Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits Under the Clean Water Act

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INTRODUCTION

In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation the Supreme Court directly addressed the issue of whether a citizen may sue to recover penalties for past violations of the Clean Water Act. The Court held that while there is no federal jurisdiction for wholly past violations of the Act, a citizen-plaintiff may bring suit if the complaint alleges in good faith an ongoing violation at the time of filing. The decision leaves open issues whose resolution will determine the continued effectiveness of citizen suits. For example, the Supreme Court did not resolve what constitutes a "good faith" allegation of a violation, when a violation will be considered "ongoing" for purposes of citizen suits, or what the plaintiff must prove to succeed on the merits. The decision did not address the question of the time at which the risk of noncompliance will be judged, how great that risk must be, or the basis of the penalty in cases where some violations were cured prior to the initiation of the suit.

Part I of this Note examines citizen suits before Gwaltney, sets forth the factual context of the case, and describes the lower court decisions. Part II presents the Supreme Court's majority and minority opinions. Part III critiques the decision and discusses its possible implications for citizen suits in the future.

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HISTORY OF THE CASE

A. Citizen Suits As an Enforcement Tool

During the Reagan administration, enforcement by the Environmental Protection Agency (EPA) of Clean Water Act violations declined, while citizen suits increased. Citizen suits are now the predominant mode of federal judicial enforcement of the Clean Water Act. Suing on behalf of their members, environmental organizations have initiated numerous citizen suits against alleged violators of the Clean Water Act. These citizen-plaintiffs examine the discharge monitoring reports (DMR's) of dischargers and bring suit based on any discovery of violations. Courts have found that permit condition violations that are substantiated by DMR's are prima facie violations and plaintiffs win summary judgment on the issue of liability. Then the case proceeds to trial only on the penalty. The suits frequently result in settlements that benefit environmental projects.

The intended effect of penalties under the Clean Water Act is to encourage compliance with the Act by making noncompliance economically unattractive. However, although “commentators have observed—and common sense indicated—that unless it is more profitable to comply

3. See, Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Envrnl. L. Rep. (Envrnl. L. Inst.) 10,407, 10,424-25 (1984). In addition to the perceived laxness in EPA enforcement, the increase in citizen suits under the Clean Water Act, beginning in 1982, has also been attributed to the fact that before then, environmental groups concentrated their limited resources on litigation to force EPA to promulgate legally required effluent limitations. Once those limitations were established, environmental groups turned their attention to violations by industrial dischargers. Comment, Private Enforcement of the Clean Air Act And the Clean Water Act, 35 AM. U.L. REV. 127, 130 (1985).


5. Miller, supra note 3, at 10,424.

6. In the mandatory discharge monitoring reports (DMR's), dischargers must report the characteristics of the discharge, or “effluent,” that they release into the water of the United States. Clean Water Act § 308(a)(A), 33 U.S.C. § 1318(a)(A) (1982). If the parameters reported in the DMR exceed the levels specified for those parameters in the discharger's National Pollutant Discharge Elimination System (NPDES) permit, then the discharger is in violation of Clean Water Act.


8. Miller, supra note 3, at 10,425-26. Many industrial advocates have criticized as improper the settlement practice of making contributions to environmental projects in lieu of paying penalties to the U.S. Government. However, some defendants prefer such settlements because they are tax deductible and promote public relations. Id. at 10,426.

with pollution laws than to resist compliance, industries will have little
incentive to obey the law,"¹⁰ insufficient empirical data exists for evaluat-
ing the deterrent effect of citizen suit penalties.¹¹ Even so, it is reasonable
to assume that citizen suits penalties are an important means of deterring
Clean Water Act violations, especially in the absence of vigorous EPA
enforcement.

While environmentalists have pursued citizen suits as a method of
protecting the nation’s waters in a climate of administrative indifference,
members of the regulated community have questioned many of the suits
on the grounds that they harass dischargers and interfere with legitimate
enforcement discretion.¹² However, a 1984 study by the Environmental
Law Institute concluded that citizen suits were operating as Congress
intended and that the suits provided both “a goad and an alternative to
government enforcement.”¹³

One of the issues on which environmentalists and industrial dis-
chargers vehemently differed was whether citizens should be able to sue
for past violations under the Act. Environmentalists argued that impos-
ing penalties for past violations promoted the policy of specific and gen-
eral deterrence that Congress intended.¹⁴ Those subject to penalties for
past violations maintained that Congress intended to promote compli-
ance with the Clean Water Act and that assessing penalties against those
currently in compliance would do nothing to achieve that goal.¹⁵

¹⁰. Comment, Citizen Suits Under the Clean Water Act, 38 Rutgers L. Rev. 813, 818
(1986).
¹¹. See Miller, supra note 4, at 10,313-14.
¹². See Miller, supra note 3, at 10,426.
¹³. ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN EN-
¹⁴. See, e.g, NWF Brief, supra note 9, at 4 (citing Tull v. United States, 107 S. Ct. 1831
(1987)).
¹⁵. In criticizing citizen suits for past damages, one industry amicus characterized plain-
tiff environmental organizations seeking penalties for past damages as “little more than bounty
hunters.” Amicus Curiae Brief of Connecticut Business and Industry Association in Support
of Petitioner at 6, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376
(1987) (No. 86-473). The same advocate further criticized the “vigilante style” of litigation
practiced by these groups, id. at 62, maintaining that they were motivated by the prospect of
recovering attorney’s fees and settlements to environmental organizations. Id. at 46-47.
B. The Conflict in the Circuits on the Issue of Past Violations

Both the Seventh Circuit in 1979\(^{16}\) and the Supreme Court in 1981\(^{17}\) mentioned in dicta the issue of whether citizens might sue for past violations. When the Supreme Court granted certiorari in *Gwaltney*,\(^{18}\) there were three views on the issue of whether section 505(a) of the Clean Water Act\(^ {19}\) allowed suit for past violations. The Fifth Circuit, in *Hamker v. Diamond Shamrock Chemical Co.*\(^ {20}\) found that the statutory language "alleged to be in violation" clearly limited citizen suits to those cases in which there was an ongoing violation of the Clean Water Act.\(^ {21}\) The Fourth Circuit explicitly rejected the position of the *Hamker* court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*.\(^ {22}\) After determining that the statutory language was ambiguous, the Fourth Circuit examined the legislative history and structure of the Clean Water Act and concluded that citizen suits were permitted for past violations of the Act.

Finally, the First Circuit held in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*\(^ {23}\) that although a citizen could not bring suit for an entirely past violation of the Clean Water Act, a citizen suit could be brought if the citizen-plaintiff reasonably alleged that there was a likelihood that the defendant would again violate the Clean Water Act if not enjoined.\(^ {24}\) This position, between the Fourth Circuit's view allowing subject matter jurisdiction based on wholly past violations and the Fifth Circuit's view allowing subject matter jurisdiction only if there is a violation when the suit is filed, would allow a suit based on intermittent viola-

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16. *City of Evansville v. Kentucky Liquid Recycling Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979) (stating that section 505(a) of the Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages").
18. *107 S. Ct. 872 (1987).*
19. The relevant portions of the citizen suit provision are set out *infra* note 111.
20. 756 F.2d 392 (5th Cir. 1985).
21. *Id.* at 394-95. After holding in *Hamker* that a suit for past violations was not allowed under the facts of the case, the Fifth Circuit reached a similar conclusion in *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987). *Sierra Club*, like *Gwaltney*, involved a pattern of repeated NPDES permit violations. *See id.* at 1174-75.
23. 807 F.2d 1089 (1st Cir. 1986), cert. denied, 108 S. Ct. 484 (1987). In that case, plaintiffs sought common law damages as well as penalties under the citizen suit provision of the Clean Water Act for defendant's discharge of contaminated effluent into the Pawtuxet River. The plaintiffs alleged that the discharge violated defendant's NPDES permit and also prevented dredging operations, causing the plaintiffs economic harm. *Id.* at 1090-91. The First Circuit affirmed the district court finding of no "but for" causation, *id.* at 1091, and ruled that there was no likelihood that the defendant would continue violating its NPDES permit since at the time plaintiffs brought suit, it had completed its hookup to a municipal pretreatment facility. *Id.* at 1094.
24. *Id.* at 1093-94.
tions, even if violations were not committed at or after the precise moment the suit is filed.

The Supreme Court's *Gwaltney* decision has at last resolved part of the controversy in the Circuits. Nevertheless, the decision leaves questions unanswered, such as whether it will significantly impair the rights of citizens to enforce the Act using the citizen suit provision.

II
THE PROCEEDINGS BELOW

A. Facts of the Case

On October 27, 1981, Gwaltney of Smithfield (Gwaltney) purchased the Gwaltney pork processing plant from ITT-Gwaltney, Inc.25 At the time of purchase, the plant, located in Smithfield, Virginia, was authorized under a National Pollutant Discharge Elimination System (NPDES) permit program administered by the State of Virginia to discharge specified permissible levels of seven measurable pollutant parameters into the Pagan river.26 There was evidence that the plant had been violating the permit before the date of Gwaltney's purchase.27 During the period between taking over the plant and the plaintiff's initiation of the suit, Gwaltney repeatedly violated the effluent limitations of its NPDES permit. The most serious violations were for the pollutants chlorine, fecal coliform, and total Kjeldahl nitrogen (TKN): between the October 27, 1981, purchase and August 30, 1984, there were thirty-four chlorine violations, thirty-one fecal coliform violations, and eighty-seven TKN violations.28 Approximately six months after the purchase, Gwaltney began correcting the causes of the permit violations, with good results. Gwaltney's last chlorine violation occurred in October, 1982, and its last fecal coliform violation occurred in February, 1984; with the installation of a more effective wastewater treatment system in October 1983, its last TKN violation occurred May 15, 1984.29

In February of 1984, the environmental groups Chesapeake Bay Foundation (CBF) and the Natural Resources Defense Council (NRDC) notified Gwaltney, EPA, and the Virginia State Water Control Board of

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29. *Id.*
their intent to bring a citizen suit against the plant. Both CBF and NRDC filed suit on June 15, 1984, in the U.S. District Court for the Eastern District of Virginia. The district court granted plaintiffs’ motion for partial summary judgment on the issue of liability and held a hearing to determine the amount of the civil penalty. In May of 1985, Gwaltney moved to dismiss the action, asserting that a suit under the Clean Water Act must allege that the defendant had committed permit violations on or after the date suit was filed. Gwaltney contended that because it had not exceeded its permit limits after the plaintiffs filed their suit, the suit should be dismissed for lack of subject matter jurisdiction.

B. The District Court Decision

In reaching its decision that citizen suits under the Clean Water Act could be based on wholly past violations, the district court reasoned that the words “to be in violation” were ambiguous in the absence of clarifying language, because they could refer plausibly to behavior that occurred entirely before the filing of a law suit, or to behavior continuing in the present. To resolve this ambiguity, the court examined the structure and legislative history of the Clean Water Act. Analogizing a past violation of the Clean Water Act to a delinquent tax payment—the taxpayer still would be “in violation” of tax laws even if he paid the correct amount the following year—the court reasoned that subsequent compliance did not necessarily mean that a discharger who had previously violated its permit was no longer “in violation” of the Act. Additionally, the court stated that the lack of an express limitation on past damages in section 309(d) implied that Congress intended no such limitation.

In examining the legislative history, the court found persuasive the same silence on the issue of whether citizen suits could properly be brought for past violations of the Act. Finding no explicit requirement

30. Id. Citizen-plaintiffs must provide the alleged violator and state and federal regulators with 60 days’ notice before filing suit. Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (1982).
32. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1544 (E.D. Va. 1985), aff’d, 791 F.2d 304 (4th Cir. 1986), vacated and remanded, 108 S. Ct. 376 (1987). The penalty was to be determined considering:
the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.
34. Id.
35. Chesapeake Bay Found., 611 F. Supp. at 1547.
36. Id.
37. Id. at 1548.
that unlawful conduct be ongoing the moment suit was filed, the court found it unlikely that Congress intended one, especially because such a requirement would not further the congressional policy of deterrence underlying the citizen suit provision. Violators would have no incentive to comply until a suit was commenced, and citizen suit effectiveness would be undermined by the evidentiary problems inherent in proving a current violation. Limiting citizen suits to past violations would also engender increased litigation while courts searched for standards to determine when a discharger was "in violation" of the Clean Water Act.

In addition to the policy reasons that supported citizen suits for past violations, the district court found that the following statement by Senator Muskie, who managed the Senate bill adding the citizen suit provision to the Clean Water Act, advanced its reading of the citizen suit provision: "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 be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." While recognizing that Senator Muskie's remark could not be used to "materially alter clear statutory language," the court nevertheless found his comment lent "further support to a plausible reading . . . of ambiguous statutory language." The district court also noted that a number of district court decisions supported its interpretation of the provision.

The district court also rejected the reasoning of the Fifth Circuit in Hamker v. Diamond Shamrock Chemical Co. Hamker could have been distinguished on its facts, but the district court refuted the Fifth Circuit's interpretation of the statutory language as clearly preventing citizen suits for past violations. The district court also rejected the Hamker court's conclusion that because primary enforcement responsibility for the Clean Water Act violations lay with either EPA or the states, the Clean Water Act precluded citizen suits for past violations. The district court reasoned that citizen suits for past violations were not inconsistent with the role of EPA or the states since the statute's sixty-day

38. Id. at 1548-49.
39. Id. at 1549.
40. Id. at 1548 (quoting 118 Cong. Rec. 33,700 (1972)) (emphasis added by the district court).
41. Id.
42. Id. at 1550 (citing, inter alia, Student Pub. Interest Res. Group of N.J. v. Monsanto Co., 600 F. Supp. 1474 (D.N.J. 1985); Sierra Club v. Aluminum Co. of America, 585 F. Supp. 842 (N.D.N.Y. 1984)).
43. 756 F.2d 392 (5th Cir. 1985), discussed in 611 F. Supp. at 1550.
44. Hamker involved a one-time oil spill that damaged the creek the plaintiffs used for their livestock. No NPDES permit violation was alleged. The plaintiffs had asserted a Clean Water Act violation primarily to obtain an implied cause of action supporting their state law damages claim. Id. at 394.
45. Chesapeake Bay Found., 611 F. Supp. at 1550.
notice provision always allowed EPA or state intervention, thus preserving their role as primary enforcers. Nor was the district court persuaded that Congress intended the sixty-day notice provision to allow violators to escape suit through compliance within the notice period. The court relied heavily on the fact that, unlike the provision for EPA- or state-initiated suits, the Act contained no express provision stating that compliance deprived citizens of a right to sue.

The district court based its decision on its conclusion that penalties for wholly past violations were appropriate under section 505(a). However, it also observed in a footnote that the plaintiffs' good faith allegation of an ongoing violation supported jurisdiction, since at the time the suit was filed, even Gwaltney was unsure that its system could adequately handle discharges during the coming winter.

C. The Court of Appeals Decision

The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's holding that section 505(a) permitted a citizen to sue to recover penalties for past violations of the Clean Water Act. It agreed with the district court's conclusion that the statutory phrase "to be in violation" was sufficiently ambiguous to warrant examination of the structure and legislative history of the statute.

In examining the structure of the Clean Water Act, the Fourth Circuit found that EPA's undisputed authority to seek penalties for past violations, based on present tense language identical to that authorizing citizen suits, indicated that citizens should be able to prosecute past violations as well. Like the district court, the Fourth Circuit refused to read in restrictions on citizen suits other than those expressed in the

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46. *Id.*
47. *Id.* The only express limitations on filing citizen suits are the 60-day notice requirement and the prior institution of an EPA or state criminal action. *Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (1982).*
48. *Chesapeake Bay Found.,* 611 F. Supp. at 1549 n.8. This footnote offered the rationale ultimately underlying the Supreme Court's disposition of the case.
50. *Id.* at 309.
51. The Fourth Circuit gave the following examples of present tense language from which EPA derives its authority to act against past violations: EPA may take enforcement action, which may include court action, if the Administrator "finds that any person *is in violation*" of the Act or of permit conditions or limitations, *Clean Water Act § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1982);* the Administrator may issue a compliance order or bring a civil action if the Administrator "finds that any person *is in violation*" of permit conditions or certain Clean Water Act provisions, *id.* § 309(a)(3), *33 U.S.C. § 1319(a)(3);* the Clean Water Act authorizes criminal penalties for one "who willfully or negligently *violates*" certain of its provisions or any NPDES permit limitations or conditions, *id.* § 309(c)(1), *33 U.S.C. § 1319(c)(1). *Gwaltney,* 791 F.2d at 309 (emphasis added by court).
Act, concluding instead that an expansive reading of jurisdiction was most consistent with the role Congress intended for citizens in enforcing the Clean Water Act.

Unconvinced by Gwaltney's use of legislative history emphasizing the abatement function of citizen suits, the Fourth Circuit determined that the legislative history favored citizen suits for past violations of the Clean Water Act. The court was persuaded by the remarks of Senator Muskie emphasized by the district court, and by his comment that “[c]itizen suits can be brought to enforce against both continuous and intermittent violations.”

While recognizing that the facts of Hamker were distinguishable from those of the Gwaltney dispute, the Fourth Circuit also specifically declined to follow the Fifth Circuit's rule barring citizen suits seeking penalties for past violations of the Clean Water Act. It disagreed with the Hamker court's view that the “ordinary meaning” of the statutory language prohibits citizen suits for past violations because it found the words “to be in violation” ambiguous. Nor was the Fourth Circuit persuaded by the Hamker court's reliance on “mere dicta” from Middlesex County Sewerage Authority v. National Sea Clammers Association. The primary issue in Middlesex was not whether citizen suits were limited to prospective relief, but whether the Clean Water Act authorized an implied cause of action for damages. In response to the concern expressed by Gwaltney and the Hamker court that allowing citizen suits for past violations would crowd the federal courts with Clean Water Act suits, the Fourth Circuit said that any such problems could be addressed by “wary exercise of pendent jurisdiction.”

The Fourth Circuit held that the Clean Water Act permitted suits for past violations, but did not consider the district court’s observation that a good faith allegation of an ongoing violation also supported the complaint.

52. Gwaltney, 791 F.2d at 310. The court did recognize ways in which citizen suit enforcement power was not coextensive with that of the government—namely, that citizens may not issue compliance orders, commence criminal actions, or initiate suit unless they give 60 days’ notice to EPA, the state, and the alleged violator. Id.

53. Id. at 310-11.

54. Id. at 311.

55. See text accompanying supra note 40.

56. Gwaltney, 791 F.2d at 312 (quoting 118 Cong. Rec. 33,693 (1972)).

57. Id. at 312-13.


59. Gwaltney, 791 F.2d at 312.

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

61. Id. at 313.
III
THE SUPREME COURT DECISION

A. The Majority Opinion

Justice Marshall delivered the opinion of the five-member majority.62 Using an approach similar to that of the First Circuit, the Court held that section 505 precludes suits for wholly past violations,63 but that section 505 "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation."64 The Court therefore remanded the case to the Fourth Circuit to determine whether the plaintiffs had made a good-faith allegation of an ongoing violation.65

The majority based its opinion that section 505 precludes suits for wholly past violations on its reading of the legislative history, as well as on its conclusion that the more natural reading of the language in section 505(a)—and the "pervasive" use of the present tense throughout section 505—reflected congressional intent that "the harm sought to be addressed by the citizen suit lies in the present or the future, not the past."66

The respondents argued that since EPA was authorized to seek civil penalties under section 309(b) for past violations based on the words "in violation," use of those same words in section 505(a) would allow a citizen to sue for past violations.67 The Court disagreed. From its close examination of the structure of the Clean Water Act, the Court concluded that EPA's power is based on three separate sections: section 309(a), which authorizes compliance orders; section 309(b), which authorizes civil actions, including injunctions; and section 309(d), which authorizes civil penalties.68 Only sections 309(a) and (b) contain the "is in violation" language.69 This language is properly absent in section 309(d), which provides a separate grant of authority to EPA for seeking civil penalties for past or present violations.70 Although section 505(a) authorizes both injunctive relief and civil penalties and "authorizes any appropriate civil penalties under section 309(d)," it contains no independent penalty provision authorizing separate actions for past viola-

63. Id. at 384.
64. Id. at 385.
65. Id. at 386.
66. Id. at 382.
67. Id. at 381-82.
68. Id. at 382.
69. Id. at 381.
70. Id. at 382.
The Court reasoned that any penalties imposed must, therefore, be pursuant to present violations for which injunctive relief is sought. The Court found that the sixty-day notice provision of section 505(b) of the Clean Water Act indicates congressional intent that citizen suits be prospective in application. In the Court's view, one of the purposes of the notice provision is to allow the violator to bring itself into compliance, thus eliminating the need for suit. To allow citizen suits for wholly past violations would completely thwart that purpose; the Court thus found such suits contravened congressional intent.

Moreover, the Court determined that the bar to citizen suits once the government commenced an enforcement action reflects the supplemental, rather than primary, role that Congress envisioned for citizens because that bar allows EPA, rather than a citizen, to prosecute an action if EPA so desires. The Court stated that if suits were allowed for wholly past violations, a citizen might interfere with EPA's discretion to enforce the Clean Water Act. For example, this could occur if a citizen were to bring suit for violations that EPA had decided not to prosecute in exchange for the violator's compliance with an EPA-imposed condition, such as installation of equipment in excess of the required minimum.

In reading the legislative history, the Court found further support for the prospective nature of citizen suits both in the prevalent references to abatement actions and injunctive relief, and in the fact that the Clean Water Act was modelled on the Clean Air Act, which authorizes citizens to bring actions for injunction and abatement only.

The Court did not agree that Senator Muskie's remarks supported suits for wholly past violations. The Court analyzed the following statement by Senator Muskie, which included language previously quoted by the lower courts:

This 60-day [notice] provision was not intended, however, to cut off the right of action a citizen may have [with respect] to violations that took

71. Id.
72. Id.
73. Id.
74. Id. at 382-83.
75. Id. at 383.
76. Id.
77. Id.
78. Id.

One commentator suggests that a reason citizen suits have been far less common under the Clean Air Act than under the Clean Water Act is the absence of a civil penalty provision in the former. Since injunctive relief affects only the defendant of that suit, while civil penalties promote general as well as specific deterrence, plaintiffs may be more willing to expend resources in a civil penalty suit. Comment, supra note 3, at 156-58.
place 60 days earlier but which may not have been continuous. As in the original Senate bill, 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 be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.\(^8\)

The Court concluded that the statement merely emphasized that suits for both continuous and intermittent violations were allowed.\(^8\)

However, the Court disagreed with Gwaltney’s contention that for jurisdiction to attach a citizen-plaintiff must prove “allegations of ongoing noncompliance,” instead holding that the violator must be “alleged to be in violation.”\(^8\) Under the Court’s view, a good-faith allegation of a violation is sufficient to sustain jurisdiction at the commencement of a suit.\(^8\) If the allegations are not in fact true, they may be attacked by a motion for summary judgment.\(^8\) If the allegations are frivolous, they may be sanctioned under Rule 11 of the Federal Rules of Civil Procedure.\(^8\) If the allegations survive a motion for summary judgment, the case proceeds to trial on the merits, where “plaintiff must prove the allegations in order to prevail.”\(^8\)

In the event that an allegation is factually supported when a suit is commenced, but the violation later subsides, the majority maintained that unless the alleged violator could pass the difficult mootness test, the action would still be proper.\(^8\) Only if a defendant can prove that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur” may an action be dismissed as moot.\(^9\)

**B. The Minority Opinion**

Justice Scalia wrote a partial dissent in which he disagreed with the portion of the Court’s opinion that stated that there is subject matter jurisdiction under section 505 when a plaintiff alleges in good faith that the defendant is “in violation” of the Clean Water Act.\(^9\) He wrote that failure to require proof of jurisdictional allegations would create a requirement that is not only “unique” but “eccentric.”\(^9\) Justice Scalia read the majority’s opinion as never requiring proof of jurisdictional alle-

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81. *Gwaltney*, 108 S. Ct. at 384 (quoting 118 CONG. REC. 33,700 (1972)).
82. Id.
83. Id. at 385 (emphasis in original).
84. Id.
85. Id. at 385-86.
86. Id. at 385 (citing FED. R. CIV. P. 11).
87. Id. at 386.
88. Id.
89. Id. (citing United States v. Phosphate Export Ass’n, 393 U.S. 199 (1968) (emphasis in original)).
90. Id. at 386-88. The opinion was joined by Justices Stevens and O’Connor.
91. Id. at 387 (Scalia, J., dissenting).
He criticized the majority's view on the ground that it would allow a suit even in the absence of an injury, which is constitutionally required to support standing.

To maintain subject matter jurisdiction, the dissenters would require proof that the defendant was "in violation" on the date suit was brought. This proof could consist of a record of past noncompliance, coupled with a failure to have in place "remedial measures that clearly eliminate the cause of the violation" on the date suit is brought. Thus, while the minority would require a plaintiff to prove jurisdictional allegations of ongoing noncompliance for the suit to go forward, any doubts about the success of remedial measures at the time suit was brought would be resolved in favor of the plaintiff. The minority conceded that in the instant case their view and the majority's would almost certainly reach the same result, but they would require proof of an ongoing violation at the initiation of the lawsuit for it to go forward.

IV
DISCUSSION

A. Ongoing Violations in the Statutory Scheme

Congress enacted the citizen suit provisions in 1972 as part of the Clean Water Act to encourage further public participation and confidence in the administrative process. In the period before enactment, from 1948 to 1971, only one suit was filed under the Clean Water Act's predecessor statute. Some commentators argue that both the majority and the minority have misread the language, legislative history, and structure of the Clean Water Act, because any restriction on the right of citizens to file suit impermissibly hinders a mechanism designed to encourage enforcement of the Act. Whether the Gwaltney decision actu-
ally frustrates Congressional intent to promote enforcement of the Clean Water Act depends on the resolution of issues left open by the decision. Nevertheless, enforcement of the Clean Water Act will be promoted by the Court's determination that jurisdiction will lie given a good-faith allegation of a violation.

In order to "restore and maintain" the "integrity of the Nation's waters," the Clean Water Act prohibits the discharge of any pollutant into navigable waters except as authorized by the Act. Section 402 of the Act allows discharges from "point sources" if a discharger obtains an NPDES permit. EPA establishes nationwide permissible discharge levels, or "effluent limitations," on an industry-by-industry basis. Either EPA or a state agency (pursuant to an EPA-approved program) may issue individual permits.

Miller states that the Court's position that suits for past violations are barred because Congress intended for citizens to "supplement rather than . . . supplant" government action ignores the practical realities of citizen suits and draws a false distinction between past violations and present violations. In instances where the citizen gives notice and the government then decides to take over enforcement, the citizen's action is supplemental. However, in cases where the citizen gives notice, the government fails to respond, and the citizen commences a suit, that action in itself might be labelled one that "supplants" government enforcement. Citizen suits may "supplant" government enforcement even if they are for ongoing violations. Furthermore, Miller asserts, a suit for injunctive relief is no less intrusive than one for a past violation. Thus, the Court's holding that suits were precluded for past violations was more like a "litany against citizen enforcement generally."

Miller also criticizes the Court's incorrect use of congressional statements concerning injunctive relief, in the absence of legislative history that directly addressed the availability of penalties for past violations in the context of citizen suits, to justify its holding. It would be more consistent with the Court's decision in Tull v. United States, 481 U.S. 412 (1987)—which held that Congress intended section 309(d) civil penalties to provide for deterrence, retribution, and restitution—to attribute this same congressional motive to civil penalties when the section was incorporated into section 505 of the Clean Water Act.

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100. See infra notes 117-59 and accompanying text.
102. As defined, the term "navigable waters" includes many bodies of water that are not actually navigable. See id. § 502(7), 33 U.S.C. § 1362(7); see also 33 C.F.R. § 328.3(a) (1987).
104. The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance, including, but not limited to, pipes, channels, discrete fissures, concentrated animal feeding operations, vessels and floating crafts." Id. § 502(14), 33 U.S.C.A. § 1362(14) (West Supp. 1988). "Non point source" runoff, including return flows from irrigated agriculture and runoff from city streets and storm sewers, poses serious water pollution problems, but is not defined as a "discharge of pollutant" under Clean Water Act; in fact, the Act specifically exempts these sources from the NPDES program. Id. § 402(f), 33 U.S.C.A. 1342(f) (West Supp. 1988).
105. Id. § 402(a), 33 U.S.C. § 1342(a) (1982).
107. Id. § 402, 33 U.S.C. § 1342. Once an approved state program is established, EPA no
CLEAN WATER ACT CITIZEN SUITS

The Clean Water Act requires permit holders to monitor and record their discharges and to make their DMR's publicly available. DMR's are an important and cost-effective enforcement tool, because they enable the party examining them to determine whether there has been a violation without actually sampling and testing a discharger's effluent.

In the absence of enforcement by the appropriate federal or state agency, section 505 allows private citizens to bring civil actions against a permit holder "alleged to be in violation of" the conditions of a federal or state permit. When a citizen-plaintiff prevails in an action to correct NPDES permit violations, the court may order injunctive relief, impose civil penalties (payable to the United States Treasury), or both.

The majority opinion recognizes the difficulty of proving a violation at the time suit is filed and thus does not require proof of an ongoing violation as a jurisdictional prerequisite. The minority's dissatisfaction with this approach ignores the practical problems that would result if longer issues NPDES permits to dischargers within that state. Id. § 402(c)(1), 33 U.S.C. § 1342(c)(1).

108. Id. § 308(a)-(b), 33 U.S.C. § 1318(a)-(b).
109. See supra notes 6-8 and accompanying text.
111. The relevant sections of the citizen suit provision read as follows:

(a) 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 Chapter 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 a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator.

(b) 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, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(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.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator . . .

Id. § 505, 33 U.S.C. § 1365.

proof of an ongoing violation were required before full discovery took place. While the characterization of DMR's as prima facie proof of liability does simplify discovery, the process is not as easy as industry advocates imply.\textsuperscript{114} A discharger may monitor its wastes once a month or even less frequently, and reports may not be available until months later.\textsuperscript{115}

Since the majority and minority opinions clearly allow jurisdiction for intermittent violations, even the absence of a violation in the most recent DMR should not necessarily destroy jurisdiction. It may be long after suit is filed before a clear picture of whether a discharger is actually “in violation” could emerge. The minority view could result in motions to dismiss by defense counsel that may succeed merely because of incomplete information, thus resulting in “needless motion practice and judicial intervention.”\textsuperscript{116} The majority wisely avoided this undesirable result by allowing jurisdiction when there is a “good faith allegation” of an ongoing violation.

\textbf{B. The Unresolved Issues}

The decision’s failure to address clearly what constitutes a good faith allegation or an ongoing violation, and what showing must be made to prevail on the merits, will undoubtedly create more litigation about those and related issues.\textsuperscript{117} The outcome of those cases will determine the continued viability of citizen suits as an enforcement tool.

The uncertainty of what is required to establish a good faith allegation may make citizen suits more cumbersome. At least one environmental attorney claims that careful recordkeeping of all inquiries and the potential use of government witnesses to establish good faith will make

\textsuperscript{114} Depending on the recordkeeping practices of an individual state, it may be difficult and time-consuming to obtain the necessary documents. Powers, \textit{A Citizen's View of Gwaltney}, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,119, 10,121 (1988).

\textsuperscript{115} A potential plaintiff must wait not only until the discharger submits a monthly DMR to EPA or to the state, but also until EPA or the state issues a public report. Comment, \textit{Citizen Suits and Civil Penalties Under the Clean Water Act}, 85 MICH. L. REV. 1656, 1672-73 (1987).


\textsuperscript{117} The expected increase in litigation on issues left unanswered by the Court is one point on which most commentators agree. See DuBoff & Clearwater, \textit{Arguing for the Defense After Gwaltney}, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,123, 10,124 (1988); Miller, \textit{supra} note 99, at 10,104; Powers, \textit{supra} note 114, at 10,119. The increase is ironic because one of the reasons cited to justify elimination of citizen suits for past violations was that such a limit would “preclude the possibility that § 1365 suits would place an undue burden on federal courts.” Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 396 (5th Cir. 1985), quoted in Motion for Leave to File and Brief of Amicus Curiae Connecticut Business and Industry Association in Support of Petition for Writ of Certiorari at 22, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376 (1987) (No. 86-473).
this requirement manageable.\textsuperscript{118} On the other hand, attorneys for the industrial community claim that the requirement may be met only by expanding the scope of inquiry beyond DMR's to encompass "all information available to the plaintiff," including recent developments in treatment facilities.\textsuperscript{119} If a court established a requirement for an extremely rigorous showing of "good faith," discovery might become more complicated and lengthy, thus making citizen suits more difficult to bring. This issue has yet to be directly addressed by the courts.

Another important question left unanswered is the definition of an ongoing violation. While the Court recognized that "ongoing" need not mean "continuous,"\textsuperscript{120} it offered no guidance as to when a series of intermittent or sporadic violations would be considered ongoing. This question raises uncertainties regarding the time, proximity, and frequency of discharges necessary to establish a violation, as well as the source of the violation. For example, the requirement for an ongoing violation might be satisfied in three different ways: by a pattern of violations of one discharge parameter at one outfall or point source;\textsuperscript{121} by a lesser showing of successive violations of different discharge parameters at the same outfall;\textsuperscript{122} or by various violations occurring at different outfalls controlled by the same discharger. The intermittent or sporadic violation requirement might even mean that only those violations of the same parameter resulting from a related problem in the treatment system may be aggregated.\textsuperscript{123} In fact, the district court's concern about the difficulties of proving an ongoing violation was one reason for its holding that suits were allowed for wholly past violations.\textsuperscript{124}

The cases that have applied \textit{Gwaltney} have not yet refined the requirements for an ongoing violation. In \textit{Brewer v. Ravan},\textsuperscript{125} the district court held that several violations of the Clean Water Act that occurred more than five years earlier at a plant that was permanently closed two years prior to suit did not rise to the level of "even a threshold good-faith allegation of violation of the Clean Water Act."\textsuperscript{126} In \textit{Sierra Club v. Sim-

\begin{thebibliography}{118}
\item 118. Powers, \textit{supra} note 114, at 10,121.
\item 119. DuBoff & Clearwater, \textit{supra} note 117, at 10,125.
\item 120. \textit{See supra} text accompanying notes 81-82.
\item 121. This was the view adopted by the Fifth Circuit in \textit{Sierra Club v. Shell Oil Co.}, 817 F.2d 1169, 1173 (5th Cir. 1987), \textit{cert. denied}, 108 S. Ct. 501 (1987).
\item 123. This position has been advocated by two industrial attorneys who argue that it is necessary to consider the status of the treatment system in determining whether a pattern of discharges rises to the level of an "intermittent violation." DuBoff & Clearwater, \textit{supra} note 117, at 10,125.
\item 125. 680 F. Supp. 1176 (M.D. Tenn. 1988).
\item 126. \textit{Id.} at 1183.
\end{thebibliography}
kins Industries, the court was not required to decide whether a discharger’s failure to sample for two consecutive months, followed by failure to prepare a quarterly average and failure to maintain records for three years, constituted “intermittent or episodic violations which did not cease to be continuous within the meaning of Gwaltney,” because some of the violations continued after the complaint was filed.

The final and critical issue left unresolved is the showing a plaintiff must make to prevail on the merits. The law has begun to develop in this area. The Gwaltney minority claimed that the majority’s decision allows a judgment without the plaintiff ever having to prove the jurisdictional allegations, and at least one commentator has stated that the “most obvious” reading of the court’s decision is that once there is subject matter jurisdiction based on a good faith allegation of an ongoing violation, the plaintiff need only prove that the defendant violated the Act. However, this interpretation has not been followed. Instead, courts have required the plaintiff to prove that the defendant is “in violation” of the Clean Water Act.

Both the majority and minority opinions agreed that a discharger would be “in violation” of the Clean Water Act as long as it presented a risk of continued illegal behavior. The degree of risk required to establish an ongoing violation, and the time at which the risk is judged, will be important factors in shaping citizen suits after Gwaltney.

If mootness principles are used to gauge the risk of illegal behavior, as the majority suggests, then the risk of illegal behavior needed to maintain a citizen suit can be remote. Thus, in Hudson River Fishermen’s Association v. Westchester County, even though a pipe through which effluent had been illegally discharged was capped, the court found that a

128. Id. at 1115.
129. See supra note 92 and accompanying text.
130. Powers, supra note 114, at 10,120. Under this interpretation, once jurisdiction attaches, the showing required to prevail is no different than that the Fourth Circuit previously would have required for wholly past violations of the Act.
133. Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Nat. Resources L. 327, 349 (1984). In this article the authors contrast two cases, one placing a far greater burden than the other on the defendant to prove that the threat would not recur. In the earlier case, the court found that the mere fact that a plant was shut down and it was not economical to reopen it did not satisfy the burden of proving that illegal behavior could not reasonably be expected to recur. Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159 (S.D.N.Y. 1980), superseded by statute as noted in Atlantic States Legal Found. v. Tyson Foods, 682 F. Supp. 1186 (N.D. Ala. 1988). In the later case, the court found that the grant of a variance satisfied that burden, since it was impossible to violate a requirement that no longer exists. Connecticut v. Long Island Lighting Co., 535 F. Supp. 546 (E.D.N.Y. 1982).
citizen suit could be properly maintained because there was evidence that the cap could be removed.\textsuperscript{135} If courts continue to require a high degree of certainty before a citizen suit is moot, then such suits may not be discouraged by \textit{Gwaltney}.

The courts have advanced two approaches to determining when the risk of illegal behavior should be judged. The current view in the circuit courts is that the risk of recurrence should be judged as of the time the complaint is filed. The other view, expressed by one district court, is that the risk may be judged as of some point during the course of the litigation.

The circuit court position was first asserted by the Fourth Circuit on remand in \textit{Gwaltney}.\textsuperscript{136} Rather than follow the reading of the majority opinion suggested by Justice Scalia's dissent,\textsuperscript{137} the Fourth Circuit remanded the case to the district court to determine whether the plaintiff had in fact proved an ongoing violation at trial.\textsuperscript{138} The Fourth Circuit said the showing could be made in either of two ways: (1) by proving that violations occurred on the date the complaint was filed or after that date; or (2) by proving a continuing likelihood of a recurrence of intermittent or sporadic violation as judged by the reasonable trier of fact.\textsuperscript{139} Factors suggested by the Fourth Circuit for the district court to consider in making its determination included "whether remedial actions were taken to cure violations, the ex ante probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation \textit{had been completely eradicated when citizen-plaintiffs filed suit}.\textsuperscript{140}"

The Ninth Circuit reached a similar conclusion in \textit{Sierra Club v. Union Oil Co.}\textsuperscript{141} after the Supreme Court vacated and remanded the case for treatment consistent with the \textit{Gwaltney} decision.\textsuperscript{142} While preserving

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.} at 1051.
  \item \textsuperscript{136} \textit{Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 844 F.2d 170 (4th Cir. 1988).}
  \item \textsuperscript{137} \textit{See supra} notes 92-94 and accompanying text.
  \item \textsuperscript{138} \textit{Gwaltney, 844 F.2d at 171.} The Fourth Circuit found that while the district court's subsidiary finding was "pertinent to the issue," it was not a "direct finding as to whether the citizen-plaintiffs proved the existence of intermittent or sporadic violations constituting an ongoing violation." \textit{Id.} at 172 (citing Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1549 n.8 (E.D. Va. 1985)).
  \item \textsuperscript{139} \textit{Id.} at 171-72.
  \item \textsuperscript{140} \textit{Id.} at 172 (emphasis added).
  \item \textsuperscript{141} \textit{853 F.2d 667 (9th Cir. 1988) (on remand).}
  \item \textsuperscript{142} \textit{Sierra Club v. Union Oil Co., 108 S. Ct. 1102 (1988), vacating and remanding 813 F.2d 1480 (9th Cir. 1987).} The case involved 76 alleged NPDES permit violations from 1979 to 1983. The Ninth Circuit had reversed the district court's decision that Union Oil was liable for none of the violations and held instead that Union Oil was liable for 74 of the 76 violations, remanding the remaining two violations to the district court for further factfinding. \textit{Union Oil Co., 813 F.2d at 1494.} The Ninth Circuit had also directed the district court to allow the
most of its judgment after determining that most of the issues considered in reaching its earlier decision would not be affected by Gwaltney, the Ninth Circuit remanded the case to the district court for a determination of whether the Sierra Club had in fact proved the existence of ongoing violations. The guidelines offered by the Ninth Circuit to aid the district court in making its determinations were exactly those suggested by the Fourth Circuit in its remand of Gwaltney.

The District Court for the Northern District of Alabama relied upon an alternative view that the judgment of risk can occur at any time during litigation. In Atlantic States Legal Foundation v. Tyson Foods, Inc., the court stayed the action after litigation had begun so that the effectiveness of an improved wastewater facility could be evaluated.

Under the view expressed by the Fourth and Ninth Circuits—that to prevail on the merits, a citizen-plaintiff must prove that there was a risk of continued illegal behavior as viewed at the initiation of the suit—the Gwaltney decision would probably not significantly change the nature or the effectiveness of citizen suits. Because of their limited resources, most environmental groups already concentrate their efforts on chronic violators.

Commentators, perhaps assuming that compliance would be judged sometime after suit was filed, have expressed concern that under the Gwaltney holding, dischargers would have every reason to delay compliance until they receive a sixty-day notice of intent to sue and to continue dragging their heels even after a suit has been filed. Nevertheless, practical difficulties involved in installing and maintaining treatment systems make it unlikely that a discharger could correct the source of most problems to the requisite degree of certainty within sixty days.

If compliance—judged not only by whether any violations occur after suit is filed, but also by whether it is absolutely clear that the defendant will not pollute again—is measured at the moment suit is filed, then delays after initiation will not inure to the benefit of defendants. Deterrence will be impaired only in those cases where a discharger could eliminate the cause of the violation within sixty days and prove the problem is

Sierra Club to amend its complaint and had found that: (1) there was no upset defense (an excuse for those permit violations that result from highly unusual circumstances beyond the reasonable control of the permittee) available to Union Oil, id. at 1486-90; (2) there was no de minimis exception to the Clean Water Act based on human error, id. at 1490-91; and (3) Union Oil could not impeach its own DMR’s based on sampling error, id. at 1491-92.

143. Union Oil, 853 F.2d at 671.
144. Id.; compare Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 172 (4th Cir. 1988).
146. Id. at 1190.
147. Powers, supra note 114, at 10,121. Furthermore, most citizen suits contain requests for injunctive relief. Comment, supra note 115, at 1674 n.94.
148. Lippes, supra note 116, at 7; Miller, supra note 99, at 10,098.
solved. However, under the reading of Gwaltney applied in Tyson Foods, dischargers would have an incentive to use delay tactics in litigation, because the delay would allow more time to establish and prove a state of compliance.

Thus, the continued deterrence of citizen suits depends both on when compliance is judged and the certainty required to establish compliance. If it is judged when notice is filed, as the Fourth and Ninth Circuits have held, then it will not seriously impair the effectiveness of citizen suits; if, however, it can be judged during the course of litigation or even after trial commences, then dischargers have little incentive to comply before receiving the sixty-day notice, and Gwaltney will hamper enforcement of the Clean Water Act.

The time that the risk of noncompliance is judged will play a role in determining the basis of the penalty once an ongoing violation has been proven. For example, in Gwaltney, the success of the operation of the new wastewater treatment system was uncertain at the time the suit was brought. The pollution parameter regulated by this system was TKN. Under both the majority and the minority view, the risk of continued violation of the parameter TKN would be enough to establish an ongoing violation. The Court did not decide whether the penalty could be based on parameters that did not pose a risk of violation when the suit was filed.

On remand from the Fourth Circuit, the district court in Gwaltney reinstated the entire civil penalty, refusing to distinguish between TKN violations, which posed a risk at the time suit was filed, and the chlorination system violations, which did not. The district court declined “defendant’s invitation to deviate from its appellate court mandate,” limiting its role to determining whether plaintiffs had proved the existence of an ongoing violation at trial, rather than modifying the penalty. Because of the procedural posture in which this issue was reached—on remand with instructions from an appeals court—the district court’s holding about the proper basis for the penalty may be limited to the facts.

The District Court for the District of New Jersey articulated a different view as to the basis of the penalty in Public Interest Resources Group v. Carter-Wallace, Inc. In determining the proper amount for a penalty in a citizen suit that was based on violations of a current, as well

149. See supra text accompanying notes 145-46.
150. See supra text accompanying note 48.
151. The success of the chlorination system, which controlled the parameters chlorine and fecal coliform, was not at issue. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 379 (1987).
153. Id. at 1080.
as an expired, NPDES permit, the court held that past violations of an expired permit deserved penalties only if the violations were still regulated by the new permit. These violations that would not transgress new permit conditions could not be penalized. The court did not impose penalties for violations that could not possibly recur because of changed permit conditions.

A policy limiting penalty liability to violations that pose a continued risk when suit is filed (based on either plant technology or current permit conditions) might impair the deterrence function of citizen suits. Any reduction in potential penalty liability in theory reduces deterrence, since the risk of illegal behavior becomes more attractive as the potential economic gain of noncompliance increases in relation to the penalty. However, depending on the wealth of the discharger, deterrence levels off at some point. For example, some dischargers presumably would be as deterred by a fine of $100,000 as by a fine of $200,000.

Thus, limiting potential penalty liability does not always reduce deterrence. It would decrease deterrence in those situations where the amount of the discharger’s liability for violations that still posed a risk was small in relation to those that did not. As long as the risk of continued violation is judged at the time suit is filed, most dischargers will probably be equally deterred by a penalty based on violations that still pose a risk, as by one based on completely cured violations, because the burden of proving a violation is cured is so great.

Aside from the impact that *Gwaltney* may have on citizen suits under the Clean Water Act, there is also the possibility that it will be applied in other situations, with undesirable results. For example, the rigid reading of the present tense may interfere with EPA authority to enforce other parts of the Clean Water Act or other environmental statutes. Thus, one commentator has suggested that under section 308 of the Clean Water Act, which authorizes EPA to inspect records to determine whether a discharger “is in violation” of the Clean Water Act, it may be argued that if no question exists as to present compliance, use of the present tense in this section prevents inspection. Since the Comprehensive Environmental Response, Compensation, and Liability Act allows citizen suits using the same language as the Clean Water Act, the reasoning of *Gwaltney* could also be applied to those citizen enforcement actions as well, with the same potentially negative effect on deterrence.

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155. *Id.* at 123.
156. *Id.*
While the future of citizen suits after the *Gwaltney* decision is not entirely clear, its application up to this point apparently has not impaired the effectiveness of citizen suits as an enforcement tool. As predicted, the decision has engendered increased litigation on peripheral issues. Some issues that have yet to be addressed could still make it more cumbersome to bring a citizen suit. Among the potentially open issues that could limit citizen suits are the scope of inquiry necessary to establish a "good-faith" allegation and the showing required to prove an "ongoing violation."

However, the cases that have addressed the issue of what a plaintiff must prove to prevail on the merits have not hampered the continued usefulness of citizen suits as a mechanism for enforcing the Clean Water Act. Requiring a high degree of certainty to prove mootness and judging that certainty when the lawsuit is initially filed will promote the continued effectiveness of citizen suits. In addition, while restricting a potential penalty to those permit conditions for which there is still a risk of violation might conceivably narrow deterrence, the degree of certainty required to prove there is not risk may result in little actual decreased deterrence. Thus, while the *Gwaltney* decision may not reflect the spirit of citizen suits under the Clean Water Act as originally conceived by Congress, its actual application will not significantly damage their viability as a mechanism to enforce its provisions.