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Do Citizens Suits Seeking Civil Penalties Become Moot When Pollution Violations Are Cured (98-822) Environmental

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Do Citizen Suits Seeking Civil Penalties Become Moot When Pollution Violations Are Cured?

by William L. Andreen

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Early in the 1970s, Congress turned its attention to the quality of the nation's water resources and found that the existing federal water-pollution-control program had failed to slow water pollution. Confronted with the dual problems of water-quality degradation and the lack of an effective program for controlling water pollution, Congress chose to chart a new course when it enacted the Clean Water Act in 1972. Since one of the weaknesses of the earlier program lay in the area of enforcement, Congress designed the new Act with an eye toward enforceability.

The control strategy of the Clean Water Act pivots around a broad prohibition against "the discharge of any pollutant by any person" from a point source to waters of the United States, unless the discharger complies with a number of requirements. 33 U.S.C. § 1311(a) (1994). The Act required the U.S. Environmental Protection Agency (EPA) to establish technology-based effluent limitations that apply to every discharger in a particular industrial category.

To implement and monitor compliance with these limitations, as well as any more stringent discharge limitations needed to meet water-quality standards in a receiving water, the EPA requires that every discharger must obtain a permit and comply with its terms. The National Pollutant Discharge Elimination System (NPDES) issues these permits, which serve as a mechanism for transforming most regulatory requirements into obligations applicable to a specific discharger. More than 40 states have been authorized to issue NPDES permits, and these states must apply federal requirements unless their own regulations are more stringent.

Enforcement was greatly facilitated by this permit scheme because precise numerical limits are generally imposed upon point-source dis-

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FRIENDS OF THE EARTH V. LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.
DOCKET NO. 98-822

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FROM: THE FOURTH CIRCUIT

Case at a Glance

Laidlaw Environmental Services operated a hazardous-waste incinerator whose waste-water discharges often violated permit conditions. Although a number of violations occurred after a citizens' suit was filed, Laidlaw improved its performance and came into compliance during the course of the litigation. The Supreme Court must now decide whether the Fourth Circuit erred in holding that the plaintiffs' claim for civil penalties was constitutionally "moot" because their injury could not be redressed by a civil penalty paid into the United States Treasury in the absence of a live claim for injunctive relief.

chargers. Congress also authorized the EPA to impose substantial monitoring and reporting requirements upon the regulated community, an authority that the EPA has exercised. Each permittee, therefore, must monitor its discharge and report the results to the EPA and the relevant state agency. The determination of a violation is thus a rather simple affair in many instances, requiring only a comparison of permit conditions with the permittee's actual performance.

The Clean Water Act also created a wide array of sanctions for violations of the Act. The federal government was authorized to enforce the Act through the use of administrative orders, civil actions for injunctive relief and civil penalties, and criminal prosecutions. State agencies, moreover, were recognized as possessing concurrent power to enforce state-issued permits. And to supplement as well as induce government enforcement, Congress empowered private citizens to act as private attorneys general to enforce the Act. Not only could citizens request injunctions to abate violations, but they could also seek the imposition of civil penalties, although legislative history indicates that these should be paid—just as in cases brought by the federal government—into the federal treasury. With public access to discharge-monitoring information from every permit holder in the country, this provision held real potential for large-scale citizen enforcement.

Citizen-suit enforcement, however, had been relatively rare until federal enforcement declined precipitously in the early 1980s. Concerned about this state of affairs, a number of environmental groups embarked upon a drive to enforce the Clean Water Act by filing dozens of citizen suits. The number of such suits, however, has declined over the last 12 years. This decline may be due, in part, to more consistent levels of federal enforcement and to a number of judicial decisions that have made it more difficult for citizens to pursue these cases. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49 (1987), the Supreme Court held that the authorization of a citizen suit against any person "alleged to be in violation" of the Clean Water Act (33 U.S.C. § 1365(a)(1)) meant that a citizen could not file suit for a wholly "past" violation. Nevertheless, a citizen-plaintiff could pursue "a good-faith allegation of continuous or intermittent violation." *Gwaltney,* 484 U.S. at 64.

More recently, the Supreme Court dealt with a citizen suit arising under the Emergency Planning and Community Right-to-Know Act (EPCRA), a statute that may have actually authorized the filing of a citizen suit for a past infraction. The Court held, however, that a citizen-plaintiff lacked constitutional standing to sue when there was no allegation of a continuing violation or the likelihood of a future violation. *Steel Company v. Citizens for a Better Environment,* 118 S.Ct. 1003 (1998). The Court concluded that in such a case neither civil penalties payable to the treasury nor an injunction dealing with the future inspection of records would redress the plaintiff's past injury.

ISSUES

Is a citizen suit brought seeking civil penalties under the Clean Water Act constitutionally moot for lack of redressability because the defendant has come into substantial compliance during the pendency of the litigation despite the fact that violations were occurring when the complaint was filed?

If such a case is dismissed for mootness, can the citizen-plaintiff be awarded attorneys' fees as a prevailing or substantially prevailing party because the violations ceased as a result of the litigation?

FACTS

For a number of years, Laidlaw Environmental Services (TOC), Inc. operated a hazardous waste incinerator near the North Tyger River in South Carolina. In 1987, the South Carolina Department of Health and Environmental Control (DHEC) issued an NPDES permit to Laidlaw that limited its discharge of mercury and other pollutants into the river. The mercury limit was not derived from a uniform national effluent limitation; rather, it was set at a more stringent level to protect the water quality of the receiving stream. Between 1987 and the time the complaint was filed, Laidlaw violated the mercury limitation in its permit 476 times and the non-mercury discharge limitations 420 times. There were also 900 monitoring or reporting violations during the same time period.

These violations occurred even though Laidlaw had installed new pollution-control equipment in 1988. After a new pollution-control system was constructed in 1991, Laidlaw came into compliance with all of its discharge requirements except for mercury. The mercury violations, in fact, increased in early 1992. On April 10, 1992, the Friends of the Earth sent Laidlaw a notice letter, as required under the Clean Water Act, stating its intention to file a citizen suit pursuant to the Act after the expiration of 60 days. Before the notice period ended, however, DHEC filed suit against Laidlaw in state court and negotiated a consent decree in early June that imposed a civil penalty of $100,000 for all previous violations and required Laidlaw to "use every effort ... to achieve compliance."

The citizen suit was brought on June 12, 1992. Laidlaw sought to dismiss the suit on the grounds that it was precluded by DHEC's diligent prosecution of Laidlaw. The district court denied the motion, finding that the state's enforcement action had not been diligent, in part, because the $100,000 penalty did not remove the economic benefit to Laidlaw resulting from the violations. 890 F.Supp. 470 (D.S.C. 1995).

In July 1992, Laidlaw adjusted the rate at which mercury was fed into its incinerator and, later in the year, installed additional equipment that increased the ability of its carbon filters to remove mercury. As a result of these efforts, the number of mercury violations subsided. Nevertheless, the mercury limit was violated 13 times after the citizen suit was filed in June.

After a three-day trial, the district court found that Laidlaw was indeed liable for the above violations. The court also found that Laidlaw had reaped an economic benefit of more than $1 million from its permit violations, although it decided that a civil penalty of $405,800 would be an adequate deterrent. 956 F.Supp. 588 (D.S.C. 1997). The court denied the plaintiffs' request for injunctive relief since Laidlaw had come into substantial compliance with its permit during the second half of 1992.

Both Laidlaw and the plaintiffs appealed. The Fourth Circuit vacated the decision as moot. 149 F.3d 303 (1998). In doing so, the Fourth Circuit concluded, based upon the Supreme Court's decision in *Steel Co.*, that since injunctive relief had been denied, the only possible relief the plaintiffs could receive would take the form of civil penalties payable to the treasury, a form of relief that would not "redress any injury suffered by a citizen-plaintiff." 149 F.3d at 306. The Fourth Circuit also held that the plaintiffs could not recover attorneys' fees since they had failed to obtain judicial relief on the merits of their claims and thus were not "prevailing or substantially prevailing part[ies]." 149 F.3d at 307, n.5.

The Supreme Court of the United States subsequently agreed to review the Fourth Circuit's decision. 67 U.S.L.W. 3397 (March 1, 1999).

Case Analysis

The outcome in this case may well turn on whether the holding in *Steel Co.* will be limited to the particular facts of that case—a citizen suit in which the plaintiff did not and could not allege a continuing violation—or whether the broad language in *Steel Co.* concerning the inability of civil penalties to redress private harm will be extended to a case in which there were continuing violations at the time the suit was filed.

Standing in the way of this extension is the Supreme Court's earlier decision in *Gwaltney,* in which standing to seek civil penalties was recognized as long as the complaint contained good-faith allegations of continuing violations. The Court, in short, will have to decide whether the "redressability" analysis in *Steel Co.* should be limited to threshold determinations of standing or whether it should be extended to what have been considered questions of mootness that can arise after years of litigation.

The plaintiffs contend that the case is governed by *Gwaltney,* not *Steel Co.* According to the plaintiffs, *Gwaltney* is indistinguishable from this case since the plaintiffs there alleged, unlike the plaintiffs in *Steel Co.*, an ongoing violation of the statute. Thus in both *Gwaltney* and the present case, the plaintiffs sought relief that would have redressed their injuries. Moreover, by the time the Court issued its opinion in *Gwaltney,* there had been no violations for more than three years.The only remaining claim the plaintiffs could press was for civil penalties. Despite that fact, the Court specifically held that the plaintiffs had constitutional standing.

The plaintiffs also argue that *Gwaltney* demonstrates in another way that injunctive relief is not a condition precedent to the imposition of civil penalties. In this regard, the plaintiffs rely upon the Court's statement that "citizens ... may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 484 U.S. at 59. The plaintiffs contend that since civil penalties can abate ongoing violations by creating an economic incentive for future compliance, the penalties can stand alone, even when injunctive relief is unavailable. In *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982), moreover, the Supreme Court stated that injunctions were not the only way to ensure compliance under the Clean Water Act and then cited civil penalties as another enforcement device.

In addition, five courts of appeal have held that claims for civil penalties in citizen suits under the Clean Water Act are not moot even after claims for injunctive relief are no longer viable because the penalties serve as deterrents to further violations by defendants. The district court in this case, furthermore, noted that the civil penalty it imposed would deter future violations by Laidlaw—thus, plaintiffs say, these penalties would redress their harm.

The plaintiffs also try to distinguish *Gwaltney* and *Steel Co.* from the

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present case by pointing to the difference in the standards for standing and mootness. While standing serves as a gatekeeper to keep nonjusticiable cases out of court, mootness does not serve the same function. By the time mootness is raised as an issue, a case has generally been litigated for a considerable period of time, sometimes years. Thus, the cases making dismissal for mootness difficult serve to protect the rights and resources not only of the parties but of the courts as well. As a result, a defendant must meet a heavy burden before a case can be dismissed as moot, and the Fourth Circuit erred by applying a standing case, *Steel Co.,* to decide a question of mootness. In doing so, the plaintiffs argue, the Fourth Circuit has undermined a carefully crafted congressional program authorizing citizen enforcement of federal environmental law.

According to the plaintiffs, to help ensure effective enforcement, Congress placed a citizen-suit provision in virtually all modern environmental legislation. Congress recognized, according to the legislative history of the provision, that because government would never have the resources to fully enforce the law, citizens would provide a vital and necessary supplement to government enforcement efforts. Plaintiffs contend that the Fourth Circuit's decision would eviscerate this alternative enforcement device. First, if civil penalties cannot be imposed for ongoing violations as long as the defendant comes into compliance at some point during the litigation, defendants would have an incentive to continue violating the Act for some length of time, as well as an incentive to extend the litigation for as long as possible. Second, citizens would be less likely to invest years of time and expense in a case which, regardless of its original merits, can be dismissed at a later time with no consequence to the defendant.

Laidlaw, of course, disagrees. In doing so, it relies heavily upon the language in *Steel Co.* to press its argument that the requirements of constitutional standing are as important later in a case as at its inception. Laidlaw contends, therefore, that the Fourth Circuit properly dismissed the appeal because once the plaintiffs' claim for an injunction was rejected, the case no longer presented a justiciable case or controversy under Article III of the Constitution. In short, when the appeal became focused solely upon the amount of a civil penalty that would be paid to the United States Treasury, the plaintiffs were pursuing a form of relief from which they could derive no personal benefit. At that time, these citizen plaintiffs no longer had a cognizable legal interest in the relief they sought and thus no standing to maintain the case.

Laidlaw concedes that the plaintiffs may have derived some satisfaction from seeing a company that caused them harm pay penalties to the federal treasury. But Laidlaw cites *Steel Co.* to the effect that such psychic gratification is not an acceptable Article III remedy. 118 S.Ct. at 1019. In fact, Laidlaw claims, again citing *Steel Co.,* that by requesting civil penalties a citizen plaintiff actually "seeks not remediation of its own injury ... but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the law]." *Id.* at 1018.

Moreover, according to Laidlaw, the plaintiffs stretched *Gwaltney* out of shape when they claimed that the Supreme Court held that civil penalties can stand alone as relief in a case since they can abate a violation. Laidlaw argues that the Court's statement that "citizens ... may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation" (484 U.S. at 59) is completely consistent with its view that civil penalties can be sought only in conjunction with an injunction or declaratory relief, because the Court failed to say or imply that a penalty could abate a violation.

In Laidlaw's view, moreover, standing cannot be conferred through the deterrent effect of a civil penalty because the real heart of deterrence is the prospect of future penalties for future violations, not the assessment of penalties for past wrongdoing. Since Laidlaw had come into compliance years before the penalties were exacted, the threat of future harm was extremely low, thus rendering the deterrence argument tenuous at best. Indeed, if there were a real possibility of future injury, the court's primary response would be to issue an injunction rather than to assess penalties for past violations in the hope that the penalties might deter continued misconduct. While Laidlaw admits that penalties have some general deterrent value, it insists that such general deterrence would not provide a plaintiff with the kind of specific relief needed to redress the plaintiff's own particular injury.

Laidlaw insists that the plaintiffs are incorrect in characterizing *Steel Co.* as a standing case while characterizing the present case as involving the less rigid doctrine of mootness. In contrast to plaintiffs' stance, Laidlaw contends that there is no constitutional distinction between the two doctrines, since they both derive from the same Article III requirement that courts only entertain cases posing a real controversy. The ultimate question for addressing either mootness or standing,

therefore, is whether there continues to be a controversy for which the court can provide redress.

In addition to vacating the district court's ruling on civil penalties, the Fourth Circuit in this case held that since the plaintiffs had failed to prevail on the issue of penalties, an award of attorneys' fees would not be appropriate. The plaintiffs vigorously contest that conclusion and insist that they would be entitled to attorneys' fees even if the case were moot. The plaintiffs argue that the Supreme Court has recognized for years that a lawsuit may produce voluntary action by a defendant that provides a plaintiff with all or part of the relief it sought. And when a lawsuit acts like a catalyst in bringing about the desired end, the Supreme Court has held that a plaintiff may be deemed to have "prevailed" despite the absence of a enforceable judgment.

According to the Fourth Circuit, however, the catalyst rule was rejected by the Supreme Court in *Farrer v. Hobby,* 506 U.S. 103 (1992). In *Farrer,* the Court stated that in order to prevail for the purposes of obtaining fees, a civil rights "plaintiff must obtain an enforceable judgment against the defendant ... or comparable relief through a consent decree or settlement." 506 U.S. at 111. Plaintiffs contend that this statement alone does not overrule the catalyst doctrine. First, the Court in *Farrer* was not addressing a situation in which a defendant had voluntarily modified its behavior in response to a lawsuit. Second, it is simply not plausible to believe that the Court intended to extinguish such a well-established principle of law without explicitly indicating that it was doing so.

Laidlaw replies that *Farrer* does control, and it requires some kind of enforceable relief before a party can be deemed as prevailing for purposes of attorneys' fees. Even if the catalyst doctrine was not rejected in *Farrer,* Laidlaw contends the plaintiffs are not entitled to an award of attorneys' fees because the citizen suit had nothing to do with the company's compliance. Instead, it was the company's own conduct and the intervention of the state that brought about the solution to the mercury violations. Laidlaw also argues that the question of attorneys' fees may not have been ripe for decision by the Fourth Circuit because in its view the district court never had jurisdiction over the case in the first instance.

Since this question of initial jurisdiction was not reached by the Fourth Circuit and appears to involve questions of fact, the Supreme Court might decide to remand the question to the Fourth Circuit. It is possible, however, that the Court will address the issue.

Laidlaw asserts that the district court never had jurisdiction because the plaintiffs never demonstrated that the mercury violations had actually harmed the environment. Furthermore, Laidlaw argues that South Carolina had diligently prosecuted a case against it, thus precluding a citizen suit under the Clean Water Act. The district court erred in this regard, according to Laidlaw, because it focused upon the amount of the civil penalty rather than on DHEC's long-term efforts to bring Laidlaw into compliance, including the June 1992 consent decree requiring Laidlaw to "use every effort" to cease its violations. Since the plaintiffs can have no personal interest in the amount of a civil penalty that goes into a government coffer, the diligent prosecution inquiry should only be directed at direct compliance efforts, not the amount of a penalty.

Plaintiffs respond that in order to have standing they only need to show harm to themselves, not the environment. And this showing has been made, since their members have demonstrated that they use or would use the river and that their use and enjoyment (such as fishing and hiking) have been adversely affected by Laidlaw's excessive discharges of mercury. Requiring environmental harm as a condition precedent to enforcement of the Clean Water Act, moreover, would upset Congress' regulatory scheme in the Clean Water Act, which focuses primarily on discharges rather than on the regulation of water bodies. Congress made this change in 1972 because it had proved so difficult to link poor water quality to a particular point-source discharge. But even if a showing of environmental harm were required, plaintiffs claim that they have such proof. The mercury limitation in Laidlaw's permit was designed to ensure that the river would meet its water-quality standard for mercury—a standard that was violated, due to Laidlaw's discharges, at least 134 times.

Finally, Laidlaw suggests that the entire case has been mooted by its closure of the North Tyger River incinerator, the dismantling of the facility, and the cessation of its waste-water discharge. In Laidlaw's opinion, therefore, the Court should dismiss the Writ of Certiorari without dealing with any of the other issues that have been raised. Plaintiffs, on the other hand, contend that the closure of the facility does not moot the case. Laidlaw has chosen to keep its NPDES permit and could, if it chose, resume discharging at the facility. Even if it never does so, however, the plaintiffs contend that the case is not

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moot because the penalty assessed in this case will help deter Laidlaw and its corporate affiliates from violating their NPDES permit at four other facilities where violations have occurred and plaintiffs have members whose environmental interests have been harmed.

SIGNIFICANCE

Since the early 1970s, private citizens have been empowered through statutes such as the Clean Water Act and Clean Air Act to act as private attorneys general to enforce most of the nation's environmental statutes. This role has always been controversial. Some would argue that citizen-suit provisions enable private citizens to sue over technical violations that government enforcers believe are not serious enough to merit formal enforcement. Others would contend that the citizen-suit device is a crucial tool that enables citizens to pick up the slack when government is either unable or unwilling to act.

In recent years, a number of courts have been subjecting these cases to closer scrutiny and, in some instances, have more narrowly analyzed the standing that private citizens must have to enforce federal environmental law. The decision under review in this case examines that line of analysis further. Although the plaintiffs in this case had standing when the complaint was filed (because the discharger's violations were ongoing at the time), the Fourth Circuit's opinion held that the case became moot when the discharger eventually came into compliance. At that point, there were no violations to enjoin and, according to the Fourth Circuit, the plaintiffs could not be compensated for past harm by penalties that would flow, not to their pockets (a form of relief that is unavailable in a citizen suit), but to the United States Treasury.

If the Supreme Court affirms, a polluter could avoid liability for civil penalties in a citizen suit as long as it comes into compliance at some point prior to final judgment—even if that takes years. Of course, a polluter could always have mooted the imposition of injunctive relief by coming into compliance, but this case could also write off a polluter's pecuniary liability for past violations. At least as damaging to citizen suit enforcement, however, is the Fourth Circuit's holding that a polluter is not obliged to pay attorneys' fees to a citizen enforcer unless the citizen obtains an enforceable judgment.

Should the Supreme Court affirm, its decision might well be the death knell for the catalyst theory of attorneys' fees, which provides that an award of fees is appropriate when a suit acts as a catalyst in bringing about a defendant's compliance. An award of attorneys' fees—a crucial incentive for encouraging citizens to act as private attorneys general—could thus be thwarted by voluntary compliance even when that compliance would not have occurred but for the filing of the citizen suit. Such an outcome would certainly mean that fewer citizen suits would be brought in the future. As a consequence, the level and vigor of government enforcement action at the state and federal levels would assume even greater significance, while the role of private enforcement actions as a supplement and goad to government action would decline.

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