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the power to appeal as prosecutorial, the Fourth Circuit looked to the nature of the right to appeal. Because of the double jeopardy bar to postacquittal appeals, the Fourth Circuit found that the ability to file an interlocutory appeal is an important prosecutorial tool. As the prosecutor, the independent counsel must be able to decide whether or not to use this device. The independent counsel's decision will depend upon whether the appeal will aid in prosecuting the defendant. If the Attorney General also has the right to file interlocutory appeals, the Attorney General is capable of directly controlling the prosecution, thus depriving the independent counsel of the independence granted by statute. Consequently, the Fourth Circuit determined that the right to file an interlocutory appeal is a prosecutorial function, and that only the independent counsel should have the right to appeal.

Acknowledging that a primary function of the Attorney General is to protect national security, the Fourth Circuit interpreted the Act and CIPA in such a way that national security is uncompromised and full force is given to the Act and the CIPA. The Fourth Circuit reasoned that the independent counsel, as well as the Attorney General, can protect national security under section 7(a) because both officers perform the same prosecutorial functions under section 7(a). Furthermore, the Fourth Circuit reserved to the Attorney General the exclusive right to file an affidavit objecting to disclosure of the classified information under section 6(e) of the CIPA. Therefore, the Fourth Circuit succeeded in protecting the prosecutorial independence of the independent counsel while reserving to the Attorney General the ultimate power to protect national security interests.

The Fourth Circuit's decision in *Appeal of U.S. by Atty. Gen.* is in agreement with the United States Court of Appeals for the District of Columbia position regarding the independent counsel's right to appeal.[82] Both circuits have held that the independent counsel should have the sole right to appeal under the CIPA. The Ninth Circuit has expanded the Fourth Circuit's interpretation of "notwithstanding any other provision of law," by stating that this phrase means that not only statutes but also common law doctrines may not limit an act bearing this phrase.[83] *Appeal of U.S. by Atty. Gen.* limits the Attorney General's role in such cases to the filing of an affidavit prohibiting disclosure of the classified information. The Attorney General may not file appeals. Therefore, *Appeal of U.S. by Atty. Gen.* increases the independent counsel's control over the prosecution of high-ranking executive officers while preserving the Attorney General's power to protect national security interests.

ENVIRONMENTAL LAW

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides a scheme for imposing liability for

82. U.S. v. North, 713 F. Supp. 1441 (D.D.C. 1989) (stating that only independent counsel can appeal in prosecution governed by Ethics in Government Act).

83. *See* In re Glacier Bay, 746 F. Supp. 1379, 1384 (D. Ala. 1990) (questioning Fourth Circuit's interpretation of "notwithstanding any other provision of law").

the cleanup of hazardous substances on those parties responsible for the release or threatened release of hazardous substances.[84] Potentially responsible parties include past and present owners of the facility from which the hazardous substances were released or are threatening release, transporters of hazardous substances who disposed of hazardous substances at the facility, and any person who generated hazardous substances and arranged for disposal of the substances at the facility.[85] Any cleanup response to the release or threatened release of hazardous substances must conform with the national contingency plan.[86] In *Richland-Lexington Airport District v. Atlas Properties, Inc.*, 901 F.2d 1206 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit considered the effect of private parties not obtaining government approval before affecting a cleanup of hazardous substances. Additionally, the Fourth Circuit considered the impact of a contractual relationship between the parties undertaking the cleanup of hazardous substances and the generator of the hazardous substances.

In *Richland* the plaintiff, Richland-Lexington Airport District (Airport), allowed the defendant, Atlas Properties, Inc., doing business as Carolina Chemicals (Carolina), to dump emptied agricultural chemical containers in a private dump that Airport operated. Airport charged Carolina twenty-five dollars per month to use the dump to dispose of the containers. Carolina stopped dumping the chemical containers at Airport's dump in 1962, Over the next several years, the containers deteriorated, leaching hazardous substances into the soil and groundwater. In 1981, the South Carolina Department of Health and Environmental Control (the Department) cited Carolina and Airport for discharging hazardous wastes into the environment without a permit. After several meetings, the Department informed Airport that Airport would have to remove the source of the pollution. Airport undertook the cleanup and then sued Carolina under CERCLA and various state law theories. Airport won a jury verdict, but the district court granted Carolina's motion for a judgment notwithstanding the verdict on the grounds that Airport did not have the requisite governmental approval of the cleanup, and that the contractual relationship between Airport and Carolina barred recovery.

Airport appealed, arguing first that CERCLA did not require government approval of private cleanup actions before the prosecution of a suit for cost recovery. Initially, the Fourth Circuit noted that some courts have found a requirement of prior government approval in CERCLA's requirement that any remedial action must be in accordance with the national contingency plan (NCP). The Fourth Circuit also noted that the Environmental Protection Agency (EPA) amended the NCP in 1985 to make clear that government approval of a private response action is not required for the party undertaking the response to recover costs from potentially re-

84. *See* 42 U.S.C. § 9607(a)(1-4) (1988) (detailing those parties potentially responsible for hazardous substance cleanup).

85. *Id.*

86. 42 U.S.C. § 9607(a)(4)(B).

sponsible parties. The Fourth Circuit followed *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891-92 (9th Cir. 1986), in giving deference to the EPA's interpretation of the NCP. Consequently, the Fourth Circuit held that governmental approval was not a prerequisite to private recovery under CERCLA.

The Fourth Circuit addressed the question of whether a contractual relationship between Airport and Carolina prevented a suit under CERCLA. The Fourth Circuit examined the language of CERCLA section 107 (a)(3), which states that "any person who by contract, agreement or otherwise arranged for disposal . . . of hazardous substances" is liable to any other person for cleanup costs incurred in accordance with the NCP. From this language, the Fourth Circuit found that CERCLA expressly provides for recovery among contracting parties. The Fourth Circuit, therefore, vacated the judgment of the district court and remanded the case for reinstatement of the jury verdict and entry of a judgment in favor of Airport. The *Richland* decision brings the Fourth Circuit in accord with the Ninth Circuit.[87]

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Section 301(a) of the Clean Water Act (the Act), 33 U.S.C. section 1311(a) (1982), outlaws the discharge of pollutants into United States navigable waters except as provided for in other relevant sections of the Act. Section 402 of the Act, 33 U.S.C. section 1342, establishes the National Pollutant Discharge Elimination System (NPDES), under which the Environmental Protection Agency may issue permits allowing a holder to discharge certain pollutants at specified levels. Section 505 of the Act (Section 505), 33 U.S.C. section 1365, allows United States citizens to bring a civil action against any person or entity alleged to be in violation of, *inter alia*, a NPDES permit limitation.[88] Under section 505(a), a federal district court entertaining such a citizen suit may assess civil penalties against a polluter as mandated by section 309(d) of the Act (Section 309(d)), 33 U.S.C. section 1319(d).[89] In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) (*Gwaltney III*), the United States Supreme Court held that section 505(a) does not confer courts with jurisdiction over citizen suits concerning violations that occurred entirely in the past. However, the

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87. *See* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891-91 (9th Cir. 1986) (allowing private suit for cost recovery without prior government approval).

88. 33 U.S.C. § 1365(a) (1982). Section 505(a) provides:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf . . . against 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. . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 1319(d) of this title.

89. 33 U.S.C. § 1319(d). Section 309(d) provides:

> Any person who violates [listed sections] of this title, or any permit condition or limitation implementing any of such sections . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Supreme Court also ruled that a plaintiff's good faith allegation of present ongoing violations is sufficient to confer jurisdiction. In *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690 (4th Cir. 1989) (*Gwaltney VI*), the United States Court of Appeals for the Fourth Circuit considered the circumstances under which NPDES permit violations constitute ongoing violations. The Fourth Circuit in *Gwaltney VI* also considered whether a court simultaneously may have jurisdiction over some specific NPDES permit limitation violations while lacking jurisdiction over other specific NPDES permit limitation violations. Finally, the court considered whether the cessation of violations before trial renders a section 505 action moot and whether citizen-plaintiffs have standing to sue under section 505 when the only remedy available is a penalty paid to the United States Treasury.

In *Gwaltney VI* the defendant, Gwaltney of Smithfield, Ltd. (Gwaltney), had purchased a meat processing plant in October 1981. At the time of the purchase, the plant was in violation of Gwaltney's NPDES permit total Kjeldahl nitrogen (TKN) and NPDES permit chlorine limitations. Gwaltney's chlorine violations continued until October 1982, at which time the violations ceased. In addition, after purchasing the plant, Gwaltney implemented a plan to modify its wastewater treatment facility to properly treat waste from the plant and thereby put an end to the company's TKN violations. Although the changes were completed in October 1983, Gwaltney continued to violate its NPDES permit TKN limitation through the winter of 1983-84. Gwaltney's last TKN violation occurred on May 15, 1984, three months after the Chesapeake Bay Foundation, Inc. (CBF) had sent to Gwaltney a notice of intention to sue and one month before CBF sued Gwaltney.

On June 15, 1984, CBF, among others, sued Gwaltney in the United States District Court for the Eastern District of Virginia under the citizen suit provisions of section 505. In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985) (*Gwaltney I*), the district court found Gwaltney liable for both the TKN and chlorine violations and levied against Gwaltney a civil penalty of $1,285,322. The total penalty included fines of $289,822 for violations of Gwaltney's TKN limit and fines of $995,500 for violations of Gwaltney's chlorine limit. Gwaltney appealed to the United States Court of Appeals for the Fourth Circuit, contending that, because the ongoing permit violations had ceased by the time CBF brought suit, the district court lacked subject matter jurisdiction under section 505(a). In support of this contention, Gwaltney cited language in section 505(a) stating that citizens only may sue a person or entity alleged to be in violation of the NPDES permit held by that person or entity. In *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 308 (4th Cir. 1986) (*Gwaltney II*), the Fourth Circuit affirmed the district court's decision. The *Gwaltney II* court interpreted section 505(a) also to confer jurisdiction over suits based completely upon past violations. To resolve differences in interpretation of section 505(a)'s jurisdictional mandate among several Federal Courts of Appeals, the United States Supreme Court granted certiorari. In *Gwaltney III*, the Supreme Court held

that section 505 only confers jurisdiction over those cases in which the defendants' violations are presently ongoing, or in which the plaintiff makes a good faith allegation that violations are ongoing at the time the suit is filed.

On remand in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cir. 1988) (*Gwaltney IV*), the Fourth Circuit found that the district court's original alternative holding in *Gwaltney I*, that CBF had made its allegation of continuing violations in good faith, was not clearly erroneous. The Fourth Circuit then remanded to the district court for further findings on whether CBF had proved actual ongoing violations at trial. Finding that CBF had proved ongoing NPDES permit violations by Gwaltney at trial, the district court reinstated the original $1,285,322 total civil penalty judgment against Gwaltney in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078 (E.D. Va. 1988) (*Gwaltney V*).

Gwaltney then appealed to the Fourth Circuit again, contending that the evidence was insufficient to uphold the district court's finding that the violations actually were ongoing. Gwaltney also claimed that the district court had erred in reinstating the penalty for the chlorine violations. Gwaltney reasoned that CBF could not have made the allegations regarding the chlorine violations in good faith, because the violations had ceased twenty months before CBF first brought suit. Gwaltney also claimed that CBF lacked standing and that the controversy was moot.

The Fourth Circuit first addressed the issue of whether CBF had proved the existence of ongoing violations. In its *Gwaltney III* opinion, the Supreme Court had defined the term "ongoing violation" for purposes of section 505 as the existence of a reasonable probability that a person who had polluted in the past would continue to pollute in the future. In *Gwaltney IV* the Fourth Circuit had described two ways in which a plaintiff could prove an ongoing violation: first, by proving that violations continued on or beyond the date that the complaint was filed; or second, by presenting evidence allowing a factfinder reasonably to conclude that a continuing probability of recurrence of the violations existed. Gwaltney asserted that, because the company had maintained a near-perfect record of compliance with its NPDES permit since the month before CBF filed the complaint, there was no ongoing violation at the time of the trial. However, the Fourth Circuit, reiterating that CBF had proved that Gwaltney had committed TKN violations between 1981 and 1984, defined the critical question as whether, at the time the complaint was filed, a reasonable likelihood existed that Gwaltney would continue to pollute in the future.

The Fourth Circuit found that, although Gwaltney had been in compliance with its NPDES permit during the summer of 1984, by the December 1984 trial date a reasonable likelihood existed that the impending cold weather would cause Gwaltney once again to fail to comply with the permit's TKN limitations. At the *Gwaltney I* trial, expert testimony offered by both parties had established that low water temperatures are a major contributor to TKN violations and, consequently, that during the winter months an

increased likelihood exists that TKN violations will occur. Both expert witnesses had expressed doubt whether, at the time of trial, Gwaltney's lagoons possessed sufficient grease cover to insulate against normal winter temperatures. Additionally, the experts had identified several other factors possibly indicating that further TKN violations were possible, including problems with laboratory procedures and the unknown effect of storm water on the treatment system. Considering all facts known at the time of trial, the Fourth Circuit concluded that a reasonable factfinder could find that, at that time, a continuing likelihood of recurring violations existed. Therefore, the Fourth Circuit affirmed the district court's finding that violations were ongoing at the time of trial.

Turning next to the issue of CBF's standing to sue, the Fourth Circuit noted the requirements for Article III standing that the Supreme Court had set forth in *Allen v. Wright*, 468 U.S. 737, 751 (1984). Under the *Allen* standing requirements, a plaintiff must allege that the defendant engaged in unlawful conduct that led to personal injury to the plaintiff. In addition, the relief requested by the plaintiff must be capable of redressing the plaintiff's alleged injury. Gwaltney argued that, because Gwaltney's permit violations had already ceased at the time CBF filed its complaint, no injunction was possible. Thus, Gwaltney pointed out, the only available remedy was civil penalties against Gwaltney. Gwaltney further argued that, because civil penalties under sections 309(d) and 505(a) are paid to the United States Treasury, the monies paid would not redress any injury done to CBF. The Fourth Circuit explained that, in *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3185 (1989), the Fourth Circuit had already decided that civil penalties payable to the United States Treasury do redress citizen-plaintiffs' injuries sustained as a result of polluters' NPDES permit limitations violations. The court pointed out that penalties paid to the Treasury can deter future violations and that, if the plaintiff has proved actual or threatened injury arising from the alleged wrong and a specific interest in deterring NPDES violations, then the civil penalties are causally related to the injury. The Fourth Circuit, therefore, held that CBF had standing to sue Gwaltney under section 505.

Gwaltney further claimed that because the TKN violations had ceased in May 1984 and had not recurred since, any action based on a claim of ongoing violations was moot. The Fourth Circuit first looked to its own summary of the Supreme Court's mootness doctrine, as set forth in *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978). In *Cedar Coal* the Fourth Circuit explained that courts are empowered to decide only concrete controversies capable of resolution through a specific and conclusive decree of relief and actually involving the legal relations of parties with opposing legal interests. The Fourth Circuit noted that courts may not render opinions based upon hypothetical statements of facts. The court then considered whether, in light of the fact that subject matter jurisdiction is based on allegations of present continuing violations, section 505 litigation regarding penalties levied solely