Subject Mater Jurisdiction, Standing, and Citizen Suits: the Effect of Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.

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In Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc. the Supreme Court held that language of the Clean Water Act allowing citizen suits against persons "alleged to be in violation" does not permit citizen suits for wholly past violations. The Court's holding is very narrow, and it does not by itself dramatically alter the nature of citizen suits. Dicta in the opinions of the Court and of the concuring Justices, however, suggest possible interpretations which could severely undercut the deterrent effect of citizen suits.

cause the Court's narrow holding leaves many questions unresolved, the lower courts undoubtedly will continue to disagree on the requirements for standing and subject matter jurisdiction.

Section 505 of the Clean Water Act grants a right of action to any citizen, defined as "a person or persons having an interest which is or may be adversely affected,"5 to commence a civil action in federal district court "against any person . . . who is alleged to be in violation of [either] (A) an effluent standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ."6 It states that neither the amount in controversy nor lack of diversity of citizenship among the parties shall bar a United States district court from having jurisdiction over a citizen suit.7 The statute provides that no citizen suit may commence until sixty days after the plaintiff has given notice to the Administrator, to the state in which the violation occurs, and to the alleged violator.8 The citizen suit statute authorizes district courts to order injunctive relief and civil penalties payable to the United States Treasury.9 The statute does not create a cause of action for damages,10 but it does authorize the court to award costs of litigation to the substantially prevailing party.11


5. 33 U.S.C. § 1365(g) (1982).

6. 33 U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1988). The statute also authorizes citizen suits "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the Clean Water Act] which is not discretionary with the Administrator." Id. at (a)(2).

7. Id. at (a). It is curious to note that the citizen suit provision may not even require plaintiffs to have United States citizenship. The Clean Water Act defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1982). "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." Id. § 1362(5).

8. 33 U.S.C. § 1365(b)(1)(A) (1982). In actions brought against the Administrator, citizen-plaintiffs need notify only the Administrator. Id. at (b)(2). Actions in response to violations of either the toxic pollutant standards or new source performance standards may commence immediately after notification. Id. at (b).


Resolving a three-way split among the circuits, the Court held that the Clean Water Act does not allow citizen suits for wholly past violations. In order to invoke district court jurisdiction, citizen-plaintiffs must make a good faith allegation, based upon a reasonable belief that is well grounded in fact, that at the time suit is filed the defendant is in a state of either continuous or intermittent violation. Further, an allegation of injury is sufficient to establish the plaintiff's standing. In order to succeed on the merits, citizen-plaintiffs must prove that the defendant is in a state of continuous or intermittent violation. If the defendant fully complies prior to judgment, under circumstances that make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, then the suit might be dismissed as moot.

The Court's interpretation of the citizen suit statute does no violence to the text, but it restricts the district courts' jurisdiction over citizen suits more than the text demands and more than Congress intended. Moreover, the Court failed to resolve what constitutes a "wholly past" violation. Likewise, the extent to which a court may impose civil penalties for past violations that are ongoing at the time of the suit also remains unclear. These uncertainties in the Court's holding make it likely that citizen suits will soon be before the Court again.

I. The Conflict Among the Circuit Courts

The Fifth Circuit Court of Appeals, in Hamker v. Diamond Shamrock Chemical Co., was the first to consider whether past violations could be the basis for a citizen suit. In January 1983 crude oil began to leak from a Diamond Shamrock Chemical Company (Diamond Shamrock) pipeline into a creek which flowed through the Hamker property. During the two weeks that elapsed between detection of the leak and its cessation, approximately 2400 barrels of crude oil escaped into the creek. On December 1, 1983, the Hamkers filed

13. Id. at 385.
14. Id.
15. Id. at 386.
17. 756 F.2d 392 (5th Cir. 1985).
18. Id. at 394.
19. Id. The court viewed this incident as oil spilled on land, which dispersed and entered the groundwater, subsequently reaching the stream. Through this reasoning, the court was able to characterize the pollution of the stream as a discharge from a nonpoint source (i.e., the land upon which the oil spilled), which would not be actiona-
a citizen suit under the Clean Water Act in the United States District Court for the Northern District of Texas alleging that Diamond Shamrock negligently had operated and continued to negligently operate the pipeline.\(^2\) The Hamkers sought an injunction requiring Diamond Shamrock to take reasonable precautions to prevent future violations of the Clean Water Act, civil penalties of $10,000 per day of violation, and an award of costs of litigation.\(^2\) The Hamkers appended a tort claim for Diamond Shamrock's negligent operation and maintenance of its pipeline and for its failure to promptly and adequately clean up the spill. Pursuant to this claim, the Hamkers sought $40,000 damages for injuries to aquatic life in the stream, loss of use of the stream for watering livestock, and loss of recreational, commercial, and aesthetic value of the property, plus $120,000 punitive damages. The district court dismissed the case for lack of subject matter jurisdiction and the Court of Appeals for the Fifth Circuit affirmed the dismissal.\(^2\)

In *Hamker* the Fifth Circuit held that the statutory language of the Clean Water Act clearly did not allow citizen suits based on past violations.\(^2\) The court found this plain meaning reinforced by the

\(^2\) Id. at 397. The fact that the oil did not fall directly from the pipeline into the water, but first spilled on land, is not an adequate basis to consider the leak and the pollution of the stream as independent events. It must be viewed as one unlicensed discharge in violation of the Clean Water Act. See McClellan Ecological Seepage Situation v. Defense Dep't, 28 Env't Rep. Cas. (BNA) 1283, 1294 (E.D. Cal. 1988) (holding that defendant could be held liable under the Clean Water Act for discharging pollutants into underground waters provided that plaintiffs "establish that the groundwater is naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act"); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (holding that "navigable waters" includes "normally dry arroyos through which water may flow, where such water will ultimately end up in public waters . . .").

\(^2\) 756 F.2d at 394.

\(^2\) Id.

\(^2\) Id.

\(^2\) Id. at 395. The Fifth Circuit focused its attention on the language "to be in violation" and found that this grammatical structure does not allow standing except when there is an allegation of an ongoing violation. Id. The court cited as authority for this position a passage from City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980). 756 F.2d at 395. But the issue in City of Evansville was whether § 505 created a cause of action for damages—the plaintiffs sought neither civil penalties nor injunctive relief. The Hamker court noted that the Supreme Court cited City of Evansville with approval in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 18 n.28 (1981). 756 F.2d at 395. The Middlesex Court invoked City of Evansville to support its conclusion that "both the structure of the Acts and their legislative history [reveal Congress' intent] that private remedies in addition to those expressly provided should not be implied." 453 U.S. at 18. The Court in Middlesex did not interpret the language "alleged to be in violation" nor did it consider whether citizen-plaintiffs could have standing based on past violations.
structure of the statute. The states and the Administrator of the Environmental Protection Agency (EPA) have primary enforcement authority, and the citizen suit provision supplements the government enforcement power by allowing citizens standing to enforce the Clean Water Act when the state and the Administrator have failed to take action. Section 505 clearly does not duplicate the powers granted to the Administrator. The court reasoned that, in view of the statutory scheme distinguishing the powers of the Administrator from those granted citizens, the Administrator's authority to bring an action based on past violations does not imply that section 505 grants that same power to citizens. The court found support for its interpretation in the sixty-day notice requirement to the Administrator, the state enforcement authority, and the polluter. The court determined that the notice requirement to the polluter is most reasonably read as allowing the polluter sixty days to cease polluting and thereby avoid suit, and that this notice provision would be meaningless if citizen suits could be maintained for past violations. The court also perceived a congressional intent to limit the use of citizen suits so as to avoid unduly burdening the federal courts. The court restricted citizen suits to present violations in order to prevent plaintiffs who ordinarily would litigate in state

24. 756 F.2d at 395.
25. Id. The most obvious difference between government enforcement and citizen enforcement under the 1972 Clean Water Act is that the Administrator or a state might seek criminal penalties against willful or negligent violators of the Act. 33 U.S.C.A. § 1319(c) (West Supp. 1988). The 1987 amendments also gave the Administrator the option to assess nonjudicial administrative penalties. Id. at (g).
26. 756 F.2d at 395. The court stated that it did not decide whether the Administrator had the power to seek redress for past violations. Id.
27. Id. at 395-96.
28. Id. at 396. The court's principal support for this finding was a statement by Senator Hart, in which he said that the citizen suit provision of the Clean Air Act did not provide for damages to the individual, and hence, potential financial gain would not motivate persons to bring citizen suits. 116 Cong. Rec. 33,104 (1970). Courts often have considered the extensive legislative history of the Clean Air Act when interpreting the citizen suit provisions of other acts. E.g., North Slope Borough v. Andrus, 515 F. Supp. 961, 964 (D.D.C. 1981) (observing that Congress had identical reasons for enacting the citizen suit provisions in the Clean Air Act, the Endangered Species Act, and the Outer Continental Shelf Lands Act), rev'd on other grounds sub. nom. Village of Kaktovic v. Watt, 689 F.2d 222 (D.C. Cir. 1982). This is appropriate with respect to citizen suits because the Clean Water Act's citizen suit provision was "modeled on the provision enacted in the Clean Air Amendments of 1970." H.R. Rep. No. 911, 92d Cong., 2d Sess. 79, reprinted in ENVT. POL'Y DIV., CONG. RES. SERV., 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973) [hereinafter LEGISLATIVE HISTORY]. But in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the Court interpreted Congress' intent as limiting citizen suits by not allowing damages. Id. at 11, 21. This is quite different from the Fifth Cir-
court from bringing their suits into federal court by pendent jurisdiction.29

The Fourth Circuit rejected the Fifth Circuit's reasoning in favor of an approach which allowed the district courts broad jurisdiction over citizen suits in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield*.30 Gwaltney of Smithfield, Ltd. (Gwaltney) owned a meat packing plant alongside the Pagan River in Smithfield, Virginia. The Virginia State Water Control Board (the Board) issued a permit under the National Pollution Discharge Elimination System (the NPDES) setting forth the conditions and limitations under which the plant might discharge seven pollutants into the river.31 The permit required the plant to file monthly discharge monitoring reports (DMRs) with the Board. These DMRs showed that the plant had repeatedly violated its effluent limitations for five of the seven pollutants covered by the permit.32 The Chesapeake Bay Foundation (the CBF) and the Natural Resources Defense Council (the NRDC) brought a citizen suit against Gwaltney under section 505 of the Clean Water Act to impose civil penalties for violations of the permit limitations and to enjoin Gwaltney from future violations.33

The circuit's interpretation that Congress sought to restrict citizen suits to ongoing violations in order to reduce the burden on the federal courts. 756 F.2d at 396.

29. 756 F.2d at 396. For plaintiffs whose claims are primarily for damages, the incentive to file a citizen suit presumably comes from 33 U.S.C.A. § 1365(d) (West Supp. 1988), allowing recovery of litigation costs. The court's concern is that plaintiffs whose claims for damages ordinarily would be filed in state court would append their claims to a citizen suit in hopes of obtaining an award of litigation costs even if their claim was not meritorious. 756 F.2d at 396. This indeed appears to have been the case in *Hamker.*30


31. Id. at 379. The National Pollution Discharge Elimination System (the NPDES), established by 33 U.S.C.A. § 1342 (West 1986 & Supp. 1988), is the principal regulation controlling pollutant discharges. The Administrator of the EPA may issue permits allowing discharge of pollutants under conditions designed to assure compliance with the Act. Id. at (a). The individual states may issue and enforce NPDES permits under state permit programs approved by the Administrator. Id. at (b), (c). The Virginia State Water Control Board (the Board), for example, administers a state permit program approved by the Administrator. VA. CODE ANN. §§ 62.1-44.2 to -44.34:12 (1987 & Supp. 1988). The Board issued an NPDES permit for the Gwaltney of Smithfield (Gwaltney) meat packing plant in 1974, and reissued and modified the permit in 1979 and 1980, respectively. The permit conditions included limitations on seven pollutants, as well as monitoring and reporting requirements. 108 S. Ct. at 379.

32. 108 S. Ct. at 379. Between October 27, 1981, and August 30, 1984, Gwaltney violated its total Kjeldahl nitrogen (TKN) (a measure of nitrogen in various chemical forms) limitation 87 times, its chlorine limitation 34 times, and its fecal coliform limitation 31 times. Id. Gwaltney also reported five violations of total suspended solids limitations and three violations of oil and grease limitations. For a chronological listing of these violations, see *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 611 F. Supp. 1542, 1566 app. A (E.D. Va. 1985).

Gwaltney acquired the plant in 1981 and assumed the obligations of the NPDES permit issued to its predecessor in interest. Gwaltney installed new equipment in March 1982 to improve its performance with respect to the pollutants chlorine and fecal coliform, and in October 1983 to reduce its release of total Kjeldahl nitrogen. In February 1984 CBF and NRDC notified the Administrator of the EPA, the Board, and Gwaltney, of their intention to file a citizen suit against Gwaltney for those effluent limitation violations occurring after Gwaltney assumed responsibility for the plant, and on June 15, 1984, they filed suit in the District Court for the Eastern District of Virginia. Gwaltney moved for dismissal for want of subject matter jurisdiction, asserting that it was not in violation because its last recorded violation occurred several weeks before CBF and NRDC filed their complaint, and that because it was not in violation the citizen suit could not be maintained.

The Fourth Circuit declined to follow the Hamker holding that the Clean Water Act does not permit citizen suits seeking civil pen-
alties for past violations. The Fourth Circuit disagreed with Hamker's use of Middlesex County Sewerage Authority v. National Sea Clammers Association to argue that citizen suits could seek only prospective relief. In Middlesex the Supreme Court held that neither the saving clause nor the citizen suit provision, nor any other provision of the Clean Water Act, created an implied private cause of action for damages. The Fourth Circuit held that citizen suits could not be used to seek damages, and "[a]ny statements that might be read as limiting the scope of citizen suits to prospective relief were mere dicta." The Fourth Circuit found that the statutory language was ambiguous and plausibly could be construed as encompassing past violations. Because the language is subject to alternative interpretations, the "plain language" of the statute cannot be dispositive. The structure of the Clean Water Act supported allowing citizen suits for past violations and any other interpretation "would eliminate a significant deterrent to violations of the Act and severely undercut the Act's ambitious purpose . . . ." The court noted that Congress phrased virtually all enforcement provisions of the Clean Water Act in the present tense. In particular, the language authorizing the Administrator to pursue civil action uses the same "is

38. 791 F.2d at 312. The Fourth Circuit also suggested that Hamker was distinguishable because it was based on a single, nonrecurring incident that occurred almost one year before the suit, "for which not even a good faith allegation of a possible continuing violation could have been made . . . ." Id. The Fourth Circuit interpreted the Hamker facts even more unfavorably to the plaintiffs than did the Fifth Circuit. See Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 397 (5th Cir. 1985). This was undoubtedly an effort by the Fourth Circuit to distinguish the facts of the two cases; apparently both courts sought to extend their holdings to the broadest possible spectrum of fact situations.

40. 791 F.2d at 312.
41. 453 U.S. at 11, 21.
43. 791 F.2d at 309. "[T]he language is ambiguous, in that it can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present." Id. "A plausible construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated.' In other words, the taint of a past violation is continuing." Id. (quoting Student Pub. Interest Research Group v. Monsanto Co., 600 F. Supp. 1474, 1476 (D.N.J. 1985)).
44. 791 F.2d at 309.
45. Id. For example, 33 U.S.C.A. § 1319 (West 1986 & Supp. 1988) employs the
in violation’ language employed in the citizen suit provision. The court reasoned that citizen suits for past violations must be allowed because the EPA clearly has authority to bring civil actions for past violations, and the statutory language authorizing citizen suits is the same as that authorizing suits by the Administrator. The court recognized that the structure of the Clean Water Act distinguishes the enforcement authority conferred on the Administrator with that conferred on citizen plaintiffs through section 505, and that these powers are not equal in all respects. Because Congress placed limitations on citizen suits, however, the court refused to infer any jurisdictional limitation which Congress could have but did not create. In addition, Congress did not limit the civil penalties available under section 505, expressly allowing courts to “apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].” Because courts may issue fines for past violations in suits brought by the EPA and the statute expressly allows the same civil penalties for citizen suits, the Fourth Circuit reasoned that courts may assess the civil fines requested in a citizen suit for past or present violations.

Further, the legislative history, though not conclusive, actually supported the position that past violations could be the basis of a citizen suit. No part of the legislative history states that relief can be granted only when violations are ongoing. In fact, Senator

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46. 33 U.S.C. § 1319(a) (1982) authorizes the Administrator to commence a civil action whenever a compliance order is authorized, which occurs “[w]henever . . . the Administrator finds that any person is in violation of any condition or limitation . . . .” Id. at (a)(1).


48. 791 F.2d at 310. In addition to the limits on relief, Congress’ express limitations on citizen suits include the 60-day notice provision, 33 U.S.C. § 1365(b)(1)(A) (1982), and no right of action when either the Administrator or the state commences and diligently pursues an enforcement action. Id. at (b)(1)(B).

49. 791 F.2d at 310 (quoting 33 U.S.C.A. § 1365(a) (West 1986 & Supp. 1988)).

50. 791 F.2d at 310 & n.11. The court acknowledged that the availability of penalties for past violations is not a grant of jurisdiction, but maintained that this demonstrates a consistent legislative scheme allowing citizen suits for past violations.

51. Id. at 311.

52. The court found that the legislative history cited by Gwaltney as denying relief consisted of statements referring to the abatement of ongoing violations, and did not relate to the issue at bar. Id. The court found these statements unpersuasive on the issue of the availability of penalties for past violations. Also, the court gave little weight to the legislative history of the Clean Air Act, because the addition of civil penalties to the citizen suit provision of the Clean Water Act changed the nature of the relief available. Id. at n.12. This change in the nature of citizen suits under the Clean Air Act can,
Muskie explicitly stated that past violations can be the basis of a citizen suit.\textsuperscript{53}

The Fourth Circuit found it unnecessary to prohibit citizen suits for past violations in order to avoid the risk of inundating the federal courts with plaintiffs seeking federal court jurisdiction for their damage claims.\textsuperscript{54} The court acknowledged the legitimacy of the concern, but found that it might be better controlled by careful exercise of the courts' discretion in granting pendent jurisdiction, with some difficulty, be reconciled with the statements in the Clean Water Act legislative history that § 505 "is modeled on the provision enacted in the Clean Air Act Amendments of 1970," H.R. REP. NO. 414, 92d Cong., 2d Sess. 79, \textit{reprinted in 2 Legislative History}, supra note 28, at 1497, and that "[s]ection 505 closely follows the concepts utilized in section 304 of the Clean Air Act," H.R. REP. NO. 911, 92d Cong., 2d Sess 133, \textit{reprinted in 2 Legislative History}, supra note 28, at 820. The question is to what extent is § 505 of the Clean Water Act modeled on, and how closely does it follow the concepts used in, § 304 of the Clean Air Act. Although these two citizen suit provisions are more alike than unlike, it appears significant that the legislators did not describe their practical effects as identical.

\textsuperscript{53} In his October 4, 1972, written summary of H.R. \textit{Conf. REP. No. 1465}, 92d Cong., 2d Sess., \textit{reprinted in 118 CONG. REC.} 32,768 (1972), Senator Muskie described the workings of the 60-day notice provision:

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

\textit{1 Legislative History, supra note 28, at 179; 118 CONG. REC.} 33,700 (1972). Senator Muskie described the enforcement power of both the Administrator and citizen-plaintiffs in his speech to the Senate introducing the conference committee report for Senate approval:

The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced. The conferees expect that the Administrator will act as aggressively against those violations which only intermittently occur as he will act against those violations which occur on a continuous basis. Failure to take this kind of effective action will permit intermittent dumping of waste with impunity. Citizen suits can be brought to enforce against both continuous and intermittent violations.

\textit{1 Legislative History, supra note 28, at 63; 118 CONG. REC.} 33,693 (1972). This statement suggests that citizen-plaintiffs may bring suit in the same situations as may the Administrator. Indeed, it draws no distinction between their respective abilities to bring actions for wholly past violations.

\textsuperscript{54} 791 F.2d at 312-13. Plaintiffs appending their damage claims to citizen suits was a significant concern in \textit{Hamker v. Diamond Shamrock Chem. Co.}, 756 F.2d 392, 396 (5th Cir. 1985), and in \textit{Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.}, 807 F.2d 1089, 1091 (1st Cir. 1986), where the plaintiffs primarily sought damages. In contrast, the plaintiffs CBF and NRDC sought the imposition of civil penalties as a deterrent to violators of the Clean Water Act and raised no damages claim. \textit{Hamker}'s answer to the problem is over-inclusive, as it denies jurisdiction to many claims that are not affected with the evil the court purports to control.

\textit{791 F.2d at 312-13.} Plaintiffs appending their damage claims to citizen suits was a significant concern in \textit{Hamker v. Diamond Shamrock Chem. Co.}, 756 F.2d 392, 396 (5th Cir. 1985), and in \textit{Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.}, 807 F.2d 1089, 1091 (1st Cir. 1986), where the plaintiffs primarily sought damages. In contrast, the plaintiffs CBF and NRDC sought the imposition of civil penalties as a deterrent to violators of the Clean Water Act and raised no damages claim. \textit{Hamker}'s answer to the problem is over-inclusive, as it denies jurisdiction to many claims that are not affected with the evil the court purports to control.
rather than by restricting the scope of citizen suits.\textsuperscript{55}

In \textit{Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.}\textsuperscript{56} the Court of Appeals for the First Circuit adopted a position in between those of the Fourth and Fifth Circuits.\textsuperscript{57} Pawtuxet Cove Marina filed a citizen suit alleging that Ciba-Geigy had discharged pollutants in excess of levels allowed under its NPDES permit.\textsuperscript{58} Before the plaintiffs filed the suit, Ciba-Geigy had begun sending its effluent to a municipal treatment facility instead of discharging into the Pawtuxet River, and was no longer operating under its NPDES permit.\textsuperscript{59} The district court dismissed the citizen suit for lack of jurisdiction and the First Circuit affirmed the dismissal.\textsuperscript{60}

The First Circuit found that the statutory language is not so ambiguous that courts should construe it to encompass wholly past violations. The difference between "is . . . in violation" and "has violated" is so conspicuous that Congress must have recognized it and intended for the statute to address ongoing violations.\textsuperscript{61} Congress consistently used the present tense, except in one instance in which the incorporation by reference of one section of the Clean Water Act into another produced what the court termed as "grammatical confusion."\textsuperscript{62} Moreover, the court found evidence of Congress' intent that citizen suits should have prospective effect in the fact that, with respect to alleged violations of permits, the statute

\textsuperscript{55} 791 F.2d at 313. Rule 13 of the Federal Rules of Civil Procedure allows parties to litigate claims not subject to federal court jurisdiction if the claims arise out of the same transaction or occurrence as a claim subject to federal court jurisdiction. \textit{FED. R. CIV. P.} 13. The discretionary nature of pendent jurisdiction is settled law: "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." \textit{United Mine Workers v. Gibbs}, 383 U.S. 715, 726 (1966).

\textsuperscript{56} 807 F.2d 1089 (1st Cir. 1986).

\textsuperscript{57} Id. at 1092.

\textsuperscript{58} Id. at 1090-91. Pawtuxet Cove Marina (Marina) appended a claim for damages, alleging that the presence of pollutants in the silt in Pawtuxet Cove prevented dredging to improve access to Marina's property, causing economic injury and stress related illness. \textit{Id.} at 1091. The court found no evidence that the dredging would have taken place even if Ciba-Geigy's pollutants were not present in the silt. \textit{Id.} The facts of the case suggest that Marina's principal interest was in finding someone else to pay for the dredging. \textit{Id.}

\textsuperscript{59} Id.

\textsuperscript{60} 807 F.2d at 1091.

\textsuperscript{61} Id. at 1092.

\textsuperscript{62} Id. Marina urged that an "effluent standard or limitation under this chapter" is defined in \textit{33 U.S.C.} § 1365(f)(1) (1982), as including any unlawful act under \textit{33 U.S.C.} § 1311(a) (1982), which in turn expressly encompasses any past or present violation. 807 F.2d at 1092. The Marina argued that the statute thereby granted jurisdiction for citizen suits for past violations. \textit{Id.} The court dismissed this argument as based on "grammatical confusion." \textit{Id.}
prohibits actions for past violations unless the "permit . . . is in effect." The court acknowledged Senator Muskie's statement in the legislative history, relied on by the Fourth Circuit in *Gwaltney*, but disregarded it, noting that the remark could not create ambiguity in an unambiguous statute.

The First Circuit reasoned that the history of citizen suits supported the interpretation allowing suits only for present violations. The language "is . . . in violation" originally appeared in the Clean Air Act, which only allowed injunctive relief and therefore was relevant only to ongoing violations. The court interpreted the inclusion of civil penalties in the citizen suit provision of the Clean Water Act as not changing the purpose or nature of citizen suits, but only as adding civil penalties to the injunctive relief. Congress originally contemplated that some past violations would be immune from citizen suits. Consequendy, because there was no change in the purpose or nature of the citizen suit provision under the Clean Water Act, citizen suits can be maintained only where injunctive relief is sought for ongoing violations.

The First Circuit also found serious problems with the *Hamker* holding, or at least with one district court's interpretation of *Hamker*. Because a serious violation might last only a few minutes, proof that a violation is occurring at the time of the suit may be an

63. 807 F.2d at 1093. 33 U.S.C. § 1365(f) (1982) defines for the purposes of citizen suits the term "effluent standard or limitation." Moreover, it is broadly inclusive in nature, and only in subsection (6) is there any language that might be interpreted in an exclusive manner: "a permit or condition thereof . . . which is in effect under [the Clean Water Act]." 33 U.S.C. § 1365(f) (1982). The court read this as excluding any actions for permit violations where the permit is no longer in effect. 807 F.2d at 1093. While this interpretation is not implausible, a less strained interpretation is possible. For example, this language reasonably could be read as distinguishing permits and conditions imposed under the authority of the Clean Water Act from any other waste-water permit or condition.

64. 807 F.2d at 1093 n.3. For the text of Senator Muskie's statement, see supra note 53. The First Circuit recognized Senator Muskie's statement as expressing his belief that 33 U.S.C.A. § 1365 (West 1986 & Supp. 1988) allows citizen suits for wholly past violations, and it recognized that its holding did not ease all of the Senator's apprehensions. 807 F.2d at 1093 n.3.

65. 807 F.2d at 1092.


67. 807 F.2d at 1092.

68. Id. at 1093.

69. Id.

70. Id. at 1094. The court referred specifically to Sierra Club v. Copolymer Rubber & Chem. Corp., 621 F. Supp. 1013, 1015-16 (M.D. La. 1985) (suit dismissed after plaintiff failed to prove its allegation that defendant was in violation on the date that plaintiff filed suit).
overwhelming obstacle to citizen suits.\textsuperscript{71} With the sixty-day notice provision, even a persistent violator temporarily may cease violating so as to eliminate subject matter jurisdiction under the \textit{Hamker} decision.\textsuperscript{72} Because of these problems, the First Circuit focused on the language "is alleged to be in violation," which it interpreted as requiring only a good faith allegation of "a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the \textit{Clean Water} Act."\textsuperscript{73}

The First Circuit gave the phrase "is alleged to be in violation" the same practical construction which it would give the $10,000 damages requirement for federal court jurisdiction in a diversity case.\textsuperscript{74} The court held that citizen-plaintiffs must make a good faith allegation that the defendant has a present continuing intent to violate the \textit{Clean Water} Act, and jurisdiction is not lost if it is proven that there was no actual violation at the time of the suit. "If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction."\textsuperscript{75} The court expressly stated that when this good faith allegation has been made, civil penalties may be issued for past violations, even if the violation has ceased and injunctive relief would not be appropriate.\textsuperscript{76}

\section*{II. \textbf{The Supreme Court Decision}}

The Supreme Court granted certiorari on \textit{Gwaltney} to resolve the conflict between the circuit courts.\textsuperscript{77} In a unanimous decision,\textsuperscript{78}

\begin{itemize}
  \item 807 F.2d at 1093.
  \item Id.
  \item Id. at 1094.
  \item Id. at 1093.
  \item 807 F.2d at 1094. The court stated that a district court should consider, "among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations." \textit{Id.} These are among the standards for issuing an injunction noted in SEC v. Bonastia, 614 F.2d 908, 912 (3d Cir. 1980) (involving violations of federal securities laws). In addition to the factors cited in \textit{Pawtuxet Cove, Bonastia} included "defendant's recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood, because of defendant's professional occupation, that future violations might occur." 614 F. Supp. at 912. All of these factors could be relevant with regard to Clean Water Act violations as well.
  \item 807 F.2d at 1094.
  \item 807 F.2d at 1093.
  \item \textit{Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.}, 108 S. Ct. 376, 381 (1987). In addition to the First, Fourth, and Fifth Circuits, decisions of the Seventh and Tenth Circuits have been cited as addressing this question. For example, in City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979), the Seventh
the Supreme Court vacated the Fourth Circuit's opinion in *Gwaltney* and remanded the case for reconsideration consistent with its holding, which follows much the same approach taken by the First Circuit in *Pawtuxet Cove*.

**A. Availability of Civil Penalties for Wholly Past Violations**

The Supreme Court agreed with the Fourth Circuit that the language of the citizen suit statute was ambiguous, but disagreed with that court's interpretation of the statute. The Court reasoned that the most plausible interpretation of "alleged to be in violation" was to require that the plaintiffs "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." The Court found that Congress' failure to use a grammatical construction that encompassed past violations could not be dismissed as inadvertent because the difference in language was both obvious and easily remedied. For example, Congress' use of the past tense in other environmental protection statutes demonstrates that Congress could avoid the prospective implication if it chose to do so.

Circuit stated in dicta that 33 U.S.C.A. § 1365 (West 1986 & Supp. 1988) "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages." *Id.* at 1014. In United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), the Tenth Circuit said, without reference to citizen suits, that the EPA may bring civil actions for past violations, regardless of whether an action has commenced for injunctive relief. *Id.* at 375-76.

78. Justices Blackmun, Brennan, Rehnquist, and White joined Justice Marshall's Opinion of the Court. 108 S. Ct. at 378. Justice O'Connor and Justice Stevens joined Justice Scalia in his opinion concurring in part and concurring in the judgment. *Id.* at 386. Justice Powell's seat was vacant when the Court decided *Gwaltney*.

79. *Id.* at 381.

80. *Id.*

81. *Id.* The Court rejected CBF and NRDC's argument that Congress' use of the present tense was a "careless accident." *Id.* But use of the present tense might be better characterized as an institutional custom than as a careless accident. It is a basic rule of bill drafting that bills should always be drafted in the present tense. 2A N. Singer, *Sutherland Statutory Construction* § 21.10 (4th ed. 1986).

82. 108 S. Ct. at 381 & n.2. The Court cited the citizen suit provision of the Solid Waste Disposal Act, which allows citizen suits against:

any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

icantly, other citizen suit statutes, which have been interpreted as authorizing only prospective relief, employ language identical to that used in the Clean Water Act.\textsuperscript{83}

Further, the Court rejected the argument that parallel construction permits citizen suits whenever the Administrator could seek civil enforcement.\textsuperscript{84} The Administrator clearly may seek civil penalties for past violations.\textsuperscript{85} CBF and NRDC argued that citizen-plaintiffs can bring civil actions in the same circumstances as might the Administrator because the language "is in violation" is used in both section 505, authorizing citizen suits, and section 309(b), authorizing civil enforcement actions by the Administrator.\textsuperscript{86} The Court disagreed, noting that section 309(b) only authorizes the Administrator to seek equitable relief, which inherently is prospective in effect.\textsuperscript{87} The Court concluded that for the language "is in violation" while leaving intact the original language allowing citizens to bring suits against any person "alleged to be in violation of any permit, standard, regulation, condition, requirement, [prohibition,] or order . . . ." 42 U.S.C. § 6972(a)(1) (1982 & Supp. IV 1986) (the 1984 amendments added "prohibition").

Further, the Court also cited the 1987 amendments to the Clean Water Act as evidence of Congress' ability to avoid the prospective implication. The 1987 amendments gave the Administrator and the Secretary of the Army the authority to assess administrative penalties whenever either "finds that any person has violated" relevant provisions of the Clean Water Act. 33 U.S.C.A. § 1319(g)(1) (West Supp. 1988).


\textsuperscript{84} 108 S. Ct. at 381-82.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 382. CBF and NRDC contended that § 309(b) authorizes the Administrator to seek civil penalties as well as injunctive relief, and § 309(d) merely determines the nature of such penalties. \textit{Id.} "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." 33 U.S.C. § 1319(b) (1982). Subsection (a), in turn, authorizes action whenever "the Administrator finds that any person is in violation of any condition or limitation . . . ." \textit{Id.} at (a)(1). CBF and NRDC argued that because the Administrator has authority to seek civil penalties for past violations, and because the authorizing language uses the same "is in violation" phrase used in the citizen suit provision, citizen suits may also seek penalties for past violations. 108 S. Ct. at 382.

\textsuperscript{87} 108 S. Ct. at 382. The Court cited Tull v. United States, 107 S. Ct. 1831, 1839 (1987) (holding that section 309(b) and section 309(d) create independent grants of enforcement authority).
used in section 309(b) and section 505 to be given parallel construction, it must consistently relate to prospective relief. In contrast, section 309(d) authorizes the Administrator to seek civil penalties against "[a]ny person who violates" relevant provisions of the Clean Water Act, a choice of language more easily read to encompass past violations. Therefore, the Court held that citizen suits, unlike government enforcement actions, may seek only civil penalties where injunctive relief could be considered.

Looking at the Clean Water Act's citizen suit provisions as a whole, the Court found that the pervasive use of the present tense gives section 505 a distinctly prospective orientation. According to the Court, any interpretation which would allow citizen suits for wholly past violations would render the sixty-day notice provision incomprehensible. The Court reasoned that because the purpose of requiring notice to the EPA and the state is to allow either entity to initiate an action and thereby bar the citizen suit, then likewise

88. 108 S. Ct. at 382.
89. Id. According to the Court, a citizen suit may be brought only for violation of a permit limitation “which is in effect” under the Act. 33 U.S.C. § 1365(f). Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation “occurs.” § 1365(b)(1)(A). A Governor of a State may sue as a citizen when the Administrator fails to enforce an effluent limitation “the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State.” § 1365(h). The most telling use of the present tense is in the definition of “citizen” as “a person... having an interest which is or may be adversely affected” by the defendant’s violations of the Act. § 1365(g).

Id. What the Court regards as the “most telling use” of the present tense is in fact its weakest argument. A wholly past violation of the Clean Water Act is very likely to cause future harms. It is the pollution itself, rather than the event of pollutant discharge, that adversely affects citizen-plaintiffs.


If the Administrator or state has commenced and is diligently prosecuting a civil or criminal action in a court of the United States (or, under the 1987 amendments to the Clean Water Act, an administrative enforcement action), citizen suits are prohibited. Id. at (b)(1)(B). The structure of the Clean Water Act places this prohibition within the notice provision of § 1365(b), clearly connecting it with the 60-day notice provision. See id. at (b)(1)(A). By virtue of this structural arrangement, it is clear that Congress intended these provisions to allow the Administrator or the state 60 days in which to commence a civil or criminal action and thereby preempt the citizen suit.
the purpose of notifying the alleged violator must be to allow the violator to come into compliance and thereby bar the citizen suit.\footnote{108 S. Ct. at 382-83.} This reasoning is not compelling, nor is it supported by the legislative history.\footnote{The Court incorrectly asserts that the notice requirement to the violator becomes gratuitous if the purpose of the 60-day notice is other than to allow the violator to avoid a citizen suit by coming into compliance. \textit{Id.} at 383. Notice of a pending suit encourages prompt compliance which furthers Congress’ goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.” 33 U.S.C.A. § 1251(a)(1) (West 1986 & Supp. 1988). The incentive for prompt compliance is the violator’s ability to limit its liability and avoid an additional 60 days of fines up to $10,000 per day (and, under the 1987 amendments, up to $25,000 per day). The legislative history clearly explains the purpose of the notice requirement: \textit{In order to further encourage and provide for agency enforcement}, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State water pollution control agency and the alleged polluter. . . . The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.} The Court also found that allowing citizen suits for past violations would undermine the primacy of governmental enforcement, and expand citizen suits beyond the supplementary role intended by Congress.\footnote{108 S. Ct. at 383. Since 1982, the number of Clean Water Act citizen suits filed against polluters increased significantly. This increase resulted from a perception among environmental organizations, particularly NRDC, that the federal government was not adequately enforcing pollution control laws. These organizations had previously devoted most of their efforts toward forcing the EPA to comply with its statutory mandates rather than pursuing enforcement actions against individual polluters. Interestingly, this increased emphasis on enforcement is actually a shift toward the original purpose of citizen suits, rather than a shift away from it. J. Miller \& Envtl. L. Inst., \textit{Citizen Suits: Private Enforcement of Federal Pollution Control Laws} 10-15 (1987) [hereinafter J. Miller].} This argument carries no weight at all. Certainly, Congress intended government enforcement to remedy most violations, and anticipated that citizen suits would arise in the rare instances when government enforcement might fall short. But it is diabolical to argue that inadequacies in governmental enforcement must bar citizen suits lest they become the dominant mode of
enforcement.94

Lastly, the Court reasoned that the legislative history of the Clean Water Act consistently characterized citizen suits as abatement actions.95 Congress modeled the Clean Water Act citizen suit provisions on those of the Clean Air Act, which provided only injunctive relief, and the legislative history suggests that Congress intended that the two provisions be comparable despite the changes introduced.96 The Court interpreted Senator Muskie’s explanation of the statute as allowing citizen suits against an intermittent polluter even if there is no violation at the time of the suit, but found no support for citizen suits for wholly past violations.97

The Court’s decision clearly overturned the Fifth Circuit’s interpretation that section 505 allows only prospective relief; it also rejected the interpretation of the Fourth Circuit to the extent that wholly past violations cannot be grounds for a citizen suit. In so holding, the Court has taken a cautious approach to construing the statute. Given the equivocal language of the statute and the legislative history, it is hard to fault the Court for avoiding either extreme. The statute and its legislative history allow a myriad of conflicting inferences, and the weight given to each inference is subjective. Still, interpretation which allows citizen suits to seek civil penalties for past violations is the stronger position.

94. Indeed, the very fact that Congress intended for citizen suits to fill a supplementary role supports allowing citizen suits for wholly past violations. If Congress intended for citizen suits to provide alternative enforcement when the EPA has failed to act, then it is apparent that the harms for which remedies are sought often will be the consequences of past violations.

The Court suggested that citizen suits for past violations could thwart the EPA’s ability to make deals with the polluter because the polluter would remain vulnerable to citizen suits. 108 S. Ct. at 383. This concern can be resolved easily without barring citizen suits. If the EPA and the polluter reach a settlement with regard to certain violations, that settlement can become res judicata through a consent judgment, and the incident no longer would be grounds for a citizen suit. See, e.g., Monsanto v. Ruckelshaus, 753 F.2d 649, 653 (8th Cir. 1985) (holding that a consent decree is a judgment) and United States v. Jefferson County, 720 F.2d 1511, 1517 (11th Cir. 1983) (same).


95. 108 S. Ct. at 383.
96. Id. at 383-84.
97. Id. at 384. For the text of Senator Muskie’s statement, see supra note 53.
The legislative history suggests that Congress generally thought of citizen suits as a mode of injunctive relief. Although Congress may have anticipated that citizen suits would in practice seek predominantly injunctive relief, it does not necessarily follow that it fashioned a statute to allow only prospective relief. The only direct authority was Senator Muskie's assertion that a citizen might bring an action against any person alleged to have been in violation. The Court found the probative value of Senator Muskie's statement to be outweighed by the inferences drawn from statements made with no thought to the issue at bar. It is difficult to see how a dozen inconclusive statements might outweigh one direct statement. This is particularly so when that single direct statement was made by the principal author of the Clean Water Act in his summary of the conference committee report, and was not contemporaneously contested. If Senator Muskie's statement were contrary to the will of Congress, surely opposition would have appeared in the legislative history.

Even if Senator Muskie's statement were not part of the legislative history, that history still would support citizen suits for wholly past violations. In narrowly focusing its attention on the meaning of "is in violation," the Court perhaps lost sight of the broader issue. The Clean Water Act begins with a statement of Congress' goals and policy, which declares as a national goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." To this end, Congress declared that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this [Act] shall be provided for, encouraged, and

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98. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may or may not have been contemplated by the legislators." Barr v. United States, 324 U.S. 83, 90 (1945).

99. The Court has noted previously that a statement of one of the sponsors of legislation "deserves to be accorded substantial weight in interpreting the statute." Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

When a bill is reported out of a standing committee, the member in charge of the bill ... explains its meaning to the house [and] answers questions concerning the meaning of particular sections or phrases.... These statements may be taken as the opinion of the committee about the meaning of the bill. [This committee member's] remarks upon presenting the bill to the house and ... answers to questions asked by members ... are accorded the same weight as formal committee reports.

2A N. Singer, supra note 81, at § 48.14 (footnotes omitted).

assisted by the Administrator and the States.\textsuperscript{101} Congress created the citizen suit provision to allow citizens to enforce the Act as "private attorneys general."\textsuperscript{102} Given Congress' undisputed intent to eliminate water pollution and to encourage citizen enforcement, the Court erred by inferring limits to citizen enforcement in the absence of clear statutory limits.

B. Jurisdiction and Standing

The Court has never satisfactorily answered the question of how to treat jurisdictional facts,\textsuperscript{103} and this decision by no means puts the question to rest. The Court held that section 505 gives district courts jurisdiction over citizen suits if plaintiffs make good faith allegations of continuous or intermittent violations.\textsuperscript{104} According to the Court, Congress intended that a good faith allegation, rather than proof that the defendant is in violation at the time of commencement of the suit, is sufficient to give the district court subject matter jurisdiction.\textsuperscript{105}

Justice Scalia disagreed with the Court, asserting that the Court misread section 505(a) to create "a peculiar new form of subject matter jurisdiction,"\textsuperscript{106} in which lawsuits might go to judgment without ever proving the jurisdictional allegations. He viewed the majority decision as eliminating the defendant's opportunity to contest subject matter jurisdiction by challenging the accuracy of the jurisdictional facts alleged and as creating a new form of jurisdiction based on a good faith belief that the defendant's acts are

\begin{itemize}
\item \textsuperscript{101} 33 U.S.C. § 1251(e) (1982) (emphasis added).
\item \textsuperscript{102} "The Committee realized that federal or state enforcement resources might be insufficient, and that federal agencies themselves might sometimes be polluters; the citizen suit provision created 'private attorneys general' to aid in enforcement." National Resources Defense Council v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973). With respect to the citizen suits under the Clean Air Act, Senator Muskie observed that "it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations [of all Clean Air Act requirements]." 1 ENVTL. POL'Y DIV., CONG. RES. SERV., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 280 (1974).
\item \textsuperscript{104} Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376, 384-85 (1987).
\item \textsuperscript{105} The Court adopted the reasoning of the Attorney General (as it did through most of the opinion) and quoted the brief of the United States as amicus curiae. "Congress's use of the phrase 'alleged to be in violation' reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards." Brief of the United States as Amicus Curiae at 18, Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376, 385 (1987) (No. 86-473).
\item \textsuperscript{106} 108 S. Ct. at 386 (Scalia, J., concurring in the judgement).
\end{itemize}
wrongful.107

Justice Scalia interpreted section 505(a) as requiring only an allegation in order to commence a citizen suit in district court, but requiring proof of the allegation in order to prevent dismissal of the suit if subject matter jurisdiction is challenged.108 The prevailing view of jurisdiction ordinarily does not require proof of the allegation,109 and Congress' choice of the language "alleged to be" supports the Court's holding that the allegation need not be proven for a district court to accept jurisdiction over citizen suits.

Justice Scalia does not suggest a return to fact pleading, where plaintiffs can be nonsuited for failure to allege sufficient facts. His concurrence demands only that in the event a plaintiff fails to prove an ongoing violation, the defendant may move for dismissal for lack of subject matter jurisdiction. While the majority opinion does not deny that suits could be dismissed for lack of subject matter jurisdiction, it is clear that citizen-plaintiffs can avoid dismissal by showing a good faith belief, formed after reasonable inquiry, that the allegations are well grounded in fact.110

The source of confusion lies in the fact that for citizen suits under the Clean Water Act, the jurisdictional question and the merits of the case are one and the same. Both sides may rest their cases before the judge rules on subject matter jurisdiction, but Justice Scalia exaggerated the Court's holding in suggesting that cases

107. Id. at 386-87. The Court clearly requires that citizen-plaintiffs prove their allegations in order to prevail at trial on the merits. Id. at 386. Conceivably, the majority intended that this requirement apply to the allegations of subject matter jurisdiction as well, but the opinion of the Court does not say so. As a practical matter, proving the ongoing or intermittent violation that gives rise to the right of action generally will prove the subject matter jurisdiction allegations as well.

108. Id. at 387.

109. In St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938), the Court reached an analogous decision regarding the amount in controversy requirement for diversity jurisdiction, even though that requirement was not softened by the words "alleged to be." Id. at 290-92. In St. Paul the United States District Court for the Southern District of Indiana decided a diversity case rendering a judgment less than the amount sought and less than the jurisdictional amount. Id. at 285. The Court of Appeals for the Seventh Circuit refused to reach the merits, holding that the district court should have remanded the case to the state court. Id. On certiorari, the Court held that the district court properly retained jurisdiction:

It must appear to be a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim.

Id. at 289 (footnotes omitted).

110. 108 S. Ct. at 385.
might be decided without plaintiffs proving their jurisdictional allegations.

Justice Scalia also dissented from the Court's holding that only an allegation of injury is necessary in order to establish standing.\(^\text{111}\) Justice Scalia contended that proof of an ongoing violation is necessary to establish the plaintiff's standing.\(^\text{112}\) The constitutional requirement that the plaintiff suffer an injury in fact, remediability by the court, is not eliminated by section 505.\(^\text{113}\) Justice Scalia argued that a citizen-plaintiff suffers no injury in fact remediability by the court unless the defendant is in violation at the time suit is filed. Under his view, citizen-plaintiffs must be prepared to prove that the defendant was in violation at the time suit was filed in order to survive a motion to dismiss for lack of standing to sue.

But should citizen-plaintiffs bringing enforcement actions under a statutory right of action constitutionally be required to prove that the violation causes them injury in fact redressable by the court? Article III does not mention an injury in fact redressable by the court; it is a judicial creation inferred from Article III's limitation of federal court jurisdiction to certain "cases" and "controversies."\(^\text{114}\) The cases and controversies clause serves two constitutional purposes, both related to separation of powers, by limiting federal court jurisdiction to adversarial disputes of the type traditionally resolved by courts, and preventing court intrusion into other branches' areas of authority.\(^\text{115}\) In addition to the constitutional limits on federal court jurisdiction, there are prudential limits.\(^\text{116}\) Only so long as the injury in fact requirement serves either

\(^{111}\) Id. The Court relied upon its decision in Warth v. Seldin, 422 U.S. 490 (1975): For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. . . . At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment of the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. Id. at 501.

\(^{112}\) 108 S. Ct. at 388.

\(^{113}\) The Clean Water Act's definition of a "citizen" as "a person or persons having an interest which is or may be adversely affected" makes the injury in fact requirement clear. 33 U.S.C. § 1365(g) (1982). See also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16 (1981).

\(^{114}\) U.S. CONST. art. III, § 2.

\(^{115}\) Flast v. Cohen, 392 U.S. 83, 94-95 (1968) (holding that taxpayers had standing to sue the federal government in order to prevent expenditures prohibited by establishment clause of the first amendment).

\(^{116}\) For a summary of the rules that the Court developed to deny review to cases
separation of powers or valid prudential concerns should it exclude citizen-plaintiffs from bringing enforcement actions.

Two doctrines, justiciability and standing, have evolved from the cases and controversies clause. A justiciability analysis looks primarily to the issue of the case, while a standing analysis focuses on the plaintiff, asking whether the plaintiff is a proper party to litigate the issue. Justiciability questions the substantiality of the controversy, the issue's ripeness for adjudication, and whether it is a political question reserved to the other branches of government. The constitutional requirements for standing are an actual or threatened injury to the plaintiff, caused by the defendant, and redressable by the court; prudential limits on standing prohibit federal courts from hearing cases asserting generalized grievances, the rights of third parties, or an interest outside the zone of interests protected by statute. The Court developed these rules in the context of cases where plaintiffs challenged the constitutionality of an agency's action and where plaintiffs challenged agency actions as unreasonable or ultra vires.

Enforcement actions brought by citizen-plaintiffs, however, within its constitutional jurisdiction, see Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).


118. The substantiality requirement allows courts to avoid advisory opinions, collusive suits, and moot issues. L. Tribe, supra note 117, at 68-69.


120. See, e.g. Warth v. Seldin, 422 U.S. 490, 508-10 (1975) (finding residents of one metropolitan area without standing to challenge constitutionality of adjoining town's zoning ordinances); Flast, 392 U.S. at 94-95. See also Valley Forge, 454 U.S. at 472; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974) (holding that plaintiffs challenging constitutionality of members of Congress serving as armed forces reserves must allege concrete injury rather than generalized interest of all citizens to establish standing).

121. E.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973) (holding members of environmental group who alleged injury to aesthetic interests had standing to challenge Interstate Commerce Commission approval of freight rate increases); Sierra Club v. Morton, 405 U.S. 727, 740-41 (1972) (holding environmental organization or its members must be among those injured to establish standing to challenge a Forest Service decision); Barlow v. Collins, 397 U.S. 159, 164 (1970) (holding tenant farmers established standing to challenge decision of Secretary of Agriculture by alleging that Secretary's permitting tenant farmers to assign benefits to landowners would cause irreparable injury); and Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970) (holding plaintiff data processing organizations not regulated by Comptroller of the Currency
should form a third and analytically distinct line of standing cases.\textsuperscript{122} Citizen suits to enforce violations of the Clean Water Act present particular violations of the law, not generalized grievances; citizen-plaintiffs assert their own statutory right of action which is plainly within the zone of interests protected by the statute, not the rights or interests of third parties. The term "private attorney general" has been used to describe plaintiffs in cases challenging agency action, but such challenges are hardly representative of the attorney general's activities. The term is most accurate when applied to citizen enforcement actions because it is the attorney general's duty to enforce the law against private parties. Instead of analyzing citizen enforcement actions in the same manner as taxpayer suits\textsuperscript{123} or challenges to agency action\textsuperscript{124} for standing purposes, the Court should regard citizen-plaintiffs as if they were the attorney general. Proof of injury in fact is not an issue when the attorney general brings an enforcement action against a polluter. Similarly, there should be no requirement of injury in fact where citizens, acting as private attorneys general, step into the government's role as enforcer of pollution control laws.\textsuperscript{125}

Although there should be no constitutional limitation on citizen standing to enforce the Clean Water Act, there are legitimate prudential concerns. For example, neither a collusive suit nor one brought by a plaintiff with resources insufficient for the task would further the purposes of the Clean Water Act. The relevant questions are whether there is a real dispute present and whether it is raised by a party who will vigorously and effectively pursue enforcement. This view is echoed by Professor Tushnet, who observed in \textit{The New Law of Standing: A Plea For Abandonment}\textsuperscript{126} that "the Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits

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\textsuperscript{122} Unlike enforcement actions, challenges to agency decisions brought under the citizen suit provision of the Clean Water Act or other statutes are not distinguished easily from those cases cited \textit{supra} note 121. In cases involving constitutional claims, the courts typically hold plaintiffs to a higher standard. As the Court noted in \textit{Bender v. Williamsport Area School Dist.}, 475 U.S. 534 (1986), "subject-matter jurisdiction assumes a special importance when a constitutional question is presented." \textit{Id.} at 541-42.

\textsuperscript{123} \textit{Flast}, 392 U.S. 83.

\textsuperscript{124} \textit{SCRAP}, 412 U.S. 669; \textit{Sierra Club}, 405 U.S. 727; \textit{Association of Data Processing Serv. Orgs.}, 379 U.S. 150.

\textsuperscript{125} See J. Miller, \textit{supra} note 93, at 19-25.

reached,” particularly when a decision on the merits would overturn established precedent. Tushnet argues that standing should be a bar only where candid assessment reveals the plaintiff’s inability to present the case adequately and a pragmatic factual evaluation demonstrates that the parties are not sufficiently adverse. Although injury in fact may be persuasive evidence of a plaintiff’s adversity, it should not be regarded as a constitutional requirement in enforcement actions.

The difference in approach between the Court’s opinion and Justice Scalia’s concurring opinion is apparent in the instructions to the court below on remand. The Court directed the lower court to find whether the plaintiffs’ complaint contained a good faith allegation of an ongoing violation by the defendant. Justice Scalia directed the lower court to determine whether there was in fact an ongoing violation by the defendant at the time suit was filed. Viewed from this perspective, it becomes clear that the majority opinion addresses only the threshold issue of what is necessary for a plaintiff to commence a suit, and leaves for another day the thorny questions associated with the merits of the case. The Court’s opinion gives little guidance as to what is proof of an ongoing violation or under what circumstances civil penalties would be available for violations that occurred prior to commencement of a citizen suit.

The difference between the Court’s and Justice Scalia’s views of jurisdiction and standing also are apparent with respect to a defendant’s coming into compliance during the course of a suit. The Court would divest citizen-plaintiffs of standing if, during the course of trial, the defendant’s coming into full compliance were to make the suit moot. The Court emphasized that the burden of proving a case moot is a heavy one, requiring it to be “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” In Justice Scalia’s view, a defendant’s coming into compliance after suit was filed would not defeat subject matter jurisdiction. He maintains that standing and subject matter jurisdiction both must attach at the time suit is filed or not at all, and once they attach they are never lost. Even if remedial actions were taken

127. Id. at 663-64.
128. Id. at 700.
130. Id. at 388.
131. Id. at 386 (quoting United States v. Phosphate Export Ass’n, 393 U.S. 199, 203 (1968)) (emphasis added by the Court).
before suit was filed but their success only became apparent during trial, subject matter jurisdiction would still exist.\textsuperscript{132}

\textbf{C. Wholly Past Violations}

For citizen-plaintiffs and dischargers alike, a question of great interest is under what circumstances a court may impose civil penalties. The Court explicitly refused to allow civil penalties for wholly past violations, yet it never defined a wholly past violation.

Justice Scalia adopted a very broad interpretation of “in violation,” similar to that expressed by the District Court for the Eastern District of Virginia below.\textsuperscript{133} “When a company has violated an effluent standard or limitation, it remains, for purposes of §505(a), ‘in violation’ of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.”\textsuperscript{134} Justice Scalia found that “to be in violation” suggests a state rather than an act. The Court also reached the same conclusion: “‘to be in violation’ is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation.”\textsuperscript{135} The Court’s unstated definition of “in violation” might be as broad as that of Justice Scalia and the district court.

The broad interpretation of “in violation” neatly resolves many of the questions addressed in these cases. First, it eliminates some

\textsuperscript{132} Id. at 387. “Subject matter jurisdiction ‘depends on the state of things at the time of the action brought’; if it existed when the suit was brought, ‘subsequent events’ cannot ‘oust[]’ the court of jurisdiction.” Id. (Scalia, J., concurring in the result, quoting Mullen v. Torrance, 23 U.S. (9 Wheat.) 537, 539 (1824)).

By focusing his analysis of subject matter jurisdiction and standing on the state of things at the time suit was filed, Justice Scalia appears to eliminate from consideration the doctrine of mootness. It is unclear whether his interpretation of subject matter jurisdiction simply made it unnecessary to invoke mootness to answer Gwaltney’s concerns, or whether he regards mootness as an aspect of subject matter jurisdiction. If the latter interpretation reflects Justice Scalia’s thinking, then this opinion hints at a unification of some of the amorphous doctrines governing access to the courts.

\textsuperscript{133} “[A] polluter that exceeds various discharge limitations in its NPDES permit... arguably remains ‘in violation’ with respect to those excesses, even though in subsequent years it brings itself into compliance.” Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1547 (E.D. Va. 1985). The district court suggested that this situation is analogous to that of a taxpayer who underpays in one year and remains “in violation” of the relevant tax laws even though proper taxes were paid in subsequent years. Id. The First Circuit noted that this analogy was “inapt” because the taxpayer’s violation is nonpayment, which continues until the obligation is met. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1092 (1st Cir. 1986). That court held that past effluent limitation violations that have ceased are not continuing violations subject to citizen suits. Id. at 1094.

\textsuperscript{134} 108 S. Ct. at 387 (Scalia, J., concurring in the judgment).

\textsuperscript{135} Id. at 381 (emphasis added).
of the practical difficulties of detecting and proving chronic episodic violations of environmental standards. Second, it reflects the nature of the harms these standards are intended to prevent. For example, the harm resulting from an illegal discharge of pollutants does not cease once the discharger reduces pollutant discharges to within prescribed limits. Aquatic organisms killed during a brief illegal discharge are not restored to life by the discharger's return to compliance, and even a temporary depletion of one species can permanently alter an ecosystem. Pollutants may linger in a stream bed for years, in a downstream bay for centuries, and in the oceans forever. Regarding a violation as a state rather than an act is consistent also with the regulatory schemes of the Clean Water Act and the Clean Air Act. Because many of the pollution regulations require technology-based controls, it is appropriate to regard a violation as continuing until the discharger makes the necessary changes in equipment or procedures.136

But what line has the Court drawn between a "wholly past" violation for which civil penalties may not be imposed and an ongoing "state of violation" for which they may? Suppose a defendant has been continuously discharging a pollutant from some time in the past and throughout the time suit is brought against it. It is clear that a court may order an injunction and civil penalties for each day from judgment until complete compliance. But may the court order civil penalties for each day of violation beginning with the earliest proven violation, beginning upon notice of the plaintiff's intent to bring a citizen suit, or beginning on the date suit was filed? Under Justice Scalia's broad view, penalties could be imposed from the earliest proven violation.137 Justice Scalia's concept of violation clearly permits civil penalties for past violations, because he expressly recognized that a citizen suit could be maintained even when a defendant has successfully remedied the problem prior to a plaintiff's


137. This is subject, of course, to the applicable statute of limitations. In the first case interpreting the Supreme Court's Gwaltney decision, Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987), the court held that the federal five-year statute of limitations, rather than California's three-year statute of limitations, applies to citizen suits under the Clean Water Act. Id. at 1522-23. The court held that the statute was tolled 60 days before suit was filed, rather than upon notice of intent to sue or upon filing of the suit, in order that the effect of the statute of limitations should be the same for actions by citizen-plaintiffs as it is for actions by the EPA. Id. at 1524.
filing, so long as that success was uncertain at the time suit was filed.\textsuperscript{138}

Whether the majority opinion goes so far is unclear. The Court tied civil penalties to injunctive relief, but did not hold expressly that civil penalties could only be ordered for days of violation for which injunctions could be ordered.\textsuperscript{139} The Court's holding that citizen-plaintiffs "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation"\textsuperscript{140} is amenable to interpretations allowing penalties for a past violation if the violation is ongoing at the time suit is brought. Because a citizen-plaintiff might seek a preliminary injunction when suit is filed or upon giving notice of intent to sue, even the most restrictive interpretation of the Court's opinion must allow imposition of civil penalties from the time a preliminary injunction could be sought.

At the other extreme, consider a fact pattern such as that which occurred in \textit{Pawtuxet Cove}.\textsuperscript{141} There, the defendant had violated its discharge permit, but had ceased discharging into the river entirely before suit was filed, and was sending its waste to a municipal treatment facility.\textsuperscript{142} Under any interpretation of the Court's \textit{Gwaltney} decision, such a case must be considered a wholly past violation and not grounds for a citizen suit. But consider a situation in which a discharger had violated an effluent limitation in the past, but believes that the violation will not recur even though no major steps have been taken to prevent its recurrence.\textsuperscript{143} Under the state of violation approach, it would be a question of fact whether the remedial measures were sufficient to bring the state of violation to an end. If the state of violation is continuing, then suit may be maintained and penalties conceivably ordered for the duration of that state of violation. While this authority to impose penalties could be abused, it seems quite unlikely that federal trial judges would do so.

III. CONCLUSION

The citizen suit provision of the Clean Water Act may be read

\textsuperscript{138} 108 S. Ct. at 387 (Scalia, J., concurring in the judgment).
\textsuperscript{139} \textit{Id.} at 382. "The citizen suit provision suggests a connection between injunctive relief and civil penalties \ldots ." \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.}, 807 F.2d 1089 (1st Cir. 1986).
\textsuperscript{142} See \textit{supra} text accompanying notes 56-76.
\textsuperscript{143} The \textit{Hamker} case, where the plaintiffs alleged that Diamond Shamrock continued to operate its pipeline negligently, illustrates this type of situation. \textit{See} Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 394 (5th Cir. 1985).
as either allowing or disallowing imposition of civil penalties for past violations. Certain passages suggest that Congress may have invested verb tenses with temporal significance, but careful review reveals so many inconsistencies that it becomes apparent that this was not the case. The legislative history is of little help, principally revealing that Congress as a whole gave no thought to the issues raised in *Gwaltney*. Because the ambitious goals of the Clean Water Act support broad interpretations of its enforcement provisions, and because uncontroverted statements by the Act's principal author indicate that citizen suits might be brought for past violations, the Court's rejection of the Fourth Circuit's decision unduly limits citizen suits.

The Court held that only an allegation of an ongoing or intermittent violation is necessary to establish subject matter jurisdiction, and only an allegation of an injury is necessary to establish standing.144 Plaintiffs ordinarily are not required to prove their allegations in order to invoke a court's jurisdiction, and Congress' choice of the language "alleged to be" supports this view of district court jurisdiction over citizen suits. Justice Scalia disagreed with the Court, asserting that the Court misread section 505(a) to create "a peculiar new form of subject matter jurisdiction,"145 based on a good faith belief that the defendant's acts are wrongful.146 Justice Scalia also asserted that unless the defendant is in violation at the time suit is filed, a citizen-plaintiff suffers no injury in fact remediable by the court and therefore fails to attain constitutional standing.147 Where the Court requires only that there be a reasonable basis for a good faith allegation of a continuing violation, Justice Scalia would require that the allegation also be true.

The majority's reluctance to adopt Justice Scalia's interpretation stems perhaps from a recognition of how close that view comes to gutting the citizen suit provision. A definition of "violation" narrower than that suggested by Justice Scalia, coupled with the requirement of proof of violation at the time suit is filed, virtually would eliminate citizen suits.148 For example, in *Gwaltney* the plain-
tiffs stipulated that Gwaltney's last permit violation occurred before the plaintiffs filed suit, although the plaintiffs maintained that this was not determinable at the time suit was filed. Despite Justice Scalia's statement that "it does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed," it is foreseeable that some courts might weigh such a stipulation heavily when deciding whether a defendant was in violation at the time suit was filed.

It is curious that the Court neither approved nor disapproved of Pawtuxet Cove. Although the Court's rejection of the positions of the Fourth and Fifth Circuits appears to be the same as that of the First Circuit, there are differences between their respective holdings. The First Circuit focused more upon the defendant's intent to continue that course of action which resulted in past violations than upon whether the plaintiff's allegations were made in good faith. The Supreme Court took the defendant's intent into account, but its opinion placed much more emphasis upon whether a citizen plaintiff had made a good faith allegation, based upon a reasonable belief that was well grounded in fact, that at the time suit is filed the defendant was in a state of either continuous or intermittent viola-


Justice Scalia's requirement of proof could be reconciled with the difficulties in proving violations of the Clean Water Act if the standard of proof for jurisdictional purposes could be less severe than that required for prevailing upon the merits. Such a scheme, however, seems no better than that which it would replace.

149. 108 S. Ct. at 379-80.

150. "Although, as it turned out, active violations had ceased a month before suit was filed, there was then good cause to fear that excessive discharges would continue in the future if petitioner were not restrained by injunction or deterred by an assessment of penalties." Brief for Respondent at 26, Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376 (1987) (No. 86-473).

151. 108 S. Ct. at 387 (Scalia, J., concurring in the judgment).

152. A second possible explanation for the majority's reluctance to adopt Justice Scalia's interpretation is that the Court gave substantial weight to the interpretation of the Attorney General. The interpretation adopted by the Court is in large part the same as that argued by the United States as amicus curiae. Id. at 385.

153. 807 F.2d 1089 (1st Cir. 1986). See supra text accompanying notes 56-76.

154. Id. at 1093-94.

155. The Court held that the most natural interpretation of the statute is to require "a reasonable likelihood that a past polluter [would] continue to pollute" should the court deny the enforcement action. 108 S. Ct. at 381. The defendant's intent may also be at issue when deciding if a case is moot, as the defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior reasonably could not be expected to recur. Id. at 386.
tion.\textsuperscript{156} The First Circuit \textit{Pawtuxent Cove} decision explicitly acknowledged that courts may issue penalties in situations where injunctive relief is unobtainable, provided that the plaintiff made good faith allegations warranting injunctive relief,\textsuperscript{157} unlike the Court’s \textit{Gwaltney} opinion which did not address this question directly.

Because the opinion of the Court did not resolve the questions concerning what is a wholly past violation and to what extent civil penalties may issue for past violations, the Court is destined to see these issues raised again.\textsuperscript{158} The most prudent interpretation of a wholly past violation would be one which meets the Court’s requirement for mooting an ongoing case: that it be “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to re-

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\item \textsuperscript{156} See part III of the Court’s opinion, \textit{id.} at 384-86.
\item \textsuperscript{157} 807 F.2d at 1094.
\item \textsuperscript{158} The uncertainty in the Court’s decision is apparent in the subsequent decisions of lower courts. On remand from the Supreme Court, the Fourth Circuit upheld the district court’s determination that the allegations of continuing violation were made in good faith, and remanded to the district court to decide whether the plaintiffs proved an ongoing violation. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, 844 F.2d 170, 171-72 (4th Cir. 1988). The district court held that the evidence demonstrated that there was a likelihood of continuing violations at the time the plaintiffs filed suit, even though Gwaltney subsequently came into compliance. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, 688 F. Supp. 1078, 1079 (E.D. Va. 1988).

In Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988), the Fourth Circuit held that the Supreme Court’s decision allowed penalties for past violations despite defendant’s coming into compliance with permit requirements during the course of the trial. In \textit{Simkins} the plaintiffs brought a citizen suit alleging the defendant’s failure to file discharge monitoring reports and failure to perform required monitoring. The defendant began monitoring and reporting after receiving the plaintiffs’ notification of intent to sue and before the plaintiffs filed suit, but the court held that there was an ongoing reporting violation at the time suit was filed because the defendant’s DMRs did not contain accurate quarterly averages owing to its failure to test at the beginning of the quarter. \textit{id.} at 1114-15.

In contrast, the District Court for the Northern District of Alabama interpreted the Supreme Court’s requirement of an ongoing violation as mooting a citizen suit at any point. In Atlantic States Legal Found. v. Tyson Foods, 682 F. Supp. 1186, 1190-91 (N.D. Ala. 1988), the court held that the Supreme Court’s decision required it to issue a stay until the defendant’s new waste water treatment facility becomes fully operational, in anticipation that the permit violations would then end and render the plaintiff’s case moot.

In Public Interest Research Group v. Carter-Wallace, Inc., 684 F. Supp. 115 (D.N.J. 1988), the court rejected the defendant’s argument that the Supreme Court’s decision only permits citizen-plaintiffs to seek penalties for violations occurring after the filing of the complaint. The court held that the Supreme Court’s instructions to the lower courts on remand would be “nonsensical” unless penalties could be imposed for violations occurring prior to filing the complaint. \textit{id.} at 118-19. The court held that citizen-plaintiffs may seek penalties for violations of an expired permit only when the present permit imposes the same conditions. \textit{id.} at 119-22.
\end{itemize}
cur."\textsuperscript{159} By holding that citizen-plaintiffs "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation,"\textsuperscript{160} the Court appears to allow penalties for past violations provided that the violation is ongoing at the time suit is brought. The most restrictive interpretation of the Court's holding would allow penalties for violations dating from the plaintiff's notice of intent to sue.

*Gwaltney* reduces the scope, and therefore the deterrent effect, of citizen suits from the broad scope found by the Fourth Circuit. While the Court has not directly restricted access to the courts by restricting standing, it has held that wholly past violations are not within the scope of Congress' jurisdictional grant. Citizen-plaintiffs inevitably will be seeking to enforce past violations because only the most egregious violations of the Clean Water Act are immediately apparent. Owing to the uncertainty in the Court's decision, lower courts will continue to allow or disallow standing inconsistently.

Scott B. Garrison

\textsuperscript{159} 108 S. Ct. at 386 (emphasis in original).
\textsuperscript{160} *Id.* at 382.