ARTICLES

GWALTNEY EIGHT YEARS LATER: PROVING JURISDICTION AND ARTICLE III STANDING IN CLEAN WATER ACT CITIZEN SUITS

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In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,[1] the Supreme Court held that section 505(a) of the Clean Water Act (CWA or Act), which authorizes citizens-plaintiffs to bring a civil action in federal court against any person alleged "to be in violation" of the conditions of a National Pollutant Discharge Elimination System ("NPDES") permit, requires the citizen-plaintiff first allege, and later prove, an ongoing violation.[2] According to the *Gwaltney* Court, section 505 does not authorize suits on the basis of wholly past violations.[3]

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1. 484 U.S. 49 (1987).
2. *Id.* at 59.
3. *Id.* at 57.

The *Gwaltney* Court's discussion of subject matter jurisdiction requirements under section 505 and of constitutional standing raised many more questions than it resolved. It is unclear from Justice Marshall's majority opinion, when read in light of Justice Scalia's concurring opinion, whether the citizen-plaintiff must prove that the violation is not wholly past and, if so, at what point in the litigation that proof is required. Justice Marshall's statement in *Gwaltney* that ". . . principles of mootness . . . prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated'"[4] seemed to suggest that proof of a violation at trial might be necessary to prevent dismissal of the suit on grounds of mootness.

Six years after *Gwaltney*, the waters cleared. The Fourth Circuit's decision in *Gwaltney*, on remand from the Supreme Court, provides a test for establishing a section 505 ongoing violation that has been adopted by all circuit courts that have addressed the issue. The courts also have considered, and resolved, questions raised by dictum in *Gwaltney* about the relationship between proving an ongoing violation to establish subject matter jurisdiction and the doctrine of mootness. The single material issue to emerge from the *Gwaltney* decisions that awaits final resolution is whether the citizen-plaintiff must plead and prove an ongoing violation of each and every parameter in the NPDES permit, or simply plead and prove an ongoing violation of the permit itself.

This article takes a practitioner's look at two of the key issues left unresolved in *Gwaltney*: what constitutes an "ongoing violation"; and when a citizen suit becomes moot as a result of post-suit compliance. In addition, this article looks at what the courts have generally found necessary to establish Article III standing—as opposed to statutory standing—in Clean Water Act suits.

I. CHESAPEAKE BAY FOUNDATION V. GWALTNEY OF SMITHFIELD

Under section 505 of the Clean Water Act, a citizen-plaintiff may bring an action in federal court against any person "alleged to be in violation" of state or federal effluent standards or limitations.[5] Prior to

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4. *Id.* at 66 (*quoting* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).
5. 33 U.S.C. § 1365(a) (1988 & Supp. V 1993). Section 505(a) provides:

> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section . . ., any citizen may commence a civil action on his [or her] own behalf—

the Supreme Court's decision in *Gwaltney*, the federal courts disagreed on whether wholly past violations were actionable under the citizen's suit provision. One interpretation, exemplified by the Fifth Circuit's decision in *Hamker v. Diamond Shamrock Chemical Co.*,[6] held that section 505 required the citizen-plaintiff to allege facts sufficient to show that a violation presently existed at the time the complaint was filed.[7] The Fourth Circuit in *Gwaltney* concluded the opposite, holding that section 505 conferred subject jurisdiction for citizen suits based on wholly past violations.[8] The First Circuit adopted an intermediate position in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*,[9] concluding that section 505 confers subject matter jurisdiction if "the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."[10]

In *Gwaltney*, plaintiffs Chesapeake Bay Foundation ("CBF") and the Natural Resources Defense Council ("NRDC") brought suit in February of 1984 against defendant Gwaltney of Smithfield, Inc. ("Gwaltney") under the citizen suit provisions of section 505, alleging violations by Gwaltney of its NPDES permit, and requesting both injunctive relief and civil penalties.[11] In response to Gwaltney's post-trial motion to dismiss for lack of subject matter jurisdiction,[12] the district

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

Id.

6. 756 F.2d 392 (5th Cir. 1985).
7. *Id.* at 395.
8. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 309-10 (4th Cir. 1986).
9. 807 F.2d 1089 (1st Cir. 1986).
10. *Id.* at 1094.
11. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 54 (1987).
12. Scalia noted that the defendant did not seek certiorari or appeal to the Fourth Circuit on the denial of its motion to dismiss for lack of standing. *Id.* at 70.

court determined that section 505 authorized suits for wholly past violations.[13] On appeal, the Fourth Circuit rejected Gwaltney's argument that section 505 requires that the citizen-plaintiff allege and prove a violation occurring at the time the complaint is filed.[14]

The Supreme Court granted certiorari in *Gwaltney* to resolve the conflict on the issue of subject matter jurisdiction under section 505 amongst the First, Fourth, and Fifth Circuits.[15] In the first substantive portions of the majority opinion, Justice Marshall, writing for a unanimous court, concluded that the "alleged to be in violation" language in section 505 "does not permit citizen suits for wholly past violations."[16] Justice Marshall defined "to be in violation" to require the citizen-plaintiff to 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."[17] The majority of the Court parted company with Justice Scalia and two other justices on the third portion of the majority opinion, which considered whether principles of standing required citizen-plaintiffs to *prove* their allegations of ongoing compliance before subject matter jurisdiction attached under section 505.[18] The majority concluded that the language of section 505, "alleged to be in violation," evidenced Congress' intent that subject matter jurisdiction require only a "good faith allegation to suffice for jurisdictional purposes. . . ."[19]

The *Gwaltney* majority then considered the defendant's contention "that failure to require proof . . . would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing."[20] The Court pointed out that, under principles of constitutional standing articulated in *Warth v. Seldin*, an action is not to be dismissed for lack of standing "if there are sufficient 'allegations of fact'—not proof—in the complaint and supporting affidavits."[21] If the plaintiff's allegations were not true but "were sham," the Court observed, a defendant always could

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13. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1547-51 (E.D. Va. 1985).
14. 791 F.2d 304, at 313 (4th Cir. 1986).
15. *Gwaltney*, 484 U.S. at 56.
16. *Id.* at 64.
17. *Id.* at 57.
18. *Id.* at 64-67.
19. *Id.* at 65.
20. *Id.*
21. *Id.*

challenge them by moving for summary judgment.[22] But if the citizen-plaintiff offers evidence to support the good faith allegation, ". . . the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail."[23]

The defendant in *Gwaltney* also contended that the majority's approach might permit a citizen-plaintiff to maintain a suit even if, at some later point in time, the defendant took corrective action and achieved a state of compliance.[24] In response to this argument, the Court noted that "[l]ongstanding principles of mootness . . . prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'"[25] Thus, the Court concluded: "[m]ootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'"[26] The case was then remanded to the Fourth Circuit with instructions that the court consider whether the plaintiffs' complaint contained a good-faith allegation of an ongoing violation by Gwaltney.[27]

In a concurring opinion, joined by Justices Stevens and O'Connor, Justice Scalia took issue with the majority's conclusion that a good faith allegation that the defendant was "in violation" was sufficient to establish subject matter jurisdiction under section 505.[28] Turning from the issue of subject matter jurisdiction to that of Article III standing, the concurrence argued that if a defendant in a section 505 suit was not in violation at the time the suit was filed, "the plaintiffs would have been suffering no remediable injury in fact that could support suit."[29] Thus, Justice Scalia concluded, the remand to the Fourth Circuit should require

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22. *Id.* at 66.
23. *Id.*
24. *Id.*
25. *Id.* (*quoting* United States v. W.T. Grant Co., 345 U.S. 629, 633(1953) (citations omitted)).
26. *Id.* at 66-67 (*quoting* United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952)).
27. *Id.* at 67.
28. *Id.* at 67-68.
29. *Id.* at 70.

that court "to consider not just good-faith allegation of a state of violation but its actual existence."[30]

In summary, the majority and concurring opinions in *Gwaltney* raised four distinct issues: (1) the scope of statutory jurisdiction and standing under section 505; (2) the timing and proof requirements for establishing statutory standing under section 505; (3) the relationship between the statutory standing requirements and constitutional standing; and (4) the relationship between the statutory standing requirements and the doctrine of mootness. Each of these four issues offered fertile ground for litigation after *Gwaltney*.

II. PROVING JURISDICTION AFTER *GWALTNEY*

Gwaltney makes clear that subject matter jurisdiction is established under section 505 if citizen-plaintiffs include in their complaints good faith allegations of ongoing violations.[31] Put conversely, a complaint brought by a citizen-plaintiff can be dismissed for lack of subject matter jurisdiction if the complaint either (1) fails to *allege* an ongoing violation, or (2) the defendant can prove that the allegation of an ongoing violation was not made in *good faith*.[32]

As to the requirement of an ongoing violation, the citizen-plaintiff need only allege facts sufficient to show "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[33] For example, if a defendant failed to obtain a NPDES permit where one is required, the citizen-plaintiff could allege that the defendant's failure to obtain an NPDES permit constitutes a continuing violation of the Act.[34] At this stage, a citizen-plaintiff need not prove the factual allegations of an ongoing violation.[35] The defendant can challenge the factual basis of the

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30. *Id.* at 70-71.

31. *Id.* at 64.

32. *See generally* Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 171 (4th Cir. 1988) (holding "the district court's finding that allegations were made in good faith is not clearly erroneous").

33. *Gwaltney*, 484 U.S. at 57.

34. *See* Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1063 (5th Cir. 1991).

35. *See, e.g.*, Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc., 2 F.3d 493, 502 (3rd Cir. 1993); Tobyhanna Conservation v. Country Place Waste Facility, 769 F. Supp. 739, 742-43 (M.D. Pa. 1991).

Did the First Circuit err in Mattoon v. City of Pittsfield, 980 F.2d 1, 6-7 (1st Cir. 1992), which concerned identical language of the citizen suit provision in the Safe Drinking Water Act (SDWA),

allegation of an ongoing allegation by moving for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure or at trial on the merits. The real question is what sort of content those initial allegations must be given after the pleading stage—that is, either on summary judgment or at trial.

Before addressing those proof requirements, one controversy is worth noting at this point. The Circuit Courts disagree on whether *Gwaltney* instructs that standing, like subject matter jurisdiction, is established merely with a good faith allegation that a violation is ongoing, or instead must be proven at trial. The Third Circuit, on the one hand, stated in *Texaco* that proof that the alleged ongoing violations were in fact ongoing is required at trial to establish standing.[36] On the other hand, the Fifth Circuit in *Carr v. Alta Verde Industries, Inc.*,[37] construed *Gwaltney* as providing that subject matter jurisdiction *and* standing are threshold jurisdictional matters that are established with a good faith allegation of an ongoing violation.[38] As conceptualized by the Fifth Circuit, the allegedly ongoing nature of the defendant's violation is best viewed as an element of the plaintiff's cause of action, not as a part of the standing equation, and must be proven at trial for the plaintiff to prevail on the merits.[39] *Carr* concluded therefore that the district court erred by dismissing the suit after trial for lack of standing, ". . . rather than simply entering judgment for the defendants on the merits."[40]

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42 U.S.C. § 300j-8(a)(1) (1988 & Supp. V 1993)? In *Mattoon*, the district court granted summary judgment to defendants, explaining that plaintiffs failed to raise a genuine factual issue on the existence of an ongoing violation. *Mattoon*, 980 F.2d at 6. It is unclear if the defendants contended lack of subject matter jurisdiction or standing; however, it looks like the former, given that plaintiffs argued on appeal that "the district court ruling caused their 'initial jurisdiction to disappear.'" *Id.* at 7. The First Circuit affirmed on the ground that plaintiffs offered no evidence "that could lead a rational trier of fact to find an 'ongoing' violation, a jurisdictional prerequisite to the maintenance of their SDWA claim. . . ." *Id.*

36. *Texaco*, 2 F.3d 493, 501 (*citing Gwaltney*, 484 U.S. at 66). The district court's error did not affect the outcome of the case and therefore did not constitute grounds for reversible error. *Id.* at n.4.

37. 931 F.2d 1055 (5th Cir. 1991).

38. *Id.* at 1061-63. According to Carr,

> The Supreme Court in Gwaltney stated that if the matter proceeds to a trial on the merits, the plaintiff does not have to prove a continuous or intermittent violation "as a threshold matter in order to invoke the District Court's jurisdiction," but "must prove the allegations in order to prevail."

Id. at 1063 (quoting *Gwaltney*, 484 U.S. at 66).

39. *Carr*, 931 F.2d at 1063.

40. *Id.* at 1063 n.5.

Still other courts have employed hybrids of these two theories. For example, in *Allen County Citizens for the Environment, Inc. v. BP Oil*,[41] the Sixth Circuit affirmed a district court's *dismissal* for lack of standing of the plaintiffs' suit after finding no evidence that defendant's violations were ongoing.

It is important to note, however, that while these decisions have differing interpretations of the rules for standing, this disagreement is taxonomic rather than substantive. All circuits agree that subject matter jurisdiction under section 505 is established with the plaintiff's good faith allegation of an ongoing violation. All circuits further agree that the plaintiff must offer evidence that the violation is ongoing to defeat a motion for summary judgment and must later prove the allegation at trial to prevail on the merits.

Whether standing is conceptualized as a threshold issue or part of the cause of action has practical significance only to the extent that it allows for procedural gamesmanship in Clean Water Act citizen suits. It is fairly common for defendants to file a motion to dismiss on standing simply to try to force the plaintiff to put on their case on the merits without the opportunity for preparation or discovery. The appropriate thing for a court to do in this situation is simply to defer ruling until a summary judgment motion is filed, or a hearing is held on the merits. (The court also has the procedural option, of course, of converting the motion to dismiss into one for summary judgment.) In any case, plaintiffs should not be forced to telescope their entire case into the proceedings on a motion to dismiss.[42]

III. PROOF OF AN ONGOING VIOLATION

A. *The* Gwaltney II *Test*

As stated above, citizen-plaintiffs must prove their good faith allegations of ongoing violations at trial to prevail on the merits, regardless of whether this requirement is conceptualized as one of

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41. No. 91-3698, 1992 U.S. App. LEXIS 14906, at *4-5 (6th Cir. June 18, 1992).

42. The Fifth Circuit has addressed this problem in Barrett Computer Servs. Inc. v. PDA, Inc., 884 F.2d 214, 219-20 (5th Cir. 1989). That circuit's approach is to let the trial court determine whether standing issues are sufficiently intertwined with the merits of the case to merit waiting for trial, or whether standing is sufficiently separable to be fairly addressed in an initial evidentiary hearing.

standing or merits or both.[43] An ongoing violation, as defined by the Supreme Court in *Gwaltney*, means a "reasonable likelihood that a past polluter will continue to pollute in the future."[44] All courts to address this issue, including the Third, Fifth, Sixth, and Ninth Circuits, have adopted the two-part test for proving the existence of an ongoing violation that was articulated by the Fourth Circuit[45] in its 1988 remand decision to the district court.[46] This test provides that a plaintiff can demonstrate the existence of an ongoing violation, that is, a continuous or intermittent violation, either

> (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. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.[47]

Gwaltney II further instructed the district court that it might

> wish to consider whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence

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43. *See* case cited *supra* notes 31-35.

44. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987).

45. Natural Resources Defense Council v. Texaco Refining and Mktg., Inc., 1993 U.S. App. LEXIS 20919, *24-25 (3rd Cir. 1993); *Allen County*, No. 91-3698, 1992 U.S. App. LEXIS 14906, at *4; *Carr*, 931 F.2d at 1062; Sierra Club v. Union Oil Co. of California, 853 F.2d 667, 669-71 (9th Cir. 1988).

46. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 171-72 (4th Cir. 1988). The Fourth Circuit pieced together the disparate discussion in Justice Marshall's opinion and determined that an additional issue on remand, albeit one not mentioned in the Court's remand instructions, was whether the plaintiffs proved their allegation. As the court explained,

> 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." 108 S. Ct. at 386-87. 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. 108 S. Ct. at 386. 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.

47. *Id.* at 171-72.

> presented during the proceedings that bears on whether the risk of the defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit.[48]

The jurisdictional standing test is written in the disjunctive. Thus, a plaintiff establishes that pre-complaint violations constitute an "ongoing" violation by meeting either part of this test.[49] "[A] plaintiff need not prove both that a post-complaint violation has occurred and that independent evidence proves a continuing likelihood of recurring violations."[50] Proof of the existence of an ongoing violation under either part of this test allows the court to assess penalties based on past violations.[51] Under the second part of this test, past violations are the only possible basis for assessing penalties.

1. Violations On or After Complaint

The first part of the jurisdictional standing test is uncomplicated: a plaintiff establishes that pre-complaint violations are ongoing by showing one or more violations of the same type as the pre-complaint violations occurring on or after the date of the complaint.[52] Proof of post-complaint violations of the same type is *conclusive* proof that the pre-complaint violation was ongoing.[53] For this reason, the Third Circuit in *Texaco* affirmed the district court's finding that pre-complaint violations were ongoing based solely on proof of a post-complaint violation.[54] Similarly, in *State Line Fishing & Hunting Club v. Waskom,*

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48. *Id.* at 172.
49. *Id.* at 171-72.
50. *Texaco*, 2 F.3d at 502 (citing *Gwaltney*, 844 F.2d at 171-72).
51. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 696 (4th Cir. 1989).
52. Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc., 2 F.3d 493, 501 (3rd Cir. 1993); Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991); State Line Fishing & Hunting Club v. Waskom, Texas, 754 F. Supp. 1104, 1110 (E.D. Tex. 1991); Sierra Club v. Port Townshend Paper Corp., No. C87-316C, 1988 U.S. Dist. LEXIS 17137 *4 (W.D. Wash. May 2, 1988).
53. *Texaco*, 2 F.3d at 502; *Carr*, 931 F.2d at 1065 n.12 (noting "proof of an actual violation subsequent to the complaint is conclusive" that the violation is ongoing); *but cf.* Allen County Citizens for the Environment, Inc. v. BP Oil Co., 762 F. Supp. 733, 744 (N.D. Ohio 1991), *aff'd*, No. 91-3698, 1992 U.S. App. LEXIS 14906 (6th Cir. June 18, 1992) (evidence of post-complaint violation of ammonia parameter does not raise factual issue that pre-complaint violations of same parameter were ongoing).
54. *Texaco*, 2 F.3d at 502 ("[D]istrict court did not err by relying solely on such violations to determine that corresponding pre-complaint violations were continuous or intermittent.").

Texas,[55] the district court found proof of post-suit violations of flow, total suspended solids, and chlorine parameters of the NPDES permit coupled with evidence of repeated and protracted pre-suit violations of those same parameters demonstrated the violation's ongoing nature.[56]

2. Evidence of Likelihood of Recurrence

The second and less straightforward part of the jurisdictional standing test allows the citizen-plaintiff to demonstrate that pre-complaint violations are "ongoing" with "evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations."[57] Intermittent or sporadic violations are considered ongoing "until the date when there is no real likelihood of repetition."[58] In addition, the likelihood that a violation will recur is considered as of the time the suit was filed, not as of the date of trial.[59]

A good example of the sort of situation in which no likelihood of repetition would be found is *Connecticut Coastal Fishermen's Ass'n v. Remington Arms*.[60] In that case, Remington Arms had for many years operated a skeet shooting range on the shores of Long Island Sound.[61] The plaintiff contended that the range was depositing lead into the Sound without an NPDES permit.[62] About four months before the suit was filed, Remington opted to shut down the range entirely.[63] About a year later, it actually removed the facilities necessary for skeet shooting.[64] The Second Circuit found that this was sufficient to demonstrate that there was no real likelihood of repetition.[65]

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55. 754 F. Supp. 1104, 1111 (E.D. Tex. 1991).

56. *See also* Public Interest Research Group of New Jersey v. Yates Indus., Inc., 790 F. Supp. 511, 515 (D.N.J. 1991) (stating that evidence of post-complaint violations satisfied first means of prevailing under *Gwaltney*.)

57. *Gwaltney*, 844 F.2d at 171-72.

58. *Id.* at 172.

59. *But see* Natural Resources Defense Council, Inc. v. Gould, 733 F. Supp. 8, 9 (D. Mass. 1990) (noting that the court will consider whether at the time of trial a violation is likely to recur).

60. 989 F.2d 1305 (2d Cir. 1993).

61. *Id.* at 1308.

62. *Id.* at 1309.

63. *Id.* at 1312.

64. *Id.*

65. *Id.* at 1312-13. *But see* Allen County Citizens for the Env't, Inc. v. BP Oil Co., 762 F. Supp. 733, 739 (N.D. Ohio 1991) (finding no factual issue of ongoing violations for numerous parameters based on post-complaint events); *see also* Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 632-33 (D.R.I. 1990) (stating past polluter of a current violation is not liable under plain language of 33 U.S.C. § 1365(a)).

3. Ongoing Violations of Specific Parameters

Gwaltney's holding that a good faith allegation of an on-going violation is sufficient at the pleading stage to confer federal subject matter jurisdiction raised the following subsidiary question: good faith allegations of an ongoing violation of what—the NPDES permit itself, or specific parameters of the NPDES permit? The term "parameter" refers to the specific water quality indicators or pollutants in an NPDES permit. If the NPDES permit has multiple effluent limitations, the permit will identify the specific "parameters" or categories of pollutants that the permit holder may discharge, and provide defined limits on the discharge of each of those pollutants.[66]

The federal courts are split—but not very split—on the question whether federal subject matter jurisdiction attaches to each parameter that allegedly was violated, or to the permit itself. Most of these cases have come up in the context of summary judgment motions.[67]

At present, there are three positions represented in the cases. The position that an ongoing violation of any permit parameter supports jurisdiction over all properly noticed permit violations, whether ongoing or not, is currently represented solely by the U.S. District Court for the Western District of Washington's decision in *Sierra Club v. Port Townshend Paper Corp.*[68] In that case, the district court held without much discussion that the appropriate analysis was of *permit* violations, not of particular parameters.[69]

The opposite position was taken by the Fourth Circuit in *Gwaltney* on remand from the Supreme Court.[70] The Fourth Circuit thought that the language of the citizen suit provision allowing suit for

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66. Public Interest Research Groups of New Jersey v. Hercules, Inc., 830 F. Supp. 1525, 1528 (D.N.J. 1993).

67. No decisions have been found that consider, in the context of a motion to dismiss under FED. R. CIV. P. 12(b) (6), whether the complaint brought by the citizen-plaintiff must in good faith *allege* an ongoing violation for each and every parameter the plaintiff intends to prove at trial. Nevertheless, it would behoove the cagey citizen-plaintiff to be as specific as possible.

68. No. C87-316C, 1988 U.S. Dist. LEXIS 17137 at *5 (W.D. Wash. May 2, 1988). Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc., 817 F. Supp. 1164, 1175 (D.N.J. 1993), and Public Interest Research Group of New Jersey v. Yates Indus., 790 F. Supp. 511, 516 (N.D.N.J. 1991) also supported this view, but was implicitly overruled by Natural Resources Defense Council v. Texaco, 2 F.3d 493 (3rd Cir. 1993).

69. Port Townshend Paper Corp., No. C87-316C, 1988 U.S. Dist. LEXIS 17137 at *5.

70. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 696-97 (4th Cir. 1989).

violation of an "effluent standard or limitation" indicated a congressional intent to allow citizen suits only for those parameters with respect to which violations were ongoing at the time of trial.[71]

The Third Circuit comes down somewhere in between. In *NRDC v. Texaco*,[72] it approved an approach that required proof of on-going violation for each parameter, but took a liberal view of what proof would be adequate:

> [This standard] requires a separate determination of jurisdiction for each violation or set of violations of a parameter. . . . Under the modified by-parameter approach, however, a plaintiff can establish at trial that violations are continuous or intermittent in either of two ways: first, by proving a likelihood of recurring violations of the same parameter; or second, by proving a likelihood that the same inadequately corrected source of trouble will cause recurring violations of one or more different parameters.[73]

In other words, under the Third Circuit approach, the court looks closely to see whether the possibility of recurring violations of one parameter has some practical connection to the possibility of recurring violations of another parameter.

The Third Circuit's approach is also acceptable to the citizen-plaintiff, since in many cases it will yield the same result as simply allowing jurisdiction to attach to all violations of the permit. The problem with that approach, however, is that it can lead to a lot of expensive technical discovery for the often impecunious citizen-plaintiff. As a policy matter, it would certainly be easier to allow the district court to consider in the penalty calculus whether or not sporadic past violations were likely to be repeated.

B. Article III Standing

The *Gwaltney* decision is somewhat confusing because it does not clearly distinguish statutory standing requirements and standing requirements under Article III of the U.S. Constitution. The requirement

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71. *Id.* at 698.
72. 2 F.3d 493 (3rd Cir. 1993).
73. *Id.* at 499.

of an ongoing violation is a matter of statutory standing. Even assuming an ongoing violation has been established, however, the citizen-plaintiff must also establish standing under Article III.[74] In some areas of environmental litigation, establishing Article III standing has become somewhat trickier in the past few years.[75] In the Clean Water Act context, however, the courts have set out a relatively well-marked course for litigants, and the end result is a standing jurisprudence that is in keeping with the objectives of the Clean Water Act.

Valley Forge Christian College v. Americans United for Separation of Church and State[76] sets out the three basic requirements of Article III standing: an injury in fact personally suffered by the plaintiff, which is fairly traceable to the defendant's conduct, and which will likely be redressed by a favorable decision.[77] In the Clean Water Act citizens suit context, the "actual injury" and "fairly traceable" prongs of this test are generally the most contested.[78]

1. Actual Injury

The jurisprudence on establishing actual injury for standing purposes in environmental cases is full of somewhat contradictory bluster. On the one hand, the Supreme Court early and late has made a

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74. Save Our Community v. United States EPA, 971 F.2d 1155, 1161-62 (5th Cir. 1992).

75. The Fifth Circuit explained the difference between statutory and Article III standing in the Clean Water Act context in Save Our Community v. United States EPA, 971 F.2d 1155, 1160-67 (5th Cir. 1992). In that case the Fifth Circuit declined to apply the test for statutory standing set out by the Supreme Court in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), on the basis that the Clean Water Act citizen suit provision was intended to confer standing to the full extent allowed by Article III. *Save Our Community*, 971 F.2d at 1161 n.11.

76. 454 U.S. 464, 471 (1982).

77. *Id.* at 472.

78. It is also worth noting that many, perhaps most, Clean Water Act citizen suits are brought by organizations of one sort or another. The Supreme Court explained in Hunt v. Washington Apple Advertising Comm., 432 U.S. 333, 343 (1977) that organizations may possess standing as representatives of their individual members if they satisfy a three part test: the organization must represent some members who would have individual standing to sue, the goal of the organization must be related to the interests it seeks to protect, and neither the claim nor the relief require individual members to participate in the suit. *Accord Save Our Communities*, 971 F.2d at 1160; O'Hair v. White, 675 F.2d 680, 691 (5th Cir. 1982). It also appears that the organization really need only have a single member that would have standing in her own right to sue. The last two parts of the Hunt v. Washington Apple test are generally not very controversial, so the real inquiry is often simply whether any single member of the plaintiff organization has suffered a concrete injury.

point of the necessity for a "concrete" and "actual" injury.[79] At the same time, the Supreme Court has never required allegations of large, significant or physical sorts of injuries. Indeed, that Court and the lower federal courts have repeatedly held that injury to aesthetic or recreational interests is quite sufficient, and that an "identifiable trifle" will suffice.[80]

In Clean Water Act cases, the question of actual injury generally comes down to whether the citizen-plaintiff actually spends time on or near the water body in question. The requirement of an "identifiable trifle" of injury, for example in the form of an injury to aesthetic enjoyment, is simply not that difficult to meet, but the courts have generally found allegations of that sort of injury to be plausible only if the plaintiff actually spends time on or adjacent to the body of water in question.[81]

How much contact with the body of water is enough? Most courts have been pretty lenient in their interpretation, and most plaintiffs have been fairly specific in their allegations. For example, in *National Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc.*, NRDC introduced testimony to the effect that its members had observed oily sheens and unpleasant odors in the Delaware River in the vicinity of the discharge in question, and that this inhibited their enjoyment of boating, swimming and recreating in waterfront areas.[82] In addition, NRDC members testified that pollution in the river kept them from eating local fish.[83]

Other cases have found standing on less detailed showings of use and injury. In *Sierra Club v. Simkins Industries*,[84] for example, standing was based on the fact that a single member of the Sierra Club went hiking

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79. *See, e.g.*, Lujan v, Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992) (finding that standing was not present because injury was not concrete enough); Sierra Club v. Morton, 405 U.S. 727 (1972) (finding organization's mere interest in an environmental problem was not sufficient to allege that it was adversely affected).

80. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973); Save Our Community v. United States EPA, 971 F.2d 1155, 1161 (5th Cir. 1992); Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64, 71 (3rd. Cir. 1990).

81. *See*, *e.g.*, Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc., 2 F.3d 493 (3rd Cir. 1993); Powell Duffryn Terminals, 913 F.2d 64; Sierra Club v. Simkins, 847 F.2d 1109 (4th Cir. 1988).

82. *Texaco*, 2 F.3d at 505.

83. *Id.*

84. 847 F.2d 1109 (4th Cir. 1988).

near the affected area.[85] In *Powell Duffryn Terminals*,[86] the court found sufficient injury to confer standing by the testimony that members of the plaintiff organization hiked several times per year in the vicinity of the affected waterbody, were offended by the pollution of its waters, and recreated in that vicinity.[87] In fact, several cases have directly stated that in the Clean Water Act context, injury in fact is established by showing that the defendant violated its permit, and that the plaintiff used the affected waterway in some fashion.[88]

One of the more common sub-issues within the actual injury analysis is the physical proximity of plaintiff's use to the discharge itself. Defendants have often argued that so-called "downstream users" of waterbodies did not have a sufficient injury to support standing. In most of the cases discussing this issue the courts have without great discussion found downstream users to satisfy the standing requirements. The key issue seems to simply be whether the waters are those directly affected by the illegal discharges.[89]

2. Fairly Traceable

The majority of Clean Water Act citizen suits are for violation of permit limits, and citizen suit defendants routinely and predictably argue that the citizen-plaintiff has not actually caused any harm to plaintiffs, or that any harm caused by the violations could not be distinguished from harm caused by other sources of pollutants. These arguments have not carried the day, and along the way the courts have developed a definition

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85. *Id.* at 1112 n.3.
86. 913 F.2d 64 (3rd Cir. 1990).
87. *Id.* at 75; *see also, e.g.,* United States v. Metropolitan St. Louis Sewer District, 883 F.2d 54, 56 (8th Cir. 1989) (finding standing for those who visit and recreate on river); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 445 (D.C. Md. 1985) (noting that plaintiffs stated a geographic connection and "injury to aesthetic and recreational interest"); California Public Interest Research Group v. Shell Oil Co., Nos. C92-4023, C93-0622, 1994 U.S. Dist. LEXIS 18999 at *14 (N.D. Cal. Jan. 5, 1994) (explaining that the diminished enjoyment of the bay due to pollution supports standing).
88. Atlantic States Legal Found. v. Universal Tool, 735 F. Supp. 1404, 1411 (N.D. Ind. 1990); Natural Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 807-08 (N.D. Ill. 1988).
89. *See, e.g.*, Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 285, 287 (N.D.N.Y. 1986); *cf.* Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980-81 (4th Cir. 1992) (finding that plaintiff's allegation that destruction of wetlands on adjacent property harms river sufficient to defeat summary judgment on lack of standing).

of causation in the citizen suit context that reflects the intent of the citizen suit provision.

Powell Duffryn Terminals established a three part test that has been widely adopted for determining whether the plaintiffs' injury is fairly traceable to the defendant's violation:

> . . . Plaintiffs need only show that there is a "substantial likelihood" that defendant's conduct caused plaintiffs' harm. . . . In a Clean Water Act case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.[90]

Additionally, the *Powell Duffryn* court stated that "the fairly traceable requirement . . . is not equivalent to a requirement of tort causation."[91] Other courts have echoed this finding, and even taken it a bit further, finding that

> [t]o require a particularized showing that that a certain discharge caused a specific injury to one of plaintiff's members would unduly burden the plaintiff and virtually emasculate the citizens suit provision by making it impossible for any plaintiff to demonstrate standing.[92]

This is a common sense approach, in keeping with the Clean Water Act's intent to confer standing on citizen-plaintiffs to the full extent allowed by Article III.[93]

In the end, what the Courts have looked for to support standing in Clean Water Act cases is some concrete indication that the plaintiff, or some member of the plaintiff group, actually has some specific

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90. Powell Duffryn Terminals, 913 F.2d 64, 72 (3rd Cir. 1990).

91. *Id.*

92. Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. at 446; *see also* Arkansas Wildlife Fed'n v. Bakeart, 791 F. Supp. 769, 777 (W.D. Ark. 1992); Student Public Interest Research Group of New Jersey v. Tenneco, 602 F. Supp. 1394, 1397 (D.N.J. 1985).

93. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 13-15 (1981).

geographical connection to the body of water affected by the illegal discharge.[94]

IV. MOOTNESS

In *Gwaltney*, the defendant asserted that the Court's good faith allegation standard would allow plaintiffs to press their suit to conclusion, even though their good faith "allegations of ongoing violations later become false at some later point in the litigation because the defendant begins to comply with the Act."[95] In response, the Court observed in dictum:

> Long-standing principles of mootness, however, prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (*quoting United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)). In seeking to have a case dismissed as moot, however, . . . [t]he defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (emphasis added). Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).[96]

The Court's ambiguous comment on mootness provoked numerous suits in which defendants argued that post-suit compliance barred claims for both civil penalties and injunctive relief.[97] The issue was first addressed in *Chesapeake Bay Foundation v. Gwaltney of*

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94. *See supra* notes 81-83 and accompanying text.
95. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987).
96. *Id.* at 66-67.
97. Defendants relied on the Supreme Court's use of the term "suit" to argue that *Gwaltney* indicates that the mooting of injunctive relief also moots claims for civil damages. *See, e.g.*, Natural Resources Defense Council, Inc. v. Texaco Refining and Mktg., Inc., 2 F.3d 493, 503 n.7 (3rd Cir. 1993).

Smithfield.[98] In that case, Gwaltney argued that there was no live case or controversy, and consequently, the Chesapeake Bay Foundation's action was moot, because Gwaltney's remedial measures and post-complaint compliance made it absolutely clear that Gwaltney would not violate the total kjeldahl nitrogen (TKN) or chlorine parameters in the future.[99]

Courts found that "the mooting of injunctive relief does not moot the request for penalties as long as such penalties were rightfully sought at the time the suit was filed."[100] It reasoned, first, that "[u]nder the Clean Water Act, civil penalties attach as of the date a permit violation occurs."[101] The Supreme Court's decision in *Gwaltney*, moreover, holds that penalties can be assessed based on pre-complaint violations, if the plaintiff establishes an ongoing violation at the time suit was filed.[102] At present, all circuits that have considered the issue agree with the Fourth Circuit that the defendant's post-complaint compliance does not render claims for civil damages moot, if the citizen-plaintiff proves the existence of an ongoing violation.[103]

The lone case finding the other way is *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, and that case involved some rather unusual facts.[104] There the EPA had actually relaxed the requirements in an existing permit.[105] The court thought that this was not a situation that a defendant simply seeking to moot a citizen suit would be likely to replicate.[106]

98. 890 F.2d 690, 696-97 (4th Cir. 1989).

99. *Id.* at 696; Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 1079-80 (E.D. Va. 1988).

100. Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990).

101. *Id.* at 696.

102. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987).

103. Atlantic States Legal Found., Inc. v. Pan American Tanning Corp., 993 F.2d 1017, 1021 (2d Cir. 1993). The court stated, "We hold . . . that a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot." *Id.* Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990) (stating "[i]f the parties are able to make a valid request for injunctive relief at the time the complaint is filed, then they may continue to maintain a suit for civil penalties, even when injunctive relief is no longer appropriate."); *cf.* Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) ("Even had the improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties."). *But see* Massachusetts Public Interest Research Group v. ICI Americas, Inc., 777 F. Supp. 1032, 1035 (D. Mass. 1991).

104. 777 F. Supp. 1032 (D. Mass. 1991).

105. *Id.* at 1035.

106. *Id.*

V. CONCLUSION

The Fourth Circuit and the courts that have followed it clearly arrived at the correct interpretation of *Gwaltney*, and any uncertainty that the loose dicta on mootness brought about should be considered over and done with. In almost any conceivable situation, mootness will simply not be a problem for citizen plaintiffs who have met the other requirements for statutory and Article III standing.

Although the restrictions *Gwaltney* placed on citizen suits seemed momentous in the event, the view from the field is that they have in fact not been of tremendous practical import. Overall, I think the discussion above shows that the post-*Gwaltney* cases have resolved the various questions raised in that case in a manner that is surprisingly friendly to the citizen plaintiff, and not too far off from the intent of the Clean Water Act.

The lower courts have placed the burden of showing that violations are not likely to be continued post-complaint squarely on the defendant, where it belongs. In addition, the courts have not bought the idea that a claim for penalties can be mooted by post-complaint compliance. Finally, apart from *Gwaltney* hurdles, the courts have not insisted on a hyper-technical analysis of the elements of Article III standing, instead broadly allowing the citizens who use a body of water the right to sue to keep it safe.

Although *Gwaltney* did not put much of a dent in most citizen suits, it is still an unfortunate case, decided based on a construction of the citizens suit provision that puts it at odds with the rest of the statute. While it is a relatively rare case in which the defendant is able to stop violations quickly enough and with enough certainty to let a court find that there is no reasonable likelihood of recurrence, those situations nevertheless arise, and there should be a way under the Clean Water for citizens to address them.

The lower courts have tacitly admitted as much in the mootness cases. As discussed above, those cases allow the citizen plaintiff to carry on an action for penalties even if post-complaint actions moot any claim for injunctive relief. Their reasoning is essentially that penalties attach as of the time that a violation occurs, and once the citizen plaintiff has established the right to carry on the suit, the Clean Water Act meant for penalties to be available. This leaves a rather anomalous situation: if the problem leading to violations is fixed one day before suit is filed, the

plaintiff is out of luck. If it is fixed one day after the complaint if filed, it is the violator that is out of luck. It is hard to imagine that the framers of the Clean Water Act meant for this sort of distinction to exist, but that is where *Gwaltney* has left us.

The current climate in Congress does not leave one with much hope that the anomalies *Gwaltney* left us will be corrected anytime soon. Until they are, careful pleading and careful case selection will be the order of the day for citizen plaintiffs.