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Citizen Environmental Lawsuits after Gwaltney: The Thrill of Victory or the Agony of Defeat?

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INTRODUCTION

Environmental law is a vast and complicated subject which has undergone significant growth and change in recent years. One important aspect of this change has been increasing involvement of private citizens, both as individuals and as organized groups, in the development and enforcement of

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1. A few of the groups most active in citizen lawsuits are Friends of the Earth, the Chesapeake Bay Foundation, Atlantic States Legal Foundation, The Sierra Club, and Citizens for a Better Environment. Raymond Proffitt has been one of the individuals active in pursuing citizen enforcement suits. See Proffitt v. Commissioners, Township of Bristol, 754 F.2d 504 (3d Cir. 1985); Proffitt v. Lower Bucks County Joint Mun. Auth., No. 86-7220 (E.D. P. May 12, 1988).
environmental laws. The increase in citizen environmental lawsuits is one manifestation of this development.

Originating in the Clean Air Act Amendments of 1970, citizen suit provisions can now be found in a wide array of environmental laws. The most significant of those laws are the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Among these, the Clean Water Act has seen by far the most citizen lawsuits in recent years.

This article is designed to serve two main purposes. First, it will give the reader an introduction to the fundamentals in litigating a citizen lawsuit, including the major legal issues and major practical problems. This discussion will take place predominantly in the context of the Clean Water Act, although the unique features of each of the above acts will be discussed.

Second, this article will discuss the recent United States Supreme Court decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation. Gwaltney answered some questions about citizen environmental lawsuits but left other questions open and, in some cases, increased confusion about central issues in such lawsuits. This article will discuss the situation leading up to Gwaltney, the Gwaltney holding, and issues left open or confused by the Gwaltney decision.

I. CITIZEN LAWSUIT BACKGROUND

The grandparent of all environmental citizen lawsuits is Sec-

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8. See L. Jorgenson & J. Kimmell, Environmental Citizen Suits: Confronting the Corporation, Special Report (BNA) at 19 and appendices (1988) (reporting that of the 1,209 citizen actions reviewed, 882 contained claims under the CWA, 265 contained claims under RCRA, and 71 contained claims under CERCLA).
tion 304 of the Clean Air Act Amendments of 1970.\textsuperscript{10} Frustrated by the failure of earlier efforts to achieve the goals of the CAA,\textsuperscript{11} Congress implemented a unique enforcement mechanism—citizen lawsuits. Section 304 authorized "any person"\textsuperscript{12} to commence a civil action against certain parties, including the United States Government and the Environmental Protection Agency (EPA), for the purpose of achieving enforcement of the emission standards and limitations established pursuant to the CAA.

Defining the proper role of citizen lawsuits in the CAA scheme\textsuperscript{13} has been a difficult process. The Senate Committee responsible for the provision\textsuperscript{14} stated:

Government initiative in seeking enforcement of the Clean Air Act has been restrained. Authorizing the citizens to bring suits for violation of standards should motivate governmental agencies charged with responsibility to bring enforcement and abatement proceedings.\textsuperscript{15}

Thus, an important objective of citizen lawsuits was to encourage enforcement of the CAA by government agencies.

That is not to say, however, that citizen lawsuits are not desirable as an alternative enforcement mechanism. The United States Court of Appeals for the Second Circuit has declared that those pursuing citizen lawsuits "are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests."\textsuperscript{16} Further, the

\textsuperscript{10} 42 U.S.C. § 7604 (1982).
\textsuperscript{11} See Friends of the Earth v. Carey, 535 F.2d 165, 168 (2d Cir. 1976).
\textsuperscript{12} 42 U.S.C. § 7604(a) (1982).
\textsuperscript{13} The structure and operation of the CAA is a fascinating topic in itself. For purposes of this article, a brief description will suffice. While remaining faithful to the proposition that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), the 1970 amendments to the CAA called for much greater control by the federal government in the anti-pollution effort. The EPA was instructed to establish primary and secondary ambient air quality standards pursuant to 42 U.S.C. § 7409. Each state was obligated, in accordance with a timetable, to promulgate a plan for implementing these standards; each state's plan is subject to review and approval by the EPA. 42 U.S.C. § 7410 (1982). Once a state's plan is approved by the EPA, the state is required to carry it out. Id.
\textsuperscript{14} The House version of the bill included no citizen suit provision. See Carey, 535 F.2d at 172 n.12 (citing Committee of Conference, H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970)).
\textsuperscript{16} Carey, 535 F.2d at 172.
intent of Congress to encourage citizen lawsuits is shown in the explicit relaxation of common jurisdictional barriers and in the provision allowing recovery of attorney’s fees.\(^7\)

Congress did not go as far as it might have, however, in encouraging citizen suits under the CAA. Section 304 did not allow recovery of damages for emission standard violations, nor did it grant power to the federal district courts to assess civil penalties against violators.\(^8\) The best remedy for which a plaintiff can hope under section 304 is an injunction against a defendant to perform the act demanded by plaintiff.\(^9\) This cautious approach to citizen lawsuits reflects Congress’ balancing of its desire for goading and supplementing EPA enforcement against the dangers of interference of EPA enforcement and abuse and overload of the courts through a flood of citizen lawsuits.\(^{20}\)

The citizen suit provision of the Clean Water Act\(^{21}\) was modeled after section 304 of the CAA.\(^{22}\) Accordingly, its structure and operation are quite similar to that of the CAA.\(^{23}\) Section 505 of the CWA authorizes a citizen lawsuit (I) against

\(^{17}\) 42 U.S.C. § 7604(a) (1982) provides for jurisdiction “without regard to the amount in controversy or the citizenship of the parties.” Section 7604(d) authorizes the courts to award reasonable attorney’s fees. \textit{Id.}


\(^{19}\) \textit{See} 42 U.S.C. § 7604(a) (1982) (“The district court shall have jurisdiction . . . to enforce such an emission standard . . . or to order the Administrator to perform such act or duty . . . .”)


\(^{23}\) The citizen suit provisions of RCRA and CERCLA are also similarly structured.
"any person . . . 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) the Administrator of the EPA "where there is alleged a failure to perform a non-discretionary duty under the CWA."

This article is concerned primarily with actions against alleged violators and not those against the EPA. Each of these citizen suit provisions places two significant limitations on a plaintiff's ability to bring suit. The first of these is the notice provision. Each of the provisions requires that a plaintiff give notice to the EPA, the state, and the alleged violator before an action is commenced. Second, no private action may be commenced if the EPA or a state has commenced and is "diligently prosecuting" a civil action in a federal or state court.

Because all of these environmental citizen suit provisions are similar in structure and contain much identical language, precedent under one statute is often useful for issues involving another. Similarly, courts often rely on the legislative history of the CAA in construing the citizen suit provision of the

24. The CAA, RCRA, and CERCLA provisions contain this identical language. This language was crucial to the Supreme Court's decision in Gwaltney, as discussed later in this article. It is likely, therefore, that the Gwaltney opinion will apply with equal force to citizen lawsuits under all four of these provisions.


26. 33 U.S.C. § 1365(a)(2) (1982). The CAA, 42 U.S.C. § 7604(a)(3) (1982), provides for an action against "any person who proposes to construct or constructs any new or modified major emitting facility without a permit . . . or who is alleged to be in violation of any condition of such permit." In 1984, the citizen suit provision of RCRA was amended, adding a new basis for citizen lawsuits, namely, actions to abate an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (Supp. IV 1986).

27. For a discussion of causes of actions against the EPA see Timbers & Wirth, Private Rights of Action and Judicial Review in Federal Environmental Law, 70 CORNELL L. REV. 403 (1985).

28. See infra notes 43–61 and accompanying text.

29. There are certain exceptions to this provision. For example, actions respecting hazardous waste management under RCRA may be brought immediately after notice is given. 42 U.S.C. § 6972(b)(1)(A) (Supp. IV 1986). See also infra note 48 and accompanying text.

30. See infra notes 62–81 and accompanying text.

The most significant difference between the CAA and subsequent environmental citizen suit provisions is the availability of civil penalties under the latter acts. The citizen lawsuit provision under the CAA is restricted to the remedy of injunction. Nowhere in the provision are civil penalties mentioned, and courts have refused to assess civil penalties under section 304. In contrast, civil penalties are available under the CWA, RCRA, and CERCLA.

II. FUNDAMENTALS OF A CWA CITIZEN SUIT

A. Standing to Sue

Essential to the litigation of any citizen lawsuit is an understanding of the legal issues commonly encountered in such suits. The first issue of critical importance in any lawsuit is standing to sue. Generally, in the environmental context standing takes on a central role, and this is certainly true in citizen environmental lawsuits.

Section 505(a) of the Act provides that "any citizen may commence a civil action on his own behalf. . . ." Section 505(g) defines "citizen" as "a person or persons having an interest which is or may be adversely affected." In Sierra Club v. SCM Corp., this language was interpreted to confer standing on those who meet the requirements enunciated in the seminal Supreme Court case of Sierra Club v. Morton. The Supreme Court in Morton held that, to establish standing to sue, a party must show more than a "mere interest in a problem." Rather, to meet the constitutional requirement, a party must allege an "injury in fact." In other words,
"the party seeking review be himself among the injured." The Court readily acknowledged, however, that injury to an aesthetic and environmental interest is sufficient to constitute "injury in fact." The upshot of Morton, as applied in SCM Corp., is that environmental groups, to establish standing, must allege injury in fact to an individual member of the group due to defendant's violations. This is often done by means of affidavits signed by group members who live near or frequently use the polluted area, or whose enjoyment of points downstream from the pollution is affected by the pollution.

B. Notice

Section 505(b)(1) of the Act provides that no action may be commenced against a person alleged to be in violation of a standard or limitation under the Act "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." Pursuant to section 505(b), the EPA has established regulations regarding the proper procedures for notification. These regulations detail both the manner in which notice

40. Id. at 735.
41. Id. at 734.
42. See Atlantic States Legal Found. v. Al-Tech Specialty Steel Corp., 635 F. Supp. 284 (N.D.N.Y. 1986) (interference with enjoyment downstream when polluted body flows into non-polluted body is sufficient to establish standing even when persons bringing suit do not use polluted body of water itself).

The other elements necessary to establish constitutional standing, that the injury be fairly traceable to the challenged action and likely to be redressed by a favorable decision, have not been significant obstacles for citizen-plaintiffs in this type of action. In Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985), the court held that plaintiff is not required to demonstrate that the injury is directly traceable to specific discharges by the defendant. Id. at 446. The court reasoned that to require such a particularized showing would "virtually emasculate the citizen's suit provision by making it impossible for any plaintiff to demonstrate standing." Id. at 446.


The statute provides for one exception. Actions respecting violations of §§ 1316 and 1317(a) of Title 33 may be brought immediately after notification. 33 U.S.C. § 1365(b)(2) (1982).

should be accomplished and the precise contents of the notice.45

Despite the clear statutory language and the simple procedures for giving notice, the issue of adequate notice is often litigated. Currently, the courts are divided on the strictness with which this notice provision is to be interpreted and applied.46 Many courts, including the Ninth Circuit,47 the First Circuit,48 the Sixth Circuit,49 and the Seventh Circuit50 consider the notice requirement a jurisdictional prerequisite. Hence, if the provision is not strictly complied with, the court will dismiss the case for lack of subject matter jurisdiction. The arguments in support of this conclusion center around the plain language of the statute, construed in light of the legislative history and the statutory scheme. The Act clearly states that “[n]o action may be commenced . . . prior to sixty days after plaintiff has given notice. . . .”51 This language, coupled with the single explicit exception to the notice requirement,52 strongly indicates a congressional intent to preclude actions commenced without proper notice.53 Further, the legislative history indicates that the sixty-day notice period was intended

45. 40 C.F.R. § 135.3 (1987) provides:

Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

Id.


47. Hallstrom v. Tillamook Cty., 831 F.2d 889, 891 (9th Cir. 1987) (adopting “jurisdictional prerequisite” approach).


49. Walls v. Waste Resource Corp., 761 F.2d 311, 316–17 (6th Cir. 1985) (compliance with notice requirement is a jurisdictional prerequisite to bringing a citizen suit under both CWA and RCRA).

50. City of Highland Park v. Train, 519 F.2d 681, 690–91 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976) (holding that, where plaintiff gave no notice to EPA, fact that EPA had 60 days to respond under the Federal Rules did not excuse lack of notice).


52. Section 1365(b) provides that an action may be brought immediately if sections 1316 or 1317(a) are alleged to be in violation.

53. See, e.g., Walls, 761 F.2d at 317 (“prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit”).
to assure that the EPA had sufficient opportunity to act upon the alleged violation, thereby rendering a citizen lawsuit unnecessary. 54 Failing to enforce this notice requirement would thwart this intent and reduce significantly the EPA's ability to control enforcement of the Act.

Other courts, including the Third Circuit 55 and the Second Circuit, 56 have adopted a less strict approach. These courts have refused to allow form to triumph over substance and recognize in the context of Section 505(b) the doctrines of substantial compliance and notice-in-fact. Thus, in Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 57 the court held that since the defendants and the EPA had actual notice of the alleged violations more than sixty days before the suit was filed, the notice requirement of the Act had been met even though plaintiff filed suit only two days after sending a notice letter. 58 Similarly, in National Resource Defense Council v. Callaway, 59 the court held that the plaintiff's filing suit only fifty days after notice was given did not deprive the court of jurisdiction where the EPA had already informed the plaintiff that no action would be taken. 60

Defendants have also attacked the substantive sufficiency of the plaintiff's notice letter. Thus far, the courts have been unwilling to dismiss a plaintiff's action simply because notice was substantively deficient. The courts have held that as long as minimal information is provided, substantial compliance will suffice, even when the EPA regulations have not been precisely followed. 61

54. Id.
57. 619 F.2d 231 (3d Cir. 1980).
59. 524 F.2d 79 (2d Cir. 1975).
60. Id. at 83–84.
61. See, e.g., Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1536 (D.C. Pa. 1985) (notice setting forth location of violations, the names of the people seeking compensation, and the alleged violations held sufficient even though neither the particular dates of the violations nor the activity constituting the alleged violations was
Obviously, a plaintiff should follow the letter of the law in both the timing and substance of notice. The courts do indeed take the notice provision of section 505(b) seriously; unexcused failure to comply will almost certainly lead to dismissal. Nevertheless, some courts have shown a willingness to overlook technical deficiencies in a plaintiff’s notice where the underlying purposes of the notice provision has been served.

C. Lack of Diligent Prosecution

The second statutory barrier to bringing a citizen lawsuit can be found at section 505(b)(1)(B) of the Act. This clause provides that “[n]o action may be commenced . . . 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.”

The key interpretative questions under this language are: (1) what is a court; (2) what is diligent prosecution; and (3) when must the action be commenced? In Baughman v. Bradford Coal Company, the Third Circuit addressed the first issue. In Baughman, the court discussed the question of whether an administrative board may be a “court” within the meaning of the statute. The Baughman court held that, in this case, the administrative board was not a “court” under the statute. The court conceded, however, that an administrative board or proceeding may constitute a “court,” where such tribunal has “the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts,” including the power to enjoin and to assess meaningful penalties, and where


64. In this case the administrative board involved was the Pennsylvania Environmental Hearing Board. Id. at 217.

65. Id. at 217-18.

66. Id. at 218.
The tribunal had procedures comparable to those in federal court. 67

The Second Circuit has refused to adopt the Third Circuit's expansive construction of this clause. In Friends of the Earth v. Consolidated Rail Corporation, 68 the court stated that since the Act unambiguously refers to an action in a "court of the United States, or a State, . . . [i]t would be inappropriate to expand this language to include administrative enforcement actions." 69 This clear-cut refusal to include administrative proceedings within the meaning also was followed by the Ninth Circuit in Sierra Club v. Chevron U.S.A., Inc. 70

One interesting and, to this point, unresolved issue on the preclusive effect of administrative actions is whether an administrative penalties action under section 309(g) 71 bars a citizen lawsuit under the Act.

A second issue under the diligent prosecution clause is whether the Administrator or state is, in fact, "diligently prosecuting" 72 its case against the alleged violator. Naturally, resolution of this issue depends upon the facts of a particular case. In general, the courts have been willing to examine the details of the state enforcement proceedings to see if their efforts have been diligent. Where the state has achieved a Consent Order 73 but has failed to enforce the order, such action does not reach the level of diligent prosecution. 74 One court has held that the diligence of the state's prosecution must be presumed "absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be con-

67. Baughman, 592 F.2d at 219. This approach has been followed by the Third Circuit (itself) in Student Public Interest Research Group v. Fritzsche, Dodge and Olcott, Inc., 759 F.2d 1131 (3d Cir. 1985). This analysis was also followed in Wiconisco Creek Watershed v. Kocher Coal Co., 641 F. Supp. 712 (M.D. Pa. 1986).
68. 768 F.2d 57, 59 (2d Cir. 1985) (dealing with a citizen suit brought under the CWA).
69. Id. at 62.
70. 834 F.2d 1517, 1519 (9th Cir. 1987).
73. A Consent Order or Consent Decree is a negotiated settlement between the parties submitted to and approved by the court.
sidered dilatory, collusive or otherwise in bad faith.” 75

The answer to the third interpretative question under the
diligent prosecution clause (when must the action be com-
menced in order to bar a citizen suit?) appears to be well-set-
tled. An action by the Administrator or state must have
been commenced prior to the filing of the citizen suit in order
to bar that citizen suit. 76 The courts have felt compelled to reach this
conclusion by the unambiguous language of section
505(b)(1)(B). The statute states, “[n]o action may be commenced
... if the ... State has commenced” 77 an action. Clearly, this
language contemplates only state actions commenced prior to
the filing of a citizen suit. Defendants have argued that the
purpose underlying the diligent prosecution clause, that a de-
fendant not be subjected simultaneously to multiple suits and
potentially conflicting court orders regarding the same statu-
tory standards, 78 is equally served whether the state action was
filed before or after the citizen suit. 79 Thus far, however, the
courts have not been persuaded by this argument, reasoning
that the trial court may consolidate the cases or allow the citi-
zen or Administrator to intervene in order to manage the
court’s docket and protect defendants from duplicative
litigation. 80

D. Statute of Limitations

The CWA contains no statute of limitations. 81 Thus, a court
is left with three alternatives in determining the proper time
limitation for a citizen lawsuit. First, it might conclude that no
statute of limitations applies. Second, it could apply an analo-
gous state statute of limitations. Finally, a court could apply

1293 (D. Conn. 1986).
76. Chesapeake Bay Found. v. American Recovery Co., 769 F.2d 207, 208–09
(4th Cir. 1985); Atlantic States Legal Found., Inc. v. Koch Ref. Co., 681 F. Supp 609,
614 (D. Minn. 1988); Connecticut Fund for the Env’t, Inc. v. Upjohn Co., 660 F.
Supp. 1397, 1403–04 (D. Conn. 1987); Connecticut Fund for the Env’t v. Job Plating
79. Brewer v. City of Bristol, 577 F. Supp. 519, 527 (E.D. Tenn. 1983); American
80. Chesapeake Bay Found., 769 F.2d at 209.
81. In fact, no environmental law provides a statute of limitations for citizen law-
suits. Note, Statute of Limitations for Citizen Suits Under the Clean Water Act, 72 CORNELL
the generic five-year federal statute of limitations for penalty actions.\textsuperscript{82}

With the notable exception of the New Jersey District Courts,\textsuperscript{83} the prevailing view is that the federal five-year limitation applies.\textsuperscript{84} In support of this conclusion, courts cite the need for uniformity in citizen enforcement suits, both from state-to-state and between citizen suits and EPA enforcement actions.\textsuperscript{85} Since proceedings initiated by the EPA would be governed by the federal five-year limitation, the same standard should be applied to citizen lawsuits.\textsuperscript{86}

The perennial questions on application of a statute of limitations, of course, are (1) when does it begin to run; and (2) when is the time limitation tolled? Noting the injustice in letting the time limitation begin to run when the violations occur (since reports of these violations are not available for some time thereafter), the courts have concluded that the statute begins to run when the reports documenting the violations are filed with the EPA.\textsuperscript{87} The courts have held that the statute of limitations is tolled upon filing of plaintiff’s notice letter.\textsuperscript{88} The court in Sierra Club \textit{v.} Chevron, U.S.A., Inc.\textsuperscript{89} realized that tolling the statute upon filing of notice allows plaintiff to delay filing the complaint until perhaps years after notice yet still be

\begin{itemize}
\item \textsuperscript{82} 28 U.S.C. § 2462 (1982). The statute provides: “Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .”
\item \textsuperscript{86} Id. at 448.
\item \textsuperscript{87} \textit{Al Tech}, 635 F. Supp. at 287–88; Friends of the Earth \textit{v.} Archer Daniels Midland Co., No. 84 Civ. 413 (N.D.N.Y. June 16, 1986).
\item \textsuperscript{88} See, e.g., \textit{Al Tech}, 635 F. Supp. at 288.
\item \textsuperscript{89} 834 F.2d 1517 (9th Cir. 1987).
\end{itemize}
within the statute of limitations. To avoid this loophole, the court held that the statute of limitations period is tolled sixty days before the filing of the complaint.

E. Penalties

Prior to February 4, 1987, the CWA provided that violators of a "National Pollution Discharge Elimination System" (NPDES) permit were subject to civil penalties not to exceed $10,000 per day of such violation. Although the CWA did not set forth standards for courts to use to determine appropriate civil penalties, the EPA set out guidelines in a published penalty policy.

As of February 4, 1987, Congress amended the CWA to increase the maximum penalty from $10,000 to $25,000 per day for each violation. In addition, Congress clarified the so-called "per violation per day" rule. Courts had ruled previously that the language in the CWA set a maximum penalty of $10,000 per day no matter how many violations on that day. The 1987 amendment prescribes penalties for each day of each violation. Congress incorporated language into the statute similar to that found in the EPA Penalty Policy to guide courts in assessing penalties. Courts must now consider 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."

Courts tend to assess between ten and twenty percent of the

90. See id. at 1524 n.5.
91. Chevron, 834 F.2d at 1524.
96. The court, not a jury, assesses penalties. See Tull v. United States, 107 S. Ct. 1831 (1987). In Tull, the Supreme Court held that alleged violators of the Clean Water Act are entitled to jury trials to determine liability under the CWA, since civil penalties and injunctive relief can be assessed against the violator, but that there is no entitlement to a jury to assess civil penalties. Id. at 1840.
98. Id.
maximum statutory penalty.\textsuperscript{99} The CWA sets out that amounts paid are considered penalties;\textsuperscript{100} however, citizen groups traditionally attempt to negotiate settlements which call for payment by the alleged violator to various environmental projects.\textsuperscript{101} While citizen plaintiffs are not themselves entitled to damages under the terms of the CWA,\textsuperscript{102} they can be awarded litigation costs and reasonable attorney's and expert fees.\textsuperscript{103}

A negotiated settlement in a citizen suit customarily takes the form of a consent order or consent decree.\textsuperscript{104} The 1987 amendments require that the Department of Justice and the EPA receive copies of the proposed consent order at least forty-five days before it is entered by the court.\textsuperscript{105} Courts must examine the decree to determine whether it is fair, reasonable and equitable and does not violate public policy.\textsuperscript{106}

III. The Gwaltney Decision

A. Prelude to Gwaltney

The case of Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.,\textsuperscript{107} provides a good example of the way in which a citizen lawsuit is litigated. Gwaltney of Smithfield, Ltd. operated a meat packing plant on the Pagan River near Smithfield, Virginia.\textsuperscript{108} In the course of its production, the plant discharged a variety of pollutants into the river.\textsuperscript{109} Gwaltney reported its discharge pursuant to a NPDES permit issued under


\textsuperscript{100} 33 U.S.C. § 1319(c) (1982).

\textsuperscript{101} Special Report, Environmental Citizen Suits: Confronting the Corporation 17 (BNA 1988). The EPA refers to environmental projects as “credit projects.”

\textsuperscript{102} See Sierra Club v. SCM Corp., 580 F. Supp. 862, 863 n.1 (W.D.N.Y. 1984); City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied 444 U.S. 1025 (1980); see supra note 18 and accompanying text (CAA citizen suit provision authorizes no damages award to citizen plaintiffs).

\textsuperscript{103} 33 U.S.C. § 1365 (1982).


\textsuperscript{105} Id.


\textsuperscript{108} Chesapeake, 611 F. Supp. at 1544.

\textsuperscript{109} Id.
These reports revealed repeated violations of Gwaltney's NPDES permits between October 27, 1981 and May 15, 1984. These violations formed the basis for the citizen lawsuit.

The excessive discharging of pollutants was a chronic problem for Gwaltney and was particularly severe during the winter. Gwaltney had attempted to reduce its discharge in March 1982, when it installed new equipment for its chlorination system. This action apparently solved the chlorine emission problem, and helped to control the fecal coliform violation, but failed to stop Gwaltney's discharge of total Kjeldahl nitrogen (TKN), which accounted for most of Gwaltney's violations. To combat this problem, Gwaltney installed a new wastewater treatment system in October of 1983. Despite the addition of this new system, TKN violations continued throughout the winter of 1983-84. The last reported violation occurring on May 15, 1984.

Plaintiffs, the Chesapeake Bay Foundation and the National Resource Defense Council, sent their sixty-day notice letter to Gwaltney, the EPA, and the Virginia State Water Control Board in February 1984. They filed suit in June 1984, alleging that Gwaltney "has violated . . . [and] will continue to violate its NPDES permit." Thus, the last reported violation occurred a few weeks before plaintiff filed suit. They sought declarative and injunctive relief, civil penalties, and costs, including attorney's fees. The plaintiffs soon moved, and were granted, partial summary judgment against defendant on the issue of liability for the reported violations.

110. Id. at 1544-45. Gwaltney exceeded its discharge limitations for several substances, including fecal coliform, chlorine, total suspended solids (TSS), total Kjeldahl nitrogen (TKN), and oil and grease. See 611 F. Supp. at 1544 n.2.

111. Id. at 1544. Prior to October 27, 1981, ITT-Gwaltney owned the plant and was solely responsible for violations occurring prior to that date. Those violations were not at issue in the lawsuit. "Only the violations subsequent to Gwaltney's assumption of responsibility on October 27, 1981," were at issue. Id. at 1545.

112. 688 F. Supp. at 1079.

113. 108 S. Ct. at 379.

114. Id.

115. Id.

116. Id.

117. Id. Thus, the violations were continuing at the time of the notice letter.

118. Id. at 380.

119. Id.

120. Id. As discussed earlier, this is a common occurrence in citizen lawsuits.
In time, Gwaltney's new treatment system became quite effective. Gwaltney reported no violations of NPDES permits for the winter of 1984-85. Confident that they had solved the problem, Gwaltney moved for dismissal of the citizen suit in May 1985. 121 In its memorandum decision, the district court addressed the issues of subject matter jurisdiction over citizen suits for wholly past violations and the appropriate penalties to be assessed in this case. 122 On the first issue, the court concluded it had jurisdiction over a suit for wholly past violations. The court reasoned that, unless citizens may sue for civil penalties regardless of defendant's compliance at the time the suit is filed, the deterrent effect of citizen suits would be lost, since polluters would have no incentive to reduce their discharge until a citizen suit is actually commenced. In addition, the court argued, to hold otherwise would plunge the courts into the search for standards to decide when a violation is "continuing"—no easy task in light of the fact that DMRs are not available until a month or more after the discharge occurs. 123

On the penalties issue, the court, using the EPA Penalty Policy 124 as a guideline, assessed civil penalties against Gwaltney in the amount of $1,285,322, out of a maximum of $6.6 million. 125 The court arrived at the $6.6 million maximum by making two important interpretations of Section 1319(d). 126 The court interpreted the phrase "$10,000 per day of such violation" 127 to mean (1) violating a monthly limitation subjects the violator to a maximum penalty of $300,000—$10,000 for each day in the month—regardless of the amount discharged on any single day, and (2) violation of a daily limitation subjects the violator to a maximum penalty of $10,000, regardless of how many substances were discharged in excess of the daily limitation on that day. 128

The Court of Appeals, Fourth Circuit, affirmed the district

121. Id.
122. The court also addressed the question of standing. See 611 F. Supp. at 1545-47.
123. Id. at 1549.
124. The court used the June 1984 penalty policy, the most current one available at that time. Id. at 1556.
125. The highest penalties ever awarded in a citizen lawsuit up to that time. See supra note 99 and accompanying text.
127. Id.
128. 611 F. Supp. at 1553-55.
court's ruling on both issues. Thus, the court embraced a view of citizen lawsuits as formidable enforcement mechanisms, which authorized private citizens to "step into the shoes of government agencies that failed to act." Consistent with this congressionally-conceived "private attorneys general" role for citizen suits, argued the court, citizen-plaintiffs should have enforcement powers co-extensive with those of the EPA, whose powers undoubtedly include bringing suit for civil penalties for purely past violations. Therefore, the language of Section 505(a) is properly interpreted to allow citizen suits based upon violations occurring solely in the past. Upon their second consecutive defeat, Gwaltney of Smithfield appealed to the United States Supreme Court.

B. The Gwaltney Opinion

Gwaltney of Smithfield v. Chesapeake Bay Foundation, is one of the few statements of the Supreme Court on environmental citizen lawsuits. In light of its narrow holding and ambiguous language, as discussed below, it is almost certainly not the final word from the Supreme Court on this subject.

The issue before the Court in Gwaltney concerned the timing of the alleged violations for which the citizen-plaintiff sought relief. It is undisputed that a citizen-plaintiff may seek relief, in the form of injunction and civil penalties, for violations occurring on or after the date the lawsuit is commenced. Before Gwaltney, it appears to have been undisputed that, where violations continue on or after the date the lawsuit was commenced,
citizen-plaintiffs could seek civil penalties for violations occurring before the suit was commenced. The issue in Gwaltney was whether plaintiffs could go one step further. In other words, whether section 505 of the CWA "confers jurisdiction over citizen suits for wholly past violations." This issue turns on the language of section 505 which states, "any citizen" may commence an action against "any person...who is alleged to be in violation of (A) an effluent standard or limitation. ... or (B) an order issued by the Administrator or a State. ..." The Supreme Court was prompted to consider this issue by a three-way split between the Fifth, First, and Fourth Circuits.

The first federal appellate court to rule on this issue was the Fifth Circuit, which held in Hamker v. Diamond Shamrock Chemical Company that section 505 confers subject matter jurisdiction only over citizen suits in which the plaintiffs allege a current, ongoing violation of an effluent standard, limitation, or order. The Hamker court was convinced that the "ordinary meaning" of the key language unambiguously indicates that suits for wholly past violations are not authorized. The court found further support for this view in the supplemental role that citizen suits are intended to play, the notice provision of section 505, and congressional intent to avoid overburdening the courts with citizen suits.

The Fourth Circuit Court of Appeals explicitly rejected the holding of Hamker in Chesapeake Bay Foundation v. Gwaltney. The Fourth Circuit found the language "to be in violation," ambiguous, and considering the statutory scheme and legislative history, held that the statute permitted "citizen suits for violations occurring solely in the past." After the Fourth Circuit's ruling, the First Circuit took up

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135. See infra note 149 and accompanying text.
136. 108 S. Ct. at 378.
139. 756 F.2d 392 (5th Cir. 1985).
140. Id. at 395.
141. Id.
142. Id.
143. Id.
144. Id. at 396.
145. 791 F.2d 304 (4th Cir. 1986).
146. Id. at 312.
the issue in Pawtuxet Cove Marina, Inc v. Ciba-Geigy Corp.\textsuperscript{147} The Pawtuxet Cove court held that section 505 confers jurisdiction over a citizen suit where the plaintiff "fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."\textsuperscript{148} Thus, according to the First Circuit, suits for purely past violations are not authorized. However, jurisdiction is not so narrow that a case must be dismissed simply because no violation occurred on the date the complaint was filed.\textsuperscript{149} With this third distinct interpretation of identical statutory language, the stage was set for a Supreme Court ruling.\textsuperscript{150}

Not surprisingly, the Supreme Court, interpreting the same statute on the same issue, came to a conclusion different from all the circuit courts, although the court's interpretation most closely resembles that of the First Circuit. Writing for the court,\textsuperscript{151} Justice Marshall concluded that section 505 does not confer jurisdiction over citizen lawsuits for wholly past violations.\textsuperscript{152} Rather, to invoke the district court's jurisdiction, the plaintiff must make a good-faith allegation that there exists a "continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future."\textsuperscript{153}

Analyzing the statutory language, the Court acknowledged that the provision is, indeed, ambiguous, although the "most natural" reading of the words is a requirement that plaintiffs allege continuous or intermittent violations.\textsuperscript{154} The Court bolstered this interpretation by noting the pervasive use of the present tense throughout section 505 of the CWA, as well as in

\textsuperscript{147} 807 F.2d 1089 (1st Cir. 1986).
\textsuperscript{148} Id. at 1094.
\textsuperscript{150} For an interesting discussion of this split among the circuits, see Note, Citizen Suits and Civil Penalties Under the Clean Water Act, 85 Mich. L. Rev. 1656 (1987); see also, Comment, Citizen Suits Under the Clean Water Act: Waiting for the Godot in the Fifth Circuit, 62 Tul. L. Rev. 175 (1987).
\textsuperscript{151} The Court was unanimous in parts one and two of the opinion, however, three justices concurred but refused to join part three of the opinion. Those justices where Stevens, O'Connor, and Scallia.
\textsuperscript{152} 108 S. Ct. at 381.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
other environmental citizen statutes.\footnote{Id. at 381-82.} This fact, coupled with the statutory definition of "citizen,"\footnote{Id. at 382.} led the Court to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."\footnote{Id.}

The Court found further support for its interpretation in the sixty-day notice provision of section \footnote{Id. at 382-83.} 505.\footnote{Id.} The logical purpose of giving notice to the alleged violator is to give it a chance to bring itself into compliance, thereby rendering the citizen suit unnecessary.\footnote{Id. at 383.} If citizens may sue for wholly past violations, argued the Court, this requirement of notice is superfluous.\footnote{Id. at 383.}

Further, the Court argued, permitting citizen suits for wholly past violations could hinder governmental enforcement of the CWA and curtail the Administrator's discretion in prosecuting violators.\footnote{Id.} Declaring that citizen lawsuits are meant to "supplement rather than to supplant"\footnote{Id.} governmental action, the court refused to "change the nature of citizens' role from interstitial to potentially intrusive."\footnote{Id.}

Finally, the Court found support for its interpretation in the Act's legislative history.\footnote{Id. at 383-84.} After answering the narrow issue of the case, the Court went on to elaborate upon its "good-faith allegation" standard of jurisdiction. Three of the justices refused to join in this elaboration.\footnote{See supra note 151.} The court began this part of the opinion by asserting that citizen-plaintiffs need not prove their allegations of ongoing violations before jurisdiction attaches under section 505.\footnote{108 S. Ct at 385.} Rather, all that is required for jurisdiction is a good-faith allegation of ongoing noncompliance with the Act.\footnote{167. Protection against frivolous allegations is provided by Rule II of the Federal Rules of Civil Procedure. Id. The court stated that Rule 11 "requires pleadings to be based on a good faith belief, formed after reasonable inquiry." Id.} To hold otherwise, said the Court, would be to read the word "alleged" out of section 505, ignoring "Congress' sensitivity to the prac-
tical difficulties of detecting and proving chronic episodic violations of environmental standards."\textsuperscript{168}

Addressing petitioner Gwaltney's contention that this could allow plaintiffs to maintain suit even though, in fact, they lack constitutional standing,\textsuperscript{169} the Court replied that allegations of injury are sufficient to meet the standing requirement.\textsuperscript{170} It is well settled that "a suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact'—not proof—in the complaint or supporting affidavits."\textsuperscript{171} The defendant, the court noted, has the opportunity to challenge the allegations upon motion for summary judgment and at trial on the merits.\textsuperscript{172}

Finally, the Court addressed the fears of petitioner that, under the Court's ruling, a citizen suit could continue to conclusion, even where the defendant has come into compliance with the Act after the suit was commenced. The Court suggested that the mootness doctrine would prevent continuance of a lawsuit when no wrong remains to be remedied. Emphasizing that the defendant's burden "is a heavy one,"\textsuperscript{173} the Court stated that in order to prevail on mootness grounds the defendant must show it is "absolutely clear" that the wrongful behavior could not be reasonably expected to recur.\textsuperscript{174}

\textbf{C. Lower Courts' Responses}

Whatever the impact of \textit{Gwaltney} on all other citizen lawsuits, its impact on the case itself is now clear. On remand, the Fourth Circuit upheld the district court's finding that plaintiffs had made their allegation of an ongoing violation in good faith.\textsuperscript{175} The Fourth Circuit did not end its inquiry there, however. It went on to hold that plaintiffs must prove at trial the existence of an ongoing violation in order to gain any relief. The court stated:

Citizen-plaintiffs may accomplish this either (1) by proving violations that continue on or after the date the complaint is

\textsuperscript{168.} \textit{Id.}
\textsuperscript{169.} \textit{Id.}
\textsuperscript{170.} \textit{Id.}
\textsuperscript{171.} \textit{Id.}
\textsuperscript{172.} \textit{Id. at} 385-86.
\textsuperscript{173.} \textit{Id. at} 386.
\textsuperscript{174.} \textit{Id.}
\textsuperscript{175.} 844 F.2d 170, 171 (4th Cir. 1988).
filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.\textsuperscript{176}

The Fourth Circuit remanded the case to the district court for factual determinations on this question.\textsuperscript{177}

On remand, the district court held that, in light of the standards enunciated by the Fourth Circuit, plaintiffs had demonstrated at trial that some “reasonable likelihood of a recurrence in intermittent violations existed.”\textsuperscript{178} Refusing to consider Gwaltney’s argument that only civil penalties relating to those violations likely to continue are assessable, the district court reinstated its earlier judgment that Gwaltney be assessed civil penalties in the sum of $1,285,322.\textsuperscript{179}

With respect to the instant case, then, Gwaltney’s persistent and, no doubt, expensive defense was to no avail. The jury is still out, however, on Gwaltney’s success in stemming the recent flood of citizen environmental lawsuits.

The confusing and ambiguous nature of the Gwaltney opinion is reflected by the reaction of industry and environmentalists to the decision. Both groups proclaimed victory upon announcement of the decision. Indeed, the New York Times reported that lawyers on each side of the Gwaltney lawsuit proclaimed a ninety-percent victory after the decision was rendered.\textsuperscript{180} Depending upon how lower courts interpret Gwaltney, either side could be right.

\section*{D. Gwaltney Aftermath}

\textit{Gwaltney} is a positive step for citizen environmental lawsuits on two levels. First, jurisdiction attaches if the citizen makes a good faith allegation of continuous or intermittent violations.\textsuperscript{181} Even though citizen suits for purely past violations are prohibited, the jurisdictional standard articulated by the Court presents no insurmountable or hypertechnical burdens to invoking jurisdiction. As such, the Court recognized the

\begin{itemize}
  \item \textsuperscript{176} Id. at 171-72.
  \item \textsuperscript{177} Id. at 172.
  \item \textsuperscript{178} 688 F. Supp. 1078, 1079 (E.D. Va. 1988).
  \item \textsuperscript{179} Id. at 1080.
  \item \textsuperscript{180} N.Y. Times, Dec. 2, 1987, at 24, col. 1.
  \item \textsuperscript{181} 108 S. Ct. at 387.
\end{itemize}
value and importance of citizen suits to the scheme of environmental enforcement in this country.

The second positive step for citizen suits resulting from Gwaltney is the severe limitations placed on a company attempting to demonstrate its compliance with its NPDES permit. The Court made clear that there was a heavy burden carried by the company to demonstrate that its wrongful behavior will not continue. Before dismissal of the suit, defendant must make "absolutely clear" that no further violations will occur.

However, the Court's somewhat unnecessary discussion of mootness presents potential problems to citizen plaintiffs. The Court's suggestion that a company who comes into compliance after commencement of the suit could successfully move for dismissal leads to a troubling and unaddressed issue: what happens to the citizen's claim for penalties? Justice Marshall, in language encouraging to industrial violators, suggests that a defendant is not exposed to penalties; rather, its only concern is payment of plaintiff's litigation costs. Perhaps the injunctive aspect of a citizen lawsuit is resolved, but the penalties aspect is not.

The Court confuses the issue of commencing an action based on wholly past violations of the Clean Water Act and maintaining the penalty aspect of a properly-commenced lawsuit, even if a company has convinced the court it has rectified the problem. The first action is prohibited; the second should not be because the citizens are entitled to resolution of the penalty issue.

It is possible that the barriers to a mootness dismissal articulated by Justice Marshall will practically avoid the problems.

182. Id. at 386.
183. Id.
184. Justice Marshall states:
Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the District Courts to award litigation costs "whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 92-414, at 81, 2 Leg. Hist. 1499.
Id. at 386 n.6.
185. Id. He refers to dismissal attempts somewhat caustically as "predictable "protestations of repentance and reform"" (citing United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952)).
However, the issue is left unaddressed by the opinion.

A related problem left open in *Gwaltney* is a citizen's entitlement to litigate penalties at all for past violations. The *Gwaltney* opinion is literally peppered with comments that the CWA citizen provisions are forward-looking and not concerned with remedying past violations.\(^{186}\) Given this language, plus the statement that citizens may seek civil penalties only in a suit brought to abate an ongoing violation,\(^{187}\) defendants could argue that civil penalties for violations occurring before the suit is commenced are not authorized by Section 505.\(^{188}\)

Environmentalists will argue that the court has determined to assess civil penalties for all violations (pre-complaint and post-complaint) so long as plaintiff makes a good faith allegation of continuing violations. Two courts, without squarely addressing the issue, assessed penalties for pre-complaint violations after the *Gwaltney* decision.\(^{189}\) One court has directly ruled that pre-complaint violations can be assessed penalties in a citizen lawsuit.\(^{190}\)

**CONCLUSION**

The reaction of federal courts post-*Gwaltney* does nothing to strike fear in the hearts of citizen environmentalists. Both the Fourth Circuit and the *Gwaltney* district court ruled in favor of the environmentalists.

Citizen lawsuits under the CWA are and will continue to be a significant element of environmental enforcement. Although *Gwaltney* leaves some issues unclear, particularly with regard to

\(^{186}\) 108 S. Ct. at 381–85.

\(^{187}\) *Id.* at 382.

\(^{188}\) This position has been adopted by at least one federal district court. Student Public Interest Group of New Jersey, Inc., v. Monsanto Co., No. 83 Civ. 2040 (D.C.N.J. Mar. 30, 1988). In this case the court, relying on the "forward looking" language of *Gwaltney*, determined that in citizen lawsuits penalties should only be assessed for post-complaint violations. The United States moved to participate as an *amicus curiae* to support its position that civil penalties may be imposed for pre-complaint violations in a properly filed citizen lawsuit. The district court denied the United States' motion to participate. The district court in *Monsanto* later amended its order to allow the imposition of penalties for the interim period before the filing of the sixty-day notice letter and the filing of the complaint. (Order dated May 9, 1988).


past penalties, it clarifies jurisdictional issues and presents no hypertechnical barriers to citizen lawsuits. As such, citizen lawsuits will continue to assist in restoring and maintaining "the chemical, physical and biological integrity of the Nation's waters."\textsuperscript{191}

\textsuperscript{191} 33 U.S.C. § 1251(a) (1982).