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## **"Thou Shalt Not Violate!": Emergency Planning and Community Right-to-Know Act Authorizes Citizen Suits for Wholly Past Violations - Atlantic States Legal Foundation, Inc. v. Whiting Roll-up Door Manufacturing Corp.**

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CASENOTE

**"Thou Shalt Not Violate!": Emergency  
Planning And Community Right-To-  
Know Act Authorizes Citizen Suits For  
Wholly Past Violations — *Atlantic States  
Legal Foundation, Inc. v. Whiting Roll-Up  
Door Manufacturing Corp.***

**Matthew J. Smith**

I. Introduction

In 1986, Congress passed an amendment to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>1</sup> These amendments became known as the Superfund Amendments and Reauthorization Act of 1986, simply referred to as SARA.<sup>2</sup> The legislation contained a provision known as the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).<sup>3</sup> Drafters hoped the legislation would greatly impact on emergency planning and

1. CERCLA §§ 103-405, 42 U.S.C. §§ 9601-9675 (1988).

2. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675, 11001-11050 (1988)).

3. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 281 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3374.

information availability, by providing data on hazardous chemicals to federal, state and local planners.<sup>4</sup> By enacting EPCRA, Congress intended to achieve two main goals: (1) provide the public with information on hazardous chemicals existing within their communities; and (2) establish reporting, notification and planning requirements which would aid state and local governments in preparing for and dealing with an emergency caused by the release of a hazardous chemical.<sup>5</sup> The enactment requires that businesses and industries meeting certain criteria<sup>6</sup> submit to selected state and federal agencies material safety data sheets,<sup>7</sup> hazardous chemical inventory forms,<sup>8</sup> and toxic chemical release forms.<sup>9</sup> Generally, most of the information required in the reporting procedures is available to the public, except for Tier II information submitted in accordance with section 312.<sup>10</sup>

After the chemical release accident at Bhopal, India where more than 2,500 people were killed,<sup>11</sup> people throughout the United States pondered the consequences of such an accident here, as well as the safety of emergency personnel reporting to the scene of such a mishap.<sup>12</sup> Local communities possess great stakes in this controversy, to include: the health of their citizens living near facilities where a hazardous chemical is either stored, used or manufactured, and the health of emergency personnel who could inadvertently stumble upon a released hazardous chemical in responding to a disaster such

4. S. REP. NO. 11, 99th Cong., 1st Sess. 14 (1985).

5. H.R. CONF. REP. NO. 962, *supra* note 3, at 281.

6. See generally EPCRA § 302(a), (b), 42 U.S.C. § 11002(a), (b) (1988) (individual sections provide additional guidance).

7. EPCRA § 311, 42 U.S.C. § 11021.

8. EPCRA § 312, 42 U.S.C. § 11022.

9. EPCRA § 313, 42 U.S.C. § 11023.

10. EPCRA § 324(a), 42 U.S.C. § 11044(a) (commonly known as the trade secret provision, limiting access to § 312 Tier II information where the facility owner or operator has requested the location of any specific chemical be withheld).

11. Jayne S.A. Pritchard, Comment, *A Closer Look at Title III of SARA: Emergency Planning and Community Right-to-Know Act of 1986*, 6 PACE ENVTL. L. REV. 203 (1988).

12. See, e.g., Karen Heller, *Public Outreach: The Stakes are High*, CHEMICAL WK., July 17, 1991, at 81; Ben Phillips, *Right to Know: Industry Takes the Offensive*, 6 GREATER BATON ROUGE BUS. REP. 30 (1988).

as a fire or explosion.<sup>13</sup>

Similarly, the stakes for businesses are also high.<sup>14</sup> Business seeks to operate at the lowest cost possible within the confines of government regulation to avoid potentially fatal civil and criminal fines.<sup>15</sup> Also, business strives to increase profits while avoiding the public relations damage and civil liability that follows a release of a hazardous chemical.<sup>16</sup> To public interest groups, EPCRA represents a vehicle to enable them to protect the environment and the public. It also aids the government by providing additional resources necessary due to increased roles and responsibilities imposed by legislation such as EPCRA.

This discussion will provide the reader with a detailed look at the *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*<sup>17</sup> case, in which EPCRA's citizen suit provision allowing actions for wholly past violations recently withstood challenge. Additionally, this casenote will delve into the legislative history of EPCRA, and provide a brief overview of some of the act's many requirements. The discussion closes with an analysis of the possible effects of this case, as well as possible penalties the court may impose against a defendant for past violations of EPCRA.

## II. Overview of *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*

This case arises from a citizen enforcement action brought by Atlantic States Legal Foundation, Inc. (ASLF) of Syracuse, New York under section 326(a) of EPCRA.<sup>18</sup> The

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13. See generally Matt Rothman, *Closing Ranks in Carbide Country*, BUS. WK., Apr. 22, 1985, at 28A; Tim Smart et al., *Pollution: Trying to Put the Best Face on Bad News*, BUS. WK., July 18, 1988, at 76; Vicky Cahan, *Calming Publics Fears: It's Up to the Chemical Makers*, BUS. WK., Aug. 26, 1985, at 33; Michael Wines, *Concern for Safety: After Bhopal — A Lid on Chemicals*, L.A. TIMES, Feb. 6, 1985, pt. 1, at 1.

14. Christine Gorman, *Listen Here, Mr. Big!*, TIME, July 3, 1989, at 40; Heller, *supra* note 12, at 81.

15. See generally Smart et al., *supra* note 13, at 76; Wines, *supra* note 13 at 1.

16. See generally Heller, *supra* note 12, at 81; Gorman, *supra* note 14, at 40.

17. Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., 772 F. Supp. 745 (W.D.N.Y. 1991).

18. EPCRA § 326(a), 42 U.S.C. § 11046(a).

citizens group alleges that the defendant Whiting Roll-Up Door Manufacturing Corp. of Akron, New York violated EPCRA's reporting requirements.<sup>19</sup> The plaintiff commenced the action in the United States District Court for the Western District of New York.<sup>20</sup> ASLF sought the following remedies in regard to Whiting's alleged violation of EPCRA: declaratory judgment on the defendant's liability; civil penalties; and injunctive relief from further violations.<sup>21</sup> The defendant responded with a motion for summary judgment under Federal Rules of Civil Procedure (FRCP) 12(b)(1), 12(b)(6) and 56.<sup>22</sup> The case focused on one central issue: whether a citizens group could maintain an action for wholly past statutory violations despite present compliance.<sup>23</sup>

The issues decided in this case are ones of first impression,<sup>24</sup> and under a relatively young piece of legislation that has little legislative history and case law to support it. A decision in favor of the defendant would greatly curtail the reach of the statute and limit its enforcement. On the other hand, a decision for the plaintiff would greatly impact the regulated public, since they could be closely monitored by citizens' groups and penalized for past violations though now in full compliance. Additionally, there could be indirect impacts such as increased insurance costs, increased consumer prices (as manufacturers pass along costs from penalties and compliance measures), and possibly even adverse effects on the regional economics (as industry shuts down when unable to meet penalties or compliance costs, leaving people unemployed, reducing tax rolls and revenues, and reducing demand for other industrial and consumer products). Several citizen groups have closely monitored the case, and advocate Atlantic State's arguments. This decision will greatly impact the ability of these groups to act against ecological villains where government has failed to act. Notably, *Amicus Curiae Memoranda* were sub-

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19. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. at 746.

20. *Id.* at 745.

21. *Id.* at 746.

22. *Id.* at 745.

23. *Id.* at 746.

24. *Id.* at 749.

mitted by the Natural Resources Defense Council (NRDC), Environmental Action, Inc., and the Public Interest Research Group of New Jersey, Inc.<sup>25</sup>

### III. Legislative History of EPCRA

The legislative history behind EPCRA, and particularly its citizen suit provision, can best be described as sparse. However, the available material sufficiently supports the court's finding that the plaintiff did have a valid cause of action based on past violations.<sup>26</sup> An indicative theme continually resounds throughout the legislative history. The theme consists of a desire to protect the public by providing valuable information on hazardous chemicals located in their local communities, which can be used to formulate emergency plans.<sup>27</sup> The legislators' concerns arise from the aftermath of the December, 1984 release of a hazardous chemical (methyl isocyanate), which killed more than 2,500 people in Bhopal, India.<sup>28</sup> One of the leading proponents of this legislation vigorously supported EPCRA as a prophylactic for the terrible ills resulting from chemical releases.<sup>29</sup> In the Senate floor debate, Senator Lautenberg stated:

[One] year ago, Bhopal, India was unknown. Now it is a name and a place known to people all over the world . . . that strikes terror in the hearts of millions who live or work near a chemical plant. Since the Bhopal incident, there have been a series of less serious, but significant, releases in the United States that suggest that we are far from immune from such dangers. Clearly, we must take every step to prevent such occurrences. But, in the event of a chemical release, we should be better prepared to respond. Hundreds of the victims in Bhopal could have been spared their lives or injuries if they had known of

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25. *Id.* at 746.

26. *Id.* at 753.

27. S. REP. NO. 11, *supra* note 4, at 14.

28. See generally S. REP. NO. 11, *supra* note 4, at 74; see also Pritchard, *supra* note 11, at 204.

29. S. REP. NO. 11, *supra* note 4, at 74.

the hazard around them and known how to respond. Many more lives could have been saved if a communication system had been in place to alert residents of Bhopal about the release. That is true of chemical releases in this country as well. Our amendment is designed to improve our ability to respond to these incidents . . . [t]o improve local emergency preparedness planning.<sup>30</sup>

The fear of an accident of the Bhopal magnitude is clearly evident, and was a distinct catalyst in the legislative process. EPCRA began as an amendment to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>31</sup> The amendment required certain facility owners or operators to prepare and distribute an inventory of hazardous substances and their characteristics to the Environmental Protection Agency (EPA), state/local governments, local emergency organizations (fire and police) and emergency planning commissions.<sup>32</sup> Legislative history indicates that the term hazardous substance in EPCRA is borrowed from section 101 (14) of CERCLA,<sup>33</sup> and additionally provides that "chemical mixtures" of one percent or more of a hazardous substance are to be regulated as well.<sup>34</sup> Additionally, the Act's history indicates that compliance would be required of facilities that had the following characteristics: those which manufactured a hazardous substance, or stored more than 6,000 kilograms of a hazardous substance and had more than ten full-time employees.<sup>35</sup> EPCRA follows the examples of previous legislation in New Jersey and Maryland, although primarily mirroring the New Jersey law.<sup>36</sup> The New Jersey legislation was enacted in

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30. 131 CONG. REC. S11,664 (daily ed. Sept. 18, 1985) (statements of Sen. Lautenberg.)

31. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675).

32. Pub. L. No. 99-499, 100 Stat. 1736-47 (codified as amended at 42 U.S.C. §§ 9601-9675, 11001-11050 (1988)).

33. CERCLA § 101(14), 42 U.S.C. § 9601(14).

34. S. REP. No. 11, *supra* note 4, at 9.

35. *Id.*

36. *Id.* at 10.

1978, and followed the state's survey of more than 7,000 members of the affected industry who contributed comments on the proposed act.<sup>37</sup> Similar to EPCRA, the state legislation required a business to provide the state/local governments with an inventory of hazardous substances on their premises.<sup>38</sup> However, the EPCRA drafters desired to keep the Act (and any later state regulation) in step with other pre-existing federal legislation, in order to prevent duplication of effort, promote national uniformity, and minimize costs to the regulated public.<sup>39</sup> This idea emerges clearly as the material safety data sheets (MSDS) (used to inventory hazardous chemicals at a facility) are governed by the "Hazardous Communication Standard promulgated under the Occupational Safety and Health Act of 1970 [OSHA],"<sup>40</sup> and are meant to "track[ ] requirements which already exist under the OSHA regulations."<sup>41</sup>

A theme of continuity permeates EPCRA's legislative history as well.<sup>42</sup> The Act expands the OSHA "employee right to know" concept establishing a "community right to know" program which allows citizens and emergency agencies in areas where hazardous chemicals are made, used, stored or handled to have the same access to information as workers do under the OSHA.<sup>43</sup> The legislative history also evidences a desire that anytime a facility owner or operator provides hazardous chemicals to another owner or operator a MSDS must either be sent before or with the initial shipment of the substance.<sup>44</sup> The legislative history warns that failure to receive a MSDS places a burden on the recipient of the hazardous substance to "make reasonable efforts to contact the manufacturer or importer and request the sheet," and which "must be documented by . . . retaining copies of correspondence sent or

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37. *Id.*; see also N.J. STAT. ANN. §§ 34:5A-1 to 34:5A-42 (West 1988).

38. S. REP. NO. 11, *supra* note 4, at 10.

39. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985).

40. 29 U.S.C. §§ 651-678 (1988).

41. H.R. REP. NO. 253, *supra* note 39, at 112.

42. *Id.* at 59-60, 111.

43. *Id.* at 110.

44. *Id.* at 111.



records of phone calls made.”<sup>45</sup> These requirements reveal an interconnected transmittal of information not only between the regulated industry and the public, but also amongst regulated industry as well. This interconnected concept is evidenced by EPCRA’s requirements being built upon the foundation of OSHA regulations, and stresses the importance of information flow at all levels and to all concerned parties having contact with a hazardous chemical.<sup>46</sup> Additionally, the legislative history of the Act stresses the importance of providing information to the public. The Senate report on the Act stresses that “once material safety data sheets are developed, it is crucial they be made available to the public in the quickest, most efficient way possible.”<sup>47</sup> The Senate conferees lamented in the same report that the key purpose of reporting via the MSDS inventory sheets was to “provide adequate and timely circulation of the inventory so that those who may be affected by a release would have access to relevant data concerning the hazardous substance.”<sup>48</sup> During debate in the House of Representatives, Congressman Edgar (a leading architect and supporter of the bill) stressed that the public was entitled to know about exposure to toxic chemicals in their communities.<sup>49</sup> He further added that the EPCRA legislation provided the public liberal access to toxic chemical information, featuring MSDS inventory sheets which were within the comprehension of an ordinary layman.<sup>50</sup> By the above indications, Congress intended that information on hazardous chemicals in one’s community be made available to the public as soon as possible, and in a form easy to understand.<sup>51</sup> Again, they hoped this would aid community planning in order to avoid another disaster of the Bhopal magnitude.<sup>52</sup>

The final discussion of legislative history deals with civil

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45. *Id.* at 112.

46. *Id.* at 110-12; see also S. REP. NO. 11, *supra* note 4, at 14.

47. H.R. REP. NO. 253, *supra* note 39, at 111.

48. S. REP. NO. 11, *supra* note 4, at 14.

49. 132 CONG. REC. H9608 (daily ed. Oct. 8, 1986) (statement of Rep. Edgar).

50. *Id.*

51. *Id.*; see also S. REP. NO. 11, *supra* note 4, at 14.

52. S. REP. NO. 11, *supra* note 4, at 74.

actions under section 326 of EPCRA. Section 326(a)(1) authorizes citizens to bring suits on their own behalf when facility owners/operators, the EPA, a state or a state emergency response commission fail to comply with EPCRA requirements.<sup>53</sup> In floor debate, Congressman Swift recognized these provisions, and also noted one existing limitation which was a prohibition of suits against local emergency planning committees.<sup>54</sup> The original House amendment had no provision for citizen suits.<sup>55</sup> The Senate's amendment provided for a citizen suit provision, which was subsequently modified and refined in a conference substitute.<sup>56</sup> The substitute embodied the Senate's provision, but further defined it by eliminating ambiguity and adding definition.<sup>57</sup> The conference substitute added a subsection under section 326 authorizing state and local governments to bring causes of action for violations of EPCRA.<sup>58</sup>

Emerging from this brief survey of the Act's limited history, Congress' intent emerges as a desire to quickly provide the public information on hazardous chemicals within their community in order to aid in emergency planning, while keeping the legislation from becoming an undue burden on the regulated public or out of step with existing federal legislation.<sup>59</sup> The history supports the desire of timely reporting, and easy, open access to the public.<sup>60</sup> Finally, the history provides an extremely limited discussion of the section 326 citizen suit provision, having only one limitation - the inability to sue local emergency planning committees.<sup>61</sup> On the subject of

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53. EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1); *see also* 132 CONG. REC. H9593-94 (daily ed. Oct. 8, 1986) (statement of Rep. Swift).

54. *Id.*

55. H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. V, at 96-98, *reprinted in* 1986 U.S.C.A.N. 3124, 3219-21.

56. S. REP. NO. 11, *supra* note 4, at 119.

57. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 309-10 (1986).

58. *Id.* at 310.

59. H.R. REP. NO. 253, *supra* note 39, at 59-60, 110-12; *see also* S. REP. NO. 11, *supra* note 4, at 14.

60. S. REP. NO. 11, *supra* note 4, at 14.

61. 132 CONG. REC. H9593 (daily ed. Oct. 8, 1986); *see also* notes 53-54 and accompanying text.

bringing suits for past violations of EPCRA, the legislative history remains silent. By failing to mention past violations amongst the statute's limitations, one could infer that the legislative history supports the interpretation that section 326 authorizes citizens suits for past violations of EPCRA.

#### IV. Overview of EPCRA

The Emergency Planning and Community Right-to-Know Act (EPCRA) can be found under Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>62</sup> EPCRA has two major themes: (1) the provision of information to the public on hazardous chemicals within their communities; and (2) providing information to federal, state and local governments which can be used in forming emergency policies and plans regarding the accidental release of a hazardous chemical.<sup>63</sup> EPCRA accomplishes these goals through the use of three reporting systems.<sup>64</sup> These systems require the facility owners or operators to submit certain information about substances termed hazardous chemicals to responsible local, state and federal authorities. Additionally, Emergency Planning Committees and Emergency Response Commissions are established on the local and state levels respectively.<sup>65</sup> These agencies monitor information submittals as required under EPCRA, and Local Emergency Planning Committees (LEPCs) use the information received to develop an emergency plan to deal with the accidental release of a hazardous chemical.<sup>66</sup> The State Emergency Response Commission (SERC) will review the plan to ensure consistency with plans of neighboring localities, and make any recommendations as

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62. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675, 11001-11050 (1988)).

63. *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 746 (W.D.N.Y. 1991); see also Pritchard, *supra* note 11, at 204 (citing H.R. REP. No. 962, 99th Cong., 2d Sess. 281, reprinted in 1986 U.S.C.C.A.N. 3276, 3374).

64. EPCRA §§ 311-313, 42 U.S.C. §§ 11021-11023. Applicability to facility owners and operators can be found in individual sections and 40 C.F.R. § 370.1 (1992).

65. EPCRA § 301, 42 U.S.C. § 11001.

66. EPCRA § 303(a), 42 U.S.C. § 11003(a).

needed.<sup>67</sup> Additionally, the LEPCs and SERC serve as conduits for information, and citizens can contact them in order to gain knowledge about hazardous chemicals located within their communities.<sup>68</sup>

As mentioned above, three reporting systems drive EPCRA. The first comes under section 311, material safety data sheets (MSDS).<sup>69</sup> Building upon the Occupational Safety and Health Act of 1970 (OSHA),<sup>70</sup> EPCRA asks facility owners and operators to submit copies of MSDSs for hazardous chemicals (which the facility owner or operator is required to have under OSHA) to appropriate LEPCs, SERC, and the local fire department.<sup>71</sup> A guide for hazardous chemicals for which a MSDS is required can be found in OSHA's implementing regulations.<sup>72</sup> EPCRA provides an option, whereby the regulated public can submit one compiled list in lieu of individual MSDSs.<sup>73</sup> However, the list must follow OSHA and Environmental Protection Agency (EPA) guidance and requirements.<sup>74</sup> The deadline for the submittal of MSDS forms can be found in section 311(d)(1), and allows for the later of either: (A) twelve months after October 17, 1986, or (B) three months after the owner or operator of the facility is required to prepare such reports under OSHA.<sup>75</sup> However, if a facility owner or operator discovers significant "new information concerning an aspect of a hazardous chemical for which a MSDS was previously submitted, . . . a revised sheet shall be provided."<sup>76</sup> The statute does not require an annual update. This information may be made available to the public upon their request.<sup>77</sup> Additionally, although an owner or operator may

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67. *Id.*

68. EPCRA §§ 311(c)(2), 312(e)(3), 313(g)(2), 324, 42 U.S.C. §§ 11021(c)(2), 11022(e)(3), 11023(g)(2), 11024.

69. EPCRA § 311, 42 U.S.C. § 11021; *see also* 40 C.F.R. § 370.21 (1992).

70. 29 U.S.C. §§ 651-678 (1988).

71. EPCRA § 311(a)(1)(A), (B), (C), 42 U.S.C. § 11021(a)(1)(A), (B), (C).

72. 29 C.F.R. § 1910.1200 (1992).

73. EPCRA § 311(a)(1), 42 U.S.C. § 11021(a)(1).

74. EPCRA § 311(a)(2)(A), (B), 42 U.S.C. § 11021(a)(2)(A), (B).

75. EPCRA § 311(d)(1), 42 U.S.C. § 11021(d)(1).

76. EPCRA § 311(d)(2), 42 U.S.C. § 11021(d)(2).

77. EPCRA §§ 311(c)(2), 324(a), 42 U.S.C. §§ 11021(c)(2), 11044(a) (noting that

have submitted a list, a LEPC may still require a MSDS for specific chemicals on the list.<sup>78</sup>

The second reporting requirement under EPCRA is the Emergency and Hazardous Chemical Inventory Form (hereinafter "inventory form").<sup>79</sup> Generally, this form must include all chemicals for which OSHA and section 311 require a MSDS.<sup>80</sup> Similar to section 311 requirements, copies of the inventory form must be sent to the appropriate LEPC, SERC and the local fire department.<sup>81</sup> However, EPCRA authorizes the administrator of the EPA to set "thresholds" for reporting.<sup>82</sup> These thresholds equal quantities of hazardous chemicals below which no facility would be subject to section 312.<sup>83</sup> The section breaks down reporting requirements into two "tiers." Tier I information is the minimum amount of information to be reported, and again is in accordance with OSHA.<sup>84</sup> Tier II information reporting is more specific, and requires various data such as where and in what manner a hazardous chemical is stored.<sup>85</sup> The statute's Tier II provisions also allow an opportunity for an owner or operator to claim a trade secret under section 324 regarding hazardous chemicals at their facility.<sup>86</sup> However, although initial submission of Tier II information is voluntary, a LEPC, SERC or local fire department may direct that such information or report be submitted, for which the regulated public has a mandatory

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the only limitation may be as designated under § 322 regarding trade secrets).

78. EPCRA § 311(c)(1), 42 U.S.C. § 11021(c)(1).

79. EPCRA § 312, 42 U.S.C. § 11022; *see also* 40 C.F.R. §§ 370.1, 370.25 (1992) (EPA regulations on EPCRA).

80. EPCRA § 312(a)(1), 42 U.S.C. § 11022(a)(1); *see also* 40 C.F.R. § 370.40 (instructions for the completion of the form).

81. EPCRA § 312(a)(1)(A), (B), (C), 42 U.S.C. § 11022(a)(1)(A), (B), (C).

82. EPCRA § 312(b), 42 U.S.C. § 11022(b); *see also* 40 C.F.R. § 370.40 (1992) (EPA regulations providing threshold levels for Tier I and II information under § 312).

83. EPCRA § 312(b), 42 U.S.C. § 11022(b).

84. EPCRA § 312(d)(1), 42 U.S.C. § 11022(d)(1).

85. EPCRA § 312(d)(2), 42 U.S.C. § 11022(d)(2).

86. EPCRA § 312(d)(2)(F), 42 U.S.C. § 11022(d)(2)(F); *see also* EPCRA § 324, 42 U.S.C. § 11044 (which provides that upon a request by an owner or operator under § 312, Tier II information should be withheld from public disclosure by the SERC/LEPC).

duty to respond.<sup>87</sup> As with section 311, information submitted is generally available to the public, with public requests even generating the demand for Tier II information.<sup>88</sup> These forms must be submitted annually by March 1.<sup>89</sup> The third main reporting requirement is the completion of Toxic Chemical Release forms.<sup>90</sup> Section 313 requires that an owner or operator complete an EPA form for all toxic chemicals on a list specified by the EPA.<sup>91</sup> This form is commonly known as EPA Form R.<sup>92</sup> This form is an inventory form and applies to facilities which either manufactured, processed or used (in amounts exceeding section 313(f) threshold limits) toxic chemicals on the EPA list.<sup>93</sup> Unlike reporting procedures in sections 311 and 312, section 313 information is only forwarded to the EPA and a representative from the state government designated by the governor.<sup>94</sup> Again, the statute provides general availability of the information to the public.<sup>95</sup> EPCRA requires that the "R" form be submitted annually, and no later than July 1.<sup>96</sup>

In applying the above sections, the question of whether a facility is subject to EPCRA regulation differs greatly from section to section. Section 311 applicability is governed under OSHA regulations,<sup>97</sup> while section 312 depends on the OSHA regulations and EPA threshold levels.<sup>98</sup> However, section 313 reporting is governed by the facility's industrial code and the amount and type of chemical located at the facility.<sup>99</sup> Additionally, sections 302 and 303 place the burden on the regu-

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87. EPCRA § 312(e)(1), 42 U.S.C. § 11022(e)(1).

88. EPCRA § 312(e)(3)(B), 42 U.S.C. § 11022(e)(3)(B).

89. EPCRA § 312(a)(2), 42 U.S.C. § 11022(a)(2); 40 C.F.R. § 370.20 (1992).

90. EPCRA § 313, 42 U.S.C. § 11023; 40 C.F.R. pt. 372 (1992).

91. 40 C.F.R. § 372.65 (1992).

92. *Id.* § 372.30; *see also id.* § 372.85 (instructions for completing the form).

93. EPCRA § 313(a), (b), 42 U.S.C. § 11023(a), (b).

94. EPCRA § 313(a), 42 U.S.C. § 11023(a).

95. EPCRA § 324(a), 42 U.S.C. § 11044(a).

96. EPCRA § 313(a), 42 U.S.C. § 11023(a).

97. 29 C.F.R. § 1910.1200 (1992).

98. EPCRA § 312(a), (b), 42 U.S.C. § 11022(a), (b).

99. EPCRA § 313(b), 42 U.S.C. § 11023(b); *see also* 40 C.F.R. §§ 372.22, 372.25, 372.65 (1992) (regarding types and quantities of chemicals which will subject facility to coverage).

lated public to determine whether they fall under the act, and if so to take actions to notify and coordinate with LEPCs and SERCs.<sup>100</sup> Failure to comply with EPCRA requirements can result in action being taken against the owner or operator of a facility.<sup>101</sup> Action can be taken in the form of an administrative, civil or criminal proceeding.<sup>102</sup>

In regard to violations of reporting requirements, only civil and administrative penalties can be assessed.<sup>103</sup> For failure to submit Inventory or Toxic Chemical Release Forms, penalties of up to \$25,000 can be assessed per violation.<sup>104</sup> For failure to submit MSDSs, penalties of up to \$10,000 can be assessed per violation.<sup>105</sup> The statute adds that each day of non-compliance equates to a separate violation.<sup>106</sup> Enforcement actions can be brought under section 325 by the EPA.<sup>107</sup> The statute dictates that both jurisdiction and venue shall be in the United States district court in which the facility is located.<sup>108</sup> However, section 326 provides a remedy for citizen groups and state and local governments.<sup>109</sup> Again, the federal district court shall have jurisdiction,<sup>110</sup> and venue reposes in the district where the violation occurred.<sup>111</sup>

Citizen groups are authorized to bring civil actions against "an owner or operator of a facility for failure to do any of the following": to submit an emergency notice (section 304); to submit a required MSDS/list (section 311); to complete and submit an inventory form (section 312); and to complete and submit a toxic chemical release form (section 313).<sup>112</sup> Additionally, citizen suits can be maintained against the EPA, the

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100. EPCRA §§ 302, 303, 42 U.S.C. §§ 11002, 11003.

101. EPCRA §§ 325, 326, 42 U.S.C. §§ 11045, 11046.

102. EPCRA § 325, 42 U.S.C. § 11045.

103. EPCRA § 325(c), 42 U.S.C. § 11045(c).

104. EPCRA § 325(c)(1), 42 U.S.C. § 11045(c)(1).

105. EPCRA § 325(c)(2), 42 U.S.C. § 11045(c)(2).

106. EPCRA § 325(c)(3), 42 U.S.C. § 11045(c)(3).

107. *Id.*

108. EPCRA § 325(a), 42 U.S.C. § 11045(a).

109. EPCRA § 326, 42 U.S.C. § 11046.

110. EPCRA § 326(c), 42 U.S.C. § 11046(c).

111. EPCRA § 326(b), 42 U.S.C. § 11046(b).

112. EPCRA § 326(a)(1)(A), 42 U.S.C. § 11046(a)(1)(A).

state and a SERC for various reasons to include failure to provide information required by EPCRA under sections 311-313.<sup>113</sup> State and local governments are authorized to bring suit "against an owner or operator of a facility for failure to do any of the following": provide notification to SERCs (section 302), submit an MSDS/list, and complete an inventory form (section 312).<sup>114</sup> Additionally, the state can sue the EPA for failure to provide information under section 322.<sup>115</sup> SERCs and LEPCs also possess the right to bring citizen suits against owners or operators who fail to provide information under section 303.<sup>116</sup>

V. The Suit: *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*

On October 30, 1990, plaintiff Atlantic States Legal Foundation (ASLF) brought an action against Whiting Roll-Up Door Manufacturing Corporation in the United States District Court, Western District of New York for failure to comply with the reporting requirements of EPCRA.<sup>117</sup> Based in Syracuse, New York, the plaintiff is a not for-profit group with nationwide membership, and is "dedicated to protecting and restoring the natural resources of the United States and its territories."<sup>118</sup> ASLF achieves its goals by promoting public awareness of man's impact on the environment, and tries to foster knowledge about the need to live in harmony with the environment.<sup>119</sup> Mr. Charles M. Tebutt, of the Buffalo law firm Allen, Lippes & Shonn, represented ASLF.<sup>120</sup> The defendant, Whiting Roll-Up Door Manufacturing Corporation, manufactures roll-up and hinged doors, and is located in Ak-

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113. EPCRA § 326(a)(1)(B), (C), (D), 42 U.S.C. § 11046(a)(1)(B), (C), (D).

114. EPCRA § 326(a)(2)(A), 42 U.S.C. § 11046(a)(2)(A).

115. EPCRA § 326(a)(2)(C), 42 U.S.C. § 11046(a)(2)(C).

116. EPCRA § 326(a)(2)(B), 42 U.S.C. § 11046(a)(2)(B).

117. *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 749 (W.D.N.Y. 1991).

118. Plaintiff's Complaint at 2, *Whiting Roll-Up Door Mfg. Corp.* (No. CIV-90-1109S).

119. *Id.*

120. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. at 745.



ron, New York.<sup>121</sup> The defendant retained the Buffalo firm of Hodgen, Russ, Andrews & Goodyear, with Jerrold Brown as counsel.<sup>122</sup> The court's decision resulted from a motion by the defendant to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to FRCP 12(b)(1) and 12(b)(6) respectively.<sup>123</sup> ASLF initiated its suit pursuant to the citizen suit provision of section 326(a)(1).<sup>124</sup> ASLF sought the following relief: declaratory judgment on Whiting's liability, civil penalties for violations of EPCRA sections 311-313, permanent injunctive relief prohibiting further EPCRA violations, and attorney fees and costs.<sup>125</sup>

ASLF alleged that Whiting had violated sections 311-313 between 1987-1989. On May 15, 1990, ASLF sent the President of Whiting a notice of intent to sue, pursuant to section 326(a) of EPCRA.<sup>126</sup> After both the EPA and the state failed to take action, ASLF commenced its civil action. ASLF alleged that Whiting violated section 311 of EPCRA by failing to submit an MSDS for hazardous chemicals including Number Two fuel oil, gasoline, EPDM compounds, and various paint mixtures.<sup>127</sup> The defendant was reported to have violated this section more than 1,000 times, and failed to come into compliance until August, 1990.<sup>128</sup> In regard to the section 312 violations, Whiting failed to submit inventory forms for Number Two fuel oil, gasoline, EPDM compounds and paints containing toluene.<sup>129</sup> ASLF claimed that Whiting had failed to comply until August 21, 1990, and had violated section 312 more than 900 times.<sup>130</sup> Finally, ASLF alleged that Whiting had violated section 313, when it failed to report and had used

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121. *Id.* at 748.

122. *Id.* at 745.

123. *Id.*

124. EPCRA § 326(a)(1), 42 U.S.C. § 11046(a)(1).

125. 772 F. Supp. at 746.

126. EPCRA § 326(a), 42 U.S.C. § 11046(a) (notice to inform defendant of any allegations to be raised in the suit).

127. Plaintiff's Complaint at 3, *Whiting Roll-Up Door Mfg. Corp.* (No. CIV-90-1109S).

128. *Id.*

129. *Id.* at 4.

130. *Id.*

more than 10,000 pounds per year of the regulated chemical toluene.<sup>131</sup> Under section 313, the Act required the defendant to submit "R" forms annually, and its non-compliance constituted over 1,100 violations.<sup>132</sup> Again, it must be noted that each day of non-compliance with sections 311-313 constitutes a separate violation under section 325(c)(3).<sup>133</sup>

Before commencement of the suit, the defendant had come into compliance.<sup>134</sup> ASLF admitted this fact at trial.<sup>135</sup> However, ASLF maintained their action was still valid as EPCRA authorized suit for wholly past violations.<sup>136</sup> Although Whiting had come into compliance, it had not done so by the mandatory dates embodied in each of the sections, resulting in violations.<sup>137</sup> ASLF maintained that these violations were actionable under section 326(a) authorizing citizen suits against owners or operators of a facility "for failure to do" specified EPCRA reporting requirements.<sup>138</sup> However, the defendant's interpretation was a stark contrast. The defendant claimed that as of the date of the suit's commencement there was no failure to comply with EPCRA, as it had submitted the required reports.<sup>139</sup> By complying and submitting its forms late, Whiting proffered there was no violation.<sup>140</sup> To support its argument, the defendant relied on *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*,<sup>141</sup> which interpreted the Clean Water Act's (CWA) citizen suit provision<sup>142</sup> regarding wholly past violations.<sup>143</sup> The Supreme Court held that CWA section 505(a) did not authorize citizen suits

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131. *Id.* at 5.

132. *Id.* at 6.

133. EPCRA § 325(c)(3), 42 U.S.C. § 11045(c)(3).

134. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. at 746.

135. *Id.*

136. *Id.*

137. *Id.* at 750.

138. *Id.* at 748.

139. *Id.* at 746.

140. *Id.* at 750.

141. 484 U.S. 49 (1987).

142. CWA § 505(a), 33 U.S.C. § 1365(a) (1988).

143. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. at 751-52.

for wholly past violations.<sup>144</sup> The relevant provision of CWA section 505 provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation . . . [or] (B) an order issued by the Administrator or a State."<sup>145</sup> The *Gwaltney* court examined the statutes' plain language, statutory scheme, and legislative history, and found that the language "alleged . . . to be in violation," although ambiguous, referred to a continuing or intermittent violation.<sup>146</sup> To further bolster its interpretation, the *Gwaltney* court stated that the sixty day notice provision<sup>147</sup> was provided to offer the opportunity for the defendant to come into compliance and avoid litigation.<sup>148</sup>

In support of the ASLF's argument, an Amici Curiae memorandum was submitted from the Natural Resources Defense Council, Environmental Action, Inc., and Public Interest Research Group of New Jersey, Inc.<sup>149</sup> In the memorandum, the Amici attacked Whiting's interpretation of EPCRA section 326(a) and stated "that this interpretation would encourage companies to avoid or delay their compliance with the law, thereby adversely affecting Amici's members and the public at large."<sup>150</sup> The memorandum also stressed that Congress' intent was for prompt and timely submission of required documents, and the defendant's interpretation severely undermined that goal.<sup>151</sup> Regarding civil penalties, the Amici stated that violators would be deterred if they knew that fines would be imposed for failing to file on time.<sup>152</sup> They rejected defendant's interpretation as encouraging companies "to do nothing until they are notified that a citizen suit is imminent

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144. *Gwaltney of Smithfield*, 484 U.S. at 59-61.

145. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

146. *Gwaltney of Smithfield*, 484 U.S. at 57.

147. CWA § 505(b), 33 U.S.C. § 1365(b). *But cf.* EPCRA § 326(d), 42 U.S.C. § 11046(d) (EPCRA's 60 day notice requirement).

148. 484 U.S. at 60.

149. Memorandum of Amici Curiae, *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991) (No. CIV-90-1109S).

150. *Id.* at 3.

151. *Id.*

152. *Id.* at 4.

and then to hastily file their forms before a citizen suit is brought.”<sup>153</sup>

Next the Amici questioned Whiting’s reliance on *Gwaltney*. They directed attention to language of both EPCRA and the CWA, noting the former authorized citizen suits “for failure” to comply with the statute while the latter focused on “persons alleged to be in violation.”<sup>154</sup> Additionally, they highlighted other textual constructions such as CWA’s repeated use of “occurs” and “occurring,” compared with EPCRA’s authorization of venue in the district where the violation “occurred.”<sup>155</sup> Additionally, the Amici discussed the *Gwaltney* court’s interpretation of the sixty day notice provision. The Amici stated that Congress amended the Clean Air Act (CAA)<sup>156</sup> to allow citizen suits for wholly past violations as a response to dissatisfaction with *Gwaltney*.<sup>157</sup> Although the citizen suit provision was amended, the sixty day notice requirement remained unchanged. Noting this, the Amici reasoned that the provision’s impact on suits (past or present) depended on which statute was involved, and that there was no universal interpretation of such a provision.<sup>158</sup> The Amici stated the sixty days notice provisions served three purposes: (1) to give the alleged violator notice and enable him to verify or contest the citizen’s allegations; (2) encourage a violator to mitigate its violations by taking corrective actions; and (3) enable parties to discuss the alleged violation and negotiate a settlement.<sup>159</sup> The memorandum concluded with a discussion on penalties, and included as an exhibit the EPA’s “Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act.”<sup>160</sup> In its analysis, the Amici described EPA’s policy as utilizing penalties to de-

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153. *Id.*

154. *Id.* at 6.

155. *Id.* at 7. Compare CWA § 505(c)(1), 33 U.S.C. 1365(c)(1) with EPCRA § 326(b), 42 U.S.C. § 11046(b).

156. CAA § 304, 42 U.S.C. § 7604 (Supp. II 1990).

157. Memorandum of Amici Curiae at 7-8, *Whiting Roll-Up Door Mfg. Corp.* (No. CIV-90-1109S).

158. *Id.* at 8.

159. *Id.* at 10-11.

160. *Id.* at 17.

ter violations of section 313, and that penalties were appropriate for nonreporting.<sup>161</sup> They also noted that the most stringent penalties recommended by the policy matrix were for nonreporting; the very offense which Whiting committed.<sup>162</sup>

After reviewing all relevant submittals, the Amici Memorandum, and hearing oral arguments on March 19, 1991, the district court rendered a decision on the defendant's motion. The court looked initially to the Act's legislative history, and finding no legislative intent to the contrary, was compelled to rely on the plain language of the statute.<sup>163</sup> Utilizing the plain language of the statute, the court found that the mandatory compliance dates in EPCRA sections 311-313 were requirements for purposes of the citizen suit penalty provision under EPCRA section 325.<sup>164</sup> The court stressed that Congress' choice of the word "shall" in sections 311-313 was indicative of an EPCRA requirement of mandatory compliance by a specified date.<sup>165</sup> Regarding the defendant's argument that the statute only governed present violations, the court held the interpretation was "far too restrictive . . . for according to the statute's plain language, the compliance dates constitute requirements of the reporting provisions; the unequivocal language of sections 311-313 requires initial reporting on dates certain."<sup>166</sup> Additionally, the court reasoned that the defendant's interpretation was not consistent with section 325(c)<sup>167</sup> authorizing penalties against "[a]ny person . . . who violates any requirement . . ." of EPCRA's reporting provision.<sup>168</sup>

Next, the court proceeded to discuss the objective of the act through its requirements and legislative history. The court determined that the Act had two objectives: (1) provide the

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161. *Id.*

162. *Id.* at 18.

163. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. at 750 (citing Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) (holding absent a clearly expressed legislative intent to the contrary a court must use a statute's plain meaning)).

164. *Id.*

165. *Id.*

166. *Id.*

167. EPCRA § 326(c), 42 U.S.C. § 11046(c).

168. 772 F. Supp. at 750.

public information on hazardous chemicals in the local communities; and (2) provide information which can be used to develop emergency plans to respond to an accidental release of a hazardous chemical.<sup>169</sup> The court added the burden was on Whiting to comply with the reporting requirements, and failure to do so severely derails attempts to develop emergency plans.<sup>170</sup> Emergency plans are formulated on information submitted. Either the failure to report or late reporting can cause incomplete plans to be formulated, which endanger the public and emergency workers. Likewise, the defendant's interpretation "would render gratuitous the compliance dates," and provide the public no recourse against violators who endanger the safety of the community.<sup>171</sup>

Finally, the court analyzed Whiting's reliance on *Gwaltney*. Immediately, it recognized that EPCRA and the CWA's citizen suit provisions differ in language.<sup>172</sup> The court noted that the CWA authorized a citizen suit against persons "alleged to be in violation,"<sup>173</sup> while EPCRA authorized suits against those for "failure to" comply.<sup>174</sup> The court then reasoned that from a "natural reading" one could interpret EPCRA to include past acts of non-compliance, and the CWA as only pertaining to present or continuing acts.<sup>175</sup> They also found that the language of section 326(b)(1),<sup>176</sup> which provided venue in the district court where the "alleged violation occurred," to be an indicator of congressional intent.<sup>177</sup>

In reference to the sixty day notice argument of *Gwaltney*, the court made strong reference to the recent amendment of the CAA. It stressed that Congress had specifically amended the CAA to provide for citizen suits on wholly past violations, yet allowed the sixty day notice provision to

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169. *Id.* at 751.

170. *Id.*

171. *Id.* at 750.

172. *Id.* at 752.

173. CWA § 505(a), 33 U.S.C. § 1365(a).

174. EPCRA § 326(a), 42 U.S.C. § 11046(a).

175. 772 F. Supp. at 752.

176. EPCRA § 326(b)(1), 42 U.S.C. § 11046(b)(1).

177. 772 F. Supp. at 753.

remain untouched.<sup>178</sup> The court reasoned that if the notice provision had the same purpose in the CAA as it did in *Gwaltney*, Congress would not have allowed such a contradiction to exist.<sup>179</sup>

Based upon the above analysis, the court held that ASLF was authorized under EPCRA to bring a civil suit for past violations of a reporting requirement, despite the defendant's current compliance. The court then denied the defendant's motion to dismiss the complaint pursuant to FRCP 12(b)(1). To date, the case remains unsettled, and pending further judicial action.<sup>180</sup>

As this is a case of first impression, there are no previous cases on point which can be cited for support. However, ASLF has commenced twelve other similar actions.<sup>181</sup> In June 1991, ASLF commenced a suit against Frink America, Inc., a manufacturer of snow plows in Clayton, New York.<sup>182</sup> ASLF alleged that Frink violated EPCRA by failing to submit a Toxic Chemical Release Inventory Report Form R for quantities of xylene it had at its facility.<sup>183</sup> Subsequently, the case reached settlement in July, 1991 when a consent decree was entered.<sup>184</sup> In the agreement, the defendant agreed to: comply with EPCRA sections 311-313, pay a fine of \$51,000 for failure to timely report under section 313 (\$43,000 of which allowed for a credit to Frink to undertake and implement a pollution prevention/toxins reduction program), and pay ASLF's legal fees.<sup>185</sup>

178. *Id.*

179. *Id.*

180. Telephone Interview with Docket Clerk, United States District Court, Western District of New York (Mar. 22, 1993). Despite this fact, the *Whiting* decision is a viable one and has been applied by a federal district court in California in arriving at a similar conclusion. See *Williams v. Leybold Technologies*, 784 F. Supp. 765 (N.D. Cal. 1992) (holding liability and fines can be assessed for past violations of EPCRA despite current compliance).

181. Telephone Interview with Charles M. Tebutt, Counsel for ASLF, of the law firm Allan, Lippes & Shonn (Feb. 18, 1992).

182. *Atlantic States Legal Found., Inc. v. Frink America, Inc.*, No. 91-CV-0734 (N.D.N.Y. June 26, 1991).

183. Plaintiff's Complaint at 3, 4, *Frink America, Inc.* (No. 91-CV-0734).

184. Consent Decree, *Frink America, Inc.* (No. 91-CV-0734) (July 8, 1991).

185. *Id.* at 3-5.

Similarly, ASLF commenced two other suits which were settled in a comparable fashion. In March, 1991, a suit was commenced against Cooper Industries Turbocompressor Division of Buffalo, New York.<sup>186</sup> The action alleged that Cooper violated EPCRA sections 311-313, and notably had significant quantities of trichloroethane and xylene present at its facility.<sup>187</sup> ASLF aimed its other action at Bennet Manufacturing of Alden, New York, which is a manufacturer of sheet metal products, nuts, bolts, rivets, and washers.<sup>188</sup> ASLF claimed that Bennet violated EPCRA section 313 by failing to submit an "R" form for the chemical xylene that was present at its facility in amounts over the threshold level.<sup>189</sup> Both cases settled by order of consent decree within thirty days of commencement.<sup>190</sup>

ASLF also initiated a suit against the Buffalo Envelope Company during the same time period the Whiting action was brought.<sup>191</sup> The suit greatly mirrored *Whiting* to include the parties arguments and the court's reasoning. In a similar fashion, the court again held for ASLF,<sup>192</sup> noting "the defendant's [Buffalo Envelope Co.] interpretation ignores [EPCRA] section 313's plain language."<sup>193</sup> An identical *Amici Curiae* Memorandum was submitted,<sup>194</sup> and likewise the defendant relied heavily upon the *Gwaltney* decision.<sup>195</sup> Again, the court easily distinguished the case from *Gwaltney* based on the plain language and legislative purpose of the Act.<sup>196</sup> However, ASLF

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186. Atlantic States Legal Found., Inc. v. Cooper Indus. Turbocompressor Div., No. CIV-91-0157A (W.D.N.Y. filed Mar. 12, 1991).

187. Plaintiff's Complaint at 3-5, *Cooper Indus. Turbocompressor Div.* (No. CIV-91-0157A).

188. Atlantic States Legal Found., Inc. v. Bennet Mfg. Co., No. CIV-91-0114A (W.D.N.Y. filed Mar. 12, 1991).

189. Plaintiff's Complaint at 3, *Bennet Mfg. Co.* (No. CIV-91-0114A).

190. Telephone Interview with Susan Kellog, Clerk, United States District Court, Western District of New York (Jan. 24, 1992).

191. Atlantic States Legal Found., Inc. v. Buffalo Envelope Co., No. CIV-90-1110S, 1991 U.S. Dist. WL 183772 (W.D.N.Y. Sept. 10, 1991).

192. *Id.* at \*7.

193. *Id.* at \*5.

194. *Id.* at \*2.

195. *Id.* at \*5-7.

196. *Id.* at \*5.



added an additional charge against Buffalo Envelope; violation of EPCRA section 304(c)<sup>197</sup> for failing to submit a follow-up emergency notice.<sup>198</sup> Despite the denial of Buffalo Envelope's motion to dismiss, the case remains unsettled on its remaining issues.<sup>199</sup>

As seen above, *Whiting Roll-Up Door Manufacturing Corp.* is part of a concerted plan to enforce EPCRA compliance throughout the area of northern New York state. The plan's goal focused on the detection of violators, with such parties being reported to the United States Environmental Protection Agency (EPA) for action; and in the event of government inaction to face a citizen suit for non-compliance with EPCRA.<sup>200</sup> The information leading to the detection of violators was compiled by ASLF utilizing volunteers who spent months scouring New York State Department of Environmental Conservation (DEC) files.<sup>201</sup> In the cases surveyed, the majority of violators have subsequently complied with EPCRA's reporting requirements, and entered consent decrees with ASLF. Of the thirteen actions brought by ASLF in northern New York, ten violators have entered into consent decrees, one is currently negotiating a settlement and two have chosen litigation.<sup>202</sup> Additionally of the ten violators who settled, six agreed to initiate pollution prevention programs, while the remaining four chose to endure higher penalties.<sup>203</sup>

The *Whiting* and *Buffalo Envelope Co.* cases stand as an example to other industries in the area, who may now have to think twice regarding non-compliance and resisting a citizen suit if caught. These cases and ASLF's actions currently provide a model for concerned groups in other states to follow.<sup>204</sup> ASLF's counsel, Charles M. Tebutt, is currently involved in similar EPCRA litigation in the Eastern District of Michigan,

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197. EPCRA § 304(c), 42 U.S.C. § 11004(c).

198. *Buffalo Envelope Co.*, 1991 U.S. Dist. WL 183772, at \*3.

199. Telephone Interview with Susan Kellog, *supra* note 180.

200. Telephone Interview with Charles M. Tebutt, *supra* note 181.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

where the Ecology Center of Ann Arbor is battling Johnson Controls.<sup>205</sup> In Wisconsin and Minnesota, Citizens for a Better Environment have commenced similar EPCRA actions.<sup>206</sup> Environmental Action has instituted actions in Virginia as well.<sup>207</sup> Thus, we are currently observing the birth of a larger movement, which will have nationwide impact.

## VI. Affect of the Decision

The *Whiting* decision will have significant impact on EPCRA enforcement. Today, we live in a period characterized by economic uncertainty and decreasing fiscal ability of federal, state, and local governments to deal with the plethora of enforcement responsibilities delegated to them by various legislation. The *Whiting Roll-Up Door* decision helps fill the gap in needed enforcement in light of government funding constraints. By allowing citizen groups to bring actions and be subsequently reimbursed for legal fees,<sup>208</sup> meager government assets are supplemented by private "citizen attorney generals." This acts as a catalyst to develop better cooperation between the public and government, as well as to ensure the development of more accurate emergency plans.

To industry, it encourages the concept of proactive compliance. As seen above, ASLF did not target businesses that filed late. ASLF pursued businesses that had not filed any required section 311-313 reports. Thus, a business seeking to avoid exposure to potentially substantial fines<sup>209</sup> and extensive legal costs would opt for compliance. It must be noted that late filing is considered an admission of a violation, and could subject a business to EPA or state penalties (still much less than fines imposed after being caught for non-compliance). However, one drawback may be greatly increased court

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205. *Id.*

206. *Id.*

207. *Id.*

208. EPCRA § 326(f), 42 U.S.C. § 11046(f) (allowing court costs to prevailing parties in civil litigation under this section).

209. EPCRA § 325(c), 42 U.S.C. § 11045(c) (penalties of up to \$25,000 for §§ 312-313 violations, and up to \$10,000 fine for § 311 violations).

dockets as citizens bring more suits, because now citizens may even bring suit against the EPA, states, or SERCs for failing to fulfill a duty under EPCRA.<sup>210</sup>

To the average member of the general public, the decision also impacts their lives, although it may be indirect. It provides a greater opportunity to participate in government, through enforcement of a statute. It helps aid public safety in providing greater and more accurate information for emergency planning. Along the same lines, increased information helps protect emergency workers (many times volunteers in most sections of the United States) from unknown chemical exposure and hazards. The citizen is also able to find out what is going on in his community, and is able to express himself if he finds a wrong. Additionally, businesses must become aware of not only employee safety, but also the safety of nearby residents and emergency workers who might be affected by another Bhopal type disaster.<sup>211</sup>

In regard to the effect on business, many operational and liability cost issues emerge. Regardless of whether an organization is in compliance, past violations are actionable, and can be costly. Substantial fines under EPCRA sections 325-326,<sup>212</sup> multiplied by the fact that each day of non-compliance equates to a separate violation,<sup>213</sup> further drive the fear of EPCRA's penalties. Additionally, violators earn reputations as a "Public Enemy" in the local community where the impact is greatest and may arouse bitter resentment. This could result in strong protests and picketing of facilities, or boycotts against the manufacturer's products.<sup>214</sup> Many businesses will find it is better to comply now than face staggering fines later after becoming the target of a citizens group's action.<sup>215</sup> However, even compliance adds costs due to the requirements en-

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210. EPCRA § 326(a)(1)(B), (C), (D), 42 U.S.C. § 11046 (a)(1)(B), (C), (D).

211. Phillips, *supra* note 12, at 30 (stating that businesses must now look beyond their gates and at local resident's safety, as they are now becoming members of the community).

212. EPCRA §§ 325, 326, 42 U.S.C. §§ 11045, 11046.

213. EPCRA § 325(c)(3), 42 U.S.C. § 11045(c)(3).

214. Gorman, *supra* note 14, at 40.

215. See generally Heller, *supra* note 12, at 81.

tailed, coupled with any administrative penalties EPA may levy for late submission.<sup>216</sup> All aspects considered, the regulated public will discover compliance as the easier and more cost effective route.

## VII. Possible Penalties Courts May Impose

In regard to violations of reporting requirements of EPCRA, courts have a limited but powerful arsenal. The statute provides no criminal penalty for violation of reporting requirements. However, civil penalties and injunctive relief are authorized.<sup>217</sup> Civil penalties can be quite substantial, and as previously stated each day of noncompliance is a separate violation.<sup>218</sup> Additionally, the court using its injunctive power can order compliance or shutdown a defendant's operation.

When imposing a judgment, the court walks a virtual "tightrope." Many dangers exist from too severe an imposition. Excessive fines could lead to the closing of a facility, and loss of jobs.<sup>219</sup> This job loss creates a "domino" effect of indirect negative results. Workers unable to find work migrate to other geographic areas or request government assistance (e.g.: unemployment or social services assistance). Unemployed workers seldom have money to spare, affecting the retail and service segments of the local economy. The government tax base, now trying to deal with an influx of unemployed workers requiring assistance, experiences a shrinkage of its tax revenue from one less industry in the tax base and declining sales tax revenue as consumers spend less.<sup>220</sup> The danger magnifies when the plant closure occurs in a rural, one industry area.<sup>221</sup>

Contrary, too light an imposition also provides negative

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216. See, e.g., Smart et al., *supra* note 13, at 77 (describing where one small company with net sales of \$10 million annually spent more than \$12,000 and lost an employee's efforts for an entire month to complete the required reports).

217. EPCRA §§ 325(c), 326(c), 42 U.S.C. §§ 11045(c), 11046(c).

218. EPCRA § 325(c), 42 U.S.C. § 11045(c).

219. See, e.g., Rothman, *supra* note 13, at 28A.

220. *Id.* (noting that the chemical industry provides approximately 20% of the taxes in Kanawha County, W. Va., and in one of the county's towns, Union Carbide employs 7,000 of the 16,000 residents).

221. *Id.*

side effects. Its failure to provide deterrence to businesses can even prolong continued non-compliance as some may find it cheaper to violate EPCRA.<sup>222</sup> Consequently, an erosion begins in the public's trust of the court's enforcement and EPCRA's protection. Adversely, public participation decreases, while the threat from hazardous chemicals and incomplete emergency planning increases.

When considering a penalty imposition, the court must consider many factors. In *United States v. Hooker Chemical & Plastics Corp.*,<sup>223</sup> a state sought \$250 million in punitive damages arising from common-law public nuisance claims which were a result of Hooker Chemical's actions at the infamous "Love Canal."<sup>224</sup> In assessing punitive damages, the court stressed that factors to be considered included deterrence, relation to harm done, and flagrancy of the conduct.<sup>225</sup> The court added that punitive damages were not set by any "rigid formula" and "need bear no ratio to compensatory damages."<sup>226</sup>

Another source for penalty guidance repositis in the EPA's "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act."<sup>227</sup> The policy states the purpose of penalties is to ensure enforcement, provide deterrence, and foster proactive business compliance with EPCRA.<sup>228</sup> In assessing a penalty, the EPA provides specific guidance. The policy provides a penalty matrix, which contains a horizontal and vertical axis specifying penalty amounts.<sup>229</sup> The vertical axis takes into account the seriousness of the violation, the quantity of chemicals involved, and the size of the corporate entity (measured by the

222. Memorandum of Amici Curiae at 19, *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991) (No. CIV-90-1109S).

223. 748 F. Supp. 67 (W.D.N.Y. 1990).

224. *Id.* at 68.

225. *Id.* at 77.

226. *Id.* (citing *Hartford Accident & Indem. Co. v. Village of Hempstead*, 422 N.Y.S.2d 47, 53 n.15 (1979)).

227. Memorandum of the Amici Curiae, *supra* note 149, Exhibit E.

228. *Id.* at 1, 4 (Exhibit E).

229. *Id.* at 9 (Exhibit E).

net sales and amount of employees).<sup>230</sup> The horizontal axis takes into account culpability, history of prior violations, ability to continue in business, and other factors as justice may require.<sup>231</sup> Penalties suggested range from a mere \$200 per violation to a statutory maximum of \$25,000 per violation.<sup>232</sup> It should be noted that this policy applies only to EPCRA section 313 violations. Finally, the policy provides guidance on out of court settlements, by emphasizing flexibility and discretion.<sup>233</sup> It stipulates that no set percentage exists for penalty reductions, but penalties should be reduced on a case-by-case basis in accordance with substantive reasons, such as defendant's cooperation and mitigation efforts.<sup>234</sup>

As previously stated, the court imposition of a judgment can be critical to our national economy on a regional basis and our efforts to safeguard the environment. Thus, courts must take many factors into consideration when pondering a penalty for an EPCRA violation, and also must not overlook both direct and indirect effects. Although penalties are meant to enforce EPCRA and punish violators, imposition must not be rigid, and must provide flexibility for mitigating circumstances. The EPA's policy provides many key factors to consider, which in essence reflects the views expressed in the *Hooker Chemical & Plastics Corp.* case.<sup>235</sup> Due to the traditional deference given to administrative agencies by the courts because of their expertise, a court should carefully review and consider the EPA's policy when imposing fines for violations of EPCRA reporting requirements.

### VIII. Conclusion

The decision reached in *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.* will greatly enhance and buttress EPCRA's utility and enforce-

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230. *Id.* at 7 (Exhibit E).

231. *Id.*

232. *Id.* at 9 (Exhibit E).

233. *Id.* at 17 (Exhibit E).

234. *Id.*

235. 748 F. Supp. at 67.

ment. Although greatly affecting business, the value from the decision greatly exceeds costs as measured by the prevention of another Bhopal level accident. While the decision only touched EPCRA in a narrow fashion on limited provisions of EPCRA, it provides a valuable resource for the public and business. For the public, it chronicles another triumph in the struggle to make our environment safe, and illustrates another vehicle for citizen action. For the regulated public, it sends a warning, and in utilizing the references contained in this article provides a source from which a business can travel toward compliance. Although the decision may be ultimately overturned if an appeal is taken, the case now stands as a milestone in the evolution of EPCRA enforcement.