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THE VIABILITY OF CITIZENS' SUITS UNDER THE CLEAN WATER ACT AFTER *Gwaltney of Smithfield v.* *Chesapeake Bay Foundation*

*Beverly McQueary Smith**

The Supreme Court of the United States, through its decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation, has sharply restricted the ability of citizens to enforce the Clean Water Act. The Court interpreted the failure of Congress to authorize expressly private civil actions for 'purely past violations of the Clean Water Act as a bar to such citizen suits. In light of Congressional intent in passing the Clean Water Act, and the recent history of lax enforcement by the United States Environmental Protection Agency, the author argues that Congress should reverse the Supreme Court by expressly authorizing, with certain limitations, citizen suits for purely past violations of the Clean Water Act.

"Environmental protection encompasses issues and problems relating to the management of our natural environment by placing limits on the amount of pollution that can be tolerated without endangering the health and welfare of human beings and the ecological systems in which we live.

The United States each year absorbs billions of tons of natu-

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ral resources and turns out goods and services which we either consume or reinvest for future production. As the economy in [sic] producing these goods and services that contribute to our standard of living, it is simultaneously producing other things—polluted rivers and streams, smog and other air pollution problems that characterize our major cities, poisonous pesticides, toxic substances, unsafe drinking water, hazardous wastes, radiation, congestion, and noise. All of these pollutants detract from our quality of life to some degree, but more importantly, they can have significant adverse effects on human health.”¹

CONGRESS HAS NOT expressly extended to citizens the ability to exact civil penalties from water polluters for purely past violations of the *Federal Water Pollution and Control Act*² [hereinafter the Clean Water Act]. This Congressional omission lead

1. U.S. GEN. ACCT. OFF., GAO-CED 82-73, *Environmental Protection: Agenda for the 1980's* (May 5, 1982).

2. 33 U.S.C. §§ 1155-75 (1948), *superceded by* Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.). Although Congress has periodically amended the Water Pollution Control Act, it has never extended a right to private citizens to sue violators for purely past damages. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566-1609 (codified as amended in scattered sections of 33 U.S.C.); Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467-69 (codified as amended at 33 U.S.C. §§ 1254-1321); Act of Dec. 16, 1979, Pub. L. No. 96-148, 93 Stat. 1088 (codified as amended at 33 U.S.C. § 1284 note); Act of Oct. 21, 1980, Pub. L. No. 96-478, 94 Stat. 2303 (codified as amended at 33 U.S.C. § 1321); Act of Oct. 21, 1980, Pub. L. No. 96-483, 94 Stat. 2360-63 (codified as amended in scattered sections of 33 U.S.C.); Act of Aug. 13, 1981, Pub. L. No. 97-35, 95 Stat. 764 (codified as amended at 33 U.S.C. § 1287); Act of Dec. 29, 1981, Pub. L. No. 97-117, 95 Stat. 1623-32 (codified as amended in scattered sections of 33 U.S.C.); Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 49 (codified as amended at 33 U.S.C. § 1321); Act of Oct. 19, 1982, Pub. L. No. 97-357, 96 Stat. 1712 (codified as amended at 33 U.S.C. § 1282); Act of Jan. 8, 1983, Pub. L. No. 97-440, 96 Stat. 2289 (codified as amended at 33 U.S.C. § 1311); Water Quality Control Act of 1987, Pub. L. No. 100-4, 100 Stat. 8-78 (codified as amended in scattered sections of 33 U.S.C.); Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329-197 (codified as amended at 33 U.S.C. § 1330); Act of Jan. 8, 1988, Pub. L. No. 100-236, 101 Stat. 1732 (codified as amended at § 33 U.S.C. § 1369); Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2940 (codified as amended at 33 U.S.C. § 1377); Act of Nov. 14, 1988, Pub. L. No. 100-653, 102 Stat. 3836 (codified as amended at 33 U.S.C. § 1330); Act of Nov. 18, 1988, Pub. L. No. 100-688, 102 Stat. 4151 (codified as amended at 33 U.S.C. §§ 1268, 1330). *Gwaltney* arose under the law which existed prior to the 1987 amendments. Unless otherwise specified, all references to the Clean Water Act relate to the Clean Water Act prior to the 1987 changes.

For a thorough discussion of the historical development of the Clean Water Act and the scope of Congressional efforts to ensure that laws against polluting the waters are enforced, see Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202 (1987).

the Supreme Court of the United States in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*³ to interpret the citizen suit provision of the Clean Water Act,⁴ as barring citizen suits for purely past violations. The Court took this position despite legislative history in which Senator Edmund Muskie, the Congressional architect of the law, stated that the statutory language also governed cases involving occasional or sporadic violators.⁵ The Supreme Court's interpretation of the language contained in section 505 of the Clean Water Act impairs the effectiveness of the citizen suit provision in pending cases. The Court's interpretation also discourages members of the regulated industry from complying with the law, thereby thwarting the law's goal of eliminating the discharge of waste into our nation's navigable waters by 1985.⁶

Despite the historical development of an environmental ethic in the United States⁷ and throughout the world,⁸ the Supreme

3. 484 U.S. 49 (1987).

4. Clean Water Act of 1972 § 505, 33 U.S.C. § 1365 (1982 & Supp. V 1987).

5. See *infra* text accompanying notes 178-79.

6. Clean Water Act of 1972 § 101(a)(1) 33 U.S.C. § 1251(a)(1) (1982).

7. The following articles provide a general background on the emerging environmental ethic in the United States: Devall, *The Deep Ecology Movement*, 20 NAT. RESOURCES J. 300 (1980); Hill, *The Politics of Environmental Law*, 64 MICH. B. J. 164 (1985); Mitchell, *How "Soft," "Deep," or "Left?" Present Constituencies in the Environmental Movement for Certain World Views*, 20 NAT. RESOURCES J. 345 (1980); Morrison, *The Soft, Cutting Edge of Environmentalism: Why and How The Appropriate Technology Notion is Changing the Movement*, 20 NAT. RESOURCES J. 275 (1980); Sagoff, *Can Environmentalists Be Liberals? Jurisprudential Foundations of Environmentalism*, 16 ENVTL. L. 775 (1986); Kuklin, *When Incommensurable Values Conflict—Thoughts On MANDELKER'S ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* (Book Review) 49 BROOKLYN L. REV. 245 (1983). In particular, Devall says:

Deep ecology, unlike reform environmentalism, is not just a pragmatic, short-term social movement with a goal like stopping nuclear power or cleaning up the waterways. Deep ecology first attempts to question and present alternatives to conventional ways of thinking in the modern West. Deep ecology understands that some of the "solutions" of reform environmentalism are counter-productive. Deep ecology seeks transformation of values and social organization.

Devall, *supra*, at 303.

8. For commentaries describing the international scope of environmental degradation and how other countries deal with it, see E. REHBINDER AND R. STEWART, *ENVIRONMENTAL PROTECTION POLICY* (1985); Abraham and Rosencranz, *An Evaluation of Pollution Control Legislation in India*, 11 COLUM. J. ENVTL. L. 101 (1986); Johnston, *Systemic Environmental Damage: The Challenge to International Law and Organization*, 12 SYR. J. INT'L L. & COM. 255 (1985); Ottley and Valauskas, *China's Developing Environmental Law: Policies, Practices and Legislation*, 6 B.C. INT'L & COMP. L. REV. 81 (1983); Rehbinder and Stewart, *Legal Integration in Federal Systems: European Community Environmental Law*, 33 AM. J. COMP. L. 371 (1985); Note, *United States—Mexico: Coping With Environmental Problems At The Border*, 9 LOY. L.A. INT'L & COMP. L.J. 117 (1986).

Court's decision is no surprise. Environmental law graphically illustrates how competing societal values battle against one another in the statehouses, courthouses and marketplaces of the nation. Environmental protection pits the well-established societal norm of modernization, in a word, "progress," against an emerging societal value that supports conservation of the earth's natural resources, including air and water.⁹ Most would concur that part of the problem stems from a perception that the earth's natural resources are effectively infinite, constantly being replenished.

Fortunately, more and more people now appreciate the limitations on the earth's capacity to absorb the pollution by-products of production and consumption. One commentator reported that, even though "[o]n an average day, 4.2 trillion gallons of precipitation fall on the continental United States, . . . an increasing number of experts see the prospect of a serious [water] shortage as likely. . . . [E]ven where water is still abundant, pollutants increasingly threaten its quality."¹⁰ The growing scarcity of our

9. Data suggest that developing an appreciation for the fact that natural resources are finite takes a long time. See generally Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283 (1982) (discussion of whether environmental policy should be based on the interests individuals act upon as consumers (exploitation of resources in the present) or on the values agreed upon by citizens (preservation of resources for the future)), and Speth, *Environmental Regulation and the Immobilization of Truth*, 8 ENVTL. AFF. 413 (1980). According to Speth:

Those who argue against continuing the environmental momentum of the 1970's have failed to grasp the full severity and dimensions of the environmental problems that continue to face us. The issues that persist today are not just questions of esthetics, or comfort, or an idealized notion of "the good life"; they are clear threats to the health and welfare of the American people. They simply cannot be put aside until a time when it is more convenient to focus on them.

. . . .

There are few who directly attack our environmental commitment, but a growing number have adopted the strategy of undermining that commitment indirectly. At first the strategy took the form of a refreshing concern for the working man and woman. In a kind of perversion of the Phillips curve once vainly used to explain inflation, the argument seemed to run that unemployment went up as smog and oil slicks went down. But that argument was permitted to die a quiet death when the National Academy of Sciences estimated that the nation's effort to clean up the environment actually accounted for about 680,000 jobs, 30 new jobs for every one eliminated due to decisions by manufacturing firms and others that resulted from environmental requirements.

Id. at 415-6.

10. Butler, *Defining a Water Ethic Through Comprehensive Reform: A Suggested Framework for Analysis*, 1986 U. ILL. L. REV. 439 (citing 1 U.S. WATER RESOURCES COUNCIL, *THE NATION'S WATER RESOURCES*, 1975-2000, at 12 (1978)). Of the total precipitation, about two-thirds evaporates immediately and the remaining amount generally contributes to ground and surface water supplies. *Id.* at 439 n.1.

fresh water resources has sparked a period of what Professor Bill Devall terms "reformist environmentalism."¹¹ Reformist environmentalism refers to several social movements whose goal is to change society for "better living" without attacking the premises of the dominant social paradigm.¹² The Clean Water Act, whether responsive to the concerns of reformist environmentalists or not, represents one Congressional attempt to address the health and welfare crisis spawned from the degradation of water quality.

The citizen suit provision of the Clean Water Act constitutes one Congressional enforcement device.¹³ Since its inclusion in the 1972 law, the citizen suit slowly emerged as an adjunct to governmental enforcement efforts—some would argue it has become the primary mechanism—for ensuring compliance with the statute in an era of substantial governmental enforcement failure.¹⁴ As a result, the Supreme Court's decision in *Gwaltney*, denying citizens the right to exact civil penalties from water polluters for wholly past violations of the law, provides an opportunity for legislators, environmentalists, and industry members to both reevaluate the viability of citizen suits under the current law and develop new strategies to achieve the societal goal of clean water. The reevaluation can also seek to determine why the government failed to eliminate the discharge of pollutants into our nation's waterways by 1985, the target date Congress included in section 101 of the Clean Water Act in 1972.¹⁵ In the latter regard, this Article examines the impact that inadequate resources have had on the Environmental Protection Agency's (EPA) ability to implement the water pollution control program.

Prior to the Supreme Court's decision in *Gwaltney*, what

11. Devall, *supra* note 7, at 302.

12. *Id.* at 302-03.

13. Private enforcement of federal environmental laws has stimulated much commentary. For helpful background on the use of the citizen suit, see generally Andreen, *supra* note 2; Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 832 (1985); Jordan, *Citizen Litigation Under the Clean Water Act: The Second Circuit Renews Its Leadership Role in Environmental Law*, 52 BROOKLYN L. REV. 829 (1986); Peller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DEN. L.J. 553 (1983); Note, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 CASE W. RES. L. REV. 515 (1987); Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127 (1985); Comment, *Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175 (1987).

14. See *infra* text accompanying notes 215-96.

15. Clean Water Act of 1972 § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1982).

reach citizen suits would have and what unlawful activities citizens would be able to prosecute successfully were still questions that were open to debate. Thus, when the Supreme Court elected a narrow, rather than an expansive, interpretation of the statute, it ended the speculation by strangling the promise of the citizens' suit provision. The Supreme Court's decision dictates that citizens cannot force water polluters to pay civil penalties for purely past violations of the law. This holding tears a hole into the enforcement net.

On balance, members of the regulated industry have more incentives to avoid compliance with the Clean Water Act in the post-*Gwaltney* climate. In a time of lax governmental enforcement, environmentalists and legal scholars may ask: Given the fact that the Supreme Court could have interpreted the ambiguous language more expansively, did the court err by refusing to do so? Within the bounds of the Constitution — that is, without an impermissible intrusion into the prerogatives of the Executive Branch — can and should Congress revise the law to allow citizen-plaintiffs to do what governmental enforcement authorities cannot or will not do? As a policy matter, is it proper to allow wrongdoers to retain the economic benefits gleaned from their prior non-compliance?

This Article examines the implications of the *Gwaltney* decision and concludes that the Court impaired the efficacy of citizen suits as an enforcement tool to such an extent that Congress needs to strengthen the law to promote greater compliance. In the process, this Article discusses the viability of citizen suits after *Gwaltney* and criticizes the policy implications of allowing water polluters to continue their unlawful activities in a climate of lax governmental enforcement. The role of citizen suits as an adjunct to the enforcement efforts of governmental agencies is examined by (1) recounting the legislative history of the provision;¹⁶ (2) discussing how the *Gwaltney* case wended its way through the federal courts;¹⁷ (3) reviewing the Supreme Court's decision to remand the case¹⁸ and the results of the remand in both the Fourth Circuit Court of Appeals¹⁹ and the Federal District Court for the

16. See *infra* text accompanying notes 23-78.

17. See *infra* text accompanying notes 79-160.

18. See *infra* text accompanying notes 161-91.

19. See *infra* text accompanying notes 192-99.

Eastern District of Virginia, respectively;²⁰ (4) examining the policy implications of allowing or barring citizens from seeking civil penalties for purely past violations of the Act;²¹ and (5) proposing and evaluating legislative alternatives that either clarify the statute to allow the imposition of civil penalties in this context or proffer other options, including depositing monies collected under section 505 into a special federal fund, imposing excise taxes on goods and services produced by polluters, and establishing a system of transferable pollution permits.²²

I. BACKGROUND AND LEGISLATIVE HISTORY OF SECTION 505 OF THE CLEAN WATER ACT

A review of the background and legislative history of the citizen suit provision of the Clean Water Act demonstrates the necessity of these suits as supplements to governmental enforcement efforts. Section 505 of the Clean Water Act²³ authorizes citizens to

20. See *infra* text accompanying note 200-07.

21. See *infra* text accompanying notes 300-41.

22. See *infra* pp. 72-75.

23. Section 505 of the Clean Water Act, 33 U.S.C. § 1365 (1982 & Supp. V 1987), provides:

Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, and section 1319(g)(6) of this title, 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 chapter 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 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.

(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

(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, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such a manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such a standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means

(1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title;

(2) an effluent limitation or other limitation under section 1311 or 1312 of this title;

(3) standard of performance under section 1316 of this title;

(4) prohibition, effluent standard or pretreatment standards under section 1317 of this title;

(5) certification under section 1341 of this title; or

(6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

(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.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

sue water polluters,²⁴ including governmental agencies, their instrumentalities,²⁵ and the Administrator of the Environmental Protection Agency,²⁶ for failure to comply with the law. The citizen suit provision of the Clean Water Act resembles a provision of the Clean Air Act²⁷ that Congress passed in 1970. Given its resemblance to the Clean Air Act provision, section 505 of the Clean Water Act probably did not receive the level of scrutiny that it should have.

Proponents of including a citizen suit provision in the Clean Water Act urged Congress to provide citizens with the same enforcement prerogatives available to citizens under the Clean Air Act.²⁸ Opponents complained that authorizing citizen suits would lead to harassing or frivolous litigation,²⁹ further overburdening

24. Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1) (1982 & Supp. V 1987), authorizes suits against water polluters including the United States and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution.

A water polluter is a person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id.*

25. The United States and other governmental agencies are subject to suit for polluting the nation's waters. *Id.*

26. If the Administrator of the Environmental Protection Agency fails to perform any nondiscretionary act or duty under this law, citizens can sue pursuant to this provision. Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1982 & Supp. V 1987).

27. Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1970) (as amended by Pub. L. No. 95-190, 91 Stat. 1401-02 (1970) (technical and conforming amendments)). The 1970 Act, originally codified at 42 U.S.C. §§ 1857-1858(a) (1982), has been recodified in 42 U.S.C. §§ 7401-7642 (1982) to incorporate the 1977 amendments.

Section 304 of the Clean Air Act, 42 U.S.C. § 7604 (Supp. V 1987), "allows any person to commence a civil action on his own behalf" against emitters and governmental entities (1) alleged to be in violation of emission standards or limitations and state or federal orders or (2) alleged to have not obtained the necessary permits for new facility construction under the Act's non-attainment and prevention of significant deterioration of air quality (PSD) provisions. The Administrator may be compelled under section 304 to perform only "non-discretionary" duties. 42 U.S.C. § 7604(a)(2) (1982). Reasonable attorney and expert witness fees may be awarded any party within the court's discretion. 42 U.S.C. § 7604(d) (1982).

28. *Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess., at 698 (1971) [hereinafter cited as *Hearings*] (statement of Weldon Barton, Assistant Director of Legislative Services, National Farmers Union).

In fact, the Administrator of the Environmental Protection Agency (EPA), William D. Ruckelshaus, proposed and supported legislation authorizing private citizens to take legal action against violators of water quality standards. *Id.* at 1352 (Exhibit F, statement of William D. Ruckelshaus, Administrator of the Environmental Protection Agency on the Nader Report).

29. *Id.* at 743, 747-48 (statement of P.N. Gammelgard, Senior Vice President, Pub-

the federal court docket.³⁰ Other opponents argued that if Congress authorized such suits, it would be abrogating its duties to oversee the administrative agency's execution of the federal law.³¹ One opponent quoted Chief Justice Warren Burger as supporting the notion of limiting a citizen's access to federal courts to prosecute water polluters.³² Despite these objections, a civil suit provision was included in the Clean Water Act.

Since the enactment of the Clean Water Act, courts have had occasion to address most of the legal and policy questions concerning citizen suits.³³ The *Gwaltney* case³⁴ presented the Supreme Court with the opportunity to consider whether section 505(a) authorizes citizens to sue water polluters *for wholly past violations* of the Clean Water Act. The Court examined the "alleged to be in violation" language of section 505(a)³⁵ to determine whether a court could impose civil penalties on water polluters in a citizen suit if, at the time the citizen filed the complaint, the defendant had stopped discharging excessive amounts of pollutants into the water.³⁶

Applying "the plain language of the statute" rule of statutory

lic and Environmental Affairs, American Petroleum Institute). *Id.* at 754 (statement of Clyde Hampton, Chairman, American Petroleum Institute Advisory Committee on Environmental Law).

30. *Id.* at 743 and 747-48 (statement of P.N. Gammelgard, Senior Vice President, Public and Environmental Affairs, American Petroleum Institute).

31. *Id.* at 1094, 1109 and 1113 (statement of Dr. J. William Haun, Vice President and Director of Engineering, General Mills, Inc.).

32. Dr. Haun quoted Chief Justice Burger as saying that:

The federal court system is for a limited purpose and lawyers, the Congress, and the public must examine carefully each demand they make on that system. People speak glibly of putting all the problems of pollution[,] of crowded cities, of consumer class actions, and others in the federal courts. We should look more to state courts familiar with local conditions and local problems.

Id. at 1094 (quoting Chief Justice Burger's speech before the American Bar Association on August 10, 1970).

33. One issue that has not been definitively resolved is what statute of limitations to apply to a citizen suit when, as here, none is stated in the statute. *See generally* Anderson, *Uniformity in Clean Water Act Enforcement: Applying a Five Year Federal Statute of Limitations to Citizen Suits*, 6 TEMP. ENVTL. L. & TECH. J. 49 (1987) (advocating the adoption of a five-year federal limitation period on civil suit actions because it strikes a balance between deterring the industry and unreasonably burdening it); Note, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195 (1986) (advocating a five year limitations period on both citizen and EPA enforcement actions).

34. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

35. *See supra* note 23 for the full text of section 505.

36. *See infra* text accompanying notes 161-91 for a full discussion of the Court's decision.

interpretation, the Justices concluded that it is unclear what Congress meant by the expression, "alleged to be in violation."³⁷ Does the provision merely require that all potential plaintiffs make a good faith "allegation" that someone is violating the law? Does it mean the same thing as stating that someone "is" violating the law? Or can the provision also govern instances in which the defendant continuously violated the law, perhaps with brief interludes of compliance, but is not violating the law on the date the suit is filed?

Given the lack of specificity extant in the statutory language, the next relevant question is whether the legislative history of section 505 offers any clarification?³⁸ As will be discussed below,³⁹

37. 484 U.S. at 56-57. Of course, many have argued that courts may be justified in adding definition to such statutory ambiguities. *See, e.g.,* L. FULLER, *ANATOMY OF THE LAW* (1968). Fuller argues that:

[A] strong adherent of the view that all true law is made law would be likely to enter an objection along these lines: Of course, when a legislator uses language he intends that language to have the meaning it has in his culture; he is himself a participant in that culture and he means by his words not what the dictionary says they mean, but what his fellow citizens mean when they use them. Thus the local significance of the institution "park" naturally enters into the meaning of the statute which his lawmaking brings into existence. That the linguistic ingredients of which the statute is fabricated are in part, as it were, locally grown does not mean that the statute is any the less made law.

.....

The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society of which it is to be applied. In this sense it may be said that no enacted law ever comes from its legislator wholly and fully "made."

Id. at 58-59.

38. *See, e.g.,* . DWORKIN, *A MATTER OF PRINCIPLE* (1985). Dworkin discusses the difficulty of determining what legislators were thinking when they enacted a particular law.

The group-psychological questions do not supply that independent evidence, except in very rare cases, because the strategy they recommend also presupposes, rather than shows, that the individual whose intentions are in play had any pertinent intention at all. The rare exceptions are cases in which the legislative history contains some explicit statement that the statute being enacted had one rather than the other consequence, a statement made under circumstances such that those who voted for the statute must have shared that understanding. In most cases the legislative history contains nothing so explicit. The group-psychological questions then fix on peripheral statements made in legislative hearings, or on the floor of the legislature, or on other provisions of the statute in question, or on provisions of statutes in related areas, attempting to show that these statements or provisions are inconsistent with an intention to create a statute under one interpretation of the unclear phrase, though consistent with an intention to create a statute under the other interpretation.

Id. at 19-20.

39. *See infra* text accompanying notes 63-78.

the legislative history addresses four main concerns: (1) which citizens have standing to bring the actions; (2) what safeguards discourage frivolous and harassing suits; (3) what mechanisms prompt governmental enforcement efforts, and (4) what inducements force water polluters to comply with the law? Before discussing how the legislators handled these considerations, however, the next section proffers a more general rationale supporting citizen suits in the environmental enforcement area.

A. The Whys and Wherefores of Citizen Suits

Since the passage of The Refuse Act of 1899, Congress has tried to address the problem of water quality.⁴⁰ With its inception in 1946, the House Committee of Public Works examined plans to restore and enhance our nation's waters.⁴¹ In 1948, Congress enacted Public Law 80-845,⁴² the Federal Water Pollution Control Act which was the first comprehensive measure aimed specifically at controlling water pollution. The Act had a five-fold purpose that:

1. Authorized the Surgeon General to assist in and encourage State studies and plans, interstate compacts, and creation of uniform State laws to control pollution.
2. Supported research.
3. Authorized the Department of Justice to bring suits to require an individual or firm to cease practices leading to pollution — suits could be brought only after notice and hearings, and only with the consent of the State.
4. Established the Federal Water Pollution Control Advisory Board.
5. Provided authorization for funding.
 - a. \$22.5 million a year for Fiscal Years 1949-1953 for low interest (2 per cent) loans for construction of sewage and waste treatment works. Loans limited to \$250,000 or one-third the cost of the project.
 - b. \$1 million a year for Fiscal Years 1949-1953 for grants to States for pollution studies.
 - c. \$800,000 a year for Fiscal Years 1949-1953 for grants to

40. *See generally* H.R. REP. NO. 911, 92d Cong., 2d Sess., 66 (1972) [hereinafter House Report 911] (history of legislative enactments designed to restore and enhance water quality from 1899 to 1972, with special emphasis on enactments passed from 1960-1971).

41. *Id.*

42. 62 Stat. 1155 (1948).

aid in drafting construction plans for water pollution control projects.⁴³

Public Law 80-845 failed to improve the quality of the water supply. Almost a quarter of a century after its passage, on November 2, 1971, Senator Edmund Muskie, the key Congressional architect of the Clean Water Act of 1972, described the magnitude of its failure during the Senate debates on the Clean Water Act. Senator Muskie said that the use of the 1948 abatement procedure contributed to delay and that "the record showed an almost total lack of enforcement."⁴⁴ He pointed out that only one case had reached the courts in more than two decades. Muskie's account revealed that more than four years had elapsed between the initial conference and the consent decree in that case. The midwestern city involved in the litigation had constructed a sewage treatment plant that, within two years of its construction, only had the capacity to treat half of the city's sewage. Consequently, the city dumped five million tons of raw sewage into the river each day.⁴⁵

After passage of the 1948 statute and during the ensuing decades, Congress enacted more legislation and appropriated more money aimed at controlling or ameliorating the water pollution problem.⁴⁶ Nonetheless, Congress found that various reorganizations, transfers, staff shortages, and restructuring resulted in a lack of continuity, poor management, and ineffective enforcement of the water pollution control program. In fact, between 1948 and 1971, twelve changes in the program's leadership occurred.⁴⁷

43. House Report 911, *supra* note 40, at 65-66.

44. 117 CONG. REC. 38,797, 38,799 (1971).

45. *Id.* The case discussed by Senator Muskie, brought against the City of St. Joseph, Missouri in 1960, involved the pollution of the Missouri River. *Water Pollution Control Programs: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 55-78 (1971) [hereinafter *Senate Oversight Hearings* 1971] (summary of enforcement proceedings). See also Andreen, *supra* note 2, at 203-04 (claiming that the citizen suit provision of the Clean Water Act assures adequate administrative enforcement of federal law by encouraging the EPA to act diligently).

46. See generally House Report 911, *supra* note 40, at 67-68 (Congressman John Blatnik described Congress' efforts to improve water quality and listed eight laws representing those efforts).

47. *Id.* at 78-79. Congressman Blatnik provided a chart detailing the leadership changes that impeded the government's ability to implement and enforce the water pollution control programs:

1948—Division of Water Pollution Control established in the Department of Health, Education, and Welfare. Shortly thereafter, the division was transferred to the Bureau of State Services of the Public Health Service.

After criticizing the enforcement of the 1948 abatement procedure, Senator Muskie found fault with subsequent attempts to employ the permit program established in 1970 under the Refuse Act.⁴⁸ He argued that the permit provision proved equally futile because it applied only to industrial polluters and because two federal agencies shared jurisdiction over the problem.⁴⁹

Coupling the difficulties in implementing the prior water pollution control laws with the increased public awareness of pollution problems, legislators could anticipate that citizens would try to bolster federal and state enforcement efforts. Evidence introduced at the hearings showed that the federal and state governmental agencies charged with implementing the water pollution control laws did not operate in a vacuum. Citizens, with uneven results, began testing various tools, including *qui tam* suits,⁵⁰ to

1954—Division of Water Pollution Control was reduced to a branch and was consolidated with other divisions into the new Division of Sanitary Engineering Services.

1959—Water Pollution Control Branch and other water pollution research and technical functions became the Division of Water Supply and Pollution Control.

1960—Division of Water Supply and Pollution Control was grouped with other divisions to form the environmental health segment of the Bureau of State Services, Public Health Service.

1961—Research and training grants responsibilities under the control of the National Institutes of Health were transferred to the Division of Water Supply and Pollution Control.

1965—Division of Water Supply and Pollution Control became the Federal Water Pollution Control Administration, a separate administration within the Department of Health, Education, and Welfare.

1966—Federal Water Pollution Control Administration was transferred to the Department of the Interior in accordance with Reorganization Plan No. 2.

1967—Federal Water Pollution Control Administration was reorganized.

1968—Federal Water Pollution Control Administration was reorganized.

1970—Federal Water Pollution Control Administration became the Federal Water Quality Administration.

1970—Federal Water Quality Administration was transferred to the Environmental Protection Agency in accordance with Reorganization Plan No.3, and became the Water Quality Office.

1971—Water Quality Office became the Office of Water Programs and with the Office of Air Programs was placed under the Assistant Administrator for Media Programs.

Id.

48. 117 CONG. REC. 38,797, 38,799 (1971).

49. *Id.*

50. A *qui tam* suit is a suit in which an action is:

[B]rought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution . . .

attack violations of the law. Witnesses impressed members of the House Committee on Public Works during the hearings with reports of their growing reliance on litigation as a means of controlling pollution and other environmental problems.⁵¹ The Committee found that individual citizens and environmental groups no longer relied on the administrative process to work, but instigated litigation in the courts instead.⁵²

The courts, however, frequently denied the use of *qui tam* actions.⁵³ These actions were dismissed unless the United States Attorney prosecuted the case based on the disclosure of the citizens.⁵⁴ When Congressman Michael J. Harrington testified before the House Committee on Public Works,⁵⁵ he explained that he joined Congressman Edward I. Koch and thirty-five other legislators in introducing H.R. 8355, which would specifically allow civil suits under the Refuse Act,⁵⁶ because courts disallowed the *qui tam* actions, holding that an individual citizen could not prosecute a criminal case while frowning on the blurred distinctions between the criminal and civil aspects of the Act.⁵⁷

H.R. 8355, which specifically authorized citizens to sue law violators in civil actions and addressed the federal judges' objections, was, arguably, the precursor to the citizen suit provision Congress included in the Clean Water Act of 1972.⁵⁸ Unlike the

BLACK'S LAW DICTIONARY 1414 (4th rev. ed. 1968).

51. House Report 911, *supra* note 40, at 132.

52. *Id.*

53. Congressman Michael J. Harrington, a Representative from Massachusetts, listed several Federal District Court cases which had rejected the citizens' right to bring *qui tam* suits under the Refuse Act: *Bass Anglers Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala. 1971); *Bass Anglers Sportsman Soc'y v. Avondale Mills*, 324 F. Supp. 412 (M.D. Ala. 1971); and *Bass Anglers Sportsman Soc'y v. Stauffer Chemical Co.*, 324 F. Supp. 412 (S.D. Ala. 1971), above three cases *aff'd sub nom* *Bass Anglers Sportsman Soc'y v. Koppers*, 447 F.2d 1304 (5th Cir. 1971) (summary affirmance); *Bass Anglers Sportsman Soc'y v. United States Plywood-Champion Papers*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848, 849-50 (E.D. Wis. 1971) *Durning v. I.T.T. Rayonier, Inc.*, 325 F. Supp. 446, 447 (W.D. Wash. 1970). *Hearings*, *supra* note 28, at 707.

54. *E.g.*, *Bass Anglers Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala. 1971).

55. *Hearings*, *supra* note 28, at 706-07 (statement of Michael J. Harrington).

56. H.R. 8355, 92nd Cong., 1st Sess. (1971).

57. *Hearings*, *supra* note 28 at 707.

58. H.R. 8355 was just one of many proposals designed to strengthen the water pollution control laws. S. 2770 92d Cong., 2d Sess. (1972), the bill which ultimately passed and became the Clean Water Act of 1972, embodied some of the characteristics of these other proposals.

bill that passed, however, H.R. 8355 went further toward establishing financial disincentives against continued violation of the law by allowing for a "bounty on polluters." The individual who informed the government of the violator could collect up to one-half of any fine imposed for violating the Act.⁵⁹ Under the Clean Water Act, the revenue generated by a citizen suit goes to the United States Treasury⁶⁰ unless the parties settle the case and provide otherwise.⁶¹ As discussed below, this possibility for diverting monies away from the United States Treasury concerns some members of the regulated industry.⁶²

B. The Congressional Response: Section 505 of the Clean Water Act

Because courts prevented citizens from using *qui tam* actions to seek redress against violators of the Refuse Act of 1899, Congress sought to establish the right of citizens to bring civil actions against water polluters in the Clean Water Act. To diminish the difficulties citizens faced in gaining access to the courts under class action requirements of the Federal Rules of Civil Procedure,⁶³ the Senate crafted section 505 to authorize a private action by any citizen or citizens acting on their own behalf.⁶⁴ Congress defined "citizen" as a "person or persons having an interest which is or may be adversely affected"⁶⁵ in order to avoid the jurisdictional questions of who has standing to bring law suits and

59. H.R. 8355, 92d Cong., 1st Sess. (1971).

60. House Report 911, *supra* note 40, at 133.

61. *See generally* ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION, A BNA SPECIAL REPORT (1988). The report indicates that revenues generated by the penalties generally go to the United States Treasury, however, several environmental groups have arranged for payments to be made to an environmental group or for an environmental project that is not involved in the citizen suit. *Id.* at 17. The Justice Department sometimes objects to proposed consent decrees in which settlement money is directed to an environmental project or non-party environmental interest instead of the Treasury. *Id.* at 13 (citing Justice Department letter dated April 1, 1987, filed in Student Pub. Interest Research Group of N.J. v. Jersey Cent. Power and Light Co., 642 F. Supp. 103 (D.N.J. 1988)).

62. *See infra* text accompanying notes 131-36, 326-28.

63. FED. R. CIV. P. 23. Congress avoided class action questions that would involve: (1) identifying a group of people whose interests have been damaged; (2) identifying the amount of total damage to determine jurisdictional qualification; and (3) allocating any damages recovered. S. REP. NO. 414, 92d Cong., 1st Sess. 81 (1971) [hereinafter Senate Report 414].

64. *See* S. REP. NO. 414, 92d Cong., 1st Sess.

65. Clean Water Act § 505(g), 33 U.S.C. § 1365(g) (1982).

incorporated the judicial rule for standing in an environmental case as articulated by the United States Supreme Court in *Sierra Club v. Morton*.⁶⁶

To discourage frivolous and harassing suits, Congress allowed for the recovery of reasonable attorney and expert witness fees to the victorious party in a citizen suit.⁶⁷ Congress determined that judges should be allowed to award costs of litigation whenever they deemed it appropriate. The legislators thereby satisfied themselves that defendants who were subjected to harassment or frivolous suits could be reimbursed for their expenses, and that the specter of having to pay litigation costs would discourage abuse of the citizen suit provision.⁶⁸ For citizens, the attorney fees provision underwrites the costs of environmental litigation.

In order to keep citizen suits from trampling governmental enforcement efforts, Congress included a notice provision in the law.⁶⁹ Section 505(b) of the Clean Water Act requires citizens, sixty days before filing a law suit, to serve a notice of intent to file such action on the Federal and State water pollution control agency and the alleged polluter.⁷⁰ The section requires each citizen or group to include facts in the notice pursuant to regulations prescribed by the Administrator of the United States Environmental Protection Agency. The citizens then must wait 60 days to see if the governmental enforcement authorities decide to prosecute the action. If not, the citizens may proceed with their own case. Otherwise, citizens can intervene in any governmental proceeding

66. 405 U.S. 727, 738 (1972). See also 118 CONG. REC. 33,692, 33,699-700 (1972).

In *Sierra Club* the Supreme Court held that under the A.P.A. [Administrative Procedure Act], 5 U.S.C. § 702 (1988) the party seeking review must itself be among those injured by the action or inaction complained of. The Court also held that non-economic injury to an environmental interest is sufficient to meet the A.P.A. test, stating specifically that "the interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values". The Court also emphasized that "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our country, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."

Id.

67. Clean Water Act, § 505(d), 33 U.S.C. 1365(d) (Supp. V 1987).

68. See House Report 911, *supra* note 40, at 133-34; Senate Report 414, *supra* note 63, at 81.

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

70. Regulations promulgated by the EPA require that the citizens serve notice by certified mail. 40 C.F.R. § 135 (1988).

against the alleged water polluter as a matter of right.⁷¹ Arguably, the notice provision in section 505 has the beneficial effect of allowing citizens to perform a watchdog function with respect to a governmental agency. By permitting citizens to monitor agency action, the legislators minimize the risk of agency capture, or co-option, by regulated industries.⁷² The Conference Committee's Report stated:

This 60-day provision was not intended, however, to cut off the right of action a citizen may have to violations that took place 60 days earlier but which may not have been continuous. As in the original Senate bill, 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, whether the violation be a continuous one, or an occasional or sporadic one.*⁷³

To establish incentives for the regulated industries to comply, Congress authorized courts to impose civil penalties as well as injunctive relief against water polluters.⁷⁴ Indeed, the statute authorizes *governmental* enforcement authorities to exact civil penalties for prior violations of the law.⁷⁵ As explained in various Environmental Protection Agency [EPA] enforcement policy statements issued over the years, one of the objectives of imposing civil penal-

71. House Report 911 *supra* note 40, at 133.

The legislators contemplated that the time between notice and filing of the action would give the administrative enforcement office an opportunity to act on the alleged violation.

[Moreover,] if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

Senate Report 414, *supra* note 63, at 90.

72. See generally E. PHELPS, *POLITICAL ECONOMY: AN INTRODUCTORY TEXT* 395 (1985) (noting that some amount of regulation is socially desirable, but that citizen vigilance is the price society pays to ensure agencies are not controlled, or captured, by the industries they regulate).

73. 118 CONG. REC. 33,692, 33,700 (1972) (emphasis added).

74. House Report 911, *supra* note 40, at 133.

75. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58 (1987) ("[I]t is little questioned that the Administrator [of the EPA] may bring enforcement actions to recover civil penalties for wholly past violations" (construing section 309 of the Clean Water Act, 33 U.S.C. § 1319 (1982 & Supp. V 1987))).

ties is to force the violator to disgorge any economic benefit from failing to comply with the law.⁷⁶ Additionally, the EPA recognizes the deterrent effect of the threat of civil penalties on would-be violators.⁷⁷ Given these goals, it should make no difference to the violator whether the court exacts a civil penalty as the result of a citizen suit or as a consequence of governmental enforcement action. Thus, the Supreme Court's reluctance to allow citizens to exact civil penalties from Gwaltney for prior violations of the law when governmental enforcement authorities would be able to do so (had they brought the action themselves) allows polluters to escape one of the consequences of violating the law. Congress can provide citizens that right by amending the law and removing the ambiguity, as discussed below.⁷⁸

II. DISCUSSION OF THE *Gwaltney* CASE

A. Background of the Case: Facts

The Supreme Court heard oral argument in the case of *Gwaltney of Smithfield v. Chesapeake Bay Foundation and Natural Resources Defense Council*⁷⁹ on the first day of the fall 1987 term.⁸⁰ Gwaltney of Smithfield, the petitioner, operates a pork processing plant situated on the banks of the Pagan River near Smithfield, Virginia. In the course of its production of pork products, the plant discharges wastewater into that river.⁸¹ *Gwaltney* evidences the coercive power of citizen suits to prompt long-term violators to comply with the law. The facts reveal that Gwaltney had obtained a permit to discharge specific amounts of effluents into the Pagan River in 1974.⁸² Gwaltney finally stopped discharging excessive amounts of pollutants into the Pagan River in 1984, after being threatened with a lawsuit by groups of citizens who noted the company's pattern of violations as disclosed in the company's pollution discharge monitoring reports.⁸³

76. See, e.g., Environmental Protection Agency, *Policy on Civil Penalties and Framework for Statute - Specific Approaches to Penalty Assessments*, 14 *Env'tl L. Rep.* (Env'tl L. Inst.) 30,001 (Feb. 14, 1984) [hereinafter *Framework*].

77. *Id.* at 30,001-02.

78. See *infra* pp. 72-75.

79. 484 U.S. 49 (1987).

80. *Id.*

81. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1544 (E.D. Va. 1985), *aff'd.*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

82. *Id.* at 1544.

83. While the opinion does not indicate a causal relationship between the suit and

The Clean Water Act allows Gwaltney to discharge specific amounts of various pollutants from its plant into the river as stated in a National Pollution Discharge Elimination System (NPDES) permit.⁸⁴ Gwaltney obtained the NPDES permit pursuant to procedures and regulations under the Clean Water Act.⁸⁵ The Gwaltney plant exceeded its discharge limitations for fecal coliform, chlorine, total suspended solids, total Kjeldahl nitrogen, and oil and grease on as many as 160 occasions between October 27, 1981 and August, 1984. Gwaltney stopped exceeding its discharge limitations on May 15, 1984,⁸⁶ about two-and-one-half months after the citizens advised Gwaltney, by serving notice as required by section 505 of the Clean Water Act, that they would sue the company for polluting the Pagan River.⁸⁷

When Gwaltney of Smithfield bought the assets of the pork-processing plant from ITT-Gwaltney on October 27, 1981,⁸⁸ Gwaltney of Smithfield knew that the prior owner had violated its NPDES permit at least 94 times between February 1980 and October 1981, the result being that ITT-Gwaltney had been in violation of the Act 13 out of 21 months in that period.⁸⁹ In fact,

Gwaltney's actions, Gwaltney did use its current nonpolluting status as a defense against the suit. *Id.* at 1547-51.

84. Clean Water Act § 402, 33 U.S.C. § 1342 (1982 & Supp. V 1987).

85. 611 F. Supp. 1542, 1544.

86. *Id.* at 1544 & n.2.

To clarify the relevant dates of noncompliance, the trial court made the following observations regarding the maximum civil penalty applicable to Gwaltney. First, the court noted that the parties stipulated to over 160 violations involving more than five different substances. *Id.* at 1557. In addition, the court examined the copies of the Discharge Monitoring Reports (DMRs) contained in the record. The district court found that during twenty-two of thirty-three months, Gwaltney violated the monthly average for at least one substance, and that Gwaltney almost always violated more than one daily maximum limitation. *Id.* at 1555. Because there were 653 days in those twenty-two months (excluding the remaining days after May 15, 1984, during which the parties stipulated that Gwaltney stopped polluting), the law subjected Gwaltney to a penalty of no more than \$10,000 per day. As such, Gwaltney was subject to a maximum penalty of \$6,530,000. *Id.* at 1555.

87. Appendix to Petition for the Writ of Certiorari at 80a, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (No. 86-473) [hereinafter App.] (respondents' complaint). Paragraph 3 of the complaint states:

3. On February 29, 1984, plaintiffs [Chesapeake Bay Foundation and the Natural Resources Defense Council] gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Virginia State Water Control Board (the "Board"), and to the defendant, as required by Section 505(b)(1)(A) of the [Clean Water] [A]ct, 33 U.S.C. § 1365 (b)(1)(A).

Id.

88. *Id.* at 85a (stipulation of the parties).

89. Brief for the Respondents at 2-3, *Gwaltney of Smithfield v. Chesapeake Bay*

before acquiring the plant, representatives of Smithfield Foods, of which Gwaltney of Smithfield became a subsidiary, visited the plant⁹⁰ and expressed their reservations about being able to operate it in compliance with the law.⁹¹

Nonetheless, Gwaltney of Smithfield continued to pollute the Pagan River after the purchase.⁹² At trial, respondents presented Gwaltney of Smithfield's mandatory discharge monitoring reports (DMRs)⁹³ that showed that Gwaltney violated the Clean Water Act by releasing more pollutants into the Pagan River than the law allows. Judge Merhige, the trial judge, found that Gwaltney exceeded the lawful limits with at least one pollutant during 22 of 33 months.⁹⁴

Gwaltney discharged excessive amounts of fecal coliform into the Pagan River. A type of microbe associated with human and animal feces, fecal coliform is a good indicator of the safety of water for drinking, swimming, and shellfish harvesting.⁹⁵ Fecal coliform contamination forced the Commonwealth of Virginia to prohibit the taking of oysters and clams for human consumption from much of the Pagan River.⁹⁶ Virginia requires Gwaltney to use appropriate concentrations of chlorine, a toxic chemical, to kill fecal coliform.⁹⁷ However, chlorine also kills other living organisms when its concentration is high enough.⁹⁸ At various times,

Found., Inc., 484 U.S. 49 (No. 86-473) [hereinafter Res. Br.] (citing Record at 350-A).

90. App., *supra* note 87, at 85-86a (stipulation of the parties).

91. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1545 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

92. *Id.* at 1544-45, 1566. Respondents argued that although Gwaltney was aware of the prior owner's defaults and the need for substantial improvements even before purchasing the plant, Gwaltney was extremely slow in taking effective measures to correct either the cause of the chlorination problems or the biological treatment system. In fact, Gwaltney took no remedial steps for more than six months, and did not complete the new treatment system until October 1983, two years after acquiring the plant. Res. Br., *supra* note 89, at 3 (citations omitted).

93. The Federal Water Pollution Control Act, mandates that the Administrator of the EPA "require the owner or operator of any point source" to establish and maintain records, to sample effluent discharges, and to provide information as the Administrator may "reasonably require." 33 U.S.C. § 1318(a)(3)(A) (1982 & Supp. V 1987). Currently, permittees under the Clean Water Act must submit DMRs. EPA National Pollutant Discharge Elimination System Program, 40 C.F.R. § 122.41(k)(4)(i) (1988). Such reports are public information by statute. 33 U.S.C. § 1318(b)(2) (Supp. V 1987).

94. 611 F. Supp. at 1555.

95. *Id.* at 1557.

96. *Id.* at 1559.

97. *Id.* at 1557.

98. *Id.*

Gwaltney used either too much or too little chlorine in its wastewater.⁹⁹ Another pollutant, Total Kjeldahl Nitrogen, or TKN, is a nitrogen compound that can degrade a river by reducing its oxygen content.¹⁰⁰ Natural chemical and biological processes involving TKN and bacteria in the river transpire after TKN is added to a river.¹⁰¹ These processes consume the oxygen dissolved in the water, thereby killing many organisms ordinarily found in a river.¹⁰² Both Gwaltney of Smithfield and ITT-Gwaltney put excessive amounts of these two pollutants into the Pagan River, prompting the Chesapeake Bay Foundation and Natural Resources Defense Council to sue Gwaltney under the citizen suit provision of the Clean Water Act in June of 1984.¹⁰³

As previously noted, the citizen suit provision, section 505 of the Clean Water Act, allows any citizen to sue any person "who is alleged to be in violation" of an effluent standard or limitation under the Clean Water Act.¹⁰⁴ In addition, section 309 authorizes the federal district courts to apply appropriate civil penalties.¹⁰⁵ In the present case, both parties stipulated that Gwaltney last polluted the river on May 15, 1984, a full month *before* the citizens filed their complaint and some two and one-half months *after* the citizens notified Gwaltney that a lawsuit was imminent.¹⁰⁶ Gwaltney stopped the illegal discharges by installing new equipment. Yet, Gwaltney failed to object when the citizens filed their motion for partial summary judgment, relying on the permit violations Gwaltney reported in its discharge monitoring reports.¹⁰⁷ Judge Mehri granted the citizens' motion on the issue of liabil-

99. *Id.*

100. *Id.* at 1562.

101. *Id.*

102. *Id.*

103. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 54 (1987).

104. Clean Water Act § 505, 33 U.S.C. § 1365(a)(1) (1982 & Supp. V 1987).

105. Clean Water Act § 309, 33 U.S.C. § 1319(d) (Supp. V 1987).

106. App., *supra* note 87, at 86a (stipulation of the parties). Paragraph 8 of the stipulation states that "Defendant's DMRs . . . do not reflect any permit violations on any occasion subsequent to May 15, 1984." *Id.* at 86a.

107. Res. Br., *supra* note 89, at 8-9. The citizens maintained that Gwaltney's failure to challenge the district court's jurisdiction supports their interpretation that section 505 of the Clean Water Act reaches Gwaltney's violative conduct. During the eleven months between the filing of the complaint and of Gwaltney's motion to dismiss for lack of jurisdiction, the district court granted the citizens' motion for summary judgment declaring Gwaltney liable and amended that judgment. Meanwhile, the parties engaged in extensive discovery, prepared a detailed stipulation of facts, several briefs and a trial. *Id.* at 8-9.

ity and scheduled a trial on the issue of a remedy.¹⁰⁸

In May of 1985, more than eight months after Judge Mehri's ruling on liability and more than four months after trial on the remedy, Gwaltney moved to dismiss the action for lack of jurisdiction.¹⁰⁹ Gwaltney relied on a Fifth Circuit case,¹¹⁰ *Hamker v. Diamond Shamrock Chemical Co.*,¹¹¹ in which the court held that citizen suits for civil penalties are impermissible unless the violations are "ongoing" at the time of the suit. District Judge Mehri rejected Gwaltney's arguments and, after applying the EPA's non-binding Civil Penalty Policy,¹¹² he calculated Gwaltney's liability at over \$6 million, but assessed civil penalties of nearly \$1.3 million. In setting the penalty, Judge Mehri noted that Gwaltney's response to specific discharge problems at the plant "trivialize[d] [their] seriousness,"¹¹³ was "nothing less than offensive,"¹¹⁴ border[ed] on benign neglect,"¹¹⁵ and contributed to well over one hundred days of violations that, by Gwaltney's own admission, could have been prevented.¹¹⁶ He also concluded that Gwaltney saved money by delaying the installation of new wastewater treatment equipment.¹¹⁷ Gwaltney appealed and the court of appeals affirmed.¹¹⁸ Thereafter, the Supreme Court granted Gwaltney's request for review.¹¹⁹

B. Issues

Gwaltney presented the Court with one novel issue and sev-

108. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1544 (E.D. Va. 1984), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

109. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 54 (1987).

110. 611 F. Supp. at 1550.

111. 756 F.2d 392 (5th Cir. 1985).

112. 611 F. Supp. at 1556 (citing *Environmental Protection Agency Civil Penalty Policy*, 41 [1 Federal Laws] ENV'T REP. (BNA) 41:2991 (June 1, 1984)).

113. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* 611 F. Supp. 1542, 1560 (E.D. Va. 1984), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

114. *Id.*

115. *Id.* at 1561.

116. *Id.* at 1562, 1564.

117. *Id.* at 1557-59, 1561-64.

118. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

119. Gwaltney filed a petition for writ of certiorari in the Supreme Court of the United States on September 23, 1986, and the court granted it on January 12, 1987. Petitioner's Brief at 2, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (No. 86-473) [hereinafter Pet. Br.].

eral subordinate issues. The precise legal question that the Supreme Court addressed was whether section 505, the citizen suit provision, authorized citizens to recover civil penalties for purely past violations of the Clean Water Act.¹²⁰ If the Act did provide for recovery, then the Court would have to address the following issues: (a) Was it proper to use the discharge monitoring reports as a basis for determining liability? (b) Was the district court's grant of summary judgment on the issue of liability correct? (c) Was it error for the district court to retain jurisdiction over the case once Gwaltney challenged the court's jurisdiction on the grounds that it was not "in violation" of the statute at the time the complaint was filed? (d) Once the lower court determined that liability attached and that Gwaltney could be assessed over \$6 million dollars in civil penalties — in fact, assessing about \$1.3 million in civil penalties—did Gwaltney have any basis for challenging the imposition of the penalty?

C. Arguments

1. Overview

An overview of the key arguments offered by the parties shows Gwaltney's strongest factual argument was that Gwaltney complied with the law before the citizens filed their complaint. Therefore, if compliance with the law was the overriding goal of the statute, the goal was achieved. The strongest factual argument the citizens could offer was that Gwaltney first obtained a permit in 1974, and that as late as May 1984, Gwaltney discharged excessive amounts of pollutants into the water. Indeed, Gwaltney continued to violate the law for two and one half months after the citizens sent Gwaltney a notice letter indicating their intent to sue.¹²¹

Gwaltney's most persuasive legal arguments was that the function of the judiciary is to interpret and apply the law as it exists. Therefore, courts should not construe the law so as to work an abrogation of the duties of the executive, here obtaining civil penalties from past violators of the law, without a directive to do so in the legislation. Moreover, the company's compliance with the law by the time the citizens filed their complaint operated to

120. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987).

121. *Id.* at 54.

divest the court of subject-matter jurisdiction. The citizens' rejoinder was that the judicial branch's responsibility to uphold the law includes an obligation to ascertain and implement the purpose of a law when, as here, there exists an ambiguity in the statutory language.

Gwaltney's strongest policy argument was that allowing citizens to exact civil penalties for purely past violations of the law would generate havoc in the marketplace, deluge the courts with cases, and permit abuses of the money once it gets diverted from the U.S. Treasury. On the other hand, the citizens claimed that it makes no difference to law violators whether the government or private citizens exact the payment of civil penalties from them. They suggested that, given the deterrent effect of the threat of having civil penalties imposed, violators should not be allowed to get away with discharging excessive amounts of pollutants into the waters without being forced to pay a monetary penalty.

2. Petitioner's Arguments

Gwaltney urged the destruction of the efficacy of citizen suits on several grounds. Gwaltney argued that the district court lacked subject-matter jurisdiction because Gwaltney ceased violating its permit before June 15, 1984, when the citizens filed their complaint.¹²² Gwaltney contended that the plain language of the Clean Water Act establishes an ongoing violation as a jurisdictional prerequisite to suit¹²³ and bars citizen suits seeking civil penalties for purely past violations.¹²⁴ Gwaltney asserted that once the discharger corrects the problem which caused the excess discharge, the discharger is no longer "in violation" of the Act.¹²⁵

Gwaltney next maintained that the "plain language reading" of the operative language in the citizen suit provision and its legislative history both clearly indicate Congress' intent that the citizen suit serve as an adjunct to governmental enforcement, supplementing, not supplanting government pollution abatement efforts.¹²⁶ Gwaltney claimed that penalties are available only to

122. Gwaltney filed a motion to dismiss for lack of subject-matter jurisdiction on May 16, 1985. Joint Appendix (Docket Entries of the District Court) at 5, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473).

123. Pet. Br., *supra* note 119, at 7-8.

124. *Id.*

125. *Id.*

126. *Id.* at 8-9.

help abate an ongoing violation because the citizen suit provision authorizes only prospective relief.¹²⁷ Any contrary construction, Gwaltney suggested, would contribute to the burgeoning volume of citizen suits flooding the federal courts.¹²⁸ A liberal construction would encourage citizens to sue because the discharge monitoring reports filed by potential defendants established a prima facie case of noncompliance,¹²⁹ allowing citizens to win on the liability issue and recover attorney's fees and expenses.¹³⁰

In a footnote, Gwaltney reiterated a proposition urged by some of the amici and a law review article, suggesting that allowing citizens to sue for purely past violations to recover money payable only to the Treasury, while not allowing them to obtain any redress themselves, would contravene the standing requirements of Article III of the United States Constitution.¹³¹ Such

127. *Id.* at 9: Gwaltney was supported in this contention by the brief of several amici. Brief of *Amici Curiae*, Mid-Atlantic Legal Foundation, Inc., and Consumer Alert at 8, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473); Brief of *Amici Curiae*, Chamber of Commerce of the United States, et al., at 9, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473).

128. Pet. Br., *supra* note 119, at 9-10.

129. *Id.* at 9, 30.

130. *Id.* at 10.

131. *Id.* at 37 n.48. Gwaltney argued that:

Reading the citizen suit provision as written avoids the necessity of confronting the serious constitutional issues that would arise if respondents' contrary interpretation were accepted, as elaborated by several amici. See *United States v. Clark*, 445 U.S. 23, 27 (1980) ("It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"). Permitting citizens to sue for penalties payable only to the Treasury for purely past violations would contravene the standing requirements of Article III. To satisfy those requirements, a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Even assuming the existence of an injury to the citizen plaintiff, penalties payable only to the Government for purely past violations cannot redress *that injury* to the plaintiff. In the case of an ongoing violation, on the other hand, penalties can be imposed in connection with abatement, which redresses the actual injury to the citizen plaintiff.

In addition, authorizing private citizens to sue for purely past violations—when they are entitled to no relief themselves—contravenes the separation of powers by permitting courts and private citizens to intrude upon the Executive's responsibility to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3. See generally Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 897 (1983). Congress may not vest that responsibility in private citizens unaccountable to the electorate. Congress may grant such citizens the right to redress injury

contravention arguably undermines the separation of powers and also misplaces the prosecutorial function that should rest with the government whenever penalties payable to the government are sought.¹³²

Finally, Gwaltney and several of its *amici* intimated that, if citizen suits are allowed to proceed unabated, they serve to line the pockets of the environmental litigation bar.¹³³ Gwaltney warned of a scenario in which environmentalists threaten a discharger with a lawsuit to force the discharger into a settlement that includes, in addition to attorney's fees and expenses, a provision requiring the discharger to make a charitable contribution to an environmental group located in the jurisdiction where the alleged violation occurred.¹³⁴ The detractors of citizen suits argued that this practice impermissibly diverts money from the Treasury into the hands of private groups, thereby usurping a governmental prerogative to appropriate resources.¹³⁵ Others stated that, not only is the practice improper, it is also illegal because it violates a federal law that requires persons having custody or possession of public money to deposit it in the Treasury.¹³⁶

3. Respondents' Arguments

The citizens, represented by the Chesapeake Bay Foundation and the Natural Resources Defense Council, two groups dedicated to the conservation of the nation's natural resources,¹³⁷ argued

to themselves—as in the case of suits brought for ongoing violations—but the essentially prosecutorial function of seeking penalties payable to the Government for purely past violations must reside—if anywhere—with the accountable governmental authorities themselves.

Id.

132. Pet. Br., *supra* note 119 at 37 n.48.

133. *Id.* at 37; Brief of *Amicus Curiae*, Rollins Environmental Services (N.J.) Inc., at 16-17, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473) [hereinafter *Amicus* Rollins]; Brief of *Amicus Curiae* Connecticut Business and Industry Association, at 6-7, 34-38, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473) [hereinafter *Amicus* CBIA].

Other *amici* also filed briefs supporting Gwaltney. The Mid-Atlantic Legal Foundation, Inc., and Consumer Alert filed a joint brief. The Chamber of Commerce of the United States, American Petroleum Institute, Chemical Manufacturers Association, Synthetic Organic Chemical Manufacturers Association, and American Paper Institute filed a joint brief. Rollins Environmental Services (NJ) Inc. also filed a brief.

134. Pet. Br., *supra* note 119, at 30-31 & nn.34-36.

135. *Id.* at 31-32 & nn.37-38; *Amicus* Rollins, *supra* note 133, at 6.

136. *Amicus* CBIA, *supra* note 133, at 47 n.10.

137. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1544 (E.D. Va. 1984), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 108 S. Ct. 376 (1987).

that the lower courts in this case properly interpreted the citizen suit provision to authorize citizens to exact civil penalties from water polluters for purely past violations of the Clean Water Act.¹³⁸ The lower courts looked to the legislative history to support their rulings, since Congress failed to include the crucial language, upon which the citizens relied, within the confines of section 505 itself.¹³⁹ The citizens averred that examining the legislative history to aid a court's construction of a statutory provision was permissible in light of the ambiguous and unclear statutory language.¹⁴⁰

Under another section of the Clean Water Act, the EPA Administrator may initiate civil proceedings (to obtain civil penalties for past violations) if he "finds that any person is in violation" of the Act.¹⁴¹ It is illogical, the citizens' groups claimed, to argue that the same language has two meanings depending on who files the complaint—the EPA or citizens.¹⁴² They argued that a proper reading of the statutory language permits citizens to seek civil penalties as well.¹⁴³

The legislative history that the citizens relied on included a statement made by Senator Muskie, the principal architect of the Act, which explained that citizen suits are authorized "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."¹⁴⁴ The citizens rejected Gwaltney's attempt to discredit (by characterizing them as "stray remarks" by "one legislator") Senator Muskie's statements.¹⁴⁵ The issue the Court faced

Several *amicus* briefs were filed in support of Chesapeake Bay Foundation, Inc. and the Natural Resources Defense Council. The Solicitor General filed a brief on behalf of the United States. The Friends of the Earth, Sierra Club, National Audubon Society, Public Interest Research Group of New Jersey, Massachusetts Public Interest Research Group, Atlantic States Legal Foundation, and Connecticut Fund for the Environment filed a joint brief. The states of Alabama, California, Connecticut, Hawaii, Maine, Michigan, Missouri, New Mexico, South Carolina, Tennessee, Vermont, Virginia, and Washington also filed a joint brief.

138. Brief for the Respondents in Opposition at 15, *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473) [hereinafter *Res. Br. in Op.*].

139. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 311-12 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987); 611 F. Supp. at 1548.

140. *Res. Br.*, *supra* note 89, at 7.

141. *Id.* at 12 (citing 33 U.S.C. § 1319(b) (1982)).

142. *Id.* at 13-14.

143. *Id.*

144. *Id.* at 16 (quoting 118 CONG. REC. 33,700 (1972)) (emphasis added).

145. *Id.* (quoting *Pet. Br.*, *supra* note 119, at 28).

was whether the courts should give any legal effect to Senator Muskie's remarks when no unequivocal statement regarding the scope of the citizen suit provision appears in section 505 of the Clean Water Act.

The citizens argued that, by definition, penalties are only awarded for past violations of the Clean Water Act.¹⁴⁶ Penalties cannot be assessed for future violations of the law. Under the regulatory scheme, citizens learn that violations have occurred after the companies file their discharge monitoring reports, which may be several months after the companies released excess pollution into the water.¹⁴⁷ A reading of the law requiring that the violation be ongoing when the citizens file suit would allow wrongdoers to escape the payment of civil penalties by "turning off the spigot" within the 60 days after they receive the notice advising them that suit is impending.¹⁴⁸ Of course, to the extent the law seeks compliance as its primary objective, the best rejoinder to the citizens' complaint that one might make could be: "Good. Congress intended prompt compliance."

The citizens stated that Gwaltney's criticism of settlement payments earmarked for specific environmental purposes was unjustified¹⁴⁹ and argued that the EPA, through its Civil Penalty Policy, encourages such "alternative payments" in specified circumstances.¹⁵⁰ They pointed out that Congress also endorses settlement payments as furthering the objectives of the Clean Water Act.¹⁵¹

They further maintained that citizens have no interest in bringing vexatious law suits because courts can dismiss the cases and also assess all the costs and legal expenses of the frivolous litigation against the citizen-plaintiffs.¹⁵² Even so, the egregious nature of the violations in this case, they contended, made unsupportable any charges that the citizens brought the action to harass

146. Res. Br., *supra* note 89, at 19-20 & n.12 (indicating *inter alia* that "DMRs always relate past violations").

147. *Id.* at 19-20.

148. The parties took the expression "turns off the spigot," which appears in their Supreme Court briefs, from *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985).

149. See generally Res. Br., *supra* note 89, at 19 at 22-23 & n.15 (arguing there is no incentive under section 505 for filing a citizen suit against a one-time polluter who has since corrected the problem).

150. *Id.* at 23 n.15.

151. *Id.*

152. *Id.* at 23-24.

a law-abiding business.¹⁵³

In sum, Gwaltney and its supporters argued that, if the Supreme Court upheld the lower courts' decisions, every business which discharged excessive amounts of waste would be sued, and the courts would be flooded with citizen suits which are unconstitutional. One of its *amici* stated that citizens suits should not be construed as an updated version of the common law *qui tam* actions, which originated as a legal means for informers in England to obtain a bounty.¹⁵⁴ The *amici* explained that the actions have been principally authorized to provide a means for private recoveries, and for that reason the *qui tam* actions "represent a much more limited infringement on the role of the Executive Branch than actions brought to recover civil penalties payable exclusively to the federal Treasury."¹⁵⁵

4. Assessment

The Supreme Court of the United States granted *certiorari* in *Gwaltney* to resolve a conflict in the federal appellate courts over whether citizens could exact civil penalties from water polluters for wholly past violations of the Clean Water Act.¹⁵⁶ The Fifth Circuit in *Hamker v. Diamond Shamrock Chemical Co.*,¹⁵⁷ had denied citizens the right to bring the suits unless the violations were "ongoing."¹⁵⁸ Another federal appellate court, in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*,¹⁵⁹ had developed a middle-of-the-road interpretation that would allow actions against chronic violators who assert they were not in violation of the law when the complaint was filed. In *Pawtuxet Cove*, the court ruled that jurisdiction lies under section 505 when "the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the [Clean Water] Act."¹⁶⁰ At that time, the *Gwaltney* appellate court had upheld the imposition of civil penalties against a past violator who was in compli-

153. *Id.* at 26.

154. *Amicus* Rollins, *supra* note 133, at 29 & n.23.

155. *Id.* at 29 n.23.

156. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987).

157. 756 F.2d 392 (5th Cir. 1985).

158. *Id.* at 395 ("a complaint brought under [33 U.S.C.] section 1365 must allege a violation occurring at the time the complaint is filed").

159. 807 F.2d 1089 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 484 (1987).

160. *Id.* at 1094.

ance with the law on the date the suit commenced, notwithstanding the water polluter's objection to the court's lack of subject-matter jurisdiction that came *after* the citizens had obtained summary judgment on the issue of liability and *after* the parties tried the case to ascertain the remedy.¹⁶¹

If Gwaltney's interpretation of the operative statutory language was persuasive, Gwaltney would deserve to prevail because the courts would then be divested of subject-matter jurisdiction in all instances where the violators are in compliance with the law on the date the complaints are filed and the courts find little likelihood that the violations will resume. Thus, Gwaltney would have deserved to win notwithstanding the citizens' countervailing policy arguments that the deterrence sparked by the threat of civil penalties on violators constitutes a crucial component of any enforcement efforts. Moreover, a conservative approach to construing a statute comports with the idea that courts interpret rather than make law.

III. THE *Gwaltney* CASE

A. The Supreme Court's Decision in *Gwaltney*

Less than two months after the Supreme Court heard oral argument in *Gwaltney*, the Court issued its decision in what one commentator characterized as a "watershed in citizen enforcement of federal environmental laws."¹⁶² In an opinion written by Justice Thurgood Marshall, the Court ruled that citizens cannot maintain actions based wholly on past violations of the Clean Water Act, but that courts have jurisdiction to hear the cases provided the plaintiffs make good-faith allegations of ongoing violations by the water polluters.¹⁶³

Although Justice Marshall agreed with the Fourth Circuit Court of Appeals that the "to be in violation language of section 505 is ambiguous,"¹⁶⁴ unlike the court below he interpreted the language narrowly to bar citizens from recovering civil penalties for past violations of the Clean Water Act. The court relied on the

161. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 791 F.2d 304 (4th Cir. 1986), *rev'd*, 484 U.S. 49 (1987).

162. Garrett, *U. S. Supreme Court's Ruling in Gwaltney Case Marks Watershed in Citizen Enforcement of Environmental Laws*, 18 ENV'T REP. 2027 (1988).

163. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987).

164. *Id.* at 56.

proposition that "the starting point for interpreting a statute is the language of the statute itself."¹⁶⁵ Noting "that section 505 is not a provision in which Congress' limpid prose puts an end to all dispute,"¹⁶⁶ the Court determined that "the most natural reading of 'to be in violation' is 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."¹⁶⁷ In so doing, the Court rejected the citizens' argument that Congress' use of the phrase "is in violation" in section 309(a) of the Clean Water Act,¹⁶⁸ which authorizes the Administrator of EPA to issue compliance orders, indicates that citizen actions for past violations were intended by Congress. The citizens had suggested that because the EPA Administrator can seek civil penalties for wholly past violations of the law, the same language in section 505 authorized them to maintain their case against Gwaltney.

The Court found that the initial plausibility of the argument folded under close scrutiny. It observed that "[t]he Administrator's ability to seek civil penalties is not discussed in either section 309(a) or 309(b) [and] civil penalties are not mentioned until section 309(d), which does not contain the 'is in violation' language."¹⁶⁹ The Court stated that section 309 does not intertwine

165. *Id.* (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

166. *Id.* at 57.

167. *Id.*

168. Clean Water Act § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1982).

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

Id.

169. 484 U.S. at 58. Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d) (1982 & Supp. V 1987) states:

Any person who violates sections 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under sub-

equitable relief with the imposition of civil penalties.¹⁷⁰ Each type of relief is authorized in a separate and distinct statutory provision. Subsection (b) provides injunctive relief and is independent of subsection (d), which provides only for civil penalties. In contrast, section 505 authorizes civil penalties and injunctive relief in the same subsection and even in the same sentence. The Court, therefore, found that a comparison of section 309 and section 505 bolsters its conclusion that Congress only authorized citizen suits for ongoing violations of the Clean Water Act.¹⁷¹

Continuing with his technical analysis, Justice Marshall indicated that the pervasive use of the present tense throughout section 505, the citizens' suit provision, is primarily forward-looking.¹⁷² The Court found that any other interpretation of the

section (a) of this section, shall be subject to a civil penalty, not to exceed \$10,000 per day of such violation.

170. 484 U.S. at 58 (citing *Tull v. United States*, 481 U.S. 412, 425 (1987)).

171. *Id.* at 58-59

172. For a critique of the Court's reliance on Congress' use of the present tense as evidence of how the statute should be construed, see Miller, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: Invitation to the Dance of Litigation*, [18 News & Analysis] *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 10,098 (Mar. 1988).

Miller summarizes the environmentalists' argument regarding the relationship between sections 505 and 309 and then criticizes the Court's interpretation as follows:

If the "is in violation" language is not fatal to suits for wholly past violations under § 309(a), why should it be for similar suits under § 505 [33 U.S.C. § 1365]? The argument is even more plausible because § 505(a) [33 U.S.C. § 1365(a)] authorizes courts to assess appropriate civil penalties under § 309(d) [33 U.S.C. § 1319(d)], literally incorporating § 309(d) [33 U.S.C. § 1319(d)] into § 505 [33 U.S.C. § 1365].

The Court's answer to this argument is that § 309(a) [33 U.S.C. § 1319(a)], using the "is in violation" language, only authorizes EPA to issue compliance orders and seek injunctive relief, both wholly prospective actions. Section 309(d) [33 U.S.C. § 1319(d)], however, authorizes assessment of civil penalties against any person "who violates" the Act. This is an entirely free-standing subsection, having no relation to § 309(a) [33 U.S.C. § 1319(a)]. [stating at 10,100 n.28: "Indeed, the Court explicitly held this recently in *Tull v. United States*, 481 U.S. [412], 107 S.Ct. 831, 17 ELR 20667 (1987), where it considered the issue at some length, albeit in a somewhat different context."] There is no freestanding penalty subsection in § 505 [33 U.S.C. § 1365], as there is in § 309 [33 U.S.C. § 1319]. Section 505 merely authorizes courts to assess civil penalties in those cases where there is subject matter jurisdiction for citizen suits.

Although the Court's answer is plausible, it leaves EPA vulnerable to attacks on its authority in the [Clean Water Act] where verb tenses can make a difference and where no such clever technical cure exists. In [Clean Water Act] § 308, [citing 33 U.S.C. § 1318] for instance, EPA is authorized to enter, inspect, and require production of records to determine if a person "is in violation of the Act." Can inspections be resisted as to records where present compliance

provision would render "incomprehensible" section 505's notice provision:

[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.¹⁷³

Parsing each term and sentence, the Court reasoned that:

[T]he notice provisions specifically provide that citizen suits are barred only if the Administrator or State has commenced an action "*to require compliance.*" . . . This language supports [the] conclusion that the precluded citizen suit is also an action for compliance, rather than an action solely for civil penalties for past, nonrecurring violations.¹⁷⁴

The Court found in the legislative history additional grounds for its conclusion that the imposition of civil penalties on these facts was improper. The Court found that citizens' suits serve as gapfillers that supplement, not supplant, governmental action: "permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit."¹⁷⁵ Justice Marshall went on to say that the citizens' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive.¹⁷⁶ Therefore, the Court rejected any arguments that Congress intended such a result.

The Court also took solace in the fact that members of Congress frequently characterized citizen suit provisions as "abatement" provisions or as injunctive measures.¹⁷⁷ Moreover, because

is not an issue? Does EPA's requirement that compliance monitoring reports be kept for three years [citing 40 C.F.R. § 122.41(j)] exceed its statutory authority? Was Congress' intent in using the present tense to raise these barriers to effective regulation?

Id. at 10,100 (information from footnotes 28-30 placed in their stead).

173. 484 U.S. at 60.

174. *Id.* at 60 n.3 (citing 33 U.S.C. § 1365(b)(1)(B)).

175. *Id.* at 60.

176. *Id.*

177. *Id.* at 61; *Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 1st Sess., pt. 1, at 114 (1971) (staff analysis of S.523) ("any person may sue a polluter to abate a violation . . ."); *id.*, pt. 2, at 707 (statement of Sen. Eagleton) ("[c]itizen suits . . . are brought for the purpose of abating pollution"); House Report 911, *supra* note 40,

section 505 was modeled after a similar provision in the Clean Air Act that is wholly injunctive, Justice Marshall rejected¹⁷⁸ the citizens' reliance 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, whether the violation be a continuous one, or an occasional or sporadic one."¹⁷⁹

Justice Marshall indicated that the court's jurisdictional standards were consistent with the "case or controversy requirement" of Article III of the U.S. Constitution.¹⁸⁰ The Court rejected Gwaltney's argument "that failure to require proof of allegations under section 505 would permit plaintiffs whose allegations of ongoing violations are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing."¹⁸¹ Writing for only a six-member majority in part III of the opinion, Justice Marshall noted though, that the Court was not closing the courtroom door to citizen-plaintiffs in that the statute would still allow citizen-plaintiffs access to federal courts merely by *alleging* in good-faith that the defendants engaged in continuous or intermittent violations of the Clean Water Act.¹⁸² Moreover, the Court rejected Gwaltney's claim that the rule would allow citizen-plain-

at 407 (1972) (written statement of Representatives Abzug and Rangel) ("Citizens may institute suits against polluters for the purpose of halting that pollution."); 118 CONG. REC. 33,693 (1972). (Statement of Sen. Muskie) ("[c]itizen suits can be brought to enforce against both continuous and intermittent violations"); *id.* at 33,717 (Statement of Sen. Bayh) ("[t]hese sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws").

178. 484 U.S. at 62.

179. 118 CONG. REC. 33,700 (1972). *But see* Miller, *supra* note 172. Miller suggests that section 304 of the Clean Air Act, 42 U.S.C. § 7604 (1982), from which Congress derived section 505 of the Clean Water Act, 33 U.S.C. § 1365, did not, and still does not, authorize the assessment of civil penalties in citizen suit cases. Thus, according to Miller:

[I]t is a bit much to read the use of the present tense in [Clean Air Act] § 304 as evidence of a grand congressional design for prospective application. Its use of the present tense merely follows from the only relief afforded by [Clean Air Act] § 304: injunctive relief. But in the [Clean Water Act], Congress authorized the assessment of civil penalties both in EPA cases, § 309 [33 U.S.C. 1319], and in citizen suit cases, § 505. Its continued use of the present tense in § 505 probably does not so much indicate a desire for prospective application, as it evidences an unthinking copying of [Clean Air Act] § 304 where penalties simply were not an issue.

Id. at 10,100.

180. 484 U.S. at 66.

181. *Id.* at 65.

182. *Id.*

tiffs to continue to press their claims when their allegations of noncompliance were later found groundless.¹⁸³ Instead, the Court suggested, longstanding principles of mootness would prevent the maintenance of a suit when "there is no reasonable expectation that the wrong will be repeated."¹⁸⁴ The Court remanded the case to determine whether, in this specific instance, the citizen-plaintiffs invoked the jurisdiction of the court by making a good-faith allegation of ongoing violations.¹⁸⁵

Justice Scalia wrote a concurring opinion in which Justices Stevens and O'Connor joined.¹⁸⁶ Justice Scalia rejected the majority's argument that mere allegations of ongoing violations were sufficient to invoke the court's jurisdiction if they were not subject to proof when challenged.¹⁸⁷ Justice Scalia stated that "subject matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged."¹⁸⁸ Admitting that the outcome was likely to be the same in the *Gwaltney* case irrespective of whether the lower courts applied the majority's standard or his own, Justice Scalia urged that the question on remand be whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought.¹⁸⁹

Relying on the statutory provision defining "citizen" as one who has "an interest which is or may be adversely affected[,] "¹⁹⁰ Justice Scalia concluded that the majority's failure to direct the lower courts to consider the standing question calls "attention to the fact that the Court interpreted the statute to confer subject matter jurisdiction over a class of cases in which, by the terms of the statute itself, there cannot possibly be standing to sue."¹⁹¹

B. The Fourth Circuit's Decision to Remand

On April 13, 1988, the Fourth Circuit Court of Appeals to which *Gwaltney* had been remanded, ruled in a per curiam opinion that the environmental groups had made good faith allegations

183. *Id.* at 66.

184. *Id.*

185. *Id.* at 67.

186. *Id.* at 67-71 (Scalia, J., concurring).

187. *Id.* at 68 (Scalia, J., concurring).

188. *Id.*

189. *Id.* at 69-70.

190. Clean Water Act § 505(g), 33 U.S.C. § 1365(g) (1982).

191. 484 U.S. at 71 (Scalia, J., concurring).

against Gwaltney and that the district court's findings were, therefore, not clearly erroneous.¹⁹² The Fourth Circuit remanded the suit to the district court for a further determination of whether the Chesapeake Bay Foundation Inc., and the Natural Resources Defense Council managed to prove at trial that Gwaltney had committed ongoing violations of the Clean Water Act.¹⁹³

The Fourth Circuit ruled that the groups could prove ongoing violations "(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."¹⁹⁴ The Fourth Circuit indicated that the time from which to determine whether continuous violations had been eradicated is the date when the citizens filed suit.¹⁹⁵ The court then suggested that the district court "may 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 presented during the proceedings that bears on whether the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit."¹⁹⁶

In a footnote, the circuit judges discussed the debate between the Supreme Court Justices who joined in the majority decision and the Justices who supported Justice Scalia's analysis regarding the threshold the citizen-plaintiffs had to pass to invoke the jurisdiction of a federal district court.¹⁹⁷ The Fourth Circuit stated,

[w]e 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.¹⁹⁸

The Fourth Circuit, after finding that the trial court did not err in ruling that the plaintiffs had made a good faith allegation, followed the majority opinion in directing the district court to deter-

192. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988).

193. *Id.* at 171-72.

194. *Id.*

195. *Id.* at 171.

196. *Id.* at 172.

197. *Id.* at 171 n.1.

198. *Id.* (citation omitted).

mine if the plaintiffs proved an ongoing violation.¹⁹⁹

C. The Federal District Court's Decision on Remand

Federal District Judge Robert R. Merhige reinstated the award of almost \$1.3 million in civil penalties against Gwaltney in a memorandum opinion filed July 18, 1988.²⁰⁰ Judge Merhige applied the rule handed down in the Supreme Court's December, 1987 decision: to wit, while section 505(a) of the Clean Water Act does not confer federal jurisdiction over citizen suits for wholly past violations, citizen-plaintiffs may prevail if there exists a continuing pattern of intermittent violations, even if there is no violation at the moment the action is filed.²⁰¹ Additionally, Judge Merhige relied on the Fourth Circuit's remand opinion in *Gwaltney* which established the proposition that citizen-plaintiffs can prove an ongoing violation if at trial plaintiffs either "(1) . . . prov[ed] violations that continue[d] on or after the date the complaint was filed, or (2) . . . adduc[ed] evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations."²⁰²

After noting that Gwaltney had a history of exceeding the discharge limitations of its National Pollution Discharge Elimination System permit for a variety of pollutants, the court determined that testimony at trial established a reasonable likelihood of recurring intermittent violations at the time plaintiffs filed suit.²⁰³ The court disregarded current data revealing that Gwaltney's remedial measures proved successful.²⁰⁴ The court focused on the evidence at trial which demonstrated that, at the time the citizen-plaintiffs filed suit, there existed a very real danger and likelihood of further violation.²⁰⁵ On that basis, the court determined that jurisdiction was proper regardless of the subsequent failure of the hazards to materialize.²⁰⁶ Judge Merhige then reinstated the civil penalty previously assessed against

199. *Id.*

200. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078, 1080 (E.D. Va. 1988).

201. *Id.* at 1079.

202. *Id.* (quoting *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.* 844 F.2d 170, 171 (4th Cir. 1988))

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1079-80.

Gwaltney.²⁰⁷

D. Evaluation of the Courts' Decisions

In the final analysis, the full impact of the Supreme Court's technical statutory interpretation will not be felt until many lower courts attempt to interpret the sundry provisions of the Clean Water Act. For those who eschew judicial activism, the Supreme Court's reluctance to construe an ambiguous statute expansively is very appealing. It remains to be seen whether, as one commentator suggested, an analysis relying on Congress' use of the present tense as a means of interpreting Congressional intent will hamper the EPA's ability to enforce other provisions in which the present tense is also used.²⁰⁸ Moreover, if the overriding goal of the law is to promote compliance and the threat of granting the plaintiffs injunctive relief is a good mechanism for achieving that goal, the prospect of having violators pay civil penalties for misfeasance or malfeasance should be even better from a law enforcement perspective. Thus, once Congress remedies the potential abuses attendant to the use of citizen suit provisions, discussed more fully below,²⁰⁹ no reason should remain to prevent citizens from acting against water polluters when governmental agencies fail to act.

The most strenuous objection to the Supreme Court's technical legal analysis of the statutory language of section 505 of the Clean Water Act is the damage done to the citizens' ability to force water polluters to disgorge economic benefits gained through noncompliance. This particular concern may have been solved by the recent amendments to the Clean Water Act, which require that courts, when determining what the civil penalty should be, consider the economic benefit that the water polluters derived from noncompliance.²¹⁰ Nonetheless, in so doing the Court may have disregarded some of the tenets of interpretation proffered by Hart and Sacks which are excerpted below:

1. Avoid linguistic naivete
2. Meaning depends on context
3. An essential part of the context of every statute is its purpose
. . . .
4. The meaning of a statute is never plain unless it fits with

207. *Id.* at 1080.

208. *See* Miller, *supra* notes 172 and 179.

209. *See infra* pp. 72-75.

210. Water Quality Control Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

some intelligible purpose

5. The first task in the interpretation of any statute (or of any provision of a statute) is to determine what purpose ought to be attributed to it

6. Deciding what purpose ought to be attributed to a statute is often difficult. But at least three things about it are always easy. (a) The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear. (b) The general words of a statute ought never to be used as directing an irrational pattern of particular applications. (c) What constitutes an irrational pattern of particular applications ought always to be judged in the light of the overriding and organizing purpose.²¹¹

One should start with the premise that the citizen suit provision, section 505 of the Clean Water Act, represents reasonable work by reasonable legislators who, at the outset, had an overriding purpose of stopping the pollution of our nation's waterways. Considering that governmental enforcement of prior water pollution control laws had been lacking,²¹² the Court may have failed to weigh properly the purpose of more vigilant enforcement of the Act in its calculus. Thus, the Supreme Court's reluctance to give an expansive but reasonable interpretation to the ambiguous language in section 505 of the Clean Water Act thwarts the law's underlying policy purpose of promoting cleaner water.

The Supreme Court's decision yields an irrational outcome during a time of lax governmental enforcement of the water pollution control law. Congressional water pollution control goals have been compromised: (1) target dates for stopping all pollution of our nation's waterways have long since passed,²¹³ and (2) one EPA Administrator resigned under fire while another EPA staffer went to jail because of their implementation of practices and policies which vitiated the environmental laws.²¹⁴ Had the Court ruled in favor of the plaintiffs it is doubtful that the Court would have been assailed by critics because, arguably, few people would challenge a court's decision to permit citizen-plaintiffs to fill the en-

211. HART AND SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1156-57 (10th ed. 1958).

212. See *supra* text accompanying notes 44-49.

213. 33 U.S.C. § 1251(a)(1) (1982).

214. *Mrs. Burford Resigns at EPA; Reagan Announced Accord Giving Congress All Papers*, N.Y. Times, Mar. 10, 1983, at 1, col. 6; *Rita Lavelle Gets 6-month Term and is Fined \$10,000 for Perjury*, N.Y. Times, Jan. 10, 1984, at A1, col.2.

forcement gap when, as here, the statute provides enough leeway for a court to do so. Moreover, the Court does not operate in a vacuum. If Congress deems a court's interpretation of the citizen suit provision incorrect because it is too liberal, it can always change the law to clarify any ambiguities. As it stands now, water polluters can fail to comply and remain reasonably confident that, at most, citizens in subsequent cases will get injunctive relief merely compelling the violators to do what the law already requires them to do. Given a choice, it may be better to make the water polluters wait for the statute to change to clarify their interests, rather than making citizens wait for the legislature to enhance the role of citizen suits under section 505 of the Clean Water Act.

IV. THE PROLIFERATION OF CITIZENS' SUITS AND *Gwaltney*

Gwaltney is actually a case about a law that worked too well. When Congress included a provision allowing citizens to sue water polluters in the Clean Water Act in 1972, Congress envisaged that citizen suits would serve as adjuncts to, but not substitutes for, the enforcement activities of federal and state governments.²¹⁵ As a practical matter, and as discussed more fully below, citizens suits may have supplanted governmental enforcement after reduced funding and altered enforcement policies curtailed the EPA's enforcement activities.²¹⁶ *Ab initio*, the citizen suit provi-

215. See *supra* notes 175-77 and accompanying text.

216. See *infra* text accompanying notes 232-87. See also *Draft Memorandum from EPA Administrator, Anne Gorsuch, on General Operating Procedures for Civil Enforcement Program*, [13 Current Developments] Env't. Rep. (BNA), at 78 (May 21, 1982) [hereinafter *Draft Memorandum*]. Ms. Gorsuch indicated in the memo that the procedures are designed to achieve the following general objectives:

- Establish an enforcement program which deters unlawful conduct and advances the regulatory policies of EPA through use of all available enforcement means.
- Maintaining a credible enforcement program which encourages prompt, voluntary compliance, but deals firmly with significant violations which cannot be resolved cooperatively and includes the use of litigation where appropriate.
- Directing all enforcement activities towards the achievement of maximum environmental benefits.

Id. at 79.

After stating that the Regional Administrators were responsible for identifying violators and conducting Federal compliance activities, Ms. Gorsuch described what was included in the Federal compliance activities:

- Identifying noncomplying sources and potential enforcement targets.
- Coordinating enforcement activities with States, as appropriate.
- Determining the appropriate Agency response to violations, including:

sion emerged as a Congressional response to lack of enforcement of prior law²¹⁷ and the plethora of district court determinations that citizens could not use *qui tam* actions to ensure compliance with the Refuse Act of 1899.²¹⁸ The presence of the notice provision, requiring citizens to notify the potential defendant and federal and local governmental agencies about the alleged violations 60 days before the citizens plan to file suit, supports the proposition that citizens' suits supplement rather than supplant governmental enforcement activities.²¹⁹ If the governmental agency elects to prosecute the case, then the citizens can intervene in the litigation as a matter of right, but the citizens cannot proceed with their own lawsuit.²²⁰ Absent any governmental prosecution of the case, the citizens, after waiting the statutory 60 days, may commence the action.

At the outset, citizens filed few suits.²²¹ But, in recent years,

-
- * Requests for information (formal and informal).
 - * Informal discussions with source.
 - * Warning letters or notices of violation.
 - * Administrative orders or administrative civil penalty complaints.
 - * Referrals to Headquarters for civil penalty actions.

— Participating in a client's role in settlement discussions to resolve administrative or judicial proceedings.

Id. at 82-83.

217. See *supra* text accompanying notes 48-66.

218. See *supra* note 53; *infra* note 230.

219. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-60 (1988).

220. The 1987 amendments to the Clean Water Act establish that administrative proceedings thwart the citizens' ability to proceed with their own suits. Water Quality Act of 1987 § 314, Pub. L. No. 100-4, § 101(g), 101 Stat. 7, 9, 49, 50, 52 (1987) (amending Clean Water Act § 309, 33 U.S.C. § 1319 (Supp. IV 1986)). The administrative action precludes the citizen suit when it precedes notice of the citizen suit, or a citizen suit is filed more than 120 days after the original notice and an administrative action has been filed in the interim. Water Quality Act of 1987 § 314(g)(6)(B), Pub. L. No. 100-4, § 312, 101 Stat. 42 (1987).

221. See generally Fadil, *Citizen Suits Against Polluters: Picking Up The Pace*, 9 HARV. ENV. L. REV. 23, 29 (1985). As Fadil said, "The paucity of citizen suits against polluters—at least under federal laws—has frequently been remarked." (citing Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DEN. L. J. 553, 564-65 (1983); Sandler, *Citizen Suit Litigation*, ENV'T, Mar. 1981, at 38; R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 547-48 (2d ed. 1978); *Moorman Seeks More Citizen Suits, Predicts Step-up in Criminal Probes*, [8 Current Developments] Env't. Rep. (BNA), at 1649 (Feb. 24, 1978)). Fadil expressed misgivings about the Sandler article because it counted only reported citizen suit cases and failed to consider citizen enforcement occurring in unreported decisions, settled cases, and threatened suits. *Id.*

A recent study, commissioned by EPA constituted the first major analysis of the impact of citizens' suits on the enforcement of federal environmental laws. It collected and

more citizens filed suits due to widespread noncompliance by dischargers and lax enforcement by government officials.²²² Coalitions of environmental groups purposefully undertook to file actions under section 505 in response to a perception that EPA's enforcement activities were either nonexistent or ineffective. This was confirmed by one lawyer with the National Resources Defense Council (NRDC), who claimed that the NRDC initiated a more rigorous enforcement effort in late 1982 and early 1983.²²³ He listed the following reasons for the NRDC's increased activity:

1. Although prior governmental enforcement needed strengthening, the Reagan Administration engaged in no enforcement.
2. There was a general feeling that government would not or could not do enough enforcement.
3. The NRDC wanted to make an effort to stop some of the egregious kinds of pollution.
4. The NRDC wanted industry members to know that they would not be able to get away with violating the law.
5. Another objective was to blaze the trail for other environmental groups by "making some law" in the area and by showing them that it [the successful prosecution of cases against water polluters] could be done.²²⁴

When asked to characterize NRDC's pursuit of water polluters, the attorney said, "[t]here is still a lot of work to do, but the campaign has been fairly successful."²²⁵ In its Annual Report for 1986-1987, the NRDC stated that its Water Enforcement Project

reported information about citizen suits filed between January 1, 1978, and April 30, 1984, under six EPA-administered statutes with citizen suit provisions. The report stated that under the Clean Water Act, a coalition of national and regional environmental groups filed 162 of the 214 citizen suits and notices of intent to sue since 1982, which accounted for the recent explosion of citizen suits initiated under section 505. *Id.* at 29-32 (discussing ENV'T L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES (1984)).

222. See Stewart and Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (primarily concerned with whether and in what circumstances creation of private rights of action are a legitimate form of procedural law-making). See generally Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833 (1985) (although citizen suits were authorized by law in the 1970s, they were not widely utilized until the mid 1980s); Fadil, *supra* note 221 (a "notable exception" to the general lack of citizen enforcement actions under environmental laws is the recent enforcement of discharge permits under the Clean Water Act).

223. Telephone interview with James Simon, NRDC Clean Water Act Enforcement Project (May 3, 1988).

224. *Id.*

225. *Id.*

"prepared cases against dozens of companies in fifteen states."²²⁶ The NRDC noted that its \$1.3 million penalty in its suit against Gwaltney as "the largest court-awarded penalty to date in a citizen's water pollution case."²²⁷

The District Court's determination in *Gwaltney* that the company was liable for up to \$6.6 million in civil penalties and the judge's decision to impose a \$1.3 million penalty²²⁸ indicate the relative success of citizen suits when contrasted to what the Department of Justice and the EPA have managed to obtain in their negotiations with water polluters within the past year. Although the EPA imposed administrative civil penalties under its new grant of authority from Congress in the Water Quality Act of 1987,²²⁹ none of the federal enforcement activities reported in recent months contains a civil penalty as large as the one obtained by the citizens in *Gwaltney*.²³⁰ One commentator suggests that the

226. NRDC, 1986-1987 *Annual Report* 13 (1987). The NRDC also provided the following background information about its suit against Bethlehem Steel Corporation.

All polluting industries received a warning loud and clear when NRDC and its co-plaintiff, the Chesapeake Bay Foundation, won a judgment holding the Bethlehem Steel Corporation liable for its illegal discharge of millions of gallons of waste into the Chesapeake Bay. On the eve of the trial to assess penalties, Bethlehem Steel agreed to settle the case out of court, by paying \$1.5 million in penalties. Of this amount, \$1.0 million will be given to local groups for environmental programs on the bay, and \$500,000 will go to the U.S. Treasury.

....
In the past year, more than fifteen companies in Ohio, Pennsylvania, Connecticut, and New England states agreed to settle cases brought against them by NRDC [sic]. As part of their settlements, the companies agreed not only to comply with their permits in the future, but also to pay a penalty to a third party environmental fund or the U.S. Treasury.

Id.

227. *Id.*

228. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556, 1565 (E.D. Va. 1985).

229. See generally Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of Titles 33 and 42, U.S.C.). Apart from containing various provisions which increase the penalties that EPA can impose, section 314 of the Water Quality Act of 1987 amended section 309 of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(B) (Supp. V 1987), to allow the Administrator to impose administrative civil penalties. Section 313 of the Water Quality Act of 1987 amends section 309(d), 33 U.S.C. § 1319(d) (1982 & Supp. V 1987), and specifically authorizes a court, when setting a civil penalty, to consider the economic benefit resulting from the violation.

230. See *Recent Developments*, 18 [News & Analysis] *Env'tl. L. Rep.* (Env'tl. L. Inst.), at 10,071 (Feb. 1988), listing the following cases: *United States v. Marine Power & Equipment Co.*, No. C85-382R (W.D. Wash. Nov. 5, 1987) (proposing a consent decree requiring future compliance and an order to remove pollutants and debris from the bottom of Lake Union in Seattle); *United States v. Key Pharmaceuticals, Inc.*, No. 87-1660 (HL) (D.P.R. Nov. 23, 1987) (imposing a \$170,000 civil penalty under the Clean Air Act cou-

\$1.3 million assessment "may have been the environmental swan song of retiring Judge Merhige, who made his environmental reputation with the largest penalty ever imposed under the [Clean Water Act], in the James River, Virginia, kepone pollution case against Allied Chemical Corporation."²³¹

A. EPA's Enforcement Activities

1. Congress' Assessment

Members of the public, including environmentalists, were justified in concluding that the EPA failed to enforce the law after Congress conducted well-publicized hearings of the EPA's activities during the Reagan administration. These hearings resulted in one EPA staffer going to jail and the EPA Administrator, Anne (Gorsuch) Burford, resigning under fire.²³² Senator Al Gore stated in a recent article:

Conservationists are conservatives, in the best sense of the word. They value our irreplaceable national heritage, and want to conserve it for generations yet unborn. But President Reagan and his people were radicals, their attack on the environment was unprecedented in our history.

James Watt [former Secretary of the United States Department of the Interior] and the Reagan radicals gutted environmental programs and budgets at the Interior Department, the Environmental Protection Agency (EPA), and related agencies.

pled with a compliance schedule for waste water treatment and substantial stipulated penalties for violations of the decree); *United States v. Simpson Paper Co.*, No. C86 5221 DLJ (N.D. Cal. Nov. 10, 1987) (proposing a civil penalty of \$23,000); *United States v. City of Bellingham*, No. C87-1621 (W.D. Wash. Nov. 24, 1987) (a penalty award of \$23,190); *United States v. Concord Electronics Corp.*, No. 85-9664 (S.D.N.Y. Dec. 2, 1987) (civil penalty of \$26,000); *United States v. Exxon Chemical Americas*, No. 871027 (M.D. La. Nov. 23, 1987) (requiring the defendant to implement and report on several measures to prevent further discharges plus imposing a civil penalty of \$40,000); *United States v. Associated Metal and Mineral Corp.*, (S.D. Tex. Dec. 7, 1987) (\$230,000 in civil penalties plus future compliance with NPDES permit in effect on Mar. 31, 1989.).

Finally, the EPA announced a proposed Class II administrative penalty under the Clean Water Act section 309(g), 33 U.S.C. § 1319(g)(1) (Supp. V 1987) of \$125,000 against Canyon Lake Marina of Arizona for five years' failure to submit daily monitoring reports and violation of its NPDES permit. 18 [News & Analysis] *Env'tl. L. Rep.* (Env'tl. Inst.), at 10,069 (Feb. 1988).

231. Miller, *supra* note 172, at 10,098 & n.4 (citing HARRISON, *ENVIRONMENTAL LAW AUDITING HANDBOOK* (1984); McAllister, *Trying Times, Trying Cases*, A.B.A. J., Jan. 1, 1988, at 48) (The fine against Allied Chemical was \$8 million.).

232. See *supra* note 214.

What they could not do legally, they often attempted illegally.²³³

Given Senator Gore's appraisal of the EPA's leadership and his explanation of why enforcement of environmental laws deteriorated in recent years, it is no surprise that environmental groups stepped-up plans to initiate suits under section 505 of the Clean Water Act.

2. General Accounting Office's Assessment

The perception that the EPA was not enforcing the law was reinforced by a General Accounting Office (GAO) report that wastewater dischargers were failing to comply with the Clean Water Act and that EPA needed more funds²³⁴ and increased enforcement authority to assess administrative civil penalties.²³⁵ In another study foreshadowing what actually happened at the EPA, the GAO noted:

The nation has embarked upon an ambitious regulatory and financial assistance program to clean up our environment. The success or failure of this effort will depend to a large extent on how well Federal, State and local governments are implementing environmental protection programs. However, decision makers are raising significant questions as to whether environmental goals are too costly to achieve and whether the right balance has been struck between environmental quality objectives and energy, economic and social goals. . . . It is far easier to calculate the costs of pollution abatement than the benefits.²³⁶

In the preceding passage, the GAO points out the conflict emerging within the federal government in assessing the costs and the benefits of safeguarding the environment. Legislators and policymakers may support the preservation and conservation of our natural resources by enacting numerous environmental laws, but may partially recant the grand promises of the legislation when allocating the financial resources necessary to meet the objectives the laws seek. Consequently, the programs falter be-

233. Gore, *The Environmental Challenge*, [18 News & Analysis] *Envtl. L. Rep.* (Envtl. L. Inst.) 10,003, 10,003 (Jan. 1988) (citing A. BURFORD, *ARE YOU TOUGH ENOUGH?* (1986) (autobiographical account of Anne (Gorsuch) Burford's Experience in the Reagan Administration)).

234. U.S. GEN. ACCT. OFFICE, *REPORT TO THE ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY* 19 (1983) [hereinafter GAO REPORT].

235. *Id.*

236. U.S. GEN. ACCT. OFFICE, *ENVIRONMENTAL PROTECTION: AGENDA FOR THE 1980's* 3-4 (1982).

cause inadequate funding bars implementation of the policies at the federal, state and local levels. The GAO, consistent with its governmental function, monitored the EPA's enforcement activities and filed several reports during the ensuing years because the EPA had, and still has, primary federal responsibility for enforcing the environmental laws and implementing the policies.

On December 2, 1983, the GAO reported that wastewater dischargers, like Gwaltney, were failing to comply with NPDES permits issued under the Clean Water Act.²³⁷ The GAO noted that, as of October 30, 1982, more than 68,000 NPDES permits had been issued.²³⁸ The GAO also complained that "thousands of municipal and industrial dischargers either have not applied for a permit or have applied and have not been issued a permit by EPA or the appropriate state agency. In addition, as of December 1982, about 34,000 NPDES permits had expired and had not been reissued."²³⁹ The GAO voiced concern that "*if the permit program continues to exhibit its present high noncompliance rates and other shortcomings, dischargers may lose further incentives to operate treatment plants in accordance with their permits, knowing little or no effective enforcement will occur.*"²⁴⁰

The GAO next examined EPA's budget between 1971 and 1981 and discussed the resources EPA had available to prosecute polluters.

Between 1971 and 1981, EPA's operating budget to develop and implement programs under major environmental legislation steadily grew, reaching \$1.35 billion in fiscal year 1981. But subsequent budgets and budget proposals have reversed this funding trend. EPA's fiscal year 1982 budget was reduced 15 percent to \$1.086 billion, to \$1.040 billion in fiscal year 1983, and was proposed at \$949 million for fiscal year 1984, a 30 percent decline over the 1981-84 period. The Congress, however, provided EPA with an additional \$295 million for fiscal year 1984.²⁴¹

The data evidence encroachments into the EPA's budget, which, coupled with changes in enforcement policy and strategy within the agency, limited the EPA's enforcement options and its

237. GAO REPORT, *supra* note 234, at 45.

238. *Id.* at 2.

239. *Id.* at 41.

240. *Id.* at 42 (emphasis added).

241. *Id.* at 3.

efficacy.²⁴²

The GAO noted in the same report that "in the 21 states and territories where EPA carries out permit program activities, resources have also declined."²⁴³ After analyzing a random sample of 531 major dischargers in six states, the GAO estimated that 82 percent exceeded their permit limits at least once in eighteen months and 31 percent exceeded their permit limits by 50 percent or more in at least four consecutive months during that time.²⁴⁴ Nonetheless, the GAO found that, on a national basis, the number of EPA enforcement actions declined from 1,523 in 1977 to 410 in 1982.²⁴⁵ The GAO concluded that "[s]tronger enforcement against permit noncompliance is needed What can be expected . . . in the foreseeable future . . . is continued high non-compliance and inadequate enforcement unless significant resources are directed to the program."²⁴⁶ Finally, the GAO recommended that Congress give the EPA authority to assess administrative penalties against law violators that could improve its ability to enforce the law and encourage compliance.²⁴⁷ But here again, even with its stated interest in cleaning up the environment, Congress waited four years before implementing that suggestion

242. The GAO states that:

Part of the explanation for the significant drop in enforcement actions in 1982 can be attributed to changes in EPA enforcement policy during that year. For example:

—In January 1982, a headquarters policy memorandum directed the regions to settle enforcement cases in a nonconfrontational manner (voluntary compliance).

—A July 1982 headquarters policy memorandum advised the regions to administer a strong, aggressive, and fair enforcement program and to use all available enforcement means.

—Another policy memorandum, issued in September 1982, acknowledged that some persons had misconstrued the approach to enforcement set out in the July 1982 memorandum. It stated that EPA's initial approach should not be confrontational and that the regulated community must be dealt with on a presumption of good faith and in an attempt to achieve voluntary compliance.

Id. at 25.

See also note 215, which quotes from Gorsuch's draft memorandum regarding general operating procedures for the civil enforcement program. Properly interpreted, the procedures suggest that the Regional Administrators take progressively more stringent steps toward encouraging compliance before referring the case to Headquarters for civil judicial action. *See id.*

243. GAO REPORT, *supra* note 234, at 3.

244. *Id.* at 7.

245. *Id.* at 24-25.

246. *Id.* at 42.

247. *Id.* at 30-31.

by passing the Water Quality Control Act of 1987,²⁴⁸ which became law on February 4, 1987, notwithstanding President Reagan's veto.²⁴⁹

The following section begins where the GAO study leaves off, examining the EPA's justifications for its water quality enforcement budget requests for fiscal years 1983-1989, with some brief forays into fiscal year 1982 data to establish a baseline for the EPA's funding history.

B. EPA's Budgets

1. Fiscal Year 1982—Establishing a Baseline

At least one commentator has characterized the escalation in citizens' environmental suits as a response to the EPA's inability or unwillingness to enforce the Clean Water Act.²⁵⁰ Governmental appropriations data for EPA over a seven-year period from 1982-1989 reveal that inadequate funding may have impinged the EPA's ability to enforce the water quality program. As a baseline, in 1982, the EPA's total water quality budget was almost \$17.6

248. Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered section of Titles 33 and 42, U.S.C.).

The amendments create administrative penalties that may amount to as much as \$125,000 under section 309 (g)(2), 33 U.S.C. § 1319 (g)(2) (Supp. V 1987). Water Quality Control Act of 1987, 100 Pub. L. No. 100-4, § 314(a), 101 Stat. 7, 46 (1987). The amendments also stiffen civil and criminal penalties under the law. They increase civil penalties awarded under section 309(d), 33 U.S.C. § 1319(d) (Supp. V 1987), from \$10,000 to \$25,000 per day. Water Quality Control Act of 1987, Pub. L. No. 100-4, § 313 (b)(1), 101 Stat. 7, 45 (1987). The amendments also increase penalties for permit violations under section 404 (5)(4), 33 U.S.C. § 1344(s) (4) (Supp. V 1987) from \$10,000 to \$25,000 per day. Water Quality Control Act of 1987, Pub. L. No. 100-4, § 313(d), 101 Stat. 7, 45 (1987) (striking old section 404(s)(4) and replacing it with an amended section 404(s)(5)). Significantly, section 313(d) of the Water Quality Control Act of 1987, 33 U.S.C. § 1344 (s)(4) (Supp. V 1987) requires that courts consider, among other things, the economic benefit (if any) that results from the violation.

249. In his veto message and in a tone reminiscent of that of President Nixon, who vetoed the Clean Water Act of 1972, President Reagan complained that while he supported the cleanup of our Nation's rivers, lakes, and estuaries, the Clean Water Act construction grant program is "a classic example of how well-intentioned, short-term programs balloon into open-ended, long-term commitments costing billions of dollars more than anticipated or needed." President's Message to the House of Representatives Returning H.R. 1 Without Appeal, 23 WEEKLY COMP. PRES. DOC. 97 (Jan. 30, 1987). Moreover, he complained that "[w]hen the program started, the cost of that commitment to the Federal taxpayer was estimated at \$18 billion[,] [y]et to date, \$47 billion has been appropriated." *Id.*

250. The Clean Water Act Amendments of 1987, [Special Report] Env't. Rep. (BNA) No. 19, at 51 (Sept. 4, 1987).

million, but the EPA spent a little less than \$17.4 million.²⁵¹ The funds supported some 440.6 permanent workyears, yet the EPA planned to reduce the permanent workyears by 12.4 percent over a two-year period, so that by 1984 the EPA expected its budget to support only 313.2 permanent workyears.²⁵² Logically, if you have fewer staffers less enforcement occurs.

Another telling figure is the EPA's allocation for abatement, control, and compliance. In 1982, the EPA devoted over \$1 million to these functions, but in the following year cut that budget by about \$800,000.²⁵³ A review of the EPA's expenditures in 1982 shows that, although the EPA expended \$224,600 for the Legal and Enforcement Counsel's Office in fiscal year 1982, the 1982 allocation preceded two years in which the EPA asked for and received no funding for that function.²⁵⁴ The following sections examine the EPA's appropriation requests, how the EPA prioritized its use, and how much money the EPA actually obligated in each fiscal year between 1983-1989.

2. Fiscal Year 1983

For fiscal year 1983, the EPA asked for a total of \$13,357,900, which supported 326.1 permanent workyears.²⁵⁵ The agency actually obligated \$13,664,100 and 366.8 workyears for water quality enforcement.²⁵⁶ The EPA expected to conduct 2,275 compliance inspections pursuant to a neutral inspection scheme and to issue approximately 760 administrative orders and notices of violations of NPDES requirements.²⁵⁷ In fact, data contained in the fiscal year 1985 budget estimate disclose that during the 1983 fiscal year the EPA conducted 1,994 compliance inspections and issued 50 Notices of Violations and 781 Administrative Orders.²⁵⁸

251. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal year 1984 [Water Quality], at WQ-85 [hereinafter 1984 Justification].

252. *Id.*

253. *Id.* at WQ-85. Funding for these functions since 1982 has been erratic, with decreases for each of the past three years. See *infra* text accompanying notes 277, 282, 284.

254. *Id.* at WQ-85 to WQ-89.

255. *Id.* at WQ-85.

256. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1985 [Water Quality] at WQ-86 [hereinafter 1985 Justification].

257. 1984 Justification, *supra* note 251, at WQ-88.

258. 1985 Justification, *supra* note 256, at WQ-86.

(The EPA failed to report the figures consistently from year to year. In some years, the EPA combined totals for Notices of Violations and Administrative Orders, while in other years it did not.) However, the EPA did provide technical support in 1983 for the development of 44 civil cases that staff had referred to headquarters for review.²⁵⁹ Unfortunately, the \$13.6 million allocated in 1983 for water quality enforcement was \$4 million less than in 1982 when the EPA allocated over \$1 million solely for abatement, control, and compliance.²⁶⁰ As indicated above, the EPA requested no funds for fiscal years 1983 and 1984 for the Legal and Enforcement Counsel functions of Water Quality Enforcement.²⁶¹

3. Fiscal Year 1984

For fiscal year 1984, the EPA requested \$13.6 million and 313.2 permanent workyears for its water quality enforcement program. The EPA planned to devote \$203,600 for abatement, control, and compliance.²⁶² In its 1986 Budget Estimate, the EPA identified the following accomplishments for 1984: (1) the agency obligated about \$13.3 million supported by 359.1 total workyears to water quality enforcement, \$13 million of which constituted salaries and expenses while only \$231,500 was for the abatement, control, and compliance appropriation; (2) the Regional Offices conducted approximately 2400 compliance inspections, issued 94 Notices of Violations and 1,644 Administrative Orders; and (3) the EPA provided technical support for the development of 90 civil and four criminal cases that staff had referred to Headquarters for review.²⁶³

4. Fiscal Year 1985

In its 1985 Budget Estimate,²⁶⁴ the EPA requested \$15.7 million supported by 370.8 total workyears, but funding at this level required that the EPA reduce the number of compliance inspections it could conduct by about 5 percent compared with the pre-

259. *Id.* at WQ-86.

260. 1984 Justification, *supra* note 251, at WQ-85.

261. *Id.* at WQ-89.

262. *Id.* at WQ-86.

263. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1986 [Water Quality] at WQ-91 [hereinafter 1986 Justification].

264. 1985 Justification, *supra* note 256, at WQ-83 to WQ-87.

ceding year.²⁶⁵ Consequently, the EPA obligated a total of \$15.9 million, of which approximately \$1.3 million was earmarked for abatement, control and compliance.²⁶⁶ Data available two years later for fiscal year 1985 show that the Regional Offices conducted 2,080 compliance inspections, twenty fewer than the EPA projected, but they issued 24 Notices of Violations and 1,028 Administrative Orders, and staff referred some 118 civil cases to Headquarters for review.²⁶⁷

5. Fiscal Year 1986

In its 1986 Budget Request, the EPA requested \$17 million supported by 392.4 total workyears for its Water Quality Enforcement program.²⁶⁸ The EPA planned a major thrust in 1986 directed at continued implementation and enforcement of the National Municipal Policy (NMP) to ensure that all Publicly-Owned Treatment Works (POTWs) complied with the applicable requirements of the Clean Water Act by the 1988 statutory deadline.²⁶⁹ The EPA hoped to ensure compliance by major industrial permittees, POTWs, and other permittees where noncompliance threatened public health or water quality objectives.²⁷⁰ It projected that total inspections would remain at 2,100, about the same level as in 1985. Administrative orders and notices of violations, including 93 pretreatment administrative orders, were supposed to total about 601 in 1986. The EPA also anticipated that there would be about 126 civil and criminal cases litigated in 1986.²⁷¹ The EPA requested approximately \$2 million for abatement, control, and compliance, a figure that purportedly reflected increased technical support for municipal and pretreatment compliance activities.²⁷²

Two years later, the data show that the Regional Offices conducted approximately 2,143 compliance inspections and issued 42 Notices of Violation and 989 Administrative Orders. Staff also

265. *Id.* at WQ-84 to WQ-85.

266. *Id.* at WQ-84.

267. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1987 [Water Quality] at WQ-65 [hereinafter 1987 Justification].

268. 1986 Justification, *supra* note 263, at WQ-88 to WQ-91.

269. *Id.* at WQ-89.

270. *Id.* at WQ-90.

271. *Id.*

272. *Id.* at WQ-89.

provided technical assistance for the development of 107 civil cases referred to Headquarters for review.²⁷³ Thus, although the EPA originally requested a mere \$2 million for abatement, control, and compliance, it actually spent over \$5.8 million. The 1986 expenditure fails to engender confidence in the EPA's enforcement commitment because the EPA again asked for only \$2 million in its 1987 budget.²⁷⁴ Congress though, gave the EPA another \$5.8 million for abatement, control, and compliance in 1987 anyway.²⁷⁵ As seen below, environmentalists can view the \$5.8 million abatement, control, and compliance tab the EPA had in fiscal years 1986 and 1987 merely as aberrations since the EPA's abatement, control, and compliance budgets for fiscal years 1988 and 1989 are back to about \$1.6 million.²⁷⁶

6. Fiscal Year 1987

For fiscal year 1987, the EPA requested \$18 million, which included the costs of 408.3 workyears and an allocation of \$2 million for abatement, control, and compliance. The figures represent a decrease of 8.0 workyears and \$3.7 million for abatement, control, and compliance.²⁷⁷ The EPA planned to conduct 2,242 inspections, issue 50 Notices of Violation and 877 Administrative Orders, and provide technical support for approximately 80 NPDES cases initiated in previous years.²⁷⁸

The EPA reported two years later that in 1987 the agency obligated almost \$22.3 million supported by 403.2 total workyears, of which \$16.5 million was for salaries and expenses and \$5.7 million was for the abatement, control, and compliance appropriation.²⁷⁹ The EPA indicated that it began judicial action against 26 POTWs as a means of establishing enforceable construction schedules. According to the EPA, the Regional Offices conducted approximately 2,577 compliance inspections and issued

273. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal Year 1988 [Water Quality] at WQ-68 [hereinafter 1988 Justification].

274. 1987 Justification, *supra* note 267, at WQ-61.

275. 1988 Justification, *supra* note 273, at WQ-64.

276. Environmental Protection Agency, Justification of Appropriation Estimates for Committee on Appropriations, Fiscal year 1989 [Water Quality] at WQ-64 [hereinafter 1989 Justification].

277. 1987 Justification, *supra* note 267, at WQ-62.

278. *Id.* at WQ-63.

279. 1989 Justification, *supra* note 276, at WQ-64.

1,002 administrative orders.²⁸⁰ The EPA also issued 20 administrative penalty orders, even though the new authority was not implemented until late in the year. Finally, the EPA provided support for the development of 92 civil judicial actions referred by staff to Headquarters for review.²⁸¹

7. Fiscal Year 1988

The EPA requested almost \$18.6 million supported by 399.8 total workyears in fiscal year 1988. Of that sum, the EPA designated \$1.6 million for abatement, control, and compliance. The agency directed the bulk of the money towards salaries and expenses, increasing the budget by \$660,600 in those categories, while decreasing the EPA's abatement, control, and compliance budget by \$450,000.²⁸² The EPA failed to disclose the number of inspections it planned to conduct during fiscal year 1988 although the agency did suggest that it would continue to supply technical support for 80 NPDES cases initiated in previous years. New enforcement efforts against industrial sources was supposed to focus on those industries required to install Best Available Technology.²⁸³

8. Fiscal Year 1989

The EPA requested \$20.4 million supported by 408.3 total workyears for 1989, nearly a \$1 million increase over 1988. However, the EPA earmarked the increased funding for salaries and expenses but reduced the abatement, control, and compliance budget by \$50,000.²⁸⁴ The EPA justifies the increase in salaries and expenses as the result of increased personnel costs.²⁸⁵ Under the agency's Water Quality Enforcement program, the Regional Offices are expected to conduct 1,900 inspections of municipal and industrial permittees, giving emphasis to evaluating compliance with toxic controls. The Regional offices are also expected to emphasize a "timely and appropriate" enforcement response in all cases of significant noncompliance.²⁸⁶ The EPA plans to provide

280. *Id.* at WQ-67 to WQ-68.

281. *Id.*

282. 1988 Justification, *supra* note 271, at WQ-65.

283. *Id.* at WQ-66.

284. 1989 Justification, *supra* note 276, at at WQ-64.

285. *Id.* at WQ-65.

286. *Id.* at WQ-66.

technical support for approximately 100 cases initiated in previous years but not yet settled. New enforcement efforts against industrial sources will focus on those industries with toxic controls in their permits.²⁸⁷

9. Funding Conclusions

The budget data from fiscal years 1982 through 1989 show that in 1982 EPA spent \$17.4 million which supported 440.6 permanent workyears; whereas, in 1989 EPA is requesting \$20.4 million to support only 408.3 workyears.²⁸⁸ This means that EPA has less money in actual dollars for water quality enforcement than it had in fiscal year 1982. The fact that the EPA has less money to monitor more dischargers suggests the commentators were correct in their assessment of the EPA's enforcement capability and also in their determination that citizen suits constitute an important component of any federal or state environmental regulatory program.

C. The Problems of Capture

Citizen environmental suits also escalated in response to administrative and political realities other than the budget. Behind the refusal to leave law enforcement solely to administrative agencies rests a suspicion that somehow the agency might be captured by the regulated industries. Commentators observe that this is a particularly serious concern vis-à-vis the states and their industry members.²⁸⁹ The inclusion of citizen suits in the regulatory scheme promotes the Congressional goal of strict enforcement better than a negotiated regulatory system whereby industry members may exact concessions from the federal EPA or the state enforcement authorities by alleging that it is too difficult to comply with the law.²⁹⁰ Notwithstanding the characterization of states as the main enforcers of environmental statutes, state authorities experience difficulty challenging major industries.²⁹¹ Local governments decline to prosecute prestigious, politically powerful indus-

287. *Id.*

288. *See supra* text accompanying notes 251-52 and 284.

289. *See, e.g.,* Terris, *Private Watchdogs: Internal Auditing and External Enforcement—Three Perspectives: [Part] A. Environmentalists' Citizen Suits*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,254, 10,255 (July, 1987).

290. *Id.*

291. *Id.*

tries within their communities out of fear that the industries will relocate.²⁹² While uniform statutes may reduce state-shopping by industry members, differences in enforcement could still cause a business to locate in one jurisdiction rather than another. Thus, while "[t]he Gorsuch [Reagan appointed EPA Administrator] era served as a very powerful indictment of the wisdom of leaving the [enforcement of] environmental statutes to EPA,"²⁹³ the problems associated with leaving enforcement of environmental statutes to the states are evident.

D. Inadequate Funding

The next reason to support environmental citizen suits relates to the lack of adequate resources, discussed above, and the theory of privatization espoused by President Reagan's administration. Since no regulatory agency at the federal or state level can or will have adequate resources to ensure comprehensive enforcement of these statutes, citizen suits are a mechanism to turn over a portion of the burden of law enforcement to members of the private sector. Citizen suits also present an opportunity to shift the costs of enforcing the law onto the entities which drain the legal system through their non-compliance, thereby underwriting environmental litigation.²⁹⁴ Violators of section 505 of the Clean Water Act have to pay the attorneys' fees and litigation costs of successful citizen-plaintiffs.²⁹⁵ Such a system promotes former President Reagan's policy of less governmental intrusion in the affairs of the private sector. Theoretically, a plan promoting more private sector involvement in enforcement should allow the executive branch to shrink the size of its administrative agencies and the federal budget deficit.

The question now is whether citizen suits can continue to do what state and federal agencies apparently lack the money, or the will, to do, or has the Supreme Court's remand destroyed them as enforcement tools. Arguably, the environmentalists could find support in the Supreme Court's decision. Violators who fortuitously happen not to be discharging excess amounts of pollutants into the

292. *Id.*

293. *Id.*

294. See generally R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY (2d ed. 1978) (expansion of legal rights for environmental advocates is meaningless if individuals are unable to finance transactional costs of litigation).

295. Terris, *supra* note 289, at 10,255.

water on the date the citizens file their complaint cannot escape the imposition of penalties, because the violators have not achieved a "state of compliance."²⁹⁶ What follows is an assessment of the status of citizen suits within the regulatory scheme in the aftermath of *Gwaltney*.

V. THE IMPLICATIONS OF THE SUPREME COURT'S DECISION IN *Gwaltney*

Environmentalist zealots view the Supreme Court's narrow construction of the citizen suit provision in the *Gwaltney* case as a defeat. To them, any decision short of unequivocal affirmance of the \$1.3 million civil penalty against the water polluter constituted a step backwards in the evolution of citizen suits. To members of the regulated industry, the Supreme Court's failure to overturn the award of civil penalties for purely past violations of the law engenders ambivalence about the decision and provides foggy incentives to comply with pollution abatement laws. This section analyzes the implications of the Supreme Court's decision in *Gwaltney* from the perspectives of the two groups at loggerheads in section 505 suits under the Clean Water Act: citizens and members of the regulated industry.

The lack of an unequivocal affirmance of the imposition of civil penalties against a water polluter who stopped discharging excess pollutants into the water by the time the citizens filed their complaint has a deleterious effect on the viability of citizen suits. Citizens rely on the dischargers' discharge monitoring reports (DMRs), which indicate the amount of effluents released into the water in the past. It would be costly and time consuming for citizens to go to the site of the discharge on the date they plan to file the complaint and test the effluents themselves, and the efforts may fail to prove anything. Yet unless they do, citizens will repeatedly have defendants in citizen suits alleging that they complied with the law by the date the citizens commenced the action, since a time lag normally exists between when the firm measures the effluents and when it issues its monitoring reports.

The Supreme Court's remand of *Gwaltney* impairs the effectiveness of section 505 of the Clean Water Act in at least three ways. First, it restricts environmental groups to sue only recalci-

296. *Gwaltney of Smithfield v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 57-58 (1987).

trant law violators whose failure to comply with the law *continues on the date the citizens file their complaints*.²⁹⁷ Second, it increases the evidentiary burden of the citizens who, prior to the *Gwaltney* decision, enjoyed a modest evidentiary obligation.²⁹⁸ Third, it removes from the citizens' arsenal of enforcement tools the possibility of collecting, or of threatening to collect, civil penalties for purely past violations of the Clean Water Act.²⁹⁹ Because the citizens can get only injunctive relief to force the water polluters to do what the law already requires them to do, the polluters enjoy at least a short-term economic benefit from noncompliance even if they eventually comply due to the threat or result of a citizen enforcement suit. Such an outcome reduces incentives for other dischargers to continue their compliance efforts.

A. The Immediate Assessment

The Supreme Court's remand of *Gwaltney* raises more questions than it answers.³⁰⁰ It purports to set forth a standard whereby continuing violators who fortuitously are not in compliance on the date the complaint is filed remain subject to suit. However, the decision allows recalcitrant water polluters who happen to be in compliance on that date to escape liability under section 505. The question in each subsequent case will be, "How will future plaintiffs know, or be able to prove, which type of law violators the defendants are?"

Prior to the Supreme Court's remand in *Gwaltney*, plaintiffs in citizens' suits enjoyed a relatively modest evidentiary burden. Proving liability against the violator was simple. Plaintiffs merely asserted that because the law requires defendants to keep the DMRs, the DMRs may be used as admissions to establish a de-

297. *Id.* at 64.

298. *Id.*

299. *Id.*

300. See generally Powers, *A Citizen's View of Gwaltney*, [18 News & Analysis] Env'tl. L. Rep. (Env'tl. L. Inst.) 10,119 (Apr. 1988) (asserting that the Court left unanswered the pivotal question of what constitutes a good faith allegation of an ongoing violation); DuBoff and Clearwater, *Arguing for the Defense After Gwaltney*, [18 News & Analysis] Env'tl. L. Rep. (Env'tl. L. Inst.) 10,123 (Apr. 1988) (what constitutes "in violation" and "ongoing violation" was left unanswered by *Gwaltney*, nor did the Court address Rule 11 and mootness concerns); Miller, *supra* note 172 (*Gwaltney* raises new questions including what constitutes a sufficient likelihood of a continuance or recurrence of past violations at the time of filing, how to define intermittent violations, and what is the effect of compliance by a defendant after the suit is filed).

fendant's civil liability.³⁰¹ Thus, the federal district court in *Gwaltney* granted the plaintiffs' motion for summary judgment on the issue of liability and imposed the largest penalty ever imposed in a citizen suit.³⁰² But once citizen suits began to generate significant financial penalties as a further inducement to ensure compliance, thus forcing water polluters to disgorge the economic benefits of noncompliance, the Supreme Court, in contradistinction to what governmental enforcement authorities are permitted to do, vitiated the power of the citizens to exact penalties for past violations of the law.

Barring law violators from retaining any economic benefits of their conduct is premised on the notion that significant resources are required to comply with regulatory laws. Given the profit motive for operating businesses, many companies would rather delay making capital expenditures for which there are no positive short-term effects on the balance sheet. Therefore, companies that comply quickly with the law may be placed in a relatively uncompetitive position because they have lost the use of the money or other resources for the amount of time it takes less compliant firms to conform. While it is true that Congress has legislative tools, such as mandating that the EPA assess a noncompliance penalty, to direct regulatory agencies to recoup these economic benefits when they are ascertainable, the current law enforcement scheme makes it more profitable for businesses to pollute rather than install the appropriate equipment.

As a practical matter, the EPA has issued civil penalty policy statements that address this concern and has established guidelines to help staffers quantify the economic benefits.³⁰³ Moreover, the recent amendments to the Clean Water Act require courts to factor these guidelines into any formula for assessing civil penal-

301. See, e.g., *Student Pub. Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Pub. Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985); *Sierra Club v. Raytheon Co.*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,990 (D. Mass. Oct. 26, 1984).

302. See *supra* notes 112-13, 226 and accompanying text.

303. See *EPA Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act*, [1 Federal Laws] Env't. Rep. (BNA) 41:1101 (June 1, 1984); *EPA Civil Penalty Policy*, [1 Federal Laws] Env't. Rep. (BNA) 41:2991 (June 1, 1984); *EPA Guidance on Class I Clean Water Act Administrative Penalty Procedures* [1 Federal Laws] Env't. Rep. (BNA) 41:3221 (Sept. 25, 1987); *EPA Consolidated Regulations for Assessing Civil Penalties and Revoking or Suspending Permits* [1 Federal Regulations] Env't. Rep. (BNA) 101:0591 (July 7, 1989).

ties. A report released in February 1988³⁰⁴ reveals that, of the 1209 citizen actions concerning environmental laws, some 882 contain claims under the Clean Water Act.³⁰⁵ Thus, cases litigated in the future, which may well be a large number, will have to reckon specifically with these new statutory provisions.

The Supreme Court's remand of *Gwaltney* will likely increase the amount of time it will take for resolution of subsequent disputes because it increases the likelihood of trials and appeals.³⁰⁶ For example, the Supreme Court, citing *Gwaltney*, recently remanded another case, *Union Oil Co. of California v. Sierra Club*.³⁰⁷ Previously, defendants may not have challenged their liability when courts construed the DMRs as admissions and credible evidence of liability. Now more defendants may raise the *Gwaltney* defense that they were in compliance with the law on the day the plaintiffs filed the action. Thus, an important strategy for virtually every defendants' lawyer will be to question the evidentiary value of the DMRs in subsequent cases.³⁰⁸ Determinations by lower courts as to whether the plaintiffs have met their evidentiary burdens regarding the defendants' noncompliance will be challenged, and more defendants will probably appeal decisions holding them liable. One consequence of delaying resolution of the cases is that a given dollar amount in civil penalties will less likely deprive the violators of the benefits of the profits they gained by violating the law. The longer a company can postpone payment of penalties, the longer the company can use the profits from its noncompliance.

As discussed more fully above, on April 13, 1988, the *Gwaltney* appellate court to which the case had been remanded

304. L. JORGENSEN AND J. KIMMEL, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION 17 (1988).

305. *Id.* at 19. The report indicates that 265 of the actions concern claims under the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended in scattered sections of 42 U.S.C.) and 71 allege violations of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 42 U.S.C. and other titles).

306. Miller, *supra* note 172, at 10,104 (arguing that *Gwaltney* will prolong litigation by rewarding polluters' delay tactics and by encouraging the government to file suits duplicative of citizens' suits).

307. 485 U.S. 931 (1988).

308. See DuBoff and Clearwater, *supra* note 300, at 10,124-25 (arguing that DMRs on their face cannot show a violation of the Clean Water Act without examining such underlying facts as whether or not violations have been systematic and whether or not pollution control facilities are adequate).

ruled that the environmental groups made good faith allegations against Gwaltney.³⁰⁹ The Fourth Circuit remanded the suit for a further determination of whether the Chesapeake Bay Foundation and Natural Resources Defense Council managed to prove at trial that Gwaltney had committed ongoing violations of the Clean Water Act.³¹⁰ The Fourth Circuit held that groups could prove ongoing violations “(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.”³¹¹ The Court indicated that the key point from which to determine whether continuous violations had been eradicated is at the time “when citizens filed suit.”³¹² Other courts handling similar cases must make the same fact-specific determinations. From the environmentalists’ point of view, the district court’s decision upon remand to reinstate the civil penalty on July 18, 1988, came fortuitously. Just enough facts were elicited at the trial on the damages to show that the experts had misgivings about whether Gwaltney’s remedial efforts would be successful.³¹³ Absent that evidence, Gwaltney probably would have escaped any financial liability.

Based on how other lower courts have construed the *Gwaltney* decision thus far, some of the pending cases may have to follow *Gwaltney* to the Supreme Court before they are resolved. For example, in *Atlantic States Legal Foundation Inc., v. Tyson Foods Inc.*,³¹⁴ a “federal district court in Alabama delayed ruling on an environmental group’s suit against an alleged Clean Water Act violator and said the suit may become moot because the company is correcting the problems.”³¹⁵ In this case, which is one of the first to apply *Gwaltney*, the district court held that the environmental group’s allegation of ongoing violations by Tyson Foods had met the *Gwaltney* standard.³¹⁶ “However, the company is tak-

309. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988).

310. *Id.* at 171-72.

311. *Id.* at 173-74.

312. *Id.* at 174.

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

314. 682 F. Supp. 1186 (N.D. Ala. 1988).

315. *Court Delays Ruling on Alabama Citizen Suit, Says Case May Be Moot Under Gwaltney Decision*, 18 Env’t. Rep. (BNA) No. 47, at 2349 (March 18, 1988) [hereinafter *Court Delays*] (citation omitted).

316. 682 F. Supp. at 1190.

ing measures to correct violations at its Blountsville, Ala[bama], plant, and the group's suit may become moot once the measures are completed. . . ."³¹⁷

The court, therefore, stayed the suit while the company completes a \$2.5 million upgrade of its wastewater treatment system.³¹⁸ The court hypothesized that the suit will become moot if the upgrade is successful, relying on language from the Supreme Court's *Gwaltney* opinion that: "longstanding principles of mootness . . . prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'"³¹⁹

The district court also rejected the citizens' claims against the company for violations at its Heflin, Alabama, plant. As one commentator reported the case, the

"Alabama Department of Environmental Management has initiated administrative action against the facility and issued an administrative order, which [as the *Tyson* court held] constitutes 'diligent prosecution' and precludes a citizen suit under the [Clean] Water Act The administrative order precludes the citizen suit, according to the district court, even though the order contained language preserving the right of others to seek civil penalties against Tyson Foods. The [Clean] Water Act does not provide that a state agency can remove a statutory block to citizen suits, the court said."³²⁰

Thus, it appears that lower court applications of the *Gwaltney* doctrine to date suggest that the viability of citizens' suits has been impaired.

B. Victory for Industry

One of the more potent arguments supporting the Supreme Court's decision in *Gwaltney* is that Congress never intended citizens to be delegated part of the prosecutorial function of the regulatory agency: the language of the law certainly fails to provide so expressly.³²¹ Furthermore, opponents of citizen suits claim that given the havoc such a delegation could create in the marketplace and in the courthouses, Congress must make clear any such intent through an express delegation. Absent a clear statement, courts

317. *Court Delays*, *supra* note 315, at 2349.

318. *Id.*

319. 682 F. Supp. at 1190.

320. *Court Delays*, *supra* note 315, at 2349.

321. See Clean Water Act § 505, 33 U.S.C. § 1365 (1982 & Supp. V 1987).

are barred from implying a prosecutorial function in citizens, who lack both accountability to the people through legislative bodies and the legitimacy attached to a branch of government.

As a policy matter, supporters of the Supreme Court's remand maintain that allowing citizens to sue for purely past violations of the Clean Water Act would deluge the courts with law suits, paralyze industry, and disrupt the marketplace. Without the remand, every polluter, even those now in compliance with the law, would be liable and subject to suit. Moreover, the implementation of a decentralized modality for seeking civil penalties means that dischargers would be subject to suit by diverse groups in piecemeal fashion for violations dating back to the adoption of the NPDES system. Defending against these law suits would divert the resources of industry away from the development and installation of new pollution control technologies and hinder industry's ability to provide goods and services. The huge financial outlays industry members would have to pay for their past infractions could force many businesses into bankruptcy, and consequently burden bankruptcy courts throughout the nation.

To the extent that water polluters must pay some compensation for their violations, the EPA is better able to determine which violators' conduct is so egregious that prosecution is warranted. In terms of prioritizing the use of governmental resources toward improving technology and, thereby, reducing the levels of pollutants injected into the nation's waters, the EPA can better determine what the enforcement focus should be. The EPA's assessment of enforcement priorities, unlike that of *ad hoc* groups of citizens, is subject to Congressional oversight and the Administrator remains accountable to the President.

C. The Politics of Settlements Under Section 505

1. The Pre-*Gwaltney* Gameplan

Before *Gwaltney*, environmental groups appeared to have a set gameplan in seeking enforcement of the Clean Water Act against polluting defendants. As two commentators point out:

[E]nvironmental groups frequently inform target companies that their settlement goals include entry of a consent decree containing the following provisions:

1. civil penalties or, alternatively, a contribution of a comparable amount to an environmental project located in the same state, to compensate for past violations;
2. a schedule for achieving compliance with the permit

limits;

3. stipulated penalties for failure to meet the schedule or failure to comply with permit limits after compliance should have been achieved; and

4. reimbursement for the plaintiff's attorneys' fees and litigation costs.³²²

This gameplan presented significant financial consequences for defendants. An unsuccessful defendant could have expected to pay a civil penalty³²³ and reasonable attorney and expert witness fees.³²⁴ Dischargers could have been fined up to \$10,000 per day for violations of permit requirements.³²⁵ Therefore, violators faced a significant penalty, prior to *Gwaltney*, under the Clean Water Act.

2. Criticisms of the Pre-*Gwaltney* Gameplan

Opponents of citizen suits assert that too little of the revenue gleaned from the negotiated settlements reaches the government and too much of the money ends up in the pockets of environmentalists, either as attorney fees or as contributions to environmental groups. The opponents surely rejoice about the Supreme Court's remand of *Gwaltney* because it may make it more difficult for citizens to coerce defendants into a settlement. Opponents of citizen suits likely resent the fee-generating statutory provision,³²⁶ which they argue resembles a law creating "full-employment for environmental lawyers" more than anything else. Some of the *amicus curiae* objected to the diversion of money from the treasury to private sources as an impermissible usurpation of a governmental prerogative to determine how revenue gets appropriated.³²⁷ Even though settlement payments may go to third-party environmental groups not involved in the litigation where there is no resultant conflict of interest, industry would argue that the money is diverted from the federal coffers, and Congress fails to get an oppor-

322. Schwartz and Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 328 (1984) (footnote omitted).

323. Clean Water Act § 505(a), 33 U.S.C. 1365(a) (1982 & Supp. V 1987).

324. Clean Water Act § 505(d), 33 U.S.C. 1365(d) (Supp. V 1987).

325. Clean Water Act § 309(d), 33 U.S.C. 1319(d) (1982 & Supp. V 1987). After passage of the Water Quality Act of 1987, the penalty became \$25,000 per day. Pub. L. No. 100-4, 101 Stat. 7, 45 (1987) (codified at 33 U.S.C. § 1319(d) (1982 & Supp. V 1987)).

326. See *supra* text accompanying notes 67-68.

327. See *supra* text accompanying notes 131-35.

tunity to determine how it should be appropriated.

Representatives from industry may also criticize the lack of accountability to the electorate about how the money is spent. No formal mechanism exists to ascertain whether the third-party environmental groups are administered and managed by charlatans. Likewise, even if such third-party groups are committed to the cause of cleaning up the environment, whether their piecemeal efforts are more effective than pooling all of the monies generated from litigation to administer cleanup programs based on a comprehensive assessment of our national priorities is a serious question.

In rebuttal to the notion that the attorney's fee provision fattens the pockets of environmental lawyers, one attorney who practices in this area of law noted:

First of all, contrary to popular belief, the attorney's fee provisions are not nearly adequate to encourage people to bring suits—not if they want to eat, at least. Many in industry believe that these suits are a great way for private attorneys to make money. In general, they are being brought either by attorneys who do not depend on them for their incomes (they bring a few of them, and they've got a practice that otherwise will compensate them), or by attorneys who work for environmental organizations and therefore get a steady salary no matter what the outcome is.

Let me introduce you to my own experience. Over the last three years, we brought 26 lawsuits. At \$75 an hour, which, few would contest, is a little below the going rate for Washington lawyers, we had more than \$1,000,000 invested as of the first of this year. Our return has been almost \$50,000. There are not many private law firms on the environmental side who would be ready to carry almost \$1,000,000 worth of billing [sic] for three years. We hope for good results in the future, but there is no certainty.³²⁸

This statement illustrates that private practitioners can ill afford to bring frivolous citizen suits, because they have no assurance they will be able to eke out a living while they await resolution of an environmental case.

3. Evaluation of the Potential for Abuse Under the Statute

Had the court decisions favored the citizens, the current stat-

328. Terris, *supra* note 289, at 10,255.

utory scheme — which allows civil penalties to be diverted away from the federal coffers — would have provided too many opportunities for abuse. No formal controls exist over who gets the money. No federal law dictates how and for what the money may be spent. If citizens were able to sue for past violations of the law, well-meaning community do-gooders might consider using the law to fund their parochial environmental projects without regard for whether the targeted business actually does implement more stringent pollution controls, and without considering whether the business is currently complying with the law.

Moreover, under the current law, violators have no assurance that, if they negotiate a settlement with one of the co-enforcers of the law, the other co-enforcers are bound by the terms of the agreement. Congress has also failed in the current law to draw lines to determine the *res judicata* effect, if any, of the enforcement actions arising out of the same acts or circumstances and brought by citizens, states, and federal agencies against the same violators repeatedly.

Recently though, one commentator observed that “[r]arely do acts by individuals or companies that allegedly violate environmental laws result in reaction by only one governmental body under a single provision of one statute.”³²⁹ The enforcement players include: at the federal level—the EPA, Department of Justice and the United States Attorney’s Office; at the state level—the EPA’s delegation to the state, but also municipal and local governmental units and political subdivisions; and, finally, private enforcement by citizens under state and federal law. For example, once the federal government sues a polluter and establishes the presence of hazardous waste, each hazardous waste site identified by the government may generate several toxic tort suits. Any scientific or engineering evidence used by the government to establish the presence of hazardous waste is permitted as evidence in private litigation.³³⁰ In essence then, until Congress resolves the issue of *res judicata*, environmental polluters may be subject to multiple suits by co-enforcers, whose evidentiary and investigatory burden may be small if they are among the last plaintiffs to bring suit. Congress could remedy some of these consequences by statu-

329. J. ARBUCKLE, M. BROWN, N. BRYSON, G. FRICK, R. HALL, J. MILLER, M. MILLER, T. SULLIVAN, T. VANDERVER, & L. WEGMAN, ENVIRONMENTAL LAW HANDBOOK 560 (8th ed. 1985).

330. See *id.* at 568.

torily limiting the time over which a suit may be brought for a particular violation. However, in many instances medical science cannot assess the physiological damage that pollutants cause because the symptoms do not present themselves until many years after exposure. Hence, Congress may try to strike a balance and determine that it is better to allow states to continue to insert an applicable statute of limitations period on a case-by-case basis.

Polluters may not be able to insulate themselves from additional litigation by entering into a consent decree. In the case of *United States v. Atlas Powder Co.*,³³¹ a federal district court determined that, although the defendant negotiated a consent decree with a third party, the federal government was not bound by the agreement the defendant reached with a third party.³³² The court stated:

There is no authority for the proposition that the United States has an affirmative duty to notify a potential defendant that it does not intend to be bound by any consent decree entered into by the defendant and a private party, or by the defendant and the Commonwealth of [Pennsylvania]. The United States is not bound by settlement agreements or judgments in cases to which it is not a party.

. . . .

Regardless of whether defendant held a good faith belief that the United States would be bound by a consent decree between itself and ASLF [Atlantic States Legal Foundation], defendant's failure to make further inquiries into this matter cannot create a liability on the part of the United States for the defendant's attorney's fees and costs in negotiating with a third party. Nor can the defendant's good faith belief establish the basis for a breach of contract claim.³³³

Other jurisdictional battles may surface when states try to sue a federal authority for violating the Clean Water Act.³³⁴ Given the state of the law, water polluters have little incentive to settle with any of the co-enforcers of the Clean Water Act. It behooves defendants to litigate each dispute with each plaintiff,

331. 26 Env't Rep. Cas. (BNA) 1391 (E.D. Pa. 1987).

332. *Id.* at 1392.

333. *Id.*

334. See, e.g., *Ohio v. Department of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988) (when suing the Department of Energy for violating the Clean Water Act and another federal law, civil penalties imposed under a state program "arise under federal law" for the purpose of abrogating the Department of Energy's sovereign immunity).

since none of the potential co-plaintiffs can bind the others without the other co-enforcers' consent.

D. Marketplace Considerations

Did the Supreme Court's decision in *Gwaltney* reflect an inclination toward extending leniency to violators of a relatively new law so as to allow members of the regulated industry adequate time to come into compliance? Certainly Congress's inclusion of a target date some thirteen years after the enactment of the law³³⁵ evidences a realization that industry needs time to modify its technology to comply with the law. Nonetheless, since the Court here reviewed violative conduct which occurred well after the target date passed, the Court would seem not to have a basis for leniency on the ground that the industry needed more time to understand and comply with the law.

Would the Court decide the case differently under different economic conditions? First, one wonders in general if a court or regulatory agency is apt to be more lenient when the industry members make a significant contribution to the local economy. Second, would (or should) it be proper for a court to consider the impact of its decision on the local economy? That is, is it proper to question whether more stringent enforcement would cause a business to either close down or divert monies ordinarily used for employees' salaries and benefits to finance pollution control devices?

The courts can embrace one of two approaches. Even though governmental enforcement has been lax, courts can elect to apply more stringent standards in a case on the grounds that it is proper to take a "get tough" approach when a business has failed to comply within ten years. On the other hand, the polluters could argue that applying the more exacting standard to its conduct is unfair because no prior defendant was subjected to the higher standard.

E. Post-*Gwaltney*: Destruction of a Lever Against Polluters

1. Reduced Compliance

Environmentalists would agree that the *Gwaltney* decision reduces the incentive to comply with the law, since prior noncompliance cannot be punished if citizens, rather than governmental

335. Clean Water Act § 101, 33 U.S.C. § 1251(a)(1) (1982).

units, choose to sue the water polluter. If some dischargers exceed their permit limitations and manage to escape prosecution until after they abate the pollution, then, under one interpretation of *Gwaltney*, these dischargers retain an economic benefit which others, prosecuted before abating the pollution, cannot. For that reason, industry members may choose not to comply. For instance, a firm may delay installing appropriate technology in the hope that it may escape prosecution for noncompliance. In these cases, the law violators obtain two financial benefits: they retain the use of the money they otherwise would have expended on the appropriate water treatment facilities and they have larger profits because they are able to sell goods and services at less cost than their counterparts who complied with the law. Thus, through procrastination, some water polluters may obtain greater profits and market advantage if they are not forced to disgorge the profits gained by exceeding authorized discharge levels.

The EPA developed a civil penalty assessment framework that takes the benefits of noncompliance into account.³³⁶ Unlike section 120 of the Clean Air Act,³³⁷ which statutorily establishes that violators must disgorge any economic benefits their noncompliance generated, the Clean Water Act fails to contain such an express indication of Congressional will. The Water Quality Act of 1987 amendments to the Clean Water Act, however, require courts to calculate the economic benefit accruing to violators during its assessment of civil penalties.³³⁸

2. Inconsistent Enforcement Policy

Environmentalists also object to the *Gwaltney* decision because it produces an inconsistent and incoherent federal water pollution control policy that yields different legal outcomes based on the identity of the plaintiff. If a governmental unit brings the action, then the law violator may have to pay civil penalties for past violations of the law, even though it is currently in compliance. Whereas, if citizens file the suit, then the law violator fortuitously escapes prosecution for the past violations of the law, even though the results of its prior pollution continue to date. When, as here, government operates pursuant to a "command and control" regu-

336. See *supra* note 303.

337. Clean Air Act § 120, 42 U.S.C. § 7470 (1982).

338. 33 U.S.C. 1319(d) (1982 & Supp. V 1987).

latory model,³³⁹ making violations of the law unprofitable is a highly desirable objective. The outcomes of environmental suits under the Clean Water Act must be made more evenhanded and equitable than they are now. Allowing law violators to escape paying civil penalties for past violations undermines the Congressional goals of promoting water pollution control and achieving prompt industry-wide compliance.

3. Promoting Governmental Intrusion Rather Than a Free Market Economy

The *Gwaltney* decision requires courts to implement an enforcement policy which confers economic benefits on water polluters. But even under the Clean Water Act, as amended by the Water Quality Act of 1987, violators may simply compute the costs and benefits of compliance versus noncompliance, even though the EPA's Civil Penalty Policy attempts to account for noncompliance benefits when it assesses civil penalties against law violators. One can argue that *any* subsidy of law violators is ill-advised while the federal government budget is in deficit: \$150 billion dollars for 1987 and \$221 billion for 1986.³⁴⁰ From a budgetary perspective, the federal government should foster classes of law suits, like environmental citizen suits, which have the potential for fattening the federal coffers. Under a policy of encouraging more citizen suits, Congress and federal and state enforcement authorities would allow the private sector to initiate and prosecute all environmental actions, and only provide oversight functions to ensure that the money either gets into the government coffers or to organizations that would agree to do the cleanup and reclamation work under governmental supervision. Of course, one would have to ensure that a new bureaucracy does not arise to drain off reclamation and cleanup funds as administrative costs.³⁴¹

VI. ENFORCEMENT OPTIONS

A. What Citizens Can Do

The evisceration of the citizens' suit provision, unfortunately, leaves citizens with few, if any, options for getting water polluters

339. See E. DOLAN & D. LINDSEY, MICROECONOMICS 426-27 (1988).

340. Message to the Congress Transmitting the Fiscal Year 1989 Budget, 24 WEEKLY COMP. PRES. DOC. 212, 214 (Feb. 18, 1988).

341. See *infra* pp. 72-75.

to comply with the law. Case law has established that section 505 does not authorize citizens to compel federal and state regulatory agencies to prosecute law violators. Emblematic of court decisions on this point is *Dubois v. Thomas*.³⁴² In *Dubois*, the Eighth Circuit Court of Appeals reversed the district court holding which ordered the federal and state officials to “investigate and make a finding as to whether pollution has occurred.”³⁴³ The court reasoned that citizens had no right to compel regulatory agencies to exercise their prosecutorial discretion.³⁴⁴ “[T]he language of the [Clean Water] Act makes no mention whatever of a duty to make findings, much less a duty to carry out an investigation of each and every citizen complaint.”³⁴⁵ If the EPA had a mandatory duty to investigate all citizen complaints, the agency would be at the mercy of citizen requests in allocating resources for investigations. The EPA’s expertise at determining significant violations would be undermined by imposing a mandatory duty to investigate citizen complaints, no matter what the magnitude of the alleged violations. The district court ignored the principle that an administrative agency’s interpretation of a statute is entitled to deference from the court.³⁴⁶

In looking at the EPA’s duty to enforce against violations, the Eighth Circuit Court of Appeals reviewed the language of the Clean Water Act, which said that the agency “shall” issue an administrative order or initiate a civil suit to enforce the Clean Water Act.³⁴⁷ The court reasoned that Congress intended citizen suits to supplement enforcement activities by federal and state officials, rather than to dictate enforcement priorities for regulators.³⁴⁸ In addition, the court examined the legislative history of the citizen suit provision. The court concluded that, although the

342. 820 F.2d 943 (8th Cir. 1987).

343. *Id.* at 944 (quoting *Dubois v. Environmental Protection Agency*, 646 F. Supp. 741, 746 (W.D. Mo. 1986)).

344. *Id.* at 951.

345. *Id.* at 947.

346. *Id.* at 951. Courts have begun to review exercises of prosecutorial discretion in the administrative and civil context under an arbitrary and capricious standard. However, prosecutorial discretion to initiate administrative, civil or criminal enforcement proceedings is ordinarily shielded from review—even for alleged abuse. For helpful background information on the unreviewability of agency enforcement and prosecutorial discretion, see S. BREYER AND STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (1979).

347. 820 F.2d at 946-47.

348. *Id.* at 949.

legislative history is not clear on the issue, the EPA Administrator's duty of enforcement is discretionary.³⁴⁹

In short, because citizens lack statutory authority to compel agencies to act, despite the inclusion of seemingly mandatory statutory language like "shall", environmentalists need to exert political pressure on legislators to improve accountability throughout the governmental bureaucracy. Legislators might then conduct oversight investigations to ensure that environmental policies get implemented by agency officials. Moreover, environmentalists need to work toward changing the normative standards of fellow citizens, thereby sensitizing them to the risks of not enforcing environmental laws.

B. What the EPA Can and Cannot Do

While the citizens' ability to exact civil penalties for past violations may be impaired, the EPA still has available a panoply of enforcement mechanisms. As mentioned earlier, the EPA has authority to impose administrative civil penalties ranging from \$10,000 to \$25,000 per day. The pursuit of actions against violators is still left to the prosecutorial discretion of the EPA, however. Consequently, no adequate safeguards exist to prevent the harm that results if the EPA's leadership refuses to exercise its statutory authority. The agency also incurs enforcement costs when it develops a case against a water polluter regardless of whether the case is referred to the Department of Justice, as required under prior law, or the case is retained by the EPA under present law. Moreover, if one measures the EPA's success by what has happened thus far under section 120 of the Clean Water Act, then a Congressional grant of additional enforcement authority will not solve the problem.³⁵⁰

The EPA also has authority to obtain criminal sanctions against law violators. The EPA uses this authority infrequently, notwithstanding its potential as a deterrent, because of the difficulty associated with identifying and prosecuting an individual within the corporate structure. This remedy also has high administrative costs because prosecutions usually involve the EPA, the

349. *Id.* at 950.

350. See generally *Duquesne Light Co. v. Env'tl. Protection Agency*, 698 F.2d 456 (D.C. Cir. 1983) (challenging EPA regulations), *reh'g denied*, 791 F.2d. 959 (D.C. Cir. 1986) (questioning whether section 120 noncompliance penalties may be applied to regulated utilities).

Department of Justice, and the Federal Bureau of Investigation. Furthermore, placing the wrongdoer in jail will not yield the long-term goal of cleaning-up the pollution generated by the violator.

The EPA can also perform the cleanup itself and then seek to recoup the costs from the violators. Apart from the large initial outlays the EPA has to make to clean the site, violators of environmental laws may prove to be insolvent, increasing the probability that the EPA will not be able to collect any monies for its cleanup effort.

VII. LEGISLATIVE OPTIONS

Congress has several options to remove limits placed on the citizen suit provision of section 505 of the Clean Water Act by the Supreme Court's decision in *Gwaltney*. First, it can amend the law to overrule expressly the *Gwaltney* decision. The delegation of a prosecutorial function to diverse groups of citizens brings with it policy complications of its own, however.

Chief among the dilemmas Congress needs to address is the issue of *res judicata*. Congress can encourage each of the co-enforcers to prosecute different, rather than the same, violators for the infractions. As illustrated by the *Atlas* case,³⁵¹ law violators may appear victimized by the number of enforcement actions brought against them by co-enforcers. If Congress expressly authorized citizen suits for past violations, then some limitations are needed to prevent groups of citizens targeting a business *seriatim*. For instance, such a law could prevent one group of citizens from suing a company after another group sued the same company for violations that occurred three to four years ago for similar violations that occurred within the past two years. As a method of record keeping, Congress could require businesses subject to suit under section 505 to notify the regulatory agency of those actions pending against it and any other legal actions adjudicated within the past five or ten years arising out of the same facts.

Additionally, even if businesses negotiate settlements with a regulatory agency, which may include compliance orders, some mechanism should be available for citizens to seek enforcement of compliance orders when either the companies refuse to comply or the regulatory authorities refuse to enforce. Congress could

351. *United States v. Atlas Powder Co.*, 26 Env't. Rep. Cas. (BNA) 1391 (E.D. Pa. 1987).

streamline the procedures for judicial review when citizens allege noncompliance or lax enforcement of administrative orders. Important questions under these circumstances include: How can the citizens know that the EPA is not enforcing the compliance order or consent decree? and How long should citizens have to wait before undertaking to bring the action themselves? Congress can handle these and other related issues by establishing a statutory presumption of nonenforcement when, for example, three or more DMRs within a twelve month period demonstrate that the companies exceeded their effluent limitations. Nonetheless, before expanding the potential number of citizen suits, Congress needs to define the parameters of the suits.

Congress should legislate to exercise more control over how monies generated under the citizen suit provisions are spent. A vehicle for dealing with the potential abuse of the resources is to bar all consent decrees which earmark monies as charitable contributions to third party environmental groups or, alternatively, bar the tax deduction. As long as contributions to charitable organizations remain tax deductible, law violators should not be allowed to make contributions as part of settlements to such groups. Rather, they should bear the full brunt, including the tax consequences, of their lawlessness.

To ensure that monies generated by environmental litigation get used to reclaim our natural resources, Congress could mandate that the monies go into a special federal fund, and not merely into the general fund. Under this option, the monies gleaned from section 505 actions would be earmarked for reclamation and other rehabilitative projects through matching grant programs for which communities would compete. Such a legislative scheme would allow for national prioritization of cleanup projects although some allowance would probably have to be made for differences in the fiscal capacity of the communities as they compete for the environmental grants.

If the administrative burden of managing the fund remains controlled, then it can reduce the transaction costs associated with cleaning up the environment. Theoretically, the federal government should be able to contract the sundry jobs to the lowest bidders, whereas local groups who get the funds may have to resort to using local tradepersons who may not perform the work at the lowest possible price. Recent disclosures that contractors overcharge the government suggest enacting stringent accounting and auditing procedures to avoid a recurrence of the problem in this

context. Care should be taken, however, to ensure that the EPA spends the money and does not merely let it accumulate.

Another option for strengthening the law includes allowing violators to absolve themselves from the threat of future law suits for their prior violations of the law by making a one-time contribution to a cleanup fund in an amount to be determined by the EPA or Congress. Here again, the EPA should ensure that the penalty fits the nature and character of the offense. Perhaps Congress could identify a formula based on the gross profits the company generated from its operations over the past twenty years. This proposal has the advantage of providing a clearly defined sum of money for cleanup when the exact harm of the pollution violations is difficult to quantify.

Congress could also require businesses to post bonds as insurance that the businesses will cleanup any inadvertent, excessive discharges. Reviews and studies of past requirements under other environmental statutes are needed to determine if the government sets the appropriate bonds. But certainly Congress needs to ensure that excessive bonds do not work a hardship denying would-be entrepreneurs access to the marketplace.

Finally, competitors and environmental zealots should be discouraged from bringing actions founded on facts of prior violations if the industry member is now in compliance. Instead, they should place a higher priority on suing those businesses not in compliance with the law.

To enforce the law under any of these proposals requires a commitment to funding the EPA's enforcement activities at appropriate levels. Therefore, unless Congress plans to appropriate more resources to the EPA to support its water quality enforcement effort, water polluters can anticipate unbridled opportunities to discharge excess pollutants into the nation's waters, remaining reasonably confident that they can avoid paying civil penalties for having done so.

Congress may have to consider other schemes for cleaning up the water and ensuring compliance with the law. A rather appealing option is the imposition of pollution charges, otherwise known as pollution excise taxes.³⁵² Under this scheme, dischargers pay fees to the government based upon the amount of pollutants they emit into the nation's waters. Other permutations of this general

352. See E. DOLAN & D. LINDSEY, *supra* note 339 at 427-29.

scheme establish a finite number of transferrable permits the industry members competitively bid for at periodic auctions.³⁵³ The initial appeal of such solutions is that government sets the maximum total amount that can be discharged, either by directly limiting the quantity of pollution allowed by permit or by assessing an excise tax on pollution to achieve the predetermined acceptable pollution amount, and the industry members are rewarded for developing and using new technologies which ensure that they generate less pollution.³⁵⁴

Because access to clean water constitutes a collective good, environmentalists who bring the actions against law violators bear the financial and other burdens of litigation until and unless they prevail while others in society free-ride on their efforts. Forcing consumers of goods and services produced by polluters to pay pollution excise taxes is one way to spread the costs of safeguarding the collective good of controlling water pollution to those who benefit from the goods whose production resulted in pollution. Moreover, some consumers will avoid buying goods and services from polluters so that they can avoid paying the pollution excise tax. The major appeal of this scheme, however, is that those firms which can reduce pollution with the lowest opportunity cost of their resources will do most of the cleanup. This means that society gets the reduction in pollution it wants with the least loss of goods and services. Firms with extremely high costs of compliance under the available technology will choose to pay the tax rather than significantly reduce pollution. Nevertheless, the excise tax is a cost that provides incentive for these firms to find new pollution reduction technologies.

CONCLUSION

The Supreme Court's reluctance to interpret section 505 to allow citizens to exact civil penalties for purely past violations of the Clean Water Act from water polluters limits the efficacy of the citizens' suit provision during a time of lax governmental enforcement. Consequently, unless Congress acts to provide more resources to the EPA for water quality enforcement, or modifies the law to establish more incentives for dischargers to comply with their NPDES permits, few, if any, legal consequences exist which

353. *Id.* at 429-30.

354. *Id.* at 436-37.

would inspire dischargers to adhere to their effluent limitations.

If enforcement of the Clean Water Act remains in the murky backwaters of the Supreme Court's remand of *Gwaltney*, then more courts may defer making a decision until the case becomes moot. Courts may seize the *Gwaltney* mootness language as a way to avoid imposing civil penalties for past violations of the law by allowing the defendants in citizens' suits to install and test new pollution control devices. Hence, while the citizen suit provision will serve to prod laggard water polluters into compliance, it will be stripped of any capacity to force recalcitrant law violators into disgorging the economic benefits of their noncompliance. Further erosion of the efficacy of citizen suits under the Clean Water Act will continue unabated unless Congress clarifies the enforcement role of citizens.

In *Gwaltney*, the Supreme Court could have interpreted the ambiguous "alleged to be in violation" language found in section 505 of the Clean Water Act more expansively to give effect to the broader statutory goals of preventing continued pollution of our nation's waterways. Instead, the Supreme Court conferred a benefit on water polluters who determine that the costs of prompt compliance exceed the benefits. Congress must act to ensure that citizens can continue to be effective enforcement gapfillers.

Blaming Congress for inserting inartful and imprecise language into the water pollution control statute will not correct the current state of the law. Before Congress confers express authority on citizens to act in this context, however, it needs to examine some of the subordinate issues affecting the enforcement authority citizens might be given in the future. Congress needs to clearly establish which co-enforcers of the Clean Water Act can bring enforcement actions and when, so that law violators do not escape prosecution while others are sued repeatedly by different co-enforcers. Congress should also clarify when citizens can pursue law violators whose conduct continues to breach administrative orders or consent decrees.

Congress needs to examine what happens to the monies currently generated as a result of actions brought under section 505 and should create safeguards to ensure that the money gets used to reclaim or cleanup polluted waterways, while denying tax benefits to law violators. Forcing the monies to go into a specially earmarked federal fund could allow a national prioritization of cleanup projects to ensure that funds are directed to those areas most in need of reclamation.

Moreover, at a time when the federal government has a huge operating deficit, Congress should be encouraging citizens to bring suits under section 505 because of their potential for generating revenue. Even if the money gets earmarked for cleanup projects, it means that fewer resources from the general treasury will have to be appropriated for environmental work. Legislation authorizing citizen suits privatizes enforcement of the Clean Water Act and shifts at least part of enforcement financing onto violators.

The Supreme Court of the United States decision in *Gwaltney* provides legislators, regulators, environmentalists, and industry members with an opportunity to re-examine the role that citizens can play in enforcing the law and meeting Congressional and national goals for improved water quality.