2013

EPCRA: A Retrospective on the Environmental Right-to-Know Act

Danielle M. Purifoy
Harvard Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/yjhple

Part of the Health Law and Policy Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Danielle M. Purifoy, EPCRA: A Retrospective on the Environmental Right-to-Know Act, 13 Yale J. Health Pol'y L. & Ethics (2013). Available at: https://digitalcommons.law.yale.edu/yjhple/vol13/iss2/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Health Policy, Law, and Ethics by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
EPCRA: A Retrospective on the Environmental Right-to-Know Act

Danielle M. Purifoy*

ABSTRACT:

October 2011 marked the 25th Anniversary of the Emergency Planning and Community Right-to-Know Act (EPCRA), which was celebrated for its "significant role in protecting human health and the environment over the last quarter century by providing communities and emergency planners with valuable information on toxic chemical releases in their area." This Note aims to evaluate the effectiveness of three important provisions of the statute—the Toxics Release Inventory, the emergency planning mandate, and the citizen suit provision—through a case study of their implementation in Institute, West Virginia, the site of an industrial accident that prompted the enactment of EPCRA in 1986. This Note argues that although EPCRA made significant improvements to industry transparency in terms of its production and release of hazardous substances, there remain significant barriers concerning adequate resources, informational tools, and enforcement measures. These challenges must be addressed to ensure that citizens are provided with equitable opportunities to inform and ultimately protect their communities from health and environmental hazards. Through interviews with Institute residents and members of a local community advocacy group, along with analyses of the current informational tools available to the public under the statute, the Note will discuss specific challenges facing industrial communities, and offer a series of practical and legal solutions to increase the effectiveness of the statute, particularly in the most economically and politically vulnerable communities.

* J.D. Harvard Law School, 2012; Ph.D. Student, Duke University. The author is indebted to Maya Nye, Sue Davis, Donna Willis, Pam Nixon, Warne Ferguson, and Gus Nelson for their invaluable contributions throughout this project and their hospitality in Institute, West Virginia. Special thanks to Dean Martha Minow, Dr. Deborah Rigling Gallagher, and the staff of the Yale Journal of Health Law, Policy, and Ethics for their helpful comments and criticisms.

# Table of Contents

**INTRODUCTION: OUT OF DISASTER, A NEW EMERGENCY PLANNING REGIME** .............................................................................................................. 377

I. INSTITUTE, WEST VIRGINIA AND UNION CARBIDE: A BRIEF HISTORY ... 383

II. EPCRA IN INSTITUTE: HOW EFFECTIVE? .......................................................... 387

   A. TOXICS RELEASE INVENTORY: AN EQUAL RIGHT TO KNOW? ........... 388

   B. EMERGENCY PLANNING AND RESPONSE: IS INSTITUTE SUCCESSFUL? .... 399

   C. CITIZEN SUITS: WHAT DOES THE STEEL CO. DECISION MEAN FOR EPCRA’S FUTURE? .............................................................................................................. 405

CONCLUSION ........................................................................................................... 415
INTRODUCTION: OUT OF DISASTER, A NEW EMERGENCY PLANNING REGIME

On August 11, 1985, a Union Carbide chemical manufacturing facility released mass quantities of methylene chloride and aldicarb oxime in the town of Institute, West Virginia, injuring six plant workers and sending 135 residents to area hospitals. The incident occurred less than one year after Union Carbide’s sister plant in Bhopal, India leaked several tons of methyl isocyanate (MIC), killing more than 3,800 people, and causing an estimated 15,000-20,000 premature deaths from exposure over a twenty-year period. In response to these two incidents, public protests around industrial accountability, and the specter of a Bhopal-like disaster in the U.S., Congress passed the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), which aimed to “help communities plan for emergencies involving hazardous substances” by creating requirements for local emergency plans, and community right-to-know laws to ensure that residents are provided with information on chemicals produced and emitted from local facilities.

EPCRA is unconventional in that its objective is not the classic “command and control” of environmental impacts that characterize many environmental statutes from the 1970s like the Clean Air Act and the Clean Water Act. The Act has four main goals. It sets requirements for: (1) emergency planning at the state and local levels, (2) emergency emissions notifications, (3) reports on the storage and transportation of threshold quantities of hazardous chemicals; and (4) yearly reports of toxic releases of listed chemicals above threshold levels. Beyond these requirements, industries have no express obligations under the statute to mitigate releases or to reduce risks to their employees and their surrounding

7 Many environmental statutes (e.g., Clean Air Act and Clean Water Act) are characterized as “command and control,” which means that regulated entities are required to comply with specific “ambient standards, source-specific emission limits, or technology requirements.” Nat’l Ctr. for Envtl. Econ., Economic Incentives for Pollution Control: Command and Control, EPA, http://yosemite.epa.gov/ee/ecaeeed.nsf/webpages/EconomicIncentivesPollutionControl.html (search “Command and control” in NCEE Custom Search box) (last updated April 14, 2013). EPCRA imposes no such standards or controls on regulated industries, regardless of the level of reported emissions. It simply compels the disclosure of information on those emissions.
communities. Nevertheless, as detailed below, this “toothless” statute has been instrumental not only in improvements in industry transparency to its neighbors and the larger public. Also, and perhaps unexpectedly, in increased self-policing by many industries of their emissions, both to appease investment stakeholders and to prevent costly waste from inefficiencies at their facilities.

It is now widely accepted that there is a fundamental link between public health risks and the condition of the physical environment. Genetic factors undoubtedly play a role in the development of chronic disease, but “70 to 90% of disease risks are probably due to differences in environments.” Environmental exposures to air and water toxics, occupational hazards, and behavioral patterns, such as dietary choices and stress levels, effectively alter the physiology of the body. This creates an “internal chemical environment” more or less conducive to the development of chronic diseases such as heart disease, cancer, and lower respiratory diseases, the top three causes of death in Americans. EPCRA yields information that can be critical in assessing the relationship between environmental health and public health. It also highlights the impact of environmental burdens, such as chemical production facilities, on the health and quality of life of the nation’s fenceline communities, many of which are segregated along race and class lines and politically marginalized.

A 2008-2009 report by the President’s Cancer Panel identified three key challenges to mitigating environmental cancer risks: “limited research on environmental influences on cancer; conflicting or inadequate exposure measurement, assessment, and classification; and ineffective regulation of environmental chemical and other hazardous exposures.” Considering these obstacles, EPCRA’s industrial emissions data, particularly from the Toxics Release Inventory (TRI), can be an indispensable and invaluable resource in research on the linkages between toxics and exposures and risks of cancer and other chronic diseases.

9 Id.
10 See JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM 80 (2005) (“Citizen group and industry respondents often agreed on the overall impacts of TRI data use. More than half the respondents in each of the categories agreed that the release of the TRI led to source reduction efforts at reporting plants, media coverage of the toxic releases, and the prompting of industry-citizen meetings.”).
12 Id.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

Such data are also critical in identifying and analyzing disparities in levels of industrial emissions and their attendant exposures in communities characterized by non-white populations, low socioeconomic status, and political disenfranchisement. Indeed, the origins of the statute itself are rooted in the narrative of environmental injustices occurring disproportionately in low-income communities and communities of color. The Union Carbide disasters in Bhopal and Institute, and numerous instances of siting environmental disamenities in historically marginalized communities, such as the 1982 placement of a PBC-contaminated soil landfill in a majority African American community in Warren County, North Carolina, spurred the development of the grassroots environmental justice movement in the 1980s. This movement is concerned not only with distributional inequalities in environmental burdens and benefits, but also with enhancing the people’s right to know about the potentially hazardous environmental exposures in their own backyards. Environmental justice advocates, including members of what became People Concerned About MIC (PCMIC), an Institute-based environmental health advocacy group, were instrumental in EPCRA’s passage in 1986, providing critical media coverage and Congressional testimony in Institute about their experiences with their industrial neighbors.

Twenty-five years later, EPCRA’s informational mandate is more salient than ever to the cause of environmental justice, as environmental and public health scholars continue to discover linkages between race, class, place, and environmental and health outcomes. Several studies have confirmed the fact that communities segregated by race and class are “disproportionately likely to live in

16 Id.
17 Environmental justice, as defined by the EPA, is

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

18 See, e.g., Abbey Zink, A Decade Later Chemical Industry Still Answering Bhopal, 10 ST. J. (Charleston, W. Va.), Dec. 1994, at 1. Because the Union Carbide plant in Institute was the only facility in the U.S. that produced MIC, the small town received a torrent of media attention from major print and television media outlets, as described in a 1985 documentary by John Gaventa and Juliet Merrifield. NO PROMISE FOR TOMORROW: COMMUNITIES RESPOND TO THE BHOPAL TRAGEDY (Highlander Center 1985).
environmentally hazardous neighborhoods." Even apart from the impacts of such hazards on physical health outcomes, as discussed above, a 2005 study found an association between residential proximity to industrial activities and increased levels of psychological distress, connected to "perceptions of individual powerlessness and neighborhood disorder." Another recently published study, on the relationship between black/white racial segregation and lung cancer mortality rates in the U.S., revealed that African Americans living in highly segregated communities had lung cancer mortality rates 10% higher than African Americans living in the least segregated communities, even after controlling for smoking behaviors and socioeconomic differences. The authors of the study noted several possible explanations for these disparities, such as unequal access to health care services or differences in biological responses to smoking and other environmental elements, and they suggested a focus on the physical environment to help diminish these unequal outcomes. As the study's lead author stated, "If you want to learn about someone's health, follow him home."

But beyond the statute's utility for further important research on environmental and public health impacts of industrial activities, much of EPCRA's power derives from its role in facilitating proper emergency preparedness and industry accountability to impacted communities. By understanding the implications and risks associated with reported emissions, along with comparative outcomes among industries in different neighborhoods, citizens can be more effective at protecting themselves during industrial emergencies and advocating against industrial abuses, thus placing them on a more even playing field with their powerful industrial neighbors.

This Note will evaluate EPCRA's effectiveness for advancing citizen awareness and advocacy, emergency preparedness, and citizen enforcement of its informational mandate. It will focus on three key provisions of the statute: the Toxics Release Inventory (TRI), the Local Emergency Planning Committees (LEPCs), and the enforcement powers of the citizen suit provision. Additionally,

---


21 Hayanga et al., supra note 19, at 40. By contrast, lung cancer mortality rates for white Americans living in highly segregated communities were 3% lower than white Americans living in the least segregated communities. Id. Lung cancer leads in rates of mortality among all forms of cancer, and African Americans have the highest lung cancer mortality rates of all racial demographics. See id. at 37.

22 See id. at 41.

EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

interviews with members of the Institute advocacy organization PCMIC will provide context for the challenges of implementing EPCRA, particularly in under-resourced, politically disenfranchised communities.\(^\text{24}\)

Part II will provide a brief history of the small, unincorporated, and predominantly African American town of Institute, its relationship with the former Union Carbide plant (now Bayer CropScience), and the recent litigation leading to elimination of MIC storage and production at Bayer. Next, Part III will provide a critique of the aforementioned provisions of EPCRA, as well as several recommendations for improving the transparency and effectiveness of the Act. First, the TRI, the statute’s standout provision, has provided researchers, the media, and to a certain extent, citizens with unprecedented information about the types and quantities of chemicals produced and released into the environment by most industries in the nation. Improvements in personal technology, such as computers and smartphones, have spurred the development of powerful tools that translate TRI data in ways that have aided health and environment researchers in advancing their scholarship, and have the potential to provide citizens with more powerful, nuanced, and easily accessible information about facility emissions and their attendant health and environmental impacts. However, technological and educational barriers diminish their potential utility for many of the most impacted citizens, ultimately detracting from the central purpose of the statute—supporting the public’s right to know about harmful emissions in their local environment. If EPCRA is to fulfill this purpose, the Environmental Protection Agency (EPA) must consider and accommodate these challenges in the future development of TRI tools. To this end, public facilities like local libraries, outfitted with the necessary technology (and analog forms of the same information) along with trained personnel, are essential to closing this access gap. Additionally, the EPA could better utilize existing forms of information, such as the highly readable and detailed chemical profiles included in the Material Safety Data Sheets (MSDS) mandated by the U.S. Occupational Safety and Health Administration (OSHA). This would allow citizens to better identify and understand the risks associated with chemicals produced in their communities.

\(^{24}\) Interviews were conducted via email at various times and in Institute, W. Va., on October 7-9, 2011, with five members of PCMIC:

1) Sue Davis, native of Institute, original member of PCMIC;
2) Donna Willis, native of Institute, original member of PCMIC;
3) Maya Nye, native of St. Albans, W. Va. in the Kanawha Valley, member of PCMIC since the late 1990s;
4) Pamela Nixon, native of Charleston, W. Va. in the Kanawha Valley, original member of PCMIC and Environmental Advocate, West Virginia Department of Environmental Protection (WVDEP); and
5) Warne Ferguson: native of Institute, original member of PCMIC.
Second, EPCRA’s crucial state and local emergency planning mandate is vastly under-resourced. The required Local Emergency Planning Committees (LEPCs) are staffed by volunteer citizens and safety professionals on top of their existing commitments. They must contribute many hours not only to developing effective emergency plans for large communities, but also to processing citizen requests for information pursuant to EPCRA’s other provisions. LEPC duties have increased in the wake of 9/11 and Hurricanes Katrina and Rita, as they were required to incorporate contingency plans for natural disasters and terrorist attacks into their existing industrial emergency plans. Where resources do exist, they are generally sparse and allocated on a competitive basis. Unsurprisingly, these conditions result in many defunct or nearly defunct LEPCs across the country, further undermining the purpose of the statute. To create the proper safeguards against all hazards, as expressly intended in the statute, Congress must provide adequate, non-competitive financial and technical resources to LEPCs, and mandate cost sharing by state governments. Finally, it will be critical for citizens and governments to collaborate in the stringent enforcement of EPCRA’s informational mandate, as effective emergency plans are contingent upon the availability of information on local industries.

Third, EPCRA’s citizen suit provision, which expressly allows citizens to sue facilities on behalf of the government for non-compliance with the statute, has been effectively defunct since the Supreme Court’s 1998 ruling in Steel Co. v. Citizens for a Better Environment,25 which held that citizen-plaintiffs lack Constitutional standing to litigate wholly past violations of EPCRA. The ultimate impact of this decision is that citizens have no recourse to hold industries accountable for failing to file the required information on time. Information related to chemical hazards is most valuable when it is timely. Stripping citizens of their ability to punish companies that miss the deadlines leaves little incentive for industries to ever file on time. Without timely information, LEPCs cannot create informed emergency plans, citizens are hindered in their efforts to keep industries accountable for their emissions, and researchers’ efforts to create new knowledge about industrial impacts on the environment and public health are severely thwarted. To restore integrity to EPCRA, Congress must amend the citizen suit provision to expressly allow suits for wholly past violations of the statute.

Finally, the Conclusion provides a brief summary of EPCRA’s challenges and the main proposals for improvement. The central argument of this Note is normative: EPCRA is an invaluable resource for building knowledge about industry impacts and creating comprehensive emergency plans for all communities. It also has the potential to empower thousands of fenceline communities with information to hold neighboring industries accountable for

their impacts on citizen and environmental health. But to reach those ideals, it must be revised, and its implementation strategies must change. The EPA must develop informational tools that are both physically and interpretively accessible to those who are most impacted by industry practices. Congress must allocate direct, adequate, and non-competitive funding to LEPCs so that they can properly and comfortably fulfill their important purpose. And Congress must amend the citizen suit provision of the statute to allow citizens to hold industries accountable for failing to abide by the express information deadlines in the statute.

I. INSTITUTE, WEST VIRGINIA AND UNION CARBIDE: A BRIEF HISTORY

Located along the Kanawha River, approximately nine miles from the state capital of Charleston, Institute is an unincorporated community in the center of what is known as “Chemical Valley” due to the more than 20 chemical manufacturing facilities surrounding the several towns located there. By population metrics like the U.S. Census and county demographic records, it is effectively an invisible town, due to both its unincorporated status and its racial demographics. Although Institute is only one of several other unincorporated towns in the area, it is the only majority African American town in the Kanawha Valley. By contrast, almost 90% of the Kanawha Valley identified as white in the 2010 Census.

The African American community in the Kanawha Valley was established in the 1800s and quickly became known for its landownership. Pursuant to the

28 According to the Philadelphia Region Census Bureau, which collects West Virginia census data, Institute is not large enough to be designated as a Census Designated Place, and is thus counted as part of a larger geographic area in Kanawha County. Telephone Interview with Kevin Holmes, U.S. Census Bureau, Phila. Region (Apr. 23, 2013). The West Virginia Department of Health and Human Resources, which collects census data, was only able to provide one census tract for Institute (Tract 104), but stipulated that the area could encompass more than one tract. Telephone Interview with Tom Light, Programmer for Statistical Services, W. Va. Dep’t of Health and Human Res. (Apr. 23, 2013). Kanawha County itself is 89.2% white, and 7.4% black. State & County QuickFacts: Kanawha County, West Virginia, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/54/54039.html (last updated Mar. 11, 2013). Institute, as affirmed by all of the PCMIC members, most of whom have lived in Institute since World War II or earlier, is approximately 90% black. See also BULLARD, supra note 27, at 51 (“Blacks compose over 90% of the community’s population.”). Although the other unincorporated communities in the area are not represented in the demographic data, they are majority white, and are thus adequately captured in the demographic profile of the area.
29 U.S. CENSUS BUREAU, supra note 28.
30 See BULLARD, supra note 27, at 51.
Second Morrill Act of 1890, the community residents successfully petitioned the state legislature to site the West Virginia Colored Institute near where they had already bought homes and formed neighborhoods. The community was named Institute after the school.

Siblings Sue Davis and Warne Ferguson are native residents of Institute, and belong to a prominent family of landowners and educators in the area. The story of the land their uncle owned, which is where the Bayer plant is now located, is well documented. In 1930, he sold the land to the state to build the historic Wertz Field, the “first airport in the Charleston area to offer scheduled airline service.” After World War II began in 1939, the Wertz Field was used increasingly to train military pilots through the National Civilian Pilot Training Program, including a number of Tuskegee Airmen, who were students at West Virginia State College. When the federal government purchased the property in order to build a rubber factory to support the war effort, however, Davis and Ferguson’s uncle sued, claiming a violation of a covenant ensuring the land would not be used for anything other than the Wertz Field. He was paid $27,000 to drop the claim. “If my uncle knew then what his land is being used for now,” Davis asserted, “he never would have sold.”

Union Carbide purchased the plant in 1947 and still operates a portion of it today, although ownership of the facility is now shared among several chemical firms, such as Praxair and Dow Chemical Company. From its inception, the plant proved to be a source of fear and resentment to the Institute community, which was transforming from a thriving center of education and power for African Americans into a dangerous industrial town.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

It's been hell. In 1954 was our first disaster. The skies from that plant lit up like the sun... it was completely orange as far as you could see in the Institute area. My sister was living by herself and I was in Charleston. I got as far away as Dunbar and could still see the orange. I went to her and we ran outta there. She got sick, and eventually died of emphysema. 43

Although the community was deeply concerned with the chemical threat of the Union Carbide plant, efforts to organize and advocate for industry accountability did not fully emerge until the subsequent incidents in Bhopal and Institute. 44 Several community members, including Davis, Willis, and Ferguson, formed People Concerned About MIC (PCMIC) shortly after Bhopal, when they discovered that Union Carbide also stored MIC at the Institute plant. 45 Fears about industrial safety, health impacts of MIC and other chemicals, and the possibility of a Bhopal-like disaster spread through the country, particularly after the 1985 Union Carbide accident. 46 This gave strong credence to the emerging environmental justice movement, which identified inequalities in environmental burdens suffered by poor communities and communities of color. 47 The public outcry galvanized Congress, which sent a small delegation of representatives, including Senator Henry Waxman of California and Representative Bob Wise of West Virginia, to Institute to investigate. 48 Pamela Nixon, an Institute resident who got involved in PCMIC after Bhopal and lives in close proximity to the facility, witnessed firsthand Union Carbide’s denial of any potential parallels between the facilities in Bhopal and Institute.

[After Bhopal], Union Carbide was saying that nothing like that would happen in Institute. And when 135 people ended up going to the hospital [after the Institute leak], the plants ended up

44 Interview with Pam Nixon, supra note 41.
45 Id.
46 See Rebecca S. Weeks, The Bumpy Road to Community Preparedness: The Emergency Planning and Community Right-to-Know Act, 4 EnvTL. Law. 827, 833 (1997-98) ("As a result of these accidents, in 1985 and 1986, Americans became increasingly concerned about the activities of the chemical factories next door. One newspaper described the general attitude as 'chemophobia'.").
47 Although communities had been advocating against disparate environmental impacts since the 1960s, the environmental justice movement began in 1982 with a protest against a landfill in Warren County, N.C. in which "more than 500 people were arrested, the first arrests in U.S. history over the siting of a landfill." Skelton & Miller, supra note 15.
48 Interview with Pam Nixon, supra note 41.
saying, 'you can’t compare that to Bhopal.' PCMIC had meetings every week to have them explain the releases to the public.49

Nixon, Davis, and several other PCMIC members participated in Congressional hearings on the incidents, providing their observations and demands for greater industry accountability for the health and safety of the communities surrounding their facilities.50 EPCRA emerged in 1986 as a type of covenant between facilities and their communities for increased communication about the dangers posed by the chemicals produced and emitted, and for greater collaboration to make effective emergency plans.

Because EPCRA’s provisions only govern public access to information and emergency planning, organizations like PCMIC cannot use the statute itself as an action-forcing tool for pollution prevention in the same way it could use other environmental statutes, such as the Clean Water Act or the Endangered Species Act.51 What EPCRA can do—and arguably did do in Institute—is provide a means of keeping industry activities and performance standards in the public spotlight to force companies to consider self-regulation to maintain shareholder support, to build important community relations, and to reduce the costs of wasteful production.52 Thus, despite continuous malfeasance by what is now Bayer CropScience, as documented by Nixon in her capacity at the West Virginia Department of Environmental Protection (WVDEP),53 PCMIC was able to incite public scrutiny of the storage and emissions of MIC in the community.

The organization’s efforts reached a critical crossroads on August 28, 2008, when an explosion at Bayer’s Larvin pesticide unit killed two workers and released unknown quantities of toxic chemicals into the neighborhood, causing a fire that burned for more than four hours.54 The residue treater that exploded was propelled into the air by a runaway chemical reaction, 70 feet away from the aboveground MIC storage tank.55 Ferguson’s wife, who was at home during the incident, developed breathing troubles a few days later and died within two

49 Id.
50 Id.
51 Indeed, whereas the Clean Water Act and the Endangered Species Act govern actual environmental harm, EPCRA is simply an information mandate. One critique of the statute is that it does not offer a cause of action to actually reduce the emissions that ultimately cause emergencies, however egregious those reported emissions may be. See Abrams & Ward, supra note 2, at 136-38.
52 See HAMILTON, supra note 10, at 80.
53 Interview with Pam Nixon, supra note 41. Ms. Nixon discussed several permit violations of and enforcement actions against the plant from the 1980s to the present.
55 Id. at 7.

386
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

months. Similarly, a student at West Virginia State University, who was living in a dorm on the side of campus farthest from the plant, died of respiratory illness a few days after the explosion.

In the spring of 2011, PCMIC members and other residents filed suit against Bayer to enjoin further storage or use of MIC at the plant. The federal district court granted a preliminary injunction against MIC production pending Bayer’s implementation of recommendations made by the U.S. Chemical Safety Board (CSB), which determined that the explosion was caused by poor safety protocols, untrained operations personnel, and malfunctioning equipment. Submitting to pressure from the public and threats of further investigations by the CSB and the EPA, Bayer decided to phase MIC out of its production processes in 2011. For members of PCMIC, the victory was a bittersweet end to the lengthy, heavily resourced battle for accountability from Union Carbide and Bayer.

[W]e were kind of sad we didn’t get to beat them in court. But even though we weren’t the ultimate reason they quit using MIC, we felt that we still made an impact by keeping the public informed about it.

II. EPCRA IN INSTITUTE: HOW EFFECTIVE?

EPCRA has four central mandates: emergency planning at the state and local levels, emergency emissions notifications, public reporting of storage and transportation of hazardous chemicals by industrial facilities, and the maintenance of a toxics release inventory to inform the public about certain hazardous substances being released into communities. As with most environmental statutes, Congress also added a citizen suit provision to EPCRA, allowing private causes of action for industry non-compliance with the informational mandates of the statute.

58 See Ferguson, 2011 WL 4479008, at *1.
59 Id.
60 See CSB REPORT, supra note 54, at 3.
61 See Jeff Johnson, Methyl Isocynate: Bayer Ends Use of Infamous Chemical at West Virginia Plant, CHEMICAL & ENGINEERING NEWS, Mar. 25, 2011, at 10.
62 Interview with Maya Nye in Institute, W. Va. (Oct. 9, 2011).
64 See id. § 11046(a)(1).

387
Prior to EPCRA’s passage in 1986, there was no federal mandate for emergency preparedness for industrial disasters. 65 States varied widely in their levels of planning. In New York, for instance, witnesses at public hearings in the wake of the Bhopal disaster “recounted responses [to previous incidents] that were dominated by confusion, fear, and lack of information.” 66 Institute was supported by a local emergency committee for 34 years prior to the passage of EPCRA, but the Kanawha Valley Industrial Emergency Planning Council membership included only industrial groups and the West Virginia State Police 67 before the 1985 Union Carbide accident.

Similarly, public right-to-know laws mandating compulsory industry reporting of hazardous materials and toxic emissions were codified only at the state level prior to 1986, and as such, there were no federally mandated baseline standards for reporting and enforcement. 68 The birth of EPCRA thus heralded a significant power shift for regulators, public health experts, environmentalists, and concerned citizens, who were given unprecedented access to information that could be used to force corporate responsibility, make practical decisions about where to live, and evaluate wasteful chemical production processes. 69 The statute is commendable for using information technology to improve industrial transparency, but implementation faces many practical and political challenges. This is particularly true in communities like Institute, which are dominated politically and economically by large industries, and lack adequate public representation of their interests.

The following Sections use the example of EPCRA’s implementation in Institute to offer a critique of three of the statute’s most important provisions: the Toxics Release Inventory, local emergency planning, and citizen enforcement of the statute.

A. Toxics Release Inventory: An Equal Right to Know?

Perhaps the most celebrated of EPCRA’s provisions is the Toxics Release Inventory (TRI). The first regulatory mandate requiring a “publicly accessible online computer system,” 70 TRI reports yearly emissions, transfers, and disposals

65 See Abrams & Ward, supra note 2, at 144.
66 Id. at 156.
67 History, KANAWHA PUTNAM EMERGENCY PLANNING COMMITTEE, https://www.kpepc.org/Home/Who-Are-We/History.aspx (last visited Apr. 15, 2013). Kanawha County had an emergency planning committee prior to EPCRA, which restructured to meet the federal requirements for Local Emergency Planning Committees (LEPCs) after the passage of the statute.
68 See Abrams & Ward, supra note 2, at 151-56.
69 See Hamilton, supra note 10, at 248-49.
of over 650 hazardous chemicals from more than 20,000 U.S. facilities. The 1990 Pollution Prevention Act expanded TRI reporting requirements to include information about how facilities manage chemicals in their waste and recycling processes. Users of TRI data can determine the volume of yearly chemical emissions and the percentage released into each environmental medium (air, water, land), as well as pollution reduction efforts by individual facilities. To maximize its effectiveness, however, the EPA must prioritize citizen access to both the raw data and the interpretive tools developed to assess the impacts of the emissions, and should incorporate existing data on public health, chemical characteristics, and community demographics to provide a comprehensive picture of industrial impacts and any resulting disparities.

Understanding the extent of pollution gives environmentalists, community advocates, and government agencies substantial leverage to negotiate higher emissions standards and to reduce negative environmental impacts. As early as 1993, five years after the release of the first TRI data, researchers and policymakers observed significant changes not only in the EPA’s environmental agenda, but also in the relationship between the agency and citizen advocates.

Experience with TRI has shown that public access assists EPA in achieving its mission of environmental protection in three distinct ways. First, the public becomes active in pursuing issues, such as pollution prevention, thus enriching the resource base of the agency. Second, public access helps EPA personnel pursue a more coordinated approach to enforcement and to understand what is occurring in other sections of the agency. Finally, public access improves data quality, thereby improving program enforcement.

Emissions data reflect substantial yearly decreases in total facility emissions since the passage of the statute. In 1988, the base year chosen by the EPA for the program, approximately 20,000 facilities reported on-site emissions and transfers of more than 300 listed chemicals with an aggregate total of 6.2 billion pounds. By 2011, 21,000 facilities reported releases and transfers of 650 listed chemicals, but the total only came to 4.1 billion pounds.

---

73 TRI Program Fact Sheet, supra note 71.
74 Bass & MacLean, supra note 70, at 303.
75 See Hamilton, supra note 10, at 59, 75-76.
76 See TRI Program Fact Sheet, supra note 71.
The caveat to such progress, however, is that these data raise many critical questions, particularly about reliability and whether the statute, as opposed to other incentives, has been a true impetus for these reductions. TRI data are self-reported by facilities, which use different mechanisms to measure releases, including engineering calculations and best judgment. Actual reductions may be exaggerated or undervalued by changes in monitoring methodology, production processes, or reporting requirements. Also, because there are many chemicals not covered under TRI, facilities can choose to replace reportable chemicals with those that are still unlisted, so as to avoid public scrutiny.

Despite these challenges, TRI remains a critical tool for bolstering public awareness of and corporate accountability for environmental harm and public health risks. To increase the program’s efficacy, it is imperative that communities obtain equitable access to new tools and information generated for clearer, more nuanced interpretations of the data.

TRI data are available to the public in diverse forms, from paper reports to extensive electronic spreadsheets, as well as online databases. The databases are designed to manipulate multiple forms of data, such as health and geographic information, to identify patterns and trends. PCMIC uses the basic data to compare releases reported by Bayer CropScience with other records the facility must provide for permits under other statutes. This information provides a backup measure to ensure the integrity of the facility’s emissions reporting, and to show the “company’s pattern and propensity towards repeat offenses.”

The raw emissions data do not, however, provide enough context. Informed public decision making requires information beyond these raw numbers, such as exposure levels and pathways, or the health and safety implications of the emissions levels. The EPA itself acknowledges the limitations of its data, cautioning TRI users that the information as presented is “inadequate to reach conclusions on health-related risks,” and that individual chemicals “must be...
evaluated along with the potential and actual exposures[,] . . . the chemical’s fate in the environment and other factors before any statements can be made about potential risks associated with the chemical or a release.”

This kind of information is particularly critical in Institute, where facility emissions are often strong enough to detect through sight and smell, and residents frequently become ill with various cancers or neurological disorders.

To mitigate this lack of contextual information, the EPA has developed two major data applications: TRI Chemical Hazard Information Profiles (TRI-CHIP), which identifies the health impacts of individual chemicals, and the Risk-Screening Environmental Indicators (RSEI) Model, which uses TRI data to generate trends and patterns of exposure to the toxins that may pose the greatest risks to the public. However, these tools, while technically available to much of the public due to the increased availability of computers and the internet, ultimately lack usability by average citizens. The applications are not compatible with all computers because they may require particular internet browsers (e.g. Internet Explorer), specialized software (e.g. Microsoft Access), administration rights, or extensive computer memory. Users also require some background expertise in health or data analysis to fully benefit from the information generated.

The equity implications of these challenges are clear when one considers that many communities burdened by polluting facilities are also less likely to have the necessary equipment to access these databases, much less the resources to train citizens to properly interpret and use the data in their advocacy. For instance, although Institute is mixed-income and centered around a university, most of the individuals involved in pollution prevention advocacy are older, and many do not have ready access to computers. Moreover, no local programs exist to train computer-equipped citizens on how to read the data and maximize their

84 Id.

85 Interview with Donna Willis in Institute, W. Va. (Oct. 7, 2011). See also Interview with Sue Davis, supra note 34 (“You could go down the streets and count the cancers and neurological diseases by house. There was one case where we had three aneurysms in one household.”).


88 TRI-CHIP for example, requires the user to obtain Microsoft Access to properly use the tool. See TRI-Chemical Hazard Information Profiles, supra note 86. RSEI requires administration rights, Internet Explorer, and a significant amount of memory to operate. See Risk-Screening Environmental Indicators (RSEI), supra note 87.

89 See Richard Engler, Risk-Screening Environmental Indicators (RSEI), EPA 9 (Feb. 13, 2008), http://www.ecos.org/files/3028_file_Engler_Presentation.ppt. Engler’s 2008 presentation highlights the fact that RSEI is used primarily by government agencies, academics, and industries, all of whom typically have the resources required for appropriate RSEI training and physical access to the application itself.

90 Interview with Pam Nixon, supra note 41.
usefulness. The EPA conducts biyearly national trainings for TRI data, but they are quite costly and “too time consuming for the average person.” And although self-tutelage is possible, as demonstrated by Nye and Davis, who learned to read the basic data with some assistance from Nixon, it is ultimately unsustainable as a means of effectively informing the larger public and maximizing the benefits of the more contextualized data available in these complex databases and applications.

One promising TRI tool is an application called myRight-To-Know (myRTK), which is designed for use on the web as well as on web-enabled mobile phones. No additional software is required to operate the program. Users simply enter a location, and the application displays all TRI-reporting facilities in the area on a Google map. A pie chart shows the percentage of overall emissions released from the facility into each environmental medium, and there is a list of emissions volumes for the facility’s reportable chemicals. Each facility is ranked nationally according to its releases, and users can determine what percentage of the county’s total emissions is generated by each facility in the area. Data columns beside each chemical indicate whether it has been associated with cancer or other health effects, a colored graphic indicates the facility’s quarterly compliance status for the last three years, and two final rows indicate the time of the facility’s last full inspection and the number of formal enforcement actions brought against the facility within a five-year period. Finally, the application links to a more detailed facility report, which offers more enforcement and compliance data from other EPA regulatory programs, eight-year TRI reported emissions, and demographic data on communities within a

91 Id.
92 See Email from Maya Nye, supra note 81. The regular registration fee for the TRI Training Conferences is typically around $300, not including travel expenses and lodging. Although travel scholarships are available to waive the registration fee, they are very limited in number. See Environmental Council of States & EPA TRI Program, Annual TRI National Training Conference (2009), available at http://www.docstoc.com/docs/125300375/2009-Annual-TRI-National-Training-Conference. While the TRI Training Conference lasts for approximately three days, it is unclear how much time would be required to master the more complex applications.
93 Email Interview with Maya Nye, supra note 81.
95 Id. Users must search for the facility under the “Search” tab of the application. Facilities are displayed on the “Map” and “List” tabs.
96 Id. To view the data for the individual facility, users must click on the desired facility from the “List” tab.
97 Id.
98 Id.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

one-, three-, and five-mile radius of the facility. The information is available in both English and Spanish.

A search for Institute reveals two TRI-reporting facilities, along with five other facilities with permits for chemical discharges under other EPA programs. Data for Bayer CropScience indicates that the majority of its emissions (548,787 pounds) are discharged into the water, and almost all of the rest (273,699 pounds) are released into the air. Five out of twenty-one reported chemicals are associated with cancer, and all are linked with other unnamed health impacts. In terms of annual chemical releases, Bayer is ranked 88th of 2,959 TRI-reporting chemical industries in the nation. Of thirteen TRI facilities in Kanawha County, Bayer is responsible for 30% of the total TRI releases for the reporting year. The facility’s three-year environmental permit compliance status (October 2009-September 2012) is listed as unknown or unavailable; however, a link to further compliance data (i.e. EPA Enforcement & Compliance History Online (ECHO)) indicates several formal enforcement actions against the plant in the past five years by both state and federal agencies. The ECHO report for Bayer CropScience currently lists no demographic information for the local population, but previous visits to the website in recent years listed the incorrect figure that African Americans comprised only 5.2% of the population within a one-mile radius of the plant.

Health statistics collected by the Centers for Disease Control and Prevention (CDC) are available through a link in the census data, if provided, offering

99 Id. The “Detailed Facility Report” can be found by clicking the “More Compliance Data” link at the bottom of the graphic facility report.

100 Id. The “Search” tab contains an option to switch to the Spanish-language version of myRTK.

101 Id.


103 Id.

104 The list is ranked highest to lowest emitters.

105 Id.


107 Id. The author’s last visit to the website prior to the deletion of this census data was April 2012. Similar data are available in the ECHO report for the Union Carbide facility, which is part of the same industrial complex. See EJView, EPA, http://oaspub.epa.gov/envjust/env_just_ejv/get_geom?report_type=html&census_type=bg2k&caller=self&coords=-81.796850,38.388216&feattype=point&radius=1.0 (last visited Apr. 15, 2013) (noting that African Americans make up 5.2% of the residential population within a one-mile radius). Users can view the health statistics by clicking on the “Health” tab on this page. The census data was likely flawed due to Institute’s unincorporated status, and the fact that the U.S. Census data does not capture unincorporated towns. See supra note 28. The percentage of African Americans in the county is only 7.4%. U.S. CENSUS BUREAU, supra note 28.

393
figures on various disease rates in the county and state, but no indication of whether or how those figures correlate with exposure to toxic emissions. The additional information provided by the National-Scale Air Toxics Assessment (NATA), however, does provide some risk estimates for cancer, neurological hazards and respiratory hazards. CDC statistics collected for Kanawha and Putnam Counties from 1988-92 indicate that death rates from heart disease ranged from 123.5 out of 100,000 people for white females to 302.5 for black males. Similarly, death rates for all cancers ranged from 122.6 per 100,000 people for white females to 214.4 for black males. Perhaps most startling, however, the 2005 NATA risk estimates for Kanawha County were in the 93rd percentile for cancer, in the 90th percentile for neurological hazard risk, and in the 88th percentile for respiratory hazard risk, all of which, with the exception of the neurological hazard risk, were significantly higher than the statewide risk estimates.

Due in large part to its simplicity, myRTK is the most transparent and user-friendly of the TRI applications. For Institute residents, much of what it offers is concrete evidence that reinforces what many already know or suspect: that the Bayer CropScience facility emits a large amount of toxics into the air, that the facility has been a persistent violator of its permits, that the demographic data for the area is misunderstood or wholly inaccurate, and that rates of cancer and neurological disorders in their community are very high. Any new insight to be gained from myRTK is limited by the TRI data: because toxic releases are only available in the aggregate, the data lack details on the rates of releases into the environment and the significance of releases relative to the toxicity of the chemicals, all of which can help communities to establish relative levels of human exposure over time. Further, the CDC health data, while informative, are mostly dated from the 1990s and not contextualized in terms of the TRI chemicals, which might give users a sense of the levels of exposure that are

108 See EJView, supra note 107. Users can view the health statistics by clicking on the "Health" tab on this page.
109 Id.
110 Id. The 2005 neurological hazard risk was in the 94th percentile for West Virginia.
111 Id. The 2005 neurological hazard risk was in the 94th percentile for West Virginia.
112 Interview with Donna Willis, supra note 85. Over the course of the interview, Ms. Willis, who has lived in Institute for her entire life, attested to common knowledge of Bayer CropScience’s permit violations, the communities’ exposure to toxins, the skewed demographic data because of the town’s unincorporated status, and the various health outcomes in the community, namely cancer and neurological disorders.
113 Bass & MacLean, supra note 70, at 302.
114 See EJView, supra note 108. The CDC data offer only general statistics about illnesses in the area, but do not give indications of how health data corresponds to the toxics release data.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

associated with illness. The TRI data in the myRTK application is also undated, so users cannot know whether it is current.115

Ultimately, most citizens, particularly those unfamiliar with TRI, are likely to come away from such data with more questions than answers. Although other resources exist to fill some of the gaps, they are either unincorporated into the more user-friendly applications (e.g. myRTK) such that average users would not know to look for them, or they are made available upon written request to the LEPCs. For example, pursuant to the Material Safety Data Sheets section of EPCRA, facilities must submit information to State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) on all chemicals handled or manufactured subject to the Occupational Safety and Health Administration Act (OSHA), which requires reporting for a larger range of chemicals than TRI.116 Each facility must prepare and submit profiles on each of the OSHA-regulated chemicals it manufactures or stores over a threshold volume. These profiles, called Material Data Safety Sheets (MSDS), contain information on the characteristics of each chemical, its known health hazards, and recommended safety precautions.117 MSDS are available to the public by request to LEPCs or SERCs, although many are linked from the EPA’s website.118 Additionally, data derived from MSDS are incorporated into the more complex EPA databases, such as RSEI and TRI-CHIP, providing important contextual information about individual chemicals and their respective traits and impacts.119 Nixon, who has received training on TRI data, reported that the MSDS are also the most user-friendly tools for the public, as they are simple and readable.120

Facilities must also submit to SERCs and LEPCs annual inventory information on all OSHA-regulated chemicals, including the average daily amount on-site, the maximum amount allowed at any time, and the location of each chemical.121 This information is designed to assist LEPCs in identifying and prioritizing the existing hazards in their communities for the purpose of incorporating them into local emergency plans. However, facilities in many states have discretion to submit the information in two different forms. They may provide either Tier I information, which only contains aggregate chemical volumes by category of hazard, or Tier II information, which is more detailed

117 See Abrams & Ward, supra note 2, at 153.
119 MSDS information is incorporated into TRI-CHIP and RSEI databases. See TRI, supra note 86; RSEI, supra note 87.
120 Interview with Pam Nixon, supra note 41.
121 42 U.S.C. § 11022.
and includes the individual names and locations of chemicals. Although many states now require Tier II information, which is far more useful for community risk assessment and targeted emergency planning, several states still permit facilities to opt for only Tier I disclosures. Further, because of concerns over homeland security, particularly after 9/11, states may restrict public access to such information to an as-needed basis. In West Virginia, for example, Tier II information can only be released after a formal request to the relevant LEPC of the SERC pursuant to the Freedom of Information Act (FOIA), and with the written authorization of the Director of West Virginia Division of Homeland Security and Emergency Management/State Emergency Response Commission. Information may be redacted if it is protected under the federal Protected Critical Infrastructure Information Program, or if it contains trade secrets, or the facility indicates that it wants to keep the location of its production site confidential.

TRI's knowledge-based tools offered communities unprecedented access to the operations of the facilities surrounding them. This empowered community members to organize and advocate for decreased emissions or even the removal of the highly toxic chemicals that had subjected them to substantial health risks.

122 See Abrams & Ward, supra note 2, at 155.
123 Id.
124 For a discussion of the tension between EPCRA’s information provision and national security concerns, see Trang T. Tran, The Emergency Planning and Community Right-to-Know Act and National Security: Restricting Public Access to Location Information of Hazardous Chemicals, 8 ENVTL. LAW 369 (2001-2002). Tran argues that “Congress should amend EPCRA to (1) restrict public access to some information by excluding location information of hazardous chemicals from the publicly available documents and (2) allow federal preemption of state law in certain circumstances.” Id. at 370; see also Katherine Chekouras, Balancing National Security with a Community’s Right-to-Know: Maintaining Public Access to Environmental Information Through EPCRA’s Non-Preemption Clause, 34 B.C. ENVTL. AFF. L. REV. 107, 109 (2007) (arguing that state right-to-know legislation, if not preempted by federal law, can “respect legitimate national security concerns, and . . . critically assess[] what information is publicly disclosed”).
126 Id; see also Tier II Instructions, W. VA. DIV. HOMELAND SECURITY AND EMERGENCY MGMT. 5 http://www.dhsem.wv.gov/SERC/Documents/Tier%20II%20Instructions.pdf (last visited Apr. 15, 2013). Section 322 of EPCRA authorizes facilities to withhold information on a chemical’s identity if it provides sufficient evidence that the chemical identity is a trade secret. Such information must still be provided to the EPA Administrator, but will be withheld from public disclosure. 42 U.S.C. § 11042(a)(2) (2006). Subsection (b) lists the requirements for trade secret status, including efforts to protect confidentiality and potential competitive harm from disclosure. Id. § 11042(b). Individuals hoping to challenge an alleged trade secret may initiate a review process. See id. § 11042(d). Trade secret protection is not absolute: certain health-related information may not be withheld from health professionals, id. § 11042(e), and information on the adverse health impacts of undisclosed chemical must be made available to the public on request, id. § 11042(h).
degraded the environment, and decreased the quality of their lives and the value of their properties.\textsuperscript{127} Forced to finally confront their pollution, industries responded both to external pressures from activist communities and shareholders, and to internal pressures from industry leadership concerned with the high costs of wasteful production processes.\textsuperscript{128} The disclosure mandate can thus boast benefits from many perspectives. In Institute, the implementation of TRI was instrumental in PCMIC's 25-year fight to eliminate MIC from the Bayer CropScience plant, providing critical data about the amounts released into the community and raising awareness about the prospects of a Bhopal-like disaster in America.\textsuperscript{129}

After 25 years, TRI data are widely integrated into new informational tools, which combine data on public health, geography, and other pertinent metrics to provide a more detailed portrait of the risks posed by reported releases to communities and the environment.\textsuperscript{130} In the quest for more detailed information, however, the EPA has created instruments that lack basic accessibility and usability by much of the public, particularly those living in the most economically and environmentally burdened communities. Considering that people living in unincorporated towns like Institute lack their own political representation, it is even more critical that easily accessible and usable tools be available to support community empowerment. MyRTK, which shows great promise as a standard, universally available tool for understanding and contextualizing TRI data, lowers the barrier of usability, but still requires access to an internet-enabled computer or smartphone.\textsuperscript{131} Further, unlike the EPA's more complex applications, myRTK does not integrate data from other sources to properly contextualize the TRI releases in terms of toxicity and health risk.\textsuperscript{132} Such disparities in information create the risk of further stratification between environmentally burdened and environmentally benefited communities, due to the relative inability of under-resourced environmentally burdened communities to access, process, and act on this information.

There are, however, viable solutions to these inequities. As a starting measure, LEPCs could compile MSDS for all state facilities and make them available in paper form at public spaces, such as local libraries, so that citizens do not have to make formal requests to access them.\textsuperscript{133} LEPCs could also simply include a link on their websites to EPA's MSDS database for those with internet access. Additionally, following the example of the National Institute for

\textsuperscript{127} See generally HAMILTON, supra note 10, at 208-43.
\textsuperscript{128} Id.
\textsuperscript{129} See Email from Maya Nye, supra note 81.
\textsuperscript{130} See TRI Information, supra note 80.
\textsuperscript{131} myRTK, supra note 94.
\textsuperscript{132} Id.
\textsuperscript{133} According to Nye, the local libraries in Kanawha County did provide this resource, but cancelled it post-9/11. Email from Maya Nye to author (Jan. 22, 2013).
Chemical Studies in West Virginia, the EPA could provide assistance to SERCs, LEPCs, or environmental organizations to generate annual scorecards for each state, ranking facilities according to their emissions, and incorporating practical information, such as threshold reporting levels and chemical profiles, as well as more nuanced information, such as exposure pathways and toxicity statistics. Such information could also be provided in both paper and electronic format, and made available at public libraries.

Finally, despite the EPA’s public disclaimers about the limitations of the released information, specialized databases like TRI-CHIP and RSEI have demonstrated the extent to which TRI data may be compiled to provide a more nuanced view of the impacts of the regulated chemicals on human health and the environment. MyRTK should offer the same quality of information. The application should integrate data from the MSDS, such that citizens selecting chemicals emitted in their communities would receive detailed profiles on relevant characteristics, along with numerical thresholds of harmful exposure where available. The CDC data linked to myRTK should appear alongside this information so that citizens can readily assess the health risks of the individual toxics, as articulated by the MSDS reports, alongside the available CDC statistics for the relevant counties and states. All of this information should be regularly updated so the public has access to the most recent research about the chemicals that are relevant to their health.

It is virtually undisputed that TRI has garnered great improvements in local emergency planning and research on the environmental and health impacts of the covered chemicals. But EPCRA should not be, and arguably was not meant to be, limited to those gains. The community right to know is about accessibility, not only of raw data and information, but also of actual understanding of the implications of that information for the health and safety of community members and their environment. To properly protect the interests of the public, particularly those who are disparately impacted by environmental burdens, information must be contextualized and tailored to provide the answers that people need to make critical decisions about their health and their lives.


135 See Emergency Mgmt., supra note 6 (“The Community Right-to-Know provisions help increase the public's knowledge and access to information on chemicals at individual facilities, their uses, and releases into the environment. States and communities, working with facilities, can use the information to improve chemical safety and protect public health and the environment.”).
B. Emergency Planning and Response: Is Institute Successful?

Pursuant to EPCRA, states must establish State Emergency Response Commissions, which are usually incorporated into existing emergency/disaster response departments. In turn, SERCs appoint Local Emergency Planning Committees (LEPCs) to serve in designated emergency planning districts. Membership to LEPCs must include a range of representatives, from elected officials to community groups and emergency response personnel. LEPCs are primarily responsible for creating and distributing a local emergency plan and processing public requests for Tier II information on OSHA-regulated chemicals. The role of LEPCs cannot be overstated. They are communities’ first defense against hazards resulting from industrial activities, natural disasters, and domestic terrorist attacks. Yet, as illustrated below, their vast responsibilities are immensely under-supported by the state and federal governments, reducing community incentive to invest precious time and personal resources in an arduous task, particularly in areas where the probability of industrial disasters seems slim. To ensure that all communities are sufficiently protected in case of emergencies, Congress and the states must provide adequate and non-competitive financial and technical resources to support LEPCs. Additionally, as emphasized below, Congress must ensure that the EPA and citizens can stringently enforce the statute so that LEPCs will have the timely information required to properly carry out their planning mandate.

As noted, the Kanawha Putnam Emergency Planning Committee (KPEPC), coordinates emergency planning for Institute. Approximately 125 citizens, community group representatives, facilities managers, emergency response personnel, and other professionals are currently members of the KPEPC, and new membership is available by application.

By most measures, KPEPC reflects the successful implementation of EPCRA’s emergency planning provision. Indeed, the capacity for emergency planning in Institute and the surrounding Kanawha Valley was not one of the major concerns expressed by the PCMIC organizers, although, as will be discussed below, they did express concern about execution. They felt confident

137 Id.
138 Id. § 11001(c) (“Each committee shall include, at a minimum, representatives from each of the following groups or organizations: elected State and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of this subchapter.”).
139 Id. § 11001(a).
140 See Who We Are, KANAWHA PUTNAM EMERGENCY PLANNING COMM. (KPEPC), http://www.kpepc.org/Home/Who-Are-We.aspx (last visited Apr. 16, 2013).
that KPEPC has an active and diversified membership, and works diligently to create viable emergency plans based upon the collective expertise of its members and the information received pursuant to the statute.\footnote{Email from Maya Nye, supra note 81; Email from Pam Nixon to author (Mar. 20, 2012).}

An EPA-funded 1999 LEPC Survey established three criteria that characterized “compliant” LEPCs: (1) membership structure and procedures (e.g. chairperson, emergency coordinator, and information coordinator; holding regular meetings); (2) public communications about the availability of EPCRA information or other types of data, and responding to requests; and (3) fully developed or developing emergency response plans. These criteria were also used in the 2008 LEPC Survey as a means of assessing the LEPCs’ activities.\footnote{Mark Starik et al., 1999 Nationwide LEPC Survey, CTR. FOR ENVTL. POL’Y & SUSTAINABILITY MGMT., GEO. WASH. U. 10 (May 17, 2000) [hereinafter 1999 LEPC Survey], www.epa.gov/oem/docs/chem/lepcsurv.pdf.}

EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

Planning and Exercise Committee conducts drills of parts of the plan several times a year.\textsuperscript{150} Of the 2,357 known LEPCs that were contacted for the EPA’s 2008 LEPC survey, only 939 responded, consistent with response rates from the 1999 survey.\textsuperscript{151} Though the 2008 survey did not conduct the same statistical evaluation of LEPCs as the 1999 survey, most 2008 respondents would be considered compliant by the 1999 criteria.\textsuperscript{152} For example, of 909 respondents, 79\% reported meeting at least on a yearly basis,\textsuperscript{153} with 38.7\% meeting on a quarterly basis.\textsuperscript{154} Of 895 respondents, only 5.8\% did not have an emergency plan.\textsuperscript{155} Of the respondents, 59\% reported that they conduct outreach to notify the public about the availability of their emergency plans and the chemical hazard data; however, relatively few of them (23.6\% of respondents) maintained websites to disseminate that information, which is largely distributed by newspapers (67\% of respondents).\textsuperscript{156} The vast majority of the survey respondents (81.2\% of 863 respondents) had experienced one or more chemical accidents in their service area within the previous five years, with 32.3\% having experienced six or more accidents.\textsuperscript{157} This fact, combined with the fact that only 40\% of known LEPCs responded to the survey,\textsuperscript{158} suggests a positive relationship between active LEPCs and frequency of chemical accidents.

Unlike most of the LEPCs surveyed, KPEPC receives some direct funding from the West Virginia SERC, allocated from funds received from reporting facilities, as well as member businesses and agencies.\textsuperscript{159} This is significant because LEPCs are largely an unfunded mandate; indeed, the West Virginia Division of Homeland Security and Emergency Management, where the SERC is administered, does not receive any federal funding to administer the LEPC program.\textsuperscript{160} This leaves many LEPCs in constant competition for the few federal grants available for emergency planning, and reliant on alternate resources, such

\begin{itemize}
\item[\textsuperscript{150}] Email from Pam Nixon, supra note 142.
\item[\textsuperscript{151}] 2008 LEPC Survey, supra note 148, at 4.
\item[\textsuperscript{152}] Compare id. at 17-19 (listing 2008 statistics on LEPC structure, meetings, and emergency plans), with supra note 143 and accompanying text (noting compliance criteria in the 1999 LEPC Survey pertaining to LEPC structure, data availability, and emergency response plans).
\item[\textsuperscript{153}] 2008 LEPC Survey, supra note 148, at 18.
\item[\textsuperscript{154}] Id. at 8.
\item[\textsuperscript{155}] Id. at 19.
\item[\textsuperscript{156}] Id. at 12.
\item[\textsuperscript{157}] See id. at 20 (percentages in text calculated based on these data tables).
\item[\textsuperscript{158}] Id. at 4.
\item[\textsuperscript{159}] Email from Pam Nixon, supra note 142. The West Virginia Department of Homeland Security and Emergency Management collects filing fees from facilities reporting Tier II data, which is required in the state. The fees are scaled depending upon the quantity of extremely hazardous substances stored at each facility. See 2012 Oil and Gas Fee Worksheet, W. VA. DIV. OF HOMELAND SECURITY & EMERGENCY MGMT. (last updated Dec. 2, 2011) http://www.dhsem.wv.gov/SERC/Pages/TIERIIREPORTING.aspx (link to worksheet at bottom of page).
\item[\textsuperscript{160}] See Telephone Interview with Melissa Buckley, supra note 125.
\end{itemize}
as in-kind donations from local entities.\textsuperscript{161} Although much of the substantive work performed by KPEPC is done by its volunteer membership, the committee is able to employ part-time staff to perform essential logistical functions.\textsuperscript{162}

The strength of the current organization is most likely a result of its long and robust history, which predates EPCRA by over thirty years and covers the numerous emergency releases that have occurred throughout the Kanawha Valley.\textsuperscript{163} Indeed, the 2008 survey reveals a strong positive correlation between higher levels of activity in LEPCs and frequency of emergencies.\textsuperscript{164} For example, the likelihood that surveyed LEPCs had met within the previous twelve months directly corresponded to increased accident history.\textsuperscript{165} Further, and perhaps more interestingly, the EPA found that communities with more frequent emergencies had a “higher level of agreement that . . . LEPC[s] ha[ve] a positive impact on chemical safety in their community[ies]".\textsuperscript{166}

Despite these accomplishments, KPEPC still faces practical challenges with implementing its plan when emergencies do happen. During the 2008 explosion at Bayer CropScience, for example, there were failures in communication between the emergency responders coordinated through KPEPC’s Emergency Management Plan and the emergency response team within the facility, creating confusion as to how to direct the public and protect the responders.\textsuperscript{167} The Chemical Safety Board (CSB) attributed much of the confusion and missteps during the accident to Bayer’s non-responsiveness and delayed safety measures during the emergency, though it also found a few significant flaws in the KPEPC Emergency Plan.\textsuperscript{168} As a result, emergency responders and residents were placed at higher risk for toxic exposure. Both groups reported that they had been exposed during the emergency, and many reported poor health symptoms in the days after the incident. Among them were Davis and Willis, who have filed a nuisance suit against the company, and Ferguson, who sued unsuccessfully for the wrongful death of his wife, allegedly caused by the accident.\textsuperscript{169}

Although KPEPC adopted necessary amendments to their Plan, as prescribed by the CSB, the outcome of the 2008 incident raises important issues about LEPCs’ power within communities and the level of support available to them as they create policies and protocols to protect public health and safety. Nixon, who has been a member of KPEPC since the mid-1980s, pointed to three key

\textsuperscript{161} 2008 LEPC Survey, supra note 148, at 24.
\textsuperscript{162} Email from Pam Nixon, supra note 142.
\textsuperscript{163} See History, supra note 67.
\textsuperscript{164} See supra notes 151-158 and accompanying text.
\textsuperscript{165} See 2008 LEPC Survey, supra note 148, at 5.
\textsuperscript{166} Id. at 10.
\textsuperscript{167} See CSB REPORT, supra note 54, at 78.
\textsuperscript{168} See id. at 82.
problems that, if resolved, could substantially improve the KPEPC—lack of funding, the fact that much of the work is taken on by “emergency service personnel who are already busy,” and the persistent communications issues that plague every emergency response. On this last point, however, she noted that she was unsure “how it can ever be resolved.”\textsuperscript{170}

Nixon’s concerns were strongly reflected in the 2008 survey. Lack of funding was cited by the most respondents as the single greatest obstacle to the success of the LEPCs,\textsuperscript{171} and in an open-ended question, many responded “that achieving good participation rates at meetings is difficult because LEPC members are volunteers and are often busy with their other jobs or familial commitments.”\textsuperscript{172} Respondents also mentioned that “dedicated membership is the greatest single factor contributing to the success of their LEPC[s].”\textsuperscript{173} Additionally, 72.8\% of the respondent LEPCs received no technical assistance from the Federal government.\textsuperscript{174} Of the LEPCs that did receive such assistance, 77.9\% stated that it “played a significant role in guiding their LEPC activities.”\textsuperscript{175}

In the aggregate, these challenges seem to reflect a lack of adequate power. That is, although Congress created these entities with the intent of reducing the costly outcomes of industrial accidents, it delegated major responsibilities to LEPCs with none of the real power to maximize their effectiveness.\textsuperscript{176} In the wake of 9/11 and Hurricanes Katrina and Rita, there is even greater demand on LEPCs than contemplated in 1986. Many states now rely on these entities to implement all-hazards emergency plans, which go far beyond EPCRA’s original chemical hazards mandate to include contingencies for terrorism and natural disasters.\textsuperscript{177} Though many states do provide resources to LEPCs and federal grants are available,\textsuperscript{178} it is clear that the current financing scheme is nonetheless detrimental to the fulfillment of the statute.

While states have an obligation and interest in emergency planning within their borders, the imposition of such a comprehensive federal regulatory scheme should not place the burden of funding solely on state coffers. The 2008 survey found that 35.9\% of 868 respondents receive some form of direct funding. Of 312 responding LEPCs that receive direct funding, 54.2\% obtain it through state

\begin{enumerate}
\item See Email from Pam Nixon, supra note 142.
\item See 2008 LEPC Survey, supra note 148, at 15 (noting that, of 852 respondents, 37.3\% cited funding as the single greatest obstacle to their success, followed by low membership involvement (20.1\%) and public apathy (12.9\%)).
\item Id. at 8.
\item Id.
\item Id. at 14.
\item Id.
\item Id. at 24-25. The survey highlights the lack of federal financial and technical support to LEPCs, which undermines their success.
\item See Weeks, supra note 46, at 859-63.
\end{enumerate}
fees collected from reporting facilities, while 39.7% of LEPCs receive direct funding from federal grants administered by agencies such as the Department of Transportation and the Federal Emergency Management Agency.

In order to adequately provide for the unfunded and under-funded LEPCs and to finally fulfill the purpose of the statute, Congress must create a source of direct, non-competitive funding for all of its EPCRA mandates. The state-based approach of levying funds from reporting facilities could be a viable model for a federal funding program. The EPA could set reporting fees for facilities based on the toxicity levels of their chemicals, thus creating additional incentives for facilities to reduce storage levels of the most hazardous chemicals or to phase them out altogether. Whatever the approach, federal and state government should be equitable financiers of the statute.

The 2008 survey results do not explain why only a few LEPCs receive federal technical assistance, though the statistics are clear that such assistance is effective and has a positive impact on the operations of LEPCs. As such, federal technical assistance, along with funding, should be made readily available to all LEPCs. Furthermore, equipping LEPCs with greater resources might create opportunities for them to support the community in new ways, such as providing local TRI training workshops for residents and community organizers and launching more intensive public outreach campaigns to promote the right to know.

Beyond these necessary resources, the success of the emergency planning mandate is contingent upon the diligent implementation of other parts of the statute, including TRI, emergency release notifications, and the citizen suit provision. Information mandates are the linchpin of emergency planning; without accurate data about the existence and extent of various risks in the community, LEPCs cannot adequately anticipate emergencies or plan for safe evacuations, shelter-in-place scenarios, or containment schemes, all of which are critical for disaster mitigation. As mentioned above, the more accessible this information is to the public, both physically and interpretively, the greater the chances that communities will become more engaged in the planning process and responsive to emergency drills and actual evacuations in the event of a real emergency.

Is Institute prepared for the next emergency? In a 2010 internal survey of KPEPC members, 43% said that the there was a “medium” probability that another industrial accident resulting in a chemical release would occur, while 40% ranked the probability as “high.” When asked what the likely
consequences of such an accident would be, 40% responded that it would substantially impact the health and safety of residents, and 28% predicted that it would be life-threatening.\textsuperscript{182}

KPEPC has remained committed to improving its Emergency Plan and has incorporated many of the recommendations offered by the Chemical Safety Board since the 2008 accident, including improving communications processes with the local Metro 9-1-1 call center, requiring facilities to report incidents directly to KPEPC, developing an emergency email system for residents in affected areas, and creating a matrix of information to be disseminated to the public during the course of an emergency.\textsuperscript{183} The Committee and Metro 9-1-1 also conducted a drill in Institute to practice these improvements.\textsuperscript{184} When KPEPC members were asked they felt about their general preparedness for another incident, 49% responded that they felt “good” and 45% said that they felt “fair,” and 6% felt “poor.”\textsuperscript{185}

\textbf{C. Citizen Suits: What Does the Steel Co. Decision Mean for EPCRA’s Future?}

Congress delegated power to the public to enforce EPCRA through citizen suits.\textsuperscript{186} Such provisions are found in almost all of the major environmental statutes, with the purpose of expanding and strengthening enforcement beyond the regulating agency.\textsuperscript{187} The first citizen suit provision was included in the Clean Air Act of 1970\textsuperscript{188} in response to Congress’ disillusionment with the under-enforcement of the 1967 version of the Act.\textsuperscript{189} Debates abounded over this new power, with concerns ranging from frivolous litigation and crowded dockets to overburdened agencies and underserved communities.\textsuperscript{190} The result was a compromise, a provision that empowered citizens to take enforcement actions against non-compliant industries, but only insofar as necessary to protect the community and the environment.

Citizen suits allow persons to sue industries that are out of compliance with environmental statutes or to take action against the relevant enforcement agency,

\textsuperscript{182} Id. at 47.
\textsuperscript{183} See CSB Report, supra note 54, at 85-87.
\textsuperscript{184} Id.
\textsuperscript{185} See KPEPC Hazard Vulnerability Survey, supra note 181, at 47.
\textsuperscript{189} See Coplan, supra note 187, at 321.
\textsuperscript{190} See Jeffrey G. Miller, Citizen Suits: Private Enforcement of Federal Pollution Control Laws 3-5 (1987).
usually the EPA, for non-enforcement of the statute.\textsuperscript{191} To protect against frivolous suits and financial exploitation of the provision, citizen-plaintiffs cannot collect damages, though they may recover attorneys’ fees and other costs of litigation if they prevail in court.\textsuperscript{192} Civil penalties, which may be charged per day for each violation, remit to the U.S. Treasury, where they may be, but are not necessarily, used to fund environmental initiatives.\textsuperscript{193} These suits are now substantial advocacy tools for individuals and environmental organizations, allowing them to represent and defend the environment and public health of communities that might otherwise slip through the overburdened federal enforcement scheme.\textsuperscript{194} With a more direct means of achieving justice, citizens have greater incentives to be active monitors of their industrial neighbors, thereby expanding the nation’s capacity for effective environmental enforcement.

The past 20 years, however, have seen a substantial reduction of these citizen enforcement powers through a series of cases interpreting citizen suit provisions of the Clean Water Act (CWA),\textsuperscript{195} Resource Conservation and Recovery Act (RCRA),\textsuperscript{196} and EPCRA. Most significantly, the 1998 Supreme Court decision in \textit{Steel Co. v. Citizens for a Better Environment}\textsuperscript{197} stated that citizen-plaintiffs lack Constitutional standing to litigate wholly past violations of EPCRA.\textsuperscript{198} This decision has effectively abolished citizen claims under EPCRA, as it offers facilities a free pass to shirk reporting deadlines, so long as they submit the required information in the sixty-day statutory waiting period before citizens are allowed to file lawsuits. Under this enforcement scheme, citizens have little incentive to invest in suits that are highly unlikely to hold industries financially accountable for the untimely filing of mandated information. Stripping citizens of this enforcement power further diminishes industry incentive to file timely information under EPCRA, which undermines the integrity and effectiveness not only of the information provisions, but also of the emergency planning requirements which depend on these data. To remedy this problem, Congress should either revise the citizen suit provision of EPCRA to expressly allow citizen-plaintiffs to litigate wholly past violations, as it has done partially under the Clean Air Act (discussed below), or allow citizen-plaintiffs to recover civil penalties. Without such a revision, citizen enforcement of EPCRA will remain defunct.

\textsuperscript{191} See Coplan, supra note 187, at 321-22.
\textsuperscript{192} See id.
\textsuperscript{193} Id.
\textsuperscript{194} See MILLER, supra note 190, at 3.
\textsuperscript{197} 523 U.S. 83 (1998).
\textsuperscript{198} Id. at 109.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

The Supreme Court’s decision in Steel Co. was intended to resolve a split in the Sixth and Seventh Circuits over whether citizens could litigate wholly past violations under EPCRA’s citizen suit provision. At the center of this split was a clause that is located in all environmental citizen suit provisions, requiring citizen-plaintiffs to 1) notify violators of the nature of their violation and the plaintiffs’ intent to sue; 2) notify the State in which the violation occurred; and notify the EPA Administrator.199 Plaintiffs must then wait sixty days from submitting the notification to file the suit. A violation becomes “wholly past” when it is resolved within the sixty-day period prior to the commencement of the citizen suit.200

In making its decision, the Court considered two previous decisions on citizen suit provisions. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,201 the Court held that the citizen suit provision under the CWA did not give plaintiffs standing to bring suits for wholly past violations based on the specific present-tense language of the provision, which authorized suits against persons alleged “to be in violation of the statute.”202 The Court found that this portion of the provision allowed citizen-plaintiffs to sue only so long as the defendant had not complied with its duties by the time the suit was filed, at least sixty days after the notice letter.203 Further, because the Court found that Congress intended for citizen enforcement to merely be supplementary to the EPA’s authority, it stated that allowing these claims would undermine the Agency’s own discretion in pursuing claims against violators, and where necessary, making settlements.204

The second case, Hallstrom v. Tillamook County,205 concerned the sixty-day notice portion of the citizen suit provision of RCRA, which the Court held to be a non-discretionary prerequisite to bringing citizen suits against facilities on the basis that it was meant to give the alleged violator an opportunity to remedy the violation, thus preempting the suit itself as per Gwaltney.206 Thus, almost ten

199 See Coplan, supra note 187, at 326.
200 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57-58 (1987); see also Coplan, supra note 187, at 326 ("Courts have posited that the purpose of the notice and waiting period is to permit the defendant to come into compliance, to allow for government agency enforcement that would eliminate the need for a citizen suit, and to allow for settlement discussions between the would-be plaintiff and the violator.").
202 Id. at 57-58.
203 Most environmental citizen suit provisions require that citizen-plaintiffs file a notice letter to the relevant agency Administrator and to the violator, informing them of the specific claims. Plaintiffs must then wait sixty days after notice before commencing litigation. See Coplan, supra note 187, at 322.
204 See Gwaltney, 484 U.S. at 64.
206 Id. at 29.
years prior to Steel Co.,\textsuperscript{207} the Court’s general disposition on the scope of environmental citizen suits and the issue of past violations was well understood. The outcome of Steel Co. might have been predicted on the basis of these two cases, if not for the unique wording of the EPCRA citizen suit provision, and the Court’s unexpected focus on the plaintiffs’ constitutional standing.

The Sixth and Seventh Circuits divided over how to apply Gwaltney and Hallstrom to the EPCRA citizen suit provision, particularly because the provision is worded differently than the CWA provision. Post-Gwaltney, Congress amended the citizen suit provision of the Clean Air Act (CAA) to allow suits for past violations, leaving the sixty-day notice requirement intact for both government officials and violators.\textsuperscript{208}

EPCRA’s citizen suit provision, in relevant part, authorizes citizen suits against an owner or operator of a facility “for failure . . . to complete and submit an inventory form under section 11022 of this title . . . [and] section 11023(a) of this title.”\textsuperscript{209} This contrasts with the present-tense wording of the CWA discussed in Gwaltney, which allows suits against persons “alleged to be in violation” of the relevant provisions of the statute.\textsuperscript{210} Like most of the environmental citizen suit provisions, however, EPCRA also mandates the sixty-day notice letter to the facility, the EPA, the state, and other relevant parties.\textsuperscript{211}

The Sixth Circuit, in Atlantic States Legal Foundation v. United Musical Instruments,\textsuperscript{212} found the difference in EPCRA’s language insignificant and interpreted Congress’ decision to allow suits for past violations under the CAA while maintaining the sixty-day notice requirement as a negative inference against allowing such suits where Congress has not explicitly allowed them.

In Steel Co.,\textsuperscript{213} the Seventh Circuit came to the opposite conclusion. The citizen-plaintiffs, an environmental advocacy group, submitted a sixty-day notice letter to a steel manufacturer for failing, since the enactment of EPCRA in 1986, to submit the required TRI and toxic chemical release forms.\textsuperscript{214} When the group filed suit at the end of the sixty-day period, the manufacturer filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), alleging that because it filed all of the missing forms after receiving the notice, the district

\begin{itemize}
  \item 207 Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998).
  \item 210 33 U.S.C. § 1365(a) (1982).
  \item 211 See 42 U.S.C. § 11046(d).
  \item 212 61 F.3d 473, 477 (6th Cir. 1995).
  \item 213 Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237 (7th Cir. 1996), vacated 523 U.S. 83 (1998), vacated 151 F.3d 1032 (7th Cir. 1998).
  \item 214 Id. at 1241; 42 U.S.C. §§ 11022-11023.
\end{itemize}

408
court had no jurisdiction to hear the suit. The district court held that it lacked jurisdiction under subsection 11046(c) over wholly past violations and dismissed the case. The Seventh Circuit reversed, finding that the CAA’s maintenance of the sixty-day notice requirement was evidence that the requirement was not simply gratuitous when citizen suits are allowed for historic violations of the statute. Additionally, the Seventh Circuit found that as a policy matter, the informational mandates of the statute are minimal requirements for facilities such that “allowing citizen suits even for historical violations was permissible to ensure compliance.” Finally, the Seventh Circuit found that the citizen suit provision would be made “virtually meaningless” if citizens invested resources in pursuing violators and were then prohibited from suing.

The Supreme Court granted certiorari, but declined to resolve the statutory dispute between the circuit courts. Reversing the Seventh Circuit’s decision, the Court held that the plaintiffs lacked standing to pursue the suit based on the lack of redressability for its claims, the third prong for constitutional standing under Article III. The opinion, which unanimously dismissed the citizen-plaintiffs’ case for lack of jurisdiction, has profound implications for the citizen suit enforcement provisions in monitoring regimes like EPCRA and the amended CAA. Whereas a defect in statutory standing can be remedied with a few words in a congressional revision, a defect in constitutional standing requires a structural revision that, while technically feasible, might reignite debates on the validity of citizen suit provisions altogether.

The alleged injury in Steel Co. was the deprivation of timely information on which the citizen-plaintiffs relied to “learn about toxic chemical releases [and] the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic

215 Id.
216 Id.
217 See id. at 1244-45.
218 See Green, supra note 208, at 422 (citing Steel Co., 90 F.3d at 1240).
219 Steel Co., 90 F.3d at 1245.
221 There was a divergence between Justice Scalia and Justice Stevens about the order in which to decide the case. Justice Scalia maintained that the Court could not move forward with the statutory issue until it resolved whether the plaintiffs had Article III standing, and thus whether the Court had actual jurisdiction to hear the case. See Steel Co., 523 U.S. at 89-102. Justice Stevens held firm that the statutory matter was also jurisdictional, and thus could have been resolved first. See id. at 113 (Stevens, J., concurring).
YALE JOURNAL OF HEALTH POLICY, LAW, AND ETHICS XIII: 2 (2013)

chemicals in areas in which they live, work and visit.”

The citizen-plaintiffs made six claims for redress.

The first claim was for declaratory judgment that defendants violated EPCRA. The Court quickly disposed of this claim, stating that because there was no dispute that the defendant failed to file the reports and that the failure to file constituted a violation of the statute, “the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.”

The second claim was for authorization to inspect the defendants’ facility and records. The Court dismissed this claim on grounds that it could only provide proper redress under Article III if the group had “alleged a continuing violation or the imminence of a future violation.”

The third was for an order to require the defendants to provide plaintiffs with copies of all of the compliance reports submitted to the EPA. The Court dismissed this claim on the same grounds as the second claim.

The fourth claim was for a requirement for defendants to pay civil penalties of $25,000 per day for each violation of §§ 11022 and 11023. Perhaps most surprisingly, the Court dismissed this claim on grounds that it could not meet the Article III redressability requirement because the penalties are paid to the U.S. Treasury instead of the plaintiffs themselves. The court explained:

> [A]lthough a suitor may derive great comfort and joy that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, 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 recognizable Article III injury.

The fifth claim was for award of costs for plaintiffs’ investigation and prosecution of the case, including attorneys’ fees and expert witness fees, authorized by section 326(f) of EPCRA. The Court dismissed this claim because the “plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.” Investigative costs were dismissed as well.

---

222 Id. at 104-05 (majority opinion).
223 Id. at 106.
224 Id. at 108.
225 Id.
226 Id. at 106.
227 Id. at 107.
228 Id.
because section 326(f) only allows for compensation of the costs of litigation itself.\textsuperscript{229}

The final claim was for further relief as the court deems appropriate. The Court did not address this claim.

The \textit{Steel Co.} Court's rejection of civil penalties paid to the Treasury as redress for the plaintiffs not only contradicts common sense and precedent, as Justice Stevens asserts in his concurrence,\textsuperscript{230} but also defies EPCRA's carefully crafted citizen enforcement scheme. Like its predecessors in the CAA and CWA, EPCRA's citizen suit provision was designed to expand the enforcement powers of the statute, while disallowing damages issued directly to citizen-plaintiffs;\textsuperscript{231} civil penalties, particularly those amounting to $25,000 per day for each violation of the statute, are meant to compensate harm—mostly through the potential use of civil penalties for environmental initiatives—and to deter future harm, regardless of who receives the money. Thus, contrary to Justice Scalia's opinion, the citizen-plaintiffs in \textit{Steel Co.} were not merely acting as faithful patriots seeking "the 'undifferentiated public interest' in faithful execution of EPCRA;"\textsuperscript{232} they were also seeking to deter the industry from future failures to make timely filings of EPCRA data. Given the small likelihood of legal action by the overburdened EPA, the Court's decision to block citizen enforcement of the late filing penalties leaves little incentive for industries to file the information on their own. They can avoid submitting their information until they receive a sixty-day notice letter, and preclude a citizen suit by complying at that time.

Though Justice Stevens concurred in the judgment on the basis of the statutory language, he did not find error in plaintiffs' Article III redressability, citing private criminal prosecutions as historical precedent for similar redress\textsuperscript{233} and assessing the consequences of denying redressability for the enforcement scheme of the statute:

Under EPCRA, Congress gave enforcement power to state and local governments. 42 U.S.C. §11046(a)(2). Under the Court's reasoning, however, state and local governments would not have standing to sue for past violations, as a payment to the Treasury would no more "redress" the injury of these governments than it would redress respondent's injury. This would be true even if

\textsuperscript{229} Id. ("Respondent finds itself, in other words, impaled upon the horns of a dilemma: For the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation cannot alone support standing.").

\textsuperscript{230} Id. at 126 (Stevens, J., concurring) ("Thus, as far as I am aware, the Court has never held—until today—that a plaintiff who is directly injured by a defendant lacks standing to sue because of a lack of redressability.").

\textsuperscript{231} See Coplan, \textit{supra} note 187, at 321-22.

\textsuperscript{232} \textit{Steel Co.}, 523 U.S. at 106.

\textsuperscript{233} See \textit{id.} at 128-29 (Stevens, J., concurring).
Congress explicitly granted state and local governments this power. Such a conclusion is unprecedented.\textsuperscript{234}

In addition to dampening incentives for industries to follow the law, the \textit{Steel Co.} decision penalizes citizen-enforcers. As stated by the Seventh Circuit in \textit{Steel Co.}, citizen-plaintiffs typically incur great expenditures in time and resources to identify violators and to obtain enough information to make a good faith claim under the citizen suit provision.\textsuperscript{235} Adding to these expenses the attorneys' fees and other costs of litigation places a substantial burden on plaintiffs not only to be reasonably certain that such violations occurred, but also to recover the costs and fees as relief after bringing an enforcement action.

\textit{Steel Co.} strips away much of the citizen-plaintiff's incentive to pursue these suits. The risks of not recovering expenses and of imposing no penalties upon industries despite clear violations of the statute cut against pursuing claims at all. As the EPA and other environmental agencies reduce enforcement actions due to capacity or budget hardships, an absence of citizen suits leaves a void in the effective implementation of the statutory mandates.\textsuperscript{236} In the \textit{Steel Co.} opinion, Justice Scalia stated that the citizen-plaintiffs might have achieved necessary redress through their injunctive claims—inspections of facilities and copies of EPA compliance reports—if they had "alleged a continuing violation or the imminence of a future violation."\textsuperscript{237} But such allegations must be predicated on sufficient evidence and good faith belief of their existence, which may not exist at the time of suit, even if it is likely that the facility will violate the statute sometime in the future.\textsuperscript{238}

Ultimately, \textit{Steel Co.} eroded the value of citizen enforcement for both the government and communities. Rather than reinforce Congress' decision to bolster the EPA's enforcement powers, the Court provided industries a way out of effective compliance with the statute, quite literally at the expense of the people it was meant to serve.

Finally, the \textit{Steel Co.} decision frustrates the purpose and scheme of the statute. Embodied in the four central mandates of the EPCRA are two.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

overarching purposes: publishing accurate, reliable information on the presence and release of toxic chemicals at a reasonably localized level; and using the reported information to formulate local emergency response plans.\textsuperscript{239} The statute clearly lays out annual deadlines for the submission of the information.\textsuperscript{240} As discussed above, the data are meant to be utilized far beyond the EPA, and have transformed the ability of scientists, policymakers, community environmentalists, businesses, and others to monitor environmental and public health hazards, propose informed policies for reducing toxic storage and emissions, and create emergency plans that effectively mitigate the devastation of hazardous accidents.\textsuperscript{241} Because the value of information is so tightly connected to its timeliness for the purposes of the statute, communities’ hazard reduction and disaster prevention efforts will be impaired if they have difficulty obtaining correct and current information, irrespective of any transformative measures to streamline and democratize data access.

Though \textit{Steel Co.} does not reach the question of whether the untimeliness of information constitutes an injury-in-fact for citizen-plaintiffs under EPCRA,\textsuperscript{242} the decision that such a claim could not be redressed had the same effect as denying the existence of the injury itself.

Further, even if the Court chose to decide the question of jurisdiction under the statute first, thereby avoiding the question of constitutional standing, it is clear from the concurrence written by Justice Stevens and the Court’s precedent on the subject that it would likely have dismissed the case for lack of statutory jurisdiction as well.\textsuperscript{243} Justice Stevens, aiming at the circuit split, scrutinizes the language of the citizen suit provision, the sixty-day notice requirement, and the supplemental role of citizens in the EPCRA enforcement scheme, ultimately siding with the Sixth Circuit’s interpretation.\textsuperscript{244} Although he acknowledges that the language of the provision—“failure . . . to complete and submit”\textsuperscript{245}—is ambiguous, he resolves the interpretive issue with the notice requirement and supplemental authority role,\textsuperscript{246} ignoring the implications of the CAA amendments to the former and the “diligent prosecution” safeguard to the latter.

It is unclear, for example, why Congress could not have intended the sixty-day notice to give owners/operators an opportunity to correct violations of the statute so as to avoid prospective accruals of penalties, which are assessed on a

\begin{footnotesize}
\textsuperscript{240} See, e.g., \textit{id.} § 11023(a) (requiring facilities to submit their release reports by July 1 of every year).
\textsuperscript{241} See \textit{HAMILTON}, supra note 10, at 208.
\textsuperscript{242} See \textit{Steel Co.}, 523 U.S. at 105.
\textsuperscript{243} See \textit{id.} at 132-34 (Stevens, J., concurring).
\textsuperscript{244} See \textit{id.}
\textsuperscript{245} \textit{Id.} (alteration in original) (quoting Atl. States Legal Found. v. United Musical, 61 F.3d 473, 475 (1995)).
\textsuperscript{246} \textit{Id.}
\end{footnotesize}
daily basis. This would provide benefits to both parties by compelling the
information and preventing increased liability, while maintaining the necessary
deterrence mechanism by allowing plaintiffs to recover penalties accrued during
the period of non-compliance. Further, it has been suggested that the sixty-day
provision is intended to give government time to decide whether to prosecute on
its own, thus precluding the citizen suit, and also to allow the citizen-plaintiffs
and the violators time to reach a settlement. Indeed, although Justice Stevens
was concerned with the intrusion of citizen-plaintiffs on the EPA’s regulatory
discretion, it is unclear why the scenario he suggests—EPA negotiating a
settlement with a party and citizen-plaintiffs interfering with subsequent lawsuits
against the same party for the same issues—would not be precluded by the
“diligent prosecution” provision of the statute, which disallows citizen suits when
the EPA or possibly the state is taking its own enforcement measures against
violating parties. Though there may be some legal disputes between citizens
and governing entities as to what constitutes “diligent prosecution,” particularly
when settlements are made to incorporate multiple claims that plaintiffs could
litigate, those conflicts could be resolved in court or by negotiation on a case-by-
case basis without depriving citizen-plaintiffs of the ability to sue for historic
violations.

The informational mandates of EPCRA are the drivers of the statute, and
emergency prevention and hazard reduction are the purpose; if the information is
not reliable and timely, then the statute is defunct. If the timeliness of the
statutorily required information can only be enforced by the agency, then many
communities are left without a viable alternative for managing non-compliant
industries, other than suing the agency for non-enforcement or spending money
and time monitoring companies and threatening them with lawsuits to force them
to file within the sixty-day notice period. A statute so heavily purposed for the
non-governmental community should not unnecessarily narrow the available
avenues for the community to obtain the information to which it is entitled.

It is important to note that that there are no records of EPCRA citizen suits
filed by plaintiffs in Institute. Nixon and Nye both asserted that the litigation
related to industry malfeasance, such as the cases brought by Davis, Willis, and

247 After outlining the civil penalties for violating EPCRA’s reporting requirements, the
statute specifies that “[e]ach day a violation . . . continues shall, for purposes of this subsection,
constitute a separate violation.” EPCRA, 42 U.S.C. § 11045(c)(3) (2006). Counting each day as a
separate violation could reasonably be interpreted to decouple past infringement from the potential
for future harm.

248 See Coplan, supra note 187, at 326.

249 See id. at 329-31. Also, in this case, EPA decided not to pursue an enforcement action
against Steel Co., despite the fact that the company had failed since EPCRA’s inception to adhere
to the requirements. See Steel Co., 523 U.S. at 87.

250 Email from Pam Nixon, supra note 142; Email from Maya Nye, supra note 81. There
were no electronic records of such suits from Institute.
EPCRA: A RETROSPECTIVE ON THE ENVIRONMENTAL RIGHT-TO-KNOW ACT

Ferguson, have been common law toxic torts claims, despite the fact that Bayer has frequently violated the statute.251 Though there are a number of reasons why Institute residents may have chosen not to bring suits under EPCRA—lack of resources, no damages, strategic alternatives—the citizen suit provision is nonetheless an important power to preserve, even if only as a means to obtain information pertinent to developing other lawsuits.

Considering these challenges, the Steel Co. decision ultimately requires an amendment to EPCRA’s citizen suit provision that will cure the redressability problem for past violations. The challenge, as mentioned above, is the fact that such a change will require plaintiffs to pursue more than a nominal or hypothetical remedy. The revisions to the CAA citizen suit provision, for instance, are also dubious as to redressability, even though Congress intended to confer statutory standing for wholly past violations. Allowing citizen suits under the CAA for persistent historic violations252 does not cure the Article III standing problem, as the typical remedy—penalties to the U.S. Treasury—are no different than those under EPCRA and most other environmental citizen suit provisions. However, Congress’ additional citizen remedy under the CAA, a Supplemental Environmental Project (SEP) for up to $100,000 in lieu of penalties to the U.S. Treasury,253 would very likely cure the redressability problem, so long as it was aimed at the plaintiffs’ community. Alternatively, Congress could always decide to allow citizen-plaintiffs to collect at least a portion of the civil penalties outlined under the statute. Such an amendment could be positive for communities in need of funding for LEPCs, training workshops, and other emergency planning initiatives. Although it cuts against the original reasoning for allocating the penalties to the Treasury, it might be the only way to resolve the issue, presuming that SEPs cannot all be specifically located in the violated community. Regardless of the specific revision chosen, Congress must act to preserve citizen suit enforcement authority under EPCRA and other environmental statutes.

CONCLUSION

EPCRA exists to balance power between communities and the industrial facilities in and around them. That Institute and Bhopal were at the forefront of the legislation is no coincidence; both communities suffered tremendously not only because they were physically surrounded by volatile industries, but also because they lacked the knowledge and political power to protect themselves from the risks inherent in the places where they lived.

251 Email from Pam Nixon, supra note 142; Email from Maya Nye, supra note 81; see also Interview with Warne Ferguson, supra note 43.
252 42 U.S.C. § 7604(a) (2006) (Citizen suits may be brought against anyone “who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation” of emission standards.).
253 See Coplan, supra note 187, at 323.

415
Congress' decision to eschew its traditional “command and control” measures in favor of a public information mandate shifted the center of regulatory power from the agency to the community, giving the public access to information they could use to strengthen public and environmental health. Indeed, as seen in the Institute context, having such data is imperative to keeping critical issues in the public eye after the sensationalism of a major disaster dissipates. Further, mandating nationwide emergency preparedness that includes participation of community members and industry representatives creates opportunities for meaningful, collaborative relationships between parties that quite often operate in opposition to one another.

In this sense, EPCRA is fundamentally rooted in the principles of environmental justice: its purpose is to promote the public interest in obtaining critical information for important decisions about where to live, play, and work, and how to protect the health of a community. Its challenges are also rooted in equity considerations—ensuring that citizens are able to hold industries accountable for their actions, and highlighting the disparities in emissions and public health outcomes in different communities, focusing particularly on impacts in low-income communities and communities of color. New technology and expanding knowledge enable innovative tools to improve understanding of the impacts of industry on the health and welfare of communities and the environment. It is imperative that the EPA and other developers of these resources critically evaluate measures to improve their accessibility and usability for the general public, such that the community right to know is not contingent upon access to specific expertise, technology, or resources.

Similarly, the right to emergency preparedness should not hinge upon whether communities can obtain financial or in-kind contributions from local businesses and industries or compete for federal funding. Leaving this vital, Congressionally mandated community function without the necessary basic operational resources seems at cross-purposes with Congress’ persistent occupation with homeland security and creates inequitable outcomes for communities with fewer resources. Congress must adequately fund the statute if the challenges identified by Nixon and the LEPC surveys are to be resolved in order to properly protect communities and national security.

Finally, as enforcement is imperative for the execution of all provisions of this statute, the Steel Co. decision warrants revisions to the citizen suit language to ensure that citizens may enforce against wholly past violations. This involves curing the Article III standing defects, as well as addressing the statutory jurisdiction issue raised by Justice Stevens in his concurrence. This will protect communities by deterring abuse of the statute.

The growing body of scholarship on the linkages between environmental hazards and public health highlights the need for policymakers to begin allocating more resources to environmental health research and to revisit statutes like EPCRA, which contribute to understanding how—and to what extent—
industries impact human health. As mentioned at the beginning of this Note, EPCRA’s potential is immense: there are few laws that can contribute so much relevant information to both academia and industry, while simultaneously empowering citizens with tools to both resist the abuses and overindulgences of powerful companies and plan for a range of emergencies. There is indeed a way for all stakeholders to gain under the statute—a rare outcome in the political arena. As such, there is no justifiable reason not to make the revisions required to bring the statute to its full potential, and there is similarly no strong reason for its implementation to not prioritize citizen awareness—it is after all, premised on the public right to know. Congress has an obligation to act, and it must continuously and consistently invest in EPCRA.