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Environmental Law - Will Jurisdiction Attach in Citizen Suits against Wholly Past Permit Violators under Section 505 of the Clean Water Act, 33 U.S.C. Section 1365 - Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.

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CASENOTE

ENVIRONMENTAL LAW—Will Jurisdiction Attach in Citizen Suits Against Wholly Past Permit Violators Under Section 505 of the Clean Water Act, 33 U.S.C. section 1365? *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376 (1987).

Between 1981 and 1984, Gwaltney of Smithfield (Gwaltney) admitted exceeding its permitted limits on various pollutants it allowed to flow into Virginia's Pagan River.[1] The company's National Pollutant Discharge Elimination System (NPDES) permit[2] established limits under which Gwaltney was permitted to dump materials from its pork processing and packing facility into the Pagan.[3] Gwaltney reported exceeding those limits in its own discharge monitoring reports,[4] which are required by law for permit holders.[5]

During the period in question, Gwaltney violated its limits on chlorine thirty-four times, fecal coliform thirty-one times and total Kjeldahl nitrogen (TKN) eighty-seven times.[6] However, because of an upgraded wastewater treatment system installed in October 1983, Gwaltney's last reported violation occurred on May 15, 1984.[7]

Chesapeake Bay Foundation and Natural Resources Defense Council (Foundation) sent notice in February 1984, to Gwaltney, the Administrator of the Environmental Protection Agency (EPA), and the Virginia State Water Control Board, indicating their intent to sue[8] under section 505 of the Clean Water Act, the citizen suit provision.[9] The Foundation

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1. Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376, 379 (1987).
2. *Id.*
3. Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1544 (E.D. Va. 1985).
4. *Id.* at 1544-45.
5. 33 U.S.C. § 1318(a)(3)(A) (1982).
6. *Gwaltney*, 108 S. Ct. at 379.
7. *Id.*
8. *Id.*
9. In its entirety, § 505(a) of the Clean Water Act, as codified, 33 U.S.C. § 1365(a), provides:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf —
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
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> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319 (d) of this title.

Congress in 1987 amended the section, but the amendments are not relevant to the discussion of this case. For the current statute, see 33 U.S.C.A. § 1365(a) (West Supp. 1988).

filed suit in the Eastern District of Virginia as private attorneys general in June, 1984, after Gwaltney's last violation, seeking civil penalties.[10]

Gwaltney contended before the district court that the court lacked jurisdiction under section 505.[11] Gwaltney argued that since the section only allows citizens to file suits against polluters alleged "to be in violation" of the Act, past violations are not actionable because past violators are not "in violation."[12]

The district judge, in a memorandum opinion, decided the semantic puzzle in favor of the Foundation. He equated a polluter that exceeded the discharge limitations in its NPDES permit, but had since complied, with a past tax evader who paid taxes the following year.[13] The Fourth Circuit Court of Appeals affirmed the district court's decision,[14] holding that the language of the statute was ambiguous but that citizen suit enforcement should be comparable to government enforcement and that the citizen suit statute was intended to include past permit violators.[15]

The Supreme Court held that jurisdiction for citizen suits against wholly past violators under the Clean Water Act does not attach unless the plaintiff makes a good faith allegation of continuing violations.[16] The Court remanded the case to the Fourth Circuit to decide whether the Foundation had alleged in good faith that Gwaltney would or might continue violating its permit conditions.[17] But the majority reached further in its opinion to state that section 505 is prospective in orientation[18] and that cases would become moot if, during the course of the litigation, a defendant could show that there was no continuing likelihood of violation.[19]

By holding that citizen suits against past violators can achieve jurisdiction when good faith allegations of continuing violations are proffered, the Supreme Court appeared to choose a "middle-of-the-road" approach.[20] It seemed to allow future suits to be brought against violators whose violations occurred in the past, so long as plaintiffs alleged that they had sufficient reason to believe that the conditions causing the violations would

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10. *Gwaltney*, 108 S. Ct. at 380.

11. *Gwaltney*, 611 F. Supp. at 1544.

12. *Id.* at 1547.

13. *Id.* Also, Judge Merhige found Gwaltney to be liable for a maximum penalty of $6,600,000 but adjusted the civil penalty downward to $1,285,322. *Id.* at 1565. The citizen suit provision does not provide a private right of action, and any fines levied are payable to the government and not to the plaintiff. Sierra Club v. SCM Corp., 580 F. Supp. 862, 863 (W.D.N.Y. 1984), *aff'd*, 747 F.2d 99 (2d Cir. 1984). The provision does, however, provide for attorney fees when appropriate. 33 U.S.C. § 1365(d) (1982).

14. Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, 791 F.2d 304, 317 (4th Cir. 1986).

15. *Id.* at 309.

16. *Gwaltney*, 108 S. Ct. at 386. Justice Marshall's opinion prevailed in the case by a 5-3 margin.

17. *Id.*

18. *Id.* at 382.

19. *Id.* at 386.

20. Respondents' Supplemental Brief on Petitioner's Writ of Certiorari at 2, Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376 (1987) (No. 86-473) [hereinafter Respondents' Supplemental Brief].

continue. However, the Court's further holding that cases could be dismissed as moot if defendants comply during the litigation has already hindered attorneys representing environmental concerns[21] and may ultimately strip the citizen suit provision of its deterrent value.

BACKGROUND

The citizen suit provision of the Clean Water Act places enforcement powers in the hands of citizens to supplement the powers of federal or state enforcement agencies.[22] The provision requires the citizen or citizens group suing to provide sixty days notice to the administrator of the EPA, the state concerned and the company alleged to be in violation of emissions limits.[23] Citizens are not allowed to prosecute actions against violators when the EPA or the state is actively pursuing enforcement.[24] The section also allows citizens to sue the administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[25] Citizen-plaintiffs can seek injunctive relief and civil penalties under the provision.[26]

Before the Supreme Court's decision in *Gwaltney*, there was a three-way split of authority between the Fourth, Fifth and First Circuits. The Fourth Circuit's decision in *Gwaltney*[27] recognized jurisdiction in cases against all past violators of the Clean Water Act.[28] The Fifth Circuit's decision in *Hamker v. Diamond Shamrock Chemical Co.*[29] precluded jurisdiction in a case involving a single past oil leak in the Texas Panhandle.[30] In *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*[31] the First Circuit held that a citizen suit against a past violator may go forward if the plaintiff in good faith alleges a continuing likelihood that the defendant will proceed to violate the Act.[32]

The Fourth Circuit's decision in *Gwaltney* represents the position that allowed jurisdiction in cases by citizens against permit holders for wholly past violations.[33] The Fourth Circuit judges discussed the limitations placed on citizen suits — the sixty day notice provision and the prohibi-

21. *See, e.g.*, Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 682 F. Supp. 1186, 1191 (N.D. Ala. 1988) (holding that a stay should be granted to allow defendants to comply with their permit so the case could be rendered moot).

22. Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 14 (1981). The *Middlesex* Court held that Congress preempted federal common law nuisance actions by passing pollution control legislation with defined remedies. *Id.* at 22.

23. 33 U.S.C. § 1365(b)(1)(A) (1982).

24. 33 U.S.C. § 1365(b)(1)(B) (1982).

25. 33 U.S.C. § 1365(a)(2) (1982).

26. 33 U.S.C. § 1365(a) (1982).

27. 791 F.2d at 317.

28. *Id.*

29. 756 F.2d 392 (5th Cir. 1985).

30. *Id.* at 398-99.

31. 807 F.2d 1089 (1st Cir. 1986).

32. *Id.* at 1094.

33. *See, e.g.*, Connecticut Fund for the Environment v. The Job Plating Co., 623 F. Supp. 207, 213 (D. Conn. 1985); Student Public Interest Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425 (D.N.J. 1985).

tion on suits already being pursued by authorities — and concluded that those were the only limitations intended by Congress.[34] The court saw "no reason to impose by implication limits which Congress could have, but did not, create."[35]

Hamker and others,[36] however, concluded otherwise by applying the plain meaning doctrine in interpreting the statute.[37] In *Hamker*, the plaintiff sued under the citizen suit provision against a non-permit holder whose oil had leaked from a pipeline into the plaintiff's creek.[38] The district court dismissed the case for lack of subject matter jurisdiction.[39]

On appeal, the Fifth Circuit affirmed the lower court, concluding that the plaintiff's insistence "that 'to be in violation . . .' [actually meant] 'to have violated' obviously strains the grammar of the statute and diverges from its ordinary meaning."[40] The Fifth Circuit also stated that the citizen suit provision was meant "to be exercised only where neither the authorities nor the polluter acts to terminate the ongoing violation."[41] The court noted that the sixty day notice provision and prohibition against filing suits against companies already being sued by authorities supported its position.[42] Further, the court stated that the Supreme Court's assertion that Congress had drastically limited citizens suits to avoid placing an undue burden on federal courts[43] also supported its decision.[44]

Judge Williams specially concurred in *Hamker*, stating that the decision should not be construed to prevent suits against the "chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit."[45]

Pawtuxet Cove Marina stemmed from alleged violations prior to November 1983 by the Ciba-Geigy Corporation on the Pawtuxet River in Rhode Island.[46] The defendant had completed a tie-in with a municipal treatment facility and had ceased operating under its permit, however, before the plaintiff sued the company.[47] The federal district judge in Rhode Island dismissed the plaintiff marina's claim for lack of subject matter jurisdiction.[48]

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34. *Gwaltney*, 791 F.2d at 310.
35. *Id.*
36. *See, e.g.*, City of Evansville, Ind. v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979); Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. 1013, 1015 (M.D. La. 1985).
37. 756 F.2d at 395.
38. *Id.* at 394.
39. *Id.*
40. *Id.* at 395.
41. *Id.* at 396.
42. *Id.*
43. *Middlesex*, 453 U.S. at 15. *See infra* note 22.
44. *Hamker*, 756 F.2d at 396.
45. *Id.* at 399 (Williams, J., concurring).
46. 807 F.2d at 1090.
47. *Id.* at 1094.
48. *Id.* at 1091.

In *Pawtuxet Cove Marina*, the First Circuit criticized Congress' drafting of the citizen suit statute but concluded that, "the proper interpretation of the statute lies somewhere between an absolute, literal, application of its language and the unlimited meaning adopted by the Fourth Circuit."[49] The First Circuit then held that jurisdiction attached "if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."[50] Nevertheless, the court affirmed the lower court's dismissal of the marina's claim.[51]

The First Circuit explained that the good faith allegation was to be used as a threshold for the purpose of reaching subject matter jurisdiction, much as the $10,000 amount in controversy is required to reach diversity jurisdiction.[52] The court explained that, just as diversity jurisdiction is not lost if a lesser sum is proved to be involved, a plaintiff who in good faith alleges continuing violations may recover a penalty judgment for past violations even if violations ceased at some point preceding or during the action.[53]

The Supreme Court granted certiorari in *Gwaltney* to resolve this split of authority, with lower courts following both the Fourth and Fifth Circuit decisions, and likely to split further by following the First Circuit.[54]

PRINCIPAL CASE

Gwaltney contended before the Supreme Court that the Fourth Circuit's decision should be overruled because it allowed plaintiffs to pursue their claims, although Gwaltney had ceased polluting a month before the case was filed.[55] Gwaltney argued that the district and Fourth Circuit decisions in *Gwaltney* violated the principle of *Hamker*, which applied the plain meaning doctrine and construed the "in violation" language of Section 505 of the Clean Water Act to mean that for citizens to bring suit under the act the company would have to be guilty of ongoing NPDES permit violations.[56] Gwaltney also argued that legislative history supported its position and that jurisdiction could not attach on the basis of "mere allegations."[57]

The Foundation countered by arguing that the ambiguity of the statute rendered the "plain meaning doctrine" inappropriate and that "[i]t would ill serve the framers of the law to ignore their intent because we were constrained to pretend they were always punctilious grammarians."[58]

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49. *Id.* at 1092.
50. *Id.* at 1094.
51. *Id.*
52. *Id.* at 1093.
53. *Id.* at 1093-94.
54. *Gwaltney*, 108 S. Ct. at 381.
55. Brief for Petitioner at 9, Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376 (1987) (No. 86-473).
56. *Id.* at 10-11.
57. *Id.* at 26-43.
58. Brief for Respondents at 8, Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376 (1987) (No. 86-473).

The Foundation also argued that statutory context and legislative history showed that citizen suits were meant to punish past violators as well as to stop present ones.[59]

The United States, purporting to support the Foundation,[60] actually argued a position closer to that of the First Circuit,[61] which allowed jurisdiction against past violators only when good faith allegations of continuing violations were made.[62] Many other parties submitted amicus briefs supporting both sides.[63]

In his opinion for the Supreme Court, Justice Marshall agreed with the Foundation that the "to be in violation" language of the citizen suit provision of the Clean Water Act "is not a provision in which Congress' limpid prose puts an end to all dispute."[64] However, he continued, "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violations" for jurisdiction to attach.[65]

Marshall concluded that the "pervasive use of the present tense" throughout the citizen suit provision supported his position that the statute is prospective in nature and that wholly past violations are not sufficient grounds for jurisdiction.[66] The Act defines " 'citizen' as 'a person . . . having an interest which is or may be adversely affected' " by permit violations.[67] Such passages led Marshall to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."[68] Also, the sixty day notice provision of the Act, Marshall reasoned, was meant to give violators an opportunity to cease NPDES permit limitations and "render unnecessary a citizen suit."[69]

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59. *Id.* at 11-18.

60. Brief for the United States as *Amicus Curiae* at 1. Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376 (1987) (No. 86-473).

61. *Id.* at 9.

62. *Id.*

63. Briefs supporting Gwaltney were also submitted by the Connecticut Business and Industry Association; the Mid-Atlantic Legal Foundation and Consumer Alert; Rollins Environmental Services (NJ) Inc.; The Chamber of Commerce of the United States, American Petroleum Institute, Chemical Manufacturers Association and American Paper Institute; Consolidated Rail Corporation, Crucible Materials Corporation, Ferro Corporation, Jersey Central Power & Light Company, McDermott, Inc., Murphy Oil USA, Inc., Pennsylvania Electric Company, Powell Duffryn Terminals, Inc., Shell Oil Company and Universal Tool and Stamping Co., Inc.; and Bethlehem Steel Corporation, Acme Steel Company, ARMCO, Inc., Inland Steep Company, LTV Steel Company, Inc., USX Corporation, and American Iron and Steel Institute.

Supporting the Foundation were the states of Alabama, California, Connecticut, Hawaii, Maine, Michigan, Missouri, New Mexico, South Carolina, Tennessee, Vermont, Virginia and Washington; the National Wildlife Federation; along with Friends of the Earth, Sierra Club, National Audubon Society, Public Interest Research Group of New Jersey, Massachusetts Public Interest Research Group, Atlantic States Legal Foundation and Connecticut Fund for the Environment.

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

65. *Id.*

66. *Id.* at 382.

67. *Id.*

68. *Id.*

69. *Id.* at 382-83.

The majority also rejected the argument that the provision for civil penalties in Section 505 meant that the statute was retrospective to some extent. The opinion stated that the civil penalties' inclusion in the same sentence as injunctive relief meant civil penalties could be sought "only in a suit brought to enjoin or otherwise abate an ongoing violation."[70] Marshall also noted that the frequent description of citizen suits as abatement actions by members of Congress supported the view that the statute was not meant to address past violations.[71]

Marshall then agreed with *Pawtuxet Cove Marina* by holding that Section 505 confers jurisdiction over citizen suits when the plaintiffs make a good faith allegation of continuing violations.[72] Further, he rejected Gwaltney's contention that plaintiffs must prove their allegations of continuing noncompliance to achieve jurisdiction.[73] He cited with approval the amicus curiae brief of the United States, which stated that the statutory language "reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations. . . ."[74]

But after emphasizing that plaintiffs need not prove ongoing violations for jurisdiction to attach, the majority opinion took a curious turn. Marshall stated that if allegations of ongoing noncompliance "become false at some later point in the litigation because the defendant begins to comply," the defendant could seek to have the case dismissed as moot.[75] He asserted, however, that under the mootness standard defendants had the burden of clearly showing that violations "could not reasonably be expected to recur."[76]

The Court remanded the case to the Fourth Circuit to determine whether the Foundation had made a good faith allegation of continuing violations.[77] Justice Scalia concurred with the Court's holding that Section 505 of the Clean Water Act was prospective in nature.[78] Scalia dissented, however, with the Court's holding that a good faith allegation of

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70. *Id.* at 382.

71. *See, e.g., Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works,* 92d Cong., 1st Sess., pt. 1, p. 114 (1971), *discussed in Gwaltney,* 108 S.Ct. at 383.

Marshall also rejected respondents' contention that remarks by Senator Muskie that the suits would be allowed "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" meant that the statute should apply in cases against past violators. *Gwaltney,* 108 S. Ct. at 384. (quoting CONG. REC. 33,700 (1972)).

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

73. *Id.*

74. *Id.*

75. *Id.* at 386 (Noting that "[l]ongstanding principles of mootness, however, prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.' ").

The court held in an earlier antitrust case that "mere voluntary cessation" of allegedly illegal conduct does not moot a case, but that the case could become moot upon a showing that the allegedly wrongful behavior could not reasonably be expected to recur. United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968).

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

77. *Id.*

78. *Id.*

continuing violation is sufficient for jurisdiction to attach.[79] He contended that citizen-plaintiffs must be able to prove their allegations of continuing violations to show subject matter jurisdiction.[80]

ANALYSIS

Had the *Gwaltney* Court simply held that citizen-plaintiffs could achieve jurisdiction by alleging in good faith that there is a likelihood of continuing violations, the decision would have recognized jurisdiction in cases against permit violators who comply during the litigation. The First Circuit applied the good faith allegation standard in its decision on *Pawtuxet Cove Marina*.[81] The good faith allegation standard, by itself, would not prevent most well-intentioned citizen suits from achieving jurisdiction. It would, however, prevent citizen-plaintiffs from poring over discharge monitoring reports to find long past violations over which to sue with the expectation of collecting attorney fees. In other words, the standard would prevent suits that serve no potential abatement purposes.

Thus, the good faith allegation standard, by itself, is of little solace to potential defendants. The good faith allegation standard does not emasculate the citizen suit provision as Gwaltney and a host of amici hoped it would.[82]

However, Marshall's opinion in *Gwaltney* diverged from *Pawtuxet Cove Marina* by stating that Section 505 of the Clean Water Act is "prospective in orientation"[83] and that cases under that section may become moot if the defendant ceases to violate its NPDES permit limitations.[84] The First Circuit regarded the good faith allegation of ongoing violations as a test for subject matter jurisdiction, analogous to the $10,000 needed for diversity jurisdiction, and held that plaintiffs would not lose jurisdiction if the defendant subsequently complied with its permit.[85]

Marshall's argument that the provision for civil penalties in Section 505 does not mean the statute was retrospective to some extent was weak. He stated that the inclusion of civil penalties in the same sentence as injunctive relief shows that abatement was the purpose of the statute.[86] However, a careful reading of Section 505, excluding excess wordage, shows that Congress authorized courts to enjoin future violations and to

79. *Id.* at 387-88.
80. *Id.*
81. 807 F.2d at 1094. It was the Foundation, in fact, that brought *Pawtuxet Cove Marina* to the Supreme Court's attention. Respondents' Supplemental Brief, *supra note 20,* at 2.
82. For example, Rollins Environmental Services argued that the citizen suit provision violated separation of powers under the Constitution. Brief of *Amicus Curiae* Rollins Environmental Services (NJ) Inc. at 7. Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376 (1987) (No. 86-473).
83. 108 S. Ct. at 382.
84. *Id.* at 386.
85. *Pawtuxet Cove Marina,* 807 F.2d at 1093-94.
86. *Gwaltney,* 108 S. Ct. at 382.

charge civil penalties but did not condition one upon the other.[87] The provision allowing civil penalties supports the First Circuit's view that the section was meant to address both prospective and retrospective remedies. For instance, civil penalties cannot punish violations that have not yet occurred.

The First Circuit had found a reasonable middle ground that allowed citizen suits to proceed through to conclusion even if assertions of continuing violations should prove false. In contrast, Marshall's dubious conclusion that the Act was exclusively prospective in orientation may have seriously damaged the citizen suit's deterrence against pollution.

Although Marshall stated that defendants' burden in showing mootness in mid-litigation is "a heavy one" — requiring defendants to show that there is no reasonable expectation that they will violate their NPDES permit limits again[88] — the majority's holding still takes away much of the deterrence built into the provision. A company has little to fear from citizen suits if it violates its permit limitations now, because it can begin installing treatment equipment as soon as a citizen gives notice to sue. A company can, as Judge Williams noted, "turn off the spigot,"[89] or it can just wait until notice is given before it begins installing pollution control equipment. Under *Gwaltney*, a company can have a case dismissed as moot at any point during the litigation. Even if a company is violating its permit on the day the suit is filed it can escape liability later when its pollution control system is completed.

For example, an Alabama federal judge recently stayed a citizen suit so that the defendant could finish upgrading a treatment facility so that the case would be rendered moot.[90] The Alabama court may have effectively halted the action against the defendant, although the defendant had continued violating its NPDES permit through the day on which the suit was filed.[91] Further, the Alabama decision was not overtly inconsistent with the majority opinion in *Gwaltney*. The Alabama judge construed *Gwaltney* as barring suits against wholly past violators,[92] which is only true if the defendant can shoulder the burden of showing there is no continuing likelihood of violations. The judge reasoned, however, that since the case would likely be rendered moot upon completion of Tyson's wastewater facility, the action should be stayed until the effectiveness of the facility could be evaluated.[93]

Other post-*Gwaltney* decisions also illustrate how inconsistently the majority's opinion has been construed by courts. Even the judges of the

87. 33 U.S.C. § 1365(a) (1982). After deleting excess wordage, the sentence reads thus: "The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under section 1319(d) of this title."
88. *Gwaltney*, 108 S. Ct. at 386.
89. *Hamker*, 756 F.2d at 399.
90. *Tyson Foods*, 682 F. Supp. at 1191.
91. *Id.* at 1190-91.
92. *Id.* at 1189.
93. *Id.* at 1190.

Fourth Circuit, for instance, lacked any magical insight when they considered *Gwaltney* on remand.[94] The Fourth Circuit judges remanded the case back to the district court with instructions to determine whether the Foundation had *proven* either 1) that violations continued on or after the date of the complaint was filed; or 2) that a reasonable trier of fact could have determined there was a continuing likelihood of intermittent or sporadic violations.[95]

By requiring the Foundation to prove its allegation against Gwaltney, the Fourth Circuit echoed the dissent of Justice Scalia, which would have placed the burden on plaintiffs of showing continuing violations, and was inconsistent with the majority opinion.[96] To be consistent with the majority decision, the court should have placed the burden on Gwaltney to show that it wouldn't violate its permit again. The district court found against the defendants again, on the basis of expert testimony that showed there was some likelihood of continuing violations during winter months.[97] However, the Fourth Circuit's misreading of Marshall's opinion is typical of a pattern of confusion among the lower courts already taking shape.[98]

From the standpoint of protecting clean water, a better decision would have been one more closely aligned with the First Circuit's *Pawtuxet Cove Marina* decision, which made the good faith allegation of continuing violation simply a jurisdictional test.[99] Such a decision would have allowed suits to continue through completion if a defendant's pollution system is completed during the course of the litigation, and it would reduce the likelihood of polluters waiting to be sued before installing treatment facilities. Such a decision would also have eliminated the confusion caused by *Gwaltney* as to whether plaintiffs must prove their allegations of continuing harm or whether defendants must prove the allegations wrong. Under *Pawtuxet Cove Marina*, there is no burden of proof regarding continuing violations, if fairly alleged, since the good faith allegation is just a jurisdictional test.[100] Under the First Circuit rule, once jurisdiction attaches there is no mootness question placing the burden on defendants, and plaintiffs are not required to prove continuing allegations to proceed with the case.

Further, the majority's decision would have been truer to Congressional intent had the Court followed *Pawtuxet Cove Marina*. Under the language of the statute, citizens may sue polluters who are "alleged to

94. Chesapeake Bay Foundation, Inc., v. Gwaltney of Smithfield, 844 F.2d 170, 170-72 (4th Cir. 1988).

95. *Id.* at 171-72.

96. *Gwaltney*, 108 S. Ct. at 386-88.

97. Chesapeake Bay Foundation, Inc., v. Gwaltney of Smithfield, 688 F. Supp. 1078, 1079 (E.D. Va. 1988).

98. For cases construing good faith allegations of continuing violations as a jurisdictional test, *see, e.g.*, Public Interest Research Group of New Jersey, Inc. v. Carter-Wallace, Inc., 684 F. Supp. 115, 122-23 (D.N.J. 1988); Brewer v. Ravan, 680 F. Supp. 1176, 1182-83 (M.D. Tenn. 1988); Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1114 (4th Cir. 1988); Hudson River Fishermen's Ass'n v. Westchester County, 686 F. Supp. 1044, 1051 (S.D.N.Y. 1988).

99. 807 F.2d at 1093-94.

100. *Id.*

be in violation" of their NPDES permits.[101] That could mean that, as the First Circuit decided, the good faith allegation should be construed as a jurisdictional test. The Supreme Court's decision that citizen suits are meant solely for abatement purposes is plainly wrong, since inclusion of civil penalties among citizen suit remedies[102] means that the provision is retrospective as well as prospective. The First Circuit's decision can be reconciled with the provision's retrospective remedy, since it would allow courts to extract civil penalties in cases in which defendants come into compliance long after, at the time of, or shortly before the case is filed.[103] Marshall's opinion cannot be reconciled with the language of the statute, because it does not recognize the inherently retrospective nature of the civil penalty provision.[104]

CONCLUSION

The *Gwaltney* majority's holding that citizen suits against past violators can be maintained when good faith allegations of continuing violations are proffered could have been a positive step in clarifying the "in violation" language of the citizen suit provision of the Clean Water Act. The allegation requirement alone would have halted suits without abatement purposes while allowing good faith actions to go forward. But, in an effort to further clarify the section, the majority reached too far by stating that Section 505 was prospective in nature and that the cases could be dismissed as moot if polluters came into compliance. Ultimately, the decision, in its effort to reach clarity, will further cloud the controversy, and it could severely limit the deterrence of the citizen suit. The decision has sufficiently damaged the effectiveness of the citizen suit that Congress may need to amend the Act to clarify its intent.

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101. 33 U.S.C. § 1365(a) (1982).
102. *Id.*
103. *Pawtuxet Cove Marina*, 807 F.2d at 1093-94.
104. 33 U.S.C. § 1365(a) (1982).