Steel Company v. Citizens for a Better Environment: The Evisceration of Citizen Suits Under the Veil of Article III

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I. INTRODUCTION

Our democracy was built on the assumption that a free flow of information is essential to effective political discourse.[1] This discourse is not confined to the politics that take place on election day, but is the foundation of our daily politics as we all make decisions about where we wish to live, what kind of air we wish to breathe, and what type of water we wish to drink. This same spirit spawned the Emergency Planning and Community Right-to-Know Act (EPCRA or the Act) in 1986.[2] EPCRA sought to empower citizens to gain knowledge about toxic substances that were being stored and released in their communities, so that they could make informed decisions about the risks that they were taking by living near these facilities, and be prepared in the case of a chemical accident.[3]

On March 4, 1998, the Supreme Court dealt a debilitating blow to citizens in their capacity as enforcers of EPCRA.[4] This article will address EPCRA's purpose, form, and function to discern the impact of the Supreme Court's decision in *Steel Company v. Citizens for a Better Environment* on EPCRA and similar environmental statutes. Part Two addresses the history and purpose of EPCRA, focusing specifically on the events that spawned its drafting. Part Three discusses the arguments set forth by Plaintiff, *Citizens for a Better Environment*, and its amici that were rejected by the Court. Part Four evaluates the potentially far-reaching impact of the decision on EPCRA and all environmental citizen suit provisions. Part Five proposes that citizen suit provisions be amended to encompass a

1. Robert W. Shavelson, *EPCRA Citizen Suits and the Sixth Circuit's Assault on the Public's Right-to-Know*, 2 ALB. ENVTL. OUTLOOK 29 (1995).
2. 42 U.S.C. §§ 11,001-11,050 (1997).
3. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998).
4. *See id.*

bounty for prevailing plaintiffs that will alleviate plaintiff's difficulty in establishing redressability.

II. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986

A. *Bhopal, India, and the Climate that Spawned EPCRA*

> At about midnight on Sunday, 2 December 1984, there was a massive leak of toxic gas from storage tank number 610 of the Union Carbide plant. The lethal white vapour poured out of the tank for over two hours, blanketing the city for miles with a deadly fog. Thousands of people were killed in their sleep or as they fled in terror, and hundreds of thousands remain injured or affected to this day. This was the worst single-accident industrial accident in history.[5]

Conservative estimates put the death toll from the accident at over 2,000.[6] It is believed, however, that the number is much greater because officials failed to count the indigent.[7] In the ensuing weeks, the toll climbed, as many of those who were initially listed as injured died from their ailments.[8] As many as 200,000 people were affected by the disaster from direct injury or the death of someone close to them.[9]

The sheer magnitude of the accident caused people in the United States to wonder if a similar accident could happen here.[10] Several investigations were launched to determine the cause of the accident, so that preventative measures could be taken at other facilities.[11] In the end, there was considerable disagreement over the source of the leak from tank 610, but one thing was abundantly clear: effective emergency response could have saved hundreds and possibly thousands of lives.[12] In the United States, Congress responded to the Bhopal accident by drafting the Environmental Policy and Community Right-to-Know Act as Title III of the Superfund

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5. Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, Univ. of Toronto Press (1993).
6. *See id.* at 5.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See* Shavelson, *supra* note 1, at 29. In fact Robert W. Shavelson has noted that "the United States experienced more than 7,000 chemical accidents in the five years preceding EPCRA's passage." *Id.* One such accident occurred within eight months of the Bhopal disaster at another Union Carbide facility in Institute, Virginia which released toxic gas harming approximately 135 people. Cassels, *supra* note 5, at 18.
11. *See* Cassels, *supra* note 5, at 7.
12. *See id.* at 7-8.

Amendments and Reauthorization Act (SARA) of 1986.[13] The Act provided for the establishment of state and local emergency response committees, a nationally available toxic release inventory, and a citizen's right-to-know about the handling and release of hazardous chemicals and substances in their communities.[14]

B. EPCRA: Form and Function

EPCRA is an incredibly sweeping statute with broad provisions requiring industrial facilities throughout the United States to report the extent to which various chemicals are used and stored.[15] As one commentator has noted, compliance with EPCRA requires that facilities meet a comprehensive set of mandates which are separated into two categories: "First, it requires industrial and other facilities to work with state and local officials to develop and implement emergency plans to prevent and respond to chemical hazards and releases. . . . Second, EPCRA provides citizens access to information about the storage and release of chemicals in their communities."[16] The Act requires certain facilities to report their inventories of hazardous chemicals to local, state and federal authorities.[17] Citizens are then given the right to obtain this information, and EPCRA section 326 gives citizens the authority to sue any facility which does not comply with EPCRA's reporting requirements.[18]

1. Section 311: Material Safety Data Sheets

The Occupational Safety and Health Act (OSHA)[19] requires facilities that expose their employees to hazardous chemicals to prepare Material Safety Data Sheets (MSDSs).[20] OSHA defines a "hazardous chemical" as "any chemical which is a physical or health hazard."[21] The stated purpose of MSDSs is to "inform employees,

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13. 42 U.S.C. §§ 11,001-11,050.
14. *See id.*
15. *See* Shavelson, *supra* note 1, at 29.
16. *See id.* at 30. This Article will focus primarily on EPCRA's Right-to-Know component.
17. 42 U.S.C. § 11,001.
18. *Id.* § 11,046.
19. *Id.* § 11,021.
20. *See* 29 U.S.C. §§ 651-658; 42 U.S.C. § 11,021(2); *see also* Shavelson, *supra* note 1, at 31 (describing the requirements of OSHA, which are incorporated into EPCRA).
21. 29 C.F.R. § 1910.1200(c)(1995); *see also* 42 U.S.C. § 11,021(e) (citing 29 C.F.R. § 1910.1200(c) (1995)).

emergency responders, and the public about hazards from, symptoms of and treatments for exposure to hazardous chemicals."[22]

EPCRA section 311 requires facilities using hazardous chemicals in quantities exceeding OSHA reporting thresholds of Extremely Hazardous Substances (as defined by EPCRA) to "submit the relevant MSDSs to the local fire department, the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC)."[23] Facilities under the purview of section 311 must then submit "[MSDSs] within three (3) months of the date [that] it first crosses the EPCRA section 311 reporting threshold."[24]

2. Section 304: Emergency Notification[25]

Any facility "which produces, uses, [or stores] a Hazardous Chemical, and which releases a Reportable Quantity (RQ) of that EPCRA EHS [into the environment], must immediately report—by telephone, radio, or in person—such release to the SERC and the LEPC."[26] Each report must then be followed by a written report with more detailed information regarding the release.[27] Furthermore, the release of an RQ of any Hazardous Substance, as defined by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), must also be reported to the National Response Center.[28] Accordingly, section 304 empowers citizens to file suit against facilities for failure to file EPCRA section 304 follow-up reports.[29]

3. Section 313: Toxic Release Inventory[30]

Section 313 of EPCRA is perhaps the most useful section of the Act for citizens wishing to be informed about exposure risks in their communities. It "requires facilities to report toxic chemicals which

22. 42 U.S.C. § 11,021.
23. *See* Shavelson, *supra* note 1, at 31; 42 U.S.C. § 11,021(a)(1).
24. Shavelson, *supra* note 1, at 31; 42 U.S.C. § 11,021(d).
25. 42 U.S.C. § 11,004.
26. Shavelson, *supra* note 1, at 31; 42 U.S.C. § 11,004. *See generally* 40 C.F.R. § 355.20 (1994) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . .").
27. *See* 42 U.S.C. § 11,004.
28. *See id.*
29. *See* 42 U.S.C. §§ 11,004, 11,046. Some releases are exempt from § 304 reporting requirements including: certain laboratory and medical facilities; releases exposing only persons within the facility; certain continuous releases; applications of recorded pesticide in accordance with its intended use; and certain radio nuclide releases. *See* 40 C.F.R. § 355.40(a)(2) (1996).
30. 42 U.S.C. § 11,023.

are regularly released [into] the environment."[31] This information is then compiled by the EPA and made available on a nationally available computer database, the Toxic Release Inventory (TRI), which makes it easy for citizens to acquire information.[32] The TRI has made it possible for citizens and government officials to estimate the quantity of pollutants entering our environment.[33]

4. Section 326: Citizen Suits[34]

Under EPCRA section 326, "any person," including individual citizens and citizen groups, may enforce the Right-to-Know requirements of the Act against facility owners or operators, the EPA, and the States.[35] Citizens may file suit against a facility for failure to file any of the required reports contained in the Act.[36] Likewise, citizens may file suit against a State or the EPA for failing to make any portion of the required reporting information available to the public.[37]

Like citizen suit provisions contained in other environmental statutes, EPCRA section 326 contains procedural requirements for filing suit.[38] Accordingly, the appropriate venue for EPCRA citizen suits is the federal district court where the violation occurs.[39]

The district courts "have broad authority to [assess remedies in EPCRA cases,] including declaratory and injunctive relief."[40] The

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31. Shavelson, *supra* note 1, at 31.

32. *See id.* at 32.

33. *See id.* Although the TRI is incredibly useful, it has been noted that the TRI is, for the most part, incomplete because a large number of facilities fail to file the required forms. *See id.* In fact, Robert W. Shavelson notes that as much as 40% of the facilities required to file form R (the TRI reporting form) often fail to do so. *See id.*

34. 42 U.S.C. § 11,046.

35. *See id.* § 11,046(a)(1)(A)-(D).

36. *Id.* § 11,046(a)(1)(A). The required reports include a follow-up emergency notice under EPCRA section 304(c); a MSDS under OSHA or EPCRA section 311(a); an inventory form under EPCRA section 312(a); or a toxic chemical release form under EPCRA section 313. *See id.*

37. Nondiscretionary duties delegated to states and the EPA include: publishing inventory forms responding to a petition to add or delete a chemical (under the Toxic Release Inventory reporting requirements) within 180 days after receipt of the petition, publishing a toxic chemical release form establishing a computer database in accordance with EPCRA section 313(j) promulgating trade secrets regulations under EPCRA section 322(c) and rendering decisions in response to petitions requesting trade secret information under EPCRA section322(d) within nine months after the receipt of the petition. 42 U.S.C. § 11,046(a)(1)(B)-(C).

38. *See id.* § 11,046.

39. *See id.* § 11,046(b)(1). However, pursuant to 42 U.S.C. § 11,046(b)(2), suits against the EPA must be brought in the District Court for the District of Columbia. 42 U.S.C. § 11,046(b)(2).

40. Shavelson, *supra* note 1, at 33; *see also* 42 U.S.C. § 11,046(c)(1997) (setting forth the requirements for jurisdiction of district courts under EPCRA).

courts may also impose civil penalties in the amount of $25,000 per violation for failure to submit Toxic Release Inventory forms.[41] In addition, fines in the amount of $10,000 per violation may be assessed for failure to submit MSDSs.[42]

Before initiating a civil suit in federal court, citizens must provide the alleged violator, the EPA, and the State with sixty-days notice of intent to sue.[43] In the notice letter, citizens must provide "their name[s], address[es] and phone [numbers] (and those of their counsel . . .), the specific location of the facility, the facility's owners or operators, and the dates . . ., chemicals and types of violations alleged."[44]

If the sixty-day notice period passes, and the EPA has not taken enforcement action, the civil suit may proceed.[45] Attorneys representing citizen plaintiffs are provided an additional incentive to file suit by way of recovering their costs and fees, since EPCRA authorizes courts to award the "costs of litigation, (including reasonable attorney and expert witness fees) to the . . . substantially prevailing party," where appropriate.[46] This fee recovery mechanism is crucial for environmental groups that often lack the financial resources to engage in expensive litigation.[47]

C. Issues in EPCRA Citizen Suits

Because citizen suits under EPCRA have historically been filed by experienced observers of industry conduct, such as citizen groups that monitor compliance on a regular basis, EPCRA litigation has mostly addressed arguments about whether or not penalties should be assessed against the alleged violator.[48] Consequently, violators might file all of their out-of-date forms within the sixty-day notice period

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41. 42 U.S.C. § 11,045(c). Section 325(c) makes every day that a facility is out of compliance a separate violation. *See id.*

42. *Id*.

43. *See* 42 U.S.C. § 11,046(d).

44. Shavelson, *supra* note 1, at 33; *see also* 42 U.S.C. § 11,046(d) (setting forth notice requirements for citizen suits under EPCRA); Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989)(noting that the sixty-day notice letter is a strict requirement not to be overlooked).

45. The EPA may preclude citizen enforcement of an EPCRA violation by diligently pursuing the violation in federal court or levying fines against the violator. 42 U.S.C. § 11,046(e). However, the EPA seldom takes action in such matters, preferring instead to allow citizen suits to go forward as a means of conserving administrative resources. *See* Shavelson, *supra* note 1, at 32.

46. *See* 42 U.S.C. § 11,046(f)(1997); Shavelson, *supra* note 1, at 33.

47. *See generally* Shavelson, *supra* note 1, at 29-38 (describing the requirements of EPCRA and citizen suits under EPCRA).

48. *See generally id.* (describing the requirements of EPCRA and citizen suits under EPCRA).

and then spend the rest of their energies entering into settlement agreements with plaintiffs, or arguing that the plaintiffs do not have standing to sue.

1. Settlements

The use of settlements in EPCRA cases has proved to be the most beneficial aspect of the Act to citizens. In a practical sense, courts have recognized that settlements (in the form of consent decrees) between the alleged violator and the plaintiff may provide "broader relief than the court could have awarded after a trial."[49] Typically, consent decrees "require the defendant to comply fully with EPCRA's reporting requirements, pay a civil penalty to the [United States] Treasury, and pay plaintiff's reasonable attorneys fees."[50] In addition, some courts have held that the parties may agree in a consent decree to apply the United States Treasury funds to Supplemental Environmental Projects (SEPs) that address the harm caused by the violation.[51] District courts have approved consent decrees in which payments were made to such projects.[52] For example, in *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.,* the court approved a consent decree which required the violator to purchase emergency response equipment for local agencies and to conduct a five-year pollution prevention/toxins use reduction program.[53]

The EPA has likewise made use of this tool to penalize polluters and make communities whole after suffering injuries due to the defendant's conduct. In *United States v. Sherwin-Williams*, the EPA entered a consent decree providing that the company would pay $4.7 million in penalties and as much as $10 million for a cleanup program aimed at bringing its 123-acre Chicago facility into compliance with federal environmental statutes, including EPCRA.[54] In addition, the

49. Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986).
50. Shavelson, *supra* note 1, at 34.
51. *See* Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 81 n.32 (3d Cir. 1990); Sierra Club v. Electronic Controls Design, 909 F.2d 1350, 1355-56 (9th Cir. 1990).
52. *See* Atlantic States Legal Found., Inc. v. Witing Roll-Up Door Mfg. Corp, No. 90-CV-11095, 1993 WL 114676 (W.D.N.Y. 1993); United States v. Pfizer, Inc. No. 398-CV-2317-CLG (D. Conn. 1998) (requiring Pfizer to implement a pollution prevention program at university laboratories); United States v. Lamb-Western, Inc., No. 98-0280-S-LMB (D. Id. 1998); Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta No. 1:95-CV-2250-TWT; No. 1:98-CV-1956-TWT (N.D. Ga. 1998).
53. *See id.*
54. 27 Env't Rep. (BNA) 2029 (Feb. 7, 1997).

EPA has drafted a report highlighting the usefulness of SEPs in citizen suit and agency enforcement actions.[55]

While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements.[56] The citizen plaintiff, therefore, is armed with the right not only to sue to bring facilities into compliance with EPCRA's reporting requirements, but also to provide meaningful solutions to the problems posed by these violations.

2. Standing

Article III of the United States Constitution grants federal courts the power to hear "cases and controversies."[57] To invoke the jurisdiction of the federal courts, plaintiffs must show that the defendant's conduct has injured or will injure them, and that their injury will be redressed by a favorable decision of the court.[58]

Unlike plaintiffs in typical environmental lawsuits, plaintiffs in EPCRA suits "must show an 'informational injury.'"[59] In other words, EPCRA plaintiffs must establish that they have been harmed by the defendant's failure to submit information. As might have been expected, this has not proved a difficult task.[60] Only one EPCRA case to date has been dismissed for the plaintiff's inability to prove injury-in-fact.[61]

This unfettered acknowledgment of plaintiff's injury has been due in large part to a plaintiff's ability to assert several different forms of injury due to a defendant's violations. First, plaintiffs have argued that "without [a] defendant's EPCRA information, they [were] unable to make informed decisions about where to live, work, and recreate."[62] Second, plaintiffs may argue that a lack of information makes emergency response impossible.[63] Third, some plaintiffs have

55. U.S. EPA, INTERIM REVISED SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, May 8, 1995, at 2.

56. Depending on circumstances and cost, SEPs also may have a deterrent impact.

57. U.S. CONST. art. III, § 2, cl.1.

58. *See* Shavelson, *supra* note 1, at 33.

59. *Id.* *See generally* Atlantic States Legal Found., 1993 WL 114676, at *1-*12 (describing injuries plaintiffs may suffer under EPCRA). Normally, a plaintiff can show that health, recreational or aesthetic interests have been harmed to establish standing. *See* Lujan v. Defenders of Wildlife, Inc., 504 U.S. 555, 560, 562 (1992).

60. Shavelson, *supra* note 1, at 34.

61. *See id.*

62. *Id.*

63. *See id.*

argued that they were injured in a procedural capacity because they were denied information to which they had a statutorily created right.[64] Finally, citizen groups have rightfully argued that they have been injured in an organizational capacity, because researching and discovering EPCRA violations takes time away from their primary tasks which include informing the public about the content of required forms.[65]

III. *STEEL COMPANY V. CITIZENS FOR A BETTER ENVIRONMENT*[66]

A. Case History

In 1995, Citizens for a Better Environment (CBE) filed a citizen suit against the Steel Company (the Company) for its failure to submit hazardous chemical inventory forms under EPCRA sections 311 and 312 and toxic release inventory forms under EPCRA section 313.[67] In accordance with the Act, prior to filing suit, CBE notified the Company that it had not met its reporting obligations since 1988.[68] Upon receiving this notice, the Company immediately filed its overdue forms.[69] When the sixty-day waiting period expired without the EPA bringing an enforcement action, CBE filed a citizen suit in federal district court under EPCRA section 326.[70] The Steel Company then promptly filed 12(b)(1) and (6) motions for want of jurisdiction and failure to state a claim upon which relief could be granted.[71] The Steel Company contended that the court lacked jurisdiction to maintain the suit because the appropriate documents had been filed within the sixty-day period.[72] The Steel Company also argued that the overdue filing satisfied EPCRA's requirements and eviscerated CBE's claim, because EPCRA does not provide relief for purely past violations of the Act.[73] The district court agreed with Steel Company,

64. *See id.* at 30. Procedural standing is separate from informational injury in that it establishes wholly different grounds whereby the plaintiff suffers harm. In the EPCRA context, however, procedural injury can be likened to informational injury because the only procedures are those dealing with the filing of timely reports. The Supreme Court is split over whether procedural injury is sufficient for the purposes of maintaining standing. *See Defenders of Wildlife*, 504 U.S. at 555.

65. Shavelson, *supra* note 1, at 34.

66. 118 S. Ct. 1003 (1998).

67. *See* Citizens For a Better Env't v. Steel Co., 90 F.3d. 1237, 1241 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997), *vacated*, 118 S. Ct. 1003 (1998).

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

holding that the case was factually indistinguishable from the Sixth Circuit's ruling in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments*.[74] The Seventh Circuit reversed this ruling, finding that although the *Steel Company* case was "factually indistinguishable," the plain language of EPCRA provides relief for citizens maintaining suits for purely past violations of the Act.[75] The United States Supreme Court then granted *certiorari* to resolve this conflict between the Sixth and Seventh Circuits.[76] Unfortunately, the Court never addressed the merits of the case. Instead, the Court agreed with the Steel Company's contention that CBE lacked standing to bring the suit.[77]

While the Justices unanimously agreed that the case should be dismissed, their reasoning differed.[78] Justice Scalia's opinion, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined, concluded that unless the question of standing was satisfactorily resolved, the Court could not address the question of statutory interpretation.[79] The majority stated that "Article III jurisdiction is always an antecedent question . . . . For a court to pronounce upon the meaning of the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*."[80] In effect, the Court pronounced that the purpose of EPCRA is not the filing of *timely* reports that allow communities to prepare for accidents at facilities which handle extremely hazardous materials.[81] Rather, the purpose of the statute is for facilities to file *any* reports.[82]

The Court's decision may have significant impacts on all citizen suit provisions, despite the fact that the majority chose not to address whether EPCRA section 326 authorizes citizens suits for wholly past violations.[83] The *Steel Company* decision extended the *Gwaltney* doctrine via another path—the unredressability of purely past violations of EPCRA.[84]

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74. *See id.* at 1242 (citing Atlantic States Legal Found., Inc. v. United Musical Instruments U.S.A., Inc., 61 F.3d 473 (6th Cir. 1995)).

75. *See id.* at 1242-43.

76. *See* 117 S. Ct. 1079 (1997).

77. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1020 (1998).

78. *See id.* at 1003-32.

79. *See id.* at 1012-13.

80. *Id.* at 1016.

81. *See id.* at 1018.

82. *See id.*

83. *See id.*

84. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) (holding that the Clean Water Act does not authorize suits for purely past violations).

B. *The Arguments*

The majority, led by Justice Scalia, declined to address the merits question of whether EPCRA permits suits against polluters for purely past violations.[85] Instead the Court held that the respondent, CBE, failed to meet the standing requirement of Article III, Section 2 of the United States Constitution.[86]

The Article III jurisprudence requires that plaintiffs suing in federal court satisfy three requirements to maintain a cause of action. First, the plaintiff must allege and ultimately prove "injury in fact," a harm suffered by the plaintiff that is "concrete and actual or imminent, not 'conjectural' or 'hypothetical.'"[87] Second, causation must exist which is fairly traceable to the defendant's conduct.[88] Third, the plaintiff's harm must be redressable by a verdict in the plaintiff's favor.[89] While these requirements have always been the mainstay of standing, redressability has only found its way, in any material manner, into the decisions of the Supreme Court in the past twenty-five years.[90] Furthermore, the introduction of redressability as a silver bullet against congressionally mandated standing in *Steel Company* is an extraordinarily broad extension of the theory.[91] It is therefore necessary to analyze the decision in depth, and with specific reference to the arguments rejected by the Court, to ascertain the true meaning of the redressability analysis that has been established.

1. Standing

While arguments over the Constitutional requirement of standing are nothing new, there has never been a consistent body of law encompassing what elements of standing a plaintiff must demonstrate.[92] The courts follow few hard and fast rules with any amount of consistency. When rules are applied, they are presented as

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85. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1018 (1998).

86. *See id.* at 1020. The jurisdiction of the federal courts extends only to "Cases" and "Controversies." U.S. CONST. art. III, § 2.

87. *Steel Co.*, 118 S. Ct. at 1016 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

88. *See id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

89. *See Simon*, 426 U.S. at 45-46.

90. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 227-28 (1988).

91. In previous cases, redressability was generally presumed where a plaintiff could prove injury in fact and causation. *See id.* at 239-40. Robert W. Shavelson has noted that the typical issue in EPCRA cases is whether the plaintiff has been injured, and that "only one EPCRA case has been dismissed for lack of standing." Shavelson, *supra* note 1, at 34 (citing McCarmick v. Anschultz Mining Corp., 19 Envtl L. Rep. (Envtl. L. Inst.) 20902 (E.D. Mo. 1989)).

92. Requirements for standing include: injury-in-fact, causation, and redressability. *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

emanating from some fountain of truth whose origin we may never know.[93] Standing has even been described as a "word game played by secret rules."[94] In *Steel Company*, this ambiguity is highlighted by the majority's ability to apply a redressability analysis without concern for the underlying purposes of the remedies sought by CBE.

In *Steel Company*, CBE alleged three claims for standing. First, it alleged concrete standing for the citizens living near the Steel Company.[95] Second, CBE alleged organizational standing, emanating from the Steel Company's failure to supply reports about its storage and emissions of toxic substances.[96] Third, CBE alleged procedural standing, resulting from the Steel Company's failure to comply with EPCRA's reporting requirements.[97] Each of these claims supported similar claims for relief.[98] The majority opinion of the Court concluded that each form of standing was reducible to one form of injury, the denial of information.[99] As such, the Court declined to address whether the denial of information was sufficient to establish injury-in-fact.[100] Reducing the lengthy discussion of injury posited by the respondent and its amici allowed the Court to simply conclude that there was no redress for a denial of information when the information had been supplied.[101] Unfortunately, the majority's analysis is nothing more than a mixing of cause and effect. The cause of injury in each case is the denial of information, but the injury differs depending on which theory of standing is being employed. Therefore, it is essential to dissect the reasoning the Court employed

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93. The necessity for changes exists in the structure of standing law. *See, e.g.*, Fletcher, *supra* note 90, at 221 (proposing that the question of standing should rely on the merit of the claim); David P. Currie, *Misunderstanding Standing,* 1981 SUP. CT. REV. 41 (1981) (noting U.S. Supreme Court's inconsistencies on issues of standing); Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (arguing that the potential effectiveness of a remedy should not be considered in standard analysis); Gene R. Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985) (arguing that the holding of *Allen v. Wright* makes standing requirements even more incomprehensible than before).

94. Flast v. Cohen, 392 U.S. 83,129 (1968) (Harlan, J., dissenting).

95. *See* Respondent's Brief at *9, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348462, *9) (indicating that members of CBE lived in the area of petitioner's facility).

96. *See id.* at *5 (CBE routinely investigates companies to determine whether or not they are in compliance with § 312 and § 313 of EPCRA).

97. *See* Amicus Brief in Support of Respondent filed by National Resources Defense Council, Inc. et. al. at *17, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 351105, *17).

98. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1017-18.

99. *See id.* at 1018.

100. *See id.*

101. *See id.* at 1020.

in dismissing these claims to determine what the true nature of the redressability requirement has become.

2. Redressability

After reducing the injury that CBE suffered from the denial of information, the majority paved a highway over the top of CBE's contentions that the relief sought would redress its injuries. Justice Scalia employed a "mechanistic" construction of redressability, denying the history of this requirement as a judicial implement for protecting the Separation of Powers principles embodied in the Constitution.[102] The Court's opinion simply stated that redressability is a time honored facet of Article III.[103] Significantly, the Court concluded that prayer for an award of all costs in connection with the investigation and prosecution of the matter, including reasonable attorney costs, cannot suffice to establish standing because redress for that "injury" exists only by virtue of the fact that the plaintiff filed the lawsuit.[104] Equally significant was the Court's holding that an order requiring payment of civil penalties to the U.S. Treasury did not redress injury to CBE or its members.[105] The Court stated that,

> [a]lthough a suitor may derive great comfort and joy from the fact the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.[106]

On the other hand, the Court stated that if CBE had alleged in its complaint the likelihood of possible repetition of the violations, the redressability issue would not be so questionable.[107] In the Court's opinion, had CBE alleged a "continuing violation or the imminence of a future violation, the injunctive relief requested would remedy the alleged harm."[108] But, given that "there [was] no such allegation here and on the facts of the case, there [was] no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III."[109] Finding that CBE did not meet the redressability

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102. *See id.* at 1027 (Stevens, J., concurring).
103. *See id.* at 1016-17.
104. *See id.* at 1019.
105. *See id*. at 1018-19.
106. *Id.* at 1019.
107. *See id.*
108. *Id.* at 1018.
109. *Id.* at 1019.

requirements of Article III, the Court ruled that the case must be dismissed, adding that however important the merits of the underlying EPCRA interpretive issue may be, "EPCRA will have to await another day."[110]

3. Declaratory Relief

The majority opinion held that declaratory relief would be meaningless because no controversy over whether the Steel Company violated EPCRA existed.[111] Indeed, the petitioner admitted to having violated EPCRA, but maintained that violations, when cured within the sixty-day notice period, were not subject to penalties under the statute.[112] CBE's contention, however, was not that a declaratory judgment was necessary to determine that the statute had previously been violated. Rather, CBE's contention went to the heart of the case; a failure to report in the past is a present and existing violation of the statute.[113] The majority denounced this contention with derision, holding that, "the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world."[114] This statement is set forth as the predicate to the Court's ultimate discussion of redressability, which gives scant attention to the actual arguments made by CBE, preferring instead to veil the decision in some sort of ultimate truism regarding redressability, a requirement of standing that had henceforth never been applied to a case such as this between two private parties.[115]

Declaratory relief in this form not only makes the statement that past violations are necessarily called for under EPCRA, it also redresses the concrete injury suffered by citizens living near the plant. It vindicates their right not only to information, but also to timely filed information. Untimely filed reports, as those filed by the Steel Company, are meaningless to a community that wishes to be responsive to the dangers which citizens incur living near an industrial facility. Undoubtedly, untimely filing sets a community back weeks, months, and in some cases years in terms of emergency preparation. Declaratory relief states that communities have the right to be protected from such backlogs and provides for actual

110. *Id.* at 1020.
111. *See id.* at 1017.
112. *See id.* at 1009.
113. *See* Respondent's Brief Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348462, *7-16).
114. Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1018 (1998).
115. *See id.* at 1018-20.

representation of their right in the law. If there exists a right to the information at all, there is little doubt that the Court's pronouncement of this right in favor of CBE would allow citizens living near polluters to understand this right.

4. Injunctive Relief: Authorization to Periodically Inspect Petitioner's Facilities and Records with Costs; and an Order Requiring Petitioner to Provide Respondent with Copies of all Compliance Reports

Citizens for a Better Environment also prayed for injunctive relief, including authorization to inspect petitioner's facilities, and an order requiring the Steel Company to provide CBE with copies of all compliance reports.[116] The Court held that, because there was no imminence of future harm, no remedy existed for the wrongs alleged.[117] While this assertion by the majority seems to make sense at first glance, it denies the central focus of the concrete harms alleged. CBE alleged it was injured because a lack of timely information harmed its members' ability to be prepared in the case of an emergency.[118] In many cases, accurate and timely reporting allows a level of trust to develop between industry and the community which, in turn, allows for inspection by community officials and citizens. In cases like *Steel Company*, where reporting has been lacking for several years, the facility has essentially operated under a veil of secrecy. Therefore, it is often difficult for emergency response officials and citizens to evaluate the risks that are being imposed on them. Consequently, risks continue until emergency preparedness is brought up to speed with the untimely reports.

Allowing CBE the opportunity to inspect the Steel Company's facilities, and providing it with copies of compliance reports would go far to curtail the negative effects of the Steel Company's failure to report. The injunctive relief sought would afford CBE and its members the ability to assess the potential for emergency situations in much less time, and would therefore help to fill the gap in preparedness created by the Steel Company's violations.

The Court was unimpressed by this reasoning, however, and held that such relief would only redress CBE's injuries if there was an imminent threat that the Steel Company would fail to report in the

116. *See id.* at 1018.
117. *See id.* at 1019.
118. *See id.* at 1017-18.

future.[119] Unfortunately, the Court failed to set forth what might satisfy this imminent threat requirement. The Court also rejected the EPA's argument, as amicus to the respondent, that past violations were sufficient to establish the potential for future violations.[120]

Additionally, CBE contended that injunctive relief would provide a deterrent to future violations of the Act.[121] The third prong of standing analysis requires that CBE establish that it is "'likely, as opposed to merely speculative, that the injury would be redressed by a favorable decision.'"[122] To meet this requirement, CBE had to show that it was likely to benefit from a decree in its favor. The Court found that CBE had failed to make such a showing.[123]

CBE contended that since it had "been accorded a procedural right to protect [its] concrete interests," it could "assert that right without meeting all the normal standards for redressability and immediacy."[124] CBE analogized its situation to the one set forth in *Lujan v. Defenders of Wildlife*.[125] In that case, the Court suggested that plaintiffs living near a site for a proposed federal dam would have procedural standing to sue if the licensing agency failed to prepare an Environmental Impact Statement(EIS), even though the EIS might have no impact on the plans for the dam.[126] CBE reasoned that it had a congruent claim for standing to sue the Steel Company for its failure to submit EPCRA reports, even if the filing of those reports would not reduce the impact of releases of toxic chemicals in the community in which CBE's members lived.[127] However, the Court again found that such a procedural interest in the faithful execution of EPCRA was not sufficient to provide CBE with a redressable cause of action.[128]

5. Costs of Litigation

Section 326(f) of EPCRA authorizes courts to grant the costs of litigation to prevailing plaintiff.[129] In *Steel Company*, CBE contended that such authorization allowed for direct redressability of the injuries

119. *See id.* at 1019.
120. *See id.* at 1019-20.
121. *See id.* at 1019.
122. U.S. v. Hays, 115 S. Ct. 2431, 2435 (1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).
123. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1019 (1998).
124. *Defenders of Wildlife*, 504 U.S. at 572 n.7.
125. *See Steel Co*., 118 S. Ct. at 1017-20.
126. *See Defenders of Wildlife*, 504 U.S. at 572.
127. *See Steel Co*., 118 S. Ct. at 1017-18.
128. *See id.* at 1017-20.
129. *See* 42 U.S.C. § 11,046(f) (1997).

caused by the Steel Company's late reporting because such costs obviously would not have accrued if the Steel Company had filed on time.[130] The majority opinion stated that these costs fail to redress respondent's injury because one cannot "achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[131] While this argument undoubtedly succeeds in most cases, it is illogical in the face of a sixty-day notice requirement, and turns a blind eye to the legislative history of the Act. Costs incurred by CBE prior to filing the sixty-day notice were all in preparation for litigation of the issue, as defined by the Act.[132] At the point that the notice letter was initially filed, no one could argue that CBE did not have standing. The violation was current (i.e. the reports had not been filed). Thus, the majority implicitly assumed that the sixty-day notice requirement was in place to enable the violator of the statute to avoid paying penalties to the Treasury and to the litigants. To the contrary, the sixty-day notice requirement was not designed so that penalties could be avoided.[133] Rather, it was designed so that litigation could be avoided through settlement, or so that the EPA could take over the case if it wished.[134]

A facility may, and often does, "use the sixty-day notice period to file past due reports, but under EPCRA past due filing does not operate to bring a facility into compliance, since the risk of injury to the community is far-reaching."[135] When facilities fail to file reports, thousands of people are placed at risk from unknown chemical exposure and from emergencies for which state and local responders are unprepared. Late filing simply does not eliminate unknown

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130. *See Steel Co.*, 118 S. Ct. at 1019.

131. *Id.*

132. *See id.*

133. *See* Respondent's Brief, Steel Co. v. Citizens for a Better Env't 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348462, *17).

134. *See id.* at *18. As an amicus curiae of CBE contended on appeal, "when Section 326(d) and Section 326(e) are read together it is clear that the primary purpose of the 60-day notice provision is to give EPA the opportunity to 'diligently pursue' violations." Amicus Brief in Support of Respondent filed by State of New York et. al., Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348211, *17-18); *see also* 42 U.S.C. § 11,046(d), (e) (1997); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987), and Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (holding the purpose of the notice requirement is to allow the EPA to decided whether it wants to bring enforcement proceedings against defendants). The purpose of "[the] notice provision cannot possibly be to allow the defendant to come into compliance; it is obviously to allow for a settlement. The same purpose is served by the notice requirement of EPCRA." Respondent's Brief, *supra* note 95, at *18.

135. Amicus Brief in Support of Respondent filed by State of New York et. al. Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348211, *18).

exposure risks, nor does it achieve EPCRA'S objectives of emergency preparedness and community right-to-know.

This concept is strongly rooted in the use of Supplemental Environmental Projects (SEPs) via consent decrees in EPCRA cases. As previously noted, SEPs have been a mainstay of EPCRA litigation where both parties recognize that the use of penalty funds for environmental projects is necessary to cure *all* of the injuries created by a defendant's failure to report, including a lack of emergency preparedness.[136] The negotiation of these types of settlements, which has been endorsed by the EPA, begins during the sixty-day notice period, when violators are confronted with the daunting prospect of penalties.[137] The mere fact that these consent decrees offer penalties even after compliance has been accomplished illustrates that the notice period does not simply serve to allow violators to come into compliance.

Unfortunately, the Court implicitly rejected this argument in *Steel Company* when it established that cured violations obfuscate a plaintiff's ability to maintain a redressable action under EPCRA.[138]

6. Civil Penalties Payable to the United States Treasury

Perhaps the most perplexing portion of the Court's decision in *Steel Company* was its disregard for the remedial characteristic that underlies the issuance of civil penalties in citizen suits. Such penalties are authorized in the amount of $25,000 per day for continuing violations of the Act.[139] The majority's holding dismissed CBE's contention that these penalties, "the only damages authorized by EPCRA," could provide any redress for its injuries because the payments are made to the United States Treasury and not to CBE.[140] The Court reasoned that such remuneration to the Treasury would provide nothing more than "psychic satisfaction" to CBE, or a delight in the knowledge that the wrongdoer had been punished.[141] Furthermore, the Court explained that such satisfaction does not "redress a cognizable Article III injury."[142] Such characterization by the Court presumes that civil penalties only provide a general

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136. *See* Shavelson, *supra* note 1, at 35.
137. *See id.*
138. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1020 (1998).
139. 42 U.S.C. § 11,045(c) (1997).
140. *Steel Co.*, 118 S. Ct. at 1018-19.
141. *Id.* at 1019.
142. *Id.* (citing Allen v. Wright, 468 U.S. 737, 754-55 (1984)); *see also* Valley Forge v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 482-83 (1982).

deterrence. However, the "undifferentiated public interest" in EPCRA enforcement is not the only kind of deterrence afforded by civil penalties.[143] To the contrary, the most useful aspect of civil penalties is their specific deterrent effect. The penalties deter the violator in question from persistently violating the statute. Thus, CBE had a valid claim that it holds a differentiated interest in deterring the Steel Company from violating EPCRA in the future, and that the most effective tool for accomplishing such a task is civil penalties.

Congress has long felt that civil penalties accomplished such a goal. Specifically, in the 1985 debates over CERCLA, from whence EPCRA was formed, Congress acknowledged that damage awards in the form of civil penalties had been remarkably effective in deterring noncompliance by polluters.[144] During the debates on the CERCLA citizen suit provision, Senator Baucus stated that "citizen enforcement is currently operating as Congress intended: first, to provide a prod and second an alternative to government enforcement."[145] He also stated that "the scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to act as a general deterrent."[146] The Senate Report on the 1987 amendments to the Clean Water Act stated that citizen suits "are a proven enforcement tool" that "have deterred violators and achieved significant compliance gains."[147]

In 1990, Congress amended the citizen suit provision of the Clean Air Act to authorize citizens to seek civil penalties.[148] The Senate report on that provision stated that "[t]he assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution."[149] "[I]ssuance of an administrative order, without penalties, has not proven powerful enough to motivate violators or deter other similar violators."[150] Congress reasoned that "this tool can be a strong force for achievement of quick compliance."[151]

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143. *Steel Co.*, 118 S. Ct. at 1018 (citing Lujan v. Defenders of Wildlife*,* 504 U.S. 555, 577 (1992) (holding that a citizen group needed to have more than a generalized interest in protecting endangered species to maintain a cognizable Article III injury)).
144. *See* 131 CONG. REC. 24748 (daily ed. Sept. 24, 1985).
145. *Id.*
146. *Id.*
147. S. REP. NO. 99-50, at 28 (1985).
148. *See* 42 U.S.C. 7545(d)(1997).
149. S. REP. NO. 100-228, at 373 (1989).
150. S. REP. NO. 99-50, at 29 (1985).
151. *Id.*

With this notion embedded in the legislative history of environmental regulations, the courts have likewise recognized the deterrent effect that civil penalties have on wrongdoers. Most recently, in *Bennett v. Spear*, the Supreme Court found that civil penalties would have a deterrent effect sufficient enough to create injury to the plaintiffs.[152] In that case, the plaintiffs, a group of ranchers and irrigation districts, challenged the adequacy of a biological opinion issued by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act.[153] The plaintiffs claimed that they were injured by a FWS opinion recommending that minimum water levels be maintained to protect two species of fish protected by the Endangered Species Act.[154] The plaintiffs claimed that the FWS's opinion would create significant losses in irrigation water that was needed to maintain their economic well-being.[155] The Court held that the plaintiffs satisfied the requirements of statutory standing, noting that federal agencies maintain a strong incentive to reduce available irrigation water to avoid penalties for the loss of endangered species.[156] The Court stated that the "powerful coercive effect" of the biological opinion on other federal agencies made it likely that plaintiffs' injury (i.e., the threatened water level restrictions) would be redressed if the biological opinion were set aside.[157] Thus, the Court correctly maintained that the threat of civil penalties deterred federal agencies from diverting water to the plaintiffs.

Similarly, in *Public Interest Research Group v. Powell Duffryn Terminals, Inc.,* the Third Circuit held that the Public Interest Research Group (PIRG) established sufficient causation for Article III purposes, and the redressability element was satisfied by the deterrent effect of civil penalties.[158] Nevertheless, the court went on to state that where a concrete injury has been proven, civil penalties would redress it.[159] The court reasoned that where a cognizable Article III

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152. 117 S. Ct. 1154, 1165 (1997).

153. *See id.* at 1158-59.

154. *See id.* at 1159-60.

155. *See id.*

156. *See id.* at 1168 (holding that the citizen suit provision of the Endangered Species Act confers standing on any person who will be impacted. This is a broad reading of "any person may commence a civil suit." The Court reasoned that one purpose of the Act is to prevent overzealous application of the law.).

157. *Id.* at 1164.

158. 913 F.2d 64, 70-74 (3d Cir. 1990).

159. *See id.* at 73; *see also* Sierra Club v. Simkins Indus., Inc., 847 F. 2d 1109, 1113 (4th Cir. 1988) (holding that "penalties can be an important deterrent against future violations," even though they are not payable directly to the plaintiff).

injury exists, it is adequate to show that deterring future violations would remedy the harms.[160]

The *Steel Company* holding vacates this reasoning, and has troubling consequences for all citizen suits which seek the issuance of civil penalties as a remedy.[161] As Part Four of this Article discusses, the *Steel Company* decision may create an unwillingness among citizen plaintiffs to file suit as groups. Unless other remedies are created through statutory revision, the expense of filing suit with little or no likelihood of monetary or environmental compensation may be far too great.

IV. PROBLEMS POSED BY THE DECISION

The most obvious consequence of the decision in *Steel Company* is that EPCRA citizen suits are, at least for the time being, a thing of the past. Less obvious, however, is the far-reaching impact that the decision may have on the effectiveness of citizen suit provisions of other environmental statutes. A recent decision handed down by the Fourth Circuit Court of Appeals highlights that the *Steel Company* treatment of civil penalties may have disastrous consequences for plaintiffs who bring no more than the threat of penalties to the table.[162]

A. Problems for EPCRA

Barring legislative remedy, the future of EPCRA appears bleak. The Court has created a disincentive for industry to comply with the reporting requirements of EPCRA. Because EPCRA is an informational statute, it is relatively easy for a company to come into compliance on short notice because most of the required information must already be gathered for other purposes.[163] Compliance with EPCRA is relatively easy when compared with the reengineering of manufacturing processes or the installation of new equipment often required under the Clean Water Act. A firm that has been ignoring sections 312 and 313 of EPCRA will find it easy to submit all past due forms within sixty days after it receives notice of intent to sue.

160. *See* Public Interest Research Group of N.J. v. Powell Duffryn, 913 F.2d 64,73 (3d Cir. 1990).

161. *See* Friends of the Earth v. Laidlaw Envtl. Servs., Inc. 149 F.3d 303 (4th Cir. 1998) (citing the *Steel Company* for the proposition that civil penalties do not redress a citizen plaintiff in a cause of action under the Federal Water Pollution Control Act).

162. *See id.*

163. *See* Addition of Facilities in Certain Industry Sectors; Revised Interpretation of Otherwise Use: Toxic Release Inventory Reporting; Community Right-to-Know, 62 Fed. Reg. 23834, 23889 (May 1, 1997) (forms required under Section 313 require an estimated average of 74 hours per report in the first year and 52.1 hours per report in subsequent years).

Under the decision in *Steel Company*, such a company is immune from a citizen suit.

Thus, EPCRA's effectiveness has been eviscerated. EPCRA is only successful when information on file is accurate and current. Untimely filings will not serve EPCRA's purposes, because emergency preparedness will never be effectuated until after the fact. Furthermore, it is unlikely that environmental organizations will be willing to undertake the costly exercise of investigating facility compliance when they harbor little or no hope of monetary compensation, in the form of attorney's fees and costs, for their efforts.

It is difficult and time-consuming for citizens and citizen groups to try to identify private companies that are using toxic chemicals. After the *Steel Company* decision, some level of investigation by citizen groups will undoubtedly continue, but it will be greatly reduced. As CBE stated in its brief to the Court:

> Because nearly all defendants will come into compliance once they receive notice, citizen suits under Section 326 will become virtually unknown. In view of the importance Congress attached to citizen enforcement—and the well-known problems of enforcement that always plague self-reporting schemes, and that appear to afflict EPCRA as well—it is extremely unlikely that Congress intended these results. . . .[164]

It is extremely short-sighted to say that the EPA will enforce EPCRA against companies that only file mandatory reports after receiving notice letters. Congress created a specific role for citizen suits under EPCRA because EPA is not capable of chasing down the reports of every industrial facility. The task is insurmountable for the Agency that has been delegated the role of enforcing *all* of our environmental laws. Enforcement of EPCRA therefore, will "await another day."[165]

B. Problems for Other Citizen Suits Posed by the Steel Company *Decision*

To determine whether or not the consequences of the decision in *Steel Company* will have an impact on other citizen suit provisions, one need only look to the Fourth Circuit's application of the holding in July of this year. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the plaintiff filed suit against

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164. Respondent's Brief, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1197 WL 348462, *20).

165. Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1020 (1998).

Laidlaw for violation of its National Pollution Discharge Elimination System permit under the Federal Water Pollution Control Act (the Clean Water Act).[166]

In 1995, Friends of the Earth (FOE) filed a citizen suit against Laidlaw in the South Carolina District Court pursuant to the citizen suit provision of the FWPCA, seeking declaratory and injunctive relief, in addition to the imposition of civil penalties.[167] Following a hearing and subsequent bench trial in 1997, the district court imposed a penalty of $405,800.[168] However, finding that the violations had not harmed the environment and that Laidlaw had been in substantial compliance in the two years since the initial action had been filed, the court denied FOE's claim for injunctive and declaratory relief.[169] The district court then issued a separate order staying a determination of plaintiff's claim for attorney's fees upon appeal.[170] FOE appealed, claiming that the district court had abused its discretion in issuing inadequate penalties.[171]

In the time between the district court's decision and FOE's appeal to the Fourth Circuit, the United States Supreme Court rendered its *Steel Company* decision. As a result, in a two-page decision written by Judge Wilkins, the Fourth Circuit, citing *Steel Company*, held that FOE lacked standing to pursue its claim because the pursuit of civil penalties provided no redress for the harms alleged.[172]

The decision in *Friends of the Earth* raises several important issues regarding the future of citizen suits in a post-*Steel Company* era. First, the decision in *Friends of the Earth v. Laidlaw* is not uncommon in its procedural dynamics. Litigation over environmental issues often stretches out over several years during which facilities come into compliance. This often occurs because it is in a polluter's interest to drag things out so that it can show a history of compliance

166. 149 F.3d 303, 305 (4th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3364 (U.S. Mar. 1, 1999) (No. 98-822).

167. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 600-01, 610 (D.S.C. 1997), *vacated*, 149 F.3d 303 (4th Cir. 1998).

168. *See id.* at 610-11.

169. *See id.* at 611-12.

170. *See id.*

171. *Friends of the Earth, Inc.*, 149 F.3d at 305. FOE did not submit a claim for injunctive and declaratory relief upon appeal.

172. *See id.* Prior to *Steel Company*, the Fourth Circuit noted that penalties were a sufficient form of redress due to their ability to deter future violations. *See id.* at 307 n.4 (citing Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988)). However, *Steel Company's* dismissal of the remedial power of civil penalties acted as a "superseding contrary decision of the Supreme Court." *Friends of the Earth*, 149 F.3d at 307 n.4.

that renders declaratory and injunctive relief unnecessary. This is precisely the situation that occurs in EPCRA litigation where polluters can easily cure violations in as little time as the sixty-day notice period. Having put declaratory and injunctive relief aside, plaintiffs are then protected by the shield of redressability, no matter what stage of litigation is being commenced. The *Laidlaw* court stated that all three elements of redressability must be met, "at every stage of review, not merely at the time of filing the complaint."[173] Furthermore, the *Laidlaw* court held that FOE was not entitled to reasonable attorneys fees because it was unable to obtain a judgment on the merits.[174]

This application of the *Steel Company* decision demonstrates that citizen plaintiffs will no longer be armed with the remedies traditionally afforded by statute. To the contrary, the Court has signaled its willingness to find redressability wanting even where injury and causation have been proven. Similarly, it will not be sufficient for plaintiffs to provide grounds whereby their injuries would be redressed by the deterrent characteristics of the remedies sought. Generally, deterrence will not provide a remedy for past wrongs committed by a polluter unless a plaintiff successfully alleges an imminent threat of future violations. This threat is almost impossible to show when litigation drags on while the defendant cures its violations. The fact that the *Steel Company* court held that the imminent threat of future violations may not be established by showing a history of failures to comply with the law provides another complication. In this regard, it may be unnecessary for a facility to fully comply throughout litigation, as long as the facility is not in violation at the time a suit is before a court.

Unable to bring an action to deter future violations, plaintiffs asking for injunctive relief will be constrained to the situation where ongoing violations are occurring. The question then becomes whether the issuance of injunctive relief is sufficient to trigger recovery of the litigation costs. The plaintiffs must be "substantially prevailing" parties to recover the costs of litigation. This question arises because most defendant facilities will begin working towards compliance with the law after they have been served with notice letters. Courts will then have to decide the extent to which the award of injunctive relief truly changes the state of affairs regarding the polluter's conduct. If it will not substantially alter a polluters conduct, courts may deny

173. *Id.* at 306.
174. *See id.* at 307 n.5.

litigation costs. It is uncertain whether other circuits will embrace the *Laidlaw* decision, but for the time being there seems little reason why they should not. In light of the ramifications, citizen plaintiffs will be wary of taking on cases likely to be dismissed without costs.

V. LEGISLATIVE REMEDY

It should now be devastatingly clear that a legislative remedy is needed to preserve the sanctity of citizen suits. Fortunately, Justice Scalia has provided some direction in this matter. In *Lujan v. Defenders of Wildlife*, he indicated that Article III standing could be conferred on a plaintiff if the Government had created a private party action "for the Government's benefit, by providing a cash bounty for the victorious plaintiff."[175] It is conceivable that the citizen suit provisions of all environmental statutes could be amended, therefore, to allow citizen plaintiffs to receive a percentage of the designated penalties under the Act for themselves. This would allow citizen suits to proceed beyond the standing inquiry in vindication of their right to penalties.

This concept is not new. The Supreme Court has acknowledged the constitutionality of informer's actions, or *qui tam* actions, in which a private person sues another private person, seeking the payment of a fine to the government plus a bounty to the plaintiff.[176] In the typical *qui tam* action, the plaintiff need not show injury-in-fact.[177] In 1992, the Court "went out of its way to avoid drawing into question such 'case[s] in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit.'"[178] As a matter of judicial reasoning, therefore, it makes good sense to incorporate a private bounty into environmental statutes.

One statute incorporating a bounty provision, the False Claims Act, allows for private citizens to take legal action if the Government fails to do so within sixty days, and provides the successful plaintiff with costs and fees as well as a percentage of the penalties assessed.[179] In relevant parts, the False Claims Act states:

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175. 504 U.S. 555, 573 (1992).

176. *See* Respondent's Brief, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No.96-643) (1997 WL 348462, *29).

177. *See id.* (citing United States v. Richardson, 418 U.S. 166 (1974)).

178. Brief for Respondent, *supra* note 95, at *29 (quoting *Defenders of Wildlife*, 504 U.S. at 573).

179. *See* 31 U.S.C. § 3730 (b)-(d) (1997).

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only of the Court and the Attorney General give written consent to the dismissal and their reasons for consenting.[180]

Furthermore, the Act stipulates awards to the plaintiff as a percentage of the overall judgment:

> If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. . . . Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.[181]

Amending environmental statutes, including EPCRA, to encompass a bounty provision would undoubtedly solve the problems associated with redressability, while at the same time providing environmental groups a greater incentive to pursue violators.

Amending EPCRA in this manner would allow citizen organizations like CBE to be compensated not only for prosecuting their cases to a successful resolution, but also for bringing violations to the attention of federal officials.

Of course, this alternative may not solve all of the problems posed by the decision in *Steel Company*. It is important to remember that the majority decision, written by Justice Scalia, declined to address the case on its merits, and that Justice Stevens' concurring opinion decided the merits question in favor of the Steel Company.[182] This may mean that, even if the redressability problems posed by the legislation can be solved, the problems posed by *Gwaltney* may remain. Presumably, however, if it is possible to get Congress to amend the citizen suit provisions of environmental statutes to incorporate a bounty provision, it would not be too difficult to get the courts to include an amendment to EPCRA explicitly allowing for retroactive applicability of the Act.[183]

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180. *Id.* § 3730(b)(1).
181. *Id.* § 3730(d)(1).
182. *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1011, 1032 (1998) (Stevens, J. concurring).
183. *See* Respondent's Brief, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (1997 WL 348642, *33).

VI. CONCLUSION

In the most basic respect, society is injured by the decision rendered in *Steel Company*. Basic concepts like democracy and the government's regard for the health and safety of communities were initially incorporated into EPCRA and now have been placed in limbo. There is no indication that a legislative remedy is forthcoming. Industry has been given an incentive not to comply with the requirements of EPCRA. In essence, we citizens have been returned to the pre-EPCRA state of information gathering. The EPA is unable to fully enforce all of the requirements of EPCRA. This is the very reason that the Agency has mostly left EPCRA enforcement to citizens. The prospect of this situation is frightening. Without emergency preparedness and response constantly evolving alongside the development of industry, we risk a Bhopal-style accident.

To adequately predict the far-reaching implications of the *Steel Company* decision, we may only have to wait. The *Laidlaw* decision, however, provides a disturbing glimpse into the future of the citizen suit.