

# Florida State University Journal of Land Use and Environmental Law

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Volume 4  
Number 1 *Summer 1988*

Article 5

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April 2018

## Case Note: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., \_\_\_ U.S. \_\_\_, 108 S. Ct. 376 (1987). Clean Water Act Citizen Suits After Gwaltney: Applying Mootness Principles in Private Enforcement Actions

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### Recommended Citation

Benson, Reed D. (2018) "Case Note: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., \_\_\_ U.S. \_\_\_, 108 S. Ct. 376 (1987). Clean Water Act Citizen Suits After Gwaltney: Applying Mootness Principles in Private Enforcement Actions," *Florida State University Journal of Land Use and Environmental Law*. Vol. 4 : No. 1 , Article 5.

Available at: <https://ir.law.fsu.edu/jluel/vol4/iss1/5>

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**Case Note: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., \_\_\_ U.S. \_\_\_, 108 S. Ct. 376 (1987). Clean Water Act Citizen Suits After Gwaltney: Applying Mootness Principles in Private Enforcement Actions**

**Cover Page Footnote**

The author wrote this note while working as an intern at the U.S. Department of Justice, Land and Natural Resources Division. The views presented are solely those of the author and do not present the views of the Justice Department.

CASENOTE: *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 376 (1987).

CLEAN WATER ACT CITIZEN SUITS AFTER  
*GWALTNEY*: Applying Mootness Principles in Private  
Enforcement Actions

REED D. BENSON\*

The Supreme Court recently held that a citizen plaintiff must make a good-faith allegation of an ongoing violation in order to bring an enforcement action under the Clean Water Act. The decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,<sup>1</sup> will prevent citizens from bringing suit for the assessment of civil penalties solely for past violations of the Clean Water Act.

*Gwaltney* undoubtedly will provoke a burst of litigation as to the imposition of penalties for Clean Water Act violations. A brief discussion of mootness appears near the end of the Court's opinion in *Gwaltney*. This mootness language, when read in conjunction with other portions of the opinion, raises questions about the ability of citizen plaintiffs to maintain enforcement suits for the assessment of civil penalties where the violations cease before final judgment. The way in which courts interpret *Gwaltney* and apply mootness principles in citizen suits will have a major impact on private enforcement of the Clean Water Act.

This note gives an overview of private enforcement and the statutory role of citizens in vindicating public rights under the Clean Water Act. Further, this note analyzes the possible effects of the Supreme Court's holding in *Gwaltney* and its potential impact on the way courts examine and apply mootness principles to citizen suits.

I. AN OVERVIEW OF CITIZEN SUITS UNDER THE CLEAN WATER ACT

Congress gave the federal government a dominant role in controlling water pollution when it enacted the Federal Water Pollution Con-

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1. 108 S. Ct. 376 (1987).

trol Act Amendments of 1972,<sup>2</sup> better known as the Clean Water Act (also referred to as the Act).<sup>3</sup> The Clean Water Act defines ambitious national goals for water quality<sup>4</sup> and outlines a technology-based approach to achieving them.<sup>5</sup> It establishes a comprehensive federal system of regulation, with the national and state governments sharing responsibility.<sup>6</sup> The Clean Water Act also features a multifaceted enforcement scheme in which the Environmental Protection Agency (the EPA), states, and private citizens are authorized to take a variety of actions to enforce its provisions.<sup>7</sup>

### A. *The Statutory Enforcement Scheme*

The Act contains "unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens."<sup>8</sup> However, Congress did not grant equal authority to all parties, and the courts have struggled to define the role of private citizens in an enforcement scheme where the federal and state governments have the pre-eminent role.

#### 1. *The Government Role*

The EPA and the states are the principal enforcers of the Clean Water Act.<sup>9</sup> In states which have federally approved National Pollution Discharge Elimination System (NPDES) permitting programs,<sup>10</sup> the state has the primary responsibility to bring enforcement actions for NPDES violations; the EPA may sue if the state does not act.<sup>11</sup> The EPA also has authority to bring enforcement actions for violations of federal permits and other unlawful conduct, and to issue

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2. Pub. L. No. 92-500, § 2, 86 Stat. 816, 888 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

3. Federal water pollution control legislation originated with the Refuse Act of 1899, 33 U.S.C. § 407 (1982). The roots of the Clean Water Act extend back to 1948; however, the 1972 law forms the basis of the modern statute. See *The Clean Water Act Amendments of 1987*, 18 Env't Rep. (BNA) No. 19, pt. 2, at 2-3 (Sept. 4, 1987) (reprinted separately).

4. 33 U.S.C. § 1251(a) (1982).

5. 33 U.S.C. § 1311-1345 (1982).

6. *International Paper Co. v. Ouellette*, 107 S. Ct. 805 (1987).

7. 33 U.S.C. §§ 1319, 1365 (1982).

8. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981).

9. See, e.g., *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625 (D. Md. 1987); *Gwaltney*, 108 S. Ct. at 383.

10. Under the NPDES program, a pollution source receives a permit from a state (or from the EPA, if the state has no federally approved NPDES program of its own) to discharge pollution, subject to certain conditions and limitations. 33 U.S.C. § 1342 (1982).

11. 33 U.S.C. §§ 1342(b), 1319(a) (1982). See also *United States v. Cargill, Inc.*, 508 F. Supp. 734, 740 (D. Del. 1981).

compliance orders for any violation.<sup>12</sup> Sanctions include administrative, civil, and criminal penalties.<sup>13</sup>

The federal-state relationship established by the Clean Water Act is both legally<sup>14</sup> and politically complex. As one federal court has stated, "the tensions inherent in a federal system are recreated, if not exacerbated, by the Act, which oftentimes fails to create clear boundaries for the respective authorities of the federal government, the states and the people."<sup>15</sup> Essentially, the EPA's job is to ensure that the states enforce the Act; thus, the EPA must delegate primary enforcement responsibility to the states while maintaining oversight and providing guidance and support. The EPA's experience with the Act illustrates the difficulty, and the importance, of striking the appropriate balance.<sup>16</sup> The matter is further complicated by the presence of a third group, private citizens, which has power to enforce the Clean Water Act.<sup>17</sup>

## 2. *The Private Role*

The Clean Water Act authorizes a "broad category" of citizens to bring enforcement actions as private attorneys general.<sup>18</sup> However, the courts have uniformly viewed citizens as secondary enforcers of the Act, with the primary enforcement responsibility vested in the EPA and the states.<sup>19</sup>

Section 505 of the Clean Water Act authorizes any citizen to file suit against any person alleged to be in violation of certain portions of the Act.<sup>20</sup> Violation of an order issued under the Clean Water Act by the EPA or a state also provides cause for a private citizen suit.<sup>21</sup> Citizens also may sue the Administrator of the EPA for failing to perform a nondiscretionary duty under the Act.<sup>22</sup> The Act defines

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12. 33 U.S.C. § 1319(a) (1982).

13. 33 U.S.C. §§ 1319, 1342(b)(7) (1982).

14. See, e.g., *Cargill*, 508 F. Supp. at 739-40.

15. *Id.* at 736.

16. See Stanfield, *Ruckelshaus Casts EPA as "Gorilla" in States' Enforcement Closet*, NAT'L J., May 26, 1984, at 1034-38.

17. See 33 U.S.C. § 1365 (1982).

18. 33 U.S.C. § 1365 (1982); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981).

19. See *Gwaltney*, 108 S. Ct. at 383; *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625 (D. Md. 1987).

20. 33 U.S.C. § 1365(a)(1) (1982).

21. *Id.*

22. 33 U.S.C. § 1365(a)(2) (1982).

“citizen” as “a person or persons having an interest which is or may be adversely affected.”<sup>23</sup>

Section 505 gives citizens basic power to enforce the Clean Water Act, but it also places limits and conditions on their authority to sue. First, some portions of the Act are not enforceable by citizens:

Reduced to a nutshell, citizens may enforce against discharges which lack required Clean Water Act §§402 [NPDES] or 404 [dredge and fill] permits; violations of . . . [those] permits; and violations of new source, toxic pollutant, and pretreatment standards. They may not enforce against violations of information request, recordkeeping, reporting, or entry requirements (except insofar as they happen to be permit violations); Clean Water Act §311 oil or hazardous material spill requirements and prohibitions; Clean Water Act §312 marine sanitation device requirements; or Clean Water Act §405 sludge disposal and permit requirements.<sup>24</sup>

Second, a prospective citizen plaintiff must give notice of a violation to the EPA, to the state in which the alleged violation occurs, and to the alleged violator at least 60 days prior to filing suit.<sup>25</sup> Third, section 505 forbids citizen suits if the EPA or a state “has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance.”<sup>26</sup> However, the Act allows citizens to intervene as a matter of right.<sup>27</sup> Fourth, the Supreme Court has recently held that citizen plaintiffs must make a good-faith allegation of an ongoing violation to bring suit under section 505.<sup>28</sup> Thus, unlike government officials, citizens may not sue purely for past violations of the Clean Water Act.<sup>29</sup>

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23. 33 U.S.C. § 1365(g) (1982). Congress chose this language so that citizen suit plaintiffs could meet the test of standing announced by the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972). *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

24. Miller, *Private Enforcement of Federal Pollution Control Laws*, (pt. 1), 13 *Envtl. L. Rep. (Envtl. L. Inst.)* 10309, 10320-21 (1983) (citation omitted).

25. 33 U.S.C. § 1365(b)(1)(A) (1982). Some courts have held that the 60-day notice requirement is jurisdictional; others have allowed citizen suits to proceed despite plaintiffs' failure to comply strictly with the Clean Water Act's notice provisions. See Annotation, *Citizen's Action Under 33 U.S.C.S. § 1365(a)(1) for Violation of Effluent Standards or Limitations Under Federal Water Pollution Control Act (33 U.S.C.S. §§ 1251 et seq.) or Orders with Respect Thereto*, 68 A.L.R. FED. 701, 708-12 (1984).

26. 33 U.S.C. § 1365(b)(1)(B) (1982). Courts have struggled with this provision, both as to the types of government proceedings it covers and as to the meaning of “diligently prosecuting.” See Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 *HARV. ENVTL. L. REV.* 23, 44-50 (1985); Miller, *Private Enforcement of Federal Pollution Control Laws*, (pt. 2), 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 10063, 10067-71 (1984).

27. 33 U.S.C. § 1365 (b)(1)(B) (1982).

28. *Gwaltney*, 108 S. Ct. at 385.

29. *Id.*

Citizen plaintiffs who clear the preliminary statutory hurdles generally fare well under section 505. Plaintiffs typically rely on discharge monitoring reports (DMRs) to prove that a permit violation has occurred. DMRs are the records of pollution discharged by the NPDES permittees, as detected by required effluent tests conducted by the dischargers.<sup>30</sup> These reports must be made available to the public.<sup>31</sup> A plaintiff may prove that a discharger violated the Act simply by showing that the discharger's DMRs show that effluents of pollution exceeded permitted levels.<sup>32</sup> Courts have frequently granted summary judgment to plaintiffs on the strength of DMRs, particularly since defendants are held strictly liable for NPDES violations.<sup>33</sup> Dischargers have tried several defenses with very limited success,<sup>34</sup> although they have sometimes been able to survive a motion for summary judgment by plaintiffs.<sup>35</sup> Most of the cases are settled after a determination of liability, with the parties finalizing the remedy in a consent decree.<sup>36</sup>

The Supreme Court has noted that, in an enforcement action under section 505 of the Clean Water Act, "the interest of the citizen-plaintiff is primarily forward-looking."<sup>37</sup> Thus, the primary remedy available to private plaintiffs is an injunction requiring a discharger to comply with the Clean Water Act, or if the citizen is suing the EPA, an order directing the administrator to perform a nondiscretionary duty.<sup>38</sup> In addition, unlike most environmental statutes, the Clean Water Act authorizes the imposition of civil penalties in citizen enforcement actions.<sup>39</sup> If ordered by a court, these penalties must be paid to the United States Treasury; however, in past cases in which the parties have settled, penalties have often gone to environmental projects or organizations rather than to the Treasury.<sup>40</sup>

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30. 40 C.F.R. §§ 122.21(f), (g), 122.44(i) (1987).

31. 33 U.S.C. § 1318(b) (1982).

32. DMRs may be used as admissions to establish the discharger's civil liability. *Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D.N.J. 1985). See also, Thomas, *Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10050, 10051-52 (1987).

33. Thomas, *supra* note 32.

34. *Id.* at 10052-55.

35. See *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 630-33 (D. Md. 1987).

36. *The Clean Water Act Amendments of 1987*, *supra* note 3, at 59.

37. Gwaltney, 108 S. Ct. at 382.

38. 33 U.S.C. § 1365(a) (1982).

39. *Id.*

40. Lewis, *Environmentalists' Authority To Sue Industry For Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine*, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 10101, 10102 (1986). The 1987 amendments to the Clean Water Act contained a provision requiring citizens to submit proposed consent decrees to the EPA and the Department of Justice at least 45 days before judicial approval. 33 U.S.C.A. § 1365(c)(3) (West Supp. 1988).

## B. Clean Water Act Citizen Suits in Perspective

Prior to 1982, private parties rarely filed enforcement actions under the Clean Water Act, or under any other federal environmental statute. In the past five years, however, Clean Water Act citizen suits have increased tremendously.<sup>41</sup> By 1985, citizen actions under section 505 had become a major, perhaps *the* major, source of enforcement of the Clean Water Act at the federal level,<sup>42</sup> while private enforcement of the other federal environmental laws remained infrequent.<sup>43</sup>

### 1. The Role of Citizen Suits in Clean Water Act Enforcement

Commentators have noted that Congress authorized citizen suits to enforce federal environmental statutes for two reasons. First, citizen suits were seen as a way to promote government enforcement by prodding agency officials into action.<sup>44</sup> Second, citizen suits were viewed as an auxiliary source of enforcement in cases of government inaction.<sup>45</sup> Thus, Congress gave private parties an important, but secondary, role in enforcing the Clean Water Act. As the Supreme Court stated in *Gwaltney*:

[T]he citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."<sup>46</sup>

For the first few years after its enactment in 1972, the citizen suit provision of the Clean Water Act was little used.<sup>47</sup> Beginning in 1982, however, environmental plaintiffs became much more active in using

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41. See *The Clean Water Act Amendments of 1987*, *supra* note 3, at 51; Fadil, *supra* note 26, at 29-35.

42. See Miller, *supra* note 24, at 10313-14.

43. See Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 868-70 (1985).

44. *Id.* at 845-47; Miller, *supra* note 24, at 10310-11.

45. Miller, *supra* note 24, at 10311; Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127, 136 (1985).

46. *Gwaltney*, 108 S. Ct. at 383.

47. See Fadil, *supra* note 26, at 35-36.



section 505 for enforcement.<sup>48</sup> Citizens filed 16 notices of intent to sue under section 505 in 1982, 99 notices in 1983, 172 notices in 1984, 107 notices in 1985, and 198 notices in 1986.<sup>49</sup> The upswing in citizen suits coincided with a decline in the EPA's enforcement activity in the early years of the Reagan Administration,<sup>50</sup> and the drop in government enforcement is generally viewed as the major cause for the growth of section 505 actions.<sup>51</sup> Thus, in the 1980s citizen suits have emerged as a major source of enforcement of the Clean Water Act. Former EPA enforcement chief Jeffrey Miller writes, "[i]ndeed, it appears that during the present dearth of government enforcement, private enforcement of traditional environmental laws is more frequent than EPA enforcement."<sup>52</sup>

Although citizen suits have become a successful tool for Clean Water Act enforcement, private actions under the Act may only be brought under section 505.<sup>53</sup> In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,<sup>54</sup> the Supreme Court held that a private right of action for damages does not exist under the Clean Water Act.<sup>55</sup> In the same case, the Court held that 42 U.S.C. section 1983 does not authorize private suits for violations of the Clean Water Act by state officials.<sup>56</sup> The rationale for that holding also seems to preclude Clean Water Act suits under the general federal question jurisdiction statute, 28 U.S.C. section 1331.<sup>57</sup> Shortly before *National Sea Clammers*, the Court held that the Clean Water Act has completely pre-empted the federal common law of nuisance in the field of water pollution.<sup>58</sup> The Supreme Court also has held that the Clean

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48. The origins of the rapid increase in litigation under section 505 are discussed in Miller, *Private Enforcement of Federal Pollution Control Laws*, (pt. 3), 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10407, 10424 (1984), which credits the Natural Resources Defense Council with starting the trend, and Fadil, *supra* note 26, at 36, which emphasizes the role of Anthony Z. Roisman, of Trial Lawyers for Public Justice in promoting litigation strategies to prosecute NPDES permit violators.

49. *The Clean Water Act Amendments of 1987*, *supra* note 3, at 51.

50. See Feller, *Private Enforcement of Federal Anti-Pollution Laws through Citizen Suits: A Model*, 60 *DEN. L.J.* 553, 554 (1983).

51. See, e.g., Boyer & Meidinger, *supra* note 43, at 870-80; Miller, *supra* note 48, at 10424.

52. Miller, *supra* note 24, at 10313.

53. Citizen plaintiffs seeking remedies other than those provided in section 505 have relied on the savings clause of section 505, 33 U.S.C. § 1365(e) (1982). That clause reads, "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

54. 453 U.S. 1 (1981).

55. *Id.* at 17-18.

56. *Id.* at 19-21.

57. Miller, *supra* note 24, at 10322-23.

58. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

Water Act precludes nuisance suits for interstate water pollution, except suits brought under the law of the state in which the pollution source is located.<sup>59</sup> Thus, section 505 and the law of the "source state" provide the only remedies for citizens harmed by water pollution.

## 2. *Section 505 Enforcement Compared with Citizen Enforcement of Other Federal Environmental Laws*

The first major federal environmental legislation to contain a citizen suit provision was the Clean Air Act Amendments of 1970.<sup>60</sup> Since then, citizen suit provisions have become a standard feature of federal environmental laws.<sup>61</sup> The original Clean Air Act provision became the model which has been used, with slight changes, by every one of these statutes.<sup>62</sup> Thus, in most respects, section 505 is identical to the other environmental citizen suit provisions. However, only in the case of the Clean Water Act have private parties used their statutory authority to assume a major role in enforcement.<sup>63</sup>

Several commentators have tried to explain why section 505 suits are numerous, while citizen suits under the other statutes are scarce.<sup>64</sup> Two factors seem most important. First, Clean Water Act violations are relatively easy to prove. The citizen plaintiff often may establish a violation simply by introducing DMRs which show that a polluter's discharges have exceeded permitted levels.<sup>65</sup> Problems of proof appear greater under other environmental statutes.<sup>66</sup> Second, section 505 is one of the few citizen suit provisions which authorizes the court to award civil penalties against violators. Other than the Clean Water

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59. *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 812-13 (1987).

60. Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1706-07 (1970) (codified at 42 U.S.C. § 7604 (1982)).

61. No less than 13 federal environmental laws specifically authorize citizen suits. In addition to the Clean Water Act, these provisions are found in the Clean Air Act, 42 U.S.C. § 7604 (1982); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9659 (West Supp. 1987); Deepwater Port Act, 33 U.S.C. § 1515 (1982); Endangered Species Act, 16 U.S.C. § 1540(g) (1982); Energy Policy and Conservation Act, 42 U.S.C. § 6305(a) (1982); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C.A. § 1415(g) (West 1986); Noise Control Act, 42 U.S.C. § 4911 (1982); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1982); Resource Conservation and Recovery Act, 42 U.S.C.A. § 6972 (West Supp. 1987); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1982); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982).

62. See Miller, *supra* note 24, at 10311-13.

63. See Boyer & Meidinger, *supra* note 43, at 868-70.

64. See, e.g., Fadil, *supra* note 26, at 35-74; Comment, *supra* note 45, at 155-72.

65. See *supra* notes 28-34 and accompanying text.

66. See, e.g., Comment, *supra* note 45, at 159-66 (which discusses the differences between the Clean Water Act and the Clean Air Act regarding problems of proof).

Act, only two federal environmental statutes allow for civil penalties in citizen suits.<sup>67</sup>

In sum, while considerable potential exists for private enforcement of federal environmental laws, Clean Water Act citizen suits are the only real success story. Citizen enforcement under section 505 has worked because plaintiffs can prove violations simply and efficiently, and because courts can impose civil penalties for those violations. The Supreme Court's decision in *Gwaltney* may change both of these elements and reduce the effectiveness of private enforcement of the Clean Water Act.

## II. POSSIBLE EFFECTS OF *Gwaltney* on Private Enforcement

The Supreme Court held in *Gwaltney* that citizens must make a "good-faith allegation of continuous or intermittent violation" to bring suit under section 505 of the Clean Water Act.<sup>68</sup> The Court thus resolved a split in the circuits over the ability of citizen plaintiffs to bring suits purely for past violations of the Clean Water Act.<sup>69</sup> However, the *Gwaltney* decision may have raised more questions than it answered, largely due to a paragraph in the opinion dealing with mootness.

### A. *Gwaltney*: Simple Holding, Puzzling Dictum

The *Gwaltney* litigation arose due to NPDES permit violations at Gwaltney's meatpacking plant in Virginia.<sup>70</sup> The Supreme Court noted that more than 150 violations occurred from 1981 to 1984.<sup>71</sup> Two environmental groups sent notice of intent to sue in February 1984, and filed an action in June of that year.<sup>72</sup> They asked the district court to provide declaratory and injunctive relief, impose civil penalties, and

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67. These statutes, and their citizen suit provisions, are the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6972 (West Supp. 1987), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C.A. § 9659 (West Supp. 1987).

68. *Gwaltney*, 108 S. Ct. at 385.

69. See *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987) (holding that allegations of past violations are sufficient for citizen suits). See also *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985) (requiring allegations of an ongoing violation at the time suit is filed); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.* 807 F.2d 1089 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 484 (1987) (determining that an allegation of "continuing likelihood" of a violation is required for a citizen suit).

70. *Gwaltney*, 108 S. Ct. at 379.

71. *Id.*

72. *Id.* at 379-80.

award attorney fees and costs.<sup>73</sup> The district court granted partial summary judgment for the plaintiffs, finding that Gwaltney had violated and was in violation of the Clean Water Act.<sup>74</sup> Before the district court decided upon a remedy, however, Gwaltney filed a motion to dismiss the action for lack of subject matter jurisdiction.<sup>75</sup> Gwaltney argued that section 505 only confers jurisdiction over citizen suits if the defendant is in violation of the Clean Water Act at the time the suit is filed.<sup>76</sup> The trial court rejected this argument, reading section 505 as authorizing citizen suits for past violations of the Clean Water Act even if there is no ongoing violation.<sup>77</sup> The Fourth Circuit affirmed, and upheld the district court's award of nearly \$1.3 million in civil penalties.<sup>78</sup>

The Supreme Court reversed, holding that citizen plaintiffs must make a "good-faith allegation of continuous or intermittent" ongoing violation to bring a section 505 suit.<sup>79</sup> The Court focused first on the language of section 505 which allows citizens to sue "any person . . . who is alleged to be in violation" of certain portions of the Clean Water Act.<sup>80</sup> The Court also focused on other portions of section 505 and its legislative history, concluding that "the interest of the citizen-plaintiff is primarily forward-looking"<sup>81</sup> in that Congress viewed citizen suits chiefly as abatement actions.<sup>82</sup> The Court remanded the case for a determination of whether the complaint contained a good-faith allegation of an ongoing violation.<sup>83</sup>

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73. *Id.*

74. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1544 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987).

75. *Id.*

76. The most recent DMRs available at the time of filing showed that Gwaltney was in violation of its permit, although it would later appear that the last actual recorded violation was in May 1984. *Gwaltney*, 108 S. Ct. at 380.

77. *Gwaltney*, 611 F. Supp. at 1547-51.

78. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987).

79. *Gwaltney*, 108 S. Ct. at 385.

80. 33 U.S.C. § 1365(a)(1) (1982).

81. *Gwaltney*, 108 S. Ct. at 382.

82. *Id.* at 383.

83. Justice Marshall delivered the Court's opinion, joined by the Chief Justice and Justices Brennan, White and Blackmun. Justice Scalia, along with Justices Stevens and O'Connor, concurred in part and concurred in the judgment. Scalia criticized the majority's holding that a good-faith allegation of an ongoing violation is sufficient to confer jurisdiction over section 505 actions. The proper jurisdictional inquiry, according to the concurring justices, is whether the defendant was actually in violation at the time of filing—"whether [defendant] had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought." *Gwaltney*, 108 S. Ct. at 388. (Scalia, J., concurring). Scalia argued that the majority had "create[d] a peculiar new form of subject matter jurisdiction" by holding that, "in order to

The most troubling part of the Court's opinion is its last substantive paragraph, and the accompanying footnote, which discuss mootness.

[Gwaltney] also worries that our construction of § 505 would permit citizen-plaintiffs, if their allegations of ongoing noncompliance become false at some later point in the litigation because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the prospective purpose of the citizen suit provisions and the "case or controversy" requirement of Article III. Longstanding principles of mootness, however, prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Air Act [*sic*] based solely on violations wholly unconnected to any present or future wrong doing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform."<sup>84</sup>

Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the District Courts to award litigation costs "whenever the court determines such award is appropriate." The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions."<sup>85</sup>

The ambiguity of this language raises substantial questions about the circumstances in which a citizen suit could be dismissed as moot. The Court's intentions are hard to fathom, particularly since neither of the parties to the action argued mootness or briefed the issue.<sup>86</sup>

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carry a lawsuit to judgment, allegations are necessary but proof of those allegations (if they are contested) is not." *Id.* at 386-87. However, Scalia's charge that the jurisdictional allegations need never be proved under the majority's holding seems to be contradicted by the majority opinion's language that the allegations must be proved at trial if plaintiff is to prevail. *Id.* at 386.

84. *Id.* at 386 (citations omitted).

85. *Id.* at 386 n.6 (citations omitted).

86. The United States' amicus brief did contain a short discussion of mootness, but concluded that the case was not moot. Brief for the United States as Amicus Curiae Supporting Affirmance at 27-29. This amicus brief greatly influenced the court in *Gwaltney*: unlike the parties to the case, the United States argued that a good-faith allegation of an ongoing violation was necessary and sufficient for jurisdiction over section 505 suits, and the Court essentially adopted the government's position.

Most likely, the interpretation of the mootness dictum in *Gwaltney* now will be a major issue in Clean Water Act citizen suits. At least one section 505 defendant has filed a "Motion for Summary Judgment on the Grounds of Mootness and Lack of a Case or Controversy."<sup>87</sup> Other defendants, who have been found to have violated the Clean Water Act and were on the verge of settling with citizen plaintiffs, have balked at signing consent decrees.<sup>88</sup> Apparently, all bets are off until *Gwaltney* is clarified.

A spate of post-*Gwaltney* litigation is inevitable. The way in which courts apply mootness principles in section 505 actions is sure to have a major impact on citizen enforcement of the Act. The following discussion suggests that courts making mootness determinations must recognize the role of citizen plaintiffs as private attorneys general in the Clean Water Act enforcement scheme.

### B. Mootness in Clean Water Act Citizen Suits

The Supreme Court's final words in *Gwaltney* indicate that "long-standing principles of mootness" apply in section 505 actions.<sup>89</sup> Two such principles were mentioned by the Court. First, that suits may not be maintained where there is "no reasonable expectation that the wrong will be repeated," and second, that defendants face a heavy burden in seeking to have cases dismissed as moot.<sup>90</sup> The Court impliedly underscored the second point by way of the first with its choice of emphasis in the following sentence: "The defendant must demonstrate that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>91</sup>

Thus, the Court has clearly placed the onus on citizen suit defendants to show that mootness principles require dismissal. Application of these principles in section 505 actions should lead courts to adopt one of three positions in determining whether to assess civil penalties if there is no ongoing violation anytime prior to final judgment.

#### 1. Position One: The Case is Moot in the Absence of Ongoing Violations at the Time of Final Judgment

Under this view, the case must be dismissed if the defendant comes into compliance with the Clean Water Act at any time before final

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87. At the time of this writing, the defendant's motion had been denied. Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co., No. 83-2040 (D.N.J. Mar. 30, 1988) (opinion and order imposing civil penalties and granting injunctive relief).

88. Interview with Douglas A. Cohen, U.S. Department of Justice, Land and Natural Resources Division (Dec. 11, 1987).

89. *Gwaltney*, 108 S. Ct. 386.

90. *Id.*

91. *Id.*

judgment. This argument already has been advanced by a defendant in one section 505 case.<sup>92</sup>

Position One is legally untenable. One of the "longstanding principles of mootness" is that voluntary discontinuance of the allegedly illegal practices does not make a case moot.<sup>93</sup> Abandonment of the activity is a factor for the court to consider, "but that is a matter relating to the exercise rather than the existence of judicial power" to hear the case.<sup>94</sup> Thus, a defendant's showing of present compliance does not dispose of the matter. Instead, it serves as evidence on the issue of whether it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>95</sup>

Position One is also bad policy, at least if one accepts two basic assumptions. The first assumption is that in many, if not most, cases defendants will be able to get the action dismissed and avoid sanctions by achieving compliance after the filing of the action but before final judgment.<sup>96</sup> This result would create two sets of bad incentives. Prior to litigation, defendants would have little incentive to come into compliance, since they probably would not be penalized for their past violations and therefore would lose nothing by waiting to be sued by citizens.<sup>97</sup> Once litigation commenced, time would be on the defendant's side, and every delay would work to the defendant's advantage.<sup>98</sup> On the other hand, a citizen plaintiff interested in seeing the defendant pay civil penalties would be inclined to push for quick judicial resolution of the case, rather than participating in settlement negotiations. A less constructive scenario is hard to imagine.

Some have argued that citizen plaintiffs should forget about exacting civil penalties,<sup>99</sup> since the penalties do not directly benefit the citi-

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92. Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co., No. 83-2040 (D.N.J. Mar. 30, 1988).

93. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

94. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982).

95. Gwaltney, 108 S. Ct. at 386.

96. These cases may be a long time in reaching final judgment. For example, the Monsanto case was filed in May 1983, and the judge found the Monsanto company to be in violation of the Act and granted partial summary judgment to plaintiffs in December 1983, but the trial on civil penalties and injunctive relief was not held until March, 1988.

97. This theory assumes that the government, which has the authority to bring suit for wholly past violations, does not take enforcement actions of its own or intervene in the citizen suit. The government's enforcement resources are limited, and therefore it might not become involved in a suit for past penalties only. This does not necessarily reflect bad faith, or even bad judgment, by the government. See *infra* notes 104-06 and accompanying text.

98. Attorney fees (both defendant's and plaintiff's) would accumulate, but paying lawyers may be cheaper than complying with the Clean Water Act or paying civil penalties.

99. See Garrett, *Citizen Suits: A Defense Perspective*, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 10162, 10163 (1986).

zen,<sup>100</sup> and should instead concentrate on forcing statutory compliance. However, this argument runs counter to the second assumption which is that penalties promote "voluntary" compliance by deterring violations.

The legislative history of the Clean Water Act confirms the notion that Congress believed stiff civil penalties were needed to "encourage compliance" with the Clean Water Act. "[T]he threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rapid access to the Federal District Court should accomplish the objective of compliance."<sup>101</sup> If no meaningful threat of sanction exists,<sup>102</sup> then dischargers' most profitable course will be to wait until they are sued to abate their violations.<sup>103</sup> A regulatory scheme which must rely on constant litigation to force compliance is fundamentally flawed.

If sanctions are necessary, one might argue, why not let the government play a greater role in Clean Water Act enforcement? The EPA's authority to bring suits purely for past violations of the Clean Water Act is "little questioned."<sup>104</sup> The EPA could even intervene in citizen suits and preserve the court's ability to assess civil penalties for past violations. However, as a practical matter the EPA cannot, and should not, greatly expand its enforcement role under the Clean Water Act. More EPA enforcement is impractical because the agency's enforcement resources are scarce, and it is unwise because those resources could be better spent elsewhere.<sup>105</sup> For example, hazardous waste enforcement cases are the kind which should be brought by the government; they are big and complex, requiring a high degree of technical expertise. Litigation may involve many parties and drag on for years, costing millions of dollars. These are not good cases for private enforcement. Clean Water Act enforcement actions, on the other hand, are well suited to citizen enforcement. They are relatively simple cases which can be proved by readily available information,

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100. See *supra* notes 39-40 and accompanying text.

101. S. REP. NO. 92-414, 92d Cong., 1st Sess. 65 (1971) [hereinafter SENATE REPORT].

102. Again, this assumes that government enforcement is unlikely. See *supra* note 97 and accompanying text.

103. See Roisman, *The Role of the Citizen in Enforcing Environmental Laws*, 16 *Envtl. L. Rep. (Envtl. L. Inst.)* 10163 (1986).

104. *Gwaltney*, 108 S. Ct. at 382. However, the defendant in one government enforcement action under the Clean Water Act argues that the EPA has no statutory authority to seek penalties for purely past violations, and seeks to discount the Court's language in *Gwaltney* as dictum. Defendant's Reply Brief to Plaintiff's Opposition to Defendant's Motion to Dismiss at 4-9, *United States v. Holly Farms of Texas, Inc.*, No. Civ-L-87-119-CA (E.D. Tex. filed Dec. 14, 1987).

105. See Boyer & Meidinger, *supra* note 43, at 906-07; Comment, *supra* note 45, at 129-30.



often allowing for resolution on partial summary judgment.<sup>106</sup> They usually involve only one defendant, and they require much less technical expertise than many kinds of environmental cases.<sup>107</sup> Thus, the emergence of private citizens as the key enforcers of the Clean Water Act does not necessarily reflect a failure by the EPA, or a breakdown in the way federal environmental laws should be enforced. On the contrary, it is an efficient allocation of public and private enforcement resources.<sup>108</sup>

Thus, it would appear that Position One should not be adopted by the courts because it is incompatible with mootness principles and is also poor policy because it will decrease the deterrence provided by citizen suits by making penalties harder to impose.

2. *Position Two: A Case is Moot if the Defendant Can Show That Violations Cannot Reasonably Be Expected to Recur*

The language in *Gwaltney* is too ambiguous to provide a clear picture of the circumstances in which the Court would find a citizen suit to be moot. However, as the Court stated in *Gwaltney*, "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible."<sup>109</sup> In this case the most plausible reading of the Court's language is that a citizen suit will be considered moot, even though the complaint contained a good-faith allegation of an ongoing violation, if prior to final judgment defendant can show that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>110</sup>

Two points of the Court's opinion provide the primary support for this interpretation. First, the mootness paragraph speaks to the conditions under which an action may be maintained.<sup>111</sup> Second, Part II of the opinion stresses the primarily prospective nature of citizen suits

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106. See *supra* notes 33-36 and accompanying text.

107. See Comment, *supra* note 45, at 159-60.

108. See Boyer & Meidinger, *supra* note 43, at 879.

109. *Gwaltney*, 108 S. Ct. at 381.

110. *Id.* at 386.

111. "Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Air [*sic*] Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" *Id.* (citation omitted). The Court went on to say in a footnote, "[u]nder the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the District Courts to award litigation costs 'whenever the court determines such award is appropriate.'" *Id.* at 386 n.6 (citation omitted). Because the Court said plaintiffs are also protected, this footnote should not be read to require dismissal wherever there is a suddenly repentant defendant.

and the link between section 505 civil penalties and injunctive relief.<sup>112</sup>

Nonetheless, one should not conclude that *Gwaltney* has firmly enconced Position Two as the mootness rule to be applied to citizen suits. First, the opinion's mootness language is ambiguous enough to allow for more than one plausible interpretation. Second, while Supreme Court pronouncements must carry great weight, the mootness discussion in *Gwaltney* was limited to a one-paragraph dictum. Third, because mootness was not an issue in *Gwaltney*, neither party addressed the issue in briefs.<sup>113</sup> Finally, the policy implications of Position Two are very troubling. In its summary treatment of mootness, the Court may have failed to consider some very important issues. Given the ambiguity of the Court's position, other courts should consider these issues in applying mootness principles in Clean Water Act citizen suits.

The most disturbing implications of Position Two are its potential impacts on litigation. First, citizen suits would become much more complicated. Until *Gwaltney*, courts generally focused simply on whether the defendant's DMRs showed violations; if so, the court granted partial summary judgment to plaintiffs on that issue, and the parties usually settled the remedy portion of the case.<sup>114</sup> Under Position Two, however, the central issue of the case would be whether there is a reasonable chance that the defendant will violate the Clean Water Act in the future. This would be a hotly contested issue of fact, one which probably would result in increasingly complex litigation requiring considerable expert testimony. Citizen suits no longer would be simple and straightforward.

Second, Position Two would encourage litigation on the mootness issue. A short term flood of post-*Gwaltney* litigation seems inevitable. However, if courts espouse an ad hoc mootness standard such as Position Two, as opposed to a bright line rule, such as Position One or Three, the result will be great uncertainty as to when a citizen suit is moot. For example, is a case moot when a discharger installs state of the art pollution control technology? When it modifies the production process that caused the violation? When it voluntarily ceases the process for economic reasons? When it reroutes its discharges to a different treatment plant? When it shuts down its facility altogether? Does a new NPDES permit, issued after the suit is filed, moot an action for violations of the former permit? Is an action moot if the discharging facility changes ownership during the litigation? If a discharger is in

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112. *Id.* at 382.

113. See *supra* note 86 and accompanying text.

114. *The Clean Water Act Amendments of 1987*, *supra* note 3, at 57-59.

violation of a number of parameters of his permit at the time the suit is filed, but has complied with all but one parameter before final judgment, is the action moot in regard to violations of the other parameters? These are just a few of the issues which probably would be litigated before the definition of "mootness" under Position Two became clear.

Third, under Position Two, time would work in favor of defendants and give them incentives to delay pending litigation in order to achieve compliance. Plaintiffs, on the other hand, would want to push the litigation forward and not spend time discussing settlement.<sup>115</sup> Litigation within this framework would undoubtedly be bitter. Thus, Position Two would tend to make litigation more adversarial, more frequent, and more complicated.

Position Two also is troubling because it may reduce the deterrent effect of private enforcement. Citizens may be less likely to file suit if they expect the litigation to be lengthy, contentious, and difficult because of the mootness issue. In addition, dischargers' compliance incentives will be low if they believe that civil penalties are not likely to be imposed under Position Two,<sup>116</sup> and as discussed above, providing deterrence through increased government enforcement is both impractical and imprudent.<sup>117</sup>

Position Two ultimately may not greatly reduce deterrence if courts require defendants to make a strong showing that they will not violate the Clean Water Act in the future. The Court's language in *Gwaltney* certainly supports a high threshold for mootness.<sup>118</sup> If the courts make it clear that citizen suits will not be dismissed as moot unless future violations definitely cannot occur, then Position Two's negative impact on deterrence and its tendency to encourage litigation on the mootness issue will be minimized.

Finally, Position Two may result in considerable unfairness to some defendants. If a defendant's liability for civil penalties for *past* violations turns upon the likelihood that the defendant will violate the Clean Water Act in the *future*, then dischargers with similar records of past violations may be treated quite differently. Indeed, a defendant with a heinous record of blatant disregard for permit limitations

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115. See *supra* notes 97-98 and accompanying text.

116. See *supra* notes 99-103 and accompanying text.

117. See *supra* notes 104-08 and accompanying text.

118. "In seeking to have a case dismissed as moot, however, the defendant's burden 'is a heavy one.' The defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Gwaltney*, 108 S. Ct. at 386 (citations omitted).

may not be penalized at all,<sup>119</sup> while another defendant with a much better record may face stiff statutory penalties.<sup>120</sup> One might argue that this is not a bad result. Since civil penalties are designed to ensure compliance, a defendant who is able to prove future compliance should not be held liable. However, there is certainly a punitive element to Clean Water Act civil penalties, as the Court recognized in a recent case.<sup>121</sup> Moreover, Congress realized that punitive sanctions are necessary to encourage voluntary compliance when it authorized civil penalties.<sup>122</sup> Clean Water Act enforcement will lose much of its deterrent effect, not to mention its fairness and legitimacy, if some defendants are made to pay for proven past violations and others are not.

In sum, Position Two would encourage litigation on the mootness issue and make each case more complicated. In addition, this position would tend to reduce the deterrent effect of citizen suits and the fairness of Clean Water Act enforcement. If courts heed the language of *Gwaltney* and place a heavy burden on defendants who seek to prove mootness, these negative effects can be mitigated. However, these impacts can be avoided altogether; they do not follow inevitably from the application of "longstanding principles of mootness" in section 505 actions. A different result is entirely consistent with mootness principles and with citizens' enforcement authority under the Clean Water Act.

### *3. Position Three: A Citizen May Maintain a Suit for Civil Penalties After Proving a Good-faith Allegation of an Ongoing Violation at the Time the Suit was Filed*

Position Three would allow a court to assess civil penalties for Clean Water Act violations even if there is no possibility of future violations, once the court determines that the plaintiff made a good-faith allegation of an ongoing violation at the time the suit was filed. This rule is based on a key principle of mootness, and on citizens' statutory role as private attorneys general in enforcing the Clean Water Act.

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119. However, deliberate violations by the defendant in the past would be strong evidence of the likelihood of future violations. See *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1952).

120. This effect is not unique to Position Two; the holding in *Gwaltney* preventing citizens from suing for wholly past violations of the Clean Water Act makes some disparate treatment of past violations inevitable. However, Position Two would create the greatest uncertainty, since liability for proven violations would depend largely upon the likelihood of violations in the future. Government intervention in citizen suits could reduce unfairness, since the EPA can sue for purely past violations.

121. *Tull v. United States*, 107 S. Ct. 1831, 1838-39 (1987).

122. See *supra* notes 101-03 and accompanying text.

When a plaintiff seeks monetary or declaratory relief in addition to an injunction, the injunction claim may become moot but the rest of the suit survives.<sup>123</sup> "*Claims for damages or other monetary relief automatically avoid mootness*, so long as the claim remains viable."<sup>124</sup> Courts have applied this principle in government actions to enforce the Clean Water Act; the possibility of civil penalties keeps the suit alive, despite the mootness of the claim for injunctive relief.<sup>125</sup> Thus, the whole mootness issue turns on whether the Clean Water Act gives citizen plaintiffs the authority to maintain suits for civil penalties once their claims for injunctive relief become moot.

The Supreme Court has acknowledged that the Clean Water Act authorizes citizens to enforce the Act as private attorneys general.<sup>126</sup> Thus, Congress "deputized" private citizens to enforce public rights created by statute.<sup>127</sup> "It should be stressed that the citizen suit authorization [of section 505] allows the citizen to vindicate a public right."<sup>128</sup> The legislative history of section 505 and its provision allowing recovery of attorney fees reflect Congress' belief that citizen plaintiffs "would be performing a public service."<sup>129</sup> Although section 505 defines "citizen" for the purpose of standing as "a person having an interest which is or may be adversely affected,"<sup>130</sup> Congress clearly intended a citizen to be able to enforce the *public* interest,<sup>131</sup> and the Supreme Court has recognized this intention.<sup>132</sup>

123. See *Powell v. McCormack*, 395 U.S. 486 (1969); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

124. 13A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3533.3 (1984) (emphasis added).

125. See, e.g., *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980) (where the district court determined liability and retained jurisdiction to ascertain civil penalties, the appeal was not moot even though defendants complied with an EPA order by installing pollution control equipment). See generally *Government of the Virgin Islands, Dep't. of Conserv. and Cul. Aff's v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 284 (3d Cir. 1983).

126. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981).

127. See generally *Public Interest Bounty Hunters v. Board of Governors of the Fed. Reserve Sys.*, 548 F. Supp. 157, 161 (N.D. Ga. 1982).

128. 1 F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 3.03[10][b] (1987). See also RODGERS, *ENVIRONMENTAL LAW* §1.13 (1977).

129. SENATE REPORT, *supra* note 101, at 81.

130. 33 U.S.C. § 1365(g) (1982).

131. Consider the following colloquy on the Senate floor between Senator Muskie, one of the principal authors of the Clean Water Act, and Senator Bayh on the standing provision which emerged from the Conference Committee:

Mr. Muskie: Thus it is clear that under the language agreed to by the conference, a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit under section 505.

Further, every citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States . . . .

Moreover, section 505 strengthens citizens' ability to enforce the Clean Water Act by authorizing the court to award civil penalties, payable to the United States Treasury, in private enforcement actions.<sup>133</sup> The importance of this provision must not be underestimated. By approving civil penalties in citizen suits, Congress gave private enforcers the power to vindicate public rights by seeking sanctions against violators. These sanctions do not directly benefit the plaintiffs. Citizens' authority to pursue penalties for public benefit confirms their role as enforcers of public rights. Because citizen plaintiffs, under section 505, are private attorneys general enforcing public statutory rights, their claims for civil penalties must survive even if their claims for injunctive relief become moot.

None of this is contrary to the Supreme Court's holding in *Gwaltney*. The Court held that citizens may not bring suit under section 505 without a "good-faith allegation of continuous or intermittent violation."<sup>134</sup> However, the Court did not state that a suit for penalties could not survive without an ongoing violation once this jurisdictional hurdle had been cleared. The Court noted that "the interest of the citizen-plaintiff is primarily forward-looking."<sup>135</sup> Since citizens may only seek civil penalties if they request an injunction and allege ongoing violations at the time of filing, their interests remain primarily forward-looking. The Court also stated that "the citizen suit is meant to supplement rather than to supplant governmental action."<sup>136</sup> However, in those situations where the government, for whatever reason, takes no action, citizens would be able to more effectively enforce the Clean Water Act.<sup>137</sup>

Nor would Position Three "create a peculiar new form of subject matter jurisdiction" under which the jurisdictional allegations need

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Mr. Bayh: I believe that the conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act or a permit, or against the Administrator if he fails to perform a nondiscretionary act.

A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 221 (1973) [hereinafter LEGISLATIVE HISTORY].

132. "This broad category of potential plaintiffs necessarily includes . . . plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "noneconomic" and probably noncompensable." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981).

133. 33 U.S.C. § 1365(a)(2) (1982).

134. *Gwaltney*, 108 S. Ct. at 385.

135. *Id.* at 382.

136. *Id.* at 383.

137. The Clean Water Act's legislative history supports this view. "It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505." SENATE REPORT, *supra* note 101, at 64.

never be proved, as the concurring justices in *Gwaltney* believed the majority opinion would do.<sup>138</sup> The majority opinion clearly states that the defendant may challenge the jurisdictional allegations before trial, and if that challenge is unsuccessful, "the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail."<sup>139</sup> This language indicates that citizen plaintiffs must eventually prove the defendant was actually in violation of the Clean Water Act at the time the suit was filed. However, as the concurring opinion indicates, this showing may be very similar to the jurisdictional showing that the allegations of an ongoing violation were made in good faith.

The phrase in § 505(a), "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests a state rather than an act—the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed.<sup>140</sup>

Thus, a citizen plaintiff must make a good-faith allegation of an ongoing violation in order to bring suit under section 505, and must support those allegations with evidence if they are challenged. At trial, the plaintiff must prove that the defendant violated the Clean Water Act and had not "taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought."<sup>141</sup> If the plaintiff can prove these points, the court should be able to assess penalties for any proven violations regardless of events occurring subsequent to the filing of the action.

The role of citizens as enforcers of public rights under the Clean Water Act has raised constitutional questions. A detailed analysis of the constitutionality of section 505 is beyond the scope of this work. However, these arguments, as well as the early judicial response to them, warrant a brief discussion.

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138. *Gwaltney*, 108 S. Ct. at 386 (Scalia, J., concurring).

139. *Gwaltney*, 108 S. Ct. at 386.

140. *Id.* at 387 (Scalia, J., concurring).

141. *Id.* at 388.

The first argument against citizens' authority to seek civil penalties is based on principles of standing and the Article III case or controversy requirement. The crux of this position is that Congress acted unconstitutionally by failing to connect the power to seek penalties to the fact of injury and by granting citizens power to protect more than their own interest.<sup>142</sup> Section 505 allows citizens to protect public rights even if the plaintiffs' personal injuries are noncompensable, as the Supreme Court has recognized.<sup>143</sup> However, courts have rejected the constitutional challenge and upheld section 505.

While every lawsuit which receives judicial review on the merits must fall within the scope of Article III of the Constitution, it is a matter of black letter law that Article III does not limit congressional power to define categories of individuals as parties sufficiently aggrieved by a particular governmental action to warrant a statutory right to sue.<sup>144</sup>

The second constitutional argument is based on the principles of nondelegation and the separation of powers.<sup>145</sup> In essence, the argument is that Congress may not grant the power to enforce federal laws to persons outside of the Executive Branch.<sup>146</sup> So far, no court has accepted this position either. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner."<sup>147</sup>

Congress has given citizens the power to vindicate public rights as private attorneys general under the Clean Water Act, including the power to seek civil penalties payable to the Treasury. Because citizens may enforce public rights and pursue statutory sanctions for public benefit, their claims for civil penalties should survive even when their claims for injunctive relief become moot. Position Three would allow citizens to remain effective as the final enforcers of public rights under the Clean Water Act.

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142. Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co., 600 F. Supp. 1474, 1478 (D.N.J. 1985).

143. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16-18 (1981). See also LEGISLATIVE HISTORY, *supra* note 131 and accompanying text.

144. RITE—Research Improves the Env't, Inc. v. Costle, 650 F.2d 1312, 1320 (5th Cir. 1981). See also *Monsanto*, 600 F. Supp. at 1478-79.

145. See Lewis, *supra* note 40.

146. See Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 623 (D. Md. 1987).

147. *Id.* at 625, quoting Davis v. Passman, 442 U.S. 228, 241 (1979). See also *Monsanto*, 600 F. Supp. at 1478-79.



### III. CONCLUSION

Citizen suits have become a vital source of Clean Water Act enforcement. Section 505 actions have been attractive to private plaintiffs because of the relative ease with which violations may be proved and the authority of courts to award civil penalties. As a result, the Clean Water Act is the only major federal environmental law in which citizen enforcement has fulfilled its potential.

As today's tight government budgets and new environmental initiatives force public enforcement officials to do more with less, private enforcement must play a major role in ensuring compliance with the environmental laws. The Supreme Court's holding in *Gwaltney*, and its dictum on mootness, are certain to provoke much litigation on the ability of citizens to bring and maintain enforcement actions under section 505. Until the courts begin to decide the issues presented in these cases, the impacts of *Gwaltney* will remain uncertain.

