical use by providing the necessary financial incentives for private monitoring.

\textsuperscript{211} 90 F3d at 1244.
\textsuperscript{212} Id at 1245.
\textsuperscript{213} See Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation, 484 US 49 (1987).