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GWALTNEY OF SMITHFIELD REVISITED

ANN POWERS*

I. INTRODUCTION

When the United States Department of Justice filed a Clean Water Act¹ enforcement action in December 1996 against Smithfield Foods and its two subsidiaries, Smithfield Packing and Gwaltney of Smithfield,² it was only the latest installment in an ongoing saga of the companies' disregard of environmental obligations, the state's abdication of its role as guardian of Virginia's natural resources, and efforts by citizens and the federal government to enforce the law. While those elements alone would provide sufficient local drama, the conflict has had an impact far beyond the borders of Virginia. It evolved from a fight to protect the Chesapeake Bay and its tributaries to a continuing national debate regarding the legal rights of citizens to assist in enforcing a broad range of federal environmental laws.

The key player in that evolution has been the Supreme Court, which ruled in an earlier case involving Smithfield, *Chesapeake Bay Foundation, Inc. & Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd. (Gwaltney)*,³ that the Clean Water Act provided no jurisdiction for citizens to seek penalties for past violations and, therefore a citizen's right to enforce the statute was considerably more limited than that of the federal government.⁴ That decision, due both to what the Court said and what it left unsaid, has created substantial impediments for

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¹ 33 U.S.C. §§ 1251-1387 (1994).

² *United States v. Smithfield Foods, Inc., Smithfield Packing Company, Inc., & Gwaltney of Smithfield, Ltd.*, 965 F. Supp. 769 (summary judgment), 969 F. Supp. 975 (motion for reconsideration denied) (E.D. Va. 1997), *appeal docketed*, No. 97-2709 (4th Cir. Dec. 9, 1997). The government prosecution will be referred to as *United States v. Smithfield*.

³ 484 U.S. 49 (1987).

⁴ *See id.* at 58-59.

citizens attempting to protect their local water bodies.⁵ Their ability to enforce the Clean Water Act, as well as other environmental statutes, contrasts sharply with the government's broad enforcement power, reflected in cases such as *United States v. Smithfield*.

Moreover, *Gwaltney* gave an early indication of the restrictions which would later be placed on citizen standing in environmental cases. While standing was not a prominent issue in *Gwaltney*, Justice Scalia's concurring opinion presages a fuller explication in later cases of his Article III,⁶ and eventually Article II,⁷ based formulations which generally restrict standing for environmentalists in citizen suit cases.⁸ The most recent iteration of those concepts appeared in last term's opinion in *Steel Company v. Citizens for a Better Environment*,⁹ where the Court ruled,

⁵ See Beverly McQueary Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1, 62 (1990) [hereinafter Smith, *The Viability of Citizens' Suits*].

⁶ U.S. CONST., art. III. Article III limits the judicial power vested in federal courts to "Cases" and "Controversies." The requirement that there be a justiciable case or controversy is the basis for the standing doctrine. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10,031, 10,032, 10,036-37 (1993). See also *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (Justice Scalia, writing for the Court, rejected the citizens' standing claims, but on statutory, rather than constitutional grounds); Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. (ENVTL. L. INST.) 10,557, 10,558 (1990).

⁷ U.S. CONST., art. II. Article II vests the executive, legislative and judicial functions in the three separate branches of government. Section 3 of the Article contains the so-called "Take Care Clause" which directs that the President "shall take Care that the Laws be faithfully executed." In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992), the Court relied upon this Clause to limit the ability of Congress to define injuries so as to provide a generalized right of standing. See *Standing—Congressional Power to Define Judicially Cognizable Injuries*, 106 HARV. L. REV. 308 (1992).

⁸ By contrast, in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), the Court liberalized the standing requirements somewhat by ruling that the "zone-of-interests test" established in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), was prudential, and not a requirement of Article III. Thus Congress might negate the judge-made rule through specific legislative language. The Court found that the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(1) (1994), which allows "any person" to commence an action, had expanded standing under the Act to the full extent permitted under Article III. See *Bennett*, 117 S. Ct. at 1163. See also Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and Stealth Court*, 33 TULSA L.J. 77, 84-87 (1997). The practical effect of this holding was to extend standing to the regulated community to challenge environmental actions.

⁹ 118 S. Ct. 1003 (1998).

Justice Scalia writing, that citizens have no standing to seek penalties under the Emergency Planning and Community Right-to-Know Act (EPCRA)¹⁰ for reporting violations that had been cured by the defendant corporation.¹¹ That decision, and the lower court cases following it, reflect an increasingly restrictive judicial approach to citizen litigation that may lead to an ever greater divergence between government and citizen enforcement authority, which Congress originally intended to be coextensive.

This article returns to the earlier *Gwaltney* decision, looking both to the text of the *Gwaltney* opinion, and to internal memoranda demonstrating the debate which occurred among the justices themselves over the nature of the beast with which they were dealing: a confusing mixture of subject matter jurisdiction, substantive cause of action and constitutionally based standing requirements. This review leads to the conclusion that the opinion's lack of analytical clarity, which created substantial confusion for courts and litigants, could have been avoided by a more carefully reasoned work based on the Court's internal discussions. Further, the Court's decision in *Steel Company* demonstrates a debate within the Court regarding the import of *Gwaltney*, raising questions as to its future application, as well as the eventual fate of citizen suits under federal environmental statutes.

II. ENVIRONMENTAL CITIZEN SUITS

While not the oldest, Clean Water Act (CWA) section 505¹² is the most prominent and the most litigated of the citizen suit provisions found in our environmental statutes.¹³ Enacted in 1972 and modeled after the Clean Air Act (CAA),¹⁴ it allows citizens to bring suits against the government for failure to carry out mandated duties,¹⁵ and against entities,

¹⁰ 42 U.S.C. §§ 11001-11050 (1994). The citizen suit provision is found at 42 U.S.C. § 11046(a)(1).

¹¹ See *Steel Company*, 118 S. Ct. at 1020.

¹² Pub. L. 92-500, § 505, 86 Stat. 888, 33 U.S.C. § 1365 (1994).

¹³ See LISA JORGENSEN & JEFFREY J. KIMMEL, BUREAU OF NATIONAL AFFAIRS, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATIONS 19 (1988) (of over 1200 citizen actions reviewed, 882 were Clean Water Act claims); Randall S. Abate, *Rethinking Citizen Suits for Past Violations of Federal Laws: Recommendations for the Next Decade of Applying the Gwaltney Standard*, 16 TEMP. ENVTL. L. & TECH. J. 1 (1997).

¹⁴ Pub. L. 91-604, § 304, 84 Stat. 1706, 42 U.S.C. § 7604 (1994).

¹⁵ See 33 U.S.C. § 1365 (to the extent permitted by the eleventh amendment to the

both public and private, which violate provisions of the statute.¹⁶ Authorizations for a citizen to bring suit are not unique to environmental law,¹⁷ and find their heritage in both American and English law of previous centuries.¹⁸ In enacting section 505, Congress understood that the resources of the government were limited, and that citizens could therefore supplement the government in its enforcement endeavors.¹⁹ It also recognized that the government might not always have the will to prosecute a violator, and citizen suits were useful to goad the executive branch to action.²⁰ In examining the relevant legislative history, there is scant support for the notion that Congress intended citizens to be more constrained in the scope of their prosecutions than the government.²¹ However, two limitations protecting the primacy of governmental enforcement were placed on a citizen's initiation of a lawsuit. First, a potential litigant must give notice to the government and to the

constitution).

¹⁶ See *id.* (authorizing a citizen to initiate an action against "any person" alleged to be in violation of federal or state limitations). A "person" under section 1362 is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."

¹⁷ A number of statutes other than those dealing with environmental law contain provisions which allow citizens to bring private actions to enforce the law or to recover for injuries. See, e.g., Clayton Act, 15 U.S.C. § 15 (1994); Securities Act of 1933, 15 U.S.C. § 77k (a) (1994); Consumer Product Safety Act, 15 U.S.C. § 2073 (1994); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(a), 2000e-5(b) (1994).

¹⁸ See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 946-57 (1985); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 171-79 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-1409 (1988). See also James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, 8-SPG NAT. RESOURCES & ENV'T 31 (1994) (characterizing citizen suits as a blend of private and public rights).

¹⁹ See S. REP. NO. 414, at 5 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3672.

²⁰ See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (Court noted that congressional displeasure with "restrained" governmental enforcement of Clean Air Act led to first citizen-suit provision); S. REP. NO. 414, *supra* note 19, at 5.

²¹ Not only the similarity of language between the government and citizen enforcement provision, but also the legislative history suggests that Congress viewed citizens as private attorneys general, who were "provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505." S. REP. NO. 414, at 64 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3730.

prospective defendant of his intent to sue.²² The second limitation generally prohibits suit if the federal or state government is already pursuing enforcement actions.²³ If, however, a citizen files his suit first, the court generally will not be ousted of jurisdiction by a subsequent government suit.²⁴ These preconditions having been met, the statute vests jurisdiction in the district court to enforce certain provisions of the law,²⁵ and to apply civil penalties as spelled out in section 309,²⁶ the general enforcement provisions applicable to both government and citizen prosecutors.

Within this framework a number of citizen suits were brought in the 1970s. Most were filed against federal agencies to compel them to carry out various mandatory duties, such as issuing standards.²⁷ It was not

²² See CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (1994). Although the Court in *Gwaltney* declared that the intent of this provision was to give the violator an opportunity to come into compliance, see 484 U.S. at 60, this view is simply unsupported by the legislative history. Rather, the provision was to allow the government time to determine whether to bring its own prosecution before allowing the citizen suit to proceed. See S. REP. NO. 414, at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745-46; JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS § 6.1, 44-45 (1987) [hereinafter MILLER, CITIZEN SUITS]; Scott B. Garrison, *Subject Matter Jurisdiction, Standing, and Citizen Suits: The Effect of Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 48 MD. L. REV. 403, 419 & n.92 (1989); Jeffrey M. Miller, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: Invitation to the Dance of Litigation*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,098, 10,101-02 (1988) [hereinafter Miller, *Invitation*]. Professor Miller also points out that the literal language of the notice provision implies that suits for past violations were contemplated. See *id.* Despite of the lack of support for Marshall's interpretation, it has become gospel, and was most recently repeated by Justice Stevens in *Steel Co. vs. Citizens for a Better Environment*, 118 S. Ct. 1003, 1031 (1998).

²³ See CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

²⁴ It is possible that a subsequently filed government lawsuit which is resolved prior to the citizen suit may be determined to be *res judicata*, barring further litigation by the citizen plaintiff. See, e.g., *EPA v. City of Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991). In any suit brought by a citizen, the government may intervene as a matter of right. See CWA § 505(c)(2), 33 U.S.C. § 1365(c)(2).

²⁵ Citizens may bring suit against "any person . . . who is alleged to be in violation of (A) an effluent standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

²⁶ 33 U.S.C. § 1319(d).

²⁷ See, e.g., *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976) (action seeking to force the Environmental Protection Agency to list lead as hazardous air pollutant pursuant to Clean Air Act § 108); *Natural Resources Defense*

until the early 1980s that citizens, impelled by discontent with implementation and enforcement of environmental laws during the administration of President Ronald Reagan, began to focus on litigation directly against polluters.²⁸ The Natural Resources Defense Council (NRDC), a national public interest environmental organization, established a Clean Water Act Enforcement Project aimed at identifying significant violators which had not been brought to task by the government, and filing suits to force compliance. NRDC joined forces with local and regional environmental groups in this effort, including the Chesapeake Bay Foundation (CBF), an organization focused on protecting and restoring the Chesapeake Bay.²⁹ The two groups reviewed state and federal records, and pinpointed Gwaltney and its sister company, Smithfield Packing, as two of the most egregious violators in the region.³⁰ After giving the requisite notice, CBF and NRDC filed suit against Gwaltney in federal district court.³¹ The state of Virginia subsequently brought an action in state court against Gwaltney, which it dismissed after trial of the federal action.³²

Council, Inc. v. Train, 519 F.2d 287 (D.C. Cir. 1975), *on remand*, 6 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,588 (D.D.C. 1976) (suit to force the Environmental Protection Agency to promulgate effluent standards for toxics under Clean Water Act § 307); Boyer & Meidinger, *Privatizing Regulatory Enforcement*, *supra* note 18, at 852-53.

²⁸ See JEFFREY G. MILLER, *CITIZEN SUITS*, *supra* note 22, § 2.3; Boyer & Meidinger, *Privatizing Regulatory Enforcement*, *supra* note 18, at 845-46, 852-53. See also S. REP. NO. 414, at 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 (noting almost total lack of government enforcement under Clean Water Act); U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-84-53, *WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS* (1983) (reporting a significant decline in federal enforcement).

²⁹ See JEFFREY G. MILLER, *CITIZEN SUITS*, *supra* note 22, § 2.3, 11 (1987); Smith, *The Viability of Citizens' Suits*, *supra* note 5, at 43-44. See also Theodore L. Garrett, *Citizen Suits After Gwaltney*, ALI-ABA COURSE OF STUDY, ENVIRONMENTAL LAW, C266 ALI-ABA 305, 308-09 (1988).

³⁰ Two other major violators identified by the groups were American Recovery and Bethlehem Steel, both in Baltimore, Maryland. See *Chesapeake Bay Found., Inc. & Natural Resources Defense Council, Inc. v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985); *Chesapeake Bay Found., Inc. & Natural Resources Defense Council, Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987).

³¹ *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 611 F.Supp. 1542, 1544 (E.D. Va. 1985) [hereinafter *Gwaltney I*].

³² *Commonwealth v. Gwaltney of Smithfield, Ltd.*, No. 3371 (Cir. Ct. Isle of Wight Co. filed July 10, 1984) (order of nonsuit Aug. 28, 1985). The Commonwealth had previously filed a separate suit against Smithfield Packing Company, another subsidiary of Smithfield Foods, which operated a facility near Gwaltney, alleging 152 violations of its wastewater discharge permit. See *Commonwealth v. Smithfield Packing Co., Inc.*, No.

Gwaltney and Smithfield Packing are the subject of the government's subsequent enforcement action.

III. THE GWALTNEY LITIGATION

Gwaltney of Smithfield was, and is, a major meatpacking operation, slaughtering thousands of hogs a day.³³ Its wastes are organic, largely offal from the slaughtering operations.³⁴ These wastes were treated in a standard biological process, similar to that used by sewage treatment plants, and discharged to the Pagan River, a tributary to the Chesapeake Bay.³⁵ The discharge was covered by a permit issued by the state of Virginia under the National Pollutant Discharge Elimination System.³⁶ Although a number of pollutants were controlled under the permit, the two of primary interest were chlorine, a toxic used to disinfect wastes, and nitrogen, a pollutant which contributes to algal growth and low levels of dissolved oxygen, or hypoxia, in the Bay and its tributaries.³⁷ Plaintiffs moved for summary judgment based on permit violations contained in reports filed with the government,³⁸ and District Judge Robert R. Merhige,

3290 (Cir. Ct. Isle of Wight Co. filed Oct. 24, 1983). The Chesapeake Bay Foundation intervened in that suit. The court found Smithfield Packing liable and imposed a penalty of \$40,000. Opinion (Dec. 14, 1984).

³³ See WELLS ENGINEERS ENVIRONMENTAL, INC., STUDY AND REPORT: PHOSPHORUS REMOVAL; SMITHFIELD FOODS, INC.; SMITHFIELD, VIRGINIA, 1 (1990).

³⁴ See *id.* at 2.

³⁵ The violations which CBF and NRDC challenged were essentially similar to those in the current government prosecution. See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 774 (E.D. Va. 1997).

³⁶ See CWA § 402, 33 U.S.C. § 1342 (1994).

³⁷ When algae die the decomposition process uses oxygen, lowering the level of dissolved oxygen in the water column. Adequate levels of dissolved oxygen are essential for aquatic life such as fish and shellfish. Hypoxia can be especially damaging for organisms, such as oysters, which cannot move to more oxygen-enriched waters. Hypoxia can also alter the ecological makeup of a water body, wiping out organisms sensitive to low oxygen levels, while allowing those types of organisms which can sustain themselves in such conditions to survive. See LONG ISLAND SOUND STUDY, HYPOXIA AND NUTRIENT ENRICHMENT—ASSESSMENT OF CONDITIONS AND MANAGEMENT RECOMMENDATIONS 10 (1993). In addition, algae cloud the water, depriving submerged aquatic vegetation important to many species for food and habitat of the light necessary for growth. See Alliance for the Chesapeake, *New Air Rules Expected to Help Reduce Bay Nutrients*, BAY JOURNAL, July-Aug., 1997, at 10.

³⁸ Discharge Monitoring Reports (DMRs) detailing the level of compliance achieved for the effluents regulated by the permit must be filed at prescribed intervals and are key to facility of oversight and enforcement. See 40 C.F.R. § 122.41(l)(4) (1998).

Jr., granted the motion, finding Gwaltney liable for over 600 days of violation of the chlorine and nitrogen limitations in its permit.³⁹ After a trial on the remedy, the court imposed a penalty of \$1.28 million;⁴⁰ almost \$1 million was based on the chlorine violations, and the balance was a result of the nitrogen discharges.⁴¹ The court rejected a post-trial challenge to its subject matter jurisdiction in which the defendant argued that the language of section 505 permitted suits only when the discharger was violating the Act at the time the complaint was filed.⁴² Defendant's argument was based on a Fifth Circuit decision issued after the *Gwaltney* trial was concluded, *Hamker v. Diamond Shamrock Chemical Co.*,⁴³ in which a court had for the first time ruled in such a fashion. It was generally viewed by public interest environmental attorneys as an aberration, flying in the face of the obvious intent of Congress to allow citizens to step into the shoes of the government when bringing suits under section 505 and similar provisions.⁴⁴ Judge Merhige concurred in this assessment and ruled against defendants.⁴⁵ On appeal, the Fourth Circuit affirmed the ruling,⁴⁶ creating a conflict with the Fifth Circuit and setting the stage for the company's petition for a writ of certiorari to the Supreme Court.

Upon initial consideration of the petition only three of the Justices voted to hear the case.⁴⁷ But subsequently the First Circuit reached a conclusion different from both the Fourth and Fifth Circuits on the jurisdictional issue in an action under Clean Water Act section 505. In *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*,⁴⁸ the First Circuit held

³⁹ See *Gwaltney I*, 611 F.Supp. 1542, 1555 (E.D. Va. 1985).

⁴⁰ See *id.* at 1564. See *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 307-08 (4th Cir. 1986) [hereinafter *Gwaltney II*]. This was the largest penalty ever imposed to date in a citizen suit; it exceeded most penalties obtained by the government. See Smith, *The Viability of Citizens' Suits*, *supra* note 5, at 44.

⁴¹ See *Gwaltney I*, 611 F. Supp. at 1562, 1565.

⁴² See *id.* at 1544.

⁴³ 756 F.2d 392 (5th Cir. 1985).

⁴⁴ At that time the enforcement powers of citizens were generally viewed as co-extensive with those of the U.S. Environmental Protection Agency. See *Gwaltney II*, 791 F.2d at 310, and cases cited therein.

⁴⁵ See *Gwaltney I*, 611 F. Supp. at 1548.

⁴⁶ See *Gwaltney II*, 791 F.2d at 310-11.

⁴⁷ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, No. 86-473, Bench Memorandum, Oct. 5, 1987 (Aug. 27, 1987), Thurgood Marshall Papers (on file with the Manuscript Division, U.S. Library of Congress) [hereinafter *Marshall Papers*], box 427, folder 8.

⁴⁸ 807 F.2d 1089 (1st Cir. 1986).

that citizens could not bring suit for violations that were totally past, but a plaintiff who in good faith made allegations of an ongoing violation could enforce penalties for past violations even if no ongoing violations were proven.⁴⁹ Based on this decision, Justice White drafted a dissent to the denial of the certiorari petition⁵⁰ that induced Justice Powell to change his negative vote, making the fourth requisite vote to grant the petition.⁵¹

Thus, when the case was presented to the Supreme Court, three Circuits had rendered three different opinions on whether section 505 conferred jurisdiction on the courts to impose penalties in a suit brought by citizens when the violations had ceased before the complaint was filed. The Fifth Circuit in *Hamker* had ruled that there was no jurisdiction to enforce the penalty provisions in such a circumstance.⁵² The Fourth Circuit decided in *Gwaltney* that citizens could bring such a suit,⁵³ while the First Circuit had ruled that citizens could enforce penalties for past violations so long as they had in good faith alleged an ongoing violation.⁵⁴ All those involved in citizen suit litigation—public interest, industry and the government attorneys—focused their attention on the Supreme Court's consideration of *Gwaltney*.

IV. THE SUPREME COURT DECISION

A. *Divining Congressional Intent*

The *Gwaltney* decision, written by Justice Thurgood Marshall, well reflects the problems which plague litigants and the courts when Congress

⁴⁹ See *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1094.

⁵⁰ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473, Second Draft of Dissent from Denial of Certiorari by Justice Byron White (Jan. 8, 1987), Marshall Papers, *supra* note 47, box 440, folder 4. Justice White had drafted an earlier dissent from the denial, but reissued it adding the *Pawtuxet Cove* case. See First Draft of Dissent from Denial of Certiorari by Justice Byron White (Dec. 22, 1986), Marshall Papers, *supra* note 47, box 440, folder 4.

⁵¹ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, No. 86-473, Bench Memorandum, Oct. 5, 1987, at 1 (Aug. 27, 1987), Marshall Papers, *supra* note 47, box 427, folder 8. Voting for certiorari were Justices White, Stevens, Scalia and Powell. See *id.*

⁵² See *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 394 (5th Cir. 1985).

⁵³ See *Gwaltney II*, 791 F.2d 304, 308-09 (4th Cir. 1986).

⁵⁴ See *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986).

writes laws with less than “syntactical precision.”⁵⁵ Laboring under the assumption that Congress knew what it was doing, an effort must be made to divine exactly what that body intended.

The statutory language central to the *Gwaltney* debate is found in section 505(a)(1) which specifies that “any citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violation of” certain requirements of the law.⁵⁶ Jurisdiction is vested in the district courts to enforce the provisions of the statute and to apply “any appropriate civil penalties” under section 309(d), the general penalty provisions of the Clean Water Act, which is applicable to both citizen and government enforcement.⁵⁷ The “alleged to be in violation” formulation is somewhat unusual as most statutes impose sanctions on those who “violate,” “are violating,” “have violated” or are simply “in violation” of the law. Much turned on the “alleged to be in violation” phrase, and reading the briefs, the decision and subsequent analyses brings to mind Humpty Dumpty’s admonition to Alice, “When I use a word . . . it means just what I choose it to mean . . . neither more nor less.”⁵⁸

Just what Congress chose these words to mean is not found in the legislative history of the Clean Water Act, but the language obviously was

⁵⁵ Brief for the Respondents at 22, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found, Inc.*, 484 U.S. 49 (1987).

⁵⁶ CWA § 505(a), 33 U.S.C. § 1365(a) (1994) 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.

⁵⁷ *See id.*

⁵⁸ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 198 (Messner ed. 1982).

copied from the original citizen suit language in the Clean Air Act.⁵⁹ Although the Clean Air Act legislative history is less than enlightening on this point, the “alleged to be in violation” language made sense in that context because, until amended in 1990, the Clean Air Act allowed citizen suits only to abate an ongoing violation and not to enforce penalty provisions.⁶⁰ Accordingly, the language of the statute was drafted to address a situation in which the violation was ongoing, and not one in which past violations were a factor. The Clean Air Act language provided an easy model for the drafters of the Clean Water Act, who simply adopted it without modification.⁶¹ Indeed, there is no reason to believe that Congress thought about this particular issue at all. It seems a classic case of Congress drafting a law which appears to be straightforward—allowing citizens to sue to enforce the law—but which has enough ambiguity to permit creative lawyers to read into it meaning that favors their clients. And unfortunately for citizens, that ambiguity was enough to create an issue for certiorari.

Petitioner Gwaltney framed its challenge in terms of subject matter jurisdiction, arguing that Congress intended the courts to be able to hear only those cases in which the defendant was “in violation” at the time the complaint was filed,⁶² and that a citizen’s cause of action should be limited to abating the violations and enforcing penalties for violations that occurred at the time the complaint was filed or thereafter.⁶³ CBF and

⁵⁹ CWA § 304(a)(1), 42 U.S.C. § 7604(a)(1) (1994). See Miller, *Invitation*, *supra* note 22, at 10,100.

⁶⁰ See 42 U.S.C. § 7604 (1994).

⁶¹ See Miller, *Invitation*, *supra* note 22, at 10,100.

⁶² Gwaltney challenged plaintiffs’ standing in district court in its answer to the complaint and moved to dismiss. Answer at 2-4. Plaintiffs moved for summary judgment on the liability issue, and Judge Merhige granted summary judgment for plaintiffs on liability. See Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?* 15 WM. MITCHELL L. REV. 327, 342 (1989) (citing *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 108 S.Ct. 376, 380 (1987)). Subsequently Gwaltney sought to force plaintiffs to present proof of standing at trial, without success. See *Gwaltney I*, 611 F. Supp. 1542, 1545-47 & n.5 (E.D. Va. 1985). Gwaltney did not appeal on the standing issue, See *Gwaltney II*, 791 F.2d 304, 306 n.1 (4th Cir. 1985), or directly challenge standing in the Supreme Court. See *Gwaltney*, 484 U.S. 49, 70 (1987). The company did raise standing in its reply brief, but only as it related to redressability. See Reply brief for Petitioner 17-18, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

⁶³ See Lance L. Shea, *Gwaltney of Smithfield v. Chesapeake Bay Foundation: Balancing Interests Under the Clean Water Act*, 25 SAN DIEGO L. REV. 857, 859 (1988) (citing *Gwaltney I*, 611 F. Supp. at 1544).

NRDC rejoined that a citizen's right to sue was coextensive with that of the government, which is to say that a citizen might seek abatement as well as penalties for both ongoing and past violations.

B. *The Government's Position*

An additional participant in the debate was the Environmental Protection Agency (EPA) whose staff was generally sympathetic to citizen enforcement efforts and had a strong interest in judicial construction of the citizen suit provisions.⁶⁴ The Department of Justice filed an *amicus* brief in the Fourth Circuit on behalf of CBF and NRDC, who ceded argument time to the government.⁶⁵ When the case reached the Supreme Court, the Solicitor General filed a brief on behalf of the United States supporting affirmance of the appellate ruling.⁶⁶ But the position the Solicitor argued was not the same as plaintiffs', and aligned more closely with the First Circuit in *Pawtuxet Cove Marina*⁶⁷ that a good faith allegation of present noncompliance was the standard established by section 505.⁶⁸ The government's position was arrived at only after extensive discussion between representatives of EPA and the Department of Justice, as well as lawyers for plaintiffs and defendant, as both sides sought Justice Department support for their positions.⁶⁹ Although some officials within the Justice Department were strongly disposed toward Gwaltney's position, there was concern by others that a ruling limiting citizens to penalties for past violations could lead to a similar limitation in government enforcement cases.⁷⁰ Because the "in violation" language is also found in section 309, the general enforcement provisions apply to both the government and citizens.⁷¹ Thus the Solicitor chose a middle

⁶⁴ See, e.g., Smith, *The Viability of Citizens' Suits*, *supra* note 5, at 19.

⁶⁵ See Letter from John M. Greacen, Clerk of the Court, Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 307-08 (4th Cir. 1986) (No. 85-1873), Jan. 21, 1986.

⁶⁶ See Brief for the United States as Amicus Curiae Supporting Affirmance at 14-22, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).

⁶⁷ 807 F.2d 1089 (1st Cir.1986).

⁶⁸ See Brief for the United States as Amicus Curiae Supporting Affirmance at 14-22, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).

⁶⁹ The author was a participant in these discussions.

⁷⁰ *Id.*

⁷¹ See, e.g., CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1) (1994) (the Administrator is authorized to take enforcement actions whenever he "finds that any person *is in violation* of any condition or limitation") (emphasis added); § 309(a)(3), 33 U.S.C. § 1319(a)(3)

ground which supported plaintiffs,⁷² but differentiated the scope of subject matter jurisdiction conferred upon citizens from that of the government.⁷³

The decision issued by the Court rejected the positions of both the citizen groups and the company, and essentially adopted the middle ground staked out by the First Circuit in *Pawtuxet Cove* and the government.⁷⁴ Unfortunately, it did not do so in the same straightforward manner found in the appellate court decisions in *Gwaltney* and *Pawtuxet Cove* and in the brief filed by the Solicitor General. Admittedly, the Court's analysis of section 505 was complicated by the unusual confluence of subject matter jurisdiction, cause of action and standing, which presented analytical problems, as reflected both in the opinion and the internal memoranda circulated among the justices. But the opinion ultimately did not present a clear and cogent analysis of the issues.

C. *The Majority Opinion*

The majority opinion, drafted by Justice Marshall, ignored the textual similarity of the government and citizen suit provisions and the

(the Administrator may issue a compliance order when he "finds that any person *is in violation*" of provisions of the statute) (emphasis added); CWA § 309(c), 33 U.S.C. § 1319(c) (criminal penalties may be imposed against "[a]ny person who willfully or negligently *violates*" provisions of the statute or permit conditions or limitations) (emphasis added); CWA § 309(c), 33 U.S.C. § 1319(d) (civil penalties may be imposed against "[a]ny person who *violates*" provisions of the statute or permit limitations or conditions) (emphasis added). Thus, if a citizen were prohibited from taking any enforcement action against polluters whose violations ceased prior to the filing of suit, the same prohibition should logically apply to government enforcement.

⁷² Plaintiffs/respondents again ceded time to the government for oral argument, but were pointed in remarking on the Solicitor's position: "Although grateful for this support, so far as it goes, we surmise that conflicting interests within the Government have, once again, led to an unrealistic search for a 'middle ground.'" Brief for the Respondents at 26 n.19, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

⁷³ In *Gwaltney*, no mention is made of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (establishing the standard by which a court reviews an agency's interpretation of a statute which it administers). This is most likely because the statutory provision at issue was not addressed administratively by the agency, but only in its *amicus* brief. It is doubtful whether a position developed as a litigation strategy should be afforded the same deference as one that has survived the administrative process. See *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988). Moreover, CWA § 505 deals with jurisdiction, a matter more suited to judicial rather than executive interpretation.

⁷⁴ See *Gwaltney*, 484 U.S. 49 (1987).

legislative history.⁷⁵ It severely undercut citizen enforcement rights under the Clean Water Act, circumscribing the situations in which citizens might enforce the Act's penalty provisions.⁷⁶ Moreover, the decision caused substantial confusion as to exactly what was required of litigants, that might have been avoided by clearer drafting.

In Justice Marshall's view, Congress intended a good-faith allegation of an on-going violation to suffice for jurisdictional purposes.⁷⁷ Plaintiffs would be constrained by the requirement, set forth in Rule 11 of the Federal Rules of Civil Procedure, of a good-faith belief well-grounded in fact in order to file the complaint.⁷⁸ Once suit had commenced, a defendant might, under proper circumstances, avail itself of the mootness doctrine in order to have the suit dismissed.⁷⁹ Marshall noted that Supreme

⁷⁵ The Court also misread the overall purpose of citizen suits, focusing on the argument that the provisions were aimed primarily at allowing citizens to abate violations, and not to step fully into the shoes of the government. The Court characterized the citizen's role at "supplemental" and "interstitial." See *Gwaltney*, 484 U.S. at 60-61.

⁷⁶ See *Gwaltney*, 484 U.S. at 65. Neither the Fourth Circuit nor the Supreme Court questioned that the government could sue to collect penalties for past violations. See *Gwaltney II*, 791 F.2d at 309; *Gwaltney*, 484 U.S. at 58. Accordingly, EPA has generally not had to concern itself with whether violations it prosecuted were ongoing. See, e.g., *United States v. Ohio Edison Co.*, 725 F. Supp.928, 931-32 (N.D. Ohio 1989) (rejecting defendant's argument that it must have been in violation of Act when suit was filed). However, in *3M v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir.1994), the court ruled that the statute of limitations begins to run at the time a violation occurs, not when it is discovered. *But see United States v. Telluride Co.*, (10th Cir. 1998) (dealing with retroactive injunctions as remedial measures for wholly past violations). Thus it is in EPA's interest in some instances to argue that a violation is not a one time occurrence, but ongoing and recurrent.

⁷⁷ See *Gwaltney*, 484 U.S. at 65.

⁷⁸ See *id.* One commentator suggested that the Supreme Court's approach differed slightly from that of the First Circuit, which seemed to place more emphasis on defendant's likelihood of continuing its violative conduct than on plaintiff's good faith belief. See Scott B. Garrison, *Subject Matter Jurisdiction, Standing, and Citizen Suits: The Effect of Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 48 MD. L. REV. 403, 432 (1989). See also *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093-94 (1st Cir. 1986).

⁷⁹ See *Gwaltney*, 484 U.S. at 66. Marshall's brief reference to mootness seemed intended to do no more than point out that traditional notions of mootness would apply in citizen suit cases, but its effect seemingly was to encourage defendants to raise mootness claims. That was certainly the effect in *Gwaltney*, where defendants raised the issue for the first time on remand. See *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989). The court refused to find the claim moot, and until recently most courts have similarly found those claims unavailing. However, the Fourth Circuit recently revised its position on the issue, ruling in *Friends of the Earth, Inc. v. Laidlaw*

Court standing jurisprudence recognized that allegations of injury were sufficient to invoke a court's jurisdiction and rejected petitioner's contention "that failure to require proof of allegations under § 505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing."⁸⁰

Having dealt with the jurisdictional language of the statute, Justice Marshall turned to the standing issue, describing the process by which a plaintiff's standing might be challenged.⁸¹ It is at this point that the analysis falters. That is not because the process for challenging standing described by Justice Marshall is incorrect.⁸² But the context in which it is applied in *Gwaltney*, where the facts necessary to prove jurisdiction and the facts necessary to prove the claim [and perhaps standing] are identical, engendered a disappointing lack of clarity, and left substantial uncertainty as to the standards citizen litigants would need to meet.

D. Justice Scalia's Concurrence

Justice Scalia's concurrence did not make matters more plain. He took Marshall to task for creating "a regime that is not only extraordinary," but to his knowledge "unique,"⁸³ by creating subject matter jurisdiction based on a good faith allegation.⁸⁴ In Scalia's view, the jurisdictional issue was whether the petitioner was "in violation" at the time the complaint was filed.⁸⁵ But he recognized that the evidence necessary to prove that the petitioner was "in violation" was essentially the same evidence that would be needed to prove a good-faith allegation; that is, "whether petitioner had taken remedial steps that had clearly achieved

Environmental Serv. (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998), that an action might become moot on appeal because the defendant had ceased its illegal conduct. See discussion *infra* note 183 and accompanying text.

⁸⁰ *Gwaltney*, 484 U.S. at 65.

⁸¹ *See id.* at 65-66.

⁸² A defendant may move for summary judgment on the standing issue, in which case plaintiff will have to show, generally by affidavits, that his allegations of standing are not a sham. If the motion fails, defendant may then put plaintiff to his proof at trial on the merits. Marshall emphasized that there was no constitutional requirement that, in order to invoke the district court's jurisdiction, a plaintiff offer this proof as a threshold matter. *See id.* at 66.

⁸³ *Id.* at 68.

⁸⁴ *See id.*

⁸⁵ *See id.* at 69.

the effect of curing all past violations by the time suit was brought.”⁸⁶ Indeed, he concedes that the two standards would produce substantially the same results.⁸⁷ Unfortunately for the lucidity of the opinion, Scalia does no more than Marshall to acknowledge and analyze the difficulties inherent in a situation where the jurisdictional facts and the cause of action overlap.

Justice Scalia raised the standing question, arguing that if the defendant was not in violation when the suit was initiated, then there would be no remediable injury.⁸⁸ He emphasized that this was both a constitutional requirement and a specific requirement spelled out in the statute which defines a “citizen” who might bring suit.⁸⁹ Scalia concluded that “we have 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.”⁹⁰ Like Marshall, Scalia failed to address the almost complete overlap in the statute of jurisdiction, merits, and standing. But his standing argument is important because it reflects his concern with necessity for an injury that can be redressed by the court to support standing, which would eventuate in the *Steel Company* opinion.

This lack of analytical clarity hampered litigants and the lower courts when parsing the decision for guidance. And at least some of that might have been avoided by a more careful crafting of the opinion. But a review of the colloquy among the judges while the opinion was being drafted reveals little attention to the matter.⁹¹ It is interesting, if not instructive, for the way in which the court chose to address or not address the issues.

V. THE COURT'S INTERNAL DISCUSSIONS

Roughly a month after the case was argued, Justice Marshall

⁸⁶ *Id.* at 69-70.

⁸⁷ *See id.* at 70.

⁸⁸ *See id.*

⁸⁹ *See id.* at 70. To have citizen's standing, one must have “an interest which is or may be adversely affected.” *See also* 33 U.S.C. § 1365(g) (1994).

⁹⁰ *Gwaltney*, 484 U.S. at 71.

⁹¹ One Supreme Court observer has suggested that the Justices are far less concerned than academics with the specific language of opinions, which may be the joint product of several Justices and their clerks. *See* Richard J. Lazarus, *Counting Votes and Discounting Holdings In The Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1119 (1998)

circulated a draft opinion that, with minor changes, became the final opinion of the Court.⁹² Both Justice Scalia and Justice Stevens voiced concerns about language in the draft that indicated that citizens “may seek civil penalties for past violations of the Act only in a suit brought to enjoin or otherwise abate an ongoing violation.”⁹³ Scalia wrote to Marshall, “I thought we had agreed to leave for another day the question whether, if one continuing violation is established, penalties may be assessed with respect to other violations that are not continuing.”⁹⁴ Stevens also wrote that it was not necessary to decide the point in the case before them.⁹⁵ He further suggested that it was not necessary to decide whether the allegation of ongoing violation was sufficient to confer jurisdiction: “[W]hy not simply remand to the district court with instructions to make appropriate findings concerning the adequacy of this proof and leave to another day the more esoteric question whether the allegation by itself is enough to support jurisdiction?”⁹⁶ Stevens continued:

“[i]f the plaintiff is unable to support an allegation of continuous or intermittent violation by evidence that is persuasive to the trial judge, the plaintiff’s claim should

⁹² See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, No. 86-473, First Draft of Opinion for the Court, slip op. (Nov. 5, 1987), Marshall Papers, *supra* note 47, box 440, folder 4.

⁹³ *Id.* slip op. at 8.

⁹⁴ Memorandum from Justice Antonin Scalia to Justice Thurgood Marshall (Nov. 9, 1987), Marshall Papers, *supra* note 47. Subsequent to *Gwaltney* this issue has been resolved in at least three different fashions by the lower courts. See, e.g., *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697-98 (4th Cir. 1989) (ongoing violation of one parameter of the permit does not confer jurisdiction at to other parameters); *Friends of the Earth v. Chevron Chemical Co.*, 900 F.Supp. 67 (E.D. Tex. 1995) (accord); *Public Interest Research Group of N.J. v. Elf Atochem N. America, Inc.*, 817 F. Supp. 1164, 1176 (D.N.J. 1993) (good faith allegations of ongoing violation as to one parameter establish jurisdiction over past and present violations); *Natural Resources Defense Council v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 503 (3d Cir. 1993) (modified parameter-by-parameter approach in which ongoing violation of one parameter establishes jurisdiction for violations of all parameters caused by the same technical problem).

⁹⁵ See Memorandum from Justice John Paul Stevens to Justice Thurgood Marshall (Nov. 9, 1987), Marshall Papers, *supra* note 47. Stevens wrote, “It is clear that a citizen may recover civil penalties for violations of the Act that occur after the complaint is filed, but I am not at all sure that such a recovery for ‘past violations’—i.e., those that occurred before the suit was filed—are authorized by § 505.” *Id.*

⁹⁶ *Id.*

fail. I am not sure it's a matter of critical importance whether it fails for want of jurisdiction or simply fails for want of proof.⁹⁷

It was this latter point, whether a good faith allegation suffices for jurisdiction under section 505, which was the focus of Scalia's first draft of a concurrence.⁹⁸ Scalia wrote to Marshall that he thought "it more orthodox to achieve substantially the same result through interpretation of the term 'in violation.'"⁹⁹ Scalia's draft provides the only real discussion of the factual overlap of jurisdiction and merits, and it is limited. There he noted that some of the same facts would be involved in a challenge to the jurisdictional allegation as well as on the merits, but called it "entirely standard."¹⁰⁰ "It is so commonplace for jurisdictional issues to overlap with the merits that the Court's interpretation here can hardly be justified on some principle that overlap is to be avoided wherever feasible."¹⁰¹ Scalia eliminated this language from the final version of the concurrence.

Scalia also wrote Marshall that language in Marshall's draft opinion suggested that the plaintiff did not have to offer proof of his allegations of standing if challenged by a motion for summary judgment.¹⁰² That would conflict have conflicted with the Court's recent opinion in *Celotex Corp. v. Catrett*,¹⁰³ in which the justices had ruled that summary judgment must be granted against a plaintiff who does not make a showing sufficient to establish the essential elements of his case.¹⁰⁴ In Scalia's view, *Celotex*, as applied to a factual issue with respect to standing, would

⁹⁷ *Id.*

⁹⁸ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, No. 86-473, First Draft of Concurring Opinion by Justice Scalia (Nov. 9, 1987), slip op. at 2, Marshall Papers, *supra* note 47.

⁹⁹ Memorandum from Justice Antonin Scalia to Justice Thurgood Marshall (Nov. 9, 1987), Marshall Papers, *supra* note 47.

¹⁰⁰ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, No. 86-473, First Draft of Concurring Opinion by Justice Scalia (Nov. 9, 1987), slip op. at 2, Marshall Papers, *supra* note 47. As an example, he stated that allegations of injury in fact made to support standing could be challenged by a motion for summary judgment, and if genuine issues of material fact remained, they might be litigated at trial, even in a situation where proof of injury was part of plaintiff's case on the merits. See *id.*

¹⁰¹ *Id.*, slip op. at 3, Marshall Papers, *supra* note 47.

¹⁰² See Memorandum from Justice Antonin Scalia to Justice Thurgood Marshall, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹⁰³ 106 S. Ct. 2548 (1986).

¹⁰⁴ See *id.* at 2552.

require the plaintiff to respond to a motion for summary judgment with sufficient evidence so that the court might rule in his favor.¹⁰⁵ That burden of production having been met, the motion should be denied and the issue set for trial.¹⁰⁶

In response to Stevens and Scalia, Marshall agreed that this case was not the vehicle to decide “the difficult question of when civil penalties are appropriate in conjunction with an action for abatement,” and changed the language that was of concern to Stevens and Scalia.¹⁰⁷ As for *Celotex*, Marshall assured Scalia that there was nothing inconsistent in the *Gwaltney* opinion.¹⁰⁸ The party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact, he said, and Gwaltney “in no way suggests that the nonmoving party may prevail upon a complete failure of proof concerning an essential element of that party’s case.”¹⁰⁹ But Marshall remained firm that the Court should address the good-faith allegation question, noting that the parties and amici all devoted substantial time to it below, and “[o]n remand, it will certainly resurface, and our failure to address it here will only create confusion and speculation.”¹¹⁰

¹⁰⁵ See Memorandum from Justice Antonin Scalia to Justice Thurgood Marshall, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹⁰⁶ See *id.*

¹⁰⁷ Memorandum from Justice Thurgood Marshall to the Conference, (Nov. 10, 1987), Marshall Papers, *supra* note 47. The exchange among the justices gives no indication of the latter linkage that some courts would make between penalties and injunctive relief. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc.*, 149 F.3d 303 (4th Cir. 1998) *cert. granted* 119 S.Ct. 1111 (1999). See also discussion *infra* note 183.

¹⁰⁸ See Memorandum from Justice Thurgood Marshall to the Conference, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹⁰⁹ *Id.* Marshall later made a slight change in the opinion to make this point clear. Memorandum from Justice Thurgood Marshall to Antonin Scalia, (Nov. 12, 1987), Marshall Papers, *supra* note 47.

¹¹⁰ *Id.* The District Court had rendered an alternative holding based on respondents’ good faith allegation. See *Gwaltney I*, 611 F. Supp. 1542, 1549 n.8 (E.D. Va. 1985). The Court of Appeals noted that a “sound argument” could be made in support of such a holding, although it did not rule on the question. See *Gwaltney II*, 791 F.2d 304, 308 n.9 (4th Cir. 1986).

Justice O’Connor shared Stevens’ and Scalia’s concerns about the jurisdictional issue and about the problem of recovery for past violations joined with an ongoing violation, and said she would wait to see what changes were made in the draft. See Memorandum from Justice Sandra Day O’Connor to Justice Thurgood Marshall (Nov. 9, 1987), Marshall Papers, *supra* note 47. She eventually joined in the judgment and in Scalia’s concurrence.

The internal colloquy among Marshall, Stevens and Scalia delineates fairly clearly the views of the justices, which is not necessarily true of the language of the draft or the final majority and concurring opinions. Marshall wrote to his colleagues that he saw Justice Stevens' point that the ultimate outcome of this case "will not be affected whether we require a good faith allegation of an ongoing violation or proof of that allegation to support jurisdiction, because the allegation must ultimately be proved or the case will fail on the merits."¹¹¹

Marshall nevertheless was unmoved by Steven's request to avoid addressing the issue, asserting that he continued

to believe (along with the Solicitor General) that Congress used the word "alleged" in § 505 with a purpose. That word does not frequently appear in grants of subject matter jurisdiction. Congress more often requires that certain events exist—for example, that citizens be residents of different states or that the amount in controversy exceed \$10,000.¹¹²

Justice Marshall remained "convinced that this difference makes a difference."¹¹³

As for the points raised by Justice Scalia, Justice Marshall argued that the express language of section 505 reflected "a perfectly logical and reasonable congressional intent . . . to permit the federal courts to assert jurisdiction over such suits on the basis of good faith allegations and to defer challenges to the underlying facts until summary judgment or trial."¹¹⁴ Congress, he reasoned, recognized that proof of an ongoing violation might be difficult, requiring substantial discovery, and that it would overlap completely with proof on the merits at trial.¹¹⁵ Yet in the opinion for the Court, Marshall only obliquely refers to these considerations, noting a congressional "sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards."¹¹⁶

¹¹¹ Memorandum from Justice Thurgood Marshall to the Conference, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *Gwaltney*, 484 U.S. 49, 65 (1987) (citing Brief for United States as Amicus Curiae at

Continuing to outline the litigation process under his construction of the statute, Marshall wrote to his colleagues, "I quite agree with Nino that the truth of a plaintiff's allegations may be challenged, either in a summary judgment motion or on the merits at trial."¹¹⁷ He further agreed that plaintiff's case would fail at summary judgment without a genuine issue of material fact as to the truth of the allegations, and, as Justice Stevens had noted, there would be "no way for a plaintiff to prevail on the merits without ultimately proving the truth of his allegations."¹¹⁸ Again, this recognition of the need to prove at some point the allegations of ongoing violation did not appear clearly in the opinion.¹¹⁹

Marshall professed himself puzzled by the tone of Scalia's draft concurrence, complaining that their disagreement was a "semantic squabble,"—"What I would term dismissal for lack of standing or failure of proof on the merits, Nino would call a defect in subject matter jurisdiction,"—and had no practical consequences.¹²⁰ He did not believe that any Clean Water Act cases would come out differently because of his construction, and affirmed that his opinion only interpreted the jurisdictional grant contained in unusual language of section 505 of the Clean Water Act, and that it was not a pronouncement of any generally applicable principles of jurisdiction.¹²¹

Scalia responded to Marshall, pursuing the good faith allegation issue.¹²² He agreed that it was unlikely that Marshall's formulation would make any difference in Clean Water Act cases.¹²³ But that only made him "all the more reluctant to acknowledge that Congress has so subtly created such an unusual jurisdictional provision—which will become known as 'Gwaltney-type jurisdiction,' and may be discovered in other statutes

18). The Solicitor General was of the same view, arguing that "[t]he statutory scheme wisely postpones the question whether the defendant is in fact failing to comply with his permit requirements for adjudication on the merits." Brief for the United States as Amicus Curiae Supporting Affirmance at 19.

¹¹⁷ Memorandum from Justice Thurgood Marshall to the Conference, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹¹⁸ *Id.*

¹¹⁹ The only reference to such a scheme was not related to the jurisdictional issue itself, but appeared in Marshall's discussion of standing. See *Gwaltney*, 484 U.S. at 65-66.

¹²⁰ Memorandum from Justice Thurgood Marshall to the Conference, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹²¹ See *id.*

¹²² See Memorandum from Justice Antonin Scalia to Justice Thurgood Marshall, (Nov. 10, 1987), Marshall Papers, *supra* note 47.

¹²³ See *id.*

where it will make a difference."¹²⁴ He argued that for the benefit of both the Court and Congress it seemed "an important part of sound judicial practice not to discern such an irregular disposition where it has not been clearly created."¹²⁵

Marshall remained unpersuaded, viewing as unfounded Scalia's concern that this jurisdictional ruling would impact upon other statutes.¹²⁶ He replied, "Our reading of § 505 is expressly based upon Congress' use of the word 'alleged' in the jurisdictional grant and the peculiar fact that the proof of a plaintiff's allegations would overlap completely with the merits of the case."¹²⁷ In his view, the "alleged to be in violation" language was unlikely to appear often in statutory grants of authority, "and on the rare occasions that it does occur, 'Gwaltney-type jurisdiction' is probably warranted."¹²⁸

Their differences remained unresolved, and with only the small changes agreed to by Justice Marshall, his original draft became the opinion of the Court.¹²⁹

VI. SPREADING CONFUSION

It is unfortunate that the final versions of both Justice Marshall's majority opinion and Justice Scalia's concurrence left considerable uncertainty as to the standard being applied and the timing of proof. The quizzical titles of articles written at the time are ample illustration of the confusion that prevailed.¹³⁰ On remand, the Fourth Circuit reflected that

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Memorandum from Justice Thurgood Marshall to Justice Antonin Scalia, (Nov. 12, 1987), Marshall Papers, *supra* note 47.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Marshall obtained the votes of Chief Justice Rehnquist, along with Justices Brennan, White and Blackmun for his interpretation of § 505 jurisdiction, while Justices Stevens and O'Connor joined Scalia's concurrence.

¹³⁰ See Emily O'Connor, Comment, *Gwaltney of Smithfield v. Chesapeake Bay Foundation—The End of the Inquiry or the Beginning of Confusion?*, 50 U. PITT. L. REV. 1209 (1989); Joel A. Waite, *The Continuing Questions Regarding Citizen Suits Under the Clean Water Act: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 46 WASH. & LEE L. REV. 313 (1989); Nauen, *supra* note 32. Mr. Nauen observed that both industry and environmentalists proclaimed victory in the case, and suggested that either side could be right, depending upon the manner in which lower courts interpreted the decision. See *id.* at 349.

There were numerous commentators who pointed out issues, in addition to the

uncertainty when the court reviewed and upheld the district court's finding that CBF and NRDC had made a good faith allegation of ongoing violations.¹³¹ The appellate judges believed though that they were also required by the Supreme Court's majority opinion to determine whether plaintiffs had actually "proved their allegation of continuous or intermittent violation, as required in order to prevail."¹³² They took issue with Justice Scalia's suggestion that the plaintiffs might never be called on to prove the jurisdictional allegation, concluding that the "majority does expressly require that a citizen-plaintiff prove the existence of an ongoing violation (continuous or intermittent) in order to prevail."¹³³ The appellate court believed that the difference between the majority and the concurring justices was not *whether* an ongoing violation had to be proved, but *when*, "with the concurrence requiring proof of an ongoing violation as a threshold jurisdictional matter."¹³⁴ Other courts have reached differing

question of when an ongoing violation must be proved, that were created or left unresolved by *Gwaltney*: What constitutes good faith? How is an ongoing violation defined? What is continuing or intermittent? Will it be analyzed in terms of aggregate violations, or on a pollutant by pollutant basis? How is the mootness doctrine to be applied? May penalties be assessed for precomplaint violations, or when abatement is not appropriate? And what is the impact of cessation of violations under Article III? See, e.g., Miller, *Invitation, supra* note 22, at 10,103-04; O'Connor, *supra*, at 1225-27; Shea, *supra* note 63, at 871-878; L. Ward Wagstaff, *Citizen Suits and the Clean Water Act: The Supreme Court Decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 1988 UTAH L. REV. 891, 920-24; Waite, *supra* note 130.

¹³¹ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 844 F.2d 170 (1988).

¹³² *Id.* at 171.

¹³³ *Id.* at 171 n.1.

¹³⁴ *Id.* The Fourth Circuit went further and outlined two alternatives by which the trial court might determine whether an ongoing violation had been proved. Plaintiffs might actually prove violations that continued on or after the date the complaint was filed, or they might adduce evidence from which a reasonable trier of fact could conclude that there existed a "continuing likelihood of a recurrence in intermittent or sporadic violations." *Id.* at 172. It has been suggested that the second alternative stretches the definition of continuing violation found in the majority opinion. See O'Connor, *supra* note 130, at 1227 (1989).

On remand to the district court, Judge Mehrige appeared to combine the alternatives, finding that plaintiffs proved an ongoing violation since evidence adduced at trial demonstrated a continuing likelihood that violations would recur, and reinstated the full \$1.3 million penalty. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 688 F. Supp. 1078, 1080 (E.D. Va. 1988). The Fourth Circuit affirmed the finding of an ongoing violation, but ruled that penalties could not be imposed for certain violations that had been wholly cured, and reduced the penalty to reflect that ruling. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 890 F.2d 690 (1989).

conclusions when faced with the issue,¹³⁵ and it has not again been directly addressed by the Supreme Court. In reviewing the course of citizen suit litigation since *Gwaltney*, one author recently noted that the decision engendered widespread chaos among the courts, and ten years after the decision federal courts still struggle to ascertain the scope and applicability of the standard it established.¹³⁶ The cost of such confusion in terms of both judicial resources and litigants time and expenditures is

¹³⁵ See, e.g., *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (holding that subject matter jurisdiction and standing are threshold matters and may be established by good faith allegation); *Natural Resources Defense Council, Inc. v. Texaco Refining & Mktg., Inc.*, 2 F.3d 493, 501 (3d Cir. 1993) (holding that proof of ongoing violation required at trial to establish standing). For a recent example of both the continuing confusion concerning the ongoing violation issue, as well as a graphic example of the litigation problems with which a plaintiff must cope, see *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997).

¹³⁶ See Randall S. Abate, *Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the Gwaltney Standard*, 16 TEMP. ENVTL. L. & TECH. J. 1, 9-12 (1997). See also WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 277-78, 289-90 (2d ed. 1994). It has led to "procedural gamesmanship" on the part of defense counsel, who often file a motion to dismiss in order to force citizen litigants to put on their case on the merits without adequate time for preparation. See Robert Wiygul, *Gwaltney Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L.J. 435, 442 (1995).

Some authors suggest that the decision has not substantially deterred citizens from bringing meritorious suits. See, e.g., Wiygul, *supra*, at 454-55. There is some support for this view, since a recent study found that citizen suits now account for almost five times as many environmental prosecutions as do federal government suits. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1609, 1573 (1995). That raises the question, however, whether government enforcement programs are sufficiently addressing the problems of noncompliance.

The lower courts have to some extent mitigated the damaging impact of *Gwaltney* through broad interpretations of the continuing violations doctrine. See Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723, 764-68 (1996). Nevertheless, one attorney who frequently represents environmental citizen litigants estimates that *Gwaltney* bars 75-80% of suits that could be meritorious. See Letter from James M. Hecker, Trial Lawyers for Public Justice, to Ann Powers (Oct. 28, 1998) (on file with author). Moreover, recent Supreme Court case law, and lower court decisions following it, threaten to make all civil penalty claims moot in all citizen suits. See *id.* See also, Jim Hecker, *EPCRA Citizen Suits After Steel Company v. Citizens for a Better Env't*, 28 Env'tl. L. Rep (Env'tl. L. Inst.) 10,306, 10,308-10 (1998); discussion *infra* notes 182-83 and accompanying text.

substantial.¹³⁷

What might the Court have done to alleviate the confusion? It might have begun by emphasizing the unusual situation that pertained, since the facts that might support jurisdiction, standing and the merits were intertwined. But in order to determine how the Court might further have explained its decision, we need to first examine the procedural framework applicable to the case. That begins with the enabling statute.

VII. THE PROCEDURAL FRAMEWORK

Typically, a statute creates a cause of action, and vests subject matter jurisdiction in the court to hear claims based on that cause of action.¹³⁸ Standing is an element of a court's jurisdiction, and the litigant must meet any standing requirements spelled out in the statute or imposed by the Constitution.¹³⁹ In the case of the Clean Water Act, section 505 creates the cause of action and provides the grant of jurisdiction.¹⁴⁰

Once a suit is filed, the defendant may move to dismiss a complaint for lack of subject matter jurisdiction, including standing, under Federal Rule of Civil Procedure 12(b)(1).¹⁴¹ In reviewing a motion to dismiss for lack of jurisdiction, the court may go beyond the pleadings to determine whether there is a reasonable basis for the jurisdictional claim, but that inquiry is limited.¹⁴² If the defendant believes that the pleading fails to state a claim upon which relief can be granted, then the motion lies under Rule 12(b)(6)¹⁴³ and may be converted to a motion for summary

¹³⁷ Professor Rodgers estimated that it easily adds \$1 million a year to the cost of citizen suit litigation. RODGERS, *supra* note 136, at 290 & n.32. Some of the chaos and expense might well have been lessened if the majority opinion in *Gwaltney* had been clearer in its explication of the burdens it placed on citizen litigants.

¹³⁸ In some cases two different statutes may be implicated, one which confers the right, or from which the right is implied, and another which grants the court authority to hear the claim. The federal statutes providing federal question and diversity of citizenship jurisdiction are the latter type. See 28 U.S.C. §§ 1331, 1332 (1994).

¹³⁹ See KENT SINCLAIR, SINCLAIR ON FEDERAL CIVIL PRACTICE, 63-65 (3d ed. 1997).

¹⁴⁰ See 33 U.S.C. § 1365(a) (1994).

¹⁴¹ A motion pursuant to Rule 12(b)(1) can be used to attack two types of defects: 1) allegations which are insufficient to show jurisdiction; or 2) the court's actual lack of jurisdiction over the subject matter of the claim. See 5A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1356 (1984).

¹⁴² See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. 1990); 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[3] (3d ed. 1997).

¹⁴³ In contrast to a motion under rule 12(b)(1), under 12(b)(6) the court makes no inquiry

judgment under Rule 56 if matters extraneous to the pleadings are submitted and considered.¹⁴⁴ But even at the summary judgment stage, the court's inquiry as to jurisdiction is a restricted one. According to Professor Wright:

[i]f, as will usually be true, the issue of jurisdictional amount is closely tied to the merits of the cause, the court, it is said, should be reluctant to insist on evidence with respect thereto, lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of trial.¹⁴⁵

If the motion fails, jurisdiction lies, and the matter is tried on the merits.

We must bear in mind that in most cases, jurisdictional facts, such as amount in controversy, are required to establish jurisdiction but are not elements of a plaintiff's case on the merits.¹⁴⁶ If the plaintiff proves less than the jurisdictional amount, jurisdiction is not affected and recovery is had for the amount proved.¹⁴⁷ Professor Wright explained why the amount in controversy cannot be made dependent upon the amount the plaintiff ultimately recovers:

To do so would make jurisdiction turn on a guess by the trial court as to the final outcome, or would require a preliminary trial on jurisdiction that would duplicate the regular trial on the merits, or would demand a wasteful jurisdictional dismissal, after the case has been fully heard on the merits, because the final award was less than the

past the pleadings, and must assume for purposes of the motion that all of the allegations in the complaint are true. See 2 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 12.34[1][b], [2] (3d ed. 1997).

¹⁴⁴ FED R CIV P. 12(b)(6).

¹⁴⁵ CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 183 (1983).

¹⁴⁶ See *id.* at 182-83.

¹⁴⁷ The First Circuit in *Pawtuxet Cove* analyzed CWA § 505 in this fashion, giving the "alleged to be in violation" language "the [full] practical construction that is given to the \$10,000 requirement for jurisdiction in a diversity case. There jurisdiction is not necessarily lost if, in the final analysis, a lesser sum is involved, a reasonably held allegation is sufficient." *Pawtuxet Cove Marina, Inc., v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)).

jurisdictional amount.¹⁴⁸

Some of the confusion in the *Gwaltney* opinion may be due to the fact that Justice Marshall did not carefully apply these rules to the particular facts in *Gwaltney*. As Justice Scalia pointed out, the jurisdictional fact under section 505 is a good faith *allegation* of an ongoing violation.¹⁴⁹ That is akin to an allegation of a jurisdictional amount. Thus the issue on a motion to dismiss should be whether plaintiffs alleged ongoing violations;¹⁵⁰ on summary judgment it should be whether plaintiffs in good faith believed the violations to be ongoing, or perhaps whether they could reasonably have had such a belief. An inquiry into the existence of good faith would focus primarily on plaintiffs' subjective beliefs. However, some examination of defendant's state of compliance would probably be needed to establish the facts known to the plaintiffs which reasonably could have led them to believe in good faith that violations were ongoing. But plaintiffs would not have to show that the company was actually in a state of noncompliance, only that they in good faith believed that it was. The defendant could attempt to disprove plaintiffs' good faith by establishing facts that were, or should have been, known to plaintiffs at the time the complaint was filed demonstrating that the violations had been fully rectified, and that no reasonable person could have had a good faith belief of an ongoing violation.

In addition to challenging the court's subject matter jurisdiction over the claim under section 505, the defendant may also challenge plaintiffs' standing, again by demonstrating on a motion to dismiss or for summary judgment "that the allegations were sham and raised no genuine

¹⁴⁸ See WRIGHT, *supra* note 145, at 182. Diversity presents a slightly clearer situation since the question of citizenship is not linked to the question of remedy. Thus if a good faith allegation of diversity is made, and sustained on a motion to dismiss, then diversity exists. It will not be defeated if one of the litigants later assumes residence in the opponent's state. See *id.* at 156-57.

¹⁴⁹ See *Gwaltney*, 484 U.S. 49, 67-68 (1987).

¹⁵⁰ The Solicitor General provided a further analysis which the court might usefully have employed:

If the citizen fails to allege a present violation, his complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. . . . Furthermore, a citizen's failure to allege a present violation also constitutes a jurisdictional defect that would justify dismissal under Fed. R. Civ. P. 12(b)(1).

Brief for the United States as Amicus Curiae Supporting Affirmance at 20 n.32, 484 U.S. 49 (1987).

issue of fact.”¹⁵¹ The lack of standing could be because the plaintiffs did not meet the standard for organizational standing, or because no injury occurred to their members.¹⁵²

Having created this “peculiar” form of subject matter jurisdiction in which the good faith allegation is the jurisdictional fact, cabined by Rule 11 (and eventually the mootness doctrine), which would have provided citizen litigants with a reasonably simple pleading hurdle, Marshall reintroduced proof problems in his discussion of standing.¹⁵³ There again, the discussion is less enlightening than we might have hoped for. The familiar litany is recited, that an allegation of the facts upon which standing is based may be challenged by a motion for summary judgment, and at trial on the merits “the plaintiff must prove the allegations in order to prevail.”¹⁵⁴ But the Court does not make it clear what allegations it is referencing. Since the discussion concerns standing, does it mean the allegation that there is an ongoing violation? If so, then Marshall would require plaintiffs to prove a fact to sustain standing that is not required to sustain jurisdiction. That being the case, plaintiffs would be put to their proof on a motion to dismiss or for summary judgment to sustain standing, even if a good faith allegation was sufficient for jurisdiction. The matter is no clearer today than it was eleven years ago, as reflected by the Supreme Court’s most recent citizen suit ruling.

VIII. *GWALTNEY REDUX: STEEL COMPANY V. CITIZENS FOR A BETTER ENVIRONMENT*

The question of subject matter jurisdiction again came to the fore in *Steel Company v. Citizens for a Better Environment*,¹⁵⁵ which dealt with the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA).¹⁵⁶ Justice Scalia believed that plaintiff’s

¹⁵¹ *Gwaltney*, 484 U.S. at 66 (quoting *U.S. v. SCRAP*, 412 U.S. 669, 689 (1973)).

¹⁵² The bench memorandum regarding *Gwaltney* in Justice Marshall’s files focused on interpreting the jurisdictional scope of § 505, but did not deal with procedural issues, perhaps because the memorandum suggested affirmance, concluding that “[t]he structure, legislative history, and general purpose of the Clean Water Act support rspts’ interpretation of § 505 permitting citizen suits for purely past violations of the Act.” Bench Memorandum, Oct. 5, 1987 (Aug. 27, 1987), Marshall Papers, *supra* note 47, box 427, folder 8.

¹⁵³ See *Gwaltney*, 484 U.S. at 65.

¹⁵⁴ *Id.* at 66.

¹⁵⁵ 118 S. Ct. 1003 (1998).

¹⁵⁶ 42 U.S.C. § 11046 (1994).

standing had to be addressed as a threshold matter, while Justice Stevens sought first to determine whether the statute conferred subject matter jurisdiction over plaintiff's claim, and thus perhaps avoid the constitutional standing issue.¹⁵⁷

EPCRA's citizen suit provision, section 11046(a), "Authority to Bring Civil Actions," allows a citizen to sue the government or private parties who fail to do certain enumerated acts.¹⁵⁸ A separate section contains the grant of jurisdiction.¹⁵⁹ Even though the statute does not contain the "alleged to be in violation" language of the Clean Water Act, Justice Stevens argued that the EPCRA provision was essentially similar to that provision reviewed in *Gwaltney*, and therefore it did not grant subject matter jurisdiction unless there was an ongoing violation.¹⁶⁰ Since this was a jurisdictional issue, on a par with standing but with a statutory rather than constitutional foundation, Stevens believed that it should have been addressed first, and the constitutional standing issue thereby avoided.¹⁶¹ Justice Stevens contended that the statutory issue could also be framed as whether the complaint stated a "cause of action," and that under the Court's precedent¹⁶² the existence of a cause of action could be addressed, even if standing was uncertain.¹⁶³

Stevens went on to rely on *Gwaltney* to demonstrate that the statutory question could be addressed first, regardless of whether it was characterized as subject matter "jurisdiction" or "cause of action."¹⁶⁴ Stating that *Gwaltney* "powerfully demonstrates this point," Stevens argued that while the Court there

framed the question as one of "jurisdiction," . . . it could also be said that the case presented the question whether the plaintiffs had a "cause of action." Regardless of the label, the Court resolved the statutory question without pausing to

¹⁵⁷ See *Steel Co.*, 118 S. Ct. at 1011.

¹⁵⁸ See 42 U.S.C. § 11046(a).

¹⁵⁹ The relevant provision is: "The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.* § 11046(c). The district court may grant only injunctive relief against the government. See *id.*

¹⁶⁰ See *Steel Co.*, 118 S. Ct. at 1022.

¹⁶¹ See *id.* at 1021.

¹⁶² See *Bell v. Hood*, 327 U.S. 678, 681-685 (1946).

¹⁶³ See *Steel Co.*, 118 S. Ct. at 1024.

¹⁶⁴ *Id.* at 1025.

consider whether the plaintiffs had standing to sue for wholly past violations. Of course, the fact that we did not discuss standing in *Gwaltney* does not establish that the plaintiffs had standing there. Nonetheless, it supports the proposition that—regardless of how the issue is characterized—the Court has the power to address the virtually identical statutory question in this case as well.¹⁶⁵

The majority opinion in *Steel Company* in several instances takes on a personal tone, with Scalia accusing Stevens of having once understood “the fundamental distinction between arguing no cause of action and arguing no Article III redressability,”¹⁶⁶ and Stevens responding that it was not his understanding that had changed, but the state of the Court’s standing doctrine due to the “current fascination with ‘redressability.’”¹⁶⁷

While there are legitimate questions as to whether Justice Stevens’ view of EPCRA’s citizen suit provision is sound, his interpretation of the *Gwaltney* decision seems more compatible with the text of the opinion and with the discussion reflected in the internal memoranda than does Scalia’s. Faced with the fact that the Court in *Gwaltney* spoke extensively of subject matter jurisdiction, Scalia strives to distinguish it by claiming that “[j]urisdiction . . . is a word of many, too many, meanings,”¹⁶⁸ and finding that the language of Clean Water Act section 505 differs from that of EPCRA section 11046 sufficiently to make it unlikely that Congress intended to make an ongoing violation a jurisdictional prerequisite.¹⁶⁹ Calling *Gwaltney* a “drive-by” jurisdictional ruling, Scalia goes further in suggesting that the majority’s opinion on this issue may not be a ruling at

¹⁶⁵ *Id.* Not only did Justice Stevens and Justice Scalia disagree on how to interpret *Gwaltney*, they seemed to disagree on what was actually in the opinion, with Stevens writing that standing was not discussed in *Gwaltney*, and Scalia asserting that standing was found. *See id.* at 1011, 1025. In fact, as Stevens explains in a note, standing was addressed, but only in relation to the principal holding. *See id.* at 1025 n.13. Plaintiffs’ standing was not specifically examined, it was perhaps implicitly decided.

¹⁶⁶ *Id.* at 1013.

¹⁶⁷ *Id.* at 1024 n.9.

¹⁶⁸ *Id.* at 1010 (quoting *U.S. v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). We are again reminded of Humpty Dumpty and poor Alice. *See supra* note 58 and accompanying text.

¹⁶⁹ *See Steel Co.*, 118 S. Ct. at 1010. Scalia seems to question whether CWA § 505 did indeed address subject matter jurisdiction, noting that a particular phrase of § 505 “strongly suggested (perhaps misleadingly) that the provision was addressing genuine subject-matter jurisdiction.” *Id.*

all, but mere dictum with no precedential effect.¹⁷⁰ In support of this view, Scalia contends that the opinion displayed not “the slightest awareness that anything *turned upon* whether the existence of a cause of action for past violations was technically jurisdictional—as indeed nothing of substance did.”¹⁷¹ He declaims, “[t]he short of the matter is that the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court.”¹⁷²

In his eagerness to distinguish *Gwaltney*, Scalia ignores the fact that from the time defendant filed its motion to dismiss based on *Hamker*, *Gwaltney* was about subject matter jurisdiction. Defendant pled in that manner,¹⁷³ the district court ruled on the issue,¹⁷⁴ the court of appeals denominated the claim as subject matter jurisdiction,¹⁷⁵ and it was briefed and argued before the Supreme Court as subject matter jurisdiction.¹⁷⁶

¹⁷⁰ See *id.* at 1011.

¹⁷¹ *Id.* at 1010-11.

¹⁷² *Id.* at 1011. He notes that, in any event, the district court had statutory jurisdiction because continuing violations were alleged, which seems to go beyond his concurrence in *Gwaltney*. See *id.* Moreover, Scalia claims that in *Gwaltney* Article III standing was found. See *id.* His remarks in this regard are somewhat puzzling since the majority did not address the standing issue and Scalia argued in his concurring opinion that, even under Marshall’s theory of the case, on remand the lower court should be directed to inquire into the existence of plaintiffs’ standing. See *Gwaltney*, 484 U.S. 49, 70-71 (1987). Scalia perhaps meant that the standing issue was implicitly decided. See *supra* note 169 and accompanying text.

¹⁷³ See Defendant’s Motion to Dismiss For Lack Of Jurisdiction at 4, *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985) (No. 84-0366-R) (arguing that when no violation is ongoing § 505 “does not create jurisdiction of the subject matter”).

¹⁷⁴ See *Gwaltney I*, 611 F. Supp. 1542, 1547-1551 (E.D. Va. 1985).

¹⁷⁵ See *Gwaltney II*, 791 F.2d 304, 308 (4th Cir. 1986).

¹⁷⁶ This is reflected in the brief of the United States in which the Solicitor General outlined the matter succinctly:

Section 505 requires a citizen to allege, as an essential element of his private enforcement action, that the defendant is failing to comply on a continuous or intermittent basis with his permit requirements. That allegation, when made in good faith and well grounded in fact (Fed. R. Civ. P. 11), states a cause of action under Section 505 that falls within a federal district court’s subject matter jurisdiction As this Court has observed, subject matter jurisdiction “is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case” *Davis v. Passman*, 442 U.S. 228, 239 n.18

Arguing that even if *Gwaltney* was correct that an ongoing violation was requisite for subject matter jurisdiction under Clean Water Act section 505, Scalia contends that it did not revise the Court's "established jurisprudence that the failure of a cause of action does not automatically produce a failure of jurisdiction."¹⁷⁷ Nor did it adopt "the expansive principle that a statute saying 'the district court shall have jurisdiction to remedy violations [in specified ways]' renders the existence of a violation necessary for subject-matter jurisdiction."¹⁷⁸ Justice Stevens, Scalia wrote, "wishes to resolve, not whether EPCRA authorizes this plaintiff to sue (it assuredly does), but whether the scope of the EPCRA right of action includes past violation. Such a question, we have held, goes to the merits and not to statutory standing."¹⁷⁹

One might argue that all of this is a contrived interpretation on Scalia's part, because if the statutory question is not a jurisdictional one, then standing and the "fascinating" doctrine of redressability can be reached immediately. Unfortunately for citizen litigants, the redressability issue became the key point in *Steel Company*. After spending an inordinate amount of effort refuting Justice Stevens' contention that the statutory issue might be addressed before the constitutional one, Scalia disposed of the primary issue in short order, ruling that none of the relief sought by plaintiff/respondent would likely remedy its injury, and that standing was therefore lacking.¹⁸⁰ The principle relief sought, imposition on the company of penalties payable to the federal Treasury for failing to

(1979). A citizen plaintiff must satisfy the conditions set forth in Section 505 to state a cause of action falling within the federal court's subject matter jurisdiction. To obtain relief, the citizen must also demonstrate, of course, that he possesses standing to bring the action and that he is entitled to an available remedy.

Brief for the United States as Amicus Curiae Supporting Affirmance at 15 & n.19, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (No. 86-473). The Solicitor further argued:

Section 505's use of the word "alleged" in conjunction with the phrase "to be in violation" indicates that for purposes of satisfying the statutory threshold, the question whether the citizen plaintiff has an actionable claim—and likewise whether the district court may hear that action—depends on the allegations contained in the complaint rather than the proof eventually adduced at trial.

Id. at 16 n.23.

¹⁷⁷ See *Steel Co.*, 118 S. Ct. at 1011.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 1018-20.

timely file required reports, would have provided no remediation of an injury to the plaintiff in the Court's view, but instead served only to vindicate an "undifferentiated public interest" in enforcement of the law.¹⁸¹ The Court ruled this could not serve as a basis for standing.¹⁸² The impact of this ruling is substantial since, by basing the ruling on a constitutional interpretation, the Court undercut Congress' ability to provide citizens a cause of action to seek penalties for past violations, thereby insulating past unlawful conduct unaccompanied by present violations.¹⁸³

In spite of this unfortunate outcome, it is Justice Scalia's analysis of EPCRA section 11046 and conclusion that the statute did not address

¹⁸¹ *Id.* at 1018.

¹⁸² *Id.* at 1018-20.

¹⁸³ The pernicious impact of the decision has already been observed. In *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1111 (1999), the Fourth Circuit, relying on *Steel Company*, reasoned that redressability must continue to exist at every stage of review. *See id.* at 306. Accordingly, it held that an action to enforce the Clean Water Act became moot on appeal for lack of redressability because plaintiffs had not appealed the denial of their requests for declaratory and injunctive relief, and thus the only potential relief available at that time was the payment of penalties to the Treasury. *See id.* at 306. The court therefore overturned the district court's verdict assessing a penalty of \$405,800 against the company for numerous violations of its wastewater discharge permit. *See id.* at 306-07. It also noted that attorneys' fees would not be available to plaintiffs because they were not substantially prevailing parties as required under the Act. *See id.* at 307 n.5 (citing 33 U.S.C.A. § 1365(d) (West Supp. 1998)). The case has caused considerable consternation among environmentalists, and its outcome could have a substantial impact on the future of citizen suits. *See* William Glaberson, *Novel Antipollution Tool is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1.

Two district courts have followed *Laidlaw* in dismissing citizen suits. In *San Francisco Baykeeper v. Cargill Salt Division*, No. C-96-02161-CAL (N.D. Cal. Sept. 2, 1998), the judge ruled that citizens can never seek civil penalties in any citizen suit because the Supreme Court announced an "absolute rule of law" that penalties do not redress a citizen's injuries. Order (Nov. 19, 1998) (on file with author). Subsequently, the court in *Dubois v. United States Dep't of Agric.*, 20 F. Supp.2d 263 (D.N.H. 1998), held that because the plaintiffs, by winning their claim for injunctive relief, had mooted their claim for penalties. *See id.* at 268. The court reasoned that because it had enjoined the defendant from further violations, "[a]bsent evidence of continuing misconduct, there are no imminent violations of the [Clean Water Act] for civil penalties to deter." *Id.* at 268. Public interest attorney James Hecker noted that these cases create a framework "where you can't get penalties if you either win or lose injunctive relief." *See* Letter from James M. Hecker, Trial Lawyers for Public Justice, to Ann Powers (Oct. 28, 1998) (on file with author). This line of decisions could result in the citizen suit provisions being reduced to a federal cause of action to abate a continuing nuisance, which by statutory structure and legislative history is clearly not what Congress intended.

subject matter jurisdiction in the same manner as section 505 of the Clean Water Act that seems more accurate than Justice Stevens', and more consistent with the jurisprudence. It may be the *Gwaltney* decision that was, after all, an aberration, creating a "peculiar" and "eccentric" form of subject matter jurisdiction.

IX. CONCLUSION

Justice Marshall was convinced that Congress meant what it said when it used the "alleged to be in violation" phrase, a view that anyone who has participated in the legislative drafting process may find questionable.¹⁸⁴ But he perceived the jurisdictional debate in *Gwaltney* to arise from the specific language of section 505, and thought it unlikely that the decision would be relevant to statutes which did not contain the same formulation.¹⁸⁵ Consequently, he might well have concurred with Scalia's position on this point in *Steel Company*. Indeed, if Justice Scalia's opinion in *Steel Company* is any indication, *Gwaltney*'s jurisdictional ruling may be reduced eventually to a narrow ruling on subject matter jurisdiction based on the "peculiar" language of section 505, or even to dicta. This might benefit citizen litigants when the jurisdictional sweep of other citizen suit statutes is being considered, since arguably only under statutes containing "alleged to be in violation" language is an on-going violation necessary for jurisdiction. But what one hand giveth the other taketh away, since an ongoing violation might have to be proven to prevail on the merits, depending on how the statute is construed, and more importantly, on what now appears to be required to meet the redressability test for standing.¹⁸⁶ Even if a court, in examining a citizen suit provision, found that Congress did not intend to limit citizens to suits in which a violation was ongoing, the Article III standing doctrine laid out in *Steel*

¹⁸⁴ The author has worked on legislative matters in numerous contexts, including as an attorney with the Land and Natural Resources Division, U.S. Department of Justice.

¹⁸⁵ See *Gwaltney*, 484 U.S. 49, 64-67 (1987).

¹⁸⁶ There appear to be at least six votes, and perhaps seven, for this standard. Scalia was joined in his opinion by Rehnquist, Thomas, Kennedy and O'Connor. See *Steel Co.*, 118 S. Ct. at 1008. Justice Breyer concurred in the part dealing with redressability. See *id.* at 1020-21. Justice Souter's position is not clear, since he joined Justice Stevens' concurrence, except for the part dealing with redressability. See *id.* at 1021. Justice Ginsburg did not join on that issue either, writing that she would follow *Gwaltney*, and "resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do." *Id.* at 1032.

Company would impose the same requirement, and arguably do so in a fashion difficult for Congress to alter because of its constitutional grounding.¹⁸⁷

In the final analysis, *Gwaltney* has raised substantial impediments to citizen litigation, preventing some suits from being initiated or maintained, and making all litigation more difficult and costly. Some of the difficulties might have been ameliorated had the Court more carefully crafted its opinion to spell out, as it did in some of its internal documents, the standards imposed upon a citizen litigant in bringing and proving his case. It raised issues that have not been adequately addressed by later decisions and will continue to present difficulties for citizen litigators. Beyond that, the decision imposed serious limitations on citizen suits which do not constrain government prosecutions such as *United States v. Smithfield*, and were not intended by Congress. As a consequence, it will be critically important that the government's enforcement presence, as reflected in the Department of Justice's recent prosecution of Smithfield Foods, is strong and effective. Even so, the minimization of citizens' ability to litigate important environmental cases is extremely unfortunate. Citizen suits have been a crucial tool in curbing pollution and achieving the present level of environmental compliance. Courts should exercise care in limiting a mechanism with such a lengthy legal history, which Congress deemed essential in protecting the environment and which has proved so successful.

¹⁸⁷ It has been suggested that a citizen suit provision which provided even a nominal sum to be paid directly to a prevailing plaintiff would remedy the redressability problem. See Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 178-79 (1994). Justice Scalia's discussion of penalties in *Steel Company* appears to lend support to this suggestion. See *Steel Co.*, 118 S. Ct. at 1018 (penalties under EPCRA "might be viewed as a sort of compensation or redress to respondent if they were payable to respondent").