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CITIZEN SUITS ALLEGING PAST VIOLATIONS OF THE CLEAN WATER ACT

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)¹ to provide for the restoration and maintenance of the purity of the nation's waters.² The Clean Water Act established the national goal of eliminating the discharge of all pollutants into the nation's waters by 1985.³ Section 301 of the Clean Water Act prohibits generally the discharge of any pollutant into navigable waters⁴ unless the polluter complies with the provisions of the Clean Water Act.⁵ In addition, the Clean Water Act confers authority upon the Administrator of the Environmental Protection Agency (EPA) to promulgate technology-based national effluent standards and limitations.⁶ The primary mechanism for enforcing the national

1. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)) [hereinafter cited as Clean Water Act].

2. Clean Water Act, § 101, 33 U.S.C. § 1251 (1982). Prior to the enactment of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), federal law required states to promulgate water quality standards for defined bodies of interstate waters. See S. REP. NO. 414, 92nd Cong., 1st Sess. 2 (1971) [hereinafter cited as S. REP. NO. 414], reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1420 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. State water quality standards, subject to federal approval, expressed the maximum amount of pollution allowable in a designated body of water. S. REP. NO. 414, *supra* at 4, reprinted in 2 LEGISLATIVE HISTORY, *supra* at 1422. Discharges of pollutants that reduced water quality below the levels specified in the state water quality standards enabled the states and the Administrator of the Environmental Protection Agency (EPA) to commence actions to abate the pollution. S. REP. NO. 414, *supra* at 4, reprinted in 2 LEGISLATIVE HISTORY, *supra* at 1422. Implementation and enforcement of water quality standards, however, proved inadequate because of difficulties in establishing precise effluent limitations based on the level of water quality desired for a given body of water. S. REP. NO. 414, *supra* at 8, reprinted in 2 LEGISLATIVE HISTORY, *supra* at 1426. The Clean Water Act requires use of pollution control technology and imposes effluent limitations on point sources of pollution rather than on receiving bodies of water. S. REP. NO. 414, *supra* at 41-42, reprinted in 2 LEGISLATIVE HISTORY, at 1459-60; see *infra* note 6 (discussing effluent standards and limitations for point sources of pollution based on pollution control technology).

3. Clean Water Act, § 101, 33 U.S.C. § 1251 (1982).

4. See Clean Water Act, § 502(7), 33 U.S.C. § 1362(7) (1982). The Clean Water Act defines "navigable waters" as the "waters of the United States, including the territorial seas." *Id.*

5. Clean Water Act, § 301(a), 33 U.S.C. § 1311(a) (1982). See generally, F. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW § 3.03 (1985) (discussing federal regulation of water pollution under Clean Water Act).

6. Clean Water Act, §§ 304, 306-307, 33 U.S.C. §§ 1314, 1316-1317 (1982). Effluent limitations are restrictions on the quantity, rate, or concentration of discharges of chemical, physical, and biological pollutants into the navigable waters. *Id.* § 502(11), 33 U.S.C. § 1362(11) (1982). Section 304(b) of the Clean Water Act requires the Administrator of the EPA to promulgate regulations that establish guidelines for effluent limitations in accordance with section 301 of the Clean Water Act. *Id.* § 304(b), 33 U.S.C. § 1314(b) (1982). Section 301(b) provides for the establishment of effluent limitations for all existing point sources of pollution. *Id.* § 301(b), 33 U.S.C. § 1311(b) (1982). Under the Clean Water Act, a point source is "any

effluent limitations and standards is the National Pollutant Discharge Elimination System (NPDES) created by section 402 of the Clean Water Act.⁷ Section 402 authorizes the Administrator of the EPA and the states to issue NPDES permits that limit the discharge of pollutants in accordance with the national effluent standards and limitations.⁸ Accordingly, the Clean Water Act grants concurrent authority to both the Administrator of the EPA and the states to enforce effluent standards and limitations.⁹ In addition to

discernible, confined and discrete conveyance" used to discharge pollutants into the water. *Id.* § 502(14), 33 U.S.C. § 1362(14) (1982). Examples of point sources include pipes, ditches, tunnels, wells, containers, and vessels. *Id.* Section 301(b)(1)(A) requires polluters, no later than July 1, 1977, to use the "best practicable control technology currently available" to achieve effluent limitations for existing point sources of pollution. *Id.* § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1982). By July 1, 1987, polluters must use the "best available technology economically achievable" to meet effluent limitations for existing point sources of pollution. *Id.* § 301(b)(2)(A), (F), 33 U.S.C. § 1311(b)(2)(A), (F) (1982). In addition, for conventional pollutants identified pursuant to section 304(b)(4), section 301(b)(2)(E) requires polluters to use, no later than July 1, 1984, the "best conventional pollutant control technology" to achieve effluent limitations for existing point sources of pollution. *Id.* § 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E) (1982); see *id.* § 304(b)(4), 33 U.S.C. § 1314(b)(4) (1982). Conventional pollutants include "pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH." *Id.* § 304(a)(4), 33 U.S.C. § 1314(a)(4) (1982).

Section 306 of the Clean Water Act requires the Administrator of the EPA to publish regulations that establish standards of performance for all new sources of pollution. *Id.* § 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (1982). A "standard of performance" controls the discharge of pollutants by application of the "best available demonstrated control technology." *Id.* § 306(a)(1), 33 U.S.C. § 1316(a)(1) (1982). A "new source" of pollution is any source of pollution constructed after the publishing of regulations which are applicable to the source. *Id.* § 306(a)(2), 33 U.S.C. § 1316(a)(2) (1982).

Section 307 of the Clean Water Act authorizes the Administrator of the EPA to establish effluent standards for all toxic pollutants. *Id.* § 307(a)(2), 33 U.S.C. § 1317(a)(2) (1982). Effluent limitations for toxic pollutants require application of the "best available technology economically achievable" for point sources of pollution. *Id.* In addition, section 307 requires the Administrator to establish pretreatment standards for discharges of pollutants that would interfere with publicly owned treatment works. *Id.* § 307(b), 33 U.S.C. § 1317(b) (1982).

7. See Clean Water Act, § 402, 33 U.S.C. § 1342 (1982). Section 402 of the Clean Water Act authorizes the Administrator of the EPA and the states to issue National Pollutant Discharge Elimination System (NPDES) permits for discharges of pollutants. *Id.* § 402(a), (b), 33 U.S.C. § 1342(a), (b) (1982). NPDES permits control the quality and quantity of pollutants which a polluter may discharge lawfully in accordance with effluent standards and limitations. *Id.*

8. *Id.* § 402, 33 U.S.C. § 1342 (1982); see *supra* note 7 and accompanying text (discussing NPDES permit system of Clean Water Act).

9. See Clean Water Act, §§ 309, 402(b)(7), 510, 33 U.S.C. § 1319, 1342(b)(7), 1370 (1982). Section 309 authorizes the Administrator of the EPA to bring a civil action against any person who violates an effluent standard or limitation or who violates an NPDES permit. *Id.* § 309(b), 33 U.S.C. § 1319(b) (1982). In a civil action under section 309, the Administrator of the EPA may ask the court to assess criminal or civil penalties against a polluter. *Id.* § 309(c), (d), 33 U.S.C. § 1319(c), (d) (1982).

Section 402 of the Clean Water Act requires the states to implement programs to abate violations of NPDES permits and to provide for criminal and civil penalties against polluters. *Id.* § 402(b)(7), 33 U.S.C. § 1342(b)(7) (1982). Section 510 of the Clean Water Act recognizes the authority of the states to enforce any effluent standard of limitation on the discharge of pollutants. *Id.* § 510, 33 U.S.C. § 1370 (1982). In addition, section 510 recognizes the authority

granting specific enforcement powers to the EPA and to the states, the Clean Water Act provides for direct public participation in the enforcement of effluent standards and limitations.¹⁰

Section 505 of the Clean Water Act permits a private citizen¹¹ to institute a civil action in a federal district court against any person "alleged to be in violation" of an effluent standard, limitation, or order¹² under the Clean Water Act.¹³ Recently, some courts have construed narrowly the language of

of the states to impose more stringent effluent limitations and standards on discharges of pollutants. *Id.*

10. *Id.* § 101(e), 33 U.S.C. § 1251(e) (1982); see *id.* § 505, 33 U.S.C. § 1365 (1982) (authorizing citizens to file suit against Administrator of EPA for failure to perform nondiscretionary function and against polluters for violations of effluent standards, limitations, or orders); *infra* note 11-25 and accompanying text (discussing requirements of citizen suit provision).

11. See Clean Water Act, § 505(g), 33 U.S.C. § 1365(g) (1982). To establish standing in a citizen suit, a person must meet the definition of "citizen" established in section 505(g) of the Clean Water Act. *Id.* Section 505(g) provides that a citizen is "a person or persons having an interest which is or may be adversely affected." *Id.* Most citizen suit provisions in other environmental regulatory statutes provide that "any person" may commence suit. See, e.g., Surface Mining Control and Reclamation Act, § 520(a), 30 U.S.C. § 1270(a) (1982) (authorizing any person to initiate citizen suit); Resource Conservation and Recovery Act, § 7002(a), 42 U.S.C. § 6972(a) (1982) (same); Clean Air Act, § 304(a), 42 U.S.C. § 7604(a) (1982) (same). The language of section 505(g) reflects a conscious attempt by Congress to meet the constitutional standing requirements expressed by the United States Supreme Court in *Sierra Club v. Morton*. See *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (affirming dismissal of plaintiff's complaint because complaint failed to allege that defendant's actions would adversely affect interests of plaintiff). See generally Miller, *Private Enforcement of Federal Pollution Control Laws: Part I*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10309, 10314-17 (1983) (discussing definition of citizen and constitutional standing requirement for persons entitled to bring citizen suits).

12. See Clean Water Act, § 505(f), 33 U.S.C. § 1365(f) (1982). Under section 505(f) of the Clean Water Act, violation of an "effluent standard or limitation" is defined as an unlawful act under section 301(a); violation of an effluent limitation under sections 301 and 302; violation of an effluent standard of performance under section 306; violation of a prohibition, effluent standard or pretreatment standard under 307; noncompliance with a certification under section 401; or noncompliance with an NPDES permit issued under section 402 of the Clean Water Act. *Id.* An effluent "order" is an order issued by the Administrator of the EPA or a state concerning an effluent standard or limitation. *Id.* § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1982). Section 309(a) of the Clean Water Act, for example, provides that the Administrator of the EPA may issue a compliance order whenever the Administrator determines that a polluter is in violation of an effluent standard or limitation or an NPDES permit issued pursuant to section 402. *Id.* § 309(a), 33 U.S.C. § 1319(a). Any person who violates an effluent standard, limitation, or order established or issued pursuant to sections 301, 302, 306, 307, 401, or 402 is subject to government enforcement proceedings under section 309 or citizen enforcement proceedings under section 505. *Id.* §§ 309, 505, 33 U.S.C. § 1319, 1365 (1982); see also *supra* note 6 and accompanying text (discussing promulgation of effluent standards and limitations and pretreatment standards by Administrator of EPA pursuant to Clean Water Act); *supra* notes 7-8 and accompanying text (discussing NPDES permit system in Clean Water Act); *supra* note 9 and accompanying text (discussing government enforcement authority under Clean Water Act); *infra* notes 13-25 and accompanying text (discussing citizen suit provision of Clean Water Act).

13. Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982). The Clean Water Act permits a citizen to commence a citizen suit "against any person who is alleged to be in violation" of an effluent standard, limitation, or order. *Id.* Under the Clean Water Act "any person" includes

section 505 to allow citizen suits based only on continuing violations of an effluent standard, limitation, or order.¹⁴ A narrow construction of section 505, therefore, may prevent a citizen suit against a polluter who had violated an effluent standard, limitation, or order in the past, but who is currently in compliance with the standard, limitation, or order.¹⁵ In contrast, a broad construction of section 505 would allow citizen suits based on any violation of an effluent standard, limitation, or order.¹⁶ For example, a broad construction of section 505 would permit a citizen to file suit against a polluter who is violating, or had violated in the past, an effluent standard, limitation, or order.¹⁷

Regardless whether a district court adopts a narrow or broad construction of section 505, a citizen wishing to file a citizen suit under section 505 of the Clean Water Act first must comply with the notice of intent to sue requirements of section 505(b).¹⁸ Under section 505(b) a citizen must give sixty days notice of the impending suit to the Administrator of the EPA, the appropriate state agency in which the citizen will file suit, and the prospective defendant before filing the suit in a federal district court.¹⁹ In addition to requiring notice of intent to sue, section 505(b) precludes a

the United States and any governmental instrumentality or agency. *Id.* In addition to authorizing a citizen suit against any person who violates an effluent standard, limitation, or order, the Clean Water Act permits a citizen to commence a civil action against the Administrator of the EPA for the Administrator's failure to perform a nondiscretionary act or duty under the Clean Water Act. *Id.*

14. See, e.g., *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 396 (5th Cir. 1985) (requiring continuing violation of effluent standard of limitation at time plaintiff files citizen suit under section 505 of Clean Water Act); *Sierra Club v. Copolymer Rubber and Chem. Corp.*, 621 F. Supp. 1013, 1014 (M.D. La. 1985) (applying *Hamker* court's reasoning to dismiss citizen suit under section 505 of Clean Water Act when plaintiff's complaint alleged only past violations of effluent standard, limitation, or order); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 21 Env't Rep. Cas. (BNA) 1390, 1391-92 (1984) (dismissing citizen suit under section 505 of Clean Water Act because plaintiff's complaint failed to allege ongoing violation of effluent standard, limitation, or order); see also Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982) (authorizing citizen suits under section 505 of Clean Water Act against polluters "alleged to be in violation" of effluent standard, limitation, or order).

15. See Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 44 (1985) (noting that narrow interpretation of section 505 of Clean Water Act would preclude citizen suits based on past violations).

16. See Miller, *Private Enforcement of Federal Pollution Control Laws: Part II*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10063, 10080 (1984) (arguing that language and underlying policy considerations of section 505 of Clean Water Act suggest that courts may assess civil penalties for both past and continuing violations of effluent standards, limitations, or orders).

17. See, e.g., *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1540-41 (M.D. Pa. 1985) (finding that plaintiff in citizen suit may seek civil penalties for past violations of Clean Water Act); *Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1475-77 (D.N.J. 1985) (holding that section 505 of Clean Water Act authorizes citizens to seek civil penalties for past violations of effluent standard or limitation); *Sierra Club v. Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1053-55 (1984) (holding that section 505 of Clean Water Act gives citizens right to seek civil penalties for past violations).

18. Clean Water Act, § 505(b), 33 U.S.C. § 1365(b) (1982).

19. *Id.* § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1982).

citizen from filing suit if either the EPA or a state agency has commenced a civil or criminal action in a state or federal court and diligently is prosecuting the alleged polluter for violation of an effluent standard, limitation, or order.²⁰ Section 505(b), however, provides for a citizen's intervention in the action as a matter of right, if diligent prosecution in federal court of an alleged violator precludes a citizen from initiating a citizen suit.²¹

Once a citizen has satisfied the requirements of section 505(b) and has filed suit in a federal district court, the citizen may petition the district court for injunctive relief to force compliance with an effluent standard, limitation, or order.²² In addition, the citizen may seek litigation costs under section 505(d) and appropriate civil penalties in accordance with section 309(d) of the Clean Water Act.²³ Civil penalties for violations of an effluent standard, limitation, or order are payable to the Federal Treasury rather than to the citizen plaintiff and can amount up to 10,000 dollars per day of violation.²⁴ If a district court adopts a broad construction of section 505 in a citizen suit and finds a polluter liable for frequent past violations of an effluent standard, limitation, or order, the civil penalties assessed against a polluter can amount to a rather large sum.²⁵ In *Hamker v. Diamond Shamrock Chemical Co.*,²⁶ however, the United States Court of Appeals for the Fifth Circuit adopted a narrow construction of section 505 and held that a citizen who alleges only past violations of an effluent standard, limitation, or order may not bring a civil action against a polluter under section 505 of the Clean Water Act.²⁷

In *Hamker*, the plaintiff filed suit in the United States District Court for the Northern District of Texas alleging that the defendant had discharged

20. *Id.* § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1982).

21. *Id.*

22. *Id.* § 505(a), 33 U.S.C. § 1365(a) (1982).

23. *Id.* § 505(a) (d), 33 U.S.C. § 1365(a), (d) (1982); *see id.* § 309(d), 33 U.S.C. § 1319(d) (1982) (authorizing Administrator of EPA to seek civil penalties in actions against polluters for violation of the Clean Water Act).

24. *Id.* 309(d), 33 U.S.C. § 1319(d) (1982).

25. *See Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986). The United States District Court for the Eastern District of Virginia in *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* found that the defendant had exceeded the defendant's monthly limitation for 666 days. *Id.* at 1555-56. The *Gwaltney* court determined that the defendant was subject to a maximum penalty of \$6,660,000. *Id.* at 1556. Declining to impose the maximum penalty, however, the *Gwaltney* court referred to the Environmental Protection Agency Civil Penalty Policy. *Id.* The EPA Civil Penalty Policy encourages the courts to examine the economic benefit accrued to the violator as a result of noncompliance and the gravity of the violator's noncompliance to determine the appropriate civil penalty levied against a violator. *See* Environmental Protection Agency Civil Penalty Policy, [Federal Laws] ENV'T REP. (BNA) 41:2991 (June 1, 1984). After estimation of an appropriate penalty, the EPA Civil Penalty Policy recommends an adjustment of the penalty that reflects the defendant's culpability, remedial cooperation, history of noncompliance, and ability to pay. *Id.* at 41:3000-02. Applying the factors established in the EPA Civil Penalty Policy, the *Gwaltney* court assessed a total civil penalty of \$1,285,322. *Gwaltney*, 611 F. Supp. at 1557-65.

26. 756 F.2d 392 (5th Cir. 1985).

27. *Id.* at 394-99.

crude petroleum into a creek which flowed onto the plaintiff's property in violation of section 301 of the Clean Water Act.²⁸ The plaintiff's complaint requested the district court to enjoin the defendant from committing future violations of the Clean Water Act.²⁹ In addition, the plaintiff requested the district court to impose on the defendant a civil penalty of 10,000 dollars per day of violation and to award litigation costs to the plaintiff.³⁰ In the plaintiff's pendent state law claim for damages, the plaintiff additionally sought 40,000 dollars in compensatory damages and 120,000 dollars in punitive damages.³¹ The defendant denied the plaintiff's allegations and further contended that the district court lacked subject matter jurisdiction because section 505 of the Clean Water Act authorizes citizen suits that allege only continuing violations of an effluent standard, limitation, or order.³² Treating the defendant's contention as a motion to dismiss for lack of subject matter jurisdiction, the district court dismissed the plaintiff's complaint.³³ The district court held that section 505 allows only prospective relief and does not authorize suits for past violations of the Clean Water Act.³⁴

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint for lack of subject matter jurisdiction.³⁵ Perceiving no ambiguity in the statutory language of section 505, the Fifth Circuit determined that section 505 requires a plaintiff in a citizen suit to allege a continuing violation.³⁶ The Fifth Circuit

28. *Id.* at 394. The defendant in *Hamker v. Diamond Shamrock Chem. Co.* operated an oil pipeline that leaked approximately 2,400 barrels of crude oil into a stream that flowed onto the plaintiff's property. *Id.* The plaintiff in *Hamker* asserted that the defendant's efforts to clean up the oil spill were grossly inadequate and perpetuated the contamination of the stream. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* In *Hamker*, the plaintiffs asserted negligence on behalf of the defendant in failing to exercise reasonable care in operating and maintaining the defendant's oil pipeline. *Id.* Under pendent jurisdiction, the *Hamker* plaintiffs filed a state law claim seeking compensation for damage to aquatic life in the stream, loss of use of the stream, and loss of value to the plaintiff's property. *Id.* The *Hamker* plaintiff also sought punitive damages for the defendant's gross negligence. *Id.*

32. *Id.* In addition to asserting lack of subject matter jurisdiction, the defendant in *Hamker* asserted that the plaintiff's complaint failed to state a claim upon which the court could grant relief. *Id.* The United States District Court for the Northern District of Texas, however, dismissed the suit for lack of subject matter jurisdiction and did not address the sufficiency of the plaintiff's complaint. *Id.*

33. *Id.*

34. *Id.* The United States District Court for the Northern District of Texas in *Hamker* stated that section 505 of the Clean Water Act provides for only prospective relief of continuing violations of an effluent standard, limitation, or order, does not permit recovery of damages, and does not establish an implied cause of action. *Id.*

35. *Id.* at 399.

36. *Id.* at 395; see Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982) (authorizing citizen suits against polluters who are "in violation" of an effluent standard, limitation, or order); *supra* notes 13-17 and accompanying text (discussing different interpretations of language of section 505 of Clean Water Act).

reasoned that, when the language of a statute is unambiguous, the court need not consider the statute's legislative history.³⁷ The plaintiff in *Hamker* argued that section 505 authorizes citizen suits based on past violations.³⁸ The Fifth Circuit, however, rejected the plaintiff's argument and found that the plaintiff's interpretation of section 505 strained the ordinary language of the statute.³⁹

The Fifth Circuit in *Hamker* further determined that the purpose of citizen suits under section 505 is to supplement the primary enforcement powers that Congress granted to the Administrator of the EPA in section 309 of the Clean Water Act.⁴⁰ Section 309 authorizes the Administrator of the EPA to bring a civil action and to seek criminal or civil penalties for violations of an effluent standard, limitation, or order.⁴¹ The Fifth Circuit in *Hamker* recognized that the Administrator of the EPA may have authority to seek redress for past violations.⁴² Nevertheless, the Fifth Circuit found that the power of citizens to seek redress for violations under section 505 does not permit citizens to duplicate the power of the Administrator of the EPA to bring suit under section 309.⁴³ Furthermore, the Fifth Circuit found that the notice requirement of section 505 indicates that citizens must allege continuing violations of an effluent standard, limitation, or order.⁴⁴ In support of the Fifth Circuit's holding that plaintiffs in citizen suits must allege continuing violations, the Fifth Circuit noted that if the Administrator

37. *Hamker*, 756 F.2d at 395. Although the United States Court of Appeals for the Fifth Circuit in *Hamker* did not consider the legislative history of the Clean Water Act in reaching a holding, the Fifth Circuit noted that the legislative history supported the court's decision to preclude citizen suits based on past violations. *Hamker*, 756 F.2d at 395, n. 1; see *Ex Parte Collett*, 337 U.S. 55, 61 (1949) (holding that clear statutory language precludes need to refer to legislative history of statute). But see *infra* notes 78-85 and accompanying text (arguing that legislative history and statutory construction of Clean Water Act supports broad interpretation of section 505 authorizing citizen suits for both past and continuing violations of effluent standard, limitation, or order).

38. *Hamker*, 756 F.2d at 395.

39. *Id.*

40. *Id.* The Fifth Circuit in *Hamker* noted that the states and the Administrator of the EPA have concurrent enforcement responsibility under the Clean Water Act. *Id.* In addition, the Fifth Circuit recognized that the Administrator of the EPA has sole power to issue orders requiring compliance with the Clean Water Act, to supersede state enforcement efforts if state efforts prove insufficient, to establish effluent standards and regulations, to revise effluent standards and limitations when necessary, and to grant variances when appropriate. *Id.*; see *supra* note 9 and accompanying text (discussing enforcement authority of Administrator of EPA).

41. Clean Water Act, § 309, 33 U.S.C. § 1319 (1982); see *supra* note 9 and accompanying text (discussing enforcement authority of Administrator of EPA).

42. *Hamker*, 756 F.2d at 395; see *infra* note 81 and accompanying text (noting courts' recognition of Administrator of EPA's authority to seek redress for past violations of effluent standard, limitation, or order).

43. *Hamker*, 756 F.2d at 395. But see *infra* notes 80-85 and accompanying text (arguing that plaintiffs in citizen suits have same authority as Administrator of EPA to seek redress for past violations of effluent standard, limitation, or order).

44. *Hamker*, 756 F.2d at 395-96.

of the EPA commences suit against a polluter within sixty days after a citizen files a notice of intent to sue the polluter, section 505(b) precludes the citizen from filing suit.⁴⁵ Similarly, the *Hamker* court reasoned that section 505(b) should preclude a citizen from commencing a citizen suit if the alleged violator establishes compliance before the citizen files suit, just as a citizen loses the right to bring suit when the Administrator of the EPA commences suit.⁴⁶ The Fifth Circuit, therefore, found that section 505 grants citizens supplemental enforcement authority only if the Government does not commence action within sixty days and if the alleged violator is in violation of an effluent standard, limitation, or order at the time the citizen files suit.⁴⁷

In addition to construing the statutory language and structure of section 505 as a bar to citizen suits for past violations of an effluent standard, limitation, or order, the Fifth Circuit in *Hamker* found that allowing citizen suits for past violations would burden unduly the federal courts.⁴⁸ The Fifth Circuit cited as support the United States Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.⁴⁹ In *Middlesex*, the Supreme Court considered whether section 505 of the Clean Water Act created an implied federal claim for damages.⁵⁰ The

45. *Id.*; see Clean Water Act, § 505(b), 33 U.S.C. § 1365(b) (1982) (providing that commencement of action by state or Administrator of EPA precludes citizen from maintaining action against polluter); *supra* notes 18-21 and accompanying text (discussing notice requirements of section 505 of Clean Water Act and effect on citizen plaintiffs of diligent prosecution by government).

46. *Hamker*, 756 F.2d at 396.

47. *Id.*

48. *Id.* But see *infra* notes 126-28 and accompanying text (discussing flaw in *Hamker* court's reasoning that precluding citizen suits based on past violations would limit burden on federal courts).

49. 453 U.S. 1 (1981); *Hamker*, 756 F.2d at 396.

50. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 11. In *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, the plaintiffs filed suit in the United States District Court for the District of New Jersey. *Id.* at 4. The plaintiffs in *Middlesex* alleged that the defendants had discharged sewage and other pollutants into the New York Harbor and the Hudson River. *Id.* at 4-5. The plaintiff's complaint further alleged that the discharges had polluted the waters of the Atlantic Ocean and had caused the collapse of the fishing and shellfish industries in the vicinity of the New York area. *Id.* at 5. The plaintiffs in *Middlesex* sought injunctive and declaratory relief and \$500 million in compensatory and punitive damages. *Id.* The plaintiffs based the claims on the citizen suit provisions of the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act (MPRSA), federal common law, the Rivers and Harbors Appropriations Act, the National Environmental Policy Act, the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, the Federal Tort Claims Act, and various state environmental and tort laws. *Id.* at 5 n.6. The district court in *Middlesex* found that the plaintiffs had not complied with the sixty day notice requirements of both the Clean Water Act and MPRSA citizen suit provisions. *Id.* at 6; see Clean Water Act, § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1982) (providing that plaintiff in citizen suit under Clean Water Act must give sixty days prior notice to Administrator of EPA, appropriate state agency, and to alleged violator before filing suit); MPRSA, § 105(g)(2)(A), 33 U.S.C. § 1415(g)(2)(A) (1982) (providing that plaintiff in citizen suit under MPRSA must give sixty days notice to Administrator of EPA or the Secretary of the Army and to alleged violator before

Supreme Court noted that section 505 contained a savings clause which preserves other remedies that a citizen may have under any statute or the common law.⁵¹ The Supreme Court, however, determined that the savings clause of section 505 preserves remedies only under other statutes and not under the Clean Water Act.⁵² In addition, the Supreme Court reasoned that allowing an implied federal damage claim would conflict with Congress' desire to prevent citizen suits from increasing the burden on the federal courts.⁵³ The Supreme Court, therefore, held that section 505 did not create

filing suit). The district court in *Middlesex*, therefore, refused to allow the plaintiffs to proceed with citizen suits under the Clean Water Act and MPRSA without complying with the notice provisions of the Clean Water Act and MPRSA. *Middlesex*, 453 U.S. at 7.

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court's decision to dismiss the plaintiff's Clean Water Act and MPRSA claims because of the plaintiff's failure to comply with the notice provisions of the Clean Water Act and MPRSA. *Id.* at 8. The Third Circuit reasoned that section 505(a) of the Clean Water Act created a limited cause of action for any person, injured or noninjured, to seek civil penalties for violations of effluent standards or limitations. *Id.* at 15. In contrast, the Third Circuit determined that section 505(e) of the Clean Water Act created an implied cause of action for injured persons seeking relief for injuries caused by a polluter's violation of an effluent standard or limitation. *Id.*; see Clean Water Act, § 505(e), 33 U.S.C. § 1365(e) (1982) (providing that citizen suit provision of Clean Water Act does not preclude plaintiff's right to seek remedies under common law or any statute). Accordingly, the Third Circuit found that the savings clause of section 505(e) preserved the plaintiff's right of action for damages even though the plaintiff's failure to give notice of intent to sue precluded the plaintiffs from bringing suit under section 505(a). *Middlesex*, 453 U.S. at 9. The Third Circuit applied the same reasoning to the plaintiff's claims under MPRSA and found that MPRSA created an implied right of action to seek injunctive relief and damages for violations of MPRSA. *Id.* at 15.

51. *Middlesex*, 453 U.S. at 15-16; see Clean Water Act, § 505(e), 33 U.S.C. § 1365(e) (1982) (providing that section 505 does not restrict person's right to seek any remedy under any statute or common law).

52. *Middlesex*, 453 U.S. at 15-16. Before addressing the Third Circuit's finding that section 505(e) of the Clean Water Act created an implied right of action for damages, the Supreme Court in *Middlesex* examined the enforcement mechanisms of the Clean Water Act and MPRSA. *Id.* at 13-14. The Supreme Court noted that both the Clean Water Act and MPRSA authorize the Administrator of the EPA to bring suit against violators of the acts and to seek civil and criminal penalties and injunctive relief. *Id.* In addition, the Supreme Court noted that the citizen suit provisions of both the Clean Water Act and MPRSA provide specific remedies for citizen plaintiffs. *Id.* The Supreme Court found that the enforcement mechanisms of the Clean Water Act and MPRSA indicate that Congress intended to provide private citizens with only the remedies expressly provided in the statutes. *Id.* at 14-15.

In addition to finding that the savings clause of section 505 preserved remedies only under statutes other than the Clean Water Act, the Supreme Court in *Middlesex* rejected the Third Circuit's reasoning that section 505(a) of the Clean Water Act created a limited cause of action for noninjured plaintiffs. *Id.* at 16. The Supreme Court noted that section 505(g) of the Clean Water Act defines a citizen as any person that may have an adversely affected interest. *Id.*; see *supra* note 11 and accompanying text (discussing section 505 definition of citizen).

53. *Middlesex* 453 U.S. at 18 n.27. The Supreme Court in *Middlesex* examined the legislative history of the citizen suit provision of the Clean Air Act, which served as the model for the citizen suit provision of the Clean Water Act. *Id.* The *Middlesex* court determined that Congress excluded damage remedies from the citizen suit provision of the Clean Air Act to limit the burden on the federal courts and to prevent frivolous and harassing suits against the government and industries. *Id.*

an implied federal damage claim.⁵⁴ Applying the reasoning of the Supreme Court in *Middlesex*, the Fifth Circuit in *Hamker* observed that citizen suits based on past violations would permit plaintiffs to litigate all state damage claims in federal court under pendent jurisdiction.⁵⁵ The *Hamker* court determined that the availability of litigation costs under section 505 would create a substantial incentive for plaintiffs to litigate state claims in a federal forum.⁵⁶ The Fifth Circuit, therefore, found that allowing citizen suits for civil penalties for past violations of an effluent standard, limitation, or order would undermine congressional intent in limiting the burden on the federal courts.⁵⁷

Although the Fifth Circuit in *Hamker* held that a citizen could not invoke federal subject matter jurisdiction to redress past violations of an effluent standard, limitation, or order, the United States District Court for the Eastern District of Virginia in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*⁵⁸ reached a different conclusion.⁵⁹ In *Gwaltney*, the defendant had exceeded sporadically the defendant's NPDES permit discharge limitations for a period of approximately two and a half years.⁶⁰ The plaintiff in *Gwaltney* filed a citizen suit under section 505 of the Clean Water Act and requested the court to assess a civil penalty of 10,000 dollars per day of violation.⁶¹ The *Gwaltney* court granted the plaintiff's motion for partial summary judgment on the issue of whether the defendant had violated the Clean Water Act.⁶² The defendant, however, challenged the plaintiff's standing to bring suit and the district court's subject matter jurisdiction to hear a citizen suit under section 505 of the Clean Water Act.⁶³

54. *Id.* at 18.

55. *Hamker*, 756 F.2d at 396.

56. *Id.*; see *supra* note 23 and accompanying text (noting availability of litigation costs under section 505(d) of Clean Water Act).

57. *Hamker*, 756 F.2d at 396; see *supra* note 53 and accompanying text (discussing Congress' intent to limit burden on federal courts by excluding damage remedy from citizen suit provision of Clean Air Act).

58. 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986).

59. *Id.*

60. *Id.* at 1544. The defendant in *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* had exceed the defendant's NPDES permit for the discharge of fecal coliform, chlorine, total suspended solids, total Kjeldahl nitrogen, and oil and grease. *Id.* at 1544 n.2; see *supra* notes 7-8 and accompanying text (discussing NPDES permit system implemented under section 402 of Clean Water Act by Administrator of EPA and states).

61. *Gwaltney*, 611 F. Supp. at 1544; see *supra* notes 22-24 and accompanying text (discussing ability of citizens to file suit under section 505 of Clean Water Act and to seek civil penalties for violation of effluent standard, limitation, or order).

62. *Gwaltney*, 611 F. Supp. at 1544. Although the United States District Court for the Eastern District of Virginia in *Gwaltney* granted the plaintiff's motion for partial summary judgment concerning the defendant's alleged violations of the Clean Water Act, the *Gwaltney* court's determination did not confer necessarily subject matter jurisdiction on the district court to hear the case. *Id.* The district court in *Gwaltney* first had to establish that section 505 of the Clean Water Act authorizes citizen suits based on allegations of past violations. *Id.*

63. *Id.* In addition to contesting the district court's subject matter jurisdiction and the

The defendant in *Gwaltney* asserted that section 505 of the Clean Water Act requires allegations of continuing violations to accord subject matter jurisdiction to a federal court.⁶⁴ The defendant, therefore, contended that the court lacked subject matter jurisdiction because the plaintiff's complaint alleged only past violations.⁶⁵ In rejecting the defendant's contention, the *Gwaltney* court first noted ambiguity in the language of section 505 which authorizes citizen suits against polluters who are "in violation" of an effluent standard, limitation, or order.⁶⁶ The *Gwaltney* court made an analogy to a taxpayer who underpays taxes for one year.⁶⁷ The *Gwaltney* court recognized that the taxpayer remains in violation of the tax laws even though the taxpayer complies with the tax laws in the following year.⁶⁸ The district court in *Gwaltney*, therefore, reasoned that a polluter who violates a discharge limitation may remain in violation even though the polluter later complies with the discharge limitation.⁶⁹

After noting the ambiguity in the language of section 505, the *Gwaltney* court examined the legislative history and the statutory language of sections 309 and 505 of the Clean Water Act.⁷⁰ The district court in *Gwaltney* recognized that neither the statutory language nor the legislative history of section 309 or section 505 limits expressly the assessment of civil penalties to polluters that are engaged in only continuing violations of an effluent standard, limitation, or order.⁷¹ The *Gwaltney* court reasoned that the absence of any time limitation on violations implies that Congress intended to make polluters liable for both past and continuing violations of an effluent

plaintiff's standing to bring suit, the defendant in *Gwaltney* contested the defendant's maximum liability and appropriate penalty for violation of the defendant's NPDES permit. *Id.* The district court in *Gwaltney* devoted a major part of the opinion to determine the proper penalty to assess the defendant. *Id.* at 1551-65. The *Gwaltney* court found that the defendant had exceeded the defendant's NPDES permit discharge limitations for five different pollutants. *Id.* at 1544. The *Gwaltney* court addressed the issue whether section 309 of the clean Water Act authorizes a court to assess \$10,000 per day for each violation or \$10,000 per day for all violations combined. *Id.* at 1522. The *Gwaltney* court imposed a limit of \$10,000 per day of violation for all pollutants combined. *Id.*; see *supra* note 25 (discussing *Gwaltney* court's application of EPA's Civil Penalty Policy to assess civil penalty against *Gwaltney* defendant).

64. *Gwaltney*, 611 F. Supp. at 1547; see *supra* notes 14-15 and accompanying text (discussing narrow interpretation of language of section 505 of Clean Water Act).

65. *Gwaltney*, 611 F. Supp. at 1547.

66. *Id.*; see *supra* notes 14-17 and accompanying text (noting differing constructions of language of section 505 of Clean Water Act); *infra* note 100 and accompanying text (noting courts that found language of section 505 ambiguous).

67. *Gwaltney*, 611 F. Supp. at 1547.

68. *Id.*

69. *Id.* In justifying that a polluter remains in violation of an effluent standard of limitation even though the violation occurred in the past, the *Gwaltney* court recognized that the effects of the defendant's illegal discharges may linger long after the discharges occur. *Id.* The *Gwaltney* court, therefore, reasoned that subsequent compliance with an NPDES permit does not mitigate a past violation. *Id.*

70. *Id.* at 1548.

71. *Id.*

standard, limitation, or order.⁷² The district court in *Gwaltney*, therefore, found that the statutory language and legislative history of section 309 and section 505 supports the conclusion that citizens may bring suits for past violations of an effluent standard, limitation, or order.⁷³

The *Gwaltney* court further determined that if citizens could not bring suits based on past violations, the citizen suit provision would offer few additional incentives for a polluter to comply with a discharge permit until a citizen issues notice and files suit under section 505.⁷⁴ The district court in *Gwaltney* also recognized that plaintiffs in citizen suits would encounter evidentiary problems if section 505 required a plaintiff to establish that the defendant was violating a discharge limitation at the time the plaintiff filed suit.⁷⁵ The *Gwaltney* court reasoned that the evidentiary problems would undermine further the deterrent effect of citizen suits.⁷⁶ The *Gwaltney* court, therefore, concluded that the necessary deterrent effect of citizen suits requires that citizens be able to allege past violations of an effluent standard, limitation, or order.⁷⁷

The *Gwaltney* court correctly concluded that the legislative history and statutory language of sections 309 and 505 of the Clean Water Act support a broad construction of section 505 authorizing citizen suits based on either past or continuing violations of the Clean Water Act.⁷⁸ United States Senator Edmund Muskie, referring to the implications of section 505, stated that the citizen suit provision of the Clean Water Act enables citizens to file suit against any polluter "who is alleged to be, or to have been, in violation" of an effluent standard, limitation, or order.⁷⁹ In addition, section 505(a) of

72. *Id.*

73. *Id.*; see *infra* notes 78-85 and accompanying text (arguing that statutory construction and legislative history of sections 309 and 505 of clean Water Act support authorization of citizen suits based on past violations).

74. *Gwaltney*, 611 F. Supp. at 1549; see *supra* notes 18-19 and accompanying text (addressing notice requirements of section 505(b) of Clean Water Act).

75. *Gwaltney*, 611 F. Supp. at 1549. In discussing the potential evidentiary problems that plaintiffs would face in alleging continuing violations, the *Gwaltney* court noted that a defendant's discharge reports are not available for public inspection until more than a month after the discharge occurs. *Id.* The *Gwaltney* court also noted that requiring plaintiffs to allege continuing violations would engage plaintiffs and defendants in discovery battles to ascertain whether the defendant is in violation at the time the plaintiff initiates suit. *Id.*; see *infra* notes 91-96 and accompanying text (discussing evidentiary problems of plaintiffs in citizen suits when plaintiff must allege continuing violations).

76. *Gwaltney*, 611 F. Supp. at 1549.

77. *Id.*; see *infra* notes 86-90 and accompanying text (arguing that narrow interpretation of section 505 of Clean Water Act would undermine deterrent effect of citizen suits).

78. See *Gwaltney*, 611 F. Supp. at 1550 (finding that statutory language and legislative history of Clean Water Act supports conclusion that section 505 of Clean Water Act authorizes citizen suits based on past violations); *infra* notes 79-85 and accompanying text (examining statutory construction of sections 309 and 505 Clean Water Act and legislative history of section 505).

79. See 1 LEGISLATIVE HISTORY, *supra* note 2, at 179. Referring to the sixty day notice provision of section 505 of the Clean Water Act, United States Senator Edmund Muskie stated

the Clean Water Act authorizes the district courts in citizen suits to assess any appropriate civil penalties that would be available in a government enforcement proceeding under section 309(d).⁸⁰ Section 309(d) of the Clean Water Act permits the Administrator of the EPA to seek civil penalties against any polluter who violates an effluent standard, limitation, or order, and no court to date has questioned the ability of the Administrator of the EPA to seek redress for past violations under section 309.⁸¹ Furthermore, the legislative history shows that Congress cautioned the courts against applying inconsistent policy in citizen suits and government enforcement actions, because all enforcement proceedings would seek enforcement of the same effluent standards and limitations.⁸² Accordingly, some courts have argued that Congress must have intended for the same enforcement standards to be applicable to citizen-plaintiffs under section 505 as are applicable to the Administrator of the EPA under section 309.⁸³ Citizens, therefore, should have the same authority to seek redress for past violations under section 505 as the Administrator of the EPA has authority to seek redress for past violations under section 309.⁸⁴ Examination of the statutory structure of sections 309 and 505, as well as the legislative history of section 505, thus,

that the drafters of the proposed bill did not intend for the notice requirement to preclude a citizen's right of action to seek redress for violations that occurred 60 days earlier but were not continuous. *Id.* Accordingly, Senator Muskie stated that section 505 authorizes citizen suits against polluters who are violating or have violated the Clean Water Act, regardless of whether the violations are continuous, occasional, or sporadic. *Id.*

80. Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982); see *supra* notes 23-25 and accompanying text (addressing availability of civil penalties in citizen suits).

81. Clean Water Act, § 309(d), 33 U.S.C. § 1365(d) (1982); see *People of the State of Ill. v. Outboard Marine Corp.*, 680 F.2d 473, 480-81 (7th Cir. 1982) (holding that Administrator of EPA may seek redress for past discharges in violation of NPDES permit); *supra* note 9 and accompanying text (discussing enforcement ability of Administrator of EPA under section 309(d) of Clean Water Act); cf. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985) (noting that Administrator of EPA may have authority to seek redress for past violations of effluent standard, limitation, or order).

82. See S. REP. NO. 414, *supra* note 2, at 80, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 2, at 1498. Senate Report 414 noted that the federal government under section 309 and private citizens under section 505 would be seeking enforcement of the same effluent standards or limitations. *Id.* Consequently, Senate Report 414 reasoned that courts should apply consistent policy in both government and citizen enforcement proceedings. *Id.*

83. See Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1197-99 (D.N.J. 1985) (arguing that Congress intended uniform enforcement standards for federal government and private enforcement proceedings); Student Pub. Interest Research Group of N. J. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425 (D.N.J. 1985) (noting that remedies available to citizens and Administrator of EPA are same); Student Pub. Interest Research Group of N.J. v. Monsanto Co., 600 F. Supp. 1474, 1476 (D.N.J. 1985) (noting that legislative history of Clean Water Act shows that citizens have same authority to seek relief for past violations as federal government has authority to seek relief for past violations); see also Miller, *supra* note 11, at 10319 (suggesting that Congress intended government agencies and citizens to have comparable causes of action and remedies under sections 309 and 505 of Clean Water Act).

84. See *supra* notes 80-83 and accompanying text (arguing that both Administrator of EPA and citizens may sue for past violations).

indicate that Congress intended past violations to be actionable under section 505 of the Clean Water Act.⁸⁵

The *Gwaltney* court properly recognized that a narrow construction of section 505 would undermine the deterrent effect of citizen suits.⁸⁶ Congress entrusted primary enforcement responsibility of Clean Water Act provisions to the Administrator of the EPA and to the states.⁸⁷ Some commentators, however, have noted that the EPA has not enforced diligently the Clean Water Act.⁸⁸ In addition, when discussing the enforcement responsibility of the states, some courts have recognized that a state has a strong incentive not to enforce permit limitations to induce industries to move to or to remain in the state.⁸⁹ Although the threat of government enforcement proceedings

85. See *supra* notes 78-84 and accompanying text (suggesting that analysis of legislative history and statutory construction of sections 309 and 505 of Clean Water Act shows that citizens may bring suit for past violations of effluent standard, limitation, or order); see also Student Pub. Interest Research Group of N.J., Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425 (D.N.J. 1985) (referring to legislative history and statutory language of section 505 of Clean Water Act to sustain citizen suit based on past violations); Sierra Club v. Aluminum Co. of Am., 585 F. Supp. 842, 854 (S.D.N.Y. 1984) (noting that legislative history of section 505 of Clean Water Act suggests Congress intended for provide relief for past violations); Sierra Club v. Raytheon Co., 22 Env't Rep. Cas. (BNA) 1050, 1054 (D.Mass. 1984) (finding that statutory language and legislative history of section 309 and 505 of Clean Water Act allow for citizen suits based on past violations).

86. See *Gwaltney*, 611 F. Supp. at 1549 (finding that narrow interpretation of section 505 of Clean Water Act would undermine deterrent effect of citizen suits); *supra* notes 14-15 and accompanying text (suggesting that narrow construction of section 505 of Clean Water Act would preclude citizen suit against polluter who had violated effluent standard, limitation, or order in past but who is currently in compliance with effluent standard, limitation, or order); *infra* notes 87-90 and accompanying text (arguing that deterrent effect of citizen suits is necessary to supplement deterrent effect of government enforcement actions). Numerous courts have asserted that a narrow construction of section 505 would reduce the deterrent effect of citizen suits. See, e.g., Student Pub. Interest Research group of N.J., Inc. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1196 (D.N.J. 1985) (arguing that narrow construction of language of section 505 of Clean Water Act would destroy effectiveness of citizen suits); Student Pub. Interest Research Group of N.J. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1426 (D.N.J. 1985) (noting that precluding citizen suits based on past violations severely would lessen deterrent effect of citizen suit provision); Student Pub. Interest Research Group of N.J. v. Monsanto Co., 600 F. Supp. 1474, 1477 (D.N.J. 1985) (arguing that strict interpretation of section 505 would not encourage deterrent effect of citizen suits); Sierra Club v. Aluminum Co. of Am., 585 F. Supp. 842, 854 (S.D.N.Y. 1984) (concluding that allowing polluter to escape liability for past violations would diminish substantially deterrent effect of citizen suits).

87. See *supra* note 9 and accompanying text (discussing concurrent enforcement authority of Administrator of EPA and states). See generally W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 534-50 (1977) (discussing enforcement under Clean Water Act and noting primary emphasis on administrative remedies).

88. See Fadel, *supra* note 15, at 62-63 (1985) (noting lax enforcement of environmental laws by federal government); Miller, *supra* note 16, at 10080 (noting lax enforcement by government agencies benefits polluters).

89. See American Frozen Food Inst. v. Train, 539 F.2d 107, 129 (D.C. Cir. 1976) (finding that Congress intended to impose uniform limitations on polluters to prevent competition between states for industry); Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1197 (D.N.J. 1985) (arguing that states have strong incentive not to combat pollution because of competition between states for industries).

would provide some incentive for polluters to comply with discharge limitations, the deterrent effect of unconstrained citizen enforcement is necessary to supplement the deterrent effect of government enforcement.⁹⁰

In addition to assessing correctly the effect of a narrow construction of section 505 on the deterrent effect of citizen suits, the *Gwaltney* court recognized properly that a narrow construction of section 505 would produce evidentiary difficulties for citizen-plaintiffs.⁹¹ Section 308 of the Clean Water Act requires polluters who have obtained NPDES permits to sample effluent discharges and to submit periodic discharge monitoring reports (DMRs) of effluent discharges to the Administrator of the EPA.⁹² In accordance with section 308, the Administrator of the EPA and the public may use the DMRs to determine whether a polluter has violated the conditions of the NPDES permit.⁹³ The DMRs, however, are not available until well after the discharge violation occurs.⁹⁴ Evidence of a continuing violation, therefore, would be virtually unattainable.⁹⁵ If courts interpret section 505 as precluding citizens suits based on past violations, polluters who violate NPDES permits would be immune from citizen enforcement.⁹⁶

90. See *supra* notes 86-89 and accompanying text (arguing that lax government enforcement increases need for citizen suits).

91. See *Gwaltney*, 611 F. Supp. at 1549 (recognizing that plaintiffs would face evidentiary problems if section 505 of Clean Water Act precludes citizen suits based on past violations); *infra* notes 92-95 and accompanying text (arguing that evidence of continuing violation is difficult to obtain); see also *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532, 535 n.1 (W.D.N.Y. 1984) (noting that plaintiffs would face difficulties in verifying violations at time plaintiff files suit).

92. Clean Water Act, § 308(a), 33 U.S.C. § 1318(a) (1982); see *supra* notes 7-8 and accompanying text (discussing NPDES permit system); 40 C.F.R. § 122.41 (1985) (providing federal regulations for discharge monitoring reports (DMRs) under NPDES permit system of Clean Water Act).

93. Clean Water Act, § 308(a)(2), 33 U.S.C. § 1318(a)(2) (1982); see *infra* note 142 and accompanying text (noting courts that granted summary judgment on issue of liability for violations contained in defendant's DMRs).

94. See 40 C.F.R. § 122.41 (1985); *Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1194 (D.N.J. 1985) (noting that DMRs would not be available for public inspection until months after violation occurs); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1549 (E.D. Va. 1985) (noting that DMRs are not available to public until month after discharge occurs). Polluters must submit DMRs to the EPA at intervals specified in the polluter's NPDES permit. 40 C.F.R. § 122.41 (1985). In addition, if a polluter violates a maximum daily discharge limitation listed in the polluter's NPDES permit, the polluter must notify orally the EPA or the appropriate state agency within 24 hours after the polluter receives the discharge sampling analysis. *Id.* Further, the polluter must submit a written noncompliance report (NCR) within five days after the polluter becomes aware of the violation. *Id.* Within a reasonable time, the EPA or appropriate state agency must make the DMRs and NCRs available for public inspection. *Id.*

95. See *supra* notes 14-15 and accompanying text (noting that allegation of continuing violations requires polluter to be in violation at time plaintiff files suit); *supra* note 94 and accompanying text (recognizing that evidence of continuing violation is difficult to obtain).

96. See *supra* notes 91-95 and accompanying text (arguing that proof of continuing violations would be difficult to obtain under narrow construction of section 505 of Clean Water Act).

Notwithstanding the *Gwaltney* court's conclusion that section 505 of the Clean Water Act authorizes citizen suits based on past violations, the defendant in *Gwaltney* relied upon the Fifth Circuit's analysis in *Hamker* to support the defendant's contention that the *Gwaltney* court lacked subject matter jurisdiction.⁹⁷ The district court in *Gwaltney*, however, disagreed with the *Hamker* court's reasoning.⁹⁸ The *Gwaltney* court first questioned the *Hamker* court's inability to perceive ambiguity in the language of section 505.⁹⁹ The *Gwaltney* court noted that several other courts had been unable to resolve the meaning of section 505's language from the face of the statute.¹⁰⁰ The *Gwaltney* court also found attenuated the *Hamker* court's reasoning that Congress' action in giving the Administrator of the EPA and the states primary enforcement responsibility precluded the power of citizens to seek redress for past violations under section 505.¹⁰¹ The *Gwaltney* court reasoned that allowing citizen suits based on past violations would not alter materially the primary enforcement responsibility of the Administrator of the EPA and the states.¹⁰² The *Gwaltney* court also questioned the *Hamker* court's reasoning that the notice requirement of section 505 precludes a citizen from filing suit if the polluter establishes compliance within the sixty day waiting period.¹⁰³ The district court in *Gwaltney* recognized that section

97. *Gwaltney*, 611 F. Supp. at 1550; see *Hamker*, 756 F.2d at 399. In *Hamker*, the Fifth Circuit affirmed the dismissal of the plaintiff's complaint because the complaint failed to allege a continuing violation of an effluent standard, limitation, or order. 756 F.2d at 399; see *supra* notes 35-57 and accompanying text (discussing Fifth Circuit's analysis in *Hamker*).

98. *Gwaltney*, 611 F. Supp. at 1550-51; see *infra* notes 99-109 and accompanying text (discussing *Gwaltney* court's analysis of *Hamker* court's reasoning).

99. *Gwaltney*, 611 F. Supp. at 1550; see *Hamker*, 756 F.2d at 395 (Hamker court asserting that clear statutory language of section 505 of Clean Water Act requires plaintiffs in citizen suits to allege ongoing violation).

100. *Gwaltney*, 611 F. Supp. at 1550. Several courts have found the language of section 505 of the Clean Water Act to be ambiguous. See, e.g., *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1541 (M.D. Pa. 1985) (noting that one plausible construction of section 505's language is to allow citizen suits based on past violations); *Student Pub. Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985) (suggesting that language of section 505 does not limit necessarily violations to current or continuing violations); *Sierra Club v. Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1054 (D. Mass. 1984) (noting ambiguity of section 505).

101. *Gwaltney*, 611 F. Supp. at 1550; see *supra* notes 40-43 and accompanying text (discussing *Hamker* court's finding that primary enforcement responsibility of Administrator of EPA precludes authority of citizens to seek redress for past violations under section 505 of Clean Water Act).

102. *Gwaltney*, 611 F. Supp. at 1550; see *supra* notes 7-9 and accompanying text (discussing enforcement authority of states and Administrator of EPA under Clean Water Act); *supra* notes 18-20 and accompanying text (noting that, under either broad or narrow construction of section 505, diligent prosecution of or commencement of action against polluter precludes citizen from filing suit).

103. *Gwaltney*, 611 F. Supp. at 1550; see *supra* notes 44-46 and accompanying text (discussing *Hamker* court's reasoning that notice of intent to sue requirements of section 505 of Clean Water Act precludes citizen from filing suit if polluter establishes compliance within 60 day waiting period).

505 expressly precludes a citizen from filing suit if the Administrator of the EPA or a state agency commences action against a polluter within sixty days after the citizen files a notice of intent to sue.¹⁰⁴ The *Gwaltney* court, however, also recognized that nothing in the language of section 505 precludes expressly a citizen from filing suit against a polluter if the polluter establishes compliance with the discharge limitation within the sixty day period.¹⁰⁵ The *Gwaltney* court, therefore, found inappropriate the inference that both government enforcement action and compliance by a polluter suffice to preclude a citizen from initiating suit under section 505.¹⁰⁶

The district court in *Gwaltney* also rejected the *Hamker* court's determination that precluding citizen suits based on past violations would limit the burden on the federal courts.¹⁰⁷ The *Gwaltney* court reasoned that the number of violations actionable under section 505 could increase dramatically if courts restricted citizen suits to allegations of continuing violations because limiting actions to continuing violations would reduce the deterrent effect on polluters.¹⁰⁸ The *Gwaltney* court, therefore, postulated that the number of citizen suits filed actually could increase if section 505 precluded citizen suits based on past violations.¹⁰⁹

Although the number of citizen suits filed could increase if courts interpreted section 505 as authorizing citizen suits based on only continuing violations, the possibility remains, as noted by the *Hamker* court, that precluding citizen suits based on past violations could limit the burden on the federal courts.¹¹⁰ The *Hamker* court, however, incorrectly relied upon the Supreme Court's decision in *Middlesex* to support the proposition that section 505 precludes citizen suits that allege only past violations.¹¹¹ In *Middlesex*, the Supreme Court was concerned with the issue whether section 505 created an implied federal damage claim.¹¹² In addition, the legislative

104. *Gwaltney*, 611 F. Supp. at 1550; see *supra* notes 18-19 and accompanying text (discussing notice of intent to sue requirements of section 505(b) of Clean Water Act).

105. *Gwaltney*, 611 F. Supp. at 1550; see Clean Water Act, § 505(b), 33 U.S.C. § 1365(b) (1982). Section 505(b) of the Clean Water Act precludes a citizen from filing suit if the Administrator of the EPA or a state commences action against a polluter within 60 day period but does not address whether compliance by polluter within 60 day period precludes citizen from filing suit. Clean Water Act, § 505(b), 33 U.S.C. § 1365(b) (1982).

106. *Gwaltney*, 611 F. Supp. at 1550.

107. *Gwaltney*, 611 F. Supp. at 1551; see *supra* notes 48-57 and accompanying text (addressing *Hamker* court's argument that citizen suits based on past violations would increase burden on federal courts).

108. *Gwaltney*, 611 F. Supp. at 1551; see *supra* note 74 and accompanying text (noting *Gwaltney* court's argument that precluding citizen suits based on past violations would reduce deterrent effect of citizen suits).

109. *Gwaltney*, 611 F. Supp. at 1551.

110. See *Hamker*, 756 F.2d at 396 (arguing that citizen suits based on past violations would undermine congressional intent to limit burden on federal courts).

111. See *infra* notes 112-20 and accompanying text (noting that Supreme Court in *Middlesex* considered effect of implied federal damage claim on federal court burden rather than effect of citizen suits based on past violations).

112. See *Middlesex*, 453 U.S. at 13-18 (holding that section 505 of Clean Water Act did

history cited by the Supreme Court in *Middlesex* expressed Congress' concern that allowing the recovery of damages in citizen suits would promote frivolous and harassing suits against polluters and would burden unduly the federal courts.¹¹³ Neither the Supreme Court in *Middlesex* nor Congress, however, has expressed a concern that citizen suits based on past violations would burden unduly the federal courts.¹¹⁴ The *Hamker* court failed to consider that an implied right to sue for damages is quite different from a right to bring a citizen suit for past violations of an effluent standard, limitation, or order.¹¹⁵ An implied right to sue for damages, for instance, could result in a financial award to successful plaintiffs and could increase the burden on the federal courts.¹¹⁶ In contrast, a citizen suit based on past violations would not increase the possibility of financial gain for plaintiffs because the remedies available to plaintiffs remain the same regardless of whether section 505 authorizes citizen suits based on past violations or only on continuing violations.¹¹⁷ Accordingly, citizen suits based on past violations only would serve to insure the health and welfare of the plaintiff and similarly situated

not create implied damage claim); *supra* notes 49-54 and accompanying text (discussing Supreme Court's decision in *Middlesex*).

113. See *Middlesex*, 453 U.S. at 17 n.1. In *Middlesex*, the Supreme Court cited the legislative history of the citizen suit provision of the Clean Water Act, which served as a model for the citizen suit provision of the Clean Water Act. *Id.* The legislative history of the Clean Air Act shows Congress' concern that allowing a damage remedy in citizen suits would burden unduly the federal courts and would promote frivolous and harassing suits against polluters. 116 CONG. REC. 33102-04 (1970). Furthermore, the legislative history provides that Congress expressly excluded a damage remedy from citizen suits to limit a plaintiff's financial incentive to bring suit. *Id.* By limiting a plaintiff's financial incentive to bring a citizen suit, Congress intended that plaintiffs would bring citizen suits only to preserve the health and welfare of those persons adversely affected by the defendant's violations. *Id.*; see *supra* note 53 and accompanying text (discussing Supreme Court's reasoning in *Middlesex* that allowing implied damage claim under section 505 of Clean Water Act would conflict with Congress' intent to limit burden on federal courts).

114. See *supra* notes 112-113 and accompanying text (noting that Supreme Court and Congress expressed concern that allowing damage remedy in citizen suits under Clean Air Act would increase burden on federal courts).

115. See Student Pub. Interest Research Group of N.J. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1426 n.3 (D.N.J. 1985) (noting that *Hamker* court failed to address difference between right to bring citizen suit for past violations and implied right to sue for damages); *infra* notes 116-19 and accompanying text (noting difference between implied right to sue for damages under section 505 of Clean Water Act and right to initiate citizen suit for past violations of Clean Water Act).

116. See *supra* notes 50-54 and accompanying text (noting United States Supreme Court's concern that allowing implied federal damage claim in citizen suits under section 505 would conflict with Congress' intent to limit burden on federal courts); *supra* note 113 (noting Congress' concern that allowing damage remedy in citizen suits would provide financial incentive for plaintiff to bring citizen suit and would increase burden on federal courts).

117. See *supra* notes 22-24 and accompanying text (recognizing ability of plaintiffs in citizen suits under section 505 of Clean Water Act to seek injunctive relief, civil penalties, and litigation costs); *infra* note 127 and accompanying text (arguing that plaintiffs in citizen suits filed pursuant to section 505 of Clean Water Act may append state damage claim to any claim arising under section 505).

persons by making polluters liable for any violation of an effluent standard, limitation, or order.¹¹⁸ Although citizen suits based on past violations may increase the burden on the federal courts, the increased burden is necessary if citizen suits are to serve as a useful supplement to government enforcement.¹¹⁹ Nevertheless, the *Hamker* court sought to limit the burden on the federal courts by precluding citizen suits based on past violations.¹²⁰

The *Hamker* court expressed a valid concern that appended state damage claims may increase the burden of the federal courts.¹²¹ The *Hamker* court noted that plaintiffs who may assert state damage claims have an incentive to litigate the claim in a federal forum.¹²² One commentator has noted that, because defendants in citizen suits under section 505 face the threat of civil penalties, plaintiffs in citizen suits could use the threat of civil penalties as leverage in pretrial negotiations to force a more favorable settlement of the state damage claim.¹²³ In addition, the possibility of court awarded litigation costs under section 505 may increase a plaintiff's incentive to litigate the state claim in federal court.¹²⁴ The increased incentive to litigate a state damage claim in federal court, therefore, could result in an increased burden on the federal courts.¹²⁵ The *Hamker* court, however, incorrectly attempted to limit the burden on the federal courts and to restrict state damage claims to state court by precluding citizen suits based on past violations.¹²⁶ The

118. See *supra* note 113 (noting Congress' desire that plaintiffs bring citizen suits only to protect health and welfare of those individuals injured by polluter's violations).

119. See *supra* notes 86-96 and accompanying text (arguing that citizen suits based on past violations are necessary supplement to federal government enforcement actions); Fadil, *supra* note 15, at 53 (asserting Congress expected citizen suits to increase burden on federal courts but accepted increased burden as justifiable).

120. *Hamker*, 756 F.2d at 396.

121. See *id.* (finding that pendent state damage claims would increase burden on federal courts); *infra* notes 123-25 and accompanying text (arguing that possible use of civil penalties as leverage and availability of litigation costs under section 505 of Clean Water Act would increase plaintiff's incentive litigate state claim in federal court and would increase burden on federal courts).

122. *Hamker*, 756 F.2d at 396; see *supra* note 121 and accompanying text (arguing that *Hamker* court correctly assessed effect of state damage claims on federal court burden); *infra* note 124 and accompanying text (noting *Hamker* court's finding that availability of litigation costs in citizen suits may increase incentive of plaintiffs to file suit in federal court).

123. See Miller, *supra* note 11, at 10319 n.100 (noting that plaintiffs with appended state damage claims could use threat of civil penalties under section 309 as bargaining tool to induce more favorable settlement of state claim); *supra* notes 23-25 and accompanying text (discussing availability of civil penalties under section 505 of Clean Water Act and noting possible assessment of large civil penalty against defendant).

124. See *Hamker*, 756 F.2d at 396 (arguing that award of reasonable attorney's fees and expert witness fees would increase plaintiff's incentive to bring suit in federal court); *supra* note 23 and accompanying text (discussing availability of litigation costs under section 505 of Clean Water Act).

125. See *supra* notes 122-24 and accompanying text (arguing that use of civil penalties as leverage and possibility of court awarded litigation costs increase incentive to bring suit in federal court).

126. See *Hamker*, 756 F.2d at 396 (interpreting section 505 of Clean Water Act as precluding

Hamker court failed to consider that a citizen-plaintiff could append a state damage claim to any claim arising under section 505, even if section 505 required allegations of continuing violations to invoke federal subject matter jurisdiction.¹²⁷ Appended state damage claims, therefore, could increase the burden on the federal courts even if courts interpreted section 505 as precluding citizen suits based on past violations.¹²⁸

Rather than precluding citizen suits based on past violations, an alternative method of limiting the burden on the federal courts, recently suggested by the United States Court of Appeals for the Fourth Circuit on appeal from the district court's decision in *Gwaltney*, is for federal courts to exercise discretion in granting jurisdiction over state damage claims.¹²⁹ Under the doctrine of pendent jurisdiction expressed by the United States Supreme Court in *United Mine Workers of America v. Gibbs*,¹³⁰ a plaintiff may append a state claim to a federal claim if both claims derive from a common

citizen suits based on past violations to prevent plaintiffs from litigating state damage claims in federal court under pendent jurisdiction); Student Pub. Interest Research Group of N.J. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1426 (D.N.J. 1985) (distinguishing *Hamker* on issue of state damage claim); *supra* notes 78-85 and accompanying text (arguing that section 505 of Clean Water Act authorizes citizen suits based on past violations); *infra* note 129 and accompanying text (suggesting that courts should use discretion in exercising pendent jurisdiction over state damage claims rather than precluding citizen suits based on past violations).

127. See *infra* note 131 and accompanying text (doctrine of pendent jurisdiction requires only that federal and appended state claims derive from common nucleus of operative fact and that plaintiff ordinarily would try both claims in one action).

128. See *supra* note 121 and accompanying text (noting that appended state damage claims may increase burden on federal courts); *supra* text accompanying note 127 (asserting that plaintiffs may append state damage claims to citizen suits based on continuing violations).

129. See *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 313 (4th Cir. 1986) (noting that cautious exercise of pendent jurisdiction by federal courts in citizen suits would help to limit burden on federal courts); *infra* notes 133-143 and accompanying text (suggesting that courts should weigh considerations of judicial economy, convenience, fairness to litigants, and substantial predominance of state issues in exercising discretion to grant pendent jurisdiction over state damage claims).

The United States Court of Appeals for the Fourth Circuit in *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.* recognized the concern, expressed by the Fifth Circuit in *Hamker*, that citizen suits could inundate the federal courts and, thus, undermine Congress' desire to limit the burden on the federal courts. *Gwaltney*, 791 F.2d at 313; see *Hamker*, 756 F.2d at 356 (arguing that citizen suits based on past violations of section 505 of Clean Water Act would increase burden on federal courts). While recognizing the concern, however, the Fourth Circuit declined to restrict unduly the scope of citizen suits. *Gwaltney*, 791 F.2d at 313. The Fourth Circuit distinguished the *Hamker* decision because the plaintiff in *Hamker*, according to the Fourth Circuit, used the citizen suit provision of the Clean Water Act merely as a medium to litigate the plaintiff's state damage claim in federal court. *Id.* The Fourth Circuit suggested that district courts in cases similar to *Hamker* should decline to exercise pendent jurisdiction over state claims. *Id.* According to the Fourth Circuit, declining to exercise pendent jurisdiction over state damage claims would counter the incentive for plaintiffs to litigate state damage claims in federal court. *Id.*; see *supra* notes 55-56 and accompanying text (noting that *Hamker* court's analysis that availability of litigation costs under section 505 of Clean Water Act creates incentive for plaintiffs with state damage claims to bring suit in federal court).

130. 383 U.S. 715 (1966).

nucleus of operative fact and the plaintiff ordinarily would try both claims in one judicial proceeding.¹³¹ According to the Supreme Court in *Gibbs*, however, the exercise of pendent jurisdiction is within the sound discretion of a federal court.¹³² Judicial economy, convenience, fairness to litigants, and substantial predominance of state issues are considerations that weigh in the exercise of a court's discretion.¹³³ One consideration that supports the exercise of pendent jurisdiction over state damage claims asserted in citizen suits under section 505 is that dismissal of the state claims would not promote judicial economy.¹³⁴ Section 505 of the Clean Water Act grants the federal district courts exclusive jurisdiction to hear citizen suits.¹³⁵ If a federal court declines to exercise jurisdiction over a citizen-plaintiff's state damage claim, the citizen-plaintiff must maintain two actions, one in federal court and the other in state court.¹³⁶ Dismissal of a state damage claim, therefore, could result in trial duplication.¹³⁷

131. *United Mine Workers of Am. v. Gibbs*, 383 U.S. at 725; *see Sun Enter., Ltd v. Train*, 394 F. Supp. 211, 224 (S.D.N.Y. 1975) (declining to exercise pendent jurisdiction over state damage claims in citizen suit under Clean Water Act because state claims present substantial issues of additional fact and state and federal claims do not derive from common nucleus of operative fact).

132. *Gibbs*, 383 U.S. at 726; *see Sun Enter., Ltd. v. Train*, 394 F. Supp. 211, 224 (S.D.N.Y. 1975). In *Sun Enter., Ltd v. Train*, the United States District Court for the Southern District of New York dismissed the plaintiff's pendent state claim because the state and federal claims did not derive from a common nucleus of operative fact. *Sun Enter., Ltd. v. Train*, 394 F. Supp. at 224. In dicta, the *Sun Enter.* court also concluded that the court would decline to exercise pendent jurisdiction even if the court had the power to exercise jurisdiction. *Id.* The *Sun Enter.* court, however, gave no reason why the court would not exercise discretion to grant jurisdiction over the plaintiff's pendent state claim. *Id.*

133. *Gibbs*, 383 U.S. at 726.

134. *See Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (finding that grant of exclusive jurisdiction to federal courts, in addition to considerations of judicial economy and convenience, strengthens argument for exercise of pendent jurisdiction because plaintiff may try all claims together only in federal court); *infra* notes 135-37 and accompanying text (recognizing that dismissal of appended state damage claim would force plaintiff to maintain two civil actions against polluter because federal courts have jurisdiction exclusive of state courts to hear citizen suits under section 505 of Clean Water Act). *But see* Miller, *Ancillary and Pendent Jurisdiction*, 26 S. Tex. L.J. 1, 3 (1985) (arguing that concept of limited federal court jurisdiction contained in Article III of United States Constitution undermines consideration of judicial economy as support for exercise of pendent jurisdiction).

135. *See* Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982) (providing that federal district courts shall have jurisdiction to hear citizen suits); 28 U.S.C. § 1355 (1982) (providing that federal district courts have exclusive jurisdiction over actions for recovery or enforcement of fines, penalties, or forfeitures incurred under any congressional act).

136. *See supra* note 132 and accompanying text (noting that exercise of pendent jurisdiction is within discretion of federal courts); *supra* note 135 and accompanying text (recognizing that state courts do not have jurisdiction to hear citizen suits under section 505 of Clean Water Act); Miller, *supra* note 134, at 4 (noting that court's refusal to exercise pendent jurisdiction would result in separate litigation of federal and state claims).

137. *See supra* note 136 and accompanying text (recognizing that dismissal of state damage claim in court's discretion could result in two trials); Miller, *supra* note 134, at 4 (noting that separate litigation of federal and state claims could result in trial duplication or inconsistent results).

Although considerations of judicial economy may support an exercise of pendent jurisdiction over state damage claims, fairness to the litigants in a citizen suit may dictate dismissal of the pendent state damage claim in some situations.¹³⁸ For example, the threat of civil penalties in citizen suits filed pursuant to section 505 could induce unfairly the defendant to settle the suit when the defendant may have a valid defense to the state damage claim.¹³⁹ In addition to fairness to the litigants, predominance of state issues in citizen suits may support a court's decision to dismiss a pendent state damage claim.¹⁴⁰ If the basis of citizen suit is violations of an NPDES permit, the defendant's own DMRs contain proof of the violations.¹⁴¹ As a result, plaintiffs who allege violations of NPDES permits based on the defendant's DMRs may move for partial summary judgment on the issue of liability.¹⁴² Proof of liability under state law, however, may involve more complex questions of causation and actual damages. Predominance of state issues in citizen suits, therefore, may justify dismissing the state damage claim.¹⁴³

Citizen participation in the enforcement of effluent standards and limitations is a necessary supplement to government enforcement of the Clean Water Act.¹⁴⁴ The vague language of section 505 of the Clean Water Act, however, makes unclear whether Congress intended for alleged violators in citizen suits to be liable for past violations of an effluent standard, limitation,

138. See *supra* note 133 and accompanying text (fairness to litigants is one consideration in exercise of court's discretion to hear state claim under pendent jurisdiction); *infra* text accompanying note 139 (recognizing possibility that plaintiff's use of civil penalties as leverage in settlement of state damage claim may be unfair to defendant).

139. See *supra* note 123 and accompanying text (asserting that plaintiffs in citizen suits could force favorable settlement of state damage claim by using threat of civil penalties as leverage).

140. See Miller, *supra* note 134 and accompanying text (suggesting that courts dismiss pendent state claims if court grants summary judgment of federal claim or if parties settle federal claim before trial); *supra* note 133 and accompanying text (noting that predominance of state issues is consideration in exercise of court's discretion in granting jurisdiction over state claim); *infra* note 141-43 and accompanying text (arguing that state issues in citizen suit based on NPDES permit violations may predominate over federal issues).

141. See *supra* note 93 and accompanying text (noting that government and private citizens may use DMRs as evidence of polluter's violation of NPDES permit).

142. See, e.g., Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1203-06 (D.N.J. 1985) (granting plaintiff's motion for partial summary judgment on issue of liability on basis of DMRs); Student Pub. Interest Research Group of N.J. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1429-32 (D.N.J. 1985) (same); *Gwaltney*, 611 F. Supp. at 1544 (same).

143. See *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 313 (4th Cir. 1986) (noting that state damage claim in *Hamker* predominated over Clean Water Act claim); *supra* notes 140-42 and accompanying text (arguing that predominance of states issues of liability over federal issues of liability may justify dismissing state claim).

144. See *supra* note 10 and accompanying text (noting that Clean Water Act provides for public participation in enforcement of effluent standards, limitations, and orders, in addition to enforcement powers of Administrator of EPA and states); *supra* notes 86-90 and accompanying text (arguing that citizen suits are necessary supplement to deterrent effect of government enforcement).

or order.¹⁴⁵ The legislative history and statutory structure of the Clean Water Act, on the other hand, provide both direct and implicit support for a broad interpretation of section 505 authorizing citizen suits based on past violations.¹⁴⁶ In addition, citizen suits based on past violations are necessary if citizen enforcement is to have a sufficient deterrent effect on polluters.¹⁴⁷ Plaintiffs in citizen suits who assert state damage claims under pendent jurisdiction, however, may frustrate Congress' desire to limit the burden on the federal courts.¹⁴⁸ To prevent frivolous and harassing citizen suits against polluters and to limit the burden on the federal courts, courts should exercise discretion in granting pendent jurisdiction over state damage claims.¹⁴⁹ Courts should not attempt, however, to limit state damage claims by precluding citizen suits based on past violations.¹⁵⁰

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145. See Clean Water Act, § 505(a), 33 U.S.C. § 1365(a) (1982) (authorizing citizen suits against polluters "alleged to be in violation" of effluent standard, limitation, or order); *supra* notes 14-15 and accompanying text (noting that narrow construction of language of section 505 precludes citizen suits based on past violations); *supra* notes 16-17 and accompanying text (noting that broad construction of language of section 505 authorizes citizen suits based on either past or continuing violations); *supra* note 100 and accompanying text (noting courts that found language of section 505 ambiguous).

146. See *supra* notes 70-73 and accompanying text (discussing *Gwaltney* court's finding that legislative history and statutory language of sections 309 and 505 of Clean Water Act support broad construction of section 505 authorizing citizen suits based on past violations); *supra* notes 78-85 and accompanying text (arguing that legislative history of section 505 and statutory construction of section 309 and 505 of Clean Water Act support authorization of citizen suits based on either past or continuing violations).

147. See *supra* notes 74-77 and accompanying text (addressing *Gwaltney* court's conclusion that precluding citizen suits on past violations would undermine deterrent effect of citizen suits); *supra* notes 86-90 and accompanying text (suggesting that deterrent effect of citizen suits is necessary to supplement deterrent effect of government enforcement).

148. See *supra* notes 50-57 and accompanying text (expressing Supreme Court's concern in *Middlesex* and *Hamker* court's concern that damage claims may conflict with Congress' intent to limit burden on federal courts); *supra* note 113 and accompanying text (noting Congress' concern that inclusion of federal damage remedy in citizen suit provision would increase federal court burden and would encourage frivolous and harassing suits against polluters); *supra* notes 121-28 and accompanying text (arguing that state damage claims may increase federal court burden).

149. See *supra* notes 129-43 and accompanying text (suggesting that courts should use discretion in exercising pendent jurisdiction over state damage claims).

150. See *supra* notes 125-27 and accompanying text (proposing that *Hamker* court incorrectly precluded citizen suits based on past violations in attempt to restrict state damage claims to state courts and to limit burden on federal courts); Fadil, *supra* note 15, at 77 (arguing that Congress' intent to limit burden on federal courts should not induce courts to dismiss citizen suits that have Congress' express grant of federal jurisdiction).

