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I. INTRODUCTION

In Steel Company v. Citizens for a Better Environment, the United States Supreme Court considered whether the Emergency Planning and Community Right-to-Know Act (EPCRA) authorized citizens to sue for wholly past violations. The Sixth and Seventh Circuit Courts of Appeal were in disagreement on the question of whether EPCRA’s language authorized such citizen suits. The United States Supreme Court resolved this split by holding that Citizens for a Better Environment lacked standing to maintain a suit for Chicago Steel & Pickling Co.’s past violations.

Part II of this note explores the facts of the Steel Company decision. Part III briefly discusses the background of environmental citizen suits, and explains the history and framework of EPCRA. Following an analysis of the Court’s reasoning in Part IV, this note considers the significance and future implications of the Steel Company ruling in Part V.

II. FACTS

Citizens for a Better Environment (CBE), a non-profit environmental group, brought a private enforcement action against Chicago Steel & Pickling Co. (Steel Co.). In March 1995, CBE discovered that Steel Co. had failed to comply with the Emergency Planning and Community Right-to-Know Act’s (EPCRA) reporting requirements since 1988. Specifically, Steel Co. failed to file inventory forms and toxic chemical release forms. CBE uses the reports

4. See id. at 1009.
5. See id. at 1020.
6. See Petitioner’s Brief at 3, Steel Co. v. Citizens for a Better Env’t, 118 S. Ct. 1003 (1997) (No. 221790). Steel Co. has been in business since 1971. See id. It is a small minority-owned facility with 55 employees, located on the southeast side of Chicago. See id. Steel Co. utilizes “steel pickling,” a finishing process that removes scale and rust from steel coils. See id. Scale is a “black or gray coating of oxide which forms on steel as it cools[,] [r]ust is a reddish brittle coating formed on steel as it is attacked by moist air.” Id.
7. See Steel Co., 118 S. Ct. at 1009. EPCRA is an informational statute which provides citizens with information on the presence of extremely hazardous and toxic chemicals in their community. See Petitioner’s Brief at 5, Steel Co. (No. 221790). The information allows community groups to form emergency response plans in the event of a toxic accident. See EPCRA, 42 U.S.C. §§ 11022, 11023 (1995).
8. See Steel Co., 118 S. Ct. at 1009. EPCRA mandates that Emergency and Hazardous Chemical Inventory Forms and Toxic Chemical Release Forms be filed annually. See EPCRA,
to educate themselves on the hazardous chemicals in the community and to prepare emergency plans in the case of a chemical accident.\(^9\)

Pursuant to EPCRA requirements, CBE gave notice to the steel company sixty days prior to filing their complaint.\(^10\) Steel Co. responded by promptly filing all delinquent inventory and release forms.\(^11\) Once Steel Co. satisfied the EPCRA filing requirements, the Environmental Protection Agency (EPA) chose not to pursue an administrative order or civil action against the steel company.\(^12\)

On August 7, 1995, CBE brought suit in the United States District Court for the Northern District of Illinois.\(^13\) Subsequently, Steel Co. filed motions to dismiss according to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6),\(^14\) alleging that the district court did not have jurisdiction because all overdue reports were filed at the time CBE's complaint was entered.\(^15\) Steel Co.'s motion also alleged that EPCRA did not authorize suits for past violations.\(^16\) The district court held for Steel Co., finding the court was without jurisdiction and that EPCRA could not remedy past violations.\(^17\) The Seventh Circuit
Court of Appeals, however, reversed. The United States Supreme Court granted certiorari to cure the split among the circuits as to whether EPCRA allowed citizen suits for past violations.

III. BACKGROUND

A. History of Environmental Citizen Suits

The 1960's marked the beginning of environmental law as we know it. During that time, the environment began showing severe signs of pollution, something government regulation and voluntary industry compliance were no longer able to prevent. Throughout the next two decades, environmental awareness grew, calling attention to the lack of governmental enforcement of environmental laws. Congress was forced to face the issue of ineffective enforcement, and the first "citizen suit" provision resulted.

Citizen suits are a critical supplement to governmental enforcement of environmental regulations. The first citizen suit provision was incorporated into the 1970 Clean Air Act. Through the Clean Air Act, for the first time in environmental law, citizens were given a cause of action to protect public resources. Citizen suits enforce environmental regulations when government cannot because of limited resources. Congress has included citizen suit

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18. See id.
22. See Robert W. Shavelson, EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-to-Know, 2-Fall ALT. L. ENVTL. OUTLOOK 29 (1995). Due to the use of a pesticide called DDT and other chemical releases, the bald eagle approached extinction, "rivers caught fire, . . . [and] air reeked of industrial stench . . . ." Id.
23. See Keithline, supra note 21, at 1234.
24. See Keithline, supra note 21, at 1234.
26. See Clean Air Act, 42 U.S.C. § 7604 (1995); see Shavelson, supra note 22, at 29. The term "citizen suit" was originally coined in a Michigan law drafted by Professor Joseph Sax. See Shavelson, supra note 22, at 29. Sax developed citizen suits to alleviate the "threat to environmental laws posed by budgetary and political limitations on government enforcement." See Vahey, supra note 25, at 241.
27. See Keithline, supra note 21, at 1233. The citizen suit provision was included in the Clean Air Act despite industry's and courts' concerns regarding frivolous suits "overloading the dockets." See Keithline, supra note 21, at 1235.
28. See Shavelson, supra note 22, at 29. See also Vahey, supra note 25, at 241-42.
provisions in nearly every environmental regulation since 1970; each has been modeled after the original Clean Air Act provision.29

B. EPCRA

1. Enactment of EPCRA

Congress enacted EPCRA in response to two major chemical accidents.30 The first accident occurred in 1984 in Bhopal, India, at a Union Carbide pesticide plant.31 The Bhopal chemical accident killed over 2,000 people, injured over 200,000, and became known as one of the worst tragedies in modern industrial times.32 In 1985, less than a year later, another Union Carbide plant experienced a toxic leak, this time closer to home in Institute, West Virginia.33 The West Virginia chemical accident took the form of a toxic gas cloud that hovered over the city, causing 200 people to seek medical aid.34 At the time the two Union Carbide accidents occurred, a national program providing citizens with information regarding hazardous chemicals in their communities did not exist, and this left public officials guessing at how to respond to the disasters.35

Congress also reacted to recent studies that showed the Union Carbide accidents were not the first chemical accidents to occur and certainly would not

29. See Keithline, supra note 21, at 1238. It is interesting to note the original language used in the Clean Air Act has been modified to fit each environmental regulation. See Keithline, supra note 21, at 1238. "Congress has . . . possibly unintentionally [ ] drafted citizen suit provisions such that" citizens have greater enforcement authority than the EPA. See Keithline, supra note 21, at 1238.


31. See id. at 1713.


33. See Lohmann, supra note 30, at 1714.

34. See Lohmann, supra note 30, at 1714. The accident occurred when a failed valve on a storage tank leaked while under extreme pressure. See Lohmann, supra note 30, at 1714. The tank contained 500 pounds of aldicarb oxime, a derivative of the chemical that leaked at the Bhopal plant. See Lohmann, supra note 30, at 1714.

35. See Lohmann, supra note 30, at 1715. See also 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 & Envtl. L. 217, 218 (1996). "[L]ocal authorities were confused about what was happening, what substance was involved, and how to protect citizens." Id.
be the last. In response to the Bhopal and Institute chemical accidents and information revealed through recent chemical accident studies, Congress enacted the Emergency Planning and Community Right-to-Know Act of 1986. Congress introduced EPCRA as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA); however, EPCRA is a free-standing law.

2. Purpose and Function of EPCRA

EPCRA is unique because it is the first environmental regulation that is purely informational in contrast to the typical "command and control" regulations enacted by Congress. As its name indicates, EPCRA serves two primary functions: emergency planning and the public's right to know about the chemicals used and stored in their community. Furnishing citizens with information regarding toxics in their communities allows local community groups to form emergency response plans in the case of a chemical accident.

The first function, emergency planning and notification, requires local communities to formulate advanced emergency response plans. EPCRA does not spell out the specific emergency plan that state or local government should follow; it merely provides a framework for community groups to use in producing a response plan. The "notification" portion requires that an industrial facility immediately notify the local community group if a hazardous chemical release has occurred.

36. See Lohmann, supranote 30, at 1715. "[O]ne 1985 publication claimed that 'in America . . . 60,000 chemicals are produced in over 6,000 communities and last year alone we had 5,700 toxic chemical accidents.'" Lohmann, supranote 30, at 1715.
37. See Wolf, supranote 35, at 218-19.
40. See Keithline, supranote 21, at 1257. "[U]nlike most environmental statutes[,][EPCRA] does not specify discharge standards, nor does it impose liability for harming the environment." Keithline, supranote 21, at 1257.
41. See Barbara Ann Clay, Note and Comment, The EPA's Proposed Phase-III Expansion of the Toxic Release (TRI) Reporting Requirements: Everything and the Kitchen Sink, 15 Pace Env't L. Rev. 293, 299 (1997). "Right-to-know" is a term of art used to describe policies "addressing the disclosure of chemical hazard information to populations at risk." See id. at 298-99.
42. See id. at 299.
43. See Wolf, supranote 35, at 220.
44. See Wolf, supranote 35, at 220.
45. See Wolf, supranote 35, at 220.
The second function, community right-to-know, allows citizens to request and receive information about hazardous and toxic chemicals used at a facility without first going through government channels. EPCRA's community right-to-know requirement was a matter of great debate due to its expansive industrial disclosure requirements.

EPCRA has been regarded as a potent environmental weapon due to its visible impact on industrial actions. The first EPCRA reports were released in 1988, noting individual companies and their yearly amounts of chemical releases. As a result of the EPCRA reports, industries began rethinking their production processes and utilized less hazardous chemicals and methods.

Overall, industries have attempted to reduce toxic chemical releases to sustain a positive community-industry relationship. Although EPCRA has become one of the most significant pieces of environmental legislation, partly due to its right-to-know provision, it remains little-known.

3. **EPCRA Provisions**


a. Emergency planning and notification

The emergency planning and notification provisions require each state to establish a state emergency response commission (SERC) and a local emergency planning committee (LEPC). The SERCs, appointed by each state’s governor, coordinate emergency response plans and supervise the

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46. See Wolf, supra note 35, at 220.
47. See Wolf, supra note 35, at 220. Congress included the right-to-know portion in EPCRA despite opposition from the industrial sector. See Wolf, supra note 35, at 220.
48. See Wolf, supra note 35, at 221. The Toxics Release Inventory (TRI) requirement under EPCRA is “among our most potent environmental weapons.” See Wolf, supra note 35, at 220-21.
49. See Shavelson, supra note 22, at 30. Corporate officials, consumers, and stockholders were all surprised when they noted the amounts and types of yearly chemical releases. See Shavelson, supra note 22, at 30. Perhaps the greatest influence was that of the consumers and stockholders, who began holding industries responsible “through consumer purchasing decisions and at corporate shareholder meetings.” See Shavelson, supra note 22, at 30.
52. See Wolf, supra note 35, at 220. EPCRA is less known than the Clean Air Act and the Clean Water Act. See Wolf, supra note 35, at 220.
53. See Wolf, supra note 35, at 221-22.
54. See Wolf, supra note 35, at 222. See also Lohmann, supra note 30, at 1716.
LEPCs' activities. Each state is divided into local emergency planning districts. The SERCs appoint an LEPC for each local emergency planning district.

LEPCs are selected from fourteen different groups and organizations in the community; these commissions thus represent a large portion of the population. SERCs and LEPCs formulate and implement procedures for receiving information from facilities regarding on-site toxic chemicals in order to form the emergency response plans. In addition, SERCs and LEPCs process public requests for information. LEPCs design and implement local response plans that include evacuation routes, warning signals, and medical information regarding the specific chemicals used at a facility; the plans also involve coordination of police and fire departments, the media, medical staff, and the public. An elected chairperson heads each LEPC, which submits the response plan to the SERC for approval.

All facilities subject to EPCRA requirements must contact the pertinent SERC, LEPC, and fire department if the facility possesses any chemical listed as an "Extremely Hazardous Substance" (EHS) and the amount of substance on-site exceeds a "Threshold Planning Quantity" (TPQ). An owner or operator of a facility must have a designated representative to work with SERC and LEPC; however, no exemption exists for liability due to a toxic accident even though the facility willingly cooperates with the LEPC.

55. See Wolf, supra note 35, at 222.
56. See Wolf, supra note 35, at 222.
57. See Wolf, supra note 35, at 222.
58. See Falkenberry, supra note 39, at 5.
59. See Falkenberry, supra note 39, at 5.
60. See Falkenberry, supra note 39, at 5.
61. See Falkenberry, supra note 39, at 5.
62. See Falkenberry, supra note 39, at 5.
63. See Falkenberry, supra note 39, at 6. EPCRA defines facility as "buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned and operated by the same person." 42 U.S.C. § 11049(4) (1995). An "Extremely Hazardous Substance" is defined under EPCRA § 302(a)(2). If the EPA does not set a TPQ for a particular substance, the TPQ is set at two pounds per facility until a TPQ is established. See Falkenberry, supra note 39, at 6.
64. See Falkenberry, supra note 39, at 6. Information to be reported by facilities includes: (1) Chemical name of the substance released; (2) whether the substance is listed as an EHS; (3) estimate of quantity released; (4) time and duration of release; (5) known or anticipated acute or chronic health risks; (6) precautions to be taken due to the release; and (7) name and phone number of persons to contact for further information. See Falkenberry, supra note 39, at 7-8.
b. Reporting requirements

Pursuant to EPCRA's reporting requirements, facility owners must submit three documents: Material Safety Data Sheets (MSDS), Emergency and Hazardous Chemical Inventory Forms, and Toxic Chemical Release Forms. The documents provide information to citizens regarding chemical use, storage, and releases.

Emergency and Hazardous Chemical Inventory Forms exist as Tier I or Tier II; however, only Tier I is mandatory. A Tier I form requires a facility to summarize the amounts of chemicals and their location at the facility. Tier II is required only upon request from a SERC, LEPC, or the fire department. Tier II forms contain Tier I information as well as storage mechanisms of each chemical and whether the owner claims trade secret privileges as to any chemicals.

The third and most controversial type of required reporting is the Toxic Chemical Release Reporting. Each facility must file annual reports documenting releases and transfers of toxic chemicals. The states collect the reports, and the EPA formulates the information in a computerized database known as the Toxics Release Inventory (TRI) Database.
CITIZEN SUIT UNDER EPCRA

serves many purposes. First, the information alerts citizens to the chemical releases and transfers throughout their communities. In addition, the TRI data supplements research used to develop future environmental regulations and standards.

Information pertaining to Toxic Chemical Release Reports is issued on what is called a Form R; the forms must be submitted by July of each year to cover the preceding year's releases. Form Rs require large facilities to report annual releases of toxic chemicals into the environment.

c. General provisions

The third subtitle contains general provisions regarding trade secret information and enforcement provisions. The enforcement provisions give the government and citizens the right to force a facility to abide by EPCRA requirements. Penalties for failure to comply with EPCRA provisions consist of a $25,000 fine for each day a violation occurs as well as civil, administrative, and criminal penalties for failure to comply with emergency notification provisions.

Due to the expansive number of facilities subject to EPCRA in the United States, EPA does not have the resources to enforce compliance. The citizen suit provisions in EPCRA were drafted to alleviate this shortcoming. Under EPCRA, any person may commence a civil action on his own behalf against an owner or operator of a facility for failure to submit and complete EPCRA required forms.

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Wolf, supra note 35, at 230.
74. See Wolf, supra note 35, at 230.
75. See Wolf, supra note 35, at 230.
76. See Wolf, supra note 35, at 230.
77. See Wolf, supra note 35, at 230-31. A Form R is a standardized form created by the EPA. See Wolf, supra note 35, at 230.
78. See Wolf, supra note 35, at 230. It is interesting to note that the information reported must be "estimates of releases," not actual measurements. See Wolf, supra note 35, at 231. TRI reporting pertains to large facilities. See Wolf, supra note 35, at 231. A facility must report if the following conditions are met: (1) the facility "manufactures in Standard Industrial Classifications (SIC Codes) 20-39;" (2) facility consists of ten or more full-time employees; and (3) the facility "manufacture[s], process[es], or use[s] toxic chemicals above yearly threshold amounts." See Wolf, supra note 35, at 231.
79. See Lohmann, supra note 30, at 1722.
80. See Lohmann, supra note 30, at 1722.
81. See Lohmann, supra note 30, at 1722.
83. See id.
84. See EPCRA, 42 U.S.C. § 11046(a)(1). Any person may commence a civil action on
Citizens must give notice to the facility and EPA sixty days prior to filing suit. The notice provisions, along with the phrase “failure to submit and complete,” account for the ambiguity that is found to exist in EPCRA. Two meanings to the ambiguous provisions have surfaced. First, facilities are liable for past violations; second, facilities may submit delinquent forms, thereby escaping liability.

C. Split Among the Circuits

The Sixth and Seventh Circuits have disagreed upon whether EPCRA authorizes citizen suits for wholly past violations. The Sixth Circuit, in Atlantic States Legal Foundation v. United Musical Instruments, held that citizens could not sue for past violations. The Seventh Circuit, in Citizens for a Better Environment v. Steel Co., rejected the Sixth Circuit’s holding and his own behalf against “(A) an owner or operator ... for failure to . . .” submit follow-up emergency notification; MSDSs; inventory forms; or toxic chemical release forms. See id. A follow-up notification report provides information regarding actions taken to respond to a chemical release, including additional health and medical risks and advice. See Steven J. Christiansen & Stephen H. Urquhart, The Emergency Planning and Community Right to Know Act of 1986: Analysis and Update, 6 BYU J. PUB. L. 235, 241 (1992).

85. See EPCRA, 42 U.S.C. § 11046 (a)(1)(A)(iii). See also Lohmann, supra note 30, at 1722; Scott, supra note 82, at 220.
86. See Lohmann, supra note 30, at 1722.
87. See Lohmann, supra note 30, at 1722.
88. See Scott, supra note 82, at 217-18.
89. 61 F.3d 473, 478 (6th Cir. 1995).
90. 90 F.3d 1237 (7th Cir. 1996), rev’d, 118 S. Ct. 1003 (1998). Three district courts, prior to the Sixth Circuit’s decision in Atlantic allowed recovery for past violations: Atlantic States Legal Foundation v. Whiting, Williams v. Leybold Technologies, and Delaware Valley Toxics Coalition v. Kurtz-Hastings, Inc. See Scott, supra note 82, at 220-21. See also Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., 772 F. Supp. 745 (W.D.N.Y. 1991); Williams v. Leybold Techs., 784 F. Supp. 765 (N.D. Cal. 1992); and Delaware Valley Toxics Coalition v. Kurtz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993). In Whiting, the Atlantic States Legal Foundation alleged that Whiting failed to submit MSDSs, inventory forms, and release forms; however, by the time suit was filed, Whiting had submitted two of the three delinquent forms. See Whiting, 772 F. Supp. at 746. Whiting claimed its compliance barred Atlantic States Legal Foundation’s suit. See id. The court held that “this Court’s acceptance of the defendant’s interpretation would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA’s reporting provisions.” Id. at 750. See also Scott, supra note 82, at 221 (quoting Whiting, 772 F. Supp. at 750). In Williams, Leybold failed to file an MSDS for nickel. See Williams, 784 F. Supp. at 766. At the time, threshold requirements for nickel had not been set. See id. at 767-68. EPA later established the threshold requirements; the amount of nickel at Leybold was well below reporting requirements. See id. at 768. The plaintiff filed suit after EPA established the threshold requirements. See id. The court held Leybold was in compliance at the time suit was filed; however, the court also found that EPCRA permitted suits for past violations. See id. at 770. In Kurtz-Hastings, the coalition alleged that Kurtz-Hastings failed to file release forms; after notice of intent to sue, Kurtz-Hastings filed the delinquent forms. See Kurtz-Hastings, 813 F. Supp. at 1136. The court
chose to follow all other courts prior to *Atlantic* in holding citizens could sue for past violations. Both the Sixth and Seventh Circuits claimed to base their decision on the Supreme Court’s holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*

1. The Gwaltney Decision

In *Gwaltney*, the issue was whether §505(a) of the Clean Water Act (CWA) authorized citizen suits for past violations. The CWA makes it unlawful for a facility to discharge any pollutant into navigable waters except as authorized by the CWA. The Clean Water Act also provides citizens with the right to sue any person alleged to be in violation of the Act.

Gwaltney, a meat-packing plant, obtained a National Pollution Discharge Elimination System (NPDES) permit which authorized Gwaltney to release seven pollutants into the Pagan River in Smithfield, Virginia. Gwaltney failed to comply with the NPDES permit and exceeded effluent limitations on five of the seven pollutants.

Two environmental groups, Chesapeake Bay Foundation and National Resource Defense Council, sent Gwaltney a notice of intent to sue in 1984, alleging that Gwaltney had violated and would continue to violate its NPDES permit. Gwaltney brought a motion to dismiss, claiming that the CWA only authorized citizen suits where a defendant was violating the Act at the time suit was filed; Gwaltney was in compliance when the environmental groups filed suit.

The district court ruled for the environmental groups, holding that the CWA allowed citizens to sue for past violations. The Fourth Circuit Court found for the coalition, holding that allowing Kurtz-Hastings to cure the violation by filing late would make citizen suit provisions ineffective. See id. at 1141-42.

93. See 33 U.S.C. § 1311(a); see also Gwaltney, 484 U.S. at 52.
94. See Gwaltney, 484 U.S. at 53.
95. See id.
97. See id. at 54.
98. See id. at 54-55.
99. See id. at 55.
of Appeals affirmed. Both courts based their decisions on the Clean Water Act’s legislative history and purpose.

On certiorari, the United States Supreme Court first looked to the statute’s language. Although the Court found the language to be ambiguous, it concluded that its most natural reading required citizens to allege a continuous or intermittent violation. Next, the Court made note of the present tense utilized in the CWA. Finally, the Court looked to the purpose of the notice of intent to sue requirement. The Court found the purpose of the notice requirement was to give facilities an opportunity to be in compliance, dispelling the need for a citizen suit. In addition, the Court stated that allowing suits for past violations would make the notice requirement to alleged violators merely gratuitous.

2. The Sixth Circuit Decision

In Atlantic States Legal Found. v. United Musical Instruments, Atlantic States Legal Foundation (ASLF), an environmental organization, alleged that United Musical Instruments (UMI) violated EPCRA reporting requirements. UMI, a manufacturer of musical instruments in Eastlake, Ohio, failed to file form Rs regarding the storage and usage of toxic chemicals at its facility. ASLF notified UMI of its intent to sue and, UMI then submitted the required form Rs. UMI filed a motion to dismiss, arguing that EPCRA did not allow citizen suits for past violations. The Sixth Circuit agreed with UMI and affirmed the district court’s dismissal. As in Gwaltney, the court first looked to the plain language of EPCRA. The court explained that although form Rs are required to be submitted by a certain date, the basis of a citizen suit is the failure to complete

100. See Gwaltney, 484 U.S. at 56.
101. See id.
102. See id.
103. See id. at 57. The Court pointed out that Congress could have phrased the language as “to have violated” rather than “to be in violation” if they intended to include past violations. See id.
105. See Gwaltney, 484 U.S. at 59.
106. See id. at 60.
107. See id.
108. 61 F.3d 473, 474 (6th Cir. 1995).
109. See id.
110. See id. See supra note 77 for the definition of a Form R.
111. See Atlantic, 61 F.3d at 474.
112. See id. at 475.
113. See id.
and submit a required form. 114 The court further stated that a form is completed and filed even though it may be untimely. 115

Next, comparing EPCRA to the Clean Water Act, the court followed Gwaltney’s reasoning regarding the notice requirement. 116 The court pointed to likenesses between EPCRA and the Clean Water Act such as the sixty-day notice requirement and the prohibition of a citizen suit once EPA enforcement actions have begun. 117 Following Gwaltney, the court recognized that the sixty-day notice period allows a facility to cure a violation and government agencies to take appropriate action, both of which dispel the need for a citizen suit. 118 The most natural reading of EPCRA, the court concluded, did not authorize citizen suits for past violations. 119

ASLF argued that, after Gwaltney, Congress amended the Clean Air Act to allow citizen suits for past violations; however, the sixty-day notice requirement was unchanged. 120 ASLF claimed that Congress’s position on the sixty-day notice period was not in agreement with Gwaltney’s reasoning. 121 The court rejected this argument, holding that Congress would have amended EPCRA as well as the Clean Water Act had Congress intended to allow EPCRA citizen suit provisions to maintain suits for past violations. 122

3. The Seventh Circuit Decision

The Seventh Circuit Court of Appeals faced the issue of whether EPCRA authorized citizen suits for past violations. 123 CBE brought suit against Steel Co. for failing to file a single inventory or toxic release form. 124 Upon receiving CBE’s notice of intent to sue, Steel Co. filed all overdue forms, bringing themselves into compliance. 125

The district court followed the Sixth Circuit’s lead in Gwaltney and dismissed CBE’s suit. 126 The district court explained that the forms were no longer overdue and that this caused the violation to be in the past. The court

114. See id.
115. See id.
116. See id. at 476.
117. See Atlantic, 61 F.3d at 476.
118. See id.
119. See id. at 477. “Congress could have phrased its requirements in language that looked to the past . . . , but it did not choose this . . . option.” Id. (quoting Gwaltney, 484 U.S. at 57).
120. See id.
121. See id.
122. See id.
123. See Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1242 (7th Cir. 1996).
124. See id. at 1241.
125. See id. See Part II. supra, for a detailed summary of the facts.
126. See Citizens, 90 F.3d at 1242.
then stated that past violations were not a cause of action that EPCRA authorized under the citizen suit provisions.\textsuperscript{127}

On appeal, the Seventh Circuit criticized the Sixth Circuit for applying a literal interpretation of the \textit{Gwaltney} holding to EPCRA.\textsuperscript{128} The Seventh Circuit did not apply the \textit{Gwaltney} holding; however, the court did choose to use \textit{Gwaltney}'s interpretive methodology.\textsuperscript{129}

As did the \textit{Gwaltney} court, the Seventh Circuit first turned to EPCRA's plain meaning.\textsuperscript{130} The court distinguished EPCRA’s language from the Clean Water Act’s language by noting the verb-tense of each act.\textsuperscript{131} The court explained that the Clean Water Act is worded in the present tense, whereas EPCRA is worded in a more neutral language.\textsuperscript{132} The court concluded that Congress could have included language limiting citizen suits to only present violations.\textsuperscript{133}

The Seventh Circuit next addressed the sixty-day notice requirement.\textsuperscript{134} The court held that permitting a cause of action for past violations did not render the notice requirement merely gratuitous.\textsuperscript{135} The court reasoned that the purpose of the notice provision is to mitigate damages because each day a violation occurs there is an additional fine.\textsuperscript{136} In addition, the notice allows EPA the option of addressing a facility’s violations before any other group or organization.\textsuperscript{137}

IV. REASONING OF THE COURT

The United States Supreme Court granted certiorari to resolve the split between the Sixth and Seventh Circuits as to whether EPCRA authorizes citizens to sue for past violations.\textsuperscript{138} The United States Supreme Court faced two possible jurisdictional issues and the dilemma as to which should be decided first.\textsuperscript{139} The first issue was whether CBE had constitutional standing;

\begin{itemize}
  \item[$\text{127.}$] \textit{See id.}
  \item[$\text{128.}$] \textit{See id.}
  \item[$\text{129.}$] \textit{See id.}
  \item[$\text{130.}$] \textit{See id.} at 1242-44.
  \item[$\text{131.}$] \textit{See id.}
  \item[$\text{132.}$] \textit{See Citizens, 90 F.3d at 1244.} According to the court, EPCRA’s language could indicate a future or past violation. \textit{See id.}
  \item[$\text{133.}$] \textit{See id.}
  \item[$\text{134.}$] \textit{See id.}
  \item[$\text{135.}$] \textit{See id.}
  \item[$\text{136.}$] \textit{See id.}
  \item[$\text{137.}$] \textit{See Citizens, 90 F.3d at 1244.}
  \item[$\text{138.}$] \textit{See Steel Co., 118 S. Ct. at 1009.}
  \item[$\text{139.}$] \textit{See id.}
\end{itemize}
without constitutional standing, the Court would not have proper jurisdiction. The second issue was whether CBE had statutory standing; in other words, the Court needed to determine whether § 11046(a) of EPCRA permitted CBE’s cause of action.

The Court stated that it is well settled that the absence of a cause of action does not implicate subject matter jurisdiction. The Court has jurisdiction if a petitioner will have the right to recover under one construction of the Constitution and laws of the United States but will be defeated under another construction. The Court further noted that a court may properly dismiss a suit for lack of subject matter jurisdiction if the claim is insubstantial and devoid of merit. In the present case, CBE would win under one construction of EPCRA but would lose under another construction.

Justice Stevens noted in his concurrence that the Court had previously decided statutory standing questions before constitutional standing questions. The majority opinion, however, stated that Stevens’s concurrence was not presenting a statutory question of standing; the Court explained that Stevens’s approach would amount to a premature determination of the merits. Scalia further stated that Stevens was unable to point to a case in which the Court labeled a cause of action as jurisdictional and decided that question before the question of Article III standing.

140. See id.
141. See id. The Court stated that the standing issue is normally considered a threshold question and would be decided first; however, due to Justice Stevens’s claim that the second issue (whether EPCRA authorizes suits for past violations) was also a jurisdictional issue, the Court saw a need for a discussion of jurisdictional issues. See id.
142. See id. at 1010.
143. See id. “[T]he District Court has jurisdiction if ‘the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.’” Id. (quoting Bell v. Hood, 327 U.S. 678, 685 (1946)).
144. See Steel Co., 118 S. Ct. at 1010. Dismissal for lack of subject matter jurisdiction is proper when the claim is “insubstantial, implausible, foreclosed by prior decisions of the Court, or otherwise completely devoid of merit . . . .” Id. (quoting Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974)).
145. See id. Scalia noted that Stevens did not argue that CBE’s claim was immaterial. See id. Instead, Stevens relied on another Supreme Court case, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., which treated a “similar issue as jurisdictional.” See id. See also Gwaltney, 484 U.S. at 49. In reference to Gwaltney, however, Scalia noted that the “jurisdictional character of the elements of the cause of action in Gwaltney made no substantive difference . . . , had been assumed by the parties, and was assumed without discussion by the Court.” Steel Co., 118 S. Ct. at 1011. The Court stated that Gwaltney is considered a “drive-by” jurisdictional ruling and has no precedential effect. See id.
146. See Steel Co., 118 S. Ct. at 1011 (Stevens, J., concurring).
147. See id. Stevens asked the Court to first answer the question whether the scope of EPCRA included a right of action for past violations. See id.
148. See id. Scalia noted that the consequences of deciding a merit question before a
The Court declared that it would refuse to decide any cause of action, even though labeled jurisdictional, before deciding whether the case meets Article III jurisdictional requirements. The Court stated that the jurisdiction of the present court—as well as the jurisdiction of the court from which the case comes—should always be decided first. The Court explained that a court cannot decide questions of law when there is doubt as to that court's jurisdiction. To do so is called "hypothetical jurisdiction," which is much like issuing an advisory opinion. The Court held that the issue of whether CBE had standing should be decided first.

The Court reiterated that Article III standing consists of three requirements: injury in fact, causation, and redressability. CBE alleged that Steel Co.'s failure to file toxic chemical inventory and release forms was an injury in fact to them. The Court did not decide the merits of that allegation; it instead held that CBE's claim was not redressable.

In considering the redressability question, the Court looked to CBE's Complaint. The complaint asked for: (1) a declaratory judgment that Steel Company violated EPCRA; (2) authorization for CBE to inspect the steel company; (3) an order requiring the Steel Company to provide copies of all compliance reports; (4) payment of a civil penalty; (5) costs and attorneys fees; and (6) any other appropriate relief.

The Court easily disposed of the first item. The Court stated that a declaratory judgment would be worthless because there was no controversy as

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149. See id. at 1011.
150. See Steel Co., 118 S. Ct. at 1012.
151. See id. at 1016.
152. See id. An advisory opinion has been "disapproved by this Court from the beginning." Id. (quoting Muskrat v. United States, 219 U.S. 346, 362 (1911)). Stevens, in his concurrence, endorsed the use of "hypothetical jurisdiction," which is an approach used by courts of appeal. See id. at 1012. Several Courts of Appeal "find it proper to proceed immediately to the merits question, despite jurisdictional objections . . . where the merits question is more readily resolved . . . and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." Id. The majority declined to endorse this approach. See id.
153. See id. at 1016.
154. See id. at 1016-17. An injury in fact is a concrete harm suffered by a plaintiff. See id. at 1016. Causation is a traceable connection between the injury in fact and the defendant's conduct. See id. at 1017. Redressability is whether the relief requested by the plaintiff will address plaintiff's injury. See id.
155. See id. at 1018.
156. See Steel Co., 118 S. Ct. at 1018.
157. See id.
158. See id.
159. See id.
to whether Steel Co. was in violation of EPCRA filing requirements.\textsuperscript{160} The fourth item, payment of a civil penalty, was not redressable because the penalty was payable to the United States Treasury.\textsuperscript{161} The Court explained that payment to the Treasury was not remedial but rather vindictive in that merely satisfying CBE with a favorable judgment would not remedy an injury.\textsuperscript{162} As to item five, costs of litigation, the Court found that CBE could not invent standing by bringing suit.\textsuperscript{163} Litigation must redress CBE's injury in some way other than for the cost of the litigation itself.\textsuperscript{164}

The Court noted that the remaining items in CBE's complaint, items two and three, served to discourage future violations of EPCRA.\textsuperscript{165} Although the Court acknowledged that deterring future violations can be remedial, it went on to find that a threatened violation was not one of CBE's allegations.\textsuperscript{166} According to the Court, neither authorizing CBE to inspect Steel Co.'s facility nor requiring Steel Co. to turn over compliance reports to CBE could redress a past wrong.\textsuperscript{167} Due to the fact that only past violations were alleged, the complaint was not redressable.\textsuperscript{168}

The United States Supreme Court, finding the complaint lacked redressability, held that CBE lacked standing to sue.\textsuperscript{169} The Court held that it did not have jurisdiction over this matter and neither do the lower courts.\textsuperscript{170}

V. SIGNIFICANCE

As a result of the United States Supreme Court's ruling in \textit{Steel Co.}, EPCRA violators are now free to withhold compliance until they receive a notice of intent to sue.\textsuperscript{171} Once noticed, violators can choose to submit all overdue forms, making each violation a past violation and thus rendering citizen suits barred.

In effect, the Supreme Court's ruling undermines the purpose of a citizen suit.\textsuperscript{172} In the past, citizen suits have made facilities think twice about violating

\begin{itemize}
\item \textsuperscript{160} See id.
\item \textsuperscript{161} See id.
\item \textsuperscript{162} See \textit{Steel Co.}, 118 S. Ct. at 1018-19.
\item \textsuperscript{163} See id. at 1019. "[P]laintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." \textit{Id.}
\item \textsuperscript{164} See id.
\item \textsuperscript{165} See id.
\item \textsuperscript{166} See id.
\item \textsuperscript{167} See id.
\item \textsuperscript{168} See \textit{Steel Co.}, 118 S. Ct. at 1020.
\item \textsuperscript{169} See id.
\item \textsuperscript{170} See id.
\item \textsuperscript{171} See Shavelson, \textit{supra} note 22, at 37.
\item \textsuperscript{172} See Keithline, \textit{supra} note 21, at 1261.
\end{itemize}
environmental regulations because courts often assess steep penalties.173 Allowing a facility to bring themselves into compliance after receiving notice lessens a citizen suit’s effectiveness and leaves little incentive for a facility to comply.174

In addition, citizens and environmental groups will no longer have an incentive to spend time and money for research and discovery.175 The only time an EPCRA citizen suit can proceed to trial is when a facility fails to cure all delinquent reporting requirements within the sixty-day notice period.176 Barring citizen suits for past violations prevents citizens from receiving reimbursement for pre-trial expenses; this is a chance many private citizens and non-profit organizations cannot afford to take.

The Supreme Court’s ruling may also undermine EPCRA’s goals.177 For the emergency response plans to work effectively, facilities must submit timely reports.178 The release and inventory reports containing amounts, types, and locations of chemicals, form the basis for the response plans. Furthermore, allowing facilities to file untimely reports neutralizes EPCRA’s community right-to-know provisions.179 Logic dictates that, without the user’s submission of informational reports, citizens cannot know of the chemicals in their locality.

Although the Supreme Court’s decision in Steel Co. will stifle the vigor in which citizen suits for EPCRA violations are pursued, it may not be a loophole readily jumped through by industrial facilities.180 Much of the information industries are required to report pursuant to EPCRA is already available to the public through other reporting requirements; therefore, industries do not receive any benefit from not complying with EPCRA.181 Additionally, the fear of critical public exposure is a force which continues to compel industries to comply with environmental regulations.182

173. See Keithline, supra note 21, at 1263. Court-assessed penalties are generally much higher than a settlement between EPA and the facility. See Keithline, supra note 21, at 1263.
174. See Shavelson, supra note 22, at 37.
175. See Shavelson, supra note 22, at 39.
181. See id.; see also Letter from Randy Thurman, Director, Arkansas Envtl. Federation, to OPPT Docket Clerk, EPA (Dec. 19, 1996) (on file with the Arkansas Envtl. Fed.). Facilities must report much of the same information required under EPCRA in order to receive permits pursuant to the Clean Air Act and the Clean Water Act. See Interview with Randy Thurman, supra note 180.
182. See Interview with Randy Thurman, supra note 180. Mr. Thurman explained that the
The Supreme Court’s holding does not encourage citizens to utilize their rights promulgated under EPCRA; however, the holding also does not influence industries to stop complying with EPCRA. Whether the *Steel Co.* ruling frustrates Congress’s goal in enacting EPCRA—to protect citizens through making each community aware of the chemicals in their locality—remains to be seen.

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fear of bad public exposure is a force strong enough to make industries comply. Mr. Thurman revealed that there are other means in which the public can discover who are the “bad” companies; for example, the Environmental Defense Fund has a web site which lists the “worst players [industrial facilities] in every community.” *See* Interview with Randy Thurman, *supra* note 180.