

THE CLEAN WATER ACT: CITIZEN SUITS NO LONGER A VALID ENFORCEMENT TOOL FOR PAST VIOLATIONS

Private citizen suits seeking civil penalties for a corporation or government entity's past violations of the Clean Water Act (the Act) are essential to achieve the Act's central purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.¹ Toward this end, the Act allows both government² and citizen³ suits. Courts have established that the federal government may sue for past violations of the Act.⁴ Most federal district courts also

1. Federal Water Pollution Control Act Amendments of 1972, § 101(a), 33 U.S.C. § 1251(a) (1982).

2. Section 309(b) of the Act, 33 U.S.C. § 1319(b) (1982), provides in pertinent part: Civil Actions.

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.

3. Section 505 of the Act, 33 U.S.C. § 1365 (1982), provides in pertinent part: Citizen Suits.

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

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

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

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

33 U.S.C. § 1365 (1982).

4. See, e.g., *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979) (EPA may seek civil penalties for past violations or issue a compliance order to prevent future violations); *United States v. Detrex Chemical Indus., Inc.*, 393 F. Supp. 735, 738 (N.D. Ohio 1975) (same); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1476-77 (D.N.J. 1985) (government is not restricted to

consistently allow private citizens⁵ to sue for past violations, even though the polluter may be in compliance with the Act at the time of suit.⁶ Federal appellate courts, however, have addressed this issue in a limited and inconsistent manner.⁷ In *Gwaltney of Smithfield v. Chesapeake*

abatement actions, which are only one "possible avenue"); *Student Public Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1197 (D.N.J. 1985) (EPA may bring suit based on past violations).

5. Section 505(g) of the Act, 33 U.S.C. § 1365(g), provides: "For the purpose of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected." See also 118 CONG. REC. 33,699-700 (1972). The congressional conference based this definition of citizen on the Supreme Court's holding in *Sierra Club v. Morton*, 405 U.S. 727 (1972), that the party seeking review must be "among those injured by the action or inaction." 118 CONG. REC. at 699-700. Noneconomic injury to the environment qualified as injury under this test. *Id.* The alleged injured interest "may reflect aesthetic, conservational, and recreational as well as economic values." *Id.* Cf. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1980); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 103-04 (2d Cir. 1984); *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 209 (D. Conn. 1985); *Sierra Club v. Simkins*, 617 F. Supp. 1120, 1128-29 (D. Md. 1985); *Student Public Interest Group of N.J. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1422-25 (D.N.J. 1985); *Student Public Interest Research Group of N.J. v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1199 (D.N.J. 1985); *Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1540 (M.D. Pa. 1985).

6. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1550 (E.D. Va. 1985) (district court allowed citizen suits seeking civil penalties for past violations of the Act, regardless of whether the violator complied at the time of the suit); *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 213-14 (D. Conn. 1985) (court allowed citizens to obtain civil penalty relief for past violations, but denied recovery for *private* damages); *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120, 1125-1126, 1127, 1131 (D. Md. 1985) (citizens, as private attorneys general, may seek civil penalties for past violations, and penalties recovered are paid into the U.S. Treasury); *Student Public Interest Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425-26 (D.N.J. 1985) (violation of the permit constitutes violation of the Act; the Clean Water Act allows citizen suits for both past and prospective relief because the "nature and extent of past violations are good indicators of a defendant's future behavior"); *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1540-41 (M.D. Pa. 1985). In *Fishel*, the defendant manufacturing plant was held liable to a neighboring landowner for plant's past violations, even though plant no longer violated the Act. The court held that its power to impose civil penalties in citizen suits had "no limiting time frame." See *infra* notes 31-33 and 38-47 and accompanying text for a discussion of *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985). But see *Pawtuxet Cove Marina, Inc. v. Ciba Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (citizen suits under the Clean Water Act pertain only to violations which are likely to continue and do not reach past violations).

7. See, e.g., *Sierra Club v. Shell Oil Co.*, No. 85-3753 (5th Cir. May 29, 1987), *cert. denied*, — U.S. —, 108 S. Ct. 501, 98 L. Ed. 2d (1987) (reaffirming the *Hamker* court's holding); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded*, — U.S. —, 108 S. Ct. 376 (1987) (allowing citizen

*peake Bay Foundation (Gwaltney)*⁸ the United States Supreme Court resolved a three-way split among the federal courts of appeal and disallowed private citizen suits for past violations of the Clean Water Act.⁹

The Chesapeake Bay Foundation and the National Resources Defense Council (N.R.D.C.) filed a citizen suit pursuant to section 505 of the Clean Water Act.¹⁰ The complaint alleged that Gwaltney of Smithfield, Inc., (Gwaltney) repeatedly violated the pollutant effluent limits¹¹ of its National Pollutant Discharge Elimination System (NPDES) permit¹² by discharging wastewater into a nearby river.¹³

suit based on past violation of Clean Water Act); *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1986) (requiring a violation occurring at the time the citizen suit is filed); *Pawtuxet Cove Marina, Inc. v. Ciba Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), *cert. denied*, — U.S. —, 108 S. Ct. 484, 98 L. Ed. 2d 483 (1987) (precluding a citizen suit based on past violations, but allowing a suit where there is a pattern of intermittent violations or a likelihood that the defendant will continue to violate the Act).

8. 108 S. Ct. 376 (1987).

9. *Id.* at 384-85.

10. *Id.* at 380-81. Chesapeake Bay Foundation and N.R.D.C. filed suit after sending notice to Gwaltney, the Environmental Protection Agency (EPA) and the Virginia State Water Control Board indicating their intention to file a citizen suit. *See infra* note 47 listing the notice requirement. *See supra* note 3 containing the citizen suit provision.

11. 40 C.F.R. § 122.2 (1987) provides: “*Effluent Limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentration of ‘pollutants’ from ‘point sources’ into ‘waters of the United States,’ the waters of the ‘continuous zone,’ or the ocean.”

12. Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (1982), provides in pertinent part:

National Pollutant Discharge Elimination System

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a), upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

The National Pollutant Discharge Elimination System is “the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of the CWA.” 40 C.F.R. § 122.2 (1986).

13. Gwaltney, situated on the Pagan River near Smithfield, Virginia, processed and

Gwaltney contended that it was in compliance with the permit when the citizens filed suit and moved to dismiss for lack of subject matter jurisdiction.¹⁴ The company argued that a defendant must be violating the Act at the time the plaintiff files suit because the Act does not permit citizen suits for past violations.¹⁵ The District Court for the Eastern District of Virginia disagreed,¹⁶ holding that the Act allows citizen suits even if the defendant is not violating the Act at the time of suit. The court in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, denied Gwaltney's motion to dismiss¹⁷ and awarded civil penalties¹⁸

packed pork products. Gwaltney's effluent discharges violated both daily and monthly averages set by the NPDES permit issued by the EPA. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 307 (4th Cir. 1986). The violations consisted of twenty-two average monthly violations and thirteen average daily violations. *Id.* The violations involved the pollutants fecal coliform, chlorine, and total Kjeldahl nitrogen (TKN). Gwaltney violated its fecal coliform limitations 31 times, its chlorine limitation 34 times, and its TKN limitation 87 times. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 108 S. Ct. at 376, 379 (1987). Discharges of the pollutant chlorine ended in October 1982, and the EPA last recorded discharges of the pollutant Kjeldahl nitrogen in May, 1984, approximately one month before the citizens filed the suit. *Id.* Gwaltney reported the violations, as required by law, pursuant to 33 U.S.C. § 1318(a)(3)(A) (1982), 40 C.F.R. § 122.41(1)(4) (1986). 791 F.2d at 307.

14. 108 S. Ct. at 380.

15. *Id.*

16. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 611 F. Supp. 1542 (E.D. Va. 1985).

17. The court viewed the dispute as one of statutory construction. The words "to be in violation," 33 U.S.C. § 1365(a)(1) (1972), could reasonably be read to encompass unlawful conduct occurring prior to the filing of the lawsuit, as well as unlawful conduct continuing into the present. 611 F. Supp. at 1547. Alternatively, the district court stated that Chesapeake Bay and the N.R.D.C. satisfied the subject matter jurisdiction requirements of 33 U.S.C. § 1365 (1982) because the complaint alleged in good faith that Gwaltney's permit violations were continuing at the time the suit was filed. 611 F. Supp. at 1549 n.8.

The court's review of the legislative history revealed no discussion of a requirement that citizens sue only for current violations of the Act. *Id.* at 1548 (citing H.R. REP. NO. 911, 92d Cong., 2d Sess. 133 (1972)), reprinted in 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 820 (1973) [hereinafter LEGISLATIVE HISTORY]; S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971), reprinted in 2 LEGISLATIVE HISTORY at 1497.

The district court also relied upon Senator Muskie's statements that a citizen has a right to file suit against any person who "is alleged to be, or to have been, in violation" whether the violation is continuous or sporadic. 611 F. Supp. at 1548 (citing 118 CONG. REC. 33,700 (1972)), reprinted in 1 LEGISLATIVE HISTORY at 179. The court found that these statements, while not controlling, supported a plausible reading of the statute. 611 F. Supp. at 1548.

Finally, the court found that citizen suits would lose most of their deterrent effect if plaintiffs were unable to obtain civil penalties for past violations. Polluters would lack

pursuant to section 309(d) of the Clean Water Act.¹⁹ Gwaltney appealed, and the Fourth Circuit affirmed in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,²⁰ holding that private citizens can seek civil penalties for past violations²¹ of the Act.

an incentive to comply with the permit discharge limitations until a citizen actually filed suit. *Id.* at 1549.

18. *Id.* at 1542. In assessing penalties, the circuit court affirmed the district court's method of calculating the amount of the penalty. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 315 (4th Cir. 1986). The EPA calculates a "monthly average" as a violation for each day of that month, allowing a maximum penalty of \$10,000 per each day of the month rather than a maximum penalty of \$10,000 for the entire month. The court may reduce the penalty if appropriate. In addition, the court penalized Gwaltney for daily violations occurring in months other than those in which the company exceeded the monthly average. The court interpreted the language of § 1319 ("per day of such violation") to mean that the EPA should not assess the \$10,000 maximum "per violation," but "per day of violation." *Id.* at 313-15. Other cases interpret 33 U.S.C. § 1319(d) similarly. *See United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1045 (W.D. Mo. 1984) ("A 'violation' necessarily encompasses *all* the days involved in the time period covered by the limitation."); *United States v. Detrex Chemical Indus., Inc.*, 393 F. Supp. 735, 737-38 (N.D. Ohio 1975). In *Detrex Chemical*, the court noted that 33 U.S.C. § 1319(d) (1982) "provides a maximum of \$10,000 per day civil money penalty for violations of the Act." Congress intended \$10,000 to be the maximum daily penalty regardless of how many different violations occur in one day. *Id.*

19. Section 309(d) of the CWA, 33 U.S.C. § 1319(d) (1982), provides:

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

Section 309(c) of the CWA generally provides for criminal penalties of between \$2,500 and \$25,000 per day for willful or negligent violations of the Act.

20. 791 F.2d 304, 316-17 (4th Cir. 1986), *vacated and remanded*, — U.S. —, 108 S. Ct. 376 (1987).

21. Courts allowing citizen suits for past violations of the Clean Water Act generally apply the five year federal statute of limitations provided for in 28 U.S.C. § 2462 (1982) rather than any analogous state statute of limitations. This is contrary to the usual practice that federal courts apply analogous state statutes of limitations when a federal statute, such as the CWA, lacks a limitations period. Courts apply the federal statute of limitations to citizen suits under the Clean Water Act because applying the state limitation would "frustrate a federal policy underlying the cause of action under consideration." *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120, 1125 (D. Md. 1985). Under the Act, citizens file suit as private attorneys general, and the defendant pays penalties to the United States, thus "[a]ny benefit from the lawsuit . . . inures to the public or to the United States." *Id.* (citing *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 449-50 (D. Md. 1985)). *Cf.* *Connecticut Fund for the Env't v.*

The primary purpose of the Clean Water Act is to ensure the chemical, physical, and biological integrity of America's waters.²² In passing the Act, Congress intended to eliminate the discharge of water pollutants by 1985.²³ The Clean Water Act was a novel approach to water pollution problems.²⁴ In contrast to the previous policy of post-discharge water quality regulation, the Act established a new system of permits which regulated discharge limits before pollutants entered the navigable waters.²⁵ Each permit set a specific quantity and quality of allowable discharge.²⁶ Congress designed the new system to fully regu-

Job Plating Co., 623 F. Supp. 207, 211-13 (D. Conn. 1985); *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532, 535-36 (W.D.N.Y. 1984); *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Laboratories*, 617 F. Supp. 1190, 1202-03 (D.N.J. 1985); *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1477 (D.N.J. 1985).

22. See 33 U.S.C. § 1251(a) (1982).

23. See 33 U.S.C. § 1251(a)(1) (1982). In *Fairview Township, County of York, Commonwealth of Pennsylvania v. United States Env'tl. Protection Agency*, 773 F.2d 517 (3d Cir. 1985), the court noted that Congress enacted the Federal Water Pollution Control Act Amendments of 1972 as a "comprehensive revision of the nation's clean water laws, which had proven inadequate in the fight against water pollution." *Id.* at 519. Previous legislation included the Federal Water Pollution Control Act (FWPCA) of 1948 and the Refuse Act of 1899. In 1977, the Clean Water Act amended the FWPCA. *Id.* at 519 n.2. See also *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979) (noting congressional intent to eliminate pollutant discharge by 1985).

24. The Act departed from the previous policy of abatement through water quality regulation, in which the EPA measured water quality after the discharge of pollutants. The Federal Water Pollution Control Act of 1948 assigned enforcement of water pollution control to state governors. Federal assistance came only in the support of water pollution research, new technology, and limited loans to finance treatment plants. Since this program was unsuccessful, Congress made legislative changes in 1956, authorizing federal grants for states to develop pollution control plans and build treatment plants. States' needs, however, far exceeded federal government funding.

Finally, in 1965 Congress approved major legislative changes requiring the states to establish water quality standards, subject to approval by the federal government. States determined the type and amount of pollutants allowed into the state's waters, the degree of abatement required, and the time granted to abate the pollution. The federal government established a new federal agency, the Federal Water Pollution Control Act Administration, to administer the federal part of the program.

This program was not as successful as contemplated because many states failed to set water quality standards. Standards were often difficult to set because of the differing effects of various pollutants on different types of bodies of water. Moreover, the state-established standards were often unenforced. *Federal Water Pollution Control Act of 1971*, S. REP. NO. 414, 92d Cong., 1st Sess., p. 1-4 (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3668-71.

25. See *supra* note 24.

26. In 1970, the federal government instituted a new program for the control of

late sources emitting pollution into the water.²⁷

In *Hamker v. Diamond Shamrock Chemical Co.*²⁸ the United States Court of Appeals for the Fifth Circuit held that a citizen suit must fail for lack of jurisdiction where the complaint did not allege a current violation of an effluent limitation, standard, or order.²⁹ The *Hamker* court strictly construed section 505 of the Act,³⁰ stating that the language "in violation" means a defendant must be in violation of an effluent standard at the time of suit.³¹ *Hamker* relied on language from *City of Evansville v. Kentucky Liquid Recycling*,³² stating that section 1365 lacks an explicit provision for suits against parties who previously violated an effluent standard or limitation.³³ The *Hamker* concurrence narrowed the majority's holding by emphasizing that the case involved only a single permit violation.³⁴ The concurrence asserted that the "in violation" language of section 505 is broad enough to include the repeat violator or a violator who knowingly halts the discharge when a

water pollution by regulating the discharge of pollutants into navigable waters. This program emphasized pollution control at the source of the discharge, *before* pollutants were released, rather than control based on the quality of water *after* pollutants were released into the environment. Congress envisioned this new system of permits setting effluent discharge limitations as a more direct approach to eliminate water pollution. *Federal Water Pollution Control Act of 1971*, S. REP. NO. 414, 92d Cong., 1st Sess. 1-8 (1971). *See also* § 101 of the Act, *supra* note 1; 50 JOURNAL OF AIR LAW AND COMMERCE 761, 761-66 (1985) (general discussion of the Clean Water Act of 1972); Student Public Interest Group of New Jersey, Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1430 (D.N.J. 1985) (Clean Water Act's permit discharge system improves water quality by regulating effluent levels); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (permits regulate quality and quantity of discharge).

27. *Earth Sciences*, 599 F.2d at 373.

28. 756 F.2d 392 (5th Cir. 1985).

29. *Id.* at 398-99. The court further stated that continuing effects of the pollutant discharges constituted an insufficient allegation of a current violation of effluent limitations. *Id.*

30. *See supra* note 3.

31. *Hamker*, 756 F.2d at 394-95. The *Hamker* court additionally asserted that it was unnecessary to consult the legislative history of a statute when its language was clear. *Id.*

32. 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (holding that the Act did not authorize a private cause of action for damages, and its legislative history failed to provide for class actions or actions for damages).

33. *Id.* at 1014. The *Hamker* court also noted that Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) cited *Evansville* with approval.

34. *Hamker*, 756 F.2d at 399.

citizen files suit.³⁵

Several district courts, however, allowed citizen suits for past violations, tacitly ignoring the *Hamker* decision.³⁶ In *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*,³⁷ the New Jersey district court construed the words "in violation" to mean that a defendant is and continues to be "in violation" when it violates a NPDES permit because "the taint" of a past violation continues.³⁸ The *Monsanto* court disagreed with the *Hamker* court's analysis of *Evansville* and *Middlesex County Sewerage Authority v. National Sea Clammers Association*,³⁹ stating that these cases dealt primarily with private damage actions instead of citizen suits.⁴⁰

The *Monsanto* court noted that the references in the Act's legislative history to "abatement" of violations could imply that the "appropriate" remedies referred to in section 309⁴¹ contemplate only prospective (injunctive) remedies.⁴² The court, however, discredited this theory, stating that because the government is not limited to abatement actions, neither should citizens.⁴³ The court found that abatement is simply one alternative means of relief.⁴⁴ Both citizens and the government

35. *Id.* At least one other court also narrowly construed the *Hamker* holding. See *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120 (D. Md. 1985).

36. See *infra* notes 38, 49, and 57-62 and accompanying text.

37. 600 F. Supp. 1474 (D.N.J. 1985).

38. *Id.* at 1476. A citizen may bring an action for an appropriate remedy against any person who "is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 CONG. REC. 33693, 33700 (1972). Should the EPA fail to issue an abatement order when a polluter violates the Act, a citizen may sue the Administrator. *Id.*

39. 453 U.S. 1, 13-18 (1981) (although the Act does not imply that citizens have a right to recover private damages, they may act as private attorneys general to enforce the Act or to seek civil penalties payable to the government).

40. *Monsanto*, 600 F. Supp. at 1477. The *Monsanto* court found that *Hamker* relied on equivocal language from both *Middlesex* and *Evansville* to support its opinion. *Middlesex* authorized only prospective relief. *Middlesex*, 453 U.S. at 14. The *Monsanto* court, however, noted that *Middlesex* referred particularly to a suit for private damages and allowed penalties in citizen suits. *Id.* The *Evansville* court, in the context of a suit for private damages, did not authorize suits for past violations. *Monsanto* found that the *Evansville* holding only addressed the issue of private damage suits. *Monsanto*, 600 F. Supp. at 1477.

41. See *supra* notes 2 and 3.

42. *Monsanto*, 600 F. Supp. at 1476. S. REP. NO. 414, 92d Cong., 1st Sess. (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3746-47.

43. *Monsanto*, 600 F. Supp. at 1476.

44. *Id.*

have equal authority to seek remedies, including civil penalties for past violations.⁴⁵

The District Court of New Jersey in *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*⁴⁶ considered the importance of citizen suits. The court discussed the Act's requirement that prospective plaintiffs give 60 days notice to both the Environmental Protection Agency (EPA) and the violator before bringing suit.⁴⁷ The *AT&T* court, in contrast to the *Hamker* court, found that Congress did not intend this requirement to allow a violator the opportunity to comply with the permit and avoid the penalty.⁴⁸ *Hamker* would allow the violator to comply with the NPDES permit prior to suit, avoid a penalty, and later resume noncompliance, making the citizen suit ineffective.⁴⁹

Recognizing that the EPA plays an important role in enforcing the

45. *Id.* at 1476-77. See also S. REP. NO. 414, 92d Cong., 1st Sess.(1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3746 ("[T]he standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement are the same."). See *supra* note 38.

46. 617 F. Supp. 1190 (D.N.J. 1985).

47. *Id.* at 1194. Section 505b(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1982), provides:
(b) Notice.

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator [of the EPA], (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

48. *AT&T*, 617 F. Supp. at 1196. The court also noted that the *Hamker* court found that Congress intended the 60 day notice to allow compliance with the permit, precluding the citizen's right to sue. The *AT&T* court found that *Hamker's* conclusion directly conflicted with Senator Muskie's statement that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations." 118 CONG. REC. 33693, 33700 (1972) (report of Conference Committee on S. 2770).

49. *AT&T*, 617 F. Supp. at 1196. The court also discussed the 60 day notice requirement and the ease with which violators can negotiate new permits. If the Act required the permit to be "in effect," or if the violation had to be current at the time the citizen filed suit, polluters could almost always escape liability by simply renegotiating new permits after citizens filed suits. The court stated, "To the extent that the Act seeks to deter violations, permitting a defendant to avoid liability for past violations works a substantial diminution of any deterrent effect." *Id.* at 1196 (citing *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 853-54 (N.D.N.Y. 1984)). But see *Hamker*, 756 F.2d at 398 (court rejected this contention, saying that the Administration's "non-discretionary duty to promulgate adequate regulations" under 33 U.S.C. § 1316(b)(1)(B) (1982) was not a consideration).

Clean Water Act,⁵⁰ the *AT&T* court noted that the 60 day notice provision gives the EPA an opportunity to sue, thus precluding a citizen suit.⁵¹ Despite these limitations, the court in *AT&T* held that citizens still retain enforcement and remedial authority under the Act.⁵² The court noted that government entities themselves may be polluters.⁵³ Therefore, the court must protect a citizen's right to bring a suit to compel the EPA and state governments to enforce the Act's standards, thereby achieving a nationally uniform enforcement policy.⁵⁴ More-

50. *AT&T*, 617 F. Supp. at 1196-97.

51. *Id.* at 1197. Section 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1982), provides:
(b) Notice.

No action may be commenced . . .

(B) if the Administrator or 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 with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

But see 118 CONG. REC. 33,700 (1972) (Congress did not intend the notice provision to preclude a citizen's cause of action as to "violations that took place 60 days earlier but which may not have been continuous").

52. The court stated, "The scope of enforcement and the remedies available are [not] sharply reduced for citizens." *AT&T*, 617 F. Supp. at 1197. *Cf. Gwaltney*, 791 F.2d 304, 310 (4th Cir. 1986) ("The scope of citizen enforcement powers must . . . be viewed as co-extensive with the enforcement powers of the EPA."); *see also supra* notes 35, 42-44 and accompanying text. *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 213 (D. Conn. 1985) (remedies obtainable in citizen suits should be co-extensive with those available in suits initiated by the federal government); *Student Public Interest Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425 (D.N.J. 1985). The court in *Georgia-Pacific* noted that "[c]itizens have access to the same remedies available to the EPA." Since the EPA can sue for past violations, citizens are not limited to prospective relief. *Id.*

53. *AT&T*, 617 F. Supp. at 1197. *See Fadil, Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L.R. 23, 23-28 (1985).

54. *See AT&T*, 617 F. Supp. at 1197-98. Congress assumed that state agencies would be largely responsible for enforcement. *Id.* at 1198. The states acting individually, however, would not enforce a nationally uniform policy. *Id.* States competing for industry may avoid their enforcement responsibilities to attract business. *Id.* Only strong citizen suits will prevent this avoidance of responsibility. *Id.* at 1198-99. Thus, citizen suits "confined to prospective relief for ongoing violations could not fill this role." *Id.* at 1198. *See also* S. REP. NO. 414, 92d Cong., 1st Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3746 ("[C]itizens should be unconstrained to bring these actions, and . . . the courts should not hesitate to consider them. Since some Federal agencies . . . have failed in abating pollution . . . it is important to provide that citizens can seek, through the courts, to expedite the government performance. . . ."); *see also Federal Water Pollution Control Act Amendments of 1972*, S. REP. NO. 92-414, 92d Cong., 1st Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3678. Fadil notes that implementation of the Act depends "upon the pressures and persistence which an interested public can exert upon the governmental pro-

over, the *AT&T* court asserted that citizens, like the EPA,⁵⁵ must be able to seek both civil penalties and prospective remedies against future violations.⁵⁶

*Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*⁵⁷ was the first federal court of appeals case to allow civil penalties for past violations of the Act. The Fourth Circuit thus directly opposed the Fifth Circuit's holding in *Hamker*⁵⁸ and followed many district court holdings. *Chesapeake II* stated that the "in violation" language of section 505 of the Act is ambiguous.⁵⁹ Consequently, statutory structure and legislative history are important factors for determining the "scope of citizen suit jurisdiction."⁶⁰ The court noted that many enforcement sections of the Clean Water Act refer to both government and citizen remedies in the present tense.⁶¹ The "in violation" language, referring to government power, includes previous as well as ongoing violations.⁶² The court emphasized that any other reading of the statute would eliminate the Act's deterrent effect.⁶³ In order to effectuate their deterrent value,⁶⁴ the court viewed citizen suit enforcement powers as "coexten-

cess. The [EPA] should actively seek, encourage and assist involvement and participation of the public . . . in implementation and enforcement." Fadil, *supra* note 53, at 23-28.

55. *AT&T*, 617 F. Supp. at 1197. See also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. at 13, 14 n.25 (1981) (EPA can "respond to violations of the Act with compliance orders and civil suits"; citizen suits can seek injunctive relief or the court can award civil penalties); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979) (EPA can sue for civil penalties of past violations); *Student Public Interest Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985) (citizens have the same relief as the government, including suits for past violations).

56. *AT&T*, 617 F. Supp. at 1198.

57. 791 F.2d 304 (4th Cir. 1986).

58. *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). See *supra* notes 28-35 and accompanying text.

59. 791 F.2d at 309.

60. *Id.*

61. *Id.* The court examined the use of present-tense enforcement language in 33 U.S.C. §§ 1319(a)(1), (a)(3) and 309(c)(1).

62. 791 F.2d at 309.

63. *Id.* at 309-10 (noting that "[a]ny other reading . . . would . . . severely undercut the Act's ambitious purpose, 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters'"); cf. *AT&T*, *supra* notes 46-49 and accompanying text.

64. 791 F.2d at 310.

sive with the enforcement powers of the EPA."⁶⁵

The court also referred to Senator Muskie's comments in the Act's legislative history regarding the interpretation of the "in violation" language.⁶⁶ Senator Muskie asserted that citizens may seek a remedy against any continuous or sporadic violator of the Act.⁶⁷ The court concluded that the Act's legislative history favored allowing citizen suits for past violations.⁶⁸

The Fourth Circuit also ruled that section 505(a) of the Clean Water Act specifically authorizes courts to award "any appropriate civil penalties under [section 309(d)] . . . of the Act in citizen suits."⁶⁹ The court believed that section 505(a) authorizes courts to use their discretion in applying civil penalties to past violations.⁷⁰ The court also found that the Act limits citizen suits and reasoned that courts should avoid adding restrictions beyond those enumerated by Congress.⁷¹ The restrictions imposed by the Act include the 60 day notice period in section 505(b)⁷² and the fact that the EPA Administrator or the state may preclude a citizen suit by diligently prosecuting a civil or criminal action.⁷³ The Act also precludes citizens from seeking criminal

65. *Id.*

66. *Id.* at 311 n.13. Senator Muskie played a crucial role in drafting and sponsoring the CWA. The court thus gives his remarks greater weight than that normally afforded to legislators. Senator Muskie specifically stated that a citizen may initiate a suit against anyone "who is alleged to be or to have been in violation, whether the violation be a continuous one, or an occasional or sporadic one." *Id.*

67. *Id.* at 312. See *supra* note 34. See also 118 CONG. REC. 33,700 (1972), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 17, at 179.

68. 791 F.2d at 311.

69. *Id.* at 310. Cf. *Georgia-Pacific*, 615 F. Supp. at 1425 (courts have held § 505(a) and § 309(d), 33 U.S.C. § 1319(d), to sustain civil penalties for past violations in citizen's suits.) The court in *Student Public Interest Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985), however, cited *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979), although the *Earth Sciences* court referred only to the government's authority to sue. See also *Student Public Interest Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985) (section 505(a) "quite specifically refers to the court's power to impose civil penalties in citizen's suits and contains no limiting time frame").

70. 791 F.2d at 310.

71. *Id.* Citizen enforcement authority is narrower than the government's. The Act imposes *express* limitations on the ability to bring citizen suits, and only those limits expressly provided by Congress shall be imposed on citizen suits. The court refused to impose additional limitations by implication. *Id.*

72. *Id.* See *supra* notes 38 and 47 and accompanying text.

73. *Id.* See *supra* notes 49 and 51 and accompanying text.

penalties.⁷⁴

The court disregarded the defendant's argument that allowing citizen suits for past violations of the Act would inundate the federal courts.⁷⁵ This argument fails to support restricting the scope of citizen suits because the authority of district courts to hear state law claims is discretionary.⁷⁶ Thus, district courts need not adjudicate all claims.⁷⁷

The First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba Geigy, Corp.*⁷⁸ adopted a moderate approach, holding that citizens may not sue for a single previous violation of a permit effluent limitation. The court, however, would allow a citizen suit if there was a "continuing likelihood that the defendant, if not enjoined, [would] proceed to violate the Act."⁷⁹ The *Pawtuxet* court warned against strictly interpreting the statutory language to require violations to occur on the actual date a complaint is filed.⁸⁰ The First Circuit stated that courts should consider several factors to determine whether a violation is likely to continue. These factors include: the isolated or recurrent nature of the violation, the defendant's intent, and assurances against future violations.⁸¹

The *Pawtuxet* court affirmed the district court's dismissal of the citizen suit seeking civil penalties.⁸² The district court had dismissed the action for lack of jurisdiction. Significantly, however, the facts before the *Pawtuxet* court made it clear that there was no future possibility of a permit violation. The defendant had ceased to operate under the permit system of the Clean Water Act.⁸³

The Supreme Court's decision in *Gwaltney* attempts to settle a three-way split among the circuits, but it fails to set forth any concrete guide-

74. *Id.* (citizens cannot seek criminal penalties or issue compliance orders under the Act, but the Act does not deprive citizens from suing post violation).

75. *Id.* at 312-13.

76. *Id.*

77. *Id.*

78. 807 F.2d 1089 (1st Cir. 1986).

79. *Id.* at 1094.

80. *Id.*

81. *Id.*

82. 807 F.2d at 1091.

83. 807 F.2d at 1091-92. Defendant was situated on a river and had allegedly exceeded its discharge limitations under the NPDES. *Id.* Pawtuxet Cove Marina was situated down river from the defendant. Before Pawtuxet Cove Marina filed its complaint, the defendant completed a tie-in with a municipal treatment facility and was no longer operating under the permit.

lines. The Supreme Court holding most closely resembles the *Pawtuxet* decision. The Court held that although section 505 of the Clean Water Act does not permit citizens to sue for wholly past violations, it gives courts subject matter jurisdiction when citizens make a "good faith allegation of continuous or intermittent violation[s]." ⁸⁴ The Court remanded the case to determine whether Gwaltney continued to violate its NPDES permit. ⁸⁵ The Court, however, failed to delineate guidelines regarding what constitutes a "continuous or intermittent violation" or a "good faith allegation" of such a violation. The Court also failed to set guidelines as to when during the legal process the violations must occur.

The *Gwaltney* Court engaged in a four-step analysis. First, the Court noted that the language "to be in violation" ⁸⁶ requires an allegation of intermittent or continuous violation or "a reasonable likelihood that a past polluter will continue to pollute in the future." ⁸⁷ The Court referred to citizen suit provisions in other environmental statutes which allow only prospective relief. ⁸⁸ The Court noted further that Congress knew how to avoid implying prospective relief. ⁸⁹

The Court refuted the contention that citizens should be allowed to sue for past violations since the EPA Administrator can do so, and since the citizen suit sections of the Act contain parallel language. ⁹⁰ The *Gwaltney* Court recognized that sections 309(a) and (b) do not address the Administrator's ability to seek civil penalties. Civil penalties are addressed in section 309(d), which lacks the "in violation" lan-

84. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 108 S. Ct. 376, 385 (1987).

85. *Id.*

86. *See supra* note 3 (citizen suit provision).

87. 108 S. Ct. at 381.

88. *Id. See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (1977); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1982 ed. and Supp. III); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982 ed. and Supp. IV).

89. For example, in the Solid Waste Disposal Act Congress explicitly used language allowing for wholly past violations. 108 S. Ct. at 381 and n.2. *See* Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B) (1982 ed., Supp. III). In 1984 Congress amended the Act to permit citizen suits for "past or present" violations of the Act. Prior to this amendment, the Solid Waste Disposal Act contained language identical to the "alleged to be in violation" language of § 505(a) of the Clean Water Act. The Court also noted that recent Clean Water Act amendments permit certain administrative penalties against any person who "has violated" the Act. Water Quality Act of 1987, Pub. L. 100-4, § 314, 101 Stat. 46.

90. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 108 S. Ct. 376, 381-82 (1987).

guage.⁹¹ The Court relied on its decision in *Tull v. United States*,⁹² holding that 309(d) establishes an enforcement power separate from section 309(a) or (b).⁹³ Section 309(b) provides for enjoining current violations and section 309(d) provides for civil penalties.⁹⁴

Section 505, however, does not contain separate sections granting civil penalties and injunctive relief. Because section 505(a) contains both civil penalty and injunctive provisions in the same subsection, the Court interpreted it to mean that civil penalties are associated with injunctive relief when citizens seek to enforce the Act. Thus, a citizen civil penalty suit is meant to enjoin only an ongoing violation.⁹⁵ The Court also interpreted the consistent use of the present tense throughout section 503 to mean that Congress intended citizen suits for prospective relief only.⁹⁶

Second, the Supreme Court noted that allowing citizens to sue for past violations would nullify the requirement⁹⁷ that a citizen provide 60 days notice of intent to sue the state, the EPA Administrator, and the alleged violator.⁹⁸ EPA or state enforcement action within 60 days of receiving notice bars a citizen suit.⁹⁹ State or EPA action makes the citizen suit unnecessary.¹⁰⁰ The 60 day notice gives the alleged violator an opportunity to comply with the Act and would be superfluous if citizens could sue for past violations.¹⁰¹ The Court interpreted the ban on citizen suits in the face of governmental enforcement action to mean that the citizen suit supplements rather than supplants governmental

91. *Id.* at 382. See *supra* note 19.

92. 107 S. Ct. 1831 (1987).

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

94. *Id.*

95. *Id.*

96. *Id.* Section 505(f) provides that citizen suits may be brought only for violation of a permit "which is in effect." Section 505(b)(1)(A) states that citizens must give notice to EPA, alleged violator and the State in which the violation "occurs." Section 505(h) allows the Governor of the State to sue as a citizen for a "violation . . . which is occurring in another State and is causing an adverse effect on the public health or welfare in [the] State." Section 505(g) defines "citizen" as "a person . . . having an interest which is or may be adversely affected."

97. *Gwaltney*, 108 S. Ct. 382-83.

98. 33 U.S.C. § 1365(b)(1)(A).

99. 33 U.S.C. § 1365(b)(1)(B).

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

101. *Id.* at 383.

action.¹⁰²

Third, the *Gwaltney* Court examined the legislative history to support its holding.¹⁰³ Congress often referred to citizen suits as injunctive or abatement measures.¹⁰⁴ Senate and House Reports drew a parallel between section 505 citizen suit provisions and the Clean Air Act citizen suit provisions, which are wholly injunctive.¹⁰⁵ Although the Supreme Court considered Senator Muskie's statement that "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged . . . to have been in violation," it nevertheless found support lacking for citizen suits for past violations.¹⁰⁶ The Court noted that the Senator's statement¹⁰⁷ allows citizen suits for intermittent or continuing violations.¹⁰⁸

Fourth, the Supreme Court stated that the Clean Water Act requires only proof that the defendant is "alleged to be in violation" of the Act when the suit is filed.¹⁰⁹ A good faith allegation of permit violations is sufficient to confer jurisdiction.¹¹⁰ The Court suggested, however, that even if the defendant violated the Act at the commencement of a suit, if violations ceased during litigation, the citizen suit may be dismissed as moot,¹¹¹ if there is "no reasonable expectation"¹¹² that the wrong will

102. *Id.* The Court stated that the Administrator may choose to forego civil penalties if the violator takes corrective measures. *Id.* If the citizen suit could seek civil penalties for those past violations, it would frustrate the Administrator's actions. *Id.*

103. *Gwaltney*, 108 S. Ct. at 383-84.

104. *Id.* at 383.

105. *Id.* See S. REP. NO. 414, at 79 (1971), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 17, at 1497 (citizen participation under the Clean Water Act is "modeled on the provision enacted in the Clean Air Amendments of 1970"); H.R. REP. NO. 911, at 133 (1972) (section 505 closely follows the concepts utilized in § 304 of the Clean Air Act).

106. *Gwaltney*, 108 S. Ct. at 385 (emphasis in original).

107. *Id.* at 384. *But see supra* notes 66-68 and accompanying text (the Fourth Circuit recognized that Senator Muskie referred to "intermittent" or "sporadic" violations as past violations, not continuous violations).

108. *Id.* Senator Muskie's full statement allows a citizen suit "in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." *Id.* (emphasis added).

109. *Id.* at 385 (emphasis in original).

110. *Id.* at 385. The Court relied on FED. R. CIV. P. 11 requiring pleadings "to be based on a good-faith belief, formed after reasonable inquiry, that they are 'well-grounded in fact.'"

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

112. *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

be repeated.”¹¹³

Justice Scalia, joined by Justices Stevens and O'Connor, concurred in part and concurred in the judgment. Justice Scalia believed that the Court's requirement of only a good faith allegation that the defendant is “in violation” at the time the suit is filed inappropriately created a new form of subject matter jurisdiction.¹¹⁴ He interpreted the Court's standard to allow an unproven allegation of a violation to carry the lawsuit to judgment.¹¹⁵ Justice Scalia stated that the Court replaced the requirement of proof with a good faith belief.¹¹⁶ He would require the violator to be “in fact in violation” upon commencement of the suit. The violator would have to put remedial measures in place to avoid being “in violation” of the Act on the date suit is filed.¹¹⁷

Justice Scalia mitigated the strictness of his jurisdictional standard, stating that subject matter jurisdiction may not be defeated once the suit is filed simply because the defendant attempts to remedy the violation. Rather, the cure for a past violation must be clear.¹¹⁸ Justice Scalia admitted that his standard would probably result in the same outcome that the Court reached in this case.¹¹⁹

Although the Supreme Court's analysis in *Gwaltney* is technically logical, it fails to recognize citizen suits as valid enforcement tools. The opinion ignores the concerns addressed in *AT&T* and *Chesapeake Bay* that the 60 day notice provision was not solely intended to allow the violator to comply with the permit requirement.¹²⁰ Otherwise, the violator could comply with the NPDES permit prior to commencement of the suit, and later resume noncompliance, destroying the deterrent effect of the citizen suit provision.¹²¹ The notice provision merely allows the state or the EPA to take enforcement action and preclude a

113. The Court stated that the defendant must show that it is “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” 108 S. Ct. at 386 (emphasis in original) (citing *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)).

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

115. *Id.* at 387.

116. *Id.*

117. *Id.*

118. “Subject matter jurisdiction depends on the state of things at the time of the action brought; . . . subsequent events cannot ‘oust’ the court of jurisdiction.” *Id.* at 387, (citing *Mullen v. Torrance*, 23 U.S. (9 Wheat) 537, 539 (1824)).

119. *Gwaltney*, 108 S. Ct. at 388.

120. See *supra* notes 48-49 and accompanying text.

121. See *supra* notes 47-49 and 63 and accompanying text.

citizen suit.¹²²

The Court also ignores section 505(b)(1)(B), which precludes a citizen suit only if the Administrator or the state is diligently prosecuting a civil or criminal action.¹²³ A citizen suit should not circumvent the Administrator's decision to forego civil penalties if the violator abates the violation. This diligent prosecution by the EPA would preclude citizen action.

This, however, does not address the case in which the EPA or state fails to diligently prosecute subsequent to the citizen plaintiff's 60 day notice. Preventing citizen suits for past violations of the Act in this instance seriously curtails the power and the deterrent effect of such suits. If a citizen suit can only seek an injunction, the violator has no incentive to cease discharging pollutants beyond those allowed under the permit system. The violator faces no threat that a citizen suit may impose for any past violations. The violator only faces an injunctive slap on the wrist.

The Administrator may seek both injunctive relief and civil penalties for wholly past violations.¹²⁴ The citizen suit is permitted only when the Administrator or state fails to diligently prosecute an action.¹²⁵ Thus, the citizen suit provision, section 505(b)(1)(B), is not limited to injunctive relief. The Administrator must diligently prosecute past violations and seek prospective relief.¹²⁶ Allowing citizen suits when the Administrator fails to prosecute for past violations does not supplant the Administrator's role. Rather, contrary to the Court's analysis,¹²⁷ the citizen suit would be an effective supplement if it is used to seek civil penalties for past violations when the Administrator fails to diligently prosecute.

The Court's theory that section 309 separates injunctive relief and civil penalties is also somewhat strained.¹²⁸ The Court interpreted section 309(b) to provide for injunctive relief and section 309(d) to provide for civil penalties.¹²⁹ Section 309(b) allows "appropriate" relief, in-

122. See *supra* notes 51-54 and accompanying text.

123. See *supra* notes 51 and 73 and accompanying text.

124. See *supra* note 4 and accompanying text.

125. See *supra* notes 51 and 73 and accompanying text.

126. See *supra* note 51.

127. See *supra* notes 97-102 and accompanying text.

128. See *supra* notes 90-96 and accompanying text.

129. See *supra* notes 91-95 and accompanying text.

cluding injunctive relief. Contrary to the Court's interpretation,¹³⁰ the section does not clearly separate the enforcement powers of injunctive relief and civil penalty.¹³¹ Incorrectly, the Court contrasted the separation of civil penalties and injunctive relief in section 309 with the lack of separation in section 505.¹³² The Court thus wrongly concluded that the lack of separation in section 505 between injunctive relief and civil penalties means that the citizen suit provision equates civil penalties only with injunctive or prospective relief.¹³³

The Court's interpretation of section 505, limiting citizen suits to prospective relief, may encourage similar limitations on other environmental statutes. The *Gwaltney* Court noted that other statutes containing the "to be in violation" language allow only prospective relief.¹³⁴ The Court also suggested that if Congress intends to permit citizen suits for past violations, it must amend the statutes.¹³⁵

The Court, however, failed to distinguish between the Clean Water Act and other environmental statutes. Each statute with which the Court compared the Clean Water Act lacks a civil penalties provision in its citizen suit section. Therefore, although the Clean Water Act contains the same "alleged to be in violation" language as other environmental statutes, Congress intended civil penalties for citizen suits under the Clean Water Act to provide different relief. The Court, however, failed to note this distinction.

The Court's jurisdictional analysis provides unclear guidance. The Court interpreted the Act to require a "good faith allegation" that the defendant is "in violation"¹³⁶ and relied on the federal rule requiring a good faith belief that pleadings are grounded in fact.¹³⁷

The Court suggested three standards which would defeat the citizen suit once it is filed. First, a defendant may succeed on a motion for

130. See *supra* notes 90-96 and accompanying text.

131. Section 309(d) simply sets the amount of civil penalty. See *supra* note 19 and accompanying text.

132. See *supra* notes 93-95 and accompanying text.

133. See *supra* notes 94-95 and accompanying text.

134. *Gwaltney*, 108 S. Ct. at 381; see also *supra* notes 88-89 and 105 and accompanying text.

135. *Gwaltney*, 108 S. Ct. at 381; see also *supra* note 89.

136. 108 S. Ct. at 385. See also *supra* notes 109-110 and accompanying text.

137. FED. R. CIV. P. 11. The rule requires a "good-faith belief found after reasonable inquiry, that [the pleadings] are well-grounded in fact." *Id.* See also *supra* note 110 and accompanying text.

summary judgment if the allegations were a "sham and raised no genuine issue of material fact."¹³⁸ Moreover, the suit may not be maintained even after litigation commences if "there is no reasonable expectation that the wrong will be repeated."¹³⁹ Finally, if it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur,"¹⁴⁰ the citizen suit would fail. Even though the defendant's burden in proving mootness is heavy, the Court's standard would allow a defendant who violated the Clean Water Act's permit requirements after suit was filed to cease the violations and take corrective action resulting in dismissal of the case. Thus, the defendant lacks incentive to cease violations prior to suit, leaving the citizen suit virtually ineffective.

By holding that penalties for past violations are not properly within the scope of citizen suits and by narrowly interpreting "in violation,"¹⁴¹ the *Gwaltney* Court frustrates Congress' intent to use citizen suits as a strong enforcement tool.¹⁴² The Court's interpretation of the Clean Water Act cripples the effectiveness of the citizen suit and fails to fully realize the Act's central purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."¹⁴³ Stripping the citizen suit of the power to seek penalties for past violations also inhibits Congress' desire to remedy inadequacies in the pollution control program through a new system of effluent limitation permits intended to regulate the sources of water pollution.¹⁴⁴

Even if the EPA is not diligently prosecuting an alleged violation, the citizen suit is henceforth limited to injunctive relief. Violators not pursued by the EPA face no threat of penalty for past wrongs. Even if a citizen suit alleges a violation sufficient to confer jurisdiction, the defendant can escape the citizen suit provision by demonstrating its corrective measures. A violator is thus immune from any reprimand for damage it has already imposed on the environment, seemingly without regard to whether past violations caused irreparable damage. Although citizen suits retain some viability in the attempt to clean up

138. 108 S. Ct. at 386.

139. *Id.* See also *supra* note 112 and accompanying text.

140. 108 S. Ct. at 386. See also *supra* note 113 and accompanying text.

141. See *supra* notes 84-108 and accompanying text.

142. See *supra* notes 49, 52-54, 63-65 and accompanying text.

143. 33 U.S.C. § 1251a (1982).

144. See *supra* note 24 and accompanying text.

our Nation's waters, the *Gwaltney* Court drastically limited a vital part of the Act's enforcement scheme.

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