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The Continuing Questions Regarding Citizen Suits Under the Clean Water Act: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation

THE CONTINUING QUESTIONS REGARDING CITIZEN SUITS UNDER THE CLEAN WATER ACT: *GWALTNEY OF SMITHFIELD, LTD. v. CHESAPEAKE BAY FOUNDATION*

Attempting to clean up and prevent further pollution of the nation's waters, in 1972 Congress enacted the Federal Water Pollution Control Act (Clean Water Act or Act).[1] The Clean Water Act prohibits any person from releasing pollutants into waterways unless the person has a permit.[2] To accomplish the goals of the Act, Congress has authorized the Environmental Protection Agency (EPA) and state governments to administer and enforce the Act.[3] Under a program that the Act refers to as the National Pollutant

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1. 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986); *see* International Paper Co. v. Ouellete, 479 U.S. 481, 492 (1987) (indicating that Congress enacted Clean Water Act to create program to regulate water pollution and clean up nation's waterways). The Clean Water Act originated in the 1972 amendments to the Federal Water Pollution Control Act. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986)). Congress amended the Water Pollution Control Act in 1972 to correct several inadequacies in the prior act. *See* S. REP. No. 92-414, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3668-3677 (discussing inadequacies in prior act). Accordingly, Congress replaced state-established water quality standards with effluent limitations as a means to measure compliance with the Act. *Id.* at 3675. Effluent limitations are rate, quantity, and concentration restrictions on the discharge of chemical, physical, and biological pollutants. 33 U.S.C. § 1362(11) (1982). The change from state-established water quality standards to effluent limitations has enabled federal and state governments to require dischargers to use the best water-pollution control technology available. *See* S. REP. No. 92-414, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3668-3677 (containing legislative history of Clean Water Act). By providing grants and loans for improvements to waste treatment facilities and requiring monitoring and reporting of compliance with the Act's requirements, the 1972 amendments also attempted to improve problems of funding and information. *Id.* at 3676-77. Finally, the 1972 amendments improved enforcement provisions of the Act by permitting the Environmental Protection Agency (EPA) and states to bring both criminal and civil actions against violators of the Act and by permitting citizens to sue violators of the Act for injunctive and civil penalty relief. *Id.* at 3677; *see infra* note 3 and accompanying text (discussing EPA and state enforcement provision under Clean Water Act); *infra* notes 9-10 and accompanying text (discussing citizen enforcement provision under Clean Water Act).

2. 33 U.S.C. § 1311(a) (1982 & Supp. IV 1986). The Clean Water Act prohibits persons from discharging pollutants into waterways without a permit. *Id.* The Act defines person to include individuals, corporations, partnerships, state and local governments, and other political subdivisions. *Id.* at § 1362(5) (1982).

3. *Id.* at § 1319. In authorizing the EPA and state agencies to enforce the Act, Congress, in § 309 of the Clean Water Act, limited the powers and procedures that the EPA and states follow in enforcing the Act. *Id.* Procedurally, § 309 requires the EPA and states to send notice of violations to each other and to the violator. *Id.* Section 309 permits the EPA, after sending notice to the violator, to issue compliance orders and take civil action against violators of the Act. *Id.* Further, the Administrator of the EPA may seek criminal fines against persons that willfully or negligently violate the Act. *Id.* at § 1319(c). Section 402(b) of the Clean Water Act gives state governments that are granted authority by the EPA to administer the permit program the same enforcement powers as the EPA. *Id.* at § 1342(b).

Discharge Elimination System (NPDES), Congress also has authorized the EPA and each state to issue permits to applicants that want to release pollutants into waterways.[4] While holders of NPDES permits may release specified pollutants into waterways, the holders must comply with the restrictions in the permits.[5] The permit restricts the type and amount of pollutants (effluent limitations) that a holder may discharge.[6] To measure compliance with the effluent limitations in the permit, the Act requires holders of permits to report the amount and type of pollutants the holder is discharging by periodically filing discharge monitoring reports (DMRs) with the state or the EPA.[7] If the permit holder fails to comply with any condition of the NPDES permit, the holder violates the Clean Water Act.[8]

To ensure compliance with the provisions of the Clean Water Act, section 505(a) of the Act authorizes any citizen to bring suit against any person that the citizen alleges is violating the Act.[9] Under the Clean Water

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4. *Id.* at § 1342(a), (b).

5. *Id.* at § 1342(a).

6. *Id.* at § 1311. The citizen suit provision in § 505 states that effluent limitations include the actual discharge parameters and reporting, record keeping, and testing requirements of the permit. *Id.* at § 1365(f); *see supra* note 1 (discussing effluent limitations in § 502(11) of Clean Water Act).

7. *Id.* at § 1318; EPA Permit Conditions, 40 C.F.R. § 122.41(k)(4) (1987). In addition to the monitoring requirements of the Act, the EPA has promulgated regulations under the Clean Water Act that require permit holders to report all monitoring results to the EPA or state in discharge monitoring reports (DMRs) at intervals the permit specifies. *See* 40 C.F.R. § 122.41(k)(4) (1987) (describing discharge monitoring report requirements). DMRs are statements that report both the maximum amount of pollutants the permit holder may discharge under the permit and the actual amount of pollutants the holder has discharged. *Id.* at § 122.41(j), (k)(4). Under the Clean Water Act, permit holders must report their failure to comply with any requirement of a permit at the interval the permit specifies for submitting the DMRs. *Id.* at § 122.41(k)(4). Permit holders, however, must immediately report any failures to comply with the permit requirements that affect health or environment. *Id.*

8. 33 U.S.C. §§ 1319, 1365 (1982); *see* Sierra Club v. Simkins Indus., 847 F.2d 1109, 1115 (4th Cir. 1988) (concluding that violations of permit sampling and reporting requirements are sufficient for maintenance of citizen suits under § 505 of Clean Water Act); Menzel v. County Utils. Corp., 712 F.2d 91, 94 (4th Cir.) (holding that courts may hear citizen suits either for violations of substantive effluent limitations or conditions of NPDES permit, including reporting violations), *reh'g denied*, 718 F.2d 120 (1983); Student Public Interest Research Group of New Jersey v. AT & T Bell Labs., 617 F. Supp. 1190, 1203 (D. N.J. 1985) (holding that violations of NPDES permits constitute violations of the Clean Water Act); Pymatuning Water Shed Citizens v. Eaton, 506 F. Supp. 902, 908 (W.D. Pa. 1980) (holding that citizen-plaintiffs do not have to prove actual violations of effluent limitations if citizen-plaintiffs prove defendant violated NPDES permit conditions), *aff'd*, 644 F.2d 995 (3d Cir. 1981).

9. 33 U.S.C. § 1365(a) (1982). Section 505(a) of the Clean Water Act states:

> [A]ny citizen may commence a civil action on his own behalf [1] 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 [of the EPA] or a state with respect to such a standard or limitation, or . . . .

Id. (emphasis added).

In addition to the language of § 505(a), the legislative history of the Clean Water Act

Act Congress confers to federal district courts jurisdiction to hear citizen suits so long as the citizen-plaintiff has notified the defendant of the alleged violation and neither the EPA nor any state government has an enforcement action proceeding against the defendant.[10]

Although the Clean Water Act authorizes citizen suits, courts previously had disagreed on when courts have jurisdiction to hear citizen suits.[11] The

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indicates the purpose and scope of the citizen suit provision. *See generally* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 (1973) [hereinafter 1 LEG. HIST.] (containing legislative reports and documents of 1972 amendments to Clean Water Act); 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 (1973) [hereinafter 2 LEG. HIST.] (same). The legislative history shows that Congress intentionally and specifically conferred to citizens or groups standing to sue based on nonproprietary interests, such as aesthetics and preservation. *See* 1 LEG. HIST., *supra*, at 249-250 (containing legislative reports and documents of 1972 amendments to Clean Water Act). Although the EPA and the states primarily are responsible for enforcing the Clean Water Act, citizens also may enforce the Act if the EPA or state agency fails to take enforcement action. S. REP. No. 92-414, 92nd Cong., 1st Sess. 64 (1971), *reprinted in* 2 LEG. HIST., *supra*, at 1482. The legislative history also indicates the intended purpose and extent of citizen-plaintiff enforcement under the Clean Water Act by referring to § 505 as a provision for use in abating violations of the Act. *See* 1 LEG. HIST., *supra*, at 876 (stating that purpose of citizen suits is to abate pollution); 1 LEG. HIST., *supra*, at 163 (stating that citizen-plaintiffs may sue polluters to halt pollution).

10. 33 U.S.C. § 1365(b) (1982). Under the Clean Water Act, citizen-plaintiffs may bring suit against alleged violators of the Act. *Id.* at § 1365(a). Before a citizen-plaintiff may file suit against a defendant, however, § 505(b)(1) of the Clean Water Act requires a citizen-plaintiff to give at least 60 days notice of the alleged violation to the alleged violator, the Administrator of the EPA, and the state where the alleged violation is occurring. *Id.* at § 1365(b)(1). The legislative history indicates that one of the purposes of the 60 day notice is to give the EPA or state time to take action against the violator. 1 Leg. Hist., *supra* note 9, at 179. In discussing the 60 day notice provision required under § 505 of the Clean Water Act, Senator Muskie stated that Congress did not intend the 60 day notice provision to eliminate the right of action of citizen-plaintiffs to file suit against defendants that are violating the Act at the time the citizen-plaintiff gives notice. *Id.* Senator Muskie further stated that the 60 day notice provision would not prevent citizen-plaintiffs from seeking appropriate remedies upon alleging that a person is or was in violation of the Clean Water Act, regardless of whether the violation is or was occasional, sporadic or continual. *Id.*; *see* 2 LEG. HIST., *supra* note 9, at 1497-98 (stating that purpose of requiring citizen-plaintiff to give notice is to encourage agency enforcement of Clean Water Act); 2 LEG. HIST., *supra* note 9, at 1498 (stating that 60 day notice requirement of § 505(b) gives EPA and states first opportunity to sue alleged violators of Clean Water Act).

In addition to the 60 day notice provision, § 505(b)(1) of the Clean Water Act restricts citizen-plaintiffs from filing suit against an alleged violator of the Act if the EPA or state actively is undertaking a civil or criminal action against the alleged violator for the violations. 33 U.S.C. § 1365(b)(1) (1982). The citizen-plaintiff, however, may intervene as a matter of right if the EPA or state has filed suit against the alleged violator. *Id.*

11. *See infra* notes 13-15 and accompanying text (discussing cases in which courts have given divergent interpretations of when § 505(a) of Clean Water Act confers subject matter jurisdiction to courts); *supra* note 9 (discussing citizen suit provision in § 505 of Clean Water Act); *infra* notes 41-62 and accompanying text (discussing *Gwaltney* Supreme Court resolution of discord among circuits concerning when courts have jurisdiction to hear citizen suits under Clean Water Act). *See generally Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987) (discussing various interpretations of § 505(a) of Clean Water Act before Supreme Court's decision in *Gwaltney*); Note, *Citizen Suits Alleging Past Violations of the Clean Water Act*, 43 WASH. & LEE L. REV. 1537 (1986) (same).

controversy arose from the courts' divergent constructions of section 505(a)'s requirement that a citizen-plaintiff may not file suit against a defendant unless the citizen-plaintiff alleges that the defendant is violating the Act.[12] In construing the language of the Act, some courts held that a citizen-plaintiff may file suit against a defendant only if the citizen-plaintiff alleged that the defendant was violating the Act at the time the citizen-plaintiff filed suit.[13] Other courts, including the United States Court of Appeals for

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12. *See infra* notes 13-15 and accompanying text (discussing cases in which courts have given divergent interpretations of when § 505(a) of Clean Water Act confers subject matter jurisdiction to courts).

13. *See, e.g.*, Sierra Club v. Shell Oil, 817 F.2d 1169, 1172 (5th Cir. 1987) (holding that defendant must be violating Clean Water Act at time citizen-plaintiff files suit for court to have jurisdiction), *cert. denied*, 108 S. Ct. 501, *reh'g denied*, 108 S. Ct. 1065 (1988); Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 395 (5th Cir. 1985) (holding that defendant must violate Act at time citizen-plaintiff files suit for court to have jurisdiction); Sierra Club v. Copolymer Rubber & Chem. Corp., 621 F. Supp. 1013, 1015-16 (M.D. La. 1985) (dismissing citizen suit because no violation occurred on date plaintiffs filed suit). Before the Supreme Court resolved the split among jurisdictions concerning when a court has jurisdiction to hear a citizen suit, some jurisdictions held that a defendant must be violating the Clean Water Act at the same time the citizen-plaintiff files suit. *See Hamker*, 756 F.2d at 395 (holding that defendant must violate Act at time citizen-plaintiff files suit for court to have jurisdiction). For example, the United States Court of Appeals for the Fifth Circuit in *Hamker v. Diamond Shamrock Chem. Co.* held that a defendant must be violating the Clean Water Act at the time the citizen-plaintiff files suit for a court to have jurisdiction under § 505(a) of the Clean Water Act. *Hamker*, 756 F.2d at 396. In *Hamker* the plaintiffs sued the defendant for a one time discharge of oil into a nearby creek. *Id.* at 394. The defendant denied the allegation and contended that the court did not have jurisdiction to hear the case. *Id.* On appeal from the United States District Court for the Northern District of Texas,the Fifth Circuit subsequently dismissed the suit for lack of jurisdiction. *Id.* at 397-99. In dismissing the suit, the Fifth Circuit interpreted the language of § 505(a) of the Clean Water Act to confer jurisdiction to a court only if a violator is violating the Act at the time a citizen-plaintiff files suit. *Id.*; *see* 33 U.S.C. § 1365(a) (1982) (providing for citizen suit provision in Clean Water Act). The Court stated that even though a defendant's past discharge, which violated the Act, has continuing effects, the past discharge is not sufficient to confer jurisdiction to a court. *Hamker*, 756 F.2d at 397. In addition, the Fifth Circuit supported its interpretation of § 505(a) by noting that Congress wrote § 505(a) in the present tense. *Id.* The court, therefore, reasoned that Congress intended § 505(a) to apply to current violations rather than past violations. *Id.*

In addition to the language of § 505 of the Clean Water Act, the *Hamker* court supported its interpretation of § 505 by noting that the Clean Water Act grants to the EPA and the states the primary responsibility to enforce the Act. *Id.* at 395; *see* 33 U.S.C. § 1319 (1982) (containing government enforcement provision of Clean Water Act). Accordingly, the Fifth Circuit noted that § 505 confers secondary powers to citizen-plaintiffs to enforce the Clean Water Act. *Hamker*, 756 F.2d at 396. To support the court's conclusion that the Act confers to the EPA and the states the primary responsibility to enforce the Clean Water Act, the Fifth Circuit reasoned that Congress included the 60 day notice provision in § 505 to give the EPA and state governments an opportunity to act first and thus ensure that citizen suits only would supplement the EPA's and states' enforcement powers. *Id.*

In addition, the Fifth Circuit in *Hamker* based its holding on the court's concern that a broader construction of the Act would burden federal courts. *Id.* at 396. The Fifth Circuit stated that if a court had jurisdiction to hear the citizen suits in which a citizen-plaintiff alleged that a defendant committed a past violation, the courts would be overburdened with cases. *Id.* Moreover, the Fifth Circuit reasoned that citizen-plaintiffs would attach pendent

the Fourth Circuit, held that a citizen-plaintiff may file suit against a defendant for any violation that occurred before the citizen-plaintiff filed suit (wholly past violations).[14] Finally other courts held that a citizen-plaintiff

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state claims to claims under the Clean Water Act, which the citizen-plaintiffs could not otherwise bring in federal court. *Id.* In addition, the *Hamker* court found that the legislative history of the Clean Water Act indicates that Congress drafted the provisions of § 505 of the Clean Water Act to avoid burdening federal courts. *Id.*

14. *See* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 313 (4th Cir. 1986) (holding that courts have jurisdiction to hear citizen suits under Clean Water Act for wholly past violations), *vacated*, 108 S. Ct. 376 (1987); Student Public Interest Research Group of New Jersey v. AT & T Bell Labs., 617 F. Supp. 1190, 1199 (D. N.J. 1985) (same). Some jurisdictions held that a citizen-plaintiff may file suit against a defendant for any violation that occurred before the citizen-plaintiff filed suit (wholly past violation). *See Gwaltney*, 791 F.2d at 313 (holding that courts have jurisdiction to hear citizen suits under Clean Water Act for wholly past violations). For example, in *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* the United States Court of Appeals for the Fourth Circuit held that courts have jurisdiction to hear citizen suits under the Clean Water Act based on wholly past violations. *Id.*; *see infra* notes 22-27 and accompanying text (describing facts of *Gwaltney* case). In affirming the decision and reasoning of the district court, the Fourth Circuit stated that the language and legislative history of the Clean Water Act, particularly the purpose of § 505 of the Act, authorized citizen-plaintiffs to maintain suits against alleged violators of the Clean Water Act for wholly past violations. *Id.* at 308-313; *see infra* notes 30-39 and accompanying text (discussing district court opinion in *Gwaltney*). In construing the language of § 505 of the Clean Water Act, the court noted that Congress drafted the language of the citizen suit provision in the present tense. *Gwaltney*, 791 F.2d at 309; *see* 33 U.S.C. § 1365(a) (1982) (providing for citizen suit provision in Clean Water Act). The *Gwaltney* court further recognized that, while Congress also wrote the EPA and state enforcement provisions in the present tense, no court had questioned the power of the EPA and states to sue for past violations under the Clean Water Act. *Gwaltney*, 791 F.2d at 309; *see supra* note 3 and accompanying text (describing EPA and state enforcement provisions under Clean Water Act). The Fourth Circuit stated that the enforcement powers of citizen-plaintiffs must be equivalent to the enforcement powers of the government. *Gwaltney*, 791 F.2d at 310. Thus, the court reasoned that permit holders would lose any incentive to comply with the Act if the Act did not confer enforcement abilities to citizen-plaintiffs that were equivalent to the enforcement powers of the government. *Id.* The *Gwaltney* court also reasoned that certain provisions of § 505 explicitly place restrictions on a citizen-plaintiff's ability to file citizen suits. *Id.* at 310. For instance, the court noted that the 60 day notice provision restricts a citizen-plaintiff from filing suit until after the citizen-plaintiff has given a defendant notice. *Id.*; *see supra* note 10 and accompanying text (discussing requirements and legislative history of 60 day notice provision). The court also noted that the Act disallows citizens from suing alleged violators of the Act if the EPA or state actively are enforcing the Clean Water Act against the violator. *Gwaltney*, 791 F.2d at 310; *see supra* note 10 and accompanying text (discussing § 505(b)(2) of Act, which prevents citizens from suing violators if EPA and states are diligently enforcing Act). Based on the restrictions on citizen suits under § 505, the court construed § 505 to confer jurisdiction to courts to hear citizen suits unless the Act expressly forbids a court to hear citizen suits. *Gwaltney*, 791 F.2d at 310. The Fourth Circuit, therefore, concluded that Congress intended to permit citizen suits for wholly past violations because § 505 does not contain any provisions that forbid citizen-plaintiffs from suing defendants for wholly past violations. *Id.*

In addition to construing the language of the Act, the Fourth Circuit in *Gwaltney* also examined the legislative history of the Clean Water Act. *Id.* at 311-12. While the court concluded that the legislative history does not conclusively support whether a district court has jurisdiction to hear citizen suits for either wholly past violations or violations that exist

may file suit against a defendant by alleging that the defendant was committing an ongoing violation of the Act.[15] The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*[16] resolved the discord among the courts and held that courts have jurisdiction to hear

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at the time a plaintiff filed suit, the court noted statements in the legislative history that permit citizen suits for wholly past violations. *Id.* Specifically, the Fourth Circuit relied on a statement that Senator Muskie made to Congress. *Id.* at 312; *see supra* note 10 (discussing Senator Muskie's statement to Congress concerning when citizens may sue violators of Clean Water Act). The *Gwaltney* court interpreted the statement of Senator Muskie to support the court's construction of § 505(a) that allows courts to hear citizen suits for wholly past violations. *Gwaltney*, 791 F.2d at 312. The Fourth Circuit also specifically rejected the interpretation of other jurisdictions that § 505(a) only permits citizen suits when a defendant is violating the Act at the time the plaintiff files suit. *Id.*; *see supra* note 13 (discussing Fifth Circuit's interpretation in *Hamker* case). Finally, because the Fourth Circuit held that § 505(a) confers jurisdiction to district courts to hear suits for wholly past violations, the Fourth Circuit found no reason to rule on the alternative holding that plaintiffs-appellees had alleged in good faith a continuing violation. *Gwaltney*, 791 F.2d at 308 n.9. The Fourth Circuit in *Gwaltney*, therefore, affirmed the decision of the district court and penalized the defendant-appellant for wholly past violations. *Id.* at 316-317.

15. *See* Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986) (holding that citizen-plaintiff must allege ongoing violation of Clean Water Act by defendant for court to have jurisdiction), *cert. denied*, 108 S. Ct. 484 (1987); Moreco Energy, Inc. v. Penberthy-Houdaille, 682 F. Supp. 931, 933 (N.D. Ill. 1987) (same). Other jurisdictions held that a citizen-plaintiff must allege that the defendant is committing an ongoing violation of the Act. *See Pawtuxet*, 807 F.2d at 1094 (holding that citizen-plaintiff must allege ongoing violation of Clean Water Act for court to have jurisdiction). For example, in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.* the United States Court of Appeals for the First Circuit held that a citizen-plaintiff must allege that a likelihood exists that a defendant will continue to violate the Clean Water Act to confer jurisdiction to a court to hear the case. *Id.* In *Pawtuxet* the defendant was a holder of a NPDES permit. *Id.* at 1090-91. The plaintiff alleged that the defendant had discharged excessive pollutants into a river violating the defendant's NPDES permit. *Id.* at 1091. The defendant contended that if the defendant had violated the Act, the violations took place before the plaintiff filed suit. *Id.* The defendant further contended that the Clean Water Act did not authorize citizen suits based on wholly past violations. *Id.* at 1092. The defendant, therefore, contended that the court had no jurisdiction to hear the suit because all of the defendant's violations occurred before the plaintiff filed suit. *Id.*

On appeal from the United States District Court for the District of Rhode Island, the First Circuit in *Pawtuxet* found that § 505(a) of the Clean Water Act does not authorize citizen suits in which a citizen-plaintiff only alleges wholly past violations. *Id.*; *see* 33 U.S.C. § 1365(a) (1982) (providing for citizen suit provision in Clean Water Act). The First Circuit interpreted § 505(a) of the Clean Water Act to confer subject matter jurisdiction to a court if the citizen-plaintiff alleges that the defendant committed an ongoing violation. *Pawtuxet*, 807 F.2d at 1094. In so construing the Act, the First Circuit noted that the 60 day notice provision in § 505(b) makes filing suit on the day of defendant's violation impossible for plaintiffs. *Id.* at 1093. Accordingly, the First Circuit reasoned that § 505(a) of the Clean Water Act authorizes citizen suits if a defendant currently is violating the Clean Water Act, or if a citizen-plaintiff reasonably believes that a defendant would continue to violate the Act in the future. *Id.* at 1094. Moreover, the court stated that a court has jurisdiction to hear a suit if a citizen-plaintiff alleges an ongoing violation, even though a current violation does not exist at the time the citizen-plaintiff files suit. *Id.* In *Pawtuxet* the court found that no likelihood remained that violations would continue because the defendant had connected to a municipal waste system and was no longer discharging directly into the river. *Id.*

16. 108 S. Ct. 376 (1987).

citizen suits if the citizen-plaintiff alleges that the defendant is committing an ongoing violation of the Act.[17] The Supreme Court defined an ongoing violation as either a continuing or intermittent violation and stated that a court has jurisdiction to hear citizen suits even if no violation occurs on the date the citizen-plaintiff files suit.[18] While the Supreme Court's holding resolved the courts' conflicting interpretations of section 505(a), the language of the *Gwaltney* opinion has created uncertainty for other courts in implementing the holding.[19] As a result of the Supreme Court's decision, courts must decide whether to award penalties for precomplaint violations to a citizen-plaintiff who shows an ongoing violation within the meaning of *Gwaltney*.[20] In addition, courts must struggle with the *Gwaltney* decision in determining when an intermittent violation ceases to be intermittent and becomes a wholly past violation.[21]

In *Gwaltney* the Chesapeake Bay Foundation and National Resources Defense Council (plaintiffs or appellees or respondents) filed suit against Gwaltney of Smithfield (defendant or appellant or petitioner) in 1984 for violating the conditions of the defendant's NPDES permit.[22] The Common-

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17. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 381 (1987) (holding that citizen-plaintiffs must allege ongoing violation for courts to have jurisdiction under § 505 of Clean Water Act); *supra* notes 11-15 and accompanying text (discussing split among jurisdictions in construing § 505(a) of Clean Water Act); *infra* notes 41-62 and accompanying text (discussing *Gwaltney* Supreme Court decision). *See generally* Clearwater & DuBoff, *Arguing for the Defense After Gwaltney*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10123 (April 1988) (discussing effect of *Gwaltney* decision on citizen suits under Clean Water Act); Miller, *Invitation to the Dance of Litigation*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10098 (March 1988) (analyzing Supreme Court's *Gwaltney* decision); Powers, *A Citizen's View of Gwaltney*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10119 (April 1988) (discussing effect of *Gwaltney* decision on citizen suits under Clean Water Act).

18. *Gwaltney*, 108 S. Ct. at 381; *see infra* notes 47-48 and accompanying text (discussing *Gwaltney* Supreme Court's explanation of continuing and intermittent violations).

19. *See Gwaltney*, 108 S. Ct. at 381 (holding that citizen-plaintiff must allege ongoing violation for courts to have jurisdiction under § 505 of Clean Water Act); *supra* notes 11-15 and accompanying text (describing split among jurisdictions in construing § 505 of Clean Water Act); *infra* notes 64-107 and accompanying text (discussing new problems for courts to address because of *Gwaltney* holding).

20. *See infra* notes 65-89 and accompanying text (analyzing appropriateness of penalties for precomplaint violations and manner in which courts have resolved this issue).

21. *See infra* notes 94-107 and accompanying text (discussing factors courts have delineated to determine when intermittent violation ceases to be intermittent violation and becomes wholly past violation).

22. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1544 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987). In *Gwaltney* the Chesapeake Bay Foundation and the Natural Resources Defense Council (the plaintiffs or appellees or respondents), nonprofit organizations that are committed to protecting natural resources, filed suit against Gwaltney of Smithfield, Ltd. (the defendant or appellant or petitioner) for violating a National Pollution Discharge Elimination System (NPDES) permit. *Id.* at 1544. The Chesapeake Bay Foundation is a regional organization with more than 19,000 of its members residing in the Chesapeake Bay Area of Virginia and Maryland. *Id.* The Natural Resources Defense Council is a national organization with over 800 of the Natural Resource Defense Council members residing in Virginia. *Id.*

wealth of Virginia had granted a permit to the defendant authorizing the defendant to discharge treated waste from a Virginia meat processing plant into the Pagan River.[23] The permit established effluent limitations and required the defendant to maintain records and to file monthly DMRs with the Commonwealth of Virginia.[24] Despite the requirements of the permit, the defendant repeatedly violated the permit during a four year period.[25] Throughout the four year period, the defendant, in an effort to comply with the requirements of the permit, installed new equipment that reduced the defendant's violations of the NPDES permit.[26] The defendant's last recorded violation occurred in May 1984, one month before plaintiffs filed suit against the defendant.[27]

In June 1984 plaintiffs filed suit in the United States District Court for the Eastern District of Virginia.[28] The plaintiffs alleged that the defendant had violated the NPDES permit and would continue to violate the NPDES permit after the plaintiffs filed suit.[29] Relying on DMRs that evidenced past

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23. *Id.* The defendant in *Gwaltney*, Gwaltney of Smithfield Ltd., discharged treated waste from a meat processing plant it purchased from ITT-Continental Baking Co. in 1981. *Id.* In acquiring the plant, the defendant assumed all of the obligations under the NPDES permit of ITT-Continental Baking Co. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 306 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987); *see supra* notes 4-8 and accompanying text (describing NPDES permit program). At the time the defendant in *Gwaltney* purchased the plant from ITT-Continental Baking Co., the defendant knew that the plant had a long history of violating the NPDES permit. *Gwaltney*, 611 F. Supp. at 1545.

24. *Gwaltney*, 611 F. Supp. at 1544-1545.

25. *Id.* at 1545. In *Gwaltney* the defendant repeatedly violated the limitations set forth in the NPDES permit. *Id.* For example, the defendant violated the total Kjeldahl nitrogen (TKN) limitation 87 times, the chlorine limitation 34 times, and the fecal coliform limitation 31 times during a four year period. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 378 (1987).

26. *Gwaltney*, 108 S. Ct. at 379. In *Gwaltney* the defendant in March 1982 upgraded the chlorination system for the plant in an effort to comply with the NPDES permit effluent limitations. *Id.* In addition, the defendant installed a new waste water treatment system in October 1983. *Id.* By installing new equipment, the defendant reduced and eventually eliminated all violations of defendant's NPDES permit. *Id.* at 379.

27. *Id.* In *Gwaltney* the defendant's efforts to comply with the effluent limitations in the defendant's NPDES permit resulted in the last violation of the permit occurring in May 1984, one month before the plaintiffs filed suit. *Id.* Specifically, the defendant's efforts to comply with the permit resulted in the last chlorine violation occurring in October 1982, the last fecal coliform violation occurring in February 1984, and the last TKN violation occurring in May 1984. *Id.* The defendant, therefore, did not violate the NPDES permit at the time or after the plaintiffs filed suit. *Id.* at 379.

28. *Id.* at 380. Before filing suit in the United States District Court for the Eastern District of Virginia in June 1984, the plaintiffs in *Gwaltney* sent notice in February 1984 to the defendant of the plaintiffs' intent to file suit against defendant for allegedly violating the NPDES permit. *Id.* at 379. In addition, the plaintiffs sent notice to the EPA and the state of Virginia. *Id.*; *see supra* note 10 and accompanying text (discussing requirements and legislative history of notice provision in § 505(b) of Clean Water Act).

29. *Gwaltney*, 108 S. Ct. at 380. Although the plaintiffs in *Gwaltney* alleged that the defendant had violated and would continue to violate the permit, the plaintiffs limited the allegations in the complaint to the violations that the defendant was allegedly responsible for

violations of the permit by the defendant,[30] the district court granted partial summary judgment for the plaintiffs.[31] After the court granted summary judgement, but before the trial to decide a remedy for the defendant's violations, the defendant filed a motion to dismiss the action, alleging that the court lacked jurisdiction to hear the case.[32] The defendant argued that the language of the Clean Water Act prevented a citizen-plaintiff from filing suit under the Act unless the defendant was violating the Act at the time the citizen-plaintiff filed the suit.[33] The defendant reasoned that the court lacked jurisdiction because the defendant's last violation had occurred a month before the plaintiffs filed suit.[34] On the other hand, the plaintiffs contended that the Clean Water Act permits citizen-plaintiffs to maintain a suit even though the defendant was not violating the Act at the time the citizen-plaintiffs filed suit.[35] Having reviewed the motions of the defendant and the plaintiffs, the district court in *Gwaltney* held that section 505(a) of the Clean Water Act does not require a citizen-plaintiff to allege that a defendant is violating the Act at the time the plaintiff files suit.[36] The court concluded that citizen-plaintiffs may maintain suits for wholly past violations.[37] In the alternative, the district court noted that even if section 505(a)

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after the defendant acquired the plant. *Gwaltney*, 611 F. Supp. at 1545; *see supra* note 23 and accompanying text (stating that ITT-Continental Baking Co. had history of violating NPDES permit before defendant acquired plant and assumed obligations under permit).

30. *Gwaltney*, 611 F. Supp. at 1545. The district court in *Gwaltney* granted partial summary judgment based on the defendant's numerous violations of the NPDES permit. *Id.* at 1544. The defendant violated substantive effluent limitations, which the defendant reported in the defendant's DMRs. *Id.* at 1544-45. The DMRs contained results of the defendant's testing, which indicated that the defendant had not complied with the permit and, therefore, violated the Act. *Id.* at 1545; *see supra* note 8 and accompanying text (stating that when permit holder violates permit, permit holder violates Clean Water Act).

31. *Id.* at 1544.

32. *Id.*

33. *Id.* at 1547.

34. *Id.*; *see supra* note 13 and accompanying text (discussing jurisdictions that held that § 505 of Clean Water Act requires defendant to be violating Act at time citizen-plaintiff files suit).

35. *Gwaltney*, 611 F. Supp at 1547; *see supra* note 14 and accompanying text (discussing cases that held that § 505 of Clean Water Act permits citizen suits when citizen-plaintiff alleges that defendant committed any past or present violation of Act).

36. *Gwaltney*, 611 F. Supp. at 1550; *see* 33 U.S.C. § 1365(a) (1982) (containing section 505(a), citizen suit provision of Clean Water Act).

37. *Gwaltney*, 611 F. Supp. at 1550. In ruling on the motions of the plaintiffs and defendant in *Gwaltney*, the district court reasoned that the language of § 505 of the Clean Water Act confers jurisdiction to courts to hear citizen suits for wholly past violations. *Id.* at 1547-1548; *see* 33 U.S.C. § 1365(a) (1982) (providing for citizen suit provision in Clean Water Act). While noting that the language of § 505 is ambiguous, the court reasoned that a violator of the Clean Water Act is similar to a taxpayer who fails to pay the full amount of his taxes. *Gwaltney*, 611 F. Supp. at 1547. The court reasoned that a person who does not pay the full amount of his taxes remains in violation of the law even though the person pays the full amount of his taxes the next year. *Id.* Accordingly, the court reasoned that a defendant who violates the Clean Water Act remains in violation of the Act even though the defendant later takes corrective measures to ensure that the defendant complies with the Act in the future.

of the Clean Water Act required citizen-plaintiffs to allege a current violation, the plaintiffs in *Gwaltney* sufficiently had alleged in good faith that the defendant remained in violation of the Act at the time the plaintiffs filed the suit.[38] Having found that the district court had jurisdiction, the district court assessed the defendant with penalties of $1,285,322.[39] On appeal the United States Court of Appeals for the Fourth Circuit affirmed the decision and adopted the reasoning of the district court.[40]

Because the Fourth Circuit's decision in *Gwaltney* represented one of three interpretations courts had given section 505(a) of the Clean Water Act, the Supreme Court granted certiorari to determine when a court has jurisdiction to hear a citizen suit under the Act.[41] In vacating the decision of the Fourth Circuit, the Supreme Court considered the language of section 505(a).[42] The Court noted that section 505(a) does not precisely state whether a citizen-plaintiff can file suit only against a defendant that is violating the Act simultaneously with the filing.[43] The Supreme Court, however, reasoned that despite the ambiguity of the Act, the most reasonable interpretation of

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Id. at 1547; *see* Student Public Interest Research Group of New Jersey v. AT & T Bell Labs., 617 F. Supp. 1190, 1195 (D. N.J. 1985) (holding that violating Clean Water Act continues past date of occurrence).

In addition to construing the language of the Act, the *Gwaltney* district court found that the legislative history of the Clean Water Act supported the court's holding. *Gwaltney*, 611 F. Supp. at 1548-49. The district court noted that a statement which Senator Muskie made supported the court's holding. *Id.* at 1548; *see supra* note 10 (describing statement of Senator Muskie that indicates extent of jurisdictional grant of § 505 of Clean Water Act). The court found Senator Muskie's reference to past violations as continuous, occasional or sporadic in nature indicative of Congress' intent that courts have jurisdiction to hear citizen suits under § 505 of the Clean Water Act for wholly past violations. *Gwaltney*, 611 F. Supp. at 1548.

Moreover, in construing the Act and interpreting the legislative history, the district court noted that it could not practically hold that citizen-plaintiffs must file suit while the defendant is violating the Act. *Id.* at 1549. The court reasoned that citizen-plaintiffs rely on the DMRs to decide whether a defendant is violating the Act and to file a citizen suit. *Id.* In addition, the district court noted that citizen-plaintiffs do not have access to DMRs until at least a month after a defendant discharges pollutants into a waterway. *Id.* Accordingly, the court found that citizen-plaintiffs would find citizen suits impossible to file if § 505 only conferred jurisdiction to a court when a defendant is violating the Act at the time a citizen-plaintiff files suit. *Id.* Thus, the district court held that courts have jurisdiction to hear citizen suits based on wholly past violations because to hold otherwise would undermine the supplemental enforcement powers of citizen-plaintiffs under § 505(a). *Id.*

38. *Gwaltney*, 611 F. Supp. at 1549 n.8.

39. *Id.* at 1565; *see infra* note 71 and accompanying text (describing penalty provisions of Clean Water Act).

40. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 316-317 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987); *see supra* note 14 (citing cases holding in accord with district court in *Gwaltney* and discussing Fourth Circuit's decision in *Gwaltney*).

41. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 381 (1987); *see supra* notes 11-15 and accompanying text (discussing split among jurisdictions in construing § 505 of Clean Water Act).

42. *Gwaltney*, 108 S. Ct. at 381-383; *see* 33 U.S.C. § 1365(a) (1982) (providing for citizen suit provision in Clean Water Act).

43. *Id.* at 381; *see supra* note 9 (quoting language of § 505(a)).

the Act indicates that section 505(a) does not confer jurisdiction to a court unless a defendant is violating the Act at the time a citizen-plaintiff files suit.[44] In so construing the Act, the *Gwaltney* Court also reasoned that Congress' pervasive use of the present tense in section 505 indicated that Congress intended the citizen suit provision to apply to present and future violations rather than wholly past violations.[45] The Court stated that the language of section 505(a) only requires a citizen-plaintiff to allege that a defendant is committing an ongoing violation at the time a citizen-plaintiff files suit for the defendant to violate the Act.[46] The Court explained that

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44. *Gwaltney*, 108 S. Ct. at 381. In *Gwaltney* the Supreme Court held that the most reasonable interpretation of the Clean Water Act indicates that a defendant must be violating the Act at the time a citizen-plaintiff files suit for a court to have jurisdiction to hear a citizen suit. *Id.* First, the Court reasoned that if Congress had intended the Clean Water Act to allow citizen-plaintiffs to sue for wholly past violations, Congress would have used different language in § 505. *Id.*; *see supra* note 9 and accompanying text (quoting language of § 505(a) of Clean Water Act). The Court further noted that Congress used the present tense throughout § 505 of the Clean Water Act. *Gwaltney*, 108 S. Ct. at 382. For example, the Court referred to the phrase, "which *is* in effect", that Congress included in § 505(f)'s requirement that citizens only may bring suit for violations of a permit limitation. *Id.* (emphasis added). In addition, the Supreme Court noted that Congress included the most pervasive use of the present tense in § 505(g)'s definition of citizen. *Id.* In § 505(g), Congress defined citizen as "a person . . . *having* an interest which *is* or *may be* adversely affected." *Id.* (emphasis added). The *Gwaltney* Court interpreted Congress' use of the present tense as indicative of Congress' intent that § 505(a) of the Clean Water Act apply to present and future violations rather than past violations. *Id.* Second, the Supreme Court noted that the Clean Air Act and Resource Conservation and Recovery Act contain the identical "to be in violation" language found in the Clean Water Act. *Id*; *see* 42 U.S.C. § 6972 (1982 & Supp. IV 1986) (Resource Conservation and Recovery Act of 1976); 42 U.S.C. § 7604 (1982) (Clean Air Act). The *Gwaltney* Court stated that the Clean Air Act and the Resource Conservation and Recovery Act only provide for prospective relief. *Gwaltney*, 108 S. Ct. at 381. The *Gwaltney* Court, therefore, reasoned that the Clean Water Act only provides prospective relief. *Id.* at 382. Third, the Court noted that in the most recent amendments to the Clean Water Act, Congress did not amend § 505 to allow citizen-plaintiffs to sue for past violations. *Id.* at 381 n.2. The Court interpreted Congress' failure to amend § 505 to support the Court's finding that § 505 allows prospective relief in citizen suits under the Clean Water Act. *Id.*; *see* Water Quality Act of 1987, Pub. L. No. 100-4, § 314, 101 Stat. 46, 46-48, codified as amended in scattered sections of 33 U.S.C.A. §§ 1251-1376 (1986 & West Supp. 1988) (amending §§ of Clean Water Act, but leaving citizen suit provision in § 505 undisturbed). Fourth, the Supreme Court noted that the Solid Waste Disposal Act (Waste Disposal Act) expressly allows citizen-plaintiffs to sue for past violations of the Act. *Gwaltney*, 108 S. Ct. at 381 n.2; *see* 42 U.S.C. §6972(a)(1)(B) (1982 & Supp. IV 1986) (Solid Waste Disposal Act) (allowing citizen-plaintiffs to sue defendants for past violations). The *Gwaltney* Court reasoned that if Congress wants citizens to have the power to sue for past violations, Congress will provide explicit language in the statute. *Gwaltney*, 108 S. Ct. at 381. The Court, therefore, reasoned that § 505(a) of the Clean Water Act did not provide courts with jurisdiction to hear citizen suits based on wholly past violations. *Id.*

45. *See supra* note 44 (discussing *Gwaltney* Court's analysis of Congress' use of present tense throughout § 505 of Clean Water Act).

46. *Gwaltney*, 108 S. Ct. at 381. In addition to the language in § 505(a) of the Clean Water Act, the Supreme Court also relied on the interrelationship between § 309 and § 505 in interpreting the jurisdictional grant in § 505(a) of the Clean Water Act. *Id.* at 382; *see infra* notes 69-77 and accompanying text (discussing *Gwaltney* Supreme Court's analysis of interrelationship between §§ 309(d) and 505(a) of Clean Water Act).

ongoing violations consist of either continuing or intermittent violations.[47] The Supreme Court, therefore, reasoned that a plaintiff must show the existence of a continuing or intermittent violation to establish that a defendant is violating the Act at the time a citizen-plaintiff files suit.[48]

In holding that a citizen-plaintiff must allege an ongoing violation of the Clean Water Act when filing suit against a defendant, the Supreme Court in *Gwaltney* also relied on the sixty day notice provision in section 505(b) of the Clean Water Act.[49] The Court noted that section 505(b) requires a citizen-plaintiff to give a defendant sixty days notice of the alleged violations before filing suit.[50] The Court reasoned that the sixty day notice would be useless if a citizen-plaintiff could sue for any past violation.[51] Accordingly, the *Gwaltney* Court stated that the purpose of the sixty day notice provision is to provide alleged violators with the opportunity to comply with the requirements of the Act and avoid needless suits.[52] The *Gwaltney* Court, therefore, concluded that the sixty day notice provision indicates Congress' intent that section 505(a) of the Clean Water Act only permit citizen-plaintiffs to sue defendants for ongoing violations rather than wholly past violations.[53]

In addition to construing the language of the Clean Water Act, the *Gwaltney* Supreme Court stated that the legislative history of the Act supported the Court's interpretation of section 505(a).[54] The Court noted that the Act's legislative history indicates that Congress included the citizen suit provision in section 505(a) to reduce or eliminate violations of the Act.[55] The *Gwaltney* Court implied that because a court cannot abate a wholly

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

48. *Id.* at 385.

49. *Id.* at 382-83; *see* 33 U.S.C. § 1365(b) (1982) (section 505(b) of Clean Water Act).

50. *Gwaltney*, 108 S. Ct. at 382.

51. *Id.*

52. *Id.* at 383. *Contra* Miller, *supra* note 17, at 10101 (proposing different purposes for 60 day notice provision). While the Supreme Court finds that the purpose of the 60 day notice is to allow violators an opportunity to bring themselves into complete compliance with the Act and avoid needless suits, one commentator argues that the notice provision serves other purposes. *See Gwaltney*, 108 S. Ct. at 382-83 (discussing Court's interpretation of purpose of 60 day notice provision of Clean Water Act). *But see* Miller, *supra* note 17, at 10101 (discussing commentator's interpretation of purposes of 60 day notice provision). The commentator proposes two alternative purposes of the 60 day notice provision. Miller, *supra* note 17, at 10101. First, the commentator proposes that the purpose of the 60 day notice provision is to allow a defendant the opportunity to convince a citizen-plaintiff that a lawsuit is unjustified. *Id.* Second, the commentator proposes that the purpose of the 60 day notice provision is to allow a defendant an opportunity to negotiate with a citizen-plaintiff to settle the issue and avoid a lawsuit. *Id.*

53. *Gwaltney*, 108 S. Ct. at 382-383.

54. *Id.* at 383-384; *see supra* note 9 (discussing legislative history of § 505 of Clean Water Act); *supra* notes 42-46 and accompanying text (noting *Gwaltney* Court's discussion of language of Clean Water Act); *infra* notes 54-58 and accompanying text (noting *Gwaltney* Court's discussion of legislative history of Clean Water Act).

55. *Gwaltney*, 108 S. Ct. at 383; *see supra* note 9 (discussing legislative history of citizen suit provision of § 505 of Clean Water Act).

past violation, the legislative history supported the Court's interpretation of section 505(a) of the Clean Water Act requiring citizen-plaintiffs to allege an ongoing violation of the Act.[56] Moreover, the Court stated that the references in the legislative history to the role of citizen-plaintiffs in enforcing the Act as supplemental to the federal and state enforcement role supported the Court's interpreting section 505(a) to disallow citizen suits for wholly past violations.[57] The Supreme Court reasoned that if citizen-plaintiffs could sue for wholly past violations, citizen suits would intrude upon the governmental enforcement role and violate Congress' intent.[58]

The Supreme Court stated that a court has jurisdiction to hear a citizen suit so long as a citizen-plaintiff in good faith alleges that a defendant's violations of the Clean Water Act occurred on or would likely continue beyond the date the citizen-plaintiff filed suit.[59] The Court noted that the "good-faith allegation" standard enables citizen-plaintiffs to file suit without first proving the ongoing violation.[60] While noting that the Act protects defendants from baseless claims, the Court stated that once a citizen suit goes to trial, the citizen-plaintiff must prove the allegations in the citizen-plaintiff's complaint to prevail.[61] Because the Fourth Circuit in *Gwaltney* had not ruled on the district court's alternative finding that the plaintiffs had alleged in good-faith that the defendant was committing an ongoing violation of the Clean Water Act, the Supreme Court remanded the case to the Fourth Circuit to decide whether the plaintiffs had proven an ongoing violation of the Act.[62]

In holding that a citizen-plaintiff must allege in good faith an ongoing violation of the Clean Water Act for a court to have jurisdiction, the

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56. *Gwaltney*, 108 S. Ct. at 383.

57. *Id.* at 383; *see supra* note 10 (discussing legislative history of notice requirement of citizen suit provision in § 505 of Clean Water Act).

58. *Gwaltney*, 108 S. Ct. at 383.

59. *Id.* at 385.

60. *Id.*

61. *Id.* at 385-86. While the majority in the *Gwaltney* case held that citizen-plaintiffs must prove an ongoing violation at trial to succeed on the merits, the *Gwaltney* concurrence disagreed with the majority on when citizen-plaintiffs must prove the existence of ongoing violations. *Id.* at 387 (Scalia, J., concurring). The concurrence stated that the Clean Water Act requires citizen-plaintiffs to provide proof of the existence of an ongoing violation of a defendant before a court has jurisdiction to hear the suit. *Id.* (Scalia, J., concurring). The concurrence interpreted the majority to state that citizen-plaintiffs need not prove the good-faith allegation of an ongoing violation once the court has jurisdiction to hear the case. *Id.* at 386-87. *Contra id.* at 386 (majority rejecting requirement that plaintiffs-respondents prove existence of ongoing violations before invoking jurisdiction and holding that plaintiffs-respondents must prove ongoing violations once case proceeds to trial). Rather, the majority requires the citizen-plaintiff to make a good-faith allegation that the defendant is committing an ongoing violation of the Clean Water Act for a court to have jurisdiction to hear the case. *Id*; *see* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 844 F.2d 170, 171 n. 1 (4th Cir. 1988) (distinguishing majority and concurring opinions in *Gwaltney* Supreme Court case concerning when citizen-plaintiff must prove allegations of ongoing violations).

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

Supreme Court's decision in *Gwaltney* resolved the divergent interpretations of the jurisdictional grant to courts in citizen suits under section 505(a).[63] The Supreme Court's construction of section 505, however, raises at least two issues that the Fourth Circuit and district court on remand in *Gwaltney* have addressed and that other courts have begun to address.[64] In ruling that a citizen-plaintiff must allege an ongoing violation, the *Gwaltney* Supreme Court did not consider whether a court may impose penalties for precomplaint violations if a citizen-plaintiff proves an ongoing violation of the Clean Water Act.[65] The *Gwaltney* case holds that courts lack jurisdiction to hear citizen suits for wholly past violations.[66] Accordingly, the language of the Court's opinion indicates that a court cannot award penalties for wholly past violations unconnected to the violation taking place at the time the citizen-plaintiff files suit.[67] Courts, however, remain uncertain whether courts may award penalties for precomplaint violations that comprise the ongoing violation which supported the jurisdiction for the citizen-plaintiff's suit.[68]

In treating section 505(a) as a provision that grants jurisdiction, the Supreme Court in *Gwaltney* seems to imply that once a citizen-plaintiff proves that a defendant committed an ongoing violation of the Clean Water Act a court may award penalties for precomplaint violations comprising the ongoing violation.[69] The Supreme Court construed the remedies clause in

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63. *See supra* notes 11-15 and accompanying text (discussing split among jurisdictions in construing § 505 of Clean Water Act); *supra* notes 42-62 and accompanying text (discussing holding of Supreme Court in *Gwaltney*).

64. *See Gwaltney*, 108 S. Ct. at 381 (holding that citizen-plaintiffs must allege ongoing violation for courts to have jurisdiction under § 505); *infra* notes 65-107 and accompanying text (discussing issues of penalties for precomplaint violations and when intermittent violations cease to be intermittent).

65. *See Gwaltney*, 108 S. Ct. at 385 (holding that citizen-plaintiffs must allege ongoing violation for courts to have jurisdiction under Clean Water Act); *infra* notes 65-89 and accompanying text (discussing appropriateness of awarding penalties for precomplaint violations of Clean Water Act).

66. *See supra* notes 42-61 and accompanying text (discussing *Gwaltney* holding that citizen-plaintiffs must allege ongoing violation and not wholly past violation for courts to have jurisdiction under § 505 of Clean Water Act).

67. *See supra* notes 42-61 and accompanying text (discussing *Gwaltney* holding that citizen-plaintiffs must allege ongoing violation for courts to have jurisdiction under § 505 of Clean Water Act).

68. *See supra* notes 65-67 and accompanying text (discussing appropriateness of courts awarding penalties for precomplaint violations in citizen suits under Clean Water Act after *Gwaltney* decision); *infra* notes 69-89 and accompanying text (same); *infra* note 69 (discussing Public Interest Research Group of New Jersey v. Carter-Wallace, which held that courts may award penalties for precomplaint violations in citizen suits under Clean Water Act).

69. *See supra* notes 42-48 and accompanying text (discussing *Gwaltney* Supreme Court's analysis of jurisdictional grant to citizen plaintiffs under § 505 of Clean Water Act). *But see* Clearwater & DuBoff, *supra* note 17, at 10125 (interpreting *Gwaltney* decision to disallow civil penalties unless injunction is also granted). *See also* Public Interest Research Group of New Jersey v. Carter-Wallace, Inc., 684 F. Supp. 115, 118 (D. N.J. 1988) (holding that courts may award penalties for precomplaint violations in citizen suits under Clean Water Act). For

section 309(d) of the Clean Water Act with section 505(a), which grants

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example, in *Public Interest Research Group of New Jersey v. Carter-Wallace* the defendant operated a plant that discharged pollutants into a brook under a NPDES permit. *Carter-Wallace*, 684 F. Supp. at 116. The plaintiffs filed suit in the United States District Court for New Jersey and alleged that the defendant had violated and was continuing to violate the effluent limitations in the defendant's NPDES permit. *Id.* The defendant moved for partial summary judgment, alleging that the district court did not have jurisdiction to award penalties for violations of the Clean Water Act that occurred before the plaintiff filed suit. *Id.* at 116-17. The defendant argued that the *Gwaltney* decision had held that a court could only award civil penalties against defendants that are subject to an injunction in citizen suits. *Id.* at 118; *see infra* notes 70-77 and accompanying text (noting *Gwaltney* Court's discussion of interrelationship between jurisdictional provision in § 505(a) and penalty provision in § 309(d)). The defendant reasoned that in *Gwaltney* the Supreme Court had concluded that Congress authorized citizen suits under the Clean Water Act to address present and future violations rather than past violations. *Carter-Wallace*, 684 F. Supp. at 118; *see supra* notes 42-62 and accompanying text (discussing *Gwaltney* Court holding that citizen-plaintiffs must allege ongoing violation rather than wholly past violation for court to have jurisdiction). Accordingly, the defendant argued that penalties for precomplaint violations are not appropriate under the *Gwaltney* holding. *Carter-Wallace*, 684 F. Supp. at 118; *see infra* notes 70-77 and accompanying text (noting *Gwaltney* Court's discussion of interrelationship between jurisdictional provision in § 505(a) and penalty provision in § 309(d)). In addition the defendant noted that the *Gwaltney* Court held that a citizen-plaintiff may seek civil penalties only in suits in which the plaintiff seeks to abate ongoing violations. *Carter-Wallace*, 684 F. Supp. at 118; *see supra* notes 42-62 and accompanying text (discussing *Gwaltney* Court holding that citizen-plaintiffs may file suit only for present and future violations and not wholly past violations). Thus, the defendant reasoned that a court cannot enjoin violations that the defendant committed before the plaintiff filed suit. *Carter-Wallace*, 684 F. Supp. at 118. The defendant, therefore, concluded that a court may award civil penalties only for a defendant's postcomplaint violations. *Id.*

The New Jersey district court dismissed the defendant's motion and held that citizen-plaintiffs may seek civil penalties for precomplaint violations upon showing an ongoing violation. *Id.* at 118-19. Finding that the defendant had misread both the *Gwaltney* decision and the Clean Water Act, the district court stated that *Gwaltney* does not limit a court's authority to award penalties for present and future violations under § 309(d). *Id.*; *see infra* notes 70-81 and accompanying text (discussing *Gwaltney* holding and § 505(a) and § 309(d) of Clean Water Act). The district court noted that § 505(a) of the Clean Water Act only establishes the jurisdictional requirement for filing citizen suits. *Carter-Wallace*, 684 F. Supp. at 118. Once a citizen-plaintiff has satisfied the jurisdictional requirement that citizen-plaintiffs must allege that defendant is committing an ongoing violation of the Act, the district court stated that a court may award any appropriate penalty under section 309(d) of the Clean Water Act. *Id.* The *Carter-Wallace* court also found support for its interpretation of § 309(d) and § 505(a) of the Act from the action of the Supreme Court in remanding the *Gwaltney* case. *Id.* at 119; *see supra* note 62 and accompanying text (stating that Supreme Court remanded *Gwaltney* case to Fourth Circuit); *infra* notes 82-86 and accompanying text (discussing implications of Supreme Court's remand of *Gwaltney* case to Fourth Circuit). The court noted that when the Supreme Court remanded the *Gwaltney* case, the Court was aware that the Fourth Circuit could award civil penalties only for precomplaint violations because the request for injunctive relief was not preserved on appeal. *Carter-Wallace*, 684 F. Supp. at 119; *see infra* notes 83-86 and accompanying text (stating that *Gwaltney* Supreme Court seemed to have been aware that Fourth Circuit on remand could award penalties only for precomplaint violations on remand).

In addition to the statutory language of the Clean Water Act and the Supreme Court's remand of the *Gwaltney* case, the *Carter-Wallace* court noted that the Ninth Circuit had recently decided a case that supported the district court's award of penalties for precomplaint

jurisdiction to courts under the Act and also authorizes a court to grant injunctive relief and award penalties under section 309(d).[70] Section 309(d) of the Clean Water Act permits a court to impose civil penalties of $25,000 per day for each violation of the Act and does not distinguish between precomplaint violations and postcomplaint violations.[71] Under section 505(a), a court may grant an injunction to provide relief even though a defendant is not violating the Clean Water Act at the time a citizen-plaintiff files suit.[72] A grant of injunctive relief is appropriate as long as a realistic possibility remains that a defendant's illegal conduct will continue.[73] A citizen-plaintiff, therefore, may appropriately request a court to grant injunctive relief upon a plaintiff showing that a defendant's ongoing violation continued when the citizen-plaintiff filed suit.[74] In construing section 309

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violations in citizen suits under the Clean Water Act. *Carter-Wallace*, 684 F. Supp. at 119 n.2.; *see* Sierra Club v. Chevron U.S.A., 834 F.2d 1517, 1521 (9th Cir. 1987) (holding that five year statute of limitations applies to citizen suits under Clean Water Act). The *Carter-Wallace* Court noted that the *Chevron* court applied a five year statute of limitations to citizens bringing suit under the Clean Water Act. *Carter-Wallace*, 684 F. Supp. at 119 n.2.; *see Chevron*, 834 F.2d at 1521 (applying five year statute of limitations to citizen suits under Clean Water Act). The *Carter-Wallace* court reasoned that the Ninth Circuit would not have applied a five year statute of limitations if the Clean Water Act did not authorize courts to award penalties for the precomplaint violations that occurred before the five year statutory limitation ran. *Carter-Wallace*, 684 F. Supp. at 119 n.2.; *see Chevron*, 834 F.2d at 1521 (holding that five year statute of limitations applies to citizen suits under Clean Water Act). *But see* Hudson River Fisherman's Ass'n v. County of Westchester, 686 F. Supp. 1044, 1051 n.9. (S.D.N.Y. 1988) (indicating in dicta court's uncertainty that Clean Water Act authorizes courts to award penalties for precomplaint violations).

70. *Gwaltney*, 108 S. Ct. at 381-82; *see supra* note 9 and accompanying text (quoting language of § 505(a) of Clean Water Act); *infra* note 71 and accompanying text (discussing § 309(d) and § 505(a) of Clean Water Act).

71. 33 U.S.C. § 1319(a) (1982). In addition to § 309(d), § 505(a) of the Clean Water Act authorizes a court to award civil penalties and to grant an injunction against a violator of the Act. *Id.* at § 1365(a). Congress amended the Clean Water Act in 1987 by increasing penalties from $10,000 per violation to $25,000 per day for each violation. *See* Water Quality Act of 1987, Pub. L. 100-4, § 314, 101 Stat. 46, 46-48, (codified as amended at 33 U.S.C.A. § 1319(d) (1986 & West Supp. 1988)) (containing 1987 amendments to Clean Water Act). Courts must award any civil penalties imposed against a defendant in a citizen suit to the federal government, rather than the citizen-plaintiff. *See* Sierra Club v. Simkins Indus., 847 F.2d 1109, 1113 (4th Cir. 1988) (stating that defendants in citizen suits pay civil penalties to United States Department of the Treasury); 33 U.S.C. § 1319(d) (1982) (providing penalty provision of Clean Water Act).

72. *See* Board of Public Instruction of Broward County v. Doran, 224 So. 2d. 693, 699-700 (Fla. 1969) (holding that courts may enjoin anticipated future wrongs). *See generally* 43 C.J.S. *Injunctions* § 22 (1978) (stating that injunctive relief is appropriate to prevent future wrongs if court finds that reasonable probability exists that future injury will occur unless court enjoins activity).

73. *See supra* note 72 and accompanying text (discussing appropriateness of injunctive relief when reasonable probability exists of future harm).

74. *See supra* notes 72-73 and accompanying text (stating that injunctions are appropriate when a reasonable probability exists of future harm); *infra* note 91 and accompanying text (stating *Gwaltney* holding that defines ongoing violation of Clean Water Act as reasonable likelihood that violations will continue in future).

together with section 505 of the Clean Water Act, the Supreme Court seems to reason that a citizen-plaintiff may seek penalties only if the citizen-plaintiff's request for injunctive relief is appropriate.[75] The Supreme Court's language in *Gwaltney*, however, does not imply that courts must issue an injunction before they are permitted to assess penalties.[76] Thus, as long as a citizen-plaintiff's injunction request is appropriate when the citizen-plaintiff files suit, a court may apply civil penalties even though the court later decides not to grant an injunction.[77]

In addition to the *Gwaltney* Supreme Court's implicit approval of courts awarding precomplaint penalties, the language of the Clean Water Act supports awarding precomplaint penalties in citizen suits.[78] As a jurisdictional grant, section 505(a) states that once a citizen-plaintiff has established jurisdiction, a court may enforce the requirements of the Act by granting injunctive relief and by applying any civil penalty under section 309(d) of the Clean Water Act.[79] The language of section 309(d) and section 505(a) together impliedly authorize a court to award penalties for precomplaint violations comprising the ongoing violation that supported jurisdiction.[80]

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75. *See Gwaltney*, 108 S. Ct. at 382 (holding that citizen-plaintiffs may seek penalties only in suit brought to enjoin violations); *supra* note 9 and accompanying text (quoting language of § 505(a) of Clean Water Act); *supra* note 71 and accompanying text (discussing § 309(d) of Clean Water Act).

76. *See supra* notes 65-77 and accompanying text (discussing language of *Gwaltney* decision concerning penalties for precomplaint violations in citizen suits under Clean Water Act); *infra* notes 78-81 and accompanying text (analyzing whether § 309(d) and § 505(a) of Clean Water Act authorize penalties for precomplaint violations).

The language that courts have used in the opinions of other cases involving citizen suits under the Clean Water Act also indicates that courts may award penalties for precomplaint violations. *See* Sierra Club v. Union Oil Co., 853 F.2d 667, 671 (9th Cir. 1988) (holding that plaintiff must prove existence of ongoing permit violations or likelihood that defendant would continue to violate the permit before court may assess penalties for past violations); Sierra Club v. Simkins Indus., 847 F.2d 1109, 1115-1116 (4th Cir. 1988) (finding that defendant committed continuing violations, court imposed penalties for precomplaint violations); Sierra Club v. Chevron U.S.A., 834 F.2d 1517, 1521 (9th Cir. 1987) (holding that five year statute of limitations applies to bringing citizen suits under Clean Water Act); *supra* note 69 (discussing *Carter-Wallace* case, which held that courts can award penalties for precomplaint violations in citizen suits under § 505 of Clean Water Act).

77. *See supra* notes 69-76 and accompanying text (discussing appropriateness of penalties for precomplaint violations in citizen suits under § 505(a) of Clean Water Act, even if injunction is no longer appropriate).

78. *See supra* notes 69-77 and accompanying text (discussing how language of *Gwaltney* holding supports awarding penalties for precomplaint violations in § 505(a) citizen suits); *supra* note 71 and accompanying text (discussing penalties provision of Clean Water Act); *infra* notes 79-81 and accompanying text (discussing Clean Water Act's language implying support for awarding penalties for precomplaint violations).

79. *See* 33 U.S.C. § 1365(a) (1982) (section 505 of Clean Water Act grants jurisdiction to courts to hear citizen suits); *supra* note 71 and accompanying text (discussing penalties provision of Clean Water Act).

80. *See* 33 U.S.C. §§ 1319(d), 1365(a) (1982); *supra* notes 78-79 and accompanying text (discussing provisions of Clean Water Act that support courts awarding penalties for precomplaint violations); *infra* note 81 and accompanying text (same).

Construing section 309 and section 505 of the Clean Water Act together to authorize courts to award penalties for precomplaint violations is consistent with the *Gwaltney* Court's holding because the Supreme Court only analyzed section 505 as a jurisdictional grant and did not discuss when a court may award civil penalties.[81]

The Court's remand of *Gwaltney* to the Fourth Circuit seems to suggest that the Court would construe section 309(d) of the Clean Water Act with section 505(a) and uphold penalties for precomplaint violations comprising the ongoing violation.[82] Before the Supreme Court heard the *Gwaltney* case, the district court had imposed penalties against the defendant, but the district court had not issued an injunction against the defendant.[83] Thus, when the Supreme Court remanded the *Gwaltney* case to the Fourth Circuit, the Court appears to have recognized that the Fourth Circuit could award only penalties because the plaintiffs-appellees had not preserved the issue of injunction on appeal.[84] The Fourth Circuit only could award penalties for precomplaint violations because the defendant-appellant's last violation occurred before the plaintiffs-appellees filed suit.[85] Accordingly, the remand action of the Supreme Court in *Gwaltney* suggests that penalties for precomplaint violations are appropriate if a citizen-plaintiff shows that the defendant was committing an ongoing violation at the time the citizen-plaintiff filed suit.[86]

If a court construed section 309(d) to limit penalties to violations occurring on or after the date a citizen-plaintiff files suit, the penalties provision does not seem to provide an incentive for a defendant to comply

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81. *See supra* notes 69-80 and accompanying text (discussing § 309 and § 505 of Clean Water Act and analyzing *Gwaltney* Supreme Court holding, which impliedly supports courts awarding penalties for precomplaint violations).

82. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 386 (1987) (remanding *Gwaltney* case to Fourth Circuit for reconsideration); *supra* note 69 and accompanying text (discussing *Carter-Wallace* case); *infra* notes 83-86 and accompanying text (discussing how Supreme Court's remand of *Gwaltney* case impliedly supports awarding penalties for precomplaint violations).

83. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1565 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 108 S. Ct. 376 (1987); *see supra* note 69 and accompanying text (discussing *Carter-Wallace* case).

84. *See Gwaltney*, 108 S. Ct. at 380 (indicating Supreme Court's awareness in *Gwaltney* of procedural posture and remedy district court granted to plaintiffs in *Gwaltney*); *supra* note 69 and accompanying text (discussing *Carter-Wallace* case).

85. *See Gwaltney*, 108 S. Ct. at 379 (indicating that Supreme Court in *Gwaltney* knew that defendant-petitioner's last violation of Clean Water Act occurred before plaintiffs-respondents filed suit); *supra* note 27 and accompanying text (discussing last violation in *Gwaltney* case, which occurred one month before plaintiffs filed suit); *supra* note 69 and accompanying text (discussing *Carter-Wallace* case).

86. *See Gwaltney*, 108 S. Ct at 386 (remanding of *Gwaltney* case to Fourth Circuit); *supra* note 69 and accompanying text (discussing *Carter-Wallace* case); *supra* notes 82-85 and accompanying text (discussing Supreme Court's remand of *Gwaltney* case); Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 1080 (E.D. Va. 1988) (reinstating on remand in *Gwaltney* previous judgment composed entirely of penalties for precomplaint violations).

with the Act.[87] Accordingly, a defendant could avoid any penalty under the citizen suit provision of the Clean Water Act by complying with the Clean Water Act on the day the citizen-plaintiff files suit.[88] Therefore, for the penalty provision in the Clean Water Act to have any useful purpose in citizen suits, the provision must permit courts to award penalties for precomplaint violations.[89]

In addition to the confusion the Supreme Court's decision has created for courts in deciding whether they may award penalties in citizen suits, a second ambiguity the *Gwaltney* holding has created concerns when an intermittent violation ceases to be intermittent and becomes a wholly past violation.[90] In describing an intermittent violation, the Supreme Court did not explain fully what the Court meant by stating that a citizen-plaintiff establishes an intermittent violation if a reasonable likelihood remains that the defendant will continue to violate the Clean Water Act.[91] The *Gwaltney* Court, however, did state that an intermittent violator is a person who violates the Act once every three months.[92] Accordingly, for a court to know when jurisdiction is proper in a citizen suit, the court must resolve how much time must pass between violations so that a reasonable likelihood of future violations no longer remains and the violation becomes wholly past.[93]

While the Supreme Court did not resolve the question of when an intermittent violation ceases, on remand the Fourth Circuit in *Gwaltney* established guidelines to assist courts in determining when violations constitute ongoing (continuing or intermittent) violations.[94] First, the Fourth

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87. *Cf. supra* notes 49-53 and accompanying text (discussing uselessness of 60 day notice provision if citizen-plaintiffs could sue for wholly past violations).

88. *Cf. supra* notes 49-53 and accompanying text (discussing uselessness of 60 day notice provision if citizen-plaintiffs could sue for wholly past violations).

89. *See supra* notes 87-88 and accompanying text (discussing uselessness of civil penalty provision for citizen suits if courts could not award civil penalties for precomplaint violations); *supra* notes 69-77 and accompanying text (discussing language of Clean Water Act and *Gwaltney* Court's treatment of § 309(d) and § 505(a)).

90. *See Gwaltney*, 108 S. Ct. at 381 (holding that citizen-plaintiffs must allege an ongoing violation of Clean Water Act for courts to have jurisdiction under Clean Water Act); *supra* notes 65-89 and accompanying text (discussing appropriateness of penalties for precomplaint violations under Clean Water Act after *Gwaltney* decision); *infra* notes 94-101 and accompanying text (discussing factors courts have used to decide when intermittent violation ceases to be intermittent and becomes wholly past violation).

91. *See Gwaltney*, 108 S. Ct. at 381 (holding that intermittent violation involves a reasonable likelihood that the violator will continue to violate the Clean Water Act); *supra* notes 46-48 and accompanying text (discussing *Gwaltney* holding that citizen-plaintiffs may show ongoing violation by adducing evidence of either intermittent or continuing violation).

92. *Gwaltney*, 108 S. Ct. at 384.

93. *See infra* notes 94-101 and accompanying text (citing cases that outline factors which indicate when intermittent violation of Clean Water Act ceases and becomes wholly past violation).

94. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 844 F.2d 170, 172 (4th Cir. 1988) (delineating factors for courts to use in determining when intermittent violation

Circuit stated that a citizen-plaintiff may show a continuing violation through evidence that the defendant is violating the Act on or after the day the citizen-plaintiff files suit.[95] Second, the Fourth Circuit stated that a citizen-plaintiff may show an intermittent violation by presenting evidence in which a court could reasonably find that a defendant would continue to violate the Clean Water Act in the future.[96] The Fourth Circuit explained that intermittent violations are ongoing violations until no likelihood remains that the defendant will violate the Act again.[97] The Fourth Circuit further clarified the meaning of intermittent violation by delineating factors for courts to consider in deciding whether an intermittent violation remains at the time a citizen-plaintiff files suit.[98] First, the Fourth Circuit stated that a court should consider the efforts that the violator has taken to correct the problems in the waste treatment system that caused the prior violations.[99] Second, the Fourth Circuit stated that a court should consider the probability that the efforts the violator took to remedy the problems in the system will be effective in preventing future violations.[100] Finally, the Fourth Circuit stated that a court should consider any and all other evidence relevant to

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exists); *infra* notes 95-101 and accompanying text (outlining factors for courts to consider in determining whether intermittent violation exists). Other courts also have adopted the guidelines the Fourth Circuit set forth in *Gwaltney* for determining when an intermittent violation exists. *See* Sierra Club v. Union Oil, 853 F.2d 667, 671 (9th Cir. 1988) (adopting guidelines of Fourth Circuit in *Gwaltney* for determining when intermittent violation exists); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 688 F. Supp. 1078, 1078-1080 (E.D. Va. 1988) (holding of district court on remand in *Gwaltney*, applying and expanding Fourth Circuit's guidelines for determining when intermittent violation exists). For example, the district court in *Gwaltney* on further remand, applied the factors that the Fourth Circuit had delineated on remand in *Gwaltney* for determining when an intermittent violation of the Clean Water Act exists. *Gwaltney*, 688 F. Supp. at 1079. On remand in *Gwaltney*, the district court found that the plaintiffs had proved at trial that the defendant had committed an ongoing violation. *Id.* at 1080. In applying the factors that the Fourth Circuit had set forth in *Gwaltney*, the district court recognized that the defendant had made efforts to correct the problems at the plant. *Id.* at 1079. The court, however, was not convinced of the effectiveness of the defendant's efforts in preventing future violations. *Id.* In concluding that an ongoing violation existed at the time the plaintiffs in *Gwaltney* filed suit, the district court indicated additional factors for courts to apply in deciding when an intermittent violation exists. *Id.* at 1079-1080. First, the district court indicated that courts should consider the number and severity of the defendant's past violations. *Id.* Moreover, the court indicated that courts should consider both the amount of time between each of the violations that took place before plaintiffs filed suit and the amount of time between the defendant's last violation and the day the plaintiffs filed the complaint. *Id.* Second, the district court indicated that courts should consider the capabilities of the defendant's plant and water treatment system to adequately handle the amounts and kinds of waste in the treatment system. *Id.* at 1079 n.2. Third, the district court indicated that courts may consider evidence concerning the priority a defendant places on complying with the defendant's NPDES permit. *Id.*

95. *Gwaltney*, 844 F.2d at 171.
96. *Id.* at 171-172.
97. *Id.* at 172.
98. *Id.*
99. *Id.*
100. *Id.*

whether a defendant has eliminated completely the risk of future violations at the time a citizen-plaintiff filed suit.[101]

While the Fourth Circuit's guidelines will facilitate a court's analysis in deciding when an intermittent violation ceases to be intermittent and becomes wholly past, other courts have enunciated additional factors that a court should consider.[102] Because the factors set forth thus far do not appear to contradict each other, lawyers may use them as a guide in advising their corporate clients how to avoid violating the Clean Water Act.[103] Depending on the permit requirements, the type of permit holder, and the particular pollutants involved, however, the time in which an intermittent violation becomes a wholly past violation will vary.[104] Accordingly, the flexible standard the Supreme Court set forth in *Gwaltney* provides courts with an accommodating standard to apply in various situations.[105] The Supreme Court seems to have adopted a reasonableness standard to provide courts with a flexible standard to apply to determine when a violation is an intermittent violation.[106] Until the Supreme Court offers further guidance, the factors that the Supreme Court and the Fourth Circuit delineated in *Gwaltney*, as well as factors other courts have delineated, provide a framework to resolve a particular controversy and to further refine the meaning of intermittent violation.[107]

In *Gwaltney of Smithfield v. Chesapeake Bay Foundation* the Supreme Court held that a citizen-plaintiff must allege in good faith that a defendant is committing an ongoing violation of the Clean Water Act for a court to have jurisdiction under section 505(a) of the Clean Water Act.[108] While the Supreme Court's decision in *Gwaltney* appears to represent a victory for NPDES permit holders, the Court's decision provides courts with consid-

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101. *Id.*; *see supra* note 94 (citing cases that delineate additional factors for courts to apply in determining whether intermittent violation exists under *Gwaltney*).

102. *See supra* note 94 (citing cases that delineate additional factors for courts to apply in determining whether intermittent violation exists under *Gwaltney*).

103. *See supra* note 94 (citing cases that delineate additional factors for courts to apply in determining whether intermittent violation exists under *Gwaltney*); *supra* notes 90-93 and accompanying text (discussing ambiguity *Gwaltney* decision has created in defining intermittent violation).

104. *See supra* notes 94-101 and accompanying text (discussing various factors for court to apply in determining whether intermittent violation exists under *Gwaltney*).

105. *See supra* notes 94-101 and accompanying text (discussing various factors for courts to consider in determining whether intermittent violation exists under *Gwaltney*); *supra* notes 90-92 and accompanying text (discussing ambiguity in Supreme Court's ruling in *Gwaltney* describing intermittent violations).

106. *See supra* notes 90-92 and accompanying text (discussing Supreme Court's ruling in *Gwaltney* describing intermittent violations).

107. *See supra* notes 103-106 and accompanying text (discussing flexibility *Gwaltney* decision allows courts in determining when intermittent violations exist). *Cf.* Powers, *supra* note 17, at 10121 (indicating that courts rarely will decide whether violation is intermittent violation because most citizen suits involve violators who continue to violate Clean Water Act after citizen-plaintiff files suit).

108. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 108 S. Ct. 376, 381 (1987).

erable discretion to find that a citizen-plaintiff in good faith has alleged a continuing or intermittent violation in the citizen-plaintiffs' complaint.[109] Accordingly, most courts will find that the court has jurisdiction to hear citizen suits.[110] In addition, the vagueness of the term "intermittent violation" provides courts with the discretion to rule in favor of citizen-plaintiffs and hold defendant's liable for violations of the Clean Water Act.[111] Moreover, a court's ability to award penalties for precomplaint violations once a citizen-plaintiff has proven an ongoing violation improves the court's ability to sanction polluters.[112] The ability of courts to award penalties for precomplaint violations also deters defendants from violating the Clean Water Act before the citizen-plaintiff files suit.[113] Thus, the future decisions of courts may very well prove that the apparent victory which *Gwaltney* gave to NPDES permit holders is more illusory than real.[114]

JOEL A. WAITE

109. *See supra* notes 41-62 and accompanying text (discussing *Gwaltney* holding that citizen-plaintiffs cannot bring suit under Clean Water Act for wholly past violation, but must show ongoing violation); *supra* notes 94-107 and accompanying text (discussing flexibility of factors courts can apply in determining whether intermittent violation exists under *Gwaltney*).

110. *See supra* notes 59-62 and accompanying text (noting *Gwaltney* Supreme Court's holding that citizen-plaintiffs only required to allege in good faith ongoing violation and need not prove ongoing violation until suit is heard at trial on merits).

111. *See supra* notes 94-107 and accompanying text (implying that factors which courts have delineated to determine whether intermittent violation exists provide courts with discretion to find that intermittent violation exists in most instances).

112. *See supra* notes 65-89 and accompanying text (discussing apparent ability of courts to award penalties for precomplaint violations in citizen suits under Clean Water Act).

113. *See supra* notes 65-89 and accompanying text (discussing apparent ability of courts to award penalties for precomplaint violations in citizen suits under Clean Water Act).

114. *See supra* notes 109-113 and accompanying text (discussing discretion left to courts in citizens suits as result of *Gwaltney* Supreme Court decision).