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Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.: The Preclusion of Actions to Redress Wholly Past Violations of the Clean Water Act

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CASENOTES

GWALTNEY OF SMITHFIELD V. CHESAPEAKE BAY FOUNDATION, INC.: THE PRECLUSION OF ACTIONS TO REDRESS WHOLLY PAST VIOLATIONS OF THE CLEAN WATER ACT

RECENTLY, the United States Supreme Court rendered an opinion which may lay to rest a steadily growing controversy as to the application of section 505(a) of the Clean Water Act.[1] In *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*,[2] the Supreme Court held that section 505(a) does not permit citizen suits for wholly past violations.[3] Although this decision may initially appear to inhibit the enforcement mechanisms of the statute, the Court, in effect, expanded its subject matter jurisdiction, so that the decision actually enhances the impact of the citizen suit provision.[4]

In order to fully understand the impact of the decision ren-

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1. In its entirety, section 505(a) (codified at 33 U.S.C. § 1365(a) (1986)) provides as follows:

> Except as provided in subsection (b) of this section, 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.

33 U.S.C. § 1365(a) (1986), *amended by* 33 U.S.C. § 1365(a) (Supp. 1988).

2. 108 S. Ct. 376 (1987).

3. *Id.* at 381.

4. *Id.* at 386. (The jurisdictional issues discussed in this Note are strictly limited to the congressional grant under the Clean Water Act.).

dered in *Gwaltney*, a basic understanding of the Clean Water Act's enforcement mechanisms is essential. The Clean Water Act was enacted in 1972 for the purpose of restoring and maintaining the chemical, physical, and biological integrity of United States' waters.[5] As a means of achieving this goal, Congress installed a permit program, known as The National Pollutant Discharge Elimination System (NPDES), which allows companies to pollute if they stay within the specific constraints set forth in their individualized permits.[6] To aid in the monitoring of permit holders, the Act allows states to establish and administer their own permit programs, provided that they conform to federal guidelines.[7]

If a state or federal official discovers a permit violation, the polluter may be subject to administrative, criminal, and civil penalties.[8] The Act provides a separate section for citizen suits which allows "any citizen" to "commence" a civil action against: (1) the plan's administrator for failure to properly perform his duties, and (2) "any person . . . who is alleged to be in violation" of a state or federal effluent standard.[9]

Pursuant to these statutory provisions, the State of Virginia established a NPDES program. In 1974, the State of Virginia Water Control Board issued a permit to the previous owners of Gwaltney's meat packing plant, permitting them to discharge seven regulated pollutants into the nearby Pagan River.[10] Gwaltney of Smithfield (Gwaltney) assumed ownership of the plant in 1981 and utilized the plant to pack and process pork products.[11] Shortly thereafter, Gwaltney's plant began to register violations on its discharge monitoring reports.[12] These violations were consistently reported until mid-1984,[13] with the last reported violation occurring on May 15, 1984.[14]

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5. 33 U.S.C. § 1251 (1986).
6. *Id.* § 1342.
7. *Id.* § 1342(b).
8. *Id.* § 1319.
9. *Id.* § 1365(a).
10. Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 108 S. Ct. 376, 379 (1987).
11. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1544 (E.D. Va. 1985).
12. *Id.* at 1545.
13. *Gwaltney*, 108 S. Ct. at 379 ("The most substantial of the violations concerned the pollutants fecal coliform, chlorine, and total Kjeldahl nitrogen (TKN). Between October 27, 1981, and August 30, 1984, petitioner violated its TKN limitation 87 times, its chlorine limitation 34 times, and its fecal coliform limitation 31 times.").
14. *Id.*

In response to these ignored violations, the Chesapeake Bay Foundation and the National Defense Council sent notices to both the federal and state administrative agencies, indicating their intent to commence suit. The Chesapeake Bay Foundation (CBF) is a nonprofit, public interest environmental group with nearly twenty thousand members living in the Chesapeake Bay area.[15] Similarly, the National Resources Defense Council (NRDC) is a national environmental group with over eight hundred members living in the State of Virginia.[16] Although this case was administratively initiated in February of 1984, the plaintiffs did not file their suit until June of 1984, approximately one month after Gwaltney's last recorded violation.[17] In their complaint, the plaintiffs allege that Gwaltney "has violated . . . [and] will continue to violate its NPDES permit," and asked the federal District Court of the Eastern Division of Virginia to provide declaratory and injunctive relief, impose civil penalties, and award attorney's fees and costs.[18]

The district court granted a partial summary judgment in favor of the plaintiffs and held that Gwaltney had violated or was in violation of the Clean Water Act. A trial then proceeded on the remedy issue. Before the district court had an opportunity to render a decision, however, Gwaltney moved to dismiss based on the court's lack of subject matter jurisdiction.[19] The district court concluded that subject matter jurisdiction did exist, and that decision was eventually upheld by the Fourth Circuit Court of Appeals.[20]

I. HISTORY

Prior to the decision rendered by the United States Supreme Court in *Gwaltney*, the appellate courts had arguably developed four different approaches in an effort to determine whether section 505(a) of the Clean Water Act confers jurisdiction on citizen suits for wholly past violations. The following is a brief summary of those approaches.

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15. *Gwaltney*, 611 F. Supp. at 1544.
16. *Id.*
17. *Gwaltney*, 108 S. Ct. at 380.
18. *Id.*
19. *Id.*
20. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986).

A. Fifth Circuit Approach

The first approach was set forth by the Fifth Circuit Court of Appeals in *Hamker v. Diamond Shamrock Chemical Co.*[21] In *Hamker*, the defendant's pipeline leaked, causing oil to flow down a nearby river, damaging the plaintiffs' property. After approximately two weeks, the leak was discovered and plugged. Although the violation had been discontinued, the plaintiffs filed a citizen's suit pursuant to section 505(a) of the Act. In affirming the district court's dismissal, the fifth circuit concluded that a complaint brought under section 505(a) of the Clean Water Act "must allege a violation occurring at the time the complaint is filed," and that "citizens are limited to bringing actions only to remedy an ongoing violation."[22] In light of the circumstances presented by that case, the disadvantages of this strict construction are obvious.

B. First Circuit Approach

An alternate approach was set forth by the First Circuit Court of Appeals in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*,[23] in which various marina owners brought suit pursuant to section 505(a) in response to the defendant's up-stream effluent permit violations, even though the violations had been discontinued. The court concluded "that an action under 33 U.S.C. § 1365 may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."[24] The court affirmed the district court's dismissal, however, due to the fact that since the defendant had ceased operations under its permit, subsequent violations were more than likely not to continue.[25]

C. Fourth Circuit Approach

A third approach was developed by the fourth circuit through its adjudication of the *Gwaltney* case.[26] In refusing to dismiss the plaintiff's suit, the court of appeals held that subject matter jurisdiction existed based on the court's conclusion that section 505

21. 756 F.2d 392 (5th Cir. 1985).
22. *Id.* at 395.
23. 807 F.2d 1089 (1st Cir. 1986).
24. *Id.* at 1094.
25. *Id.*
26. *Gwaltney*, 791 F.2d at 304.

"can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present."[27] This opinion was supported by some rather persuasive commentary from the statute's enacting Congress.[28]

D. Good Faith Allegation Approach

Arguably, a fourth approach was articulated as an alternative in the decisions rendered by the Fourth Circuit Court of Appeals and the federal District Court of the Eastern Division of Virginia in their *Gwaltney* opinions. In footnotes, both courts essentially stated that subject matter jurisdiction may be established in a citizen suit under the Clean Water Act if the plaintiff alleges in good faith that the defendant was continuing to violate its permit at the time the suit was filed.[29]

Consequently, the Supreme Court was confronted with a series of inconsistent lower court decisions. *Gwaltney* presented the Court with a perfect opportunity to dispel the confusion by setting forth a clear definitive statement of the law.

II. GWALTNEY OF SMITHFIELD v. CHESAPEAKE BAY FOUNDATION, INC.

A. Opinion of the Court

As stated earlier, the *Gwaltney* case presented the issue of whether section 505(a) of the Clean Water Act confers federal jurisdiction over citizen suits for wholly past violations.[30] In attempting to resolve the lower court inconsistencies, the Court set forth an opinion which may raise questions as to the statute's subject matter jurisdiction.

1. Statutory Construction

After carefully examining the language, structure and legislative history of section 505 of the Act, the Court found that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation."[31] Although the Court ac-

27. *Id.* at 309.
28. *Id.* at 311-12.
29. *Id.* at 308 n.9; *Gwaltney*, 611 F. Supp. at 1549 n.8.
30. *Gwaltney*, 108 S. Ct. at 381.
31. *Id.* at 382.

knowledged that the language of section 505 is ambiguous, the Court argued that had Congress intended the statute to apply to wholly past violations, it would have used language such as "to have violated," and not "to be in violation."[32] The Court rejected CBF's argument that the ambiguity was the result of a careless legislative accident.[33]

The Court also considered the statute's structure in supporting its conclusion. The majority argued that the statute precludes actions for past violations because its phrasing is almost entirely in the present tense. Specifically, the Court pointed to the Act's definition of the term "citizen," which includes only those "having an interest which *is* or *may* be adversely affected."[34]

Additionally, the Court observed that the Clean Water Act requires citizens to notify violators of their intent to file suit sixty days before commencing an action.[35] Because the only purpose of the notice provision is to give violators an opportunity to comply with the Act[36] and escape the imposition of sanctions, allowing citizens to bring actions for past violations would undermine the function of the notice provision and frustrate administrative discretion.

Finally, the Court's review of the Act's legislative history revealed that most of the enacting Congress intended the citizen suit mechanism to be essentially considered as an "abatement."[37] For the most part, the arguments set forth above were highly persuasive and consequently escaped criticism.

2. Jurisdictional Issues

However, this case was not concluded upon the resolution of the statutory interpretation issues. The Court went on to address the scope of the statute's jurisdictional grant and held that section 505(a) of the Clean Water Act confers jurisdiction over citizen suits when the "citizen-plaintiffs make a good-faith allegation of a continuous or intermittent violation."[38] Consequently, the Court remanded the case to the court of appeals for further

32. *Id.* at 381.
33. *Id.*
34. *Id.* at 382 (emphasis added)(construing Clean Water Act § 505(a), 33 U.S.C. § 1365(g) (1986)).
35. *Id.* (construing Clean Water Act § 505(a), 33 U.S.C. § 1365(b)(1)(A) (1986)).
36. *Id.* at 382.
37. *Id.* at 383.
38. *Id.*

consideration.[39]

The Court reached its conclusion by examining the statute's plain language which merely requires that the defendant be "*alleged* to be in violation" and not be "in violation" of the Act.[40] The Court again rejected the argument that Congress had been sloppy in its drafting of the Act, and concluded that requiring a mere allegation of a violation indicates Congress' recognition of the technological difficulties of detecting chronic environmental violators.[41] The Court further noted that Rule 11 of the Federal Rules of Civil Procedure,[42] which imposes sanctions for the filing of frivolous claims, would prevent federal courts from being innundated with baseless claims of violation of the Clean Water Act.[43]

Gwaltney argued that such a holding would be contrary to traditional notions of standing and allow parties to maintain suits which have been mooted subsequent to filing. In addition, Gwaltney argued that allowing a suit based on mere allegations would grant jurisdiction to parties that have not actually been in-

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39. *Id.*

40. *Id.* at 382 (construing 33 U.S.C. § 1365(a)(1)(ii) (1986)).

41. *Id.*

42. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. B. CIV. P. 11.

43. *Gwaltney*, 108 S. Ct. at 385.

jured.[44] The Court countered this argument by asserting that "a suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact' — not proof — in the complaint or supporting affidavits."[45] The Court noted that if the allegations of standing were not true, then the defendant could contest them through a motion for summary judgment, at which point the burden would shift to the plaintiff to offer evidence to support his allegations.[46]

With respect to the mootness issue, Gwaltney argued that allowing allegations of an ongoing violation would permit citizens to maintain suits after the violator has taken correctional measures and achieved a state of compliance.[47] Again, the Court refused to accept Gwaltney's argument and held that a defendant may be dismissed if he is able to demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."[48]

In reaching this conclusion, the Court looked to *United States v. Concentrated Phosphate Export Ass'n*,[49] which arose out of various allegations of antitrust law violations. The defendants in that case argued that conditions had since changed, making it uneconomical to continue their unlawful course of dealing. In an opinion written by Justice Marshall, the Court refused to accept this defense and held that simply because an unforeseen development renders a particular practice uneconomical, does not make it absolutely clear that the wrongful behavior would not be likely to reoccur.[50]

The *Gwaltney* Court further noted that the mootness doctrine protects plaintiffs "from defendants who seek to evade sanction by

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44. *Id.*

45. *Id.* (The Court stated that this assertion is supported by the decision in Warth v. Seldin, 422 U.S. 490 (1975), wherein various individuals and building companies filed suit against the City of Penfield claiming that its zoning ordinance excluded persons of low and middle income from living within the city. The *Warth* court concluded that the parties did not have standing. Interestingly, Justice Marshall, who wrote the *Gwaltney* opinion, dissented in *Warth*. Not surprisingly, the *Warth* dissent argued against deciding jurisdictional issues based upon predictions as to the outcome of the case on its merits.).

46. *Id.* at 386.

47. *Id.*

48. *Id.*

49. *Id.* (considering United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

50. United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

predictable 'protestations of repentance and reform.' "[51] This reasoning was enunciated in *United States v. Oregon State Medical Soc'y*,[52] which also involved allegations of antitrust violations. That case, however, only considered the factual issue of whether a conspiracy among the medical profession actually existed.[53]

B. The Concurring Opinion in *Gwaltney*

For the most part, Justice Scalia, in his concurring opinion, accepted the majority's view of the substantive interpretation of the Clean Water Act.[54] However, Scalia sharply criticized the majority for creating what he believed to be a new form of subject matter jurisdiction. Scalia believed that the majority opinion was a radical and inappropriate departure from traditional jurisdictional notions.[55]

Scalia interpreted the statute to allow citizens to *commence* actions based on allegations. Proof in support of the facts alleged, he argued, could never be required at the commencement stage. Rather, the allegations must be proven if the facts are challenged. Scalia observed that it is "well ingrained in the law that subject matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged."[56]

To support his position, Scalia cited several cases which address the issue of whether the plaintiff's case in controversy exceeded the requisite dollar amount. In the cited cases, the Court held that the plaintiff bears the burden of supporting the accuracy of the jurisdictional facts alleged if disputed by the defendant.[57] The holding in these cases is clearly more traditional and consequently, more acceptable.

As an alternative, the concurring opinion proposed that a vio-

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51. *Gwaltney*, 108 S. Ct. at 386.
52. United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952).
53. *Id.* at 333.
54. *Gwaltney*, 108 S. Ct. at 386-87.
55. *See id.* at 387.
56. *Id.*
57. Thomson v. Gaskill, 315 U.S. 442 (1942)(dismissing the plaintiffs' claims for railroad seniority rights because the matter in controversy exceeded the requisite dollar amount); KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)(plaintiff's attempt to enjoin defendant for disseminating news gathered by plaintiff dismissed for lack of dollar amount); McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)(dismissing the plaintiff's complaint for want of jurisdiction as the claim failed to support the requisite dollar amount).

lator should be considered to remain in violation of the Act until it has "put in place remedial measures that clearly eliminate the cause of the violation."[58] Based on this view, the issue on remand would be whether Gwaltney "had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought."[59] Scalia believed that this was the preferable approach because it did not require the creation of a novel form of subject matter jurisdiction and also lightened the plaintiff's burden.

III. ANALYSIS

In *Gwaltney*, the United States Supreme Court resolved a steadily brewing controversy as to the applicability of section 505(a) of the Clean Water Act to citizen suits for wholly past violations. By concluding that a citizen suit may only be brought to enjoin or otherwise abate an ongoing violation, the Court has created uniformity amongst the lower courts and a heightened degree of certainty amongst the litigants. Although that choice appears to limit the Clean Water Act's citizen enforcement mechanism, the Court enhanced that tool by allowing actions to lie based on mere good faith allegations of violation.

The majority's approach to the statute's jurisdictional question is somewhat radical and was not intended to apply to non-environmental disputes. The concurring opinion sets forth a more stable and consequently more preferable approach. Through broadening the definition of the phrase "to be in violation," Scalia's approach renders plaintiffs better equipped to withstand jurisdictional attack, without disturbing the traditional approaches to statutory grants of federal jurisdiction. Furthermore, the majority opinion allows a plaintiff to bring claims that may not satisfy the case or controversy requirements of article III of the Constitution. However, such conflicts are beyond the scope of this Note.

Nonetheless, the approaches set forth in the majority and concurring opinions advance the goals of the Clean Water Act. Justice Marshall and Justice Scalia were cognizant of the particular difficulties associated with the detection of pollution control violators and the resulting difficulty in documenting the evidence necessary to avoid a dismissal. Through the opinions, the Court

58. *Gwaltney*, 108 S. Ct. at 387.
59. *Id.* at 388.

has manifested a willingness to relax the prerequisites necessary to obtain jurisdiction under the Clean Water Act and has aided in the effectuation of the Clean Water Act's purpose.

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