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Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the Gwaltney Standard

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Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the Gwaltney Standard

Randall S. Abate†

INTRODUCTION

Citizen suits under the Clean Water Act¹ are more prevalent than those filed under any other federal environmental law that authorizes citizen suits.² Not surprisingly, one of the most important cases in environmental citizen suit jurisprudence, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,³ arose in a Clean Water Act citizen suit. The Supreme Court’s decision in Gwaltney is perhaps the most extensively analyzed yet most frequently misunderstood standard in citizen suit jurisprudence under federal environmental laws. Ten years after the Supreme Court issued its decision in Gwaltney, federal courts continue to struggle to ascertain the scope and applicability of the Gwaltney standard.

In Gwaltney, the Supreme Court held that subject matter jurisdiction does not attach for wholly past violations of National Pollutant Discharge Elimina-

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²There are two important reasons for the popularity of Clean Water Act citizen suits. First, allegations in these actions are easier to prove because of the availability of evidence contained in discharge monitoring reports (DMRs) that dischargers are required to file under the Act. Second, civil penalties of up to $25,000 per violation, per day are available. 33 U.S.C. § 1319 (d) (1994).

tion System (NPDES) permits alleged in citizen suits under the Clean Water Act. The Court concluded that subject matter jurisdiction attaches only when a citizen suit plaintiff makes a good faith allegation of an ongoing violation.

Although the Gwaltney standard was developed in the context of the Clean Water Act with its concomitant grounding in compliance records contained in discharge monitoring reports, courts have liberally construed the standard to govern past violations in citizen suits under other major federal environmental statutes with different monitoring and enforcement schemes, such as the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-Know Act (EPCRA). Courts have struggled to ascertain the scope and applicability of the Gwaltney standard to citizen suits under these statutes.

The Gwaltney standard has been expanded, contracted, and distorted by courts attempting to understand it, both within and outside the Clean Water Act context. An important factor contributing to this confusion has been the courts’ inability to reach a consistent terminological understanding of “past violations.” Courts attempting to apply the Gwaltney standard have reviewed two types of past violations in citizen suits under federal environmental laws: 1) “wholly past” violations that occurred and ceased prior to a citizen suit; and 2) “ongoing” violations that occurred prior to the filing of a citizen suit and either continued in some form after the suit was filed, or where the citizen-plaintiffs alleged in good faith that there was a reasonable likelihood that such violations would continue. Courts have experienced confusion in discerning whether wholly past or ongoing violations are at issue in a given case and in determining whether citizen suit provisions other than those of the Clean Water Act should be governed by the Gwaltney standard.

Part I of this article examines the structure and underlying policies of the citizen suit provision of the Clean Water Act. Part II reviews the history and ultimate resolution of the Gwaltney case. Part III discusses the various approaches that courts have adopted in Clean Water Act cases to understand and apply the Gwaltney “good faith allegation of an ongoing violation” standard. Part IV addresses the application of the Gwaltney standard to citizen suits under RCRA, CERCLA, and the Clean Air Act. Part V analyzes the judicial misapplication of the Gwaltney standard to EPCRA citizen suits for past violations.

The article concludes that the Gwaltney standard should be legislatively revised to incorporate the “modified by parameter” approach to evaluating citizen suits for past violations under the Clean Water Act. Moreover, the article

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4Section 402 of the Clean Water Act allows the Administrator of the Environmental Protection Agency to issue permits authorizing the discharge of pollutants in accordance with specified conditions. 33 U.S.C. § 1342 (1994).
5Gwaltney, 484 U.S. at 64.
6Id. at 67.
8Id. §§ 6901-6992k (1994).
9Id. §§ 9601-9675 (1994).
10Id. §§ 11001-11050 (1994).
11See Part III. C., infra.
recommends that whatever form the Gwaltney standard takes in Clean Water Act citizen suit jurisprudence, it should not be applied to govern citizen suits for past violations under the Clean Air Act, RCRA, CERCLA, or EPCRA.

I. The Source of the Controversy: The Citizen Suit Provision of the Clean Water Act

In 1972, Congress enacted the Clean Water Act to address the rising concern over water quality in the nation. Congress declared as a national goal and policy the restoration and maintenance of the "chemical, physical and biological integrity of the Nation's waters." One mechanism that Congress developed to achieve this goal was the NPDES permit. The Clean Water Act prohibits the discharge of any pollutant without an NPDES permit, and authorizes the EPA Administrator or an appropriate state official to issue such permits.

To ensure compliance with NPDES permits, Congress granted the EPA Administrator authority to enforce any permit condition or limitation against any person in violation of a permit, by issuing an administrative compliance order or by initiating a civil action. Any person who violates an NPDES permit is subject to civil penalties of up to $25,000 per violation, per day.

In less expansive terms, Congress also granted citizens authority to enforce the permit provisions of the Clean Water Act. A citizen may commence a civil action against any person who is "alleged to be in violation of... an effluent standard or limitation." District courts have jurisdiction to enforce effluent standards or limitations and may award civil penalties in Clean Water Act citizen suits in accordance with section 309(d), the same section of the Clean Water Act that authorizes the EPA Administrator to seek civil penalties.

17Section 505 of the Clean Water Act provides in pertinent part:
(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section... any citizen may commence a civil action on his own behalf —
(1) against any person... 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. ...
(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 of right.
33 U.S.C. § 1365 (a), (b).
Unlike suits brought by the EPA Administrator, Clean Water Act citizen suits are subject to additional procedural requirements. Citizens are precluded from bringing a suit to enforce NPDES requirements unless they provide 60-days notice of the impending action to the EPA Administrator, the state in which the alleged violation occurs, and the alleged violator.19 A citizen is also precluded from bringing a suit if the EPA Administrator or the state has "commenced and is diligently prosecuting a civil or criminal action."20 Although worded slightly differently, the same preclusion of citizen suits appears again in the EPA Administrator's enforcement section of the Clean Water Act.21 Despite these instances of preclusion, a citizen may intervene as of right in suits brought by the EPA Administrator.22

The language of the citizen suit provision of the Clean Water Act is repeated, at least in part, in several other federal environmental statutes. For example, the citizen suit provisions of RCRA and CERCLA essentially parallel the structure and language of the Clean Water Act's citizen suit provision and its "alleged to be in violation" language.23 The Clean Air Act's citizen suit provision, after which its Clean Water Act counterpart was patterned, was revised as part of the 1990 Clean Air Act Amendments to change its original "alleged to be in violation" language to authorize recovery for past violations where there is evidence that a violation has been repeated.24 Conversely, EP-CRA does not contain the "alleged to be in violation" language and lacks the present tense structure of the Clean Water Act's citizen suit provision. As Part II of this article illustrates, the Gwaltney case addressed the unresolved controversy concerning the nature and scope of enforcement authority under the citizen suit provision of the Clean Water Act and, arguably, the similarly worded citizen suit provisions of other federal environmental statutes.25

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19 Id. § 1365 (b)(1)(A).
20 Id. § 1365 (b)(1)(B).
21 Section 309 (g)(6)(A) provides in pertinent part:
   (A) Limitation on actions under other sections
   Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation —
   (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection, . . .
   shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

22 Id. § 1319 (g)(6)(A).
23 See Part IV. A., infra, for a discussion of the applicability of the Gwaltney standard to the citizen suit provisions of RCRA and CERCLA.
24 See Part IV. B., infra, for a discussion of the applicability of the Gwaltney standard to the citizen suit provision of the Clean Air Act.
II. History and Ultimate Resolution of the *Gwaltney* Case

A. The Split in the Circuits

The Supreme Court in *Gwaltney* granted certiorari to resolve a three-way split among the First, Fourth, and Fifth Circuits concerning subject matter jurisdiction for citizen suits under the Clean Water Act alleging wholly past violations. The Fifth Circuit was the first among these circuits to address the issue. In *Hamker v. Diamond Shamrock Chem. Co.*, the plaintiffs filed a Clean Water Act citizen suit 11 months after an oil leak had contaminated a creek on the plaintiffs' property. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the plaintiffs' case for lack of subject matter jurisdiction. The Fifth Circuit held that the language "alleged to be in violation" in the Clean Water Act citizen suit provision confers jurisdiction only when the plaintiff alleges an ongoing violation. The court defined "ongoing violation" to mean a violation occurring at the time the complaint was filed.

The Fourth Circuit reached the opposite conclusion in *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.* Chesapeake Bay Foundation (CBF) filed a citizen suit under the Clean Water Act against Gwaltney of Smithfield alleging repeated violations of the fecal coliform, chlorine, and total kjeldahl nitrogen (TKN) parameters of Gwaltney’s NPDES permit. Relying on *Hamker*, Gwaltney contended that because it had not violated its permit since two weeks prior to the date that CBF filed suit, the complaint was based on wholly past violations and should therefore be dismissed for lack of subject matter jurisdiction.

The Fourth Circuit upheld the district court’s conclusion that section 505(a) of the Clean Water Act authorized citizen suits for wholly past violations of the Act. It based its decision on a comparison between section 505 and section 309, which authorizes EPA civil actions. The court reasoned that because the EPA is authorized to seek civil penalties under section 309 for wholly past violations, and because section 505 directs civil penalties in accordance with section 309(d), the Clean Water Act authorizes civil penalties for wholly past violations alleged under section 505. The court distinguished *Hamker* from the facts in *Gwaltney* on the ground that *Hamker* involved a single incident that occurred almost one year prior to the time suit was filed which was unlikely to recur.

The First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.* reached a conclusion that adopted a form of compromise between the holdings in *Hamker* and *Gwaltney* concerning whether plaintiffs may recover civil penalties for wholly past violations of the Clean Water Act. In *Pawtuxet Cove*, the appellate court affirmed the dismissal of the Clean Water Act citizen suit, holding that the action lacked subject matter jurisdiction. The court interpreted the

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26756 F.2d 392 (5th Cir. 1985).
27791 F.2d 304 (4th Cir. 1986).
28 Id. at 309.
29 Id. at 310.
30 Id. at 312.
31807 F.2d 1089 (1st Cir. 1986), cert. denied, 484 U.S. 975 (1987).
“alleged to be in violation” language of the citizen suit provision to require a good faith allegation of a “continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act.”

The First Circuit concluded that once such good faith allegations are shown, civil penalties may be assessed for past violations. Thus, like the Fifth Circuit in *Hamker*, the court stated that it would not confer subject matter jurisdiction to a citizen suit premised solely on wholly past violations of the Clean Water Act. The court, however, criticized the *Hamker* decision on the ground that serious violations may be short in duration; in other words, proving that violations were occurring at the time of suit may be virtually impossible.

B. The Supreme Court’s Decision in *Gwaltney*

In 1987, the Supreme Court granted certiorari in the *Gwaltney* case to resolve whether the “alleged to be in violation” language of section 505 of the Clean Water Act confers subject matter jurisdiction for citizen suits seeking recovery for wholly past violations of the Act. The Court held that the language and legislative history of the citizen suit provision of the Clean Water Act barred suits for wholly past violations. Adopting the holding in *Pawtuxet Cove*, the Court imposed a requirement that a plaintiff must make a good faith allegation of an ongoing violation to maintain such an action. While acknowledging the vital function that citizen suits play in the overall enforcement scheme of the Act, the Supreme Court in *Gwaltney* determined that Congress intended citizen suits to have a prospective focus and play a supplementary role in relation to government enforcement efforts.

The facts of the case are as follows. Gwaltney held an NPDES permit authorizing the discharge of seven pollutants. Violations of five of these parameters occurred repeatedly between 1981 and 1984; however, the violations of only three of these limits was at issue in the case: chlorine, fecal coliform, and total Kjeldahl nitrogen (TKN). Due to the installation of new pollution control equipment in March 1982, Gwaltney’s chlorine violations ceased in October 1982. Gwaltney’s last fecal coliform violation occurred on May 15, 1984, just before the plaintiffs filed their complaint in June 1984. The majority opinion in *Gwaltney* concluded that section 505(a) is ambiguous. The Court noted that if Congress intended section 505(a) to authorize citizen suits for wholly past violations, it could have done so in more explicit statutory language. It further stated that the most natural reading of the “alleged to be in violation” language is a requirement that plaintiffs allege a state of either “continuous” or “intermittent” violation. The Court held that citizen suit plaintiffs must allege a reasonable likelihood that a past polluter will

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32 Id. at 1094.
33 Id. at 1093.
34 *Gwaltney*, 484 U.S. at 56-67.
35 Id. at 64.
36 Id. at 60-61.
37 Id. at 53-54.
38 Id. at 54.
39 Id. at 57.
40 Id.
continue to pollute in the future. The Court stated that the pervasive use of the present tense in the language of the citizen suit provision indicates that "the harm sought to be redressed by the citizen suit lies in the present or the future, not in the past."41

The Court also relied on the wording and underlying purpose of the 60-day notice provision to support its conclusion. The Court stated that the notice provision was designed to give an alleged violator an opportunity to come into compliance with the Act. The Court reasoned that a citizen suit based on wholly past violations in which the violator is currently in compliance would render the notice to the violator "gratuitous."42

The Court then turned to an analysis of the applicable legislative history. The Court cited several passages of legislative history that indicate that the citizen suit provisions of the Clean Water Act and the Clean Air Act (after which the Clean Water Act provision was patterned)43 were enacted to authorize citizens to abate pollution when the government cannot or will not command compliance.44 Thus, the Court stated that Congress intended the citizen suit provision to be available only for prospective relief.

The Court's opinion concluded with a discussion of standing and mootness. The Court stated that to establish standing in Clean Water Act citizen suits, plaintiffs do not need to "prove" violations in their complaints — they need only make "good faith showings" of violations.45 With respect to mootness, the Court concluded that if the defendant is able to prove that the alleged violations are not reasonably expected to recur, the defendant should be able to dismiss the action as moot.46

The Supreme Court remanded the case because the lower courts incorrectly held that citizen suits under the Clean Water Act could be maintained for wholly past violations. The case was remanded with instructions to determine whether CBF's complaint contained a good faith allegation of an ongoing violation at Gwaltney's facility.47

C. Gwaltney on Remand

On remand, the Fourth Circuit identified another issue for the district court to address in addition to determining whether CBF's complaint contained a good faith allegation of an ongoing violation. The Fourth Circuit remanded the case to the district court to require the district court to determine whether CBF had proved their allegations of ongoing (i.e., continuous or intermittent) violations.48 The appellate court issued the following remand instructions to guide the district court's evaluation:

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41 Id. at 59.
42 Id. at 60.
43 Id. at 62 (citing S. Rep. No. 92-414, at 79, 2 Leg. Hist. 1497, noting that citizen participation under the Clean Water Act is "modeled on the provision enacted in the Clean Air Amendments of 1970").
44 Id.
45 Id. at 64.
46 Id. at 66.
47 Id. at 67.
48 844 F.2d 170, 171 (4th Cir. 1988) (per curium).
citizen-plaintiffs may show proof either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.49

The Fourth Circuit also listed factors that the district court may consider in its evaluation: (1) whether remedial action was taken to correct Clean Water Act violations; (2) the ex ante effectiveness of remedial measures that Gwaltney had undertaken; and (3) any other considerations that would show that Gwaltney’s violations had been completely eradicated when the plaintiffs filed suit.

Applying the Fourth Circuit’s remand guidelines, the district court held that the trial testimony of two witnesses indicated that a reasonable likelihood existed that permit violations would recur.50 The court stated that when CBF filed its suit in June 1984, there was no certainty that the risk of continued violations had been eradicated. These recurrences were possible despite the improved pollution control equipment that Gwaltney installed in 1982 and 1983. Concluding that CBF had met its burden of proof for establishing ongoing violations, the district court reinstated its original $1.3 million judgment against Gwaltney.51

Gwaltney subsequently appealed the case back to the Fourth Circuit. The Fourth Circuit held that the district court did not have jurisdiction to impose penalties for chlorine violations because it was clear that Gwaltney had abated those violations. Therefore, the Fourth Circuit instructed the district court to assess Gwaltney’s penalties based on TKN violations only, in the amount of $290,000.52

In determining whether Gwaltney’s violations were “ongoing,” the Fourth Circuit held that it must consider the facts not with the advantage of hindsight, but from the time of the original suit.53 The court concluded that at the time of trial the TKN violations could reasonably be expected to recur.54 The court based its conclusion on witness testimony at the original trial indicating that the then-current condition of Gwaltney’s TKN collecting lagoons was substandard, and witness testimony by both parties indicating that there was reasonable doubt as to whether Gwaltney could remain within its permit limitations during winter months, which were approaching at the time of trial.

With respect to mootness, the Fourth Circuit stated that civil penalties attach when violations occur and because violations are discovered after they occur, liability attaches for the permit violation based on an event in the past.55 The court noted that it is a well-established legal principle that the cessation of illegal activity does not moot a case.56 Thus, the appellate court stated that any violations that plaintiffs prove as ongoing at trial must be related to present

49Id. at 171-72.
51Id.
52890 F.2d 690, 698 (4th Cir. 1989).
53Id. at 693.
54Id. at 695-96.
55Id. at 696.
56Id. (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).
wrongdoing. Once an ongoing violation is proved at trial, the district court is required to assess civil penalties.

Applying these mootness principles, the Fourth Circuit concluded that it was absolutely clear that Gwaltney's TKN violations had ceased at the time CBF filed suit because Gwaltney's new pollution control equipment had produced no chlorine violations since October 1982.\textsuperscript{57} The appellate court held that the district court erred in assessing penalties for the "wholly past" chlorine violations and for not evaluating permit violations on a "parameter-by-parameter" basis.\textsuperscript{58} As Part III of this article illustrates, this distinction formed the basis of extensive litigation and confusion among the federal courts in applying the \textit{Gwaltney} standard in subsequent Clean Water Act cases.

**III. Application of the \textit{Gwaltney} Standard in Clean Water Act Cases**

In the wake of the ultimate resolution of the \textit{Gwaltney} case on remand from the Supreme Court, many questions remained unanswered for federal courts attempting to apply the \textit{Gwaltney} standard in Clean Water Act cases. First, the post-\textit{Gwaltney} courts had to address the difficult issue of distinguishing between "ongoing" and "wholly past" violations. Second, in cases where a violator brought itself into compliance with its permit conditions after suit was filed, the post-\textit{Gwaltney} courts had to determine whether such post-complaint compliance rendered the suit moot, and whether to assess civil penalties and in what amount. Third, some of the post-\textit{Gwaltney} courts also evaluated whether an ongoing violation of one permit parameter confers jurisdiction over the entire permit or only over that specific limitation.

**A. What Constitutes a "Good Faith" Allegation of an "Ongoing" Violation?**

The courts applying the \textit{Gwaltney} standard in the years immediately following the \textit{Gwaltney} decision tended to focus on determining what type of conduct constitutes an "ongoing" violation and what a plaintiff needs to establish to "allege in good faith" the existence of such violations. For example, in \textit{Sierra Club, Inc. v. Simkins Indus., Inc.},\textsuperscript{59} the Sierra Club sued the defendant for failing to file quarterly discharge monitoring reports required under its NPDES permit. The district court granted the Sierra Club's motion for partial summary judgment on liability and assessed civil penalties against the defendant.\textsuperscript{60}

On appeal to the Fourth Circuit, the defendant contended that the plaintiff's complaint failed to establish jurisdiction under the \textit{Gwaltney} standard for an ongoing violation. Citing \textit{Gwaltney}, the Fourth Circuit held that the Sierra Club had proved that an ongoing violation existed, even though the defendant's failure to retain sampling records as required under its NPDES permit

\textsuperscript{57}\textit{Id.}
\textsuperscript{58}\textit{Id.} at 693, 698.
\textsuperscript{59}\textit{Sierra Club, Inc. v. Simkins Indus., Inc.}, 847 F.2d 1109 (4th Cir. 1988), cert. denied, 109 S. Ct. 3185 (1989).
\textsuperscript{60}\textit{Sierra Club, Inc. v. Simkins Indus., Inc.}, 617 F. Supp. 1120 (D. Md. 1985); \textit{see also} 847 F.2d at 1111.
occurred solely prior to the complaint.\textsuperscript{61} Evidence in the record indicated that the defendant had not filed a complete DMR until January 1985, three months after the Sierra Club had filed its complaint.\textsuperscript{62} The plaintiff was therefore able to maintain jurisdiction by proving that the defendant’s filing of incomplete DMRs, a permit violation, continued past the date that the plaintiff filed its complaint, even though the sampling failures occurred solely prior to the filing of the complaint.

The court in \textit{Natural Resources Defense Council, Inc. v. Outboard Marine Corp.}\textsuperscript{63} also addressed the threshold for establishing ongoing violations under the \textit{Gwaltney} standard. In \textit{Outboard Marine}, the plaintiff filed a Clean Water Act citizen suit alleging violations of the pH and polychlorinated biphenyls (PCB) parameters of the defendant’s NPDES permit. The defendant contended that its three violations over the course of three years did not constitute ongoing violations under the \textit{Gwaltney} standard.\textsuperscript{64} The court rejected the defendant’s position, stating that the \textit{Gwaltney} court did not concern itself with what frequency of violations is necessary for jurisdictional purposes, but with whether the violations had conclusively ceased.\textsuperscript{65} Therefore, the court held that because one of the defendant’s three violations occurred after the plaintiff’s complaint was filed, the defendant had failed to implement remedial measures that eliminated the cause of the violation.\textsuperscript{66}

In \textit{Hudson River Fisherman’s Ass’n v. County of Westchester},\textsuperscript{67} the court evaluated what type of showing is necessary to meet the “good faith allegation” requirement of the \textit{Gwaltney} standard. In this case, the plaintiff filed a Clean Water Act citizen suit alleging failure to control drainage from a closed landfill.\textsuperscript{68} The drainage ditch adjacent to the closed landfill was connected to an outflow pipe that discharged into a neighboring swimming area. The court held that the portions of the plaintiff’s complaint that alleged continuing discharge into the swimming area satisfied the \textit{Gwaltney} standard.\textsuperscript{69} The defendant contended that the violations were not ongoing because the discharge had been brought under control since the filing of the plaintiff's complaint. The court stated that the state of affairs at the time the complaint is filed controls the jurisdictional question.\textsuperscript{70} Thus, the court held that because the plaintiff had submitted photographs and affidavits of landfill cap leaks and cap removal to accommodate excess discharge, the complaint satisfied “the \textit{de minimis} prima facie standard for alleging in good faith an ongoing violation.”\textsuperscript{71}

\textsuperscript{61}Sierra Club, 847 F.2d at 1114.
\textsuperscript{62}Id.
\textsuperscript{63}692 F. Supp. 801 (N.D. Ill. 1988).
\textsuperscript{64}Id. at 812, 814.
\textsuperscript{65}Id. at 814.
\textsuperscript{66}Id. at 815 (quoting \textit{Gwaltney}, 108 S.Ct. 376, 387 (Scalia, J., concurring)).
\textsuperscript{68}Id. at 1047.
\textsuperscript{69}Id. at 1051.
\textsuperscript{70}Id. (citing \textit{Gwaltney}, 108 S.Ct. 376, 387).
\textsuperscript{71}Id.
The Sixth Circuit, in *Allen County Citizens for the Env’t v. B.P. Oil Co.*, affirmed without opinion a district court’s holding that a single violation, occurring after the filing of a citizen suit under the Clean Water Act, is not an ongoing violation under the *Gwaltney* standard. The defendant’s permit contained 13 different pollutant parameters. The district court adopted the two-part test from *Gwaltney* to determine whether an ongoing violation of any of the parameters existed. The plaintiff’s complaint alleged violations of two parameters that occurred between the 60-day notice period and the filing of the complaint. The court ruled that the violations occurred before the complaint was filed; thus, it was irrelevant for jurisdictional purposes that the violations occurred after 60-day notice was given.

The plaintiff in *B.P. Oil* also alleged six single-parameter violations that occurred prior to the filing of the complaint and one that occurred after the filing of the complaint. The time span between the date of the post-complaint violation and the most recent pre-complaint violation was 41 months. With respect to the single violation occurring after the complaint was filed, the court held that one violation of a pollution parameter does not constitute an ongoing violation. In reaching this conclusion, the court noted that it need not “rule on the cause of the problem or the likelihood of its recurrence.”

Vacated and remanded by the Supreme Court for further consideration in light of *Gwaltney*, the district court in *Sierra Club, Inc. v. Union Oil Co. of California* decided against adopting the definition of “ongoing” violation under *Gwaltney*. Instead, the court held that it would find a violation to be “ongoing” by comparing self-reported exceedances before and after the complaint was filed. If the same permit parameter is exceeded, or a violation recurs and the cause has not been completely eliminated, the violation will be deemed ongoing and liability will attach. Self-reported exceedances reported in the defendant’s DMRs “constitute conclusive evidence of an exceedance of a permit limitation.”

The court in *Union Oil* held that the defendant was liable for all 74 violations admitted in its DMRs. The defendant contended that it had installed equipment that had eliminated any chance of the violations recurring; however, the defendant’s improvements had been found defective in an earlier decision in the case. Therefore, the defendant’s failure to raise a genuine issue of material fact against plaintiffs’ evidence of the violations constituted proof of the violations.

As the aforementioned cases reveal, post-*Gwaltney* courts reached disparate and sometimes conflicting results in ascertaining the meaning of the most basic component of the *Gwaltney* standard—how to define an ongoing violation. As
the next two sections illustrate, this confusion was only the beginning of what would become widespread chaos among the courts in their efforts to understand and apply the *Gwaltney* standard in Clean Water Act cases.

**B. Ongoing Violations and Civil Penalties**

The post-*Gwaltney* courts often addressed situations in which the *Gwaltney* standard had to be applied to Clean Water Act citizen suits seeking both injunctive relief and civil penalties. In these cases, violators sometimes brought themselves into compliance with their permit conditions after suit was filed. Under such circumstances, the post-*Gwaltney* courts had to determine whether such post-complaint compliance rendered the suit moot, and whether to assess civil penalties and in what amount.

In *Atlantic States Legal Found., Inc. v. Tyson Foods*, the Eleventh Circuit made a critical distinction between injunctive relief and the recovery of civil penalties under the *Gwaltney* standard. In *Tyson*, the defendant sought to dismiss as moot the plaintiff's Clean Water Act citizen suit, contending that it had installed new equipment that eliminated its NPDES permit violations. In one of the first cases to apply the *Gwaltney* standard, the district court in *Tyson* granted the defendant's motion for summary judgment, holding that the defendant's compliance with its NPDES permit after plaintiff filed its complaint rendered the plaintiff's allegations moot.

On appeal, the Eleventh Circuit framed the issue in the following manner: whether civil penalties may be assessed in a Clean Water Act citizen suit where injunctive relief was available at the time suit was filed but became unavailable due to the defendant's measures to bring itself into compliance with its NPDES permit. The court concluded that if the defendant comes into compliance after the complaint is filed, then the mootness doctrine would prevent the maintenance of the suit for injunctive relief, provided that there is no reasonable likelihood that the wrongful activity will recur. However, the court stated that "the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed." The court held that the defendant's installation of the pollution control equipment rendered moot the plaintiff's claim for injunctive relief; however, the defendant's DMRs from May 1986 to February 1988 (when the plaintiff's allegations became moot) proved ongoing violations for which the plaintiff could recover civil penalties.

In *Public Interest Research Group of New Jersey v. Carter-Wallace, Inc.*, the court evaluated whether, and to what extent, civil penalties may be recovered in an NPDES permit continuation context. In *Carter-Wallace*, the plaintiff al-

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81 897 F.2d 1128 (11th Cir. 1990).
83 897 F.2d at 1134.
84 Id. at 1135.
85 Id. *See also* Atlantic States Legal Found., Inc. v. Pan American Tanning Corp., 993 F.2d 1017 (2d Cir. 1993) ("We hold therefore that a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot").
leged that the defendant committed wastewater discharge violations under two contiguous discharge permits. The first permit was issued in 1975 and expired in 1985 when a second, slightly different permit became effective. The plaintiff filed a Clean Water Act citizen suit alleging 12 violations under the first permit and 31 violations under the second.

Relying on Gwaltney, the defendant filed a motion for summary judgment requesting dismissal of all of the violations alleged under the first permit and all of the pre-complaint violations alleged under the second permit. The defendant contended that civil penalties in Clean Water Act citizen suits may only be based on violations that can be cured by an injunctive order, and that only post-complaint violations may be subject to civil penalties.

The court stated that section 505 authorized citizen suits seeking civil penalties for permit violations under expired permits, provided that the conditions in the expired permit are carried over to the new permit and are currently in force. Applying this standard to the facts of the case, the court concluded that the plaintiff failed to prove that the 1985 permit limitations were identical to the limitations in the 1975 permit. Although the court ruled that the violations of the 1975 permit were wholly past, the court concluded that it had jurisdiction over the plaintiff's allegations of ongoing violations of the defendant's 1985 permit.

The court in Natural Resources Defense Council, Inc. v. Gould, Inc. addressed the effect of pre- and post-complaint violations in the assessment of civil penalties. In Gould, the plaintiff, the Natural Resources Defense Council (NRDC), alleged 160 violations of the Clean Water Act, 157 of which occurred prior to the filing of the complaint. In its initial opinion, the district court granted NRDC's motion for summary judgment as to liability, but only for the three post-complaint violations. The court further stated that civil penalties may be imposed only for post-complaint violations; however, in determining the amount of such penalty, the court may consider pre-complaint violations.

The opinion in Gould was subsequently modified. In its revised opinion, the district court held that civil penalties at trial must be linked to the plaintiff's proof that the defendant committed post-complaint violations or that at the time of trial there is a reasonable likelihood that sporadic or intermittent pollution will occur in the future.

The aforementioned limits on the recovery of civil penalties notwithstanding, the post-Gwaltney courts generally were "pro-plaintiff" in their interpretation of the Gwaltney standard and its relationship to the recovery of civil penalties in Clean Water Act citizen suits. Nevertheless, as the next section discusses, citizen suit plaintiffs' recoveries of civil penalties were complicated.

87Id. at 116-17.
88Id.
89Id. at 119.
90Id. at 123.
92Id. at 635.
93Id. at 638.
94Id. at 638 n.2.
by the post-

C. Does an Ongoing Violation of One Permit Parameter Confer Jurisdiction Over the Entire Permit or Merely the One Parameter?

NPDES permits often contain multiple parameters governing the amounts of specific pollutants that may be discharged. Courts applying the Gwaltney standard in Clean Water Act citizen suits have used three approaches with respect to the effect of violations of permit parameters: the "permit-based" approach; the "parameter-by-parameter" approach; and the "modified by parameter" approach.

1. The "Permit-Based" Approach

Some courts have adopted a permit-based approach to evaluating particular permit parameters and the effect of such violations under the Gwaltney standard. This approach provides that courts may exercise jurisdiction over all parameters based on a violation of any one permit parameter. For example, in Public Interest Research Group of New Jersey v. Elf Atochem of North America, environmental organizations filed a citizen suit under the Clean Water Act for violations of the defendant's NPDES permit. The court held that a good faith allegation of a continuing violation of at least one parameter established jurisdiction over all of the past and present violations of the entire permit. The court stated that the Clean Water Act citizen suit provision authorizes citizen suits against any person "who is alleged to be in violation of an effluent standard or limitation." The court concluded that since the Clean Water Act defines "effluent standard or limitation" to include "a permit or condition thereof," a good faith allegation of a violation of an effluent standard (i.e., a parameter) confers jurisdiction over the entire permit.

Similarly, in Public Interest Research Group of New Jersey v. Hercules, Inc., the court adopted the permit-based approach in holding that the court may exercise jurisdiction over all parameters based on an ongoing violation of any parameter. The court stressed, however, that the facts of the case facilitated its decision to employ the permit-based approach in light of the fact that multiple parameters of the permit at issue had been violated in the past.

2. The "Parameter-by-Parameter" Approach

After the concept of the parameter-by-parameter approach was first introduced in the Fourth Circuit's decision on remand in Gwaltney, several other courts followed up on the idea. For example, the court in Natural Resources

\[96,97,98,99\]
Defense Council, Inc. v. Gould, Inc. held that it will conduct a parameter-by-parameter analysis in its determination of ongoing violations and in its assessment of penalties. Similarly, in Sierra Club, Inc. v. Union Oil Co., the court stated that if a violation of the same parameter of an NPDES permit is repeated, or a violation recurs and the cause has not been completely eliminated, the violation will be deemed ongoing and liability will attach. In addition, the court in Atlantic States Legal Found., Inc. v. Tyson Foods determined that the daily maximum civil penalty may be applied to each violation of an NPDES permit on a parameter-by-parameter basis.

3. The “Modified by Parameter” Approach

In Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc., the court developed and applied what it termed the “modified by parameter” test to a Gwaltney-type ongoing violation factual scenario. In Texaco, the NRDC filed a Clean Water Act citizen suit alleging 344 NPDES permit violations between 1983 and 1988. The defendant moved for summary judgment, contending that its permit, which was reissued in 1989, defeated the plaintiff’s jurisdiction to recover for the violations from 1983 to 1988. The defendant urged the court to adopt a parameter-by-parameter jurisdictional analysis.

The NRDC contended that jurisdiction under section 505 attached not to specific violations, but to cases, and that jurisdiction attaches when permits are violated, not when particular types of violations continue to occur. The court agreed with the NRDC’s position, holding that once jurisdiction had been established, the court may consider past, present, and potential future violations. Therefore, the court held that the violations occurring from January 1983 to January 1988 were ongoing, even though the NRDC did not file its notice of intent to sue until March 1988 and did not file its complaint until May 1988.

Texaco appealed to the United States Court of Appeals for the Third Circuit. The issue before the Third Circuit was whether a good faith allegation of a continuing violation of a permit parameter confers jurisdiction over the entire permit, or only over the specific violations alleged in the complaint. The court held that jurisdiction attaches to good faith allegations of continuing violations of the specifically alleged parameter and to violations of parameters not specifically alleged but related to a common flaw in the treatment process that caused the alleged violations.

In reaching its decision, the Third Circuit considered each of the three options before determining that this “modified by parameter” approach was best. The other two options were the “permit-based” and “parameter-by-parameter” approaches. Under the permit-based approach, jurisdiction attaches to all

100733 F. Supp. at 10.
101716 F. Supp. 429.
102897 F.2d 1128, 1138-39 (11th Cir. 1990).
104Id. at 283.
105Id. at 287.
1062 F.3d 493, 498 (3d Cir. 1993).
alleged past, present, and future violations. The court stated that the permit-based approach is overly broad because it allows citizens to sue for wholly past violations of several permit parameters merely by alleging, in good faith, an ongoing violation of one parameter. The court also rejected the "parameter by parameter" approach, which would require a court to examine each violation or set of violations of each parameter separately. The court recognized that this approach is flawed because often there is a single underlying cause of several different parameter violations.

The "modified by parameter" approach is the most sensible and workable interpretation of the Gwaltney standard for Clean Water Act cases. Although it is the brainchild of the Third Circuit, the "modified by parameter" approach is the culmination of almost a decade of interpreting and applying the Gwaltney standard in Clean Water Act cases throughout the federal court system. The "modified by parameter" approach is more politically palatable than the "permit-based" or "parameter-by-parameter" approaches and more understandable and easier to apply than the Gwaltney standard. This approach also has the potential to promote environmental protection without being unduly onerous to industries that make good faith efforts to bring themselves into compliance with the terms of their NPDES permits.

Thus, Congress should amend the Clean Water Act citizen suit provision to incorporate the modified by parameter approach set forth in Texaco. As Parts IV and V of this article analyze, however, any amendments to the Clean Water Act citizen suit provision should not govern citizen suits under RCRA, CERCLA, the Clean Air Act, or EPCRA.

IV. STRETCHING THE ENVELOPE: POST-GWALTYE CASE LAW UNDER RCRA, CERCLA, AND THE CLEAN AIR ACT

The Gwaltney standard established the jurisdictional requirements for Clean Water Act citizen suits and, arguably, for citizen suits under other federal environmental statutes containing similar language. However, as this Part of the article discusses, the unique DMR-based reporting system and enforcement scheme of the Clean Water Act often complicates and thwarts the applicability of Gwaltney beyond the Clean Water Act context.

A. RCRA and CERCLA

Unlike the Clean Water Act, RCRA authorizes two types of citizen suits against alleged violators. The first type of action, under section 7002

107 A previous effort to amend the Clean Water Act's citizen suit provision was unsuccessful. In July 1993, Senators Baucus (D-Mont.) and Chaffee (R-R.I.) introduced S. 1114 to amend and reauthorize the Clean Water Act. The bill proposed to amend the citizen suit provision to respond to and replace the Gwaltney standard. The proposed language would have inserted language using the past tense into the current citizen suit provision of the Clean Water Act that would allow citizens to sue for wholly past permit violations. This initiative died amidst the extensive Congressional "rollback" of environmental legislation in 1995.


109 RCRA's citizen suit provision, 42 U.S.C. § 6972, provides in pertinent part:
(a)(1)(A) of the Act,\textsuperscript{110} essentially mirrors the "alleged to be in violation" language and structure of the Clean Water Act citizen suit provision. Section 7002 (a)(1)(B) of RCRA, however, authorizes citizen suits against any past or present RCRA offender who has contributed or who is contributing to past or present solid waste handling practices that "may present an imminent and substantial endangerment to health or the environment."\textsuperscript{111} In this type of RCRA citizen suit, "the endangerment must be ongoing, but the conduct that created it need not be."\textsuperscript{112}

The court in \textit{Lutz v. Chromatex}\textsuperscript{113} addressed the applicability of the \textit{Gwaltney} standard to citizen suits for past violations under CERCLA and section 7002 (a)(1)(A) of RCRA. The plaintiff sought to recover under the citizen suit provisions of RCRA and CERCLA for the defendant's alleged contamination of private drinking water wells. The defendant moved for summary judgment, contending that the plaintiff's complaint did not satisfy the \textit{Gwaltney} standard. On the CERCLA claim, the court held that because Congress used the same "alleged to be in violation" language in the citizen suit provisions of CERCLA and the Clean Water Act, \textit{Gwaltney}'s exclusion of citizen suits for wholly past violations applies to CERCLA's citizen suit provision.\textsuperscript{114}

For the same reasons it denied the CERCLA claim, the court also held that RCRA does not authorize citizen suits for wholly past violations.\textsuperscript{115} The court reasoned that the plaintiff's allegations failed to satisfy the \textit{Gwaltney} standard because they were written almost entirely in the past tense and did not allege that the defendant's violations "continued beyond the filing of the complaint or are likely to recur in the future."\textsuperscript{116}

On two distinct grounds, other courts have reached the conclusion opposite that of the \textit{Lutz} court in addressing RCRA section 7002 (a)(1)(A) citizen suits

\footnotesize{(a) In general
Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

\begin{itemize}
\item[(1)(A)] against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
\item[(B)] against any person, including . . . past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .
\end{itemize}

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia.

\textsuperscript{110}\textit{Id.} § 6972 (a)(1)(A).
\textsuperscript{111}\textit{Id.} § 6972 (a)(1)(B).
\textsuperscript{113}718 F. Supp. 413 (M.D. Pa. 1989).
\textsuperscript{114}\textit{Id.} at 421.
\textsuperscript{115}\textit{Id.} at 425.
\textsuperscript{116}\textit{Id.}
for past violations. First, courts have compared the language of section 7002 (a)(1)(A) and the Clean Water Act citizen suit provision. For example, the court in *Gache v. Town of Harrison*\(^{117}\) relied on the language in RCRA section 7002 (a)(1) which, unlike the present tense language of the Clean Water Act's citizen suit provisions, requires that RCRA citizen suits be filed in the district in which the alleged violation occurred.\(^{118}\)

Courts have also relied on the different nature of past violations under RCRA and CERCLA as compared to those under the Clean Water Act. Addressing the different nature of past hazardous waste violations, the court in *City of Toledo v. Beazer Materials & Servs., Inc.*\(^{119}\) held that the disposal of wastes "can constitute a continuing violation as long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable."\(^{120}\) The *City of Toledo* court cited approvingly the decision in *Fallowfield Dev. Corp. v. Strunk*,\(^{121}\) which stated that a hazardous waste violation, unlike water pollution, "continues until the proper disposal procedures are put into effect or the hazardous waste is cleaned up."\(^{122}\)

Therefore, although the citizen suit provisions of RCRA and CERCLA parallel the language and structure of the Clean Water Act's citizen suit provision, the different nature of hazardous waste violations as compared to water pollution violations, and the discrepancy in aspects of the language of RCRA's provision as compared to its Clean Water Act counterpart, militate against extending the *Gwaltney* standard to govern RCRA or CERCLA citizen suits for past violations.

B. Legislative Erosion of the *Gwaltney* Standard: The Effect of the 1990 Clean Air Act Amendments

Although the Clean Air Act was the first federal environmental statute to contain a citizen suit provision, few citizen suits were filed under the Act prior to the 1990 Clean Air Act Amendments. One of the primary reasons for the paucity of Clean Air Act citizen suits was the lack of a concrete monitoring system to detect and record violations that is comparable to the ease with which environmental groups can ascertain a Clean Water Act violation by reviewing DMRs.

The 1990 Amendments included three important revisions that may enhance the frequency with which Clean Air Act citizen suits\(^{123}\) are filed. First, the

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\(^{118}\)Id. at 1041 (emphasis added).
\(^{119}\)833 F. Supp. 646.
\(^{120}\)Id. at 656.
\(^{122}\)City of Toledo at 656 (citing Fallowfield, 1990 WL 52745 at *10). The *City of Toledo* court also addressed whether the failure to fulfill a reporting requirement under CERCLA §103 (c) constitutes a wholly past or an ongoing violation of CERCLA. The court held that CERCLA § 103 (c) imposes a one-time reporting requirement, the violation of which is wholly past and may not form the basis of a CERCLA citizen suit. *Id.* at 661.
\(^{123}\)The citizen suit provision of the Clean Air Act, as revised by the 1990 Clean Air Act Amendments, provides in pertinent part:

(a) Authority to bring civil action; jurisdiction
amendments require facilities to submit monitoring reports and compliance certifications to permitting agencies, similar to the DMR requirement under the Clean Water Act, thereby easing environmental groups' efforts to detect and determine the degree to which a facility has failed to comply with its permit requirements. Second, civil penalties were added to the citizen suit enforcement arsenal, again bringing the Clean Air Act's citizen suit provision "up to speed" with its Clean Water Act counterpart. Third, effective since November 15, 1992, the revised Clean Air Act citizen suit provision authorizes citizens to bring actions against persons "alleged to have violated" an emission standard, limitation or order, provided that there is "evidence that the violation has been repeated." The amendments, however, do not define "repeated violations," an omission that is likely to be the subject of future litigation.

The legislative history of the 1990 Amendments contains conflicting accounts as to whether the revised language of the Clean Air Act citizen suit provision represents an effort to conform the provision to the *Gwaltney* standard or whether it signaled a deliberate departure from *Gwaltney*. Senate managers Chaffee and Baucus stated that the conferees intended that "citizens should be allowed to seek civil penalties against violators of the Act whenever two or more violations have occurred in the past." In addition, Senator Baucus announced that the revised language marks a departure from the *Gwaltney* precedent, stating that "in response to the Supreme Court ruling in *Gwaltney*... the conference agreement allows citizen suits to be brought with respect to past violations if there is evidence that the violation has been repeated." However, the legislative history also contains statements that directly contradict the statements of Senators Baucus and Chaffee. For example, Representative Norman Lent of New York stated that "we modified the citizen suit provision on past violations to conform to the Supreme Court's *Gwaltney* decision."

President Bush's signing statement in the 1990 Clean Air Act Amendments reflects that Congress had the *Gwaltney* standard in mind when it amended the Clean Air Act's citizen suit provision:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

1) against any person... who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of

(A) an emission 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.


President Bush's signing statement in the 1990 Clean Air Act Amendments reflects that Congress had the *Gwaltney* standard in mind when it amended the Clean Air Act's citizen suit provision:
I note that in providing for citizen suits for civil penalties, the Congress has codified the Supreme Court’s interpretations of such provisions in the *Gwaltney* case. As the Constitution requires, litigants must show, at a minimum, intermittent, rather than purely past violations of the statute in order to bring suit.\textsuperscript{130}

Nevertheless, it remains unclear whether, and to what extent, the amended Clean Air Act citizen suit provision overrules the *Gwaltney* standard.

Since the enactment of the 1990 Amendments, at least one case has addressed the effect of the *Gwaltney* standard on the revised Clean Air Act citizen suit provision. In *Fried v. Sungard Recovery Servs., Inc.*,\textsuperscript{131} the plaintiffs filed a Clean Air Act citizen suit against contractors for alleged violations of provisions of the Clean Air Act governing asbestos removal.\textsuperscript{132} The court directed further briefing as to whether the Clean Air Act’s asbestos provisions applied to the contractor’s activities and whether such requirements were violated at all, repeatedly or continuously.\textsuperscript{133}

The court stated that the amended Clean Air Act citizen suit provision overruled *Gwaltney* with respect to wholly past violations. The court concluded that the Clean Air Act as amended allows citizen suits for “both continuing and wholly past violations, so long as the past violation occurred more than once.”\textsuperscript{134} The court indicated that the *Gwaltney* standard would govern the evaluation of violations that continue to the date that an action is filed, whereas the plain language of the revised Clean Air Act citizen suit provision authorizes recovery for “wholly past” violations without having to satisfy the *Gwaltney* threshold of making a good faith allegation of an “ongoing” violation.\textsuperscript{135}

The court’s analysis in *Sungard Recovery* concerning the effect of the amended Clean Air Act citizen suit provision on the *Gwaltney* standard is an accurate and sensible interpretation of the language and legislative history of the revised Clean Air Act citizen suit provision. Until Congress acts to amend the Clean Water Act’s citizen suit provision, the *Sungard Recovery* court’s distinction between the reach and effect of the two citizen suit provisions should remain good law. Otherwise, the revised Clean Air Act citizen suit provision would amount to nothing more than a contorted recapitulation of the already ambiguous *Gwaltney* standard.

\textbf{V. A Fish Out of Water: The Misapplication of the *Gwaltney* Standard to the EPCRA Citizen Suit Provision}

Since *Gwaltney*, federal courts have reached conflicting results in interpreting and applying the *Gwaltney* standard outside the context of the Clean Water Act. The *Gwaltney* standard has been applied in EPCRA citizen suit cases more so than under any other federal environmental statute, excluding the Clean Water Act. The circuits are split, however, as to whether EPCRA’s citi-

\textsuperscript{130}President’s Statement on Signing the Bill Amending the Clean Air Act, 26 Weekly Comp. Pres. Doc. 1824 (Nov. 15, 1990).
\textsuperscript{132}Id. at 467.
\textsuperscript{133}Id. at 469.
\textsuperscript{134}Id.
\textsuperscript{135}Id. at 468.
zen suit provision authorizes recovery for past violations consistent with, or independent of, the *Gwaltney* standard.\(^\text{136}\)

A. EPCRA Overview

Like the Clean Water Act, EPCRA requires extensive self-reporting and the information derived from such reporting may form the basis of a citizen suit. EPCRA was enacted to "provide the public with important information on the hazardous chemicals in their communities,"\(^\text{137}\) and establish reporting, notification, and planning requirements to aid federal, state, and local authorities in preparing for and dealing with an emergency caused by the release of a hazardous chemical.\(^\text{138}\) The legislative history of EPCRA indicates that Congress intended that this information should be made available to the public as quickly and efficiently as possible.\(^\text{139}\)

Section 313 of EPCRA requires regulated facilities to submit, by July 1 every year, toxic chemical release forms ("form Rs") that contain information regarding the toxic chemicals that such facilities manufactured, produced or used during the preceding calendar year.\(^\text{140}\) An owner or operator who violates this requirement is subject to civil penalties of up to $25,000 per violation, per day.\(^\text{141}\)

Congress sought to fulfill two goals by requiring companies to comply with EPCRA's requirements for submission of information concerning their toxic chemical releases. First, companies must provide information concerning toxic chemical releases to the neighbors of these facilities that the affected parties can use to make life choices, such as where to live, where to work, and where to recreate. Second, companies must provide information to federal, state, and local governments to be used to compare facilities or geographic areas, identify hotspots, evaluate existing environmental programs, more effectively set regulatory priorities, and track pollution control and waste reduction programs.\(^\text{142}\)

To help attain these goals, Congress included a citizen suit provision within EPCRA's enforcement scheme. The citizen suit provision\(^\text{143}\) authorizes citi-

\(^{136}\)Compare *Citizens for a Better Env't v. The Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (past violations are recoverable under EPCRA's citizen suit provision) with *Atlantic States Legal Found. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995) (past violations are not recoverable under EPCRA's citizen suit provision).


\(^{140}\)42 U.S.C. § 11023 (a) (1994).

\(^{141}\)Id. § 11045 (c)(1).


\(^{143}\)EPCRA's citizen suit provision provides in pertinent part that citizen suits may be brought against:

(A) An owner or operator of a facility for failure to do any of the following:
zens to commence civil actions against owners or operators of a facility who fail to: (1) submit an emergency notice under section 304; (2) submit material safety data sheets under section 311; (3) complete and submit an inventory form under section 312; or (4) complete and submit a form R under section 313. The citizen suit provision also authorizes plaintiffs to file actions against the EPA, state governors, or State Emergency Response Commissions for failing to provide a mechanism for public access to EPCRA information.

B. The Initial Cases: The Gwaltney Standard Does Not Govern EPCRA Citizen Suits for Past Violations

Although EPCRA’s citizen suit provision has been an effective tool to compel facilities to report under EPCRA, federal courts are divided as to whether civil penalties may be awarded in citizen suits alleging wholly past violations of EPCRA’s reporting requirements. Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp. was the first case to address the applicability of the Gwaltney standard to past violations under the citizen suit provision of EPCRA. In Whiting, Atlantic States Legal Foundation (ASLF), an environmental group, sued the defendant for allegedly failing to submit required information under EPCRA sections 311, 312, and 313. After receiving ASLF’s notice of intent to sue and prior to the date that ASLF filed suit, Whiting brought itself into compliance with EPCRA requirements. Whiting filed a motion to dismiss for lack of subject matter jurisdiction, contending that under the Gwaltney standard, the violations should be deemed “wholly past” and therefore unactionable.

The court held that EPCRA confers jurisdiction over citizen suits for past violations. The court reasoned that the plain language of EPCRA’s citizen suit provision differed significantly from the Clean Water Act provision. It noted that EPCRA authorizes citizen suits for an owner’s or operator’s failure to comply with EPCRA’s reporting requirements, which the court determined to include past acts of noncompliance. The court further noted that EPCRA’s citizen suit provision did not contain the pervasive use of the present tense language contained in the Clean Water Act’s citizen suit provision.

Subsequent federal district court decisions adhered to the reasoning in Whiting Roll-Up Door. For example, in Williams v. Leybold Technologies, Inc., the court held that the plain language and legislative history of EPCRA...
demonstrate that past violations are actionable under EPCRA’s citizen suit provision. Several other federal district courts have held that EPCRA’s citizen suit provision provides the federal courts with jurisdiction for past violations of the Act.

C. The Split in the Circuits: *United Medical Instruments* and *Steel Company*

In *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, the defendant, United Medical Instruments (UMI), conceded that from 1988 to 1991 it had failed to file form Rs for its use and release of at least two chemicals. On July 17, 1992, the plaintiff, Atlantic States Legal Foundation (ASLF), filed its notice of intent to sue UMI for violating EPCRA section 313. On July 21, 1993, ASLF filed its complaint alleging that UMI failed to timely submit form Rs for the years 1988-1991. After receiving ASLF’s notice and prior to the date ASLF filed its complaint, UMI submitted the required forms.

The Sixth Circuit held that the citizen suit provision of EPCRA does not authorize suits for reporting violations that are not continuing at the time the complaint is filed. The court stated that the citizen suit speaks only of the completion and filing of the required forms; therefore, only the failure to complete and submit the required forms can provide the basis for a citizen suit. The court also distinguished between the type of relief that the EPA may seek under EPCRA and that available under the citizen suit provision of the Act. The court stated that Congress authorized the EPA to bring actions to assess and collect “any civil penalty for which a person is liable,” whereas Congress limited citizen suits by “emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action.” The court further stated that to award civil penalties for violations that have been cured by late filing would undermine the purpose of the 60-day notice provision.

The Seventh Circuit in *Citizens for a Better Env’t v. Steel Company* disagreed with the outcome and reasoning in the *United Medical Instruments* case. In this case, Citizens for a Better Environment (CBE) filed an EPCRA citizen suit against the defendant, alleging that the defendant: (1) failed to comply with EPCRA Section 312 by failing to file reports detailing its use of certain “hazardous” and “extremely hazardous” chemicals by March 1 of each year since 1988; and (2) failed to comply with EPCRA Section 313 by not filing reports detailing the company’s release of certain “toxic” chemicals into the

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152 *Id.* at 769.
154 *61 F.3d 473* (6th Cir. 1995).
155 *Id.* at 474.
156 *Id.* at 475.
157 *42 U.S.C. § 11045 (c)(4) (1994).*
158 *Id.*
159 *90 F.3d 1237* (7th Cir. 1996).
environment by July 1 of each year since 1988. The defendant moved to dismiss the suit, contending that it had filed the required reports after receiving CBE’s notice. The company maintained that its filing of the reports cured its previous non-compliance with EPCRA and thus deprived the court of jurisdiction over the matter.

The district court in *Steel Company* held that because the defendant had responded to the plaintiffs’ pre-suit notice by filing eight years’ worth of required reports, it was no longer in violation of EPCRA. Following the Sixth Circuit in *United Musical Instruments*, the court stated that Congress intended to limit citizen suits to correcting ongoing violations of EPCRA and vest the EPA with sole authority to seek penalties for past violations.

In a thorough and well-reasoned opinion, the Seventh Circuit reversed the district court’s holding in *Steel Company*. In reaching its conclusion that EPCRA’s citizen suit provision authorizes suits for wholly past violations, the appellate court examined various aspects of the language of EPCRA’s citizen suit provision. First, the court distinguished EPCRA’s language, which authorizes citizen suits “for failure to” comply with the Act, from the Clean Water Act, which authorizes citizen suits when a defendant is “alleged to be in violation” of the Act. The court held that EPCRA’s citizen suit provision lacked the temporal limitation embodied in the Clean Water Act provision, noting that a failure to do something can include a past or present failure.

Like the Supreme Court in *Gwaltney*, the Seventh Circuit in *Steel Company* also reviewed the enforcement structure of the statute at issue. The court concluded that because EPCRA lacked the present tense phrasing contained in the Clean Water Act, Congress intended to authorize citizen suits under EPCRA for violations that are not ongoing at the time a citizen complaint is filed. EPCRA provides that citizen suits must be filed in the district court for the district in which the alleged violation occurred, whereas the Clean Water Act citizen suit provision contains present-tense language throughout.

In the most recent case to address the applicability of the *Gwaltney* standard to EPCRA citizen suits for past violations, the court in *Don’t Waste Arizona, Inc. v. McLane Foods, Inc.*, followed the Seventh Circuit’s reasoning in the *Steel Company* case. The plaintiff, an environmental and community education organization, filed a citizen suit against defendant McLane Foods for failing to submit a Tier II report by March 1, 1994, for the calendar year 1993, and a Tier II report by March 1, 1995, for the calendar year 1994. On April 28, 1995, the plaintiff gave notice of the defendant’s alleged violations of EPCRA and of plaintiff’s intent to file suit to the Administrator of the EPA, the Regional Administrator of the EPA Region IX, the Arizona Department of Envi-

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161 Id. at *2.
162 Id.
163 Id. at 1243.
164 Id.
165 Id. at 1244.
168 Id. at 973.

On May 12, 1995, after receipt of the plaintiff's notice of intent to sue but before the plaintiff filed suit, the defendant filed the required reports. The defendant contended that the court lacked jurisdiction over the suit because the plaintiff sought to recover for wholly past violations of the Act.

Like the Seventh Circuit in Steel Company, the court in Don't Waste Arizona held that EPCRA authorized citizen suits for past violations that had been cured after receipt of notice of intent to file a citizen suit but before the suit was filed. The court reiterated the Steel Company court's reliance on the language and enforcement structure of EPCRA in reaching its conclusion. ¹⁶⁹ From a policy perspective, the court further noted that if EPCRA citizen suits for past violations are barred by the alleged violator's coming into compliance prior to suit, then “facilities have an incentive not to comply with reporting requirements until they have been caught.” ¹⁷⁰

D. The Gwaltney Standard Should Not Govern Past Violations Under EPCRA

On February 24, 1997, the Supreme Court granted certiorari to review the Steel Company case and resolve the split in the circuits concerning EPCRA citizen suits for past violations. ¹⁷¹ The issue before the Court is whether Congress, in enacting EPCRA's citizen suit provision, intended to authorize citizens to seek penalties for violations that were cured before a citizen suit is filed, “thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes.” ¹⁷²

The phrasing of this question presented before the Supreme Court is misleading and slanted in favor of Steel Company's position in the case. EPCRA citizen suits should not be interpreted to authorize something “more” than what is available under citizen suit provisions of other federal environmental statutes. Rather, the Court should construe the language and enforcement structure of the EPCRA citizen suit provision merely to authorize relief for past violations that need not meet the requirements of the Gwaltney standard. Several courts interpreting the citizen suit provisions of EPCRA, the Clean Air Act, and RCRA have reached this conclusion. ¹⁷³ In the Steel Company case, the Supreme Court has the opportunity to definitively resolve the scope and applicability of the Gwaltney standard to EPCRA citizen suits and, arguably, citizen suits under other federal environmental statutes.

Even if the Gwaltney standard remains good law under the Clean Water Act, it should not govern EPCRA citizen suits. When Congress enacted the Superfund Amendments and Reauthorization Act (SARA) of 1986, it established two citizen suits provisions: one for CERCLA and one for EPCRA.

¹⁶⁹ Id. at 977.
¹⁷⁰ Id. at 978.
¹⁷² Id.
¹⁷³ See Parts IV, V.B. and V.C., supra.
The CERCLA citizen suit provision authorizes suit against persons “alleged to be in violation” of CERCLA, while EPCRA’s citizen suit provision contains no such limitation. Thus, it is fair to assume that Congress intended EPCRA’s citizen suit provision to authorize enforcement against persons who were no longer “in violation” at the time of suit.\(^{174}\)

Since EPCRA’s citizen suit provision lacks the “alleged to be in violation” language upon which the *Gwaltney* court based its interpretation of the Clean Water Act citizen suit provision, it should not be governed by the outcome or reasoning in *Gwaltney*. EPCRA’s citizen suit provision also lacks the “pervasive use of the present tense” contained in the Clean Water Act provision. The purpose of EPCRA citizen suits in general, as well as the role of the 60-day notice period contained within the provision, must be considered. The underlying purpose of EPCRA citizen suits would be undermined if EPCRA citizen suits for past violations are barred. A violator need do nothing to comply with the law until it receives a notice letter from a citizen, then merely hastily file the required reports to escape liability and civil penalties. Regarding the 60-day notice provision, authorizing EPCRA citizen suits for past violations would not render this requirement superfluous, as the *UMI* court suggested. Notice serves two primary purposes: (1) to allow the EPA or the state enforcement authority to file suit and preempt the citizen suit; and (2) to give the alleged violator an opportunity to verify the allegations and contact the notifier to resolve the dispute prior to the filing of a complaint. Notice also ensures, as a matter of fairness, that the alleged violator is aware that the citizen has informed federal and state authorities of the alleged violations, who may elect to act on their own. These purposes are entirely compatible with authorizing EPCRA citizen suits for past violations.\(^{175}\)

The goals of the statute also must be examined. Late reporting under EPCRA cannot cure damage that has already occurred. Environmental citizen suit jurisprudence recognizes three equally cognizable forms of injury: substantive, procedural, and informational. Injury to the chemical and biological integrity of a waterbody, such as the type of harm that occurred in *Gwaltney*, is “substantive” harm whereas being deprived of information, such as when form Rs are not filed under EPCRA, is “informational” injury. Late reporting cannot “cure” informational harm just as installing new pollution control equipment cannot “cure” past water pollution violations. Thus, precluding EPCRA citizen suits for past violations would thwart the goals of the statute.\(^{176}\)

Similarly, the monitoring mechanism available under the Clean Water Act does not exist under EPCRA. Until a company reports its use and releases of Section 313 regulated chemicals, the public agencies are unaware of whether the company is required to report. Without investigations to determine compliance, the people of communities whom the statute is designed to protect and

\(^{174}\) *DOJ Amicus Brief* at 7-8.

\(^{175}\) See *Steel Company*, 90 F.3d at 1244.

\(^{176}\) It is important to note, however, that the speed with which a violator files after receipt of a citizen notice should be a factor to be considered in determining the amount of appropriate penalties but should not be a factor in determining liability. See Petition for Rehearing with Suggestion for Rehearing En Banc at 10-11, Atlantic States Legal Found., Inc. v. United Medical Instruments, U.S.A., Inc., 61 F.3d 473 (6th Cir. 1993)(No. 93-4379).
inform, and the public agencies that are charged with providing the information, would be deprived of the information indefinitely.177

CONCLUSION

In the past decade, courts applying the Gwaltney standard to citizen suits under the Clean Water Act have struggled to understand the scope and applicability of the standard. This difficult task became even more challenging when courts attempted to extend the Gwaltney standard to govern citizen suits under the Clean Air Act, RCRA, CERCLA, and EPCRA. However, there are important distinctions between the nature of violations under the Clean Water Act and violations under the Clean Air Act, RCRA, CERCLA, and EPCRA. Moreover, these statutes operate under different enforcement frameworks than the Clean Water Act. In fact, some of these distinctions are reflected in the language of the citizen suit provisions of these statutes.

Despite the abundance of case law addressing the scope and applicability of the Gwaltney standard, only three post-Gwaltney opinions have offered clear, well-reasoned guidance to help chart the course for the next decade of interpreting Gwaltney. In the Clean Water Act context, the Third Circuit's opinion in Texaco, with its “modified by parameter” approach to interpreting the Gwaltney standard, stands out as the most sensible and politically palatable resolution to this aspect of the controversy surrounding the Gwaltney standard. In addition, the court in Sungard Recovery provides an excellent analysis of the effect of the revised Clean Air Act citizen suit provision on the Gwaltney standard. Finally, the Seventh Circuit in Steel Company offers a thorough and accurate analysis of how the EPCRA citizen suit provision is analytically distinct from the Clean Water Act's provision and how EPCRA's citizen suit provision must therefore be interpreted to authorize suits for wholly past violations of the Act.

Although the Clean Air Act's citizen suit provision was amended to address and, arguably, overrule the effect of the Gwaltney standard to Clean Air Act cases, legislative initiatives to amend the Clean Water Act's citizen suit provision have failed. The Gwaltney standard should be legislatively revised to incorporate the Texaco “modified by parameter” approach to evaluating citizen suits for past violations under the Clean Water Act. This legislative adjustment under the Clean Water Act should, however, be deemed to be distinct from the Clean Air Act Amendment language and the case law history interpreting the citizen suit provisions of RCRA, CERCLA, and especially EPCRA.

The pending Supreme Court decision in the Steel Company case could set the Gwaltney analysis on the right track for the next decade. The court should construe the language and enforcement structure of the EPCRA citizen suit provision to authorize relief for past violations without having to meet the requirements of the Gwaltney standard. The Supreme Court’s decision in Steel Company could conclusively resolve the decade-old confusion regarding the scope and applicability of the Gwaltney standard to EPCRA citizen suits and, arguably, citizen suits under other federal environmental statutes.

177 Id. at 9.