



Summer 6-1-1997

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Recommended Citation

Jeffrey A. Keithline, *Emergency Planning and Community Right-to-Know Citizen Suits: Should the Supreme Court Extend Gwaltney?*, 54 Wash. & Lee L. Rev. 1227 (1997).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss3/12>

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Emergency Planning and Community Right-to-Know Citizen Suits: Should the Supreme Court Extend *Gwaltney*?

Jeffrey A. Keithline*

[Those pursuing citizen lawsuits] are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.

— *Friends of the Earth v. Carey*¹

I. Introduction

In 1984, a methyl cyanide release at the Union Carbide pesticide facility in Bhopal, India killed at least two thousand people and injured countless others.² A few months later, an accident at another Union Carbide factory in West Virginia caused over one hundred injuries.³ Union Carbide's

* I would like to thank Professor David A. Wirth, Marc Paduda, Krista Bowen, Kathleen Flynn, and Christopher W Meyer for their invaluable editorial assistance. I would also like to acknowledge my parents, Herschel and Carol Keithline, who were always willing to drop everything and drive halfway across the country to help take care of Nathan when things got crazy. Finally, I wish to thank my wife, Kimberly, for her patience, support, and encouragement throughout everything that we accomplish together.

1. *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), quoted in Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327, 329 (1989).

2. See Pico Iyer, *India's Night of Death: More than 2,500 People Are Killed in the Worst Industrial Disaster Ever*, TIME, Dec. 17, 1984, at 22, 22-31 (reporting details of Bhopal disaster); see also JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL 5-6 (1993) (describing Bhopal disaster as worst industrial catastrophe in history except perhaps Chernobyl nuclear explosion); DAN KURZMAN, A KILLING WIND: INSIDE UNION CARBIDE AND THE BHOPAL CATASTROPHE IX (1987) (estimating disaster killed eight thousand people and injured nearly 300,000 people). Cassels notes that the long-term effects on the people of Bhopal included respiratory disorders, blindness, gynecological illnesses, and a high infant mortality rate. CASSELS, *supra*, at 5-6; see also *Citizens for a Better Env't v Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996) (discussing Union Carbide disaster), cert. granted, 117 S. Ct. 1079 (1997).

3. See *More Woe for Union Carbide*, TIME, Mar. 25, 1985, at 45, 45 (noting over 60 smaller leaks at Union Carbide factory in Institute, West Virginia); *Under a Noxious Cloud*

emergency response planning and prevention measures were inadequate to address these incidents.⁴ Largely in response to these disasters, Congress passed the Emergency Planning and Community Right-To-Know Act (EPCRA) as part of the Superfund Amendments and Reauthorization Act of 1986.⁵ EPCRA's purpose is to provide the public with important information on hazardous chemicals manufactured, used, stored, or handled in its communities.⁶ EPCRA requires the gathering and dissemination of informa-

of Fear: A Toxic Gas Leak Rocks "Chemical Valley" Residents, TIME, Aug. 26, 1985, at 13, 13 (reporting leak at Union Carbide factory in West Virginia); see also KURZMAN, *supra* note 2, at 205-07 (discussing Union Carbide accident in Institute, West Virginia). Only a few months before the accident, Union Carbide assured West Virginians that a Bhopal-like leak "could not happen" in West Virginia. *Id.* at 205; 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) (noting West Virginia facility accident's contribution to enactment of Emergency Planning and Community Right-to-Know Act (EPCRA)).

4. See CASSELS, *supra* note 2, at 6 (noting that response to Bhopal accident was disorganized and disappointing); Wolf, *supra* note 3, at 218 (noting that Union Carbide was not prepared for accidents).

5. Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001-11050 (1994)) [hereinafter EPCRA]. Congress intended EPCRA to be a free standing law even though Congress included EPCRA in the 1986 amendments to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). See Wolf, *supra* note 3, at 218-19 (discussing passage of EPCRA); see also *Citizens for a Better Env't*, 90 F.3d at 1238 (stating that Congress passed EPCRA in response to Union Carbide disaster as well as other smaller incidents to improve emergency response capabilities and provide information to communities); CASSELS, *supra* note 2, at 68 (noting emergence of "right to know" principle after Bhopal); Paul E. Hagen, *Update on the Emergency Planning and Community Right-To-Know Act*, HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES, SB25 A.L.I.-A.B.A. 73, 77 (Oct. 24, 1996) (discussing Bhopal disaster as catalyst for passage of EPCRA). *But see* KURZMAN, *supra* note 2, at 206 (explaining reasons, including economic self-interest, why citizens did not demand broader rights to information regarding chemicals stored in their communities); Robert W. Shavelson, *EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right to Know*, ALB. L. ENVTL. OUTLOOK, Fall 1995, at 29, 29 (noting that enactment of EPCRA occurred in wake of more than 7,000 chemical accidents in five years preceding its passage).

6. See H.R. REP. NO. 99-253, pt. 1, at 59, 110-11 (1985) (stating program provides citizens expanded information concerning hazards of chemical material in their communities), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2892-93. House Report 253 accompanied House Bill 2817 H.R. 2817, 99th Cong. (1986). Congress passed House Bill 2005 in lieu of House Bill 2817; House Bill 2005 contained much of the text of the original bill. See H.R. REP. NO. 99-253, pt. 1, at 1 (1985) (discussing development of EPCRA), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2835. The citizen suit provision emerged from Senate Bill 51. S. 51, 99th Cong. § 138 (1985); see H.R. CONF. REP. NO. 99-962, at 309 (1986) (noting that House version had no comparable citizen suit provision), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3402.

tion regarding the hazardous and toxic chemicals that industrial facilities possess or release.⁷ Like most environmental statutes, EPCRA contains a citizen suit provision.⁸ Although most environmental citizen enforcement provisions follow the model from the Clean Air Act, Congress departed from this model when it drafted EPCRA's citizen suit provision.⁹ This departure

7 EPCRA §§ 300-330, 42 U.S.C. §§ 11001-11050 (1994); *see also* 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4C.01, at 4C-2 to -3 (1997) (describing background and purposes of EPCRA); Wolf, *supra* note 3, at 220 (discussing major functions of EPCRA).

8. EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1). The citizen suit provision of EPCRA provides:

Except as provided in subsection (e) of this section, any 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:

(i) *Submit* a followup 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.

(B) The Administrator for failure to do any of the following:

(i) Publish inventory forms under section 11022(g) of this title.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 11044(a) of this title.

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title within 120 days after the date of receipt of the request.

Id. (emphasis added); *see* Wolf, *supra* note 3, at 277-78 (noting that industry feared EPCRA's citizen suit provision and was concerned that citizens could use information obtained under EPCRA to aid toxic tort litigation). Professor Wolf notes that citizens have brought only a modest number of citizen suits under EPCRA. *Id.*

9. *See* S. REP. NO. 99-11, at 62 (1985) (stating that Congress modeled EPCRA's citizen suit provision after similar provisions in Clean Air, Clean Water, and Solid Waste Disposal Acts); JEFFREY G. MILLER & ENVIRONMENTAL LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS § 2.1, at 6 (1987) (stating that Congress has tendency to lift citizen suit provision from Clean Air Act and to make only minor changes when enacting new environmental legislation). *But see* Benedict S. Cohen & Dirk D. Haire, *Environmental Citizen Suits: Standing and the Proper Scope of Relief*, in CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 21, 49-50 (Roger Clegg & James L.J. Nuzzo eds., 1996) (noting difference in language in citizen suit

requires careful consideration to determine whether courts should extend the legislative history and court decisions under the model provision to EPCRA.

Two United States Circuit Courts of Appeals have disagreed over the interpretation of EPCRA's citizen suit provision.¹⁰ Under EPCRA, a plaintiff cannot commence a citizen suit until sixty days after the plaintiff gives notice of an alleged violation to the state office responsible for environmental enforcement, to the Environmental Protection Agency (EPA), and to the alleged violator.¹¹ However, the circuit courts have disagreed on what happens to a citizen's cause of action if the alleged violator cures its noncompliance after receipt of notice and before the plaintiff files suit. In *Atlantic States Legal Foundation v United Musical Instruments, Inc.*,¹² the United States Court of Appeals for the Sixth Circuit stated that the court lacked jurisdiction because EPCRA does not authorize citizen suits for purely historical violations of the Act.¹³ In *Citizens for a Better Environment v Steel Co.*,¹⁴ a factually similar case, the United States Court of Appeals for the Seventh Circuit disagreed with the Sixth Circuit and stated that EPCRA authorized citizen suits for wholly past violations.¹⁵

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,¹⁶ the Supreme Court considered the same issue under the Federal Water Pollution Control Act (Clean Water Act)¹⁷ citizen suit provision.¹⁸ After close analysis

provision in EPCRA from that in Clean Air Act and Clean Water Act).

10. See Hagen, *supra* note 5, at 120 (noting split between Sixth and Seventh Circuits over interpretation of EPCRA citizen suit provision).

11. See EPCRA § 326(d)(1), 42 U.S.C. § 11046(d)(1) (requiring citizen to provide notice before filing cause of action to enforce EPCRA).

12. 61 F.3d 473 (6th Cir. 1995).

13. See *Atlantic States Legal Found. v. United Musical Instruments, Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (concluding that EPCRA precluded citizen suits for purely historical violations of Act); *infra* notes 119-37 and accompanying text (discussing *United Musical Instruments*).

14. 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997).

15. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244-45 (7th Cir. 1996) (recognizing that citizens can sue under EPCRA even after violators submit overdue filings and comply with EPCRA), *cert. granted*, 117 S. Ct. 1079 (1997); *infra* notes 138-58 and accompanying text (discussing *Citizens for a Better Env't*).

16. 484 U.S. 49 (1987).

17. Clean Water Act § 505, 33 U.S.C. § 1365 (1994). The citizen suit provision of the Clean Water Act provides in part:

Except as provided in subsection (b) of this section , any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the

of the statute's language, the Supreme Court concluded that plaintiffs could not commence citizen suits against polluters for wholly past violations of the Clean Water Act.¹⁹ Although both the Sixth and Seventh Circuit courts

eleventh amendment to the Constitution) who is *alleged to be in violation of* (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (emphasis added).

18. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (concluding that citizen suit provision of Clean Water Act did not confer federal jurisdiction over citizen suits for "wholly past violations"). In *Gwaltney*, the Supreme Court considered the extent of the citizen suit provision in the Clean Water Act. *Id.* at 52. The citizen suit provision allowed citizens to recover civil penalties and legal fees against alleged violators of the Act. *Id.* at 53. Between 1981 and 1984, Gwaltney repeatedly violated the conditions of a discharge permit. *Id.* In accordance with the Clean Water Act citizen suit provision, two nonprofit environmental organizations sent a notice of intent to sue to Gwaltney, the EPA, and the appropriate state agency. *Id.* at 54. After the notice period had run, the two organizations filed suit. *Id.* Gwaltney moved to dismiss the suit because its last recorded violation occurred several weeks before the plaintiffs filed the complaint. *Id.* at 55. The district court rejected Gwaltney's argument and found that it could reasonably read the citizen suit provision as allowing suits for unlawful conduct "that occurred solely prior to the filing of the lawsuit." *Id.* Rejecting the Fifth Circuit's interpretation which barred citizen suits for wholly past violations, the Fourth Circuit affirmed the district court's opinion. *Id.* at 56 (discussing *Hanker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985)). The Supreme Court granted certiorari to resolve the circuit split. *Id.* The Court stated that the "most natural reading" of the citizen suit provision required citizen plaintiffs to allege continuous or intermittent Clean Water Act violations. *Id.* at 57. Reviewing the language and legislative history of the Act, the Court concluded that the purpose of the notice period was to allow the EPA or the state to bring enforcement actions as well as to provide the alleged violator an opportunity to bring itself into compliance. *Id.* at 59-60. The *Gwaltney* Court stated that allowing suits for past violations would render the notice provision incomprehensible. *Id.* at 59. Relying on its reading of the Clean Water Act citizen suit provision, the Court found that the Act did not authorize a citizen suit based solely on historical violations. *Id.* at 64. However, the Court stated that the district court found that the citizen-plaintiff had alleged a continuing violation in good faith. *Id.* at 64. The Court remanded the case for reconsideration because it agreed that the citizen suit provision confers jurisdiction "when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation" *Id.* at 64; see *infra* notes 80-112 and accompanying text (discussing *Gwaltney*).

19. *Gwaltney*, 484 U.S. at 64.

purported to base their decision on an extension of the Supreme Court's analysis in *Gwaltney*, the inconsistent holdings of these two courts demonstrate the uncertain application of *Gwaltney* to EPCRA citizen suits. The Supreme Court recently granted certiorari in the *Citizens for a Better Environment* case to resolve the split in the circuits.²⁰

This Note reviews the recent decisions in *Atlantic States Legal Foundation v United Musical Instruments, Inc.* and *Citizens for a Better Environment v Steel Co.* and explores the courts' reasoning in an effort to determine the best approach to this problem. Part II describes the legislative history and development of citizen enforcement in environmental legislation. Part III analyzes the *Gwaltney* decision, which precluded citizen suits for purely historical violations, and the two circuit court opinions that addressed this issue with regard to the EPCRA citizen suit provision. Part IV analyzes the plain language of EPCRA's citizen suit provision and discusses other concerns with citizen suits. This Note concludes by recommending an amendment to citizen suit provisions that would allow plaintiffs to recover expenses associated with bringing violators into compliance.

II. A Brief History of the Citizen Suit in Environmental Statutes

Private law enforcement is not unique to the modern environmental arena.²¹ Stockholder derivative suits, class actions, and public nuisance claims are examples of private enforcement in other areas of the law.²² Although citizens historically used courts to protect private property from each other and from the government, private citizens had no cause of action to protect shared public resources until 1970.²³ After the Supreme Court recognized harm to the environment as sufficiently serious to provide standing for citizens to sue, private enforcement of environmental legislation

20. *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), cert. granted, 117 S. Ct. 1079 (1997).

21. See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 1.02, at 1-2 to -5 (1995) (tracing origin of citizen suit to English common law and Norman conquest); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 946-47 (1985) (tracing citizen enforcement to Richard II and English Parliament as evidenced by their 1388 passage of water pollution statute that provided for public as well as private enforcement).

22. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 1.0, at 1 (describing endorsement of private enforcement in federal statutes); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 173-75 (1992) (suggesting that private action to enforce public interest is historic feature of American and English legal systems).

23. See AXLINE, *supra* note 21, § 1.02, at 1-2, 1-5 to -8 (tracing evolution of modern environmental citizen suit).

blossomed.²⁴ This Part traces the development and purpose of the citizen suit provision in environmental legislation.

Modern environmental law originated in the 1960s as part of the activist movement.²⁵ Environmental fervor gathered steam in the late 1960s and exploded in the early 1970s.²⁶ The large gathering of people at the first Earth Day on April 22, 1970 demonstrated the swell of support for the environment.²⁷ As concern for the environment grew, awareness of the lack of effective state and federal enforcement programs also increased.²⁸ During the 1970s, often called the "environmental decade," Congress attempted to address the issue of ineffective enforcement of environmental statutes.²⁹ Environmental scholars proposed increased citizen participation as one solution to the enforcement problem,³⁰ and Congress responded by including

24. See *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing that aesthetic and environmental well-being, like economic well-being, can be basis for standing under Administrative Procedure Act). Although protection of shared resources can be the basis for standing, the Court found plaintiffs had not demonstrated that they were "injured in fact" and dismissed their suit. *Id.* at 739-41; see also AXLINE, *supra* note 21, § 1.02, at 1-8 to -9 (discussing importance of *Sierra Club* in development of citizen suit).

25. See 1 GRAD, *supra* note 7, § 1.01, at 1-3 to -8 (describing development of modern environmental law). Before the 1960s, the country was not concerned with the environmental impact of industrial growth because it was too busy fighting and recovering from World War II. *Id.* at 1-3. Several environmental disasters in the 1960s caused increased awareness of humanity's effect on the environment. *Id.*

26. See David Sive, *Environmental Standing*, NAT. RESOURCES & ENV'T, Fall 1995, at 49, 51 (describing early environmental movement). Mr. Sive states that public interest and debate over the environment resulted in many events, including enactment of the Clean Air Act, creation of the Environmental Law Institute, and President Nixon's creation of the EPA. *Id.*

27. See Jeanne McDowell, *Let Earth Have Its Day: But the Biggest Demonstration in History Should Be Only the Beginning*, TIME, Dec. 18, 1989, at 71, 71 (discussing historical gathering of over 20 million people which awakened public to importance of preserving environment).

28. See 1 GRAD, *supra* note 7, § 2.03[19][a], at 2-474 (noting lenient and inadequate enforcement in 1960s and 1970s era).

29. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.1, at 3-4 (1987) (discussing early attempt to overcome cumbersome mechanisms of early environmental statutes).

30. See Sive, *supra* note 26, at 51 (discussing development of citizen suit provisions). A group of scholars suggested that citizen suits were an important vehicle in enforcement of environmental laws. *Id.* This group included Professor Frank Grad of Columbia Law School, author of a leading treatise on environmental law, and Professor Joseph Sax of Michigan Law School, drafter of the Michigan environmental citizen suit provision. *Id.* This group helped to convince Congress to include a citizen suit provision in the 1970 Clean Air Act Amendments. *Id.* Professor Sax argued that budgetary constraints and political forces prevent effective environmental enforcement by the Government. See Peter H. Lehner, *The Efficiency*

a citizen suit provision in the 1970 amendments to the Clean Air Act.³¹ Because the legislators minimized debate so as to appear bipartisan on environmental protection, Congress left little evidence documenting the true purpose behind the creation of the citizen suit.³² Using the Clean Air Act as a model, Congress has included citizen enforcement provisions in nearly every other federal environmental statute enacted since 1970.³³ Because the Clean Air Act serves as a basis for most environmental citizen suit provisions, including EPCRA, the legislative history and development of this initial citizen suit provision is important to understand subsequent environmental statutes.³⁴

In its report on the Clean Air Act amendments, the Senate Committee on Public Works (Senate Committee) stated that citizen suits should motivate

of Citizen Suits, ALB. L. ENVTL. OUTLOOK, Fall 1995, at 4, 4 (discussing Professor Sax's advocacy of citizen suit provisions). See generally JOSEPH SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971) (discussing citizens' role in environmental enforcement).

31. Clean Air Act § 304, 42 U.S.C. § 7604 (1994). The earliest version of a statutory citizen suit appeared in the Michigan Environmental Protection Act of 1970. See AXLINE, *supra* note 21, § 1.02, at 1-5 (discussing citizen suit development). The Senate used similar language in the citizen suit provision in Senate Bill 3575, the Environmental Protection Act of 1970. S. 3575, 91st Cong. § 3 (1970); see AXLINE, *supra* note 21, § 1.02, at 1-5 to -6 (discussing early environmental citizen suit legislation). Although this bill never passed, Professor Axline believes it was a catalyst for including a citizen suit provision in the Clean Air Act. *Id.* § 1.02, at 1-7

32. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.1, at 4-5 (describing debate over citizen suit provision in Clean Air Amendments). Proponents claimed that the citizen suits would provide a check on ineffective or absent government enforcement. *Id.* at 4. Opponents claimed that the provision would increase the burden on the overcrowded court system. *Id.* at 5. Proponents switched their tack to arguing that the country needed citizen suits to correct for insufficient government resources allotted to environmental enforcement. *Id.*, see also Natural Resources Defense Council v. *Tram*, 510 F.2d 692, 699-700, 723-30 (D.C. Cir. 1974) (discussing model citizen suit legislative history and debate); Note, *Notice by Citizen Plaintiffs in Environmental Litigation*, 79 MICH. L. REV. 299, 301-07 (1980) (reviewing legislative history of notice requirements in citizen suits).

33. See AXLINE, *supra* note 21, § 1.02, at 1-8 (stating that nearly every environmental statute enacted since 1970 has included citizen suit provision very similar to that in Clean Air Act of 1970); MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.01, at 6 (stating that when drafting citizen suit provisions, Congress tended literally to "lift" § 304 from Clean Air Act making only modest changes).

34. See 1 GRAD, *supra* note 7, § 2.03[19], at 2-473 (stating that "citizen enforcement has become so widely accepted that there is little general discussion of the issue and it is easy to forget both the contribution of the [1970 Clean Air Act] and the problem public interest litigants faced before its enactment"); MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.2, at 7 (stating that because citizen suit sections are virtually identical, precedent under one typically applies to others).

governmental agencies to initiate environmental enforcement and abatement proceedings.³⁵ Citizen enforcement concerned industry executives because the executives thought it would lead to frivolous and harassing lawsuits.³⁶ Although urged by industry groups to eliminate the citizen suit provision, the Senate Committee did not yield to this pressure.³⁷ The Senate Committee was aware of concern in the courts that citizen enforcement of legislation would overload the dockets, but it encouraged courts to endorse citizen participation in protection of the environment.³⁸

The citizen suit provision in the 1970 Clean Air Act amendments required citizens to file notice of intent to sue with the federal or state agency charged with pollution control, as well as with the alleged polluter.³⁹ This

35. S. REP. NO. 91-1196, at 36-37 (1970), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 436-37 (1974). The 1970 amendments to the Clean Air Act originated in Senate Bill 4358. S. 4358, 91st Cong. (1970). Its companion in the House, House Bill 17255, did not contain a citizen suit provision. H.R. 17255, 91st Cong. (1970); *see* H.R. CONF. REP. NO. 91-1783, at 55-56 (1970) (discussing evolution of citizen suit provision), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 151, 205-06 (1974). The conference committee retained the Senate version with minor modifications. *Id.*

36. *See* Letter from James D. Kittelton, Director, Environmental Activities, American Mining Congress to Mr. Richard Grundy, Professional Staff Member, Senate Committee on Public Works 2 (Aug. 26, 1970) (recommending modification of citizen suit provision to allow legal action against only government instrumentalities or agencies), *reprinted in Air Pollution, 1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong. 1575 (1970).

37. *See* S. REP. NO. 91-1196, at 38 (discussing addition of provision that would allow award of litigation costs to defendants to prevent frivolous actions), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 438 (1974); *see also* AXLINE, *supra* note 21, § 1.02, at 1-6 to -7 (discussing Nixon Administration's opposition to citizen suit provisions).

38. *See* S. REP. NO. 91-1196, at 36-38 (discussing use of citizen suits), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 436-38 (1974). The Committee report stated: "[C]ourts should recognize that in bringing [such actions] under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." *Id.* at 38; *see also* Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 260-61 (1987) (discussing citizen role in enforcement of environmental statutes).

39. Clean Air Act § 304(b)(1), 42 U.S.C. § 7604(b)(1) (1994). An early version of the Clean Air Act did not include the alleged violator in the notice provision. *See Air Pollution, 1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong. pt. 5, V, LXXX (1970) (providing draft air pollution bill designated "Committee Print No. 1" from Subcommittee on Air and

notice encouraged government agencies to enforce pollution control laws.⁴⁰ The notice also provided an opportunity for government intervention in the action.⁴¹ If the agency did not initiate abatement proceedings within the notice period,⁴² the citizen could file an action in federal district court.⁴³ In some situations, citizens could file suit before the notice period elapsed.⁴⁴ The Senate report did not discuss the disposition of the citizen suit if the alleged violator came into compliance during the notice period.⁴⁵ However,

Water Pollution). The draft bill required a citizen plaintiff to provide notice of intent to file suit only to the federal and state environmental regulators. *Id.* at LXXX.

40. *See* S. REP. NO. 91-1196, at 37 (1970) (explaining purpose of notice period), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 437 (1974); *see also* MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 6.1, at 44-51 (tracing purpose of 60-day notice provision).

41. *See* S. REP. NO. 91-1196, at 37 (1970) (explaining notice period gives government opportunity to act), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 437 (1974). The Senate report stated that the "time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation." *Id.*

42. The final version of the bill changed the notice period from 30 to 60 days. *See* H.R. CONF. REP. NO. 91-1783, at 56 (1970) (noting change in final version), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 151, 206 (1974); *see also* MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 6.1, at 45 (arguing that Congress changed notice period from 30 to 60 days to placate opponents of citizen suits).

43. Clean Air Act § 304(b), 42 U.S.C. § 7604(b).

44. *See id.* (providing that citizens may bring suits alleging violations of orders of EPA Administrator "immediately" after giving notice). The Clean Air Act citizen suit provision waives the waiting period for suits alleging violations of hazardous pollution provisions. *Id.*, *see also* Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (1994) (waiving 60 day notice period for violations of new source pretreatment or toxic substance release standards). Notice is also unnecessary under other citizen suit provisions if the violation creates an imminent threat to the plaintiff's health or safety or immediately affects the plaintiff's legal rights. *See* Surface Mining Control and Reclamation Act of 1977 § 520(b)(2), 30 U.S.C. § 1270(b)(2) (1994) (allowing citizen suits when violation constitutes imminent threat to health or safety or affects legal interest of plaintiff); Outer Continental Shelf Lands Act Amendment of 1978 § 23(a)(3), 43 U.S.C. § 1349(a)(3) (1994) (same); *see also* AXLINE, *supra* note 21, § 6.05, at 6-9 to -11 (discussing other examples of exceptions to notice requirement in various environmental statutes). Professor Axline states that the numerous exceptions demonstrate the political, rather than logical rationale for the notice requirement. *Id.* § 6.05, at 6-10 to -11. He argues that the purpose of the notice requirement — opportunity for government preemptive enforcement — evaporates when citizens can file suit immediately. *Id.*

45. Despite claims to the contrary, legislative history of the citizen suit does not indicate that one purpose of the notice period is to allow the alleged violator to come into compliance with the Act. *See* *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (analyzing citizen suit provision and concluding that "[i]t follows logically that

the Committee encouraged courts to award the citizen plaintiff reasonable litigation expenses even when the defendant corrected the violation before the court issued its verdict in the case.⁴⁶

After passing the Clean Air Act, Congress turned its attention to other environmental problems. In 1972, Congress passed the Clean Water Act and included a citizen suit provision modeled after the Clean Air Act provision.⁴⁷ In *Gwaltney*, the Supreme Court considered the proper interpretation of the Clean Water Act's citizen suit provision.⁴⁸ Responding to years of dispute, the *Gwaltney* Court concluded that the Clean Water Act did not authorize citizen suits for wholly past violations of the Act.⁴⁹ The Court read the "alleged to be in violation" language of the citizen suit provision⁵⁰ to require a present violation rather than a purely historical one.⁵¹ The Court stated,

the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act"). In a later opinion, the Supreme Court used its interpretation of the Clean Water Act in *Gwaltney* as evidence of the legislative intent of the notice provision. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). Supreme Court logic does not equal congressional intent. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 6.1, at 52 (criticizing Supreme Court's analysis of legislative history of notice provision); see also Note, *supra* note 32, at 304 (stating that in Senate debate, supporters of citizen suits believed that threat of suit would encourage violators to comply with Act). It is important to note that an early version of this provision did not provide notice to the alleged violator. See *supra* note 39 (discussing early draft of the Clean Air Act).

46. See S. REP. NO. 91-1196, at 38 (describing situations where courts should award citizen plaintiffs their litigation expenses), reprinted in 1 ENVIRONMENTAL POLICY DIVISION, LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 438 (1974). The Committee stated, "[I]f as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." *Id.*

47. See S. REP. NO. 92-414, at 79 (1971) (noting that Congress modeled Clean Water Act citizen suit provision after Clean Air Act), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1497 (1973).

48. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 52 (1987).

49. See *id.* at 55-56, 64 (noting split among First, Fourth, and Fifth Circuits and concluding Clean Water Act did not allow citizens to sue for wholly past violations); see also *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 309 (4th Cir. 1986) (allowing citizen suits for wholly past violations), *rev'd*, 484 U.S. 49 (1987); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (forbidding suits based solely on historical violations, but allowing citizen suit when citizen plaintiff alleges continuing likelihood that defendant, if not enjoined, will again violate Clean Water Act); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985) (finding that Clean Water Act required plaintiff to "allege a violation occurring at the time the complaint is filed").

50. Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1994).

51. See *Gwaltney*, 484 U.S. at 57 (noting most natural reading requires continuous or intermittent violation).

however, that the Clean Water Act authorized a citizen suit if the plaintiff alleged, in good faith, a continuous or intermittent violation of the Act.⁵²

Since its first incorporation of a citizen suit provision in the Clean Air Act, Congress has included similar citizen suit provisions in nearly every environmental law passed, including the Resource Conservation and Recovery Act,⁵³ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵⁴ and the Endangered Species Act.⁵⁵ Although Congress typically used similar wording in drafting these various provisions, it modified the language to fit within the respective statutory scheme.⁵⁶ Because the model provision does not necessarily fit every statutory scheme, Congress has occasionally, and possibly unintentionally, drafted citizen suit provisions such that enforcement authority of citizens is actually broader than the authority of the EPA.⁵⁷

To address concerns about storage of hazardous chemicals in communities, Congress passed EPCRA.⁵⁸ The Bhopal incident, which was the genesis of EPCRA, occurred while Congress was considering amendments to CERCLA.⁵⁹ As its name implies, EPCRA has two primary functions. First, EPCRA authorizes collection and dissemination of information to citizens

52. *Id.* at 64.

53. Resource Conservation and Recovery Act of 1976 § 7002, 42 U.S.C. § 6972 (1994).

54. CERCLA § 310, 42 U.S.C. § 9659.

55. Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994); *see* AXLINE, *supra* note 21, § 1.02, at 1-8 (noting every major federal environmental law passed since 1972, except Marine Mammal Protection Act and Federal Insecticide, Fungicide, and Rodenticide Act, has contained citizen suit provision); MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.1, at 5-6 & n.10 (citing environmental statutes with citizen suit provisions); Shavelson, *supra* note 5, at 29 & n.5 (discussing pervasiveness of citizen suits in environmental legislation); *see also* Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1994) (authorizing citizen suits); Clean Water Act § 505, 33 U.S.C. § 1365 (same); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1994) (same); EPCRA § 326, 42 U.S.C. § 11046 (1994) (same).

56. *See* MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.1, at 6 (noting that Congress used very similar language in drafting various citizen suit provisions).

57. *See id.* §§ 2.2, 4.0, at 6, 33-34 (noting that citizens are able to enforce more provisions of Resource Conservation and Recovery Act and Safe Drinking Water Act than EPA). Professor Miller suggests that Congress probably did not intend this result and states that the error was likely due to poor drafting by Congress. *Id.* § 2.2, at 6.

58. *See* H.R. REP. NO. 99-253, pt. 1, at 59, 110-11 (1985) (stating program provides citizens expanded information concerning hazardous chemicals in their communities), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2892-93; *see also* Wolf, *supra* note 3, at 218-21 (discussing development of EPCRA).

59. *See* Wolf, *supra* note 3, at 219 (discussing Bhopal incident's impact on Superfund legislation).

concerning hazardous substances stored in their communities.⁶⁰ Second, EPCRA creates community based groups that use this information to formulate and administer emergency response plans in case of a hazardous chemical release.⁶¹ Congress incorporated community right-to-know and planning provisions into the CERCLA amendments and passed a single bill, the Superfund Amendments and Reauthorization Act (SARA).⁶² However, Congress retained EPCRA and CERCLA as independent and separately named acts.⁶³ The incorporation of CERCLA and EPCRA into a single bill is noteworthy because Congress enacted two separate citizen suit provisions in SARA, one under CERCLA⁶⁴ and the other under EPCRA.⁶⁵ These two provisions are markedly different; the CERCLA citizen suit provision follows the Clean Air Act model, while the EPCRA provision departs from the model citizen suit language.⁶⁶ It is likely that Congress intentionally drafted the two provisions differently because it enacted the differing provisions in the same bill.⁶⁷ Like the Clean Air Act and the Clean Water Act,

60. See *id.* at 220 (describing functions of EPCRA); see also *Atlantic States Legal Found. v Buffalo Envelope Co.*, No. CIV-90-1110S, 1991 WL 183772, at *5 (W.D.N.Y. Sept. 10, 1991) (noting that failure to comply with requirements of EPCRA would undermine EPCRA's two functions).

61. See *Wolf*, *supra* note 3, at 220 (describing functions of EPCRA).

62. See *id.* at 219 (discussing EPCRA's start as separate bill and noting its later incorporation into SARA); *Shavelson*, *supra* note 5, at 37 (noting EPCRA inclusion in SARA). CERCLA is also known colloquially as Superfund.

63. *Wolf*, *supra* note 3, at 219.

64. CERCLA § 310, 42 U.S.C. § 9659 (1994).

65. The citizen suit provision came from Senate Bill 51. S. 51, 99th Cong. (1985); see H.R. CONF REP NO. 99-962, at 309 (1986) (noting that House version had no comparable citizen suit provision), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3402.

66. The language used by Congress in EPCRA's citizen suit provision is substantially different from that in other environmental legislation. Compare Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1994) (authorizing citizen suits against any person "alleged to be in violation of" Act), and Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994) (same), and Clean Water Act § 505, 33 U.S.C. § 1365 (1994) (same), and Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1994) (same), and Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (same), and CERCLA § 310, 42 U.S.C. § 9659 (1994) (same), with EPCRA § 326, 42 U.S.C. § 11046 (1994) (authorizing citizen suits against "an owner or operator of a facility for failure to complete and submit" forms and data sheets required under Act). Congress amended the Clean Air Act in 1990 to allow citizen suits against any person "alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation" of the Act. Clean Air Act § 304, 42 U.S.C. § 7604 (1994).

67. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (describing rule of apparent negative pregnant, one common rule of statutory construction). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclu-

the CERCLA provision authorizes suits against persons "alleged to be in violation" of CERCLA, whereas EPCRA's citizen suit provision allows suits for failure to "complete and submit" required information.⁶⁸

In 1990, Congress reacted to the *Gwaltney* decision and amended the Clean Air Act citizen suit provisions.⁶⁹ The amended statute affords citizens the right to sue for past violations if there is evidence that the facility repeatedly violated the statute.⁷⁰ Some courts have used this amendment as evidence that Congress intended to overrule the Supreme Court's decision in *Gwaltney* and have extended this reasoning to interpret other environmental citizen suit provisions.⁷¹ Others have stated that Congress may have intended to codify the continuing violation requirement of *Gwaltney*⁷² Because

sion or exclusion." *Id.* (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The Supreme Court's recent narrowing of the negative pregnant does not apply to SARA. *See Field v Mans*, 116 S. Ct. 437, 442-43 (1995) (refusing to apply apparent negative pregnant rule in bankruptcy case when rule's application offends common sense). The Court specifically stated that the rule is most useful when contrasting simultaneously enacted statutory sections. *Id.* at 446; *see also Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (applying negative pregnant rule when single enactment created provisions with differing language); Shavelson, *supra* note 5, at 37 (noting difference between EPCRA and CERCLA citizen suit provisions and suggesting that difference demonstrates clear congressional "intent that citizens could pursue past violations" under EPCRA).

68. Compare Clean Water Act § 505, 33 U.S.C. § 1365 (1994) (Clean Water Act's citizen suit provision), and Clean Air Act § 304, 42 U.S.C. § 7604 (1994) (Clean Air Act's citizen suit provision), and CERCLA § 310, 42 U.S.C. § 9659 (1994) (CERCLA's citizen suit provision), with EPCRA § 326, 42 U.S.C. § 11046 (1994) (EPCRA's citizen suit provision).

69. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 707(g), 104 Stat. 2399, 2683 (codified as amended at 42 U.S.C. § 7604(g)) (1994) (allowing citizen to recover civil penalties and allowing actions for past violations if there is evidence of repeated violations); James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, NAT. RESOURCES & ENV'T, Spring 1994, at 31, 32 (stating that congressional disagreement with result in *Gwaltney* resulted in 1990 Clean Air Act amendments). Many legislators have criticized *Gwaltney* as bad enforcement policy. *See id.* (citing 136 CONG. REC. 5277, 5279, 5286, 5354-55, 5357-58 (1990) (statements of Senators Lieberman, Chafee, Durenburger, Baucus, and Mitchell), and noting Senators' disagreement with *Gwaltney* decision); *see also* Cohen & Haire, *supra* note 9, at 46 (predicting that 1990 amendments to Clean Air Act's citizen suit provision likely will create confusion).

70. Clean Air Act Amendments of 1990 § 707(g), 42 U.S.C. § 7604(g); *see also* AXLINE, *supra* note 21, § 6.08, at 6-39 (predicting that Congress will likely adopt provisions similar to 1990 Clean Air Act amendments in other citizen suit provisions).

71. *See* *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244 (7th Cir. 1996) (noting that *Gwaltney's* reasoning may no longer be compelling because of 1990 Clean Air Act Amendments), *cert. granted*, 117 S. Ct. 1079 (1997); *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991) (stating that 1990 Clean Air Act Amendments undercut *Gwaltney* and support conclusion that citizen suits are allowed for wholly past violations under EPCRA).

72. *See* *Atlantic States Legal Found. v. United Musical Instruments, Inc.*, 61 F.3d 473,

Congress used the Clean Air Act model when originally drafting other environmental citizen suit provisions, most citizen suit provisions contain the same "alleged to be in violation" language.⁷³ Recently, Congress has considered amendments to other environmental laws to allow expanded citizen enforcement for historical violations.⁷⁴

III. The Judiciary and Citizen Enforcement of Environmental Laws

In the 1970s, most citizen plaintiffs used the citizen suit provisions to file actions against administrative agencies for failure to complete nondiscretionary duties.⁷⁵ In the early 1980s, the Reagan Administration decreased

477 (6th Cir. 1995) (noting that by failing to amend EPCRA similarly, Congress could have intended to limit EPCRA citizen suits to ongoing violations); *infra* notes 104-08 and accompanying text (discussing *Gwaltney's* continuing violation requirement); *see also* Cohen & Haire, *supra* note 9, at 46-47 (discussing Bush Administration's interpretation of 1990 Clean Air Act Amendments). President Bush, in his statement upon signing the Clean Air Act Amendments into law, stated:

[I]n providing for citizen suits for civil penalties, the Congress has codified the Supreme Court's interpretation of such provisions in the *Gwaltney* case. As the Constitution requires, litigants must show, at a minimum, intermittent, rather than purely past, violations of the statute in order to bring suit. This requirement respects the constitutional limitations on the judicial power and avoids an intrusion into the law-enforcement responsibilities of the executive branch.

George Bush, Statement on Signing the Bill Amending the Clean Air Act, PUB. PAPERS 1602, 1604 (1990). The parenthetical "(if there is evidence that the alleged violation has been repeated)" included in the amendment prompted President Bush's reading. Cohen & Haire, *supra* note 9, at 46.

73. *See supra* notes 53-57 and accompanying text (discussing statutes that follow model citizen suit provision).

74. *See Hecker, supra* note 69, at 32 (noting congressional consideration of similar amendment to Clean Water Act); *see also* S. 1114, 103d Cong. § 503 (1993) (containing proposed amendment to Clean Water Act to allow suits for wholly past violations).

75. *See* Karl S. Coplan, *Private Enforcement of Federal Pollution Control Laws — The Citizen Suit Provisions*, ENVTL. LITIG., SA85 A.L.I.-A.B.A. 1033, 1038 (1996) (describing use of citizen suit in 1970s); *see also* William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV 403, 409-10 (1985) (describing difference between citizen suits against administrators and citizen suits against regulated industry). Professor Coplan states that recently there has been a shift from suits brought by national environmental organizations to a decentralized citizen enforcement effort. Coplan, *supra*, at 1038. These suits are now brought by all sorts of plaintiffs. *Id.* He also states that the EPA and Department of Justice are now strong supporters of citizen suits as an enhancement of their enforcement efforts. *Id.*, *see also* MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 10-11 (describing early use of citizen suits). Note, however, that the drafters of the original citizen suit provision in the Clean Air Act expected suits against government enforcers to be the primary use of citizen suits. *See supra* note 35 and accompanying text (describing drafters' expectations).

emphasis on environmental enforcement.⁷⁶ Large environmental organizations responded by shifting their focus away from suits against the government to suits against regulated industries.⁷⁷ The decline in federal enforcement from 1980 to 1982 corresponded with a marked increase in citizen suits.⁷⁸ By the mid-1980s, environmental organizations had filed nearly two hundred citizen suits against private industry.⁷⁹ In 1984, the Chesapeake Bay Foundation (CBF) and the National Resource Defense Council (NRDC) filed such a suit against Gwaltney of Smithfield, Ltd.⁸⁰

A. Gwaltney, *Wholly Past Violations, and the Continuing Violation Requirement*

During the operation of its meat packing plant, Gwaltney of Smithfield, Ltd. (Gwaltney) discharged a variety of pollutants into the Pagan River.⁸¹ Pursuant to the Clean Water Act, Gwaltney obtained a National Pollutant Discharge Elimination System (NPDES) permit that allowed discharge up to specified levels.⁸² Between 1981 and 1984, Gwaltney repeatedly violated

76. See Boyer & Meidinger, *supra* note 21, at 876 (describing Reagan administration's environmental enforcement policy). Professors Boyer and Meidinger noted that "[t]he 1981 appointment of Anne Gorsuch Burford as Administrator of the EPA brought a dramatic change in the agency's enforcement philosophy, and accelerated the loss of faith in government enforcement." *Id.* They noted that voluntary compliance negotiations dominated EPA's enforcement procedures, and prosecution in court was rare. *Id.*

77. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 12 (noting marked decline in federal enforcement from 1980 to 1982 corresponds to increase in citizen enforcement); Coplan, *supra* note 75, at 1038 (discussing shift from citizens suits against government to suits against regulated industries).

78. See 3 ENVIRONMENTAL LAW INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES, 10, 27, 39 (1984) [hereinafter ELI Study], cited in MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 12 (discussing results of ELI Study). Professor Miller suggests that this decline prompted organizations such as National Resources Defense Council (NRDC) to use citizen suits to reverse EPA's enforcement breakdown and goad the agency into action. MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 11. NRDC used student interns to review federal and state records and targeted major industrial facilities that had multiple and serious violations. *Id.* NRDC filed several citizen suits and hoped to produce a self-sustaining effort by using recovered attorneys fees to fund future cases. *Id.*

79. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 13-14 (stating that of 349 notices of intent to sue issues, 189 led to citizen suits).

80. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 54 (1987); see also MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 2.3, at 11-12 (describing NRDC's method of using student interns and technical consultants to discover and target potential defendants for citizen suits).

81. *Gwaltney*, 484 U.S. at 53.

82. *Id.*

the Clean Water Act by exceeding the permit's effluent limitations.⁸³ After reviewing Gwaltney's discharge monitor report, CBF and NRDC discovered Gwaltney's violations.⁸⁴ In February 1984, CBF and NRDC sent a notice of intent to commence a citizen suit to Gwaltney, to the EPA Administrator, and to the Virginia State Water Control Board.⁸⁵ In June 1984, CBF and NRDC filed a citizen suit and alleged that Gwaltney violated and would continue to violate the NPDES permit.⁸⁶ Gwaltney moved for dismissal of the action because the last recorded violation occurred several weeks before the plaintiffs filed suit.⁸⁷ Gwaltney lost in both the district court⁸⁸ and the United States Court of Appeals for the Fourth Circuit.⁸⁹ Both the district court and the circuit court concluded that the Clean Water Act authorized citizens to sue for historical violations.⁹⁰ Gwaltney then appealed to the Supreme Court. Faced with a split in the circuits, the Supreme Court granted Gwaltney's petition for *certiorari*.⁹¹

The *Gwaltney* Court began with an analysis of the plain language of the Clean Water Act citizen suit statute⁹² and noted that the provision's language was somewhat ambiguous.⁹³ According to the Court, the most natural reading of the "alleged to be in violation" language required the plaintiff to allege that the polluter either was continuing to violate or was intermittently

83. *Id.*

84. *Id.* at 54.

85. *Id.*

86. *Id.*

87. *Id.* at 54-55.

88. *See id.* at 55 (citing *Chesapeake Bay Found. v. Gwaltney*, 611 F Supp. 1542, 1547 (E.D. Va. 1985)). The district court found that citizens could bring actions based on historical violations. *Id.*

89. *See id.* at 58 (citing *Chesapeake Bay Found. v. Gwaltney*, 791 F.2d 304, 309 (4th Cir. 1986)). The Fourth Circuit affirmed the district court's decision. *Id.* The court also interpreted the citizen suit provisions as allowing actions for wholly historical violations. *Id.*

90. *Id.* at 55-56.

91. *See id.* at 56 (stating Court's reason for taking case was to resolve conflicting interpretations by lower courts); Timothy A. Wilkins, Note, *Mootness Doctrine and the Post-Compliance Pursuit of Civil Penalties in Environmental Citizen Suits*, 17 HARV ENVTL. L. REV. 389, 392 (1993) (noting conflict among First, Fourth, and Fifth Circuits); *see also* *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (requiring continuing likelihood that defendant will repeatedly violate Clean Water Act); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985) (requiring ongoing violation of Clean Water Act at time plaintiff filed suit).

92. Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1994); *see supra* note 17 (providing relevant text of Clean Water Act's citizen suit provision).

93. *Gwaltney*, 484 U.S. at 56-57

violating the Act.⁹⁴ The Court cited the pervasive use of present tense throughout the citizen suit provision as support for its conclusion.⁹⁵ CBF and NRDC noted the similar use of present tense in the provision that authorized the EPA to sue for past violations⁹⁶ and argued that this language demonstrated congressional intent to allow citizens to sue for historical violations.⁹⁷ The Court rejected this argument and concluded that citizens, unlike the EPA, may sue only to stop an ongoing violation.⁹⁸

Without citing supportive legislative history regarding the notice provision, the Court asserted that its decision was in accord with legislative intent.⁹⁹ To support its reasoning, the Court pointed to the statutory bar

94. *Id.* at 57 The Court rationalized its interpretation by noting that Congress could have phrased the statute in the past tense. *Id.* The Court pointed to the Solid Waste Disposal Act as proof that Congress knew how to explicitly authorize citizen suits for wholly past violations. *Id.* at 57 n.2; Solid Waste Disposal Act § 7002(a), 42 U.S.C. § 6972(a) (1994).

95. *Gwaltney*, 484 U.S. at 59. In support of its analysis, the Court noted four other sections which used present tense. *Id.* For example, the use of present tense in the definition of citizen as "a person having an interest which *is or may be* adversely affected by the defendant's violations of the Act." *Id.* (emphasis added) (internal quotations omitted) (quoting Clean Water Act § 505(g), 33 U.S.C. § 1365(g) (1994)).

96. *Gwaltney*, 484 U.S. at 58; see Clean Water Act § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1994) (authorizing EPA Administrator to commence enforcement action if Administrator finds "any person is in violation").

97. *Gwaltney*, 484 U.S. at 58. After reviewing both statutes, the Court stated that this argument did not "withstand close scrutiny." *Id.* According to the Court, the "is in violation" language referred to by the plaintiffs did not grant EPA the authorization to collect civil penalties. *Id.*, Clean Water Act § 309(a)(1), 33 U.S.C. § 1319(a)(1). Congress provided authorization to collect civil penalties in a separate section. *Gwaltney*, 484 U.S. at 58 (citing Clean Water Act § 309(d)). *But see* Hecker, *supra* note 69, at 32 (criticizing Court for failure to equate citizen suit provision language with government enforcement provision). Mr. Hecker argues that the nearly identical language of both provisions demonstrates that Congress intended courts to treat citizen plaintiffs like private attorneys general who should be able to sue for wholly past violations. *Id.*

98. *Gwaltney*, 484 U.S. at 58-59.

99. *See id.* at 60 (concluding that one purpose of 60-day notice period is to allow alleged violator to come into compliance). The Court did not point to any evidence of its conclusion in the legislative history of the citizen suit notice period, but simply stated that "it follows logically." *Id.* at 60. The Court discussed the Clean Water Act legislative history in a separate part of its opinion and ignored statements in the legislative reports that discussed the purpose of the notice period. *Id.* at 61-62. The Court reviewed congressional statements that discussed citizens suits as injunctive measures. *Id.* at 61. From these, the Court concluded that Congress intended citizen suits to have an interstitial role in enforcement and to supplement rather than supplant government enforcement actions. *Id.* at 60. Much of the debate over the citizen suit provision in the Clean Water Act centered on the definition of "citizen" and whether the Act should permit environmental organizations to sue under the citizen suit provision. *See* 119 CONG. REC. 10,771-74 (1972) (considering amendment to modify defini-

against a citizen suit when the EPA or a state agency commences an enforcement action against an alleged violator.¹⁰⁰ This statutory bar convinced the Court that one purpose of the sixty-day notice was to allow the polluter to come into compliance with the Clean Water Act, thereby rendering the citizen suit unnecessary.¹⁰¹ If the purpose of the notice requirement did not include an allowance for an alleged violator to come into compliance, the Court reasoned, the notice to the violator would be merely gratuitous.¹⁰² The

tion of "citizen"), reprinted in 2 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 671-675 (1973). There is little evidence of congressional intent regarding the purpose of 60-day notice period. See notes 39-46 and accompanying text (discussing similar lack of information concerning Clean Air Act citizen suit 60-day notice period). The Senate Public Works Committee, however, stated that the sixty-day notice period should give the administrative enforcement authority an opportunity to act on the alleged violation. S. REP. NO. 92-414, at 80 (1971), reprinted in 2 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1415, 1498 (1973). The committee further stated that if the agency fails to act or if the citizen believes that the agency's action is inadequate, the citizen could file the action. *Id.* The committee discussed the notice provision in four paragraphs of its report; however, there was no discussion regarding an intent to allow the alleged violator to come into compliance during the notice period. *Id.* at 79-80. If Congress intended the role for the notice period suggested by the *Gwaltney* Court, one would expect that Congress would at least mention this role.

100. *Gwaltney*, 484 U.S. at 60; see also Clean Water Act § 505, 33 U.S.C. § 1365(b)(1)(B) (1994) (precluding citizen suit from proceeding if federal or state agency initiates abatement proceedings).

101. *Gwaltney*, 484 U.S. at 59-60. The Court's logic is particularly confusing, especially in light of the legislative history of this provision. See *supra* notes 39-46 and accompanying text (discussing legislative history of citizen suit notice provision); see also MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 6.1, at 52 (noting that only legislative purpose of notice requirement is to prompt government enforcement); Jeffrey G. Miller, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., Invitation to the Dance of Litigation*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10098, 10101-02 (1988) (criticizing Court's legislative history discussion). Professor Miller states: "The Court cites nothing to suggest [allowing violator to escape litigation] was Congress' purpose for the [sixty-day notice] requirement. Indeed, there is no such suggestion in the legislative history." *Id.* at 10101.

102. *Gwaltney*, 484 U.S. at 60. Although the plaintiffs could provide no other reason than "it seemed right," others have suggested a few reasons why Congress included notice to violation. *Id.*, see AXLINE, *supra* note 21, § 6.01, at 6-2 to -3 (arguing that defendants' financial interests are best served by attempting to negotiate with plaintiff early because meritorious citizen suits can be costly, are normally thoroughly investigated before filing notice, and can result in large civil penalties and attorney fees); MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 6.1, at 52 (stating that such notice allows alleged violator to correct the violation, negotiate early settlement, or convince complainants that citizen suit is not warranted); see also *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244 (7th Cir. 1996) (stating that "[b]ecause each day of an EPCRA violation is a separate violation carrying additional penalties, notice gives a violator the opportunity to limit" liability by coming into

Court concluded that the Clean Water Act did not permit citizen suits for wholly past violations.¹⁰³

Gwaltney won the battle, but lost the war.¹⁰⁴ The Court noted CBF and NRDC's good faith allegation of Gwaltney's continuing violation of its permit.¹⁰⁵ Recognizing the practical difficulties of detecting and proving violations of environmental standards, the Court acknowledged that good faith allegations satisfied jurisdictional requirements.¹⁰⁶ The Court remanded the case for further consideration of this issue.¹⁰⁷ Although *Gwaltney* holds that a citizen may not sue for wholly past violations of the Clean Water Act, it allows such suits if a plaintiff, in good faith, alleges continuing or intermittent violations.¹⁰⁸

compliance with Act), *cert. granted*, 117 S. Ct. 1079 (1997).

103. *Gwaltney*, 484 U.S. at 64.

104. See Joel A. Waite, Comment, *The Continuing Questions Regarding Citizen Suits Under the Clean Water Act: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 46 WASH. & LEE L. REV 313, 334 (1989) (suggesting that Gwaltney's victory might prove illusory).

105. *Gwaltney*, 484 U.S. at 64.

106. *Id.* at 64-65. Justice Scalia, with Justices Stevens and O'Connor, concurred in the judgment of the Court, but did not join the Court's opinion regarding the continuing violation requirement. *Id.* at 67 (Scalia, J., concurring). Justice Scalia suggested that the issue on remand should be whether Gwaltney was in violation on the date the plaintiffs brought the suit. *Id.* at 69. He continued: "A good or lucky day is not a state of compliance." *Id.* Rejecting the "good faith allegation" requirement, he stated that a company remains in violation as long as it has not put in place remedial measures that eliminate the cause of the problem. *Id.*

107. *Id.* at 67. Gwaltney argued that the plaintiff must prove ongoing violations before jurisdiction attached. *Id.* at 64. The Court responded that Gwaltney's construction read "alleged" out of the statute. *Id.* The citizen suit provision required only that the defendant be "alleged to be in violation." *Id.* Upon remand, the district court reinstated its original judgment of \$1,285,322. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078, 1080 (E.D. Va. 1988). The Fourth Circuit reduced this award to \$289,000. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 698 (4th Cir. 1989); see also AXLINE, *supra* note 21, § 6.08, at 6-37 (discussing *Gwaltney* subsequent history).

108. *Gwaltney*, 484 U.S. at 65. The Court noted that Rule 11 of the Federal Rules of Civil Procedure should prevent suits premised on baseless allegations. *Id.* Many courts have interpreted the Court's requirement of a continuing or intermittent violation broadly and have allowed direct proof of actual violations or proof of a reasonable likelihood that violations will recur. See David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233, 2237 (1991) (noting considerable appellate litigation over what plaintiffs must prove to demonstrate existence of ongoing violations); Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723, 764-65 (1996) (noting lower courts' broad interpretation of continuing violation requirement); see also AXLINE, *supra* note 21, § 6.08, at 6-35 to -38 (noting broad interpretation of continuing violation requirement).

In dicta, the *Gwaltney* Court recommended a limited role for citizen participation in enforcement of environmental policy.¹⁰⁹ The Court posed a hypothetical that illustrated its critique of citizen suits.¹¹⁰ The hypothetical demonstrates the *Gwaltney* Court's concern that citizen suits for past violations could prevent effective EPA enforcement and would limit EPA's enforcement options.¹¹¹ The Supreme Court cautioned that giving citizens the same enforcement power as the government to sue for historical violations would transform citizens into policymakers.¹¹² The Supreme Court's

109. *Gwaltney*, 484 U.S. at 60-61. The Court stated that the effect of citizen suits is "to supplement rather than to supplant government action." *Id.* at 60. This statement has been used by numerous courts to limit severely the use of citizen suits. See *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991) (relying on dicta in *Gwaltney* to preclude injunctive relief otherwise allowed by statute in citizen suit); Hecker, *supra* note 69, at 33-34 (discussing use of this dicta by various courts). *But see* David 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, 1640-41 (1995) (criticizing First Circuit's use of dicta from *Gwaltney*); 118 CONG. REC. 33,716 (1972) (statement of Sen. Bayh) (contending that "[c]itizen suits — in which the plaintiff cannot collect damages for himself, but can simply seek an injunction to prevent violations — can be a very important tool for keeping industry and Government alike from letting standards and enforcement slip").

110. *Gwaltney*, 484 U.S. at 60-61. The Court posed the following hypothetical:

Suppose that the Administrator identified a violator of the Act and issued a compliance order under [the Act]. Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

Id. *But see* Hecker, *supra* note 69, at 34 (criticizing *Gwaltney* Court's hypothetical as "inconsistent with the remedy that Congress defined").

111. *Gwaltney*, 484 U.S. at 60-61.

112. *Id.* at 61. The Court stated that allowing citizen suits for wholly past violations would "change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* *But see* Hecker, *supra* note 69, at 34 (criticizing this statement by Court); Miller, *supra* note 101, at 10102 (asserting that Court's statement has nothing to do with wholly past violations but rather with Court's abhorrence of citizen enforcement in general). Mr. Hecker states that if the Court's dicta are read broadly, citizens would be seen as competing with government in enforcement of environmental laws. Hecker, *supra* note 69, at 34. He suggests that this notion is contrary to the enforcement scheme created by Congress that allows some duplication between government and citizen enforcement. *Id.* *But see* Colleen M. Wolter, Note & Comment, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: The Supreme Court Disallows Citizen Suits for Wholly Past Violations of the Clean Water Act*, 3 ADMIN. L.J. 425, 447 (1989) (responding to criticism of *Gwaltney*).

reluctance to fully endorse citizen suits set the stage for conflicts in the lower courts under statutes other than the Clean Water Act.

B. Historical Violations and the Notice Requirement Under EPCRA

Not surprisingly, many defendants in environmental citizen suits have used *Gwaltney* to argue for dismissal of citizen suits.¹¹³ Recently, at least one commentator has questioned *Gwaltney*'s application to citizen suits under EPCRA.¹¹⁴ Moving away from the traditional regulatory scheme used both in the Clean Water Act and discussed in *Gwaltney*, Congress drafted EPCRA to empower citizens and to provide readily accessible information regarding the chemicals stored in communities.¹¹⁵ The wording and structure of the EPCRA citizen suit provision differs substantially from that of the Clean Water Act.¹¹⁶ The Clean Water Act follows the model "alleged to be in violation" language, but EPCRA authorizes citizen suits for "failure to complete and submit" required reports.¹¹⁷ Until the Sixth Circuit's decision in *Atlantic States Legal Foundation v. United Musical Instruments, Inc.*, every district court that considered the "*Gwaltney* defense" in an EPCRA citizen suit rejected it.¹¹⁸

113. See Hecker, *supra* note 69, at 34 (discussing defendants' reliance on *Gwaltney*); Hodas, *supra* note 109, 1642-45 (discussing flawed use of *Gwaltney*'s dicta); see also *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 979 (D. Ariz. 1997) (rejecting defendant's argument, borrowed from *Gwaltney*, that citizen suits could "supplant, rather than supplement" EPA enforcement); *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991) (relying on dicta in *Gwaltney* to uphold dismissal of citizen suit).

114. See Shavelson, *supra* note 5, at 36 (comparing language differences in EPCRA and Clean Water Act citizen suit provision and suggesting *Gwaltney* analysis inapplicable to EPCRA).

115. See *id.* at 30 (describing difference between EPCRA and other federal environmental legislation); Wolf, *supra* note 3, at 220-21 (stating that although obscure, EPCRA right-to-know feature provides citizens with powerful weapon).

116. Compare EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1) (1994), quoted at *supra* note 8, with Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1994), quoted at *supra* note 17 (illustrating provisions' differing language).

117. See *supra* note 66 (comparing EPCRA citizen suit provision to other citizen suit provisions).

118. See *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1141 (E.D. Pa. 1993) (rejecting extension of *Gwaltney* to citizen suit under EPCRA); *Williams v. Leybold Tech., Inc.*, 784 F. Supp. 765, 768 n.2 (N.D. Cal. 1992) (same); *Atlantic States Legal Found., Inc. v. Buffalo Envelope Co.*, No. CIV-90-1110S, 1991 WL 183772, at *7 (W.D.N.Y. Sept. 10, 1991) (same); *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991) (same); see also Shavelson, *supra* note 5, at 36 (noting initial refusals to extend *Gwaltney* to EPCRA citizen suits).

On July 17, 1992, Atlantic States Legal Foundation (Foundation) sent United Musical Instruments (Musical), a manufacturer of musical instruments, notice of intent to sue for failure to timely submit required information under EPCRA for the reporting years 1987 through 1990.¹¹⁹ Foundation attempted to negotiate a settlement with Musical.¹²⁰ Although these negotiations failed, Musical corrected the violations prior to July 21, 1993, when Foundation filed its complaint in federal court seeking civil penalties as well as attorneys' fees.¹²¹ The district court dismissed the action on statute of limitations grounds, and Foundation appealed.¹²² On appeal, Musical invoked *Gwaltney* and argued that the citizen suit provision under EPCRA did not authorize citizen plaintiffs to proceed against defendants for purely historical violations.¹²³ The United States Court of Appeals for the Sixth Circuit agreed and affirmed the district court's decision to dismiss the complaint.¹²⁴

In support of its decision, the Sixth Circuit reviewed the plain language of the citizen suit provision, that authorizes suits for "failure to [c]omplete and submit" required documentation.¹²⁵ Although Congress provided deadlines for filings elsewhere in EPCRA, the court noted that the citizen suit provision emphasized only the "completion and filing of the form."¹²⁶ The court considered the information completed and filed even though Musical filed after the statutory deadline.¹²⁷ The appellate court also noted

119. See *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473, 474 (6th Cir. 1995) (describing plaintiff's filing of notice of intent to sue); Shavelson, *supra* note 5, at 35-36 (same). When Foundation filed its complaint, it alleged that Musical had failed to file reports for 1988-91. *United Musical Instruments*, 61 F.3d at 474.

120. Shavelson, *supra* note 5, at 35. Atlantic States Legal Foundation is a nonprofit public interest group known for its aggressive use of the citizen suit provision of EPCRA. *Id.* at 29-30.

121. *United Musical Instruments*, 61 F.3d at 474-75.

122. See *id.* (discussing district court opinion).

123. *Id.* at 475.

124. *Id.* The district court had relied on different reasoning for dismissing the complaint. *Id.* at 474-75. Although EPCRA contained no independent statute of limitations and the plaintiff argued for a five-year limit, the district court applied the one-year limit from Ohio law and dismissed the complaint. *Id.*, see also Shavelson, *supra* note 5, at 35-36 (discussing district court's opinion).

125. EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1) (1994); see *United Musical Instruments*, 61 F.3d at 475 (discussing EPCRA citizen suit provision); *supra* note 8 (quoting portions of EPCRA citizen suit provision).

126. *United Musical Instruments*, 61 F.3d at 475.

127. *Id.* But see Shavelson, *supra* note 5, at 36 (noting that court ignored citizen suit provision reference to EPCRA requirement that facilities submit reports by specific dates);

that the EPA had broader authority to enforce the Act and cited this as evidence of congressional intent to limit citizen suits to ongoing violations.¹²⁸ The Sixth Circuit embraced the Supreme Court's decision in *Gwaltney* and used statements by the Court to support its own analysis.¹²⁹

Noting that Congress worded the EPCRA and Clean Water Act citizen suit provisions differently, Foundation argued that the court's invocation of *Gwaltney* was misplaced.¹³⁰ The Sixth Circuit rejected Foundation's reading as "hypertechnical" and stated the most natural reading of EPCRA precluded suits for purely historical violations.¹³¹ The 1990 Amendments to the Clean Air Act explicitly allow citizen suits for historical violations.¹³² Foundation

Citizens for Better Env't v. Steel Co., 90 F.3d 1237, 1243 (7th Cir. 1996) (noting that Congress authorized citizen suits for failure to submit forms "'under' §§ 312-313" and incorporated deadline section into provision as if the provision read "in accordance with §§ 312-313"), *cert. granted*, 117 S. Ct. 1079 (1997). Section 312(a) of EPCRA, referenced in the citizen suit provision, provides that:

(1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical shall prepare and submit an emergency and hazardous chemical inventory form to each of the following:

- (A) The appropriate local emergency planning committee.
- (B) The State emergency response commission.
- (C) The fire department with jurisdiction over the facility.

(2) The inventory form containing tier I information shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year

EPCRA § 312(a), 42 U.S.C. § 11022(a) (emphasis added). EPCRA's citizen suit provision authorizes suit for failure to complete and submit forms "under § 312" of the Act. EPCRA § 326(a)(1)(A)(iii), 42 U.S.C. § 11046(a)(1)(A)(iii); *see supra* note 8 (providing relevant text of EPCRA citizen suit provision).

128. *See United Musical Instruments*, 61 F.3d at 475 (discussing congressional intent in drafting EPCRA). The court noted that the civil penalty section authorizes EPA to assess and collect civil penalties for any violation of § 313(a)'s requirements. *Id.*, *see* EPCRA § 325(c)(4), 42 U.S.C. § 11045(c)(4) (authorizing EPA to seek civil penalties). The court stated that Congress intentionally limited citizen suits to claims involving failure to submit requisite forms and not for violations of other requirements of the act, like filing deadlines. *United Musical Instruments*, 61 F.3d at 475. According to the court, this difference demonstrated congressional intent to give the EPA the sole discretion to recover penalties for past violations. *Id.*

129. *See United Musical Instruments*, 61 F.3d at 475-77 (applying *Gwaltney*).

130. *See id.* at 476-77 (discussing Foundation's argument). The court noted that "EPCRA authorizes citizen actions for 'failure to' submit certain information, while the Clean Water Act authorizes citizen suits against persons 'alleged to be in violation' of [the Act]." *Id.* at 476.

131. *Id.* at 477

132. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 707(g), 104 Stat.

asserted that these amendments undercut *Gwaltney* and demonstrated that Congress intended to overrule the Court's decision.¹³³ The court rejected this argument.¹³⁴ By failing to similarly amend EPCRA, the appellate court suggested that Congress may have intended to limit EPCRA's citizen suit provision to violations existing at the time the plaintiff filed the suit.¹³⁵ Embracing the dicta from *Gwaltney*, the court stated that EPA should have the sole responsibility for seeking civil penalties for past violations because citizen suits for past violations would undermine the EPA's discretion to seek other remedies in the public's interest.¹³⁶ The plain language and structure of EPCRA led the court to conclude that EPCRA barred citizen suits for purely historical violations.¹³⁷

The plain language of EPCRA led the Seventh Circuit to a different conclusion, however. The facts in *Citizens for a Better Environment v Steel*

2399, 2683 (1990) (codified as amended at 42 U.S.C. § 7604(a)(1) (1994)) (allowing suits for historical violations). The 1990 amendments changed the citizen suit provision of the Clean Air Act to authorize citizen suits against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation [of an emission standard]" Clean Air Act § 304(a)(1), 42 U.S.C. § 7604(a)(1) (1994); see *supra* notes 69-74 and accompanying text (discussing 1990 Clean Air Act Amendments).

133. See *United Musical Instruments*, 61 F.3d at 477 (discussing Foundation's interpretation of *Gwaltney*).

134. *Id.*

135. *Id.* The court's response to the Foundation's argument is somewhat flawed. Its reasoning assumes that Congress accepts the court's conclusion that the existing EPCRA provision does not allow a citizen suit for past violations despite its difference from Clean Air Act. Congress may disagree with the court and therefore an amendment would not be required. See Brief of the United States as Amicus Curiae in Support of the Appeal at 13-14 n.7, *Citizens for a Better Env't v Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (No. 96-1136) (noting EPCRA citizen suit language is so different from Clean Water Act and Clean Air Act that *Gwaltney*'s textual analysis does not apply), *cert. granted*, 117 S. Ct. 1079 (1997); see also Brief of United States as Amicus Curiae Supporting Respondent at 12, *Steel Co. v Citizens for a Better Env't*, 1997 WL 348166 (U.S. 1997) (No. 96-643) (citing textual difference between EPCRA and Clean Water Act for conclusion that *Gwaltney* holding does not apply to *Steel Co.* case); Shavelson, *supra* note 5, at 37 (describing court's statutory interpretation as bordering on ludicrous). Mr. Shavelson explains that Congress does not amend every environmental law each time it recognizes a deficiency. *Id.* He suggests that Congress considers amendments to complex environmental statutes only when they are up for reauthorization. *Id.*

136. *United Musical Instruments*, 61 F.3d at 477 This conclusion is very similar to the hypothetical posed by the Court in *Gwaltney*. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987) (presenting hypothetical); *supra* notes 109-12 and accompanying text (discussing hypothetical).

137. *United Musical Instruments*, 61 F.3d at 478. The Clinton Administration did not succeed in its attempt to get the Sixth Circuit to rehear the case en banc. Cohen & Haire, *supra* note 9, at 50 n.110.

Co.¹³⁸ are very similar to those in *United Musical Instruments*.¹³⁹ Citizens for a Better Environment (Citizens), a nonprofit environmental group, discovered violations of EPCRA, and on March 16, 1995, sent notice of intent to sue to The Steel Company, Inc. (Steel), a Chicago steel manufacturer.¹⁴⁰ After receiving the notice, Steel filed its overdue forms with the designated agencies.¹⁴¹ When the EPA did not initiate enforcement proceedings within the sixty-day notice period, Citizens filed a complaint in federal district court on August 7, 1995.¹⁴² The district court agreed with the Sixth Circuit analysis in *United Musical Instruments* and dismissed Citizens' complaint because it found EPCRA did not authorize citizen suits for purely historical violations.¹⁴³ Citizens appealed.¹⁴⁴

Rather than applying the *Gwaltney* rule directly, the Seventh Circuit began its analysis by using *Gwaltney's* interpretive methodology.¹⁴⁵ The court found that the plain language of the EPCRA citizen enforcement provision did not point to a present violation requirement.¹⁴⁶ Noting that the language of EPCRA contains no temporal limitation, the appellate court stated that "'failure to do' something can indicate a failure past or present."¹⁴⁷

138. *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238, 1242 (7th Cir. 1996) (noting only Sixth Circuit had previously addressed issue before court and describing case as "factually indistinguishable" from *United Musical Instruments*), cert. granted, 117 S. Ct. 1079 (1997).

139. See *Atlantic States Legal Found. v. United Musical Instruments, Inc.*, 61 F.3d 473, 474-75 (6th Cir. 1995) (discussing factual background of case).

140. *Citizens for a Better Env't*, 90 F.3d at 1241. Citizens also sent the required notices to the EPA and local authorities. *Id.*

141. *Id.* During oral argument, counsel for the defendant admitted that the defendant had not filed the appropriate forms in accordance with the Act. *Id.*

142. *Id.*

143. *Id.* at 1241-42. At that time, the Sixth Circuit was the only circuit that had considered whether EPCRA authorized citizen suits for wholly past violations. *Id.* at 1242.

144. *Id.* at 1241. The United States filed an amicus curiae brief in support of Citizens' interpretation of the statute. *Id.*

145. *Id.* at 1242. The court noted that the first teaching of *Gwaltney* was to read the statute with its "most plain and natural meaning." *Id.* The court noted that the Sixth Circuit in *United Musical Instruments* (and the district court in *Citizens for a Better Env't*) applied *Gwaltney's* literal holding by analogy to EPCRA to determine that the statute did not allow citizen suits for purely historical violations. *Id.*

146. *Id.* at 1243.

147. *Id.* The court distinguished *Gwaltney*, which found that the "alleged 'to be in violation'" language used in the Clean Water Act required a present or likely future violation for a citizen suit to go forward. *Id.* at 1243-44. The Sixth Circuit called this distinction a "hypertechnical parsing of the language of the statutes." *Id.*, see also *Atlantic States Legal Found. v. United Musical Instruments, Inc.*, 61 F.3d 473, 476-77 (6th Cir. 1995) (comparing Clean Water Act and EPCRA citizen suit provisions).

The Seventh Circuit stated that the 1990 amendments to the Clean Air Act, enacted after *Gwaltney*, demonstrated that Congress did not view the sixty-day notice provision as inconsistent with allowing citizens to sue for past violations.¹⁴⁸ In further support of its holding, the court noted that Congress incorporated filing deadlines as essential statutory elements that citizens have authority to enforce.¹⁴⁹ The court also provided three reasons why the notice provision was not gratuitous.¹⁵⁰ First, it allowed an alleged violator to correct an erroneous claim by a citizen.¹⁵¹ Second, the notice allowed the violator to limit its liability by filing the late reports.¹⁵² Third, it provided the parties an opportunity and an incentive to negotiate a settlement.¹⁵³

The court also offered a policy argument in support of its decision.¹⁵⁴ The citizen suit provision allows the citizen plaintiff to recover reasonable costs of enforcement.¹⁵⁵ The court explained that allowing violators to es-

148. *Citizens for a Better Env't*, 90 F.3d at 1244. The Sixth Circuit considered and dismissed this argument. See *supra* notes 132-35 (discussing Sixth Circuit's interpretation of 1990 Clean Air Act Amendments). The *Gwaltney* Court stated that one rationale for the 60-day notice was to allow violators to come into compliance during this notice period. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49, 60 (1987). Allowing citizens to sue for past violations would undercut this purpose. *Id.* The Court stated that Congress could not have intended the inconsistency of requiring notice to the violator and allowing citizens to sue for purely historical violations. *Id.* at 61. However, in 1990, Congress amended the Clean Air Act and allowed for citizen suits for past violations, but retained the notice requirement. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 707(g), 104 Stat. 2399, 2683 (1990) (codified as amended at 42 U.S.C. § 7604(a)(1) (1994)).

149. *Citizens for a Better Env't*, 90 F.3d at 1243. The court stated that the most natural reading of "under" is "in accordance with." *Id.* at 1241. The EPCRA citizen suit provision references §§ 312 and 313 which state that forms "shall be" submitted annually. *Id.*, see also S. REP. NO. 99-11, at 14-15 (1985) (noting goal of EPCRA to make information "available widely and in a timely fashion").

150. *Citizens for a Better Env't*, 90 F.3d at 1244.

151. *Id.*

152. *Id.* Each day that a report is late is a separate violation subject to a \$25,000 per day fine. *Id.* at 1241. Because the EPA can enforce the Act for past violations, filing as early as possible limits the possible civil penalties which EPA can seek. *Id.* at 1244. Under the citizen suit provision, the EPA takes over enforcement during the notice period. *Id.*

153. *Id.*, see MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, at 138-42 (recommending that potential defendants carefully consider entering settlement negotiations to limit expenses). Professor Miller states that early discussions may persuade citizen plaintiffs that they have no case or should not pursue enforcement. *Id.* at 141. Additionally, early discussions may lead to a settlement before suit is filed which could save the defendant substantial legal costs. *Id.* at 141-42; see also Miller, *supra* note 101, at 10101 (discussing legitimate reasons for notice requirement even where violations are wholly past).

154. See *Citizens for a Better Env't*, 90 F.3d at 1244-45 (discussing need to interpret "citizen suit provision in a way that gives meaning to the provision as a whole").

155. EPCRA § 326(f), 42 U.S.C. § 11046(f) (1994).

cape enforcement simply by correcting discrepancies (after receipt of notice of an intent to sue) would undermine the purpose of EPCRA's citizen suit.¹⁵⁶ Private citizens would have to absorb costs associated with monitoring with little hope of recovery.¹⁵⁷ The Seventh Circuit stated that the Sixth Circuit's view (forbidding suits for wholly past violations) would render citizen enforcement "virtually meaningless."¹⁵⁸

IV Deciphering EPCRA's "Plain" Language

Most courts have decided that EPCRA's plain language allows citizen suits for wholly past violations.¹⁵⁹ Critics of this position concede that EPCRA's statutory language is ambiguous with regard to allowing citizen suits for such violations.¹⁶⁰ When interpreting ambiguous statutes, courts must rely on the plain language of statutes in the absence of clearly expressed intent to the contrary.¹⁶¹ The plain language of EPCRA's citizen suit

156. *Citizens for a Better Env't*, 90 F.3d at 1244-45.

157. *Id.* at 1245.

158. *Id.* at 1244. The court predicted that private enforcement of the reporting requirements would drop off if courts accepted the Sixth Circuit's view. *Id.* at 1245. However, after the Supreme Court's decision in *Gwaltney*, citizen enforcement remained relatively constant. See Hodas, *supra* note 109, at 1573 tbl.1 (demonstrating 60-day notice filings remained fairly constant from 1986 through 1992).

159. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996) (finding plain language of EPCRA citizen suit provision does not require present violation), *cert. granted*, 117 S. Ct. 1079 (1997); *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448, 1452 (D. Colo. 1997) (finding EPCRA allows citizen suits for historical violations); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 978-79 (D. Ariz. 1997) (same); *Idaho Sporting Congress v. Computrol, Inc.*, 952 F. Supp. 690, 692-93 (D. Idaho 1996) (same); *Delaware Valley Toxics Coalition v. Kurzhastings, Inc.*, 813 F. Supp. 1132, 1141 (E.D. Penn. 1993) (same); *Williams v. Leybold Tech., Inc.*, 784 F. Supp. 765, 770 (N.D. Cal. 1992) (same); *Atlantic States Legal Found. v. Buffalo Envelope Co.*, No. CIV-90-1110S, 1991 WL 183772, at *7 (W.D.N.Y. Sept 10, 1991) (same); *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991) (same); see also Shavelson, *supra* note 5, at 34 (noting most courts have allowed citizen suits for historical violations). But see *Atlantic States Legal Found. v. United Musical Instruments, Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (disallowing EPCRA citizen suit for wholly past violations).

160. See *Cohen & Haire*, *supra* note 9, at 49 (noting that, as pure question of statutory construction, one can read EPCRA citizen suit provision to allow suit for wholly past violations, but noting that such interpretation is unpersuasive); see also *Idaho Sporting Congress*, 952 F. Supp. at 692 (stating that "failure to do" language is not without ambiguity).

161. See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (stating that starting point for statutory interpretation is ordinary language of statute). But see Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53

provision does not contain a temporal limitation.¹⁶²

In addition to the plain language, the structure of the citizen suit provision also provides some evidence of congressional intent. The citizen suit provision authorizes citizen suits for violations of specific provisions of EPCRA that include strict filing deadlines.¹⁶³ Because EPCRA is concerned with providing information to the community in a timely manner, Congress must have intended to allow citizen enforcement for violations of the filing deadlines.¹⁶⁴ EPCRA's citizen suit venue provision also suggests that Congress intended to allow suits for past violations.¹⁶⁵ Unlike the Clean Water Act's venue provision used in support of the *Gwaltney* Court's decision,¹⁶⁶ the venue requirement in the EPCRA citizen enforcement provision is not cast in the present tense.¹⁶⁷ Finally, because compliance is relatively simple, violators easily could cure the violations during the notice period.¹⁶⁸ If

WASH. & LEE L. REV 1231, 1271-75 (1996) (arguing that legislative history can be useful in determining Congress's purpose for enacting particular statute).

162. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996) (noting no temporal limitation on timing of citizen suits), *cert. granted*, 117 S. Ct. 1079 (1997).

163. EPCRA § 326(a)(1), 42 U.S.C. § 10046(a)(1) (1994) (authorizing citizen suits for violation of § 312 and § 313 of EPCRA). Sections 312 and 313 provide mandatory annual filing deadlines as well as other submission requirements. EPCRA §§ 312-313, 42 U.S.C. §§ 11022-11023.

164. See *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg.*, 772 F. Supp. 745, 751 (W.D.N.Y. 1991) (stating filing deadlines are first critical step in achieving intent of EPCRA). The court suggested that if facility "owners or operators fail to comply with the reporting requirements, including the mandatory compliance dates, the development and success of emergency response plans would be seriously, if not critically, undercut, and the entire thrust of EPCRA could be defeated." *Id.*, see also Brief of the United States as Amicus Curiae in Support of the Appeal at 12, *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (No. 96-1136) (discussing EPCRA deadlines). "Congress intended citizens to be able to sue facility owners and operators who fail to comply with section 312(a) and 313(a), including persons who ignore the statutory deadlines." *Id.*

165. See EPCRA § 326(b)(1), 42 U.S.C. § 11046(b)(1) (requiring citizen to bring suits in district where alleged "violation occurred"); *Citizens for a Better Env't*, 90 F.3d at 1244 (discussing EPCRA's venue provision). "Congress's choice of language specifically referring to past violations [is a strong indicator] that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen complaint is filed." *Id.* at 1244.

166. See *supra* notes 92-98 and accompanying text (discussing *Gwaltney* Court's analysis of pervasive use of present tense throughout citizen suit provision).

167. EPCRA § 326(b)(1), 42 U.S.C. § 11046(b)(1) (stating citizens shall bring suits in "district in which the alleged violation occurred").

168. See Wolf, *supra* note 3, at 271 (noting low cost of compliance with EPCRA compared to potential penalties). Professor Wolf states that violators are likely to settle because they have little incentive to litigate. *Id.*

citizens cannot sue for historical violations, the citizen suit provision is meaningless.¹⁶⁹

The *Gwaltney* Court's concern regarding citizen suit interference with EPA settlements does not apply to suits filed under EPCRA.¹⁷⁰ Congress inserted a provision that precludes citizen enforcement if the EPA or the state is "diligently pursuing" enforcement.¹⁷¹ This language is another departure from the model citizen suit provision of the Clean Air Act Amendments of 1970.¹⁷² Congress made it easier for the EPA to preclude citizen suits under EPCRA.¹⁷³ When entering into good faith enforcement negotiations, neither the EPA nor the alleged violator should be concerned that citizen suits will upset their agreements.¹⁷⁴

One possible criticism of this interpretation of EPCRA is that Congress may not have intended any substantive change in authorization of citizen

169. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244-45 (7th Cir. 1996) (discussing purpose and policy of EPCRA citizen suit provision), cert. granted, 117 S. Ct. 1079 (1997).

170. See *supra* note 110 (quoting hypothetical posed by *Gwaltney* Court); see also Brief of the United States as Amicus Curiae in Support of the Appeal at 12-13, *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (No. 96-1136) (describing *Gwaltney* hypothetical as inapposite).

171. See H.R. REP. NO. 99-253, pt. 3, at 35 (1985) (discussing CERCLA and EPCRA citizen suit provisions), reprinted in 1986 U.S.C.C.A.N. 3038, 3058. The statute precludes a citizen suit if the EPA or the state is "diligently pursuing" enforcement action. EPCRA § 326(e), 42 U.S.C. § 11046(e) (1994). The House Judiciary Committee stated that "the bars are necessary to avoid the confusion or termination of settlement negotiations because EPA, a State, or potentially responsible parties face citizen suit litigation relative to the matters under negotiation." H.R. REP. NO. 99-253, pt. 3, at 35 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3058. This seems to address the concerns of the *Gwaltney* Court in its hypothetical. See *supra* notes 109-12 (discussing *Gwaltney* hypothetical).

172. Compare EPCRA § 326(e), 42 U.S.C. § 11046(e) (precluding citizen suit if EPA is pursuing enforcement), with Clean Water Act § 505(b)(1) 33 U.S.C. § 1365(b)(1) (1994) (precluding citizen suit if EPA or state "has commenced and is diligently prosecuting [an] action in court"). Under the Clean Water Act, the *Gwaltney* Court's hypothetical may be valid. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987) (posing hypothetical that questions citizen suits).

173. See *supra* note 171 (discussing legislative history of "diligently pursuing" phrase).

174. See H.R. REP. NO. 99-253, pt. 3, at 35-36 (1985) (discussing "diligently pursuing" language in EPCRA citizen suit provision), reprinted in 1986 U.S.C.C.A.N. 3038, 3058-59. The Committee explained that "diligent pursuit" was more than intentions or future plans on the part of the enforcement agency to address the matter. *Id.* at 36, reprinted in 1986 U.S.C.C.A.N. 3038, 3059; see also Hodas, *supra* note 109, at 1623 (noting concern by some commentators that citizen suits may discourage innovation by EPA and regulated community). Professor Hodas describes these fears as unfounded because EPA and industry can draft permits and consent orders to shield themselves from citizen suits. *Id.*

suits. This critique suggests that Congress was merely adjusting the language to fit within the right-to-know statutory scheme. However, Congress has enacted numerous other environmental statutes with widely different schemes and has included the "alleged to be in violation" language in the citizen suit provisions of those statutes.¹⁷⁵ Congress must have intended a different result with EPCRA because it used different language. Also, EPCRA is unlike most environmental statutes; it does not specify discharge standards, nor does it impose liability for harming the environment. EPCRA is an informational statute intended to provide prompt and timely notification to citizens about chemicals stored in their communities.¹⁷⁶ If citizens were unable to force facilities to meet statutory filing dates, they could not enforce a primary goal of the Act.¹⁷⁷

An early version of the model citizen suit provision did not require notice to alleged violators.¹⁷⁸ The legislative history is silent on Congress's reason for adding this requirement. Contrary to statements made by the Supreme Court in *Gwaltney*, sixty-day notice to the alleged violators is not gratuitous.¹⁷⁹ The 1990 Clean Air Act Amendments demonstrate that Congress did not consider the sixty-day notice requirement as inconsistent with allowing suits for historical violations.¹⁸⁰ Additionally, courts and commentators have suggested other valid functions of the notice.¹⁸¹

The plain language, legislative history, and statutory construction of EPCRA support the Seventh Circuit's reading in *Citizens for a Better Envi-*

175. See *supra* note 66 (citing environmental statutes that use "alleged to be in violation" language).

176. See S. REP. NO. 99-11, at 14 (1985) (noting goal of EPCRA is to make essential information available widely and in timely fashion); H.R. REP. NO. 99-253, pt. 1, at 111 (1985) (noting importance of providing information "to the public in the quickest, most efficient way possible"), reprinted in 1986 U.S.C.C.A.N. 2835, 2893.

177. See Brief of the United States as Amicus Curiae in Support of the Appeal at 15-17, *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (No. 96-1136) (discussing importance of filing dates to EPCRA's purpose). "Timely reporting is, after all, why Congress established precise annual deadlines." *Id.*

178. See *Air Pollution, 1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong. pt. 5, V, LXXXI (1970) (providing draft air pollution bill designated "Committee Print No. 1" from Subcommittee on Air and Water Pollution).

179. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59-60 (1987) (suggesting purpose of notice provision is to allow violator to avoid litigation by coming into compliance).

180. Clean Air Act § 304, 42 U.S.C. § 7604 (1994) (allowing citizen suits for historical violations and retaining 60-day notice to violator requirement).

181. See *supra* notes 148-58 and accompanying text (discussing possible functions of notice to violator).

ronment v Steel Co.¹⁸² Although the language of the statute appears to support the conclusion that citizen plaintiffs can sue for past violations, one must determine if such authority is consistent with an effective enforcement policy.¹⁸³ The next section will review several issues surrounding citizen suits in general and then consider their application to EPCRA.

A. Citizen Suits for Past Violations May Not Meet Constitutional Standing Requirements

Congress cannot create abstract causes of action which are unrelated to tangible or intangible benefits to the plaintiff.¹⁸⁴ To establish standing in an environmental citizen suit, the plaintiff must demonstrate three elements.¹⁸⁵ First, the plaintiff must have suffered an injury or invasion of a legally protected interest.¹⁸⁶ Second, the defendant's conduct must have caused, or must be causally connected to, this injury.¹⁸⁷ Third, the plaintiff must prove that the remedy sought will likely redress the injury.¹⁸⁸

Some have suggested that citizen suits for wholly past violations raise serious constitutional questions.¹⁸⁹ If the facility cures the violation, there is

182. See H.R. REP NO. 99-253, pt. 3, at 33-37 (1985) (providing House Judiciary Committee's position regarding citizen suit provision in Superfund Amendments), reprinted in 1986 U.S.C.C.A.N. 3038, 3056-60. In its discussion of the 60-day notice requirement, the Committee stated that the notice period provided EPA the opportunity to usurp enforcement action. *Id.* at 35, reprinted in 1986 U.S.C.C.A.N. 3038, 3058. Similar to the legislative history of the Clean Air Act and Clean Water Act, the Committee did not state that the notice period provided an opportunity for the violator to come into compliance as a reason for this waiting period.

183. See Cohen & Haire, *supra* note 9, at 28-31, 49 (suggesting that allowing citizen suits for past violations is bad enforcement policy and raises serious constitutional problems).

184. See *id.* at 22-24 (describing constitutional standing requirements); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992) (noting Article III limitations on Congress's ability to create statutory "interests" capable of being injured).

185. See Lujan, 504 U.S. at 560-61 (reciting three requirements for standing).

186. See *id.* at 560 (requiring plaintiff to establish injury-in-fact). The injury must be concrete and particularized, and actual rather than hypothetical. *Id.*

187. See *id.* (describing causation as standing requirement); Cohen & Haire, *supra* note 9, at 24-25 (discussing environmental injury-in-fact and standing). While courts typically presume injury and causation if a legal violation has occurred, the citizen plaintiff must still demonstrate that he was "geographically at risk." *Id.* at 24.

188. See Lujan, 504 U.S. at 561 (discussing redressability as element of standing); Cohen & Haire, *supra* note 9, at 26-30 (same).

189. See Cohen & Haire, *supra* note 9, at 28-34 (discussing constitutional concerns regarding citizen suits). In his statement upon signing the 1990 Clean Air Act Amendments bill, President Bush stated that Article III of the Constitution requires litigants to demonstrate more than purely historical violations of the Act. George Bush, Statement on Signing the Bill

no specific conduct that the suit will deter, and civil penalties paid to the United States Treasury do not redress the injury that gave rise to the suit.¹⁹⁰ General deterrence may not be enough to support standing for wholly past violations.¹⁹¹ A majority of the Supreme Court has not yet decided this issue.¹⁹²

*B. Authorization of Legal Fees Indicates Congress Intended
Expansive Citizen Participation*

Under the American legal system, each party must bear its own litigation expenses, absent some other expressed authority.¹⁹³ In EPCRA, Con-

Amending the Clean Air Act, PUB. PAPERS 1602, 1604 (1990). *But see Sive, supra* note 26, at 56-57 (dismissing suggestion that citizen suit provisions are unconstitutional based on standing). Mr. Sive cites cases that have also rejected this argument. *Id.* at 56., *see* Atlantic States Legal Found. v. Buffalo Envelope Co., 823 F. Supp. 1065, 1076 (W.D.N.Y. 1993) (holding that EPCRA citizen suit provision does not violate separation of powers); Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg., No. 90-CV-1109S, 1993 WL 114676, at *8-13 (W.D.N.Y. Mar. 31, 1993) (finding EPCRA citizen suit provision constitutional).

190. *See* Cohen & Haire, *supra* note 9, at 29 (noting that civil payment to Treasury could enhance general deterrence, but would not support standing).

191. *See id.* at 29-30 (questioning adequacy of general deterrence in meeting redressability requirement of standing). Future injuries to the plaintiff could not support standing because such injuries are too speculative. *Id.* at 29; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-64 (1992) (plurality opinion) (explaining that future injuries are too speculative to support standing and that plaintiff cannot assert rights of unrelated third parties). However, some courts have used general deterrence to establish redressability. *See* Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 73 (3d Cir. 1990) (concluding that deterrent effect of civil penalties adequately redressed plaintiff's injuries); Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988) (stating that civil penalties can be important deterrence against future violations of environmental laws); Student Pub. Interest Research Group, Inc. v. AT&T Bell Labs., 617 F. Supp. 1190, 1200-01 (D.N.J. 1985) (finding civil penalties paid to government redressed plaintiffs' injuries). Courts have found redressability in cases where plaintiff alleged wholly past violations of EPCRA, and one has stated that the injury could be redressed by declaratory judgment, fining the defendant, or enjoining it from committing future violations. *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 980 (D. Ariz. 1997) (stating deterrence from causing future injuries adequate to find redressability); *see also* Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1140-41 (E.D. Pa. 1993) (discussing redressability).

192. Justice Scalia discussed redressability in *Lujan*. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plurality opinion) (discussing redressability). Justices Kennedy and Souter did not join this part of the opinion. *Id.* at 580 (Kennedy, J., concurring) (refusing to reach redressability). Writing separately, Justice Stevens disagreed with Justice Scalia, but concurred in the judgment. *Id.* at 581-82 (Stevens, J., concurring) (disagreeing with conclusion that injury is not redressed). Justices Blackmun and O'Connor dissented and found "genuine issues of fact as to injury and as to redressability." *Id.* at 589 (Blackmun, J., dissenting).

193. *See* MILLER & ENVIRONMENTAL LAW INSTITUTE, *supra* note 9, § 9, at 95-130

gress provided express authority for a citizen plaintiff to recover attorneys' fees.¹⁹⁴ The authorization of attorneys' fees in environmental citizen suits encourages citizen enforcement.¹⁹⁵ Some courts have used this authorization as proof of congressional intent to allow citizen suits for wholly past violations.¹⁹⁶ Under EPCRA, compliance is relatively easy.¹⁹⁷ EPCRA is an informational statute and does not require installation of expensive pollution abatement equipment like many other environmental statutes.¹⁹⁸ Most facilities should be able to comply with EPCRA's requirements within the sixty-day waiting period.¹⁹⁹ Therefore, most violations will become historical violations soon after the citizen notifies the facility of its intention to sue.²⁰⁰ If citizens cannot file suit for purely historical violations, then they cannot recover the costs of their efforts to discover these violations, and the citizen suit provision becomes meaningless.²⁰¹

(discussing award of attorneys' fees in environmental citizen suits). Environmental citizen suits authorize recovery of litigation expenses when "appropriate," while other nonenvironmental citizen enforcement provisions allow for recovery of attorneys' fees predicated on success of the party. *Id.* at 104-05. *But see* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684-86 (1983) (stating that Court would reverse presumption against award of attorneys' fees only when there is clear statutory language or strong evidence of legislative intent).

194. EPCRA § 326(f), 42 U.S.C. § 11046(f) (1994).

195. *See* S. REP. NO. 91-1196, at 38 (1970) (discussing authorization for attorneys' fees in original environmental citizen suit provision), *reprinted in* 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 438 (1974); MILLER & ENVIRONMENTAL LAW INST., *supra* note 9, § 9.7, at 127 (describing ELI study results demonstrating importance of attorneys' fees in encouraging citizen suits).

196. *See* Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996) (discussing award of attorneys fees under EPCRA), *cert. granted*, 117 S. Ct. 1079 (1997). The court stated that by allowing recovery of litigation expenses, EPCRA creates a structure which encourages citizens to invest resources to uncover violations of the Act. *Id.* The court suggested that if facility owners could prevent recovery of costs by simply "completing and submitting" required forms during the notice period, citizens would have no real incentive to seek out and discover EPCRA violations. *Id.*

197. *See* Wolf, *supra* note 3, at 271 (discussing relatively low cost of compliance with EPCRA when compared to potential penalties). *But see* Petitioner's Brief at *42, Steel Co. v. Citizens for a Better Env't, (U.S. filed May 2, 1997) (No. 96-643) (arguing that completion of required forms is "no simple matter" and is particularly laborious for smaller companies), *available in* 1997 WL 221790.

198. *See* Wolf, *supra* note 3, at 220 (describing EPCRA as informational statute).

199. *See* Citizens for a Better Env't, 90 F.3d at 1244 (noting minimal burden of completing and submitting forms).

200. *See id.* at 1244 (suggesting facilities have no real incentive to comply with EPCRA deadlines and might wait to file information until citizens provide notice of suit).

201. *Id.*

C. *Effective Enforcement Hampered by Government Preemption of Citizen Suits*

Although authorized to do so by statute, the EPA does not normally preempt a citizen suit when it receives notice of an impending citizen suit.²⁰² Administrative bureaucracy normally prevents EPA action within the sixty-day notice period.²⁰³ Additionally, the Clinton Administration supports citizen enforcement and is concerned that preemption may discourage citizen suits.²⁰⁴ However, states, which also can preempt citizen suits, are not similarly reluctant to act.²⁰⁵ State enforcement for the purpose of preempting citizen suits has become more the rule than the exception, and it has caused some environmental organizations to reconsider filing citizen suits.²⁰⁶ If states routinely preempt citizen suits, but do not diligently enforce the requirements of the environmental laws, then the citizen suit provisions do not fulfill their intended purpose of encouraging effective enforcement by government agencies.²⁰⁷

D. *Results Depend on the Enforcer*

Because most environmental statutes base penalties on the number of days that a facility is in violation, penalties rapidly accumulate.²⁰⁸ Addition-

202. See Hodas, *supra* note 109, at 1647 (discussing preclusion of citizen suits by administrative action). Professor Hodas noted that receipt of a 60-day notice letter will not stop EPA action on a matter in which it already has begun enforcement proceedings. *Id.*

203. *Id.*

204. See *id.* at 1647-48 (discussing reasons EPA does not preempt citizen suits); see also Cohen & Haire, *supra* note 9, at 45, 51 (noting Clinton administration supports expanding citizen suit authority).

205. See Hodas, *supra* note 109, at 1648 (discussing state agency preemption of citizen suits).

206. *Id.* Professor Hodas explains that sometimes state agencies have taken enforcement action at the polluter's request to shield the polluter from a citizen suit. *Id.* States have preempted NRDC at least 50 times in less than 10 years, each resulting in lenient sanctions against the local polluters. *Id.* at 1648-49. In one situation, Michigan began enforcement proceedings and preempted nineteen citizen suits on the 59th day after receiving notice. *Id.* at 1649. The state settled these cases for what NRDC considered a slap on the wrist. *Id.* Neither the state nor the violators reimbursed NRDC for the \$43,000 in expenses and attorneys fees which NRDC incurred in preparing the cases. *Id.* NRDC has since disbanded its Clean Water Act enforcement project because it became too expensive in light of this type of state preemption which precludes recovery of litigation expenses. See *id.* at 1651 (attributing NRDC's disbanding due to state preemption, standing concerns, and impact of *Gwaltney*).

207 See *supra* note 35 and accompanying text (discussing intended purpose of citizen suits).

208. See EPCRA § 325(c), 42 U.S.C. § 11045(c) (1994) (providing penalties for violations of EPCRA). EPCRA authorizes EPA to seek up to \$25,000 per day for violation of the

ally, judicially imposed penalties typically are much higher than administratively imposed penalties.²⁰⁹ Many organizations use these potentially large assessments as bargaining chips to goad violators into settlement agreements rather than to force regulators into enforcement.²¹⁰ The legislative history of citizen suit provisions demonstrates that Congress intended citizen enforcement to encourage agency enforcement, not to produce revenue for diligent environmental organizations.²¹¹ Because settlements are quicker and easier than litigation, the EPA resolves most cases through settlement.²¹² This result is inequitable because the magnitude of the assessed penalty often depends on whether the EPA or a citizen enforces the action against a violator. One critic condemned such use of citizen suits as distorting policy and creating new law rather than mere participation in enforcement of environmental laws.²¹³ However, another commentator suggests that the

Act and \$75,000 for repeated violations. *Id.* Because each day is a separate violation, the maximum penalty for failing to file reports for one year would exceed \$9,000,000. Under the citizen suit provision, citizens are allowed to seek the same penalties, but the violator would pay penalties to the U.S. Treasury EPCRA § 326(c), 42 U.S.C. § 11046(c); *see also* AXLINE, *supra* note 21, §§ 7.03-04, at 7-5 to -19 (describing methods of calculating penalties for violations of environmental laws); Austin, *supra* note 38, at 237-40 (discussing remedies available to citizen plaintiffs). Under its civil penalty policy, the EPA does not seek the maximum penalty, but rather sets fines based on the seriousness of the violation and economic benefit received by the violator for not complying with the Act. *See* Environmental Protection Agency, *Policy on Civil Penalties* (Feb. 16, 1984) (providing EPA's policy guidelines regarding use of civil penalties), *reprinted in* [1 Admin. Materials] *Envtl. L. Rep.* (Envtl. L. Inst.) 34,083-85 (1984); AXLINE, *supra* note 21, § 7.04, at 7-11 to -13 (describing EPA's penalty policy). Although not required, courts use EPA's penalty policy as an analytical guide when determining the appropriate penalty. *See* Austin, *supra* note 38, at 238 (discussing use of EPA penalty policy by courts).

209. *See* Hodas, *supra* note 109, at 1613-14 (describing EPA report comparing penalties imposed in court and administrative proceedings). In 1992, the median judicial penalty was nearly 40 times greater than the median administratively imposed penalty. *Id.*

210. *See* Boyer & Meidinger, *supra* note 21, at 839-40 (observing that environmental statutes provide citizen plaintiffs financial incentives to bring citizen suits); Austin, *supra* note 38, at 240 (discussing settlement negotiation of citizen suits). Professors Boyer & Meidinger noted that many of the early citizen suit cases were settled and the agreed-upon penalties were paid into "environmental funds" rather than the U.S. Treasury Boyer & Meidinger, *supra* note 21, at 932-33; *see supra* note 35 and accompanying text (explaining that original purpose of citizen suits was to encourage agencies to enforce environmental laws).

211. *See supra* notes 21-46 and accompanying text (discussing legislative history and purpose of citizen enforcement).

212. *See* Hodas *supra* note 109, at 1609 (discussing EPA settlement policy). Professor Hodas cited a GAO study which demonstrated that EPA often assessed low (or no) penalties in these settlements. *Id.* at 1609-10.

213. *See* Cohen & Haire, *supra* note 9, at 42-45 (criticizing use of citizen suits). Cohen and Haire noted the vast difference in policy perspectives between environmental organizations

deterrent effect of citizen suits is higher than with EPA enforcement because courts assess higher penalties than the EPA does in settlements.²¹⁴

E. Citizen Enforcement Desirable When Government Fails to Act

Some commentators claim that citizen plaintiffs are fully capable of taking over enforcement of routine cases.²¹⁵ Congress granted citizen enforcement authority because it recognized that occasionally agencies may choose not to enforce environmental laws.²¹⁶ Additionally, one critic suggested that relying on existing institutions for application of environmental standards and procedures is "to ask too much of institutional self-interest and good-ol'-boy human nature."²¹⁷ Because engineers tend to move between government and industry, government engineers may be reluctant to bring an enforcement action against a possible future employer.²¹⁸ Unlike state administrative agencies, citizens are not subject to the political pressure from industry and are concerned less with attracting industry to the state.²¹⁹ Free

and regulated industry. *Id.* They predicted that the 1996 elections would determine which side's interpretation would prevail. *Id.* at 45. With President Clinton retaining the White House and Republicans retaining control of Congress, it seems that this dispute will continue.

214. See Hodas, *supra* note 109, at 1613-14 (comparing judicially assessed penalties with administratively assessed ones). Professor Hodas suggests that, because of the public nature of court judgments, large judicial penalties have a greater deterrent effect. *Id.* at 1614. He states that administrative penalties are "too small and too private to motivate private compliance." *Id.*

215. See Boyer & Meidinger, *supra* note 21, at 836, 963-64 (suggesting that citizen enforcement can correct agency inaction); Hodas, *supra* note 109, at 1654 (stating nonmajor polluters could escape regulation if not for citizen suits).

216. See S. REP. NO. 91-1196, at 36-37 (1970) (citing ineffective government enforcement as one reason Congress created citizen enforcement provisions), reprinted in 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 436-37 (1974); Hodas, *supra* note 109, at 1651 (describing citizen suits as enforcement system's safety net).

217. See Hodas, *supra* note 109, at 1651-55 (describing citizen suits as safety net); Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1007 (1994) (discussing political effects of agency enforcement).

218. See Hodas, *supra* note 109, at 1653 (discussing possible conflict of interest between government engineers and regulated industry). Professor Hodas also suggests that government and industry engineers share similar professional outlooks which can also blur the line separating the two sides. *Id.*

219. See *id.* at 1615, 1653 (endorsing citizen's role in enforcement). Professor Hodas notes that some state agencies are reluctant to enforce strictly environmental standards for fear of creating a bad business climate. *Id.* at 1615.

of the bureaucratic and political constraints that inhibit government enforcers,²²⁰ citizens should be welcome participants in the enforcement of environmental laws.²²¹

V *Returning Citizens to Effective Enforcement Role*

The plain language of the EPCRA's citizen suit supports a finding that Congress intended to authorize citizen suits for historical violations.²²² The Supreme Court heard arguments on the *Citizens for a Better Environment* case in the 1997 term and may resolve the conflict between the courts of appeals.²²³ The Court likely will read the statute narrowly and follow its analysis in *Gwaltney*.²²⁴ Interpreting the somewhat ambiguous language²²⁵ and a possible concern over standing,²²⁶ the Court will probably find that citizens cannot maintain suits for wholly past violations under EPCRA.

Based on decisions of the Court following *Gwaltney*, the Supreme Court continues to be very skeptical of citizen enforcement. In *Hallstrom v Tillamook County*,²²⁷ decided three years after *Gwaltney*, the Supreme Court required literal compliance with citizen suit notice and sixty-day waiting period requirements.²²⁸ The Court effectively transformed the notice and

220. See Boyer & Meidinger, *supra* note 21, at 836. Professors Boyer and Meidinger see citizen suits neither as mere occasional prods that citizens use to goad reluctant agencies into action, nor as extraordinary remedies for unusual administrative failures. *Id.* at 836-37. Rather, they see citizen suits as a necessary realignment of roles and powers. *Id.* at 837.

221. See *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (discussing Congress's endorsement of citizen participation in environmental enforcement).

222. See *supra* Part IV (interpreting EPCRA's plain language).

223. *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997).

224. See *supra* notes 92-112 and accompanying text (analyzing *Gwaltney* decision).

225. See *supra* Part IV (discussing EPCRA language).

226. See *supra* notes 184-92 and accompanying text (discussing standing for wholly past violations of environmental statutes).

227. 493 U.S. 20 (1989).

228. *Hallstrom v. Tillamook County*, 493 U.S. 20, 33 (1989) (holding district court must dismiss citizen suit when party fails to meet notice and 60-day waiting period requirements). The Court considered whether a citizen plaintiff must strictly comply with the 60-day waiting period to maintain an action under Resource Conservation and Recovery Act of 1976 (RCRA). *Id.* at 22-23. Hallstrom owned a dairy farm adjacent to the Tillamook County (County) landfill and notified the County of his intention to sue under RCRA's citizen suit provision. *Id.* at 23. Hallstrom failed to notify EPA and state officials in accordance with the citizen suit provision's requirements. *Id.* The County moved for summary judgment on grounds that Hallstrom's failure to follow the requirements deprived the district court of jurisdiction. *Id.* at 23-24. The Court determined that the notice requirements are mandatory conditions precedent. *Id.* at 26. The Court refused to equate a 60-day stay in the proceedings with verbatim

waiting period, which many lower courts had found subject to waiver and equitable tolling, into a jurisdictional requirement.²²⁹ In another case, the Court limited citizens' right to sue by imposing strict standing requirements.²³⁰ The Supreme Court has refused to provide an equitable remedy to an aggrieved citizen plaintiff because Congress did not include such a remedy in the elaborate environmental enforcement scheme.²³¹ As indicated by these decisions, the Court continues to narrow its view of citizens role in environmental enforcement.²³²

Since Congress enacted EPCRA, the EPA and State governments have been successful in assembling data regarding the presence of hazardous chemicals in communities.²³³ The public release of this information has forced business and industry to consider reducing their use of hazardous materials.²³⁴ As President Clinton explained, "Sharing vital information

compliance with the statute. *Id.* Citing *Gwaltney* as authority, the Court noted that one reason Congress enacted the notice provision was to allow the violator to come into compliance with the Act during the 60-day waiting period. *Id.* at 29. The Court held that the notice and 60-day waiting period are mandatory requirements that district courts cannot ignore. *Id.* at 33.

229. See AXLINE, *supra* note 21, § 6.03, at 6-5 to -6 (noting that Supreme Court stopped short of actually stating requirements are jurisdictional). However, Professor Axline asserts that strict compliance with the notice provision is a necessary prerequisite of filing a citizen suit. *Id.* § 6.03, at 6-6.

230. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (plurality opinion) (dismissing suit for failure to demonstrate injury-in-fact).

231. *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1256 (1996) (allowing dismissal of citizen suit because plaintiff had already cleaned up pollution). The Court found that the pollution no longer posed "imminent and substantial endangerment," one requirement for citizen suit authorization. *Id.* at 1255.

232. The Supreme Court's recent expansion of a citizen's right to sue under the Endangered Species Act may be an aberration. See *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (expanding "zone of interest" under Endangered Species Act citizen suit provision and allowing suit by persons other than those suing to protect environment). In *Bennett*, the plaintiffs sought to prevent application of environmental restrictions rather than support them. *Id.* at 1159. The defendant argued that the plaintiffs lay outside the zone-of-interest of the Endangered Species Act. *Id.* at 1160. The Court noted that, although the citizen suit provision generally favors environmentalists, the citizen suit also provides "persons" the opportunity to challenge nondiscretionary administrative actions. *Id.* at 1163. Finding that the agency failed to consider economic impact of its action, the Court stated that the agency's action was reviewable under the Endangered Species Act citizen suit provision. *Id.* at 1166. This case may not be an expansion of the right to sue under citizen suit provisions, but rather a recognition that persons, whether seeking to protect the environment or valid business interests, can seek review of agency action under the citizen suit provision as well as the Administrative Procedure Act.

233. See *Wolf*, *supra* note 3, at 308-10 (discussing successes of EPCRA).

234. *Id.* at 309-12 (describing efforts by industry to decrease toxic substance releases).

with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals."²³⁵ However, the EPA has not enforced EPCRA aggressively.²³⁶ As budgetary pressures increase, it is likely that Congress will reduce EPA funding and federal enforcement will continue to wane. Enhanced citizen suits could be a cost effective means to fill the growing gap of environmental enforcement.

Allowing citizens to recover the costs incurred in bringing a violator into compliance, but not allowing recovery of civil penalties, is one compromise solution to the problem with citizen suits and historical violations cured during the notice period.²³⁷ To accomplish this proposed solution, Congress must modify the citizen suit provision. Using the Equal Access to Justice Act (EAJA) as a model, Congress could easily provide citizens a cause of action to recover litigation expenses.²³⁸ The EAJA requires a court to award attorney's fees to a "prevailing party" in a civil suit against the government unless the court finds that the government's position was substantially justified or if the court determines that special circumstances make the award unjust.²³⁹ A party does not need to win for the court to deem it a "prevailing party."²⁴⁰ Under EAJA, some courts allow plaintiffs to recover if their lawsuit was a material factor or played a "catalytic role" in bringing about a change in the government's position.²⁴¹ As recognized by Congress when developing the citizen suit, citizens occasionally can play a catalytic role in enforcement of environmental laws.²⁴² Citizens assume this role in enforce-

235. Exec. Order No. 12,969, 60 Fed. Reg. 40,989 (1995).

236. See GAO, REPORT TO CONGRESS, TOXIC CHEMICALS: EPA'S TOXIC RELEASE INVENTORY IS USEFUL BUT CAN BE IMPROVED (1991) (criticizing EPA for inadequate enforcement of EPCRA), discussed in Wolf, *supra* note 3, at 268-76.

237. To encourage violators to file the required forms and reports, Congress should maintain authorization for citizens to seek civil penalties for violations that exist at the time the citizen files the complaint.

238. Equal Access to Justice Act, 28 U.S.C. § 2412 (1994).

239. 28 U.S.C. § 2412(d)(1)(A); see Kurt M. Dutton, *Wilderness Society v. Babbitt: Court Awards Attorney's Fees to "Prevailing Party" in an Out-of-Court Settlement*, 4 U. BALT. J. ENVTL. L. 117, 118 (1994) (discussing EAJA).

240. See *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993) (noting plaintiff need not obtain formal relief on merits for courts to deem plaintiff "prevailing"); *Oregon Env'tl. Council v. Kunzman*, 817 F.2d 484, 497 (9th Cir. 1987) (same); Dutton, *supra* note 239, at 118 (same).

241. See *Wilderness Soc'y*, 5 F.3d at 386-89 (allowing plaintiff to recover litigation expenses in out-of-court settlement); *Oregon Env'tl. Council*, 817 F.2d at 497 (noting that plaintiff may recover litigation costs if it can establish causal relationship between litigation and outcome).

242. See S. REP. NO. 91-1196, at 38 (1970) (discussing reimbursement of litigation expenses in citizen suits), reprinted in 1 ENVIRONMENTAL POLICY DIV., LIBRARY OF CON-

ment of EPCRA if the facility submits reports to EPA after receiving the citizen's notice of intent to sue.²⁴³

This proposal will encourage substantial compliance with EPCRA and provide citizens with a more effective role in enforcement.²⁴⁴ By amending either EAJA or environmental citizen suit provisions, Congress could provide an effective tool in accomplishing widespread compliance with environmental laws. Citizens plaintiffs would get what they seek — compliance with EPCRA — as well as reimbursement for their expenses incurred in obtaining compliance. States could not prevent citizens from recovering expenses by preempting the suit and then passively refuse to enforce the Act; the amendment would allow citizens to recover reasonable expenses incurred up to the date which states take over enforcement. However, the proposed amendment would curtail citizens' ability to force the regulated industry into coerced settlement because the statute would no longer authorize citizens to seek large civil penalties for wholly past violations. The EPA would retain the authority to seek penalties for purely historical violations and thus control essential policy decisions. Citizens could not interfere with the policy role of EPA administrators. Additionally, the solution would provide taxpayers low-cost, effective enforcement and would accomplish EPCRA's goal of providing communities timely information about the hazardous chemicals stored and released in their communities.

VI. Conclusion

To prepare properly for emergencies, state and local leaders must have complete and accurate information regarding the hazardous chemicals stored

GRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 397, 438 (1994). Congress recognized that courts might be reluctant to grant litigation expenses to citizen plaintiffs. The Senate Committee stated that "if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." *Id.*, see *supra* note 38 and accompanying text (discussing committee's endorsement of citizen role in environmental enforcement).

243. The proposed solution expands this notion to apply to situations where the violator comes into compliance before the citizen files suit. It basically extends EAJA to private defendants of citizen suits. The "catalytic role" line of cases under EAJA allows recovery of expenses even when the private litigant does not win on the merits. See *Wilderness Soc'y*, 5 F.3d at 386 (allowing recovery if plaintiff was catalyst in change in government position); *Oregon Envtl. Council*, 817 F.2d at 497 (explaining plaintiff "need not obtain formal relief" for EAJA to entitle plaintiff to litigation expenses). The proposed solution creates a rebuttable presumption that the citizen had a catalytic role on the facility's compliance if the facility files the required reports after receiving the notice of the citizen's intent to sue.

244. This proposal is a win-win solution. See STEVEN COVEY, SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 204 (1989) (stating fourth habit of highly effective people is to seek win-win solution).

in their communities. When a facility fails to file required reports, emergency personnel may be unaware of the presence of hazardous material and may respond improperly to emergencies at the facility. Congress drafted EPCRA to prevent this problem. Budgetary and political constraints have prevented adequate government enforcement of EPCRA.

Congress created citizen suits in response to insufficient state and federal enforcement. However, environmental organizations have occasionally misused the citizen suit authorization to coerce regulated industry officials, who fear the draconian penalties associated with judicial verdicts, into settlements. Courts have responded to this misuse by reading the citizen suit provisions narrowly and have severely limited the effectiveness of citizen suits. To restore the original purpose of citizen enforcement, Congress must step in and amend the current citizen suit provisions and allow citizens to return to the status of welcome participants in the enforcement of environmental laws.