

GWALTNEY IS FULL OF BALONEY: PROTECTION FROM CITIZEN SUITS FOR PAST NPDES VIOLATIONS MAY NOT BE MUCH PROTECTION AT ALL

Professor Jeffrey M. Gaba*

I. INTRODUCTION

In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,¹ the U.S. Supreme Court held that citizens may not bring actions against dischargers for “wholly past” violations of an NPDES permit. In the Fall 1988 issue of this *Environmental Law Journal*, a scholarly analysis of not only of why *Gwaltney* was correctly decided, but why it should be extended to limit government prosecutions for past violations was provided.² As impressive (and impassioned) as that analysis is, it is probably a good idea to let Texas lawyers know that there may be less to *Gwaltney* than meets the eye; it certainly does not provide all the comfort industrial dischargers might think. In fact, the *Gwaltney* decision is dumb, largely useless, and creates a procedural mess that can only result in increased litigation.

II. BACKGROUND

A little background to the *Gwaltney* decision may be in order for Clean Water Act novices. Under the Clean Water Act, all facilities that discharge pollutants into navigable waters (broadly defined) are required to obtain and comply with a National Discharge Pollution Discharge Elimination System (“NPDES”) permit.³ Violation of the conditions of the permit, especially the effluent limitations that place restrictions on the quantity of pollutants that may be discharged, subject the permittee to a potential injunction or civil penalties of up to \$25,000 per day per violation.⁴ Proof of violation of a permit is very simple; permittees are required to monitor and report the quantity of pollutants in their discharge. If their report shows that they have exceeded their permit limits, they are in a bit of potential trouble.

Pursuant to section 309, an enforcement action may be brought in federal court by the federal government.⁵ Congress, however, did not completely trust the government effectively to enforce the Act, and the Clean Water Act also contains, in section 505, a “citizen suit” provision that authorizes any citizen “adversely affected” to bring an action for violation of the permit.⁶ In the early days of the Reagan administration, there was widespread perception that enforcing pollution control laws was not high on the government’s agenda, and environmental groups began a concerted effort to identify and sue major violators.⁷ Remember, proof of violation is very simple (and attorney’s fees may be awarded).

Although the citizen suits were largely successful (and usually settled with agreements by the discharger to improve their pollution control equipment), a number of defendants argued that citizens could not bring actions for past violations of NPDES permits. The basic argument was that section 505 only authorizes actions against persons who are “in violation” of the Act. Present tense, get it. The circuits split. One court said citizens could not sue for past violations;⁸ one court said citizens could sue for past violations;⁹ one court said citizens could sue for past violations only if they were part of an intermittent but ongoing pattern of violations.¹⁰

Which brings us finally to the Supreme Court’s opinion in *Gwaltney*. Justice Marshall writing for the Court, held that section 505 does *not* authorize citizen suits for “wholly past” violations of the Clean Water Act. He held, however, that good faith allegations of ongoing or intermittent violations were sufficient to state a justiciable claim. Justice Scalia, concurring with the holding that the Act does not authorize citizen actions for wholly past violations, disagreed that good faith allegations were sufficient to establish jurisdiction. He believed that the factual basis of the complaint could be challenged as part of a motion to dismiss for lack of subject matter jurisdiction.

III. PROBLEMS WITH GWALTNEY

Gwaltney on its face seems to limit the ability of citizens (environmentalists are citizens) to enforce the Clean Water Act when the federal and state governments are not acting. Industrial dischargers may take heart from *Gwaltney*, I wouldn’t if I were you. *Gwaltney* is a mess.

A. It’s Dumb

The opinion does limit the ability of citizens to sue for “past” violations of NPDES permits. This limitation is fair and sensible isn’t it? If permit violations are past and over with why should citizens be able to sue?

I do not know about you, but where I live, people believe that enforcing laws has a deterrent effect, not only on the violator, but on others. It has been a long time since I heard anyone argue that a murderer should not be prosecuted if he promised never to do it again. I’m not advocating capital punishment for NPDES permit violations, but it seems clear that part of the deterrent effect of the Clean Water Act has been weakened by *Gwaltney*. There is no point, however, in crying over spilled pollutants. The Supreme Court has spoken, and the Supreme Court is always right.

In the Fall 1988 *Journal* article, it is argued that even the government should be precluded from bringing enforcement actions for past violations of the Clean Water Act.¹¹ That issue, however, may be moot. The author recognizes that the government in 1987 was given clear authority to assess administrative penalties for “wholly past” violations.¹² If it is a comfort to have to pay administrative penalties rather than civil penalties, then take comfort.

B. It’s Useless (Or At Least Less Useful Than You Might Think)

Although *Gwaltney* precludes citizen suits for “wholly past” permit violations, the question remains as to what it means to say that a violation is “wholly past.” Justice Marshall recognizes jurisdiction for a citizen suit for “continuous or intermittent” violations. According to Justice Scalia:

The phrase in section 505(a), “to be in violation,” unlike the phrase “to be violating” or “to have committed a violation,” suggest a state rather than an

act — the opposite of the state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated.¹³

Thus, the fact that a discharger is not currently in violation does not mean that a citizen suit cannot be brought. A pattern of past violations, which is usually the case in citizen suits, may be sufficient to confer jurisdiction.

Consider the nature of the cases in which this issue arose. In *Hamker v. Diamond Shamrock*,¹⁴ a citizen suit was brought because a leak in an oil pipeline that occurred in January 1983, resulted in contamination of a creek on plaintiff's property. Not your typical NPDES case.¹⁵ The Fifth Circuit held that under section 505 the plaintiff did not have jurisdiction to bring a citizen suit for a past violation. However, a holding that citizens cannot sue under section 505 for a single, past leak in a pipeline says very little about the scope of section 505.¹⁶

In *Pawtuxet Cove Marina v. Ciba-Geigy*,¹⁷ the plaintiffs located downstream of the defendant brought a citizen suit alleging violations of the defendant's NPDES permit. In this case, the defendant had *completely ceased* operating under the permit, since it had tied in to a municipal sewage treatment system. The court of appeals held that the citizen suit could be brought if the plaintiff "fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."¹⁸ The court concluded that in this case, since the defendant had stopped discharging completely, a likelihood of continuing violations did not exist. It may be small comfort to know that citizens cannot bring an enforcement action if you are no longer discharging.¹⁹

Gwaltney itself raises the tough factual situation. In *Gwaltney*, the defendant had repeatedly violated the conditions of the permit by exceeding effluent limitations on five of the seven pollutants covered. The defendant had, however, installed new pollution control equipment after these violations. The issue was whether this new equipment completely corrected the problem that had caused the earlier violations, thus rendering them "wholly past." Although the Supreme Court held that jurisdiction does not exist for past violations, both Justice Marshall and Justice Scalia suggested that on these facts it is quite likely that jurisdiction would exist. Justice Scalia phrased the issue on remand as whether the defendant "had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought."²⁰

On remand, the district court found that the plaintiffs had satisfied the *Gwaltney* test.²¹ Even though remedial actions by the defendant had, in fact, eliminated the cause of violations, the court found that at the time the suit was filed, there was legitimate uncertainty as to whether violations would recur.²² Thus, the plaintiff had established

citizen suit jurisdiction, and the penalties were reinstated. (At least *Gwaltney's* lawyers can tell their client that they won a moral victory.)

In fact, virtually all of the cases decided since *Gwaltney* have concluded that the citizen suit should not be dismissed for lack of jurisdiction.²³ One court has even held that once jurisdiction is established for intermittent or ongoing violations a court may assess penalties for wholly past violations.²⁴

Thus, the fact that a discharger is not caught in the act of polluting is probably not going to mean much in defeating a citizen suit. In order to prevent citizen suit jurisdiction after a pattern of violations, a facility had better take serious steps to make sure a violation cannot reoccur. If those steps are taken after the filing of the citizen suit, it may be too late.

C. It's Messy

Consider the problems that *Gwaltney* now creates. Justice Marshall states that a good faith allegation of intermittent noncompliance is sufficient to establish jurisdiction, but Justice Marshall does indicate that the facts of that allegation may be contested in a motion to dismiss for lack of standing. Justice Scalia would have the facts directly contestable in a motion to dismiss for lack of subject matter jurisdiction. In either event, imagine the nature of a trial for NPDES permit violations.

Citizen suit litigation will now require the court to determine, as a jurisdictional matter, whether a particular type of pollution control equipment has "clearly achieved the effect of curing all past violations by the time suit was brought."²⁵ Can you imagine the time that will be wasted on convincing the court of technical issues about the prospective operation of pollution control equipment. Incentive for the parties to settle what previously had been simple factual cases will be little or nonexistent. Rather than considering remedial efforts as factors in setting penalties, judges will be forced actually to adjudicate whether pollution control equipment is "clearly" adequate. After a discharger has lost on this issue, how will a court feel when it comes time to consider penalties? I frankly do not know how sympathetic courts are going to be to polluters or citizen plaintiffs, but I do not think either side should feel real comfortable.

In fact, the only group that clearly benefits from all this are the lawyers. A new layer of litigation and new complications for lawyers. Maybe *Gwaltney* isn't so bad after all.

*Associate Professor, Southern Methodist University School of Law; 1989, M.P.H. Candidate, Harvard University School of Public Health; 1976, J.D., Columbia University; 1972, B.A., University of California, Santa Barbara.

FOOTNOTES

¹ ___ U.S. ___, 108 S.Ct. 376 (1987).

² Deatherage, *Questionable Federal Jurisdiction over Suits for Past Violations of the Clean Water Act*, 19 ST. B. TEX. ENVTL. L.J. 34 (1988).

³ Section 301(a), 33 U.S.C. § 1311(a).

⁴ Section 309(b) and (d), 33 U.S.C. § 1319(b) and (d).

⁵ *Id.*

⁶ Section 505, 33 U.S.C. § 1365. See generally Miller, *Private Enforcement of Federal Pollution Control Laws*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309 (1983).

⁷ See Guida, *Dramatic Growth in Citizen Suits under the Federal Clean Water Act*, Nat'l L. J. Dec. 3, 1984.

⁸ *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985).

⁹ *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304 (4th Cir. 1986).

¹⁰ *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986).

¹¹ Although I hesitate to disagree with so scholarly an analysis, I think Deatherage's arguments are unlikely to be accepted by the courts. Certainly, courts have held that the government has the authority to sue for past violations. See, e.g., *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985), and the Supreme Court, admittedly in dictum, has assumed the government has such authority. See *Gwaltney*, 108 S.Ct. at 381-382. However, given the availability of administrative penalties for past violations, the issue may be largely academic.

¹² 33 U.S.C. § 309(g)(1).

¹³ 108 S.Ct. at 387.

¹⁴ 756 F.2d 392 (5th Cir. 1985).

¹⁵ In fact, this case looks an awful lot like an oil spill covered by section 311. Section 311 of the Clean Water Act deals with spills of oil and hazardous substances into navigable waters; this section predates and is distinct from the NPDES program. Presumably *Hamker* was brought as a section 301 violation for discharging without a permit, but it seems to be an unusual citizen suit.

¹⁶ Prior to *Gwaltney*, the Fifth Circuit also considered the issue in *Sierra Club v. Shell Oil*, 817 F.2d 1169 (5th Cir. 1987). The court considered whether, under *Hamker*, a citizen suit could be brought for a series of prior violations of an NPDES permit. The court held that district courts should not dismiss on jurisdictional grounds when the issue of jurisdictional fact are intermeshed with the merits of a case. Rather, the court held that such disputed issues should be dealt with in resolving the merits of the case. Although the court found that any error was essentially harmless, *Sierra Club* certainly suggests that a properly pleaded citizen suit should survive a motion to dismiss on jurisdictional grounds.

On the merits, the court held that plaintiffs had not satisfied *Hamker*, even if that opinion were held to allow suits for past "chronic episodic" violators. Although the court acknowledged that a series of prior violations of permit limitations had occurred, it concluded that most were excusable "bypasses," where now authorized under a newly liberalized NPDES permit, or would not recur because of a switch in the facilities control system. Since even under these conditions, the plant still had a significant number of past violations that were not

resolved, the opinion is puzzling. The opinion may in part be explained by the fact that Sierra Club, disagreeing with the *Hamker* decision, apparently did not attempt to establish that chronic or ongoing violations were occurring.

Sierra Club, although decided before *Gwaltney*, does suggest that the Fifth Circuit might give a broader reading to *Gwaltney* than any other court that has considered it.

¹⁷ 807 F.2d 1089 (1st Cir. 1986).

¹⁸ *Id.* at 1094.

¹⁹ See also *Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

²⁰ 108 S.Ct. 388.

²¹ *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 688 F.Supp. 1078 (E.D. Va. 1988). After the Supreme Court opinion, the court of appeals remanded the case to the district court for a finding of whether plaintiffs proved an ongoing violation at trial.

²² The district court cited the remand decision, in which the Fourth Circuit wrote that ongoing violations could be found if the plaintiff:

1) . . . "proved violations that continued on or after the date the complaint was filed, or 2) adduced evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Id.*

²³ See, e.g., *Sierra Club v. Union Oil Co.*, 853 F.2d 667 (9th Cir. 1988); *Sierra Club v. Simkins Industries*, 847 F.2d 1109 (4th Cir. 1988); *Atlantic States Legal Foundation v. W. H. Pfarrer Co.*, 1988 Lexis 15683 (N.D. Ind. 1988); *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 688 F. Supp. 801 (E.D. Va. 1988); *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988); *Public Interest Research Group of New Jersey v. Carter-Wallace*, 684 F. Supp. 115 (D. N.J. 1988).

As discussed above, however, the Fifth Circuit in *Sierra Club v. Shell Oil*, 817 F.2d 1169 (5th Cir. 1987), reached the rather astonishing conclusion that since most of the NPDES violations would not recur, citizen suit jurisdiction based on possible chronic or episodic violations. This decision was issued prior to the Supreme Court's opinion in *Gwaltney*. See *supra* note 15.

²⁴ *Public Interest Research Group of New Jersey v. Carter-Wallace*, 684 F. Supp. 115 (D.N.J. 1988). See also *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 688 F. Supp. 1078 (D.N.J. 1988).

²⁵ *Id.* (emphasis added).

RECENT DEVELOPMENTS— AIR

Administrative Law: Enforcement Orders

The U.S. Court of Appeals for the Fifth Circuit has issued an opinion in the case of *General Motors Corp. v. EPA* concerning enforcement orders issued by the states under section 113(d) of the Clean Air Act. *General Motors Corp. v. EPA*, No. 88-4257, (5th Cir., April 13, 1989). The case involved an order that was disapproved after the ninety day statutory deadline and after the order expired.

Ultimately, the court held that EPA lacks the authority to disapprove a state's 113(d) enforcement order that has

expired by its own terms. The court also held that the ninety day statutory deadline bars the imposition of penalties for noncompliance with the underlying State Implementation Plan provision for the period between the deadline and EPA's eventual determination of the order's validity. The opinion characterizes the importance of the deadlines regarding delayed compliance orders by comparison to the similar requirements pertaining to State Implementation Plan revisions addressed in *American Cyanamid Co. v. U.S. EPA*, 810 F.2d 493 (5th Cir. 1987).

John Turney