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Gwaltney of Smithfield v. Chesapeake Bay Foundation: Balancing Interests Under the Clean Water Act

I. Introduction

In 1862, Mr. Bamford sued Mr. Turnley for producing "unwholesome vapours, smokes, fumes, stinks and stenches." Since that time, our industrial advancement has resulted in widespread manufacturing of products that, like the bricks from Mr. Turnley's kiln, results in pollution. Mr. Bamford sued under the law of nuisance, which balanced the private interests of the aggrieved landowner against the utility of the offending activity. Today, the impact of industrial pollution has become a matter of public nuisance. Realizing the inability of nuisance law to cope with this problem, Congress has enacted pollution control legislation to control the problem at the national level. However, Congress did not remove the citizen's power to enforce pollution control.

The subject of this Note is the citizen's right to enforce provisions of the Clean Water Act (CWA) by bringing suit against violators


§ 1365. Citizen Suits
(a) Authorization; Jurisdiction. Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf-
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
(b) Notice. No action may be commenced -
(1) Under subsection (a)(1) of this section-
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
in federal court. In *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* the Supreme Court was faced with balancing the "citizen-plaintiff's" interest in enforcing pollution-control laws against the "industrial-defendant's" interest in adequately defending pollution enforcement suits and remaining free from frivolous actions. The issues in this case were the citizen's right to bring suit for damages created through past violations of the CWA and the requirements which the citizen-plaintiff must meet to receive standing. This Note will discuss these issues by introducing the facts of the *Gwaltney* dispute. This Note will examine the pertinent law existing prior to this dispute by focusing on a three-way split in the federal appellate courts. Finally, this Note will recount the Court's opinion and concurrence, and discuss the advantages and disadvantages of the positions taken by the majority and concurrence.

II. FACTS AND PROCEDURAL BACKGROUND

The Petitioner, Gwaltney, a subsidiary of Smithfield Foods, Inc., owned and operated a meat-packing plant near Smithfield, Virginia. Smithfield Foods purchased Gwaltney from ITT-Gwaltney, Inc., taking control of the plant on October 27, 1981. The plant was located on and discharged wastewater into the Pagan River. Five months after purchasing the plant, Gwaltney installed a new wastewater treatment system to control a number of pollutants which it discharged under a NPDES permit issued by the Virginia State Water Control Board. The pollutants involved were fecal coliform, chlorine (Cl2), total suspended solids (TSS), total Kjeldahl nitrogen (TKN), and "oil and grease." The limitation for chlorine was last violated in October 1982: The limitation for TKN was last violated on May 15, 1984. *Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield,* 791 F.2d 304, 307 (4th Cir. 1986).

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator . . . .

(g) Citizen. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.


4. The National Pollution Discharge Elimination System (NPDES) was established under the Clean Water Act. 33 U.S.C. § 1342 (1982). Under this system, the Environmental Protection Agency (EPA) is empowered to issue permits allowing discharges of manufacturing effluent into surface water. The permits set the conditions controlling the discharge, including "effluent limitations" which establish maximum quantities or concentrations of certain substances that may be discharged. The permittee is subject to enforcement action by the EPA or a citizen-plaintiff if the conditions of the permit are violated.

The pollutants involved were fecal coliform, chlorine (Cl2), total suspended solids (TSS), total Kjeldahl nitrogen (TKN), and "oil and grease." The limitation for chlorine was last violated in October 1982: The limitation for TKN was last violated on May 15, 1984. *Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield,* 791 F.2d 304, 307 (4th Cir. 1986).

5. Pursuant to 33 U.S.C. § 1342(b), which allows the implementation of state NPDES programs, the Commonwealth of Virginia implemented a federally approved
by injecting chlorine into wastewater. This control strategy resulted in a violation of fecal coliform limits whenever too much chlorine was added. These violations were disclosed in “Discharge Monitoring Reports” (DMRs) which Gwaltney submitted to the Water Control Board.6

The findings of the District Court indicate that Gwaltney violated its permit limitations on TKN, chlorine and fecal coliform on many occasions between October 27, 1981, and August 30, 1984. Due to installation of new chlorination equipment in March 1982, the last reported chlorine violation occurred in October 1982, and the last reported coliform violation occurred in February 1984. Due to an upgraded wastewater treatment system in October 1983, the last TKN violation occurred on May 15, 1984.7

Due to these violations of Gwaltney’s NPDES permit, Chesapeake Bay Foundation, Inc. (CBF), and Natural Resources Defense Counsel (NRDC) filed a citizen suit pursuant to section 1365 of the CWA.8 CBF and NRDC are non-profit corporations which have the purpose of protecting natural resources.9 These corporations have many “members” that reside in Virginia.10 CBF served a notice of intent to sue in February 1984, and brought a citizen suit against Gwaltney in June 1984.11 The complaint stated that Gwaltney “has violated . . . [and] will continue to violate its NPDES permit.”12

CBF and NRDC was granted a partial summary judgment from the District Court on grounds that Gwaltney was in violation of the NPDES permit.13 Gwaltney moved to dismiss due to lack of subject matter jurisdiction, arguing the CWA did not permit suits for past violations and that it had ceased to violate its permit before the suit was filed.14 The District Court denied the motion to dismiss and

NPDES program. VA CODE ANN §§ 62.1-44.2 to 44.32 (1950).


9. The defendants will be referred to as “CBF” for the remainder of this Note.

10. CBF has approximately 19,000 members residing in the Chesapeake Bay area and NRDC has approximately 800 members in Virginia. Gwaltney, 791 F.2d at 306.


12. Id. at 380.


14. Id.
Gwaltney appealed.\textsuperscript{15} The Court of Appeals affirmed the District Court's denial of Gwaltney's motion, holding that suits were authorized for wholly past violations only.\textsuperscript{16} This holding added to an already existing split of authority between the appellate courts, which is discussed in the following section.

Regarding whether Gwaltney's violation was "wholly past" or "continuing," it is important to keep in mind that once Gwaltney's wastewater treatment system was balanced, the chlorine violations ended thirty-two months before suit was filed and fecal coliform violations ended four months before suit was filed. TKN was treated in a separate system, which yielded its last violation one month before suit was filed.

III. PRIOR DECISIONS BACKGROUND: RESOLUTION OF CONFLICTING CIRCUIT HOLDINGS

In resolving Gwaltney, the Supreme Court was confronted with a three-way split among the circuits regarding whether plaintiffs could bring an enforcement action against a polluter's wholly past violations of the CWA.

\textbf{A. The Fourth Circuit:} Gwaltney v. Chesapeake Bay Foundation

In opposition to Hamker v. Diamond Shamrock Chemical Co.,\textsuperscript{17} the Fourth Circuit, in the lower Gwaltney decision, held that suits were authorized for wholly past violations.\textsuperscript{18} The court advanced four arguments in favor of allowing citizen suits for wholly past violations. First, the court found that the present tense construction in section 1365 did not preclude suits for past violations.\textsuperscript{19} The court noticed that a similar construction was used to describe EPA's enforcement powers under the CWA and that such powers definitely extended to past violations. Second, the court determined that although citizen suits were limited to a supplementary role in enforcement, a bar to sue for past violations was not one of the limitations. The only limitations expressly provided by Congress were held to be those of the notice requirement and the bar to suit where the Administrator had already taken enforcement action.\textsuperscript{20}

Third, the court distinguished the Hamker case by pointing out

\begin{footnotesize}
\begin{enumerate}
  \item[15] Id. at 1550.
  \item[16] Gwaltney, 791 F.2d at 304.
  \item[17] 756 F.2d 392 (5th Cir. 1985).
  \item[18] Gwaltney, 791 F.2d 304.
  \item[19] Id. at 309.
  \item[20] Id. at 310. See supra note 2, for description of these notice and prior enforcement provisions.
\end{enumerate}
\end{footnotesize}
that Diamond Shamrock was sued regarding an oil spill that was a "one-time occurrence" and did involve an NPDES permit. The court stated:

Because no permit violation was involved in Hamker, because only a single long-past and non-recurring discharge (for which not even a good faith allegation of a possible continuing violation could have been made), and because the Hamkers failed to allege a violation of any effluent standard or limitation under the Act, it could be argued that Hamker is distinguishable . . . and . . . inapplicable.21

Fourth, the court discussed Gwaltney's contention that allowing suits for past violations would flood the federal courts with citizen suits. The court admitted that there was danger of a proliferation of section 1365 suits as well as "state damage claims which could be brought under pendent jurisdiction."22 However, the court dismissed this concern by finding that judicial discretion could control the admission of state claims under pendent jurisdiction.23 The court did not discuss a method for controlling a proliferation of purely CWA claims.

**B. The Fifth Circuit:**

Hamker v. Diamond Shamrock

In Hamker,24 the Fifth Circuit held that a citizen-plaintiff must allege an ongoing permit violation in order to meet the requirements of section 1362. The court based its decision on two major grounds. First, the court believed that the ordinary meaning of the statute's language required an allegation of ongoing violation, as it was written in the present tense.25 Second, the court concluded that the statutory scheme of section 1365 indicated congressional intent that a citizen could sue only for ongoing violations. This congressional intent was indicated by the placement of primary enforcement responsibility in the EPA Administrator. Additionally, this intent was indicated by the establishment of a notice provision whereby citizen-plaintiffs were required to serve notice to the EPA and the alleged violator sixty days prior to filing suit. According to the court, this notice provision allowed the administrator to take enforcement action prior to filing suit or allowed the permit-holder to come into

21. 756 F.2d at 312.
22. Id. at 313.
23. Id.
24. 756 F.2d 392 (5th Cir. 1985).
25. Id. at 396.
compliance prior to filing suit.26

C. The First Circuit: Pawtuxet Cove v. Ciba-Geigy

In Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.,27 the First Circuit held that a plaintiff could not maintain suit for a wholly past violation but that suit might “go forward if the citizen-plaintiff fairly alleged a continuing likelihood that the defendant, if not enjoined, [would] again proceed to violate the Act.”28 Thus, the court focused on the probability that a cessation in permit violations would not necessarily foreclose jurisdiction over a citizen suit. The following factors were listed as pertinent considerations: 1) the isolated or recurrent nature of the infraction; 2) the degree of scienter on the part of the defendant; and 3) the sincerity of the defendant’s assurances against future violations.29

This three-way split between the First, Fourth and Fifth Circuits presented the Supreme Court with an opportunity to establish uniform law regarding citizen suits under the CWA.

IV. The Supreme Court’s Opinion

A. The Majority Opinion

In resolving the three-way division among the circuit courts, the Supreme Court held that section 1365 did not permit citizen suits for wholly past violations.30 This restrictive holding was modified by the introduction of an allegation-based system of federal court jurisdiction under the CWA: a “good-faith allegation of continuous or intermittent violation” was held to invoke the subject matter jurisdiction of the federal courts.31 Additionally, a “sufficient allegation of fact,” not proof, was held to establish standing.32

1. Maintenance of Suit for Wholly Past Violations

In deciding to disallow suits for wholly past violations and arriving at its allegation-based jurisdictional theory, the Court explored the same ground as did the lower courts: the construction of CWA section 1365, the legislative history of CWA section 1365, and the potential effects of allowing past suits.

26. Id. at 395. The notice provision is set out in note 2, supra.
27. 807 F.2d 1089 (1st Cir. 1986).
28. Id. at 1094.
29. Id.
31. Id. at 385.
32. Id.
a. Statutory Construction

After examining Congress’s wording of section 1365, the Court determined that the statute was drafted to permit citizen suits for ongoing violations only.

First, the Court believed, as did the Court of Appeals, that the “to be in violation” language was ambiguous. However, the Court felt that the presence of ambiguity did not leave all interpretations equally acceptable. It found that “to be in violation” was most reasonably construed to impose a “requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”

Second, the Court saw the “pervasive use” of present tense in section 1365 as indicating that citizen suits were addressed to ongoing violations. The majority found Congress’ definition of “citizen” to be the most “telling use” of present tense, stating: “This definition makes plain what the undeviating use of present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.”

CBF argued that Congress’ choice of the phrase “to be in violation” was a careless accident that resulted from a “debatable lapse of syntactical precision.” The majority disagreed, finding identical language in other environmental statutes to authorize purely prospective relief. Denoting similar language used in the Solid Waste Disposal Act and the most recent amendments to the CWA, the Court stated that Congress knew how to draft liability for past violations and would have used such language in section 1365 if such liability was intended.

CBF pointed out that the phrase “is in violation” was drafted into CWA sections 1319(a) and 1319(b), which authorized the Administrator to issue compliance orders and bring civil compliance suits. Since these CWA sections allowed the EPA to bring civil actions for past violations, CBF contended that the parallel phrase in section

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33. Id. at 381.
34. Id. at 382. The definition of “citizen” in section 1365(g) is set out in note 2, supra.
35. Id. at 381 (citing Brief for Respondents at 8).
36. Id. The Court cited three other environmental statutes: the Clean Air Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act.
37. Id.
38. Gwaltney, 791 F.2d at 309.
1365 permitted citizens to bring similar suits. Yet, the Court relied on *Tull v. United States* to show that powers to seek injunctive relief and civil penalties were not intertwined but granted separately in sections 1319(d) and 1319(b). Thus, the Supreme Court disagreed with CBF, pointing out that the phrase "is in violation" appeared only in section 1319(b), which addressed injunctive relief, whereas section 1319(d), which addressed civil penalties, did not contain present tense language.

Finally, the majority believed that the combination of injunctive relief and civil penalties in the same sentence of section 1365(a) gave citizens the authority to seek civil penalties only in suits for ongoing violations. The Court stated: "The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement . . . . [C]itizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 

b. Legislative History

After considering the legislative history of section 1365, the Court stated that the primary purpose of the citizen suit provision was to afford injunctive relief from ongoing permit violations. The justices denoted legislative history wherein lawmakers frequently referred to the citizen suit provisions as abatement provisions or injunctive measures. Further, the majority pointed to Senate and House reports that linked section 1365 with the citizen suit provisions of the Clean Air Act, which authorized only injunctive relief. Additionally, the Court found that CBF could not support their contentions by relying on Senator Muskie's statement that "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation [of the CWA]." This reliance was said to be misplaced because the Senator's references to "occasional or sporadic" releases, when construed in context of his full statement, could not

39. *Id.*
42. *Id.*
43. *Id.* at 383.
44. *Id.* (referring to *Water Pollution Control Legislation: Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee or Public Works, 92d Cong., 1st Sess. 114 (1971)).
45. 118 CONG. REC. 33700 (1972).
46. Senator Muskie's statement was reported by the Court as follows:
This 60-day [notice] provision was not intended, however, to cut off the right of action a citizen may have [with respect] to violations that took place 60 days
be fairly read to include “wholly past” violations. The Senator’s remarks were said to emphasize that the intermittent polluter could be sued in like-fashion to the polluter who violated a permit in a “steady-stream” fashion.\footnote{47}

c. Effects of Allowing “Past Suits”

The Court decided against allowing citizen suits for past violations based on the effects that such suits would have on EPA enforcement of the CWA. First, the majority stated that allowing suits for past violations would render as useless the Act’s notice provision.\footnote{48} The Court believed that notice was required to give the Administrator time to act and to give the alleged violator time to abate permit violations, making the suit unnecessary. Under CBF’s interpretation, the notice requirement was said to become merely gratuitous to the violator.\footnote{49}

Second, the Court highlighted the bar to citizen suits once administrative action had begun. This bar was said to suggest that citizen suits were to be supplemental to administrative authority. The Court believed that allowing suits for past violations would undermine this supplementary role by removing abstinence from seeking civil penalties as a tool available to the Administrator in negotiating compliance orders.\footnote{50} On the above-mentioned grounds, the Court held that citizens did not have authority under section 1365 to bring compliance suits for past violations.

2. Institution of an Allegation-Based System

As to the federal courts’ subject matter jurisdiction over citizen suits for ongoing violations, the majority established an allegation-based jurisdictional system. This system required that under section 1365, the citizen-plaintiff plead a good faith allegation that the permit-holder was in violation of permit requirements.\footnote{51} Here, the ma-

\footnotesize{earlier but which may not have been continuous. As in the original Senate bill, a citizen has a right under section 305 to bring an action for an appropriate [sic] remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.}

Gwaltney, 108 S. Ct. at 384 (quoting 118 CONG. REC. 33700 (1972)).

\footnote{47} Id.

\footnote{48} Id. at 382. See 33 U.S.C. § 1365(b), supra note 2 (the notice provision).

\footnote{49} Gwaltney, 108 S. Ct. at 382-83.

\footnote{50} Id. at 383.

\footnote{51} Id. at 385.
Majority would consider whether, given the circumstances confronting the plaintiff regarding proof of an ongoing violation, the plaintiff had reasonably formed and pleaded a good faith belief that an ongoing violation existed. The majority's intent to fashion a "lower hurdle" for the plaintiff to cross was manifest by the rationale given for this standard: "We agree with the Solicitor General that 'Congress's use of the phrase "alleged to be in violation" reflects a conscious sensitiv-
ity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards."" Thus, the majority offered the citizen-plaintiff a shorter barrier to hurdle on the race to trial.

As to standing, the Court's requirement remained liberal. The majority held that plaintiff's allegations of injury in fact, not proof of injury, were sufficient to establish standing.

The Court recognized that this allegation-based standard was permissive, but the majority believed that Rule 11 of the Federal Rules of Civil Procedure would protect defendants by requiring pleadings to be made in good faith, "well grounded in fact," and formed after "reasonable inquiry." By including this "grounded in fact" requirement as a modification to a purely allegation-based jurisdictional scheme, the majority stopped short of erasing a defendant's ability to challenge jurisdictional facts. As the majority pointed out, a defendant may still attack the factual basis of the plaintiff's allegations, but the defendant must show that the plaintiff could not have a good faith belief in the existence of the permit violations which was well grounded in fact and formed after reasonable inquiry. This theory seems to allow the plaintiff a greater opportunity to reach trial, as the defendant would have a more difficult time showing lack of "good faith belief well grounded in fact" than the absence of a genuine issue of material fact.

Additionally, the Court stated that defendants could protect themselves through motions for summary judgment and motions to dismiss for mootness. The Court reminded the defendants that these allegations could be challenged by a motion for summary judgment where the defendant could show that the allegations were "sham and raised no genuine issue of fact." If the defendant failed to make such a showing, the case would then proceed to the merits, where the plaintiff would be required to prove its allegations in order to pre-

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52. Id. (quoting Brief for United States as Amicus Curiae at 18).
quirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . ."
54. Id. at 385.
55. Id.
56. Id. at 386 (quoting United States v. SCRAP, 412 U.S. 669, 689 (1973)).
vail. Therefore, the system of allegation-invoked jurisdiction was not to replace the plaintiff's need to prove the existence of an ongoing violation at trial.

The majority stated that principles of mootness would operate to protect the defendant where violations had been ceased and the source of the violations had been remedied. The defendant would be protected where it could prove that there was "no reasonable expectation that the wrong [would] be repeated." The burden on the defendant was said to be a "heavy one" that would be met only where it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." This heavy burden of proof would protect the plaintiff against mere "protestations of repentance and reform." Therefore, where the defendant could clearly prove that the conditions leading to violations had been remedied, the case would be dismissed for mootness.

Considering the allowances made to each party, the majority's decision counterbalances the plaintiff's easier road to trial by allowing the defendant to move for dismissal if compliance is obtained during the litigation process.

B. The Concurring Opinion

Justice Scalia, joined by Justices Stevens and O'Connor, concurred in part and concurred in the judgment. These Justices disagreed with the institution of an allegation-based jurisdictional system and argued for the institution of a proof-based system. Under the following analysis, the concurrence concluded that the citizen-plaintiff should be made to prove jurisdictional facts if those facts are challenged.

The concurrence believed that a plaintiff's burden in commencing a suit differed from its burden in maintaining that suit once jurisdictional facts were challenged. Justice Scalia interpreted section 1365(a) to allow a plaintiff only to commence a suit with good-faith
allegations. Citing cases involving amount in controversy and diversity of citizenship, he argued that if jurisdictional allegations were challenged by the defendant, the plaintiff would have to prove them to maintain suit. Thus, the concurrence believed that the allegations regarding subject matter jurisdiction, when challenged, had to be proven by a preponderance of the evidence in summary proceedings. Once this issue was decided, permit compliance occurring thereafter would have no effect on jurisdiction. In fact, Justice Scalia specifically stated that compliance after the date of filing would not "'oust[]' the court of its jurisdiction." Under this standard, he would not consider compliance data generated after the filing date to show a state of compliance in support of a motion to dismiss for subject matter jurisdiction.

The concurring justices supported their position that the plaintiff must prove the accuracy of the alleged jurisdictional facts with three decisions in which the plaintiff attempted to invoke federal jurisdiction through procedural bases. Since these decisions dealt with motions to dismiss for lack of jurisdiction under governing procedures, the jurisdictional and standing questions were fairly straightforward and easily decided by pre-trial motions. These summary issues did not resemble the logistically difficult points of proof presented in Gwaltney; thus these cases offered little support for the proposition that plaintiff must prove jurisdiction by a preponderance of the evidence in complicated pollution cases.

A fourth decision cited by the concurrence, Land v. Dollar, involved an action against members of the United States Maritime Commission for wrongful detainer of private property. The complaint alleged that Commission members were wrongfully retaining

63. Id.
64. Id. (quoting Mullen v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)).
65. Thompson v. Gaskill dealt with diversity jurisdiction and held that the "policy of Judicial Code § 24(1), conferring jurisdiction by diversity of citizenship, calls for strict construction of the statute." 315 U.S. 442, 446 (1942). If a "plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff must support them by competent proof, or the bill must be dismissed." Id.

KVOS, Inc. v. Associated Press dealt with amount in controversy and held that "where the plaintiff's allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof." 299 U.S. 269, 278 (1936).

McNutt v. General Motors Acceptance Corp. dealt with amount in controversy and held that a plaintiff in District Court must plead the "facts essential to show jurisdiction [in this case amount in controversy] and must carry throughout the litigation the burden of showing that he is properly in court . . . . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof . . . ." 298 U.S. 178, 189 (1936) (emphasis added). In McNutt, the sole jurisdictional question before the court was that of amount in controversy. The court limited its examples of "essential jurisdictional facts" to amount in controversy and diversity of citizenship.

possession of common stock delivered to the Commission as security for a loan. The respondents, shareholders, argued that the Commission members were acting beyond the scopes of their duties and asked that they be restrained from selling the stock and directed to return it to the respondents. The Commission members moved for summary judgment on the ground that the suit was barred under sovereign immunity because it was against the United States. The Supreme Court stated that the question of jurisdiction was dependent on the decision on the merits, since the suit could advance against the individual Commission members if they were found to have acted beyond the scopes of their duties. The Court affirmed the lower court, holding that "the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."

Thus, Land held that the plaintiff must prove its allegations, but only at trial. At first glance, this decision seems to go against the concurrence's proof-based system. However, Land and Gwaltney may be distinguished. In Land, jurisdiction and merit issues were identical, because the finding on the merits and the finding regarding jurisdiction depended on the court's view of the defendants' actions occurring prior to the time suit was filed. No new evidence could have been created after the filing date that would have applied to the decision on the merits but not to the jurisdictional decision. However in Gwaltney, compliance data generated after the time of filing was relevant to the decision on the merits and the decision regarding jurisdiction, but could not be used to determine jurisdiction. Thus, the impact of post-filing circumstances made it impossible to base the jurisdictional finding on the merit finding. Therefore, Land, considered in its entirety, does not contradict the concurrence's theory prohibiting a decision regarding subject matter jurisdiction to be made concurrently with the decision on the merits in cases such as Gwaltney.

The concurrence's requirement of proof in summary proceedings would greatly increase the citizen-plaintiff's burden. Procedurally, since the existence of a continuing violation is predominantly a factual issue, it could not have been decided without extraneous evi-

67. Id. at 738-39.
68. Id. at 739.
69. One must keep in mind the distinction between the discovery of existing evidence that would affect the jurisdictional decision and the creation of previously non-existing evidence that would affect the decision on the merits.
dence. With the introduction of extraneous evidence, a motion to dismiss for lack of subject matter jurisdiction ripens to resemble a motion for summary judgment. 70 The district court may grant summary judgment only where “everything in the record . . . demonstrates that no genuine issue of material fact exists.” 71 Logically, to require the plaintiff in such a case to rebut opposing evidence by proving its jurisdictional allegations by a “preponderance standard” would require the plaintiff to prove its entire case in the summary proceedings, a burden more onerous than the usual summary judgment “existence of a genuine issue” standard. 72

Under the concurrence’s proof-based system, Justice Scalia stated that the proper question on remand was whether Gwaltney was in violation at the time of filing, not whether CBF’s allegations were made in good faith. Since Gwaltney disputed the jurisdictional allegations, the concurrence believed that CBF should have been made to “prove” those allegations in summary proceedings. Such proof would have required the citizen-plaintiff to show that the permit holder was in a “state” of violation at the time the suit was filed. The concurrence stated that once a defendant violated an effluent limitation, it would remain in a state of violation “so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.” 73 If the defendant was in violation at the time of filing, subsequent events could not oust the court of jurisdiction. In this case, the concurring Justices stated that the lower court should determine whether the petitioner had “taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought.” 74

V. DISCUSSION

Under the concurring opinion, to show subject matter jurisdiction the plaintiff must prove the alleged ongoing violation by a preponderance standard. 75 This standard places a more onerous burden on the plaintiff at the outset of trial than does the majority’s standard. However, this burden, in practice, may be no heavier due to the broad parameters announced for defining a “state of compliance.” To show an ongoing violation, the concurrence required proof of

72. As will be seen from the following discussion, it does not seem possible that the concurrence intended the usual summary judgment “existence of genuine issue” standard to be used with respect to subject matter jurisdiction.
73. Gwaltney, 108 S. Ct. at 387.
74. Id. at 388.
75. Id. at 387.
complete and clear eradication as evidenced by the employment of “remedial measures that clearly eliminate the cause of the violation.” This language gives a trial court sufficient latitude to fashion for the plaintiff a lighter burden in proving an ongoing violation by defining a “state of compliance” that would be difficult for the defendant to obtain.

This Note agrees with Justice Scalia’s statement: “I cannot claim that the Court’s standard and mine would differ greatly in their practical application.” In fact, the malleability of each theory, through applying the question of “good faith belief” by the majority and the definition of “state of compliance” by the concurrence, affords the trial judge significant discretion in determining subject matter jurisdiction. Only through that judge’s exercise of this discretion would one scenario favor one party over the other.

Although we now know that a citizen-plaintiff cannot sue for a wholly past violation, we are no closer to knowing what actions by the permit-holder constitute a wholly past violation. Thus, the dust settles leaving the same problem: It is still unclear what set of circumstances will allow the citizen-plaintiff to sue under the CWA.

In 1985, two authors expressed the need for resolving the past violation issue. While discussing the Hamker opinion, they stated that “the continuing violation argument has now become a standard part of the defense repertoire, and it will continue to take up the time of courts and litigants until this conflict in statutory construction is authoritatively resolved.” As previously discussed, the Supreme Court has taken a step in resolving the confusion which had split the federal circuits. The effective length of the Court’s stride and the options to be provided for citizen suits will depend upon the shapes into which future litigation will mold the following considerations.

A. Defining “Continuing Violation”

First, the court must reach a workable, consistent definition of “continuing violation.” The majority recognizes that the defendant may be in violation from either “continuous” or “intermittent” releases. The concurrence describes this concept by articulating a “state” of noncompliance.

76. Id.
77. Id. at 388.
The phrase in § 505(a), “to be in violation”... suggests a state rather than an act... A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of [the Act], “in violation” of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.79

This concept must become sufficiently tangible to provide a consistent measure for all cases but sufficiently pliable to apply to the variety of technical questions raised by different types of pollution.80 Neither our environment nor our economy can afford a standard that is applied inconsistently by the federal circuits.

B. Rule 11 Parameters

Second, the courts must set parameters for the application of Rule 11. This procedural rule, applied to this case, states that the plaintiff must certify that “to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry if [the allegation of continuing violation] is well grounded in fact...”81

Applied to the Gwaltney facts, this standard requires the plaintiff to show: (1) State of violation: Past DMR’s must be shown to demonstrate a history of violation; and, (2) Lack of abatement: Plaintiff must show a lack of information demonstrating that the state of violation has been abated.

Generally, the defendant may show the allegation false by demonstrating that the problem has been clearly abated. As proof, the defendant may offer monitoring data from DMR’s not available to the plaintiff at filing. Obviously, the shorter the pre-filing abatement history, the stronger must be the defendant’s showing that the abatement was complete.82

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80. The concurrence’s definition may not be complete, as it does not encompass the permittee who has a long history of perfect performance with one recent, minor violation. Under such a circumstance, it is unclear how the “upset provisions” will apply in court. These provisions allow permittees to contest liability for exceeding a discharge limit by arguing that the incident was exceptional, unintentional and composed only temporary non-compliance. 40 C.F.R. § 122.41(n) (1987).

In SPIRGNJ, Inc. v. Georgia-Pacific Corp., the district court held that the upset provisions did not apply, since Congress did not intend for “courts to examine the factual circumstances underlying each of a series of exceedences over an extended period of time. Therefore, the ‘upset’ regulations are irrelevant to this case, which involves more than one hundred and fifty exceedences over five years.” 615 F. Supp. 1419, 1431 (D.C.N.J. 1985). This holding gives little guidance for cases where the defendant has a much better record.

For a case discussing continuous violation under the Clean Air Act, see United States v. SCM Corp., 667 F. Supp. 1110 (D. Md. 1987).
81. FED. R. CIV. P. 11.
82. Litigation is centering on violation in fact of the discharge permit terms.
Given the highly technical nature of pollution monitoring, future decisions may define "reasonable inquiry" and "well grounded in fact" largely on a case-by-case basis. However, citizen suits are brought as part of a regulatory scheme. This scheme would lose much of its efficiency if the citizen-plaintiff could not determine its investigatory responsibilities and the regulated community could not ascertain consistent enforcement policies and its own monitoring requirements under the NPDES. Such circumstances would deter citizens from pursuing permit violations. Additionally, permit holders may well be encouraged to meet only minimum requirements because they could not justify sizeable capital expenditures to meet inconsistently defined obligations. Thus, parameters must be placed on the application of Rule 11 to provide consistently imposed obligations on both parties.83

Further, the plaintiff must not be allowed to abuse this allegation-based theory by using other than the most currently available DMRs or by feigning ignorance when it knows that the defendant has abated discharge. The federal courts should inhibit abuse of goodfaith allegations by heavily sanctioning plaintiffs that bring groundless suits. Likewise, the defendant must not be allowed to raise empty proclamations of repentance where violations have not been truly abated.

In Mumford Cove Association, Inc. v. Town of Groton, the town was not excused for violations of its permit because pollution might have been due to factors other than the permitted sewage discharge. Additionally, the town was not excused from violation because it had made every reasonable effort to comply. 640 F. Supp. 392 (D. Conn. 1986).

In Sierra Club v. Simkins Industries, Inc., the court held that enforcement of permit violations was based on strict liability and a good faith but improper recording of discharges allowed under permits would not act as a good defense. In addition, summary judgment against the defendant was found appropriate as a matter of law, since violations were listed in DMRs and the defendant offered no evidence to contradict the listings. 617 F. Supp. 1120, 1128, 1130-31 (D. Md. 1985).

However, in Friends of the Earth v. Facet Enterprises, Inc., the court held that DMRs filed by the defendant did not constitute conclusive proof that the permit was violated where "defendant has offered a multitude of justifications for the alleged violations, along with convincing arguments why many of the alleged violations should not actually constitute violations (e.g., typographical mistakes in the DMRs)." 618 F. Supp. 532, 536 (W.D.N.Y. 1984).

83. Pertinent questions include: 1) Whether DMRs carry equal weight when used by defendant to show lack of violation as when used by plaintiff to show violation; 2) Whether the plaintiff meets its burden of reasonable inquiry by suing on the basis of past DMRs or must collect its own "up to date" monitoring data to meet the reasonable inquiry requirement; and 3) If the plaintiff must collect its own data, whether the collection and analysis methods were reasonable.
C. Standing Requirements

Third, the courts must set standing requirements which can be consistently applied. To meet standing requirements, the plaintiff must show "injury in fact." Plaintiffs in CWA cases may show standing more easily than those alleging a general constitutional injury; because Congress has created a "zone" of standing through the wording of the statute, the CWA-plaintiff need meet only the requirements of Article III, whereas, the plaintiff who sues under a general constitutional theory must overcome the courts' use of standing as a tool for judicial self-restraint as well as the requirements of Article III.

As noted above, the Court cited United States v. SCRAP when discussing the defendant's right to show a sham pleading. In SCRAP, the Court created a liberal rule for showing injury in fact. Professor Davis writes: "Probably the SCRAP case represents an all-time high in Supreme Court liberality on the subject of standing." The Court even quoted an earlier treatise by Professor Davis, which stated that "[t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

Citizen suits are intended to supplement a regulatory system. If the liberal SCRAP standard is to be applied to standing issues, it must be applied consistently to give both parties notice of their obligations under the system. A standard of this liberality may prove difficult to consistently apply, because allowing arguments of greatly attenuated injury throws open the doors for inventive and circuitous claims. Additionally, since we are coming out of the "capture"
where regulatory agencies were unduly sympathetic to regulated industries, such easily met requirements may no longer be necessary to correct an unfair balance.

D. Mootness and Considerations of Pollutant Monitoring Technology

Fourth, the mootness doctrine must be tailored to meet the highly technical showings required in environmental suits. The doctrine of mootness may be applied by the defendant, prior to final judgment, to show that the state of violation has been abated and that the case should be dismissed. The Court states that the defendant must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Given the numerous scientific assumptions which are made during the development of monitoring equipment and the possibility of error entailed in the use of monitoring equipment, proof of mootness may center on highly technical considerations.

Here, the courts should be concerned with the rapidly advancing sensitivity and precision of monitoring instrumentation. There is potential for technology battles with one side claiming that its data is more precise than that of the opposing party. The defendant may be in danger of being shown to be in violation where the monitoring technology it employs meets the requirements under NPDES but falls short of more powerful plaintiff technology. As such arguments become more focused on technical matters, the ranges of uncertainty become greater. Thus, a broad standard of mootness may be difficult to create and apply to these environmental questions.


91. One apt question is whether the technology employed by the defendants in meeting DMR requirements is sufficient to show a lack of violation in court.

Given that jurisdiction will now be based on good-faith allegations and standing will be liberally applied in favor of the plaintiff, permit-holders are well advised to keep a provably spotless record by using state of the art abatement and monitoring technology to keep all effluent streams free from violative releases. The greatest problem will be deciding what is "provably spotless."
E. Problems Confronting Future Litigation

In applying section 1365, courts must consider its impact on the number of citizen suits which may be brought, the impact of citizen suits upon the EPA's and citizens' roles in enforcing the CWA, and the impact of citizen suits upon the notice provisions of section 1365. First, future litigation must address the ease with which citizen-plaintiffs can bring a case to trial, as such will impact the number of suits brought. The direction resulting from this impact is not clear. The Hamker court believed that disallowing past violations would reduce the number of citizen suits by removing one ground on which they could be brought. The Gwaltney district court thought that disallowing past violations would increase the number of suits. This increase would come from the citizen's need to compel compliance by defendants with little incentive to abate until suit was filed. The Gwaltney appellate court thought that allowing past violations would not flood the federal courts. That court did not discuss how purely CWA claims would be controlled, but did assert that the judge could use his or her discretion to control state claims brought under pendent jurisdiction.

There should be concern over use of citizen suits as a vehicle to bring pendent claims before the federal court. Since the federal court may choose to decide pendent claims despite dismissal of the federal question and permit violation cases would not be dismissed for lack of jurisdiction until the merits were tried, these suits could be an attractive vehicle for getting the state claims to judgment in federal court. Under the lighter, allegation-based requirements for meeting subject matter jurisdiction, plaintiffs may be tempted to bring marginal section 1365 suits in order to append state claims. The federal judges must weigh this factor strongly when deciding to allow pendent claims.

Second, future litigation must address the impact of citizen suits upon the roles of the EPA and citizen in enforcing the CWA. The Supreme Court sought to keep the citizen's role "interstitial" rather than "potentially intrusive." By keeping the citizen's role supplementary to the EPA's, the Court sought to give the agency more authority to reach settlements with permit-holders. The EPA's ability to offer abstinence from suit for civil penalties may prove to be an important tool in inducing permit-holders to undertake expensive remedial actions.

Third, future litigation must address the impact of citizen suits upon the notice provision of section 1365. By holding that citizen suits may be brought only for ongoing violations, the Court gives

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purpose to the notice provisions of section 1365. The notice provision now serves both the citizen-plaintiff and the permittee. The potential plaintiff may use the provision to compel compliance without actually filing suit. The permittee may use the notice provision to diffuse incorrect allegations of non-compliance or abate violations before the potential plaintiff could gain standing under the CWA. This potential for "notice trials" is open to abuse for both sides. Thus, use of notice provisions should be closely scrutinized by the EPA and courts.

VI. CONCLUSION

_Gwaltney_ has given the lower circuits a general direction in which to travel in deciding whether a citizen-plaintiff has the right to sue for NPDES permit violations.\(^9\) Beyond that, however, the decision leaves many questions to be answered. The ruling that jurisdiction is based on good-faith allegation, standing is to be liberally construed in favor of the plaintiff, and the defendant has a heavy burden in

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9. On April 13, 1988, _Gwaltney_ was remanded from the Fourth Circuit Court of Appeals to the district court for determination of whether "citizen-plaintiffs" had proved an ongoing violation within the meaning of the Supreme Court's decision. 844 F.2d 170 (4th Cir. 1988). The appellate court upheld the district court's earlier finding that CBF's allegations of ongoing violations were made in good faith. Thus, the subject matter jurisdictional finding of the district court has again been approved. In remanding, the appellate court required proceedings to determine whether, on the merits, "plaintiffs proved at trial an ongoing violation." _Id._ at 171.

The appellate court stated that citizen-plaintiffs may prove an ongoing violation at trial "(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. _Id._ at 171-72. The appellate court stated,

The Supreme Court Justices who concurred in parts of the majority opinion and the judgment suggest that because the majority views subject matter jurisdiction to be met by good-faith allegations, the majority implies that a "plaintiff can never be called on to prove that jurisdictional allegation." We think that the majority does expressly require that a citizen-plaintiff prove the existence of an ongoing violation (continuous or intermittent) in order to prevail. The majority and the Justices concurring separately differ as to when this proof would be required, with the concurrence requiring proof of an ongoing violation as a threshold jurisdictional matter.

_Id._ at 171, n.1 (citations omitted).

On July 18, 1988, the district court held that Gwaltney's violations were ongoing at the time CBF filed suit. Chesapeake Bay Found. v. Gwaltney of Smithfield, 688 F. Supp. 1078, 1080 (E.D. VA. 1988). The court noted: "If the evidence at trial showed a continuing likelihood of recurrence in violations, jurisdiction was proper regardless of the subsequent failure of the hazards to materialize." _Id._ at 1079. Thus, despite nonrecurrence of violative discharges after May, 1984, the court found those violations to be ongoing because there existed a reasonable likelihood of recurrence at the time suit was filed.

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proving mootness may be necessary to get all but a few cases to
court, but will inevitably allow many borderline cases to proceed. In
future litigation, the courts must strive to provide a workable defini-
tion of "continuing violation," set parameters for the application of
Rule 11, set standing requirements that may be consistently applied,
and tailor the mootness doctrine to meet the highly technical show-
ings required in environmental suits. Additionally, the courts must
consider the potential effects of their decisions, such as flooding the
courts with citizen suits, confusing citizen and EPA enforcement of
the CWA, and keeping the notice provision of section 1365 intact.

LANCE L. SHEA