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NOTES

Citizen Suits and Civil Penalties Under the Clean Water Act

In the 1970 amendments¹ to the Clean Air Act (CAA),² Congress introduced citizen enforcement suits into environmental statutory law.³ Since 1970, Congress has included such provisions in virtually every piece of federal environmental legislation.⁴ The citizen suit provision of the CAA⁵ has served as a model for all subsequent statutes authorizing environmental citizen suits.⁶ However, section 505 of the Clean Water Act (CWA)⁷ differs significantly from its CAA precursor.

1. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

2. 42 U.S.C. § 7401 (1982).

3. Citizen suit provisions in the CAA and other environmental laws authorize citizen suits that compel agency action in addition to citizen enforcement actions against private actors. While forcing courts to review agency action (or, more typically, inaction) is important, see Timbers & Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403 (1985), this Note will consider only citizen actions that attempt to force private parties to comply with federal water standards.

4. Citizen suit provisions are part of: The Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1) (1982); the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (1982); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a)(1) (1982); and the Noise Control Act of 1972, 42 U.S.C. § 4911(a)(1) (1982), among others.

5. Clean Air Act § 304, 42 U.S.C. § 7604(a)(1) (1982).

6. See Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10309, 10311 (Oct. 1983) [hereinafter Miller I] ("The citizen suit sections of the various environmental statutes are virtually identical, being patterned closely after Clean Air Act § 304."); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 328 (1984).

7. 33 U.S.C. § 1251 (1982). Section 505 is codified at 33 U.S.C. § 1365 (1982). In 1972 and 1977, Congress amended the Federal Water Pollution Control Act. With the 1977 amendments, the name of the Act was changed to the Clean Water Act. Pub. L. No. 95-217, 91 Stat. 1567 (1977).

The basic authorization for citizen suits under the CWA at 33 U.S.C. § 1365(a) (1982) holds that:

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.

Section 1319(d) states that:

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued

Section 505 permits citizens to sue not only for injunctive relief, but for civil penalties as well.⁸ Courts have struggled in their efforts to interpret this provision, in large part because its citizen suit arrangement is unique.

One of the most difficult tasks for courts hearing suits brought under section 505 is determining when the statute authorizes the granting of citizen-requested civil penalties. Under other statutory arrangements where only injunctive relief is available, citizens consider bringing suit only when the alleged violation is one that continues (or has the potential to continue⁹) until the time suit is brought. There is no need to enjoin past, noncontinuing behavior. However, when courts have the authority to assess civil penalties of up to \$25,000 per day of violation,¹⁰ citizen incentives change. Citizen enforcers who believe that violators should not only cease violating but be fined for their misconduct as well have an incentive to sue even though a polluter may have permanently stopped violating.¹¹ Citizens thus have

under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

In 1987, the CWA was amended to allow civil penalties of up to \$25,000 per day of violation. See note 10 *infra*.

8. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 1.13, at 83 (1977).

9. Under general equity principles, injunctive relief may be appropriate even if the violation is not actually occurring when suit is filed. All that is necessary is that there be a realistic possibility that the illegal conduct will occur again. See Miller, *Private Enforcement of Federal Pollution Control Laws, Part II*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10063, 10075 (Feb. 1984) [hereinafter Miller II].

10. Water Quality Act of 1987, Pub. L. No. 100-4, § 313, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 46-47. The 1987 amendments to the CWA increased the per day penalty from \$10,000 to \$25,000.

11. Penalty fines imposed under the CWA are paid to the U.S. Treasury. H.R. REP. NO. 911, 92d Cong., 2d Sess. 133, reprinted in 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 820 (1973) [hereinafter 1 A LEGISLATIVE HISTORY]. Nevertheless, citizen enforcers do not necessarily lose money by suing to punish polluters. The statute permits a successful plaintiff to recover attorney's fees. 33 U.S.C. § 1365(d) (1982); see Miller, *Private Enforcement of Federal Pollution Control Laws, Part III*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10407, 10407-22 (Nov. 1984) [hereinafter Miller III]. Although initially reluctant to award attorney's fees, courts are increasingly agreeing to make such awards. (However, the amounts of money awarded do not match those given in the antitrust or securities citizen suit settings, either in terms of total dollars awarded or in terms of hourly rates allowed.) In addition, there is a chance that plaintiffs who are unsuccessful or only partially successful will be allowed to recover attorney's fees. Miller III, *supra*, at 10422; see also *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 62 F.R.D. 353 (D. Del. 1974), *aff'd.*, 510 F.2d 969 (3d Cir. 1975) (setting forth attorney's fees standards in analogous CAA situation). Finally, if courts permit citizen enforcers to focus suits on past violations, the enforcers face only a very slight risk of losing such suits and recovering no attorney's fees. This is because most courts hearing cases under the CWA are quick to find statutory violations, awarding relief whenever the plaintiff can prove that the defendant has exceeded permit limitations. This movement goes against traditional common law rules, where deliberation regarding the possible granting of an injunction involved a great deal of judicial discretion. Miller II, *supra* note 9, at 10076; see *Student Pub. Interest Res. Group of N.J., Inc. v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D.N.J. 1985) ("Enforcement of NPDES permits is based on strict liability."). But see *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (claiming that the U.S. Navy, in polluting the ocean with bombshells from target practice, is not to be enjoined, even though it has no discharge permit,

the power not merely to prevent the continuation of violations but also to promote deterrence of future violations by forcing polluters to pay for their past wrongs.

The courts have not responded uniformly to the question of when the CWA permits a citizen to request an assessment of civil penalties under section 505. Some courts have argued that the statute permits assessment only against polluters who remain in violation at the time suit is brought,¹² adopting an "ongoing violation" standard. The majority of courts have held otherwise, however, either explicitly or implicitly allowing suits based solely on past violations.¹³ A small number of courts have adopted an intermediate approach, permitting the assessment of civil penalties for past *or* ongoing violations, provided the request is part of a suit in which the plaintiff also makes a legitimate request for injunctive relief.¹⁴

The resolution of this conflict has serious implications for the overall enforcement of the CWA. While relatively rare during the first ten years of the statute's existence, citizen enforcement suits under section 505 have become increasingly common.¹⁵ In response to perceived lax

because injunctions are issued only when "essential in order effectually to protect property rights against injuries otherwise irremediable"). The plaintiff's risk of losing is small because the evidence used to prove these violations comes from the polluter's discharge monitoring reports (DMRs), which the plaintiff can review in order to determine whether the case is winnable before filing suit. (DMRs are reports that list all outputs of effluents. Every permit holder is required to file a DMR periodically. 40 C.F.R. §§ 122.21(f), (g), 122.41(l)(4)(i) (1986).) See notes 80-83 *infra*. "Most of the recent notices of intent to sue have been submitted by environmental organizations which reviewed discharge monitoring reports (DMRs) to identify noncomplying companies." Schwartz & Hackett, *supra* note 6, at 327. Courts make the process of accurately predicting results in a DMR-based case even easier by holding that defendants in § 505 actions are not permitted to question the accuracy of their own monitoring reports when those reports are introduced in order to prove violations. Student Pub. Interest Res. Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, 579 F. Supp. 1528, 1538 (D.N.J. 1984).

12. See *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 21 Env't. Rep. Cas. (BNA) 1390 (D.R.I. 1984).

13. See, e.g., *Friends of the Earth v. Archer Daniels Midland Co.*, 24 Env't. Rep. Cas. (BNA) 1993 (N.D.N.Y. 1986); *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Student Pub. Interest Res. Group of N.J., Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Sierra Club v. Raytheon Co.*, 22 Env't. Rep. Cas. (BNA) 1050 (D. Mass. 1984).

14. See *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986). Although the First Circuit was the first court of appeals to adopt an intermediate standard, such an approach was previously supported by other lower courts. See *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., concurring); *Sierra Club v. Union Oil Co. of Cal.*, 22 Env't. Rep. Cas. (BNA) 1342 (N.D. Cal. 1985); *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532, 535 n.1 (W.D.N.Y. 1984) (allegation of an ongoing violation does not mean polluter must be violating the statute on the day suit is filed); *Sierra Club v. Tosco Corp.*, 22 Env't. Rep. Cas. (BNA) 2117, 2118 (N.D. Cal. 1984) (ongoing violation does not require "technical violation at the instant that the complaint is filed").

15. For the years 1978-1982, 41 notices of suit and actual suits were reported. In 1983 alone, this number jumped to 108. In the first three months of 1984 the increase continued, with 87 notices and suits being recorded. Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 34 (1985). See Polebaum & Slater, *Preclusion of Citizen Environ-*

enforcement by the EPA under the Reagan Administration,¹⁶ environmental groups are relying more and more heavily on section 505 citizen suits.¹⁷ The availability of civil penalties undeniably affects both the type of relief requested and the timing of the suits. The importance of this issue has led the Supreme Court to grant certiorari in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*¹⁸ The decision in *Chesapeake* will resolve disputes over the proper interpretation of the civil penalty portion of section 505. This Note examines the various arguments made in support of each interpretation of section 505 and suggests that the appropriate standard closely resembles that proposed by the First Circuit. This approach permits the assessment of civil penalties when the request for penalties is accompanied by a reasonable request for injunctive relief.

Part I briefly describes the division that currently exists between the Fourth, Fifth, and First Circuits. Part II analyzes the arguments relating to statutory construction, focusing on statutory language and structure as illuminated by legislative history. Part III examines the broader policy considerations arising when courts decide questions of citizen suit jurisdiction under section 505. Resolution of this issue has usually entailed an extreme interpretation of section 505, either very rarely allowing suits for past violations or allowing them in all cases.¹⁹

mental Enforcement Litigation by Agency Action, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 10013 (Jan. 1986); "Citizen Suits" Become a Popular Weapon Against Industrial Polluters, *Wall St. J.*, Apr. 17, 1987, at 11, col. 4.

16. Miller III, *supra* note 11, at 10424.

17. See note 15 *supra*. While individual citizens are allowed to bring suits on their own behalf, in practice the great majority of citizen suits under the CWA are brought by national environmental groups. "Such groups are primarily responsible for the explosion of citizen suits under the Clean Water Act." Fadil, *supra* note 15, at 31. See also Schwartz & Hackett, *supra* note 6, at 327.

While § 505 nowhere mentions suits by environmental groups on behalf of their members, it is clear that Congress intended to permit such suits because § 505 consciously incorporates the standing requirements set forth in *Sierra Club v. Morton*, 405 U.S. 727 (1972). *Senate Consideration of the Report of the Conference Committee*, Oct. 4, 1972, reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 221. According to this standard, an environmental group may bring suit when the group alleges an injury to a cognizable interest that affects the group itself, or any individual members of the group. *Morton*, 405 U.S. at 734-35; Fadil, *supra* note 15, at 39-40; Miller I, *supra* note 6, at 10309 ("[T]he general or even particular interest of an organization in a pollution problem will not give it standing, but allegations that its members are injured will.").

18. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987).

19. When discussing civil penalties under the CWA, analysts typically argue either that all suits should be prohibited in the absence of an ongoing violation, or that such suits should be permitted when based on any violation, whether past, intermittent, or continuing. See generally Roisman, *The Role of the Citizen in Enforcing Environmental Laws*, 16 *Envtl. L. Rep.* (Envtl. L. Inst.) 10163 (July 1986) (stressing the deterrent effect of civil penalties by contrasting an "ongoing violation" system with only one alternative, a system permitting any past violation to work as a basis for suit); *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 213 (D. Conn. 1985) (inquiry limited to the "ongoing violation" and "any past violation" standards, even though the defendant's history of 174 permit violations could have supported a compromise standard permitting suit on grounds plaintiff had reason to believe violations were ongoing). But see note 14 *supra*.

Parts II and III argue that the most appropriate response to this problem is actually the less frequently adopted "reasonableness" standard approved by the First Circuit. This intermediate standard would best achieve the two principal goals of the CWA — compelling polluters to comply with appropriate effluent standards and deterring potential future violators — and would significantly improve enforcement under the statute.

I. THE CURRENT CONFLICT: THE "ONGOING VIOLATION," "ANY PAST VIOLATION," AND "REASONABLE BELIEF" STANDARDS

In 1985, with *Hamker v. Diamond Shamrock Chemical Co.*,²⁰ the Fifth Circuit became the first court of appeals to interpret expressly section 505.²¹ In *Hamker*, citizen-plaintiffs brought suit seeking injunctive relief and civil penalties under section 505, and damages under state law on a theory of negligence.²² Additionally, the plaintiffs claimed an implied private right of action under section 505 and sought damages for injuries caused by the continuing effects of a one-time past oil leak from a Diamond Shamrock pipeline. The court affirmed a dismissal for lack of subject matter jurisdiction, holding that citizen suits under section 505 are authorized only where plaintiffs allege a current, ongoing violation of an effluent standard, limitation, or order, and that the section authorizes only civil penalties and injunctive relief, not private damages.²³

20. 756 F.2d 392 (5th Cir. 1985). The Fifth Circuit adhered to the *Hamker* approach in *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1172 (5th Cir. 1987).

21. One court of appeals had touched on this issue in dicta. The Seventh Circuit, in *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979), suggested that such suits were only allowable for prospective relief. Even this suggestion, however, was called into question by the Seventh Circuit's later decision in *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982).

22. *Hamker*, 756 F.2d at 393.

23. *Hamker*, 756 F.2d at 396. Significantly, many of the cases in which courts adopted this "ongoing violation" approach have involved plaintiffs seeking private damages by including either appended state-law damages claims or implied causes of action under federal common law. See *Kentucky Liquid Recycling*, 604 F.2d at 1008; *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 21 Env't. Rep. Cas. (BNA) 1390 (D.R.I. 1984) (before a magistrate); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1145 (E.D. Penn. 1982). The framers of the 1972 amendments envisioned that all civil penalties from actions would be paid into the U.S. Treasury. The explanation of the provision presented before the Senate expressed the belief that all awards were to be "deposited as miscellaneous receipts and not . . . recovered by the complainant." S. REP. NO. 414, 92d Cong, 1st Sess. 79, reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1497 (1973) [hereinafter 2 A LEGISLATIVE HISTORY]. Faced with claims for damages brought under a federal statute that provides only for injunctive relief and civil penalties, courts have found further reason to reject subject matter jurisdiction. Nevertheless, many courts adopting the ongoing violation approach have not limited their holdings to cases involving private damages claims, thus creating an unduly restrictive standard. This failure to place limits on the reach of the decisions has led other courts to agree with the results while disagreeing with the standard adopted. The First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), remarked upon this problem, agreeing with the decisions in *Hamker* and the lower court in *Pawtuxet*, 21 Env't. Rep. Cas.

Shortly after the decision in *Hamker*, the Fourth Circuit decided *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*,²⁴ requiring an interpretation of the citizen suit provision of the CWA. The facts in *Chesapeake* were significantly different from those in *Hamker*. The *Chesapeake* plaintiffs did not seek to recover damages themselves, but merely to enjoin the defendant from violating relevant effluent standards and to force the defendant to pay civil penalties for previous violations.²⁵ In *Chesapeake*, the Fourth Circuit explicitly rejected the Fifth Circuit's approach²⁶ and held that civil penalties are assessable even if based solely on past violations.²⁷ By adopting this "any past violation" standard, the Fourth Circuit legitimized the approach taken by a majority of district courts²⁸ and created a clear division among the circuits.

While the *Hamker* and *Chesapeake* approaches represent the two most common interpretations of section 505, the First Circuit rejected both in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*²⁹ The court opted for a new third standard, although the factual setting of the case had led the district court to declare citizen requested civil penalties assessable only when the violation is continuing.³⁰ The plaintiffs in *Pawtuxet* alleged injury due to the release of untreated wastewater by Ciba-Geigy Corp., owner of an upstream chemical manufacturing plant. Because the defendant was not releasing effluents in violation of its discharge permit at the time suit was brought, the district court

(BNA) 1393 (D.R.I. 1984), but suggesting that the reasoning leading to the decisions was faulty. In *Hamker*, one of the three judges, Judge Williams, agreed with the result reached by the majority but wrote a separate concurring opinion suggesting that the decision should be restricted to its facts, thereby leaving room to penalize a chronic or episodic violator who might not be violating at the time suit is filed. *Hamker*, 756 F.2d at 399 (Williams, J., concurring).

24. 791 F.2d 304 (4th Cir. 1986), cert. granted, 107 S. Ct. 872 (1987).

25. *Chesapeake*, 791 F.2d at 306. This fact situation is more typical of the majority of suits brought under § 505. Unlike the suits brought by the *Hamker* plaintiffs, most suits do not involve attempts to recover private damages. See, e.g., *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207 (D. Conn. 1985); *Sierra Club v. Union Oil Co. of Cal.*, 22 Env't. Rep. Cas. (BNA) 1342 (N.D. Cal. 1985); *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532 (W.D.N.Y. 1984). But cf. *Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190 (D.N.J. 1985) (plaintiff sued for civil penalties without requesting injunctive relief).

26. *Chesapeake*, 791 F.2d at 309, 312-13. As well as refusing to follow *Hamker's* lead, the *Chesapeake* court also considered but rejected a compromise standard suggested, in amicus curiae, by the federal government. 791 F.2d at 308 n.9.

27. *Chesapeake*, 791 F.2d at 313 ("citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section 505(a)").

28. See, e.g., *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207 (D. Conn. 1985); *Student Pub. Interest Res. Group of N.J., Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Sierra Club v. Aluminum Co. of Am.*, 585 F. Supp. 842 (N.D.N.Y. 1984).

29. 807 F.2d 1089 (1st Cir. 1986).

30. *Pawtuxet*, 21 Env't. Rep. Cas. (BNA) 1393 (D.R.I. 1984).

dismissed for lack of jurisdiction under section 505.³¹ The court of appeals upheld dismissal of the suit, but declined to affirm the district court's interpretation of section 505. Rather, the court of appeals opted for a standard under which a citizen may sue for civil penalties when the request for penalties is part of a reasonable request for injunctive relief.³² So long as the plaintiff in good faith believes that the defendant poses a threat to violate again, the request for relief is reasonable and jurisdiction should be authorized.³³

The courts of appeals have thus proposed three very different approaches for the determination of when to allow citizens to sue for civil penalties under the CWA. Detailed examinations of the language of section 505, the provision's role in the CWA as a whole, and the ramifications of each approach suggest that the First Circuit's approach is the most appropriate.

II. STATUTORY CONSTRUCTION AND LEGISLATIVE HISTORY

A. *The Language of Section 505*

The starting point for interpreting any provision must be the language of the provision.³⁴ Section 505 provides that suits may be

31. *Pawtuxet Cove Marina, Inc. v Ciba-Geigy Corp.*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20685 (D.R.I. May 17, 1984).

32. Under this standard, a citizen-plaintiff is permitted to go forward with an action under § 505 "[i]f a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue." *Pawtuxet*, 807 F.2d at 1094. Once jurisdiction is authorized on the basis of the reasonableness of the citizen-plaintiff's request for injunctive relief, the plaintiff "may recover a [civil] penalty judgment for past violations *even if the injunction proves unobtainable*." 807 F.2d at 1094 (emphasis added). The court affirmed dismissal in *Pawtuxet* because at the time suit was brought the defendant was no longer operating under the National Pollution Discharge Elimination System (NPDES) permit it had allegedly violated. Therefore, the plaintiffs could not allege a reasonable likelihood of further violation. 807 F.2d at 1094.

33. This intermediate standard may be framed as a good faith standard, *see Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 308 n.9 (4th Cir. 1986), a reasonable belief standard, *see Sierra Club v. Union Oil Co. of Cal.*, 22 *Env't. Rep. Cas. (BNA)* 1342 (N.D. Cal. 1985); *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532 (W.D.N.Y. 1984) (pattern of intermittent violations permits a reasonable inference of ongoing misconduct), or a mootness standard, *see Schwartz & Hackett, supra* note 6, at 349. In the great majority of cases, the identical result will be reached under any of these formulations. The *Pawtuxet* court itself points to the interchangeability of these standards by referring at one point to a situation in which "it is reasonable to believe" past wrongs will be repeated, while later suggesting that the standard hinges upon whether the plaintiff "makes allegations warranting injunctive relief in good faith, judged objectively." *Pawtuxet*, 807 F.2d at 1094. Under a mootness test, an action for civil penalties would be allowed provided the prerequisite prayer for injunctive relief were not moot. Common law principles hold that, generally, a request for injunctive relief is moot only where there is no possible reason to believe that the violation will recur. *See, e.g., United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). *See generally Schwartz & Hackett, supra* note 6, at 349. Such a standard is capable of functioning effectively in the environmental arena. At least one court has already applied a mootness test to requests for injunctions under the Clean Air Act. *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980) (request for injunctive relief not moot so long as defendant company is legally entitled to resume plant operations).

34. *See Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985); *Chesapeake*, 791 F.2d at 308. The Supreme Court has consistently held that the starting point for

brought against any person “alleged to be in violation” of statutory or regulatory limitations.³⁵ Use of the present tense in the citizen suit provision seems to support an ongoing violation standard by implying that only the defendant’s present conduct determines liability. The Fifth Circuit in *Hamker* and the District of Rhode Island in *Pawtuxet*³⁶ both placed great weight on the language in subsection 505(a), asserting that Congress clearly and unambiguously intended to permit suits only against those literally “in violation” at the time suit is brought.³⁷ Because some courts have held that the language of this provision is determinative, they have found no need to rely on further statutory analysis or on broader policy considerations for support of the “ongoing violation” standard.³⁸

Despite assertions that subsection (a) is unambiguous, its language may be read to support a standard that is based on the reasonableness of the plaintiff’s request for enforcement of effluent standards. The First Circuit, for example, construed the phrase “is alleged to be in violation” so as to complement the injunctive thrust of subsection 505(a).³⁹ The court held that citizen suits may be allowed where the plaintiff “fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the [CWA].”⁴⁰

The language of subsection 505(g) further supports the reasonableness approach. In this provision, Congress defines “citizen” for purposes of the statute as a “person or persons having an interest which is or may be adversely affected.”⁴¹ This language indicates that Congress intended to authorize citizen suits where the plaintiff is currently suffering injury or where there is a chance that the plaintiff’s interests will be adversely affected. There is no mention of suits for the protection of interests that “have been” adversely affected, or a limitation

determination of congressional intent is the statutory language. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

35. 33 U.S.C. § 1365(a) (1982).

36. 21 *Env’t. Rep. Cas.* (BNA) at 1393.

37. *Hamker*, 756 F.2d at 395; *Pawtuxet*, 21 *Env’t. Rep. Cas.* (BNA) at 1392. Cf. *Pawtuxet*, 807 F.2d at 1089; *Hamker*, 756 F.2d at 399 (Williams, J., concurring).

38. See *Pawtuxet*, 21 *Env’t. Rep. Cas.* (BNA) at 1393.

39. *Pawtuxet*, 807 F.2d at 1093.

40. 807 F.2d at 1094. Noting that “this is precisely the showing that would induce a court to issue an injunction,” 807 F.2d at 1094, the First Circuit analogized this test to the standard regularly applied to the \$10,000 requirement for diversity jurisdiction, where a good faith allegation is generally sufficient to preserve jurisdiction even if the amount at issue turns out to be less. 807 F.2d at 1093; see also *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 308 n.9 (4th Cir. 1986); 28 U.S.C. § 1332 (1982). Under both the diversity jurisdiction and proposed reasonableness standards, so long as the allegation enabling the court to take jurisdiction is reasonable, the court retains jurisdiction for the entire case regardless of eventual outcome.

41. 33 U.S.C. § 1365(g) (1982).

restricting suits only to those on behalf of interests currently being harmed.

It is evident, however, that the language of section 505 is actually capable of supporting multiple justifiable interpretations.⁴² The present-tense language in subsection 505(a) is similar to that employed in sections authorizing government enforcement,⁴³ and no court has held that the government is limited to enforcement of ongoing violations.⁴⁴ Use of the present tense does not necessarily mean that only ongoing violations may be the subject of penalty suits. Additionally, one who violated in the past plausibly remains "in violation" in the present.⁴⁵ The language of section 505 therefore is not self-explanatory, and more than the language itself must be examined.⁴⁶

B. *Statutory Structure, Legislative History, and the Need for a Distinction Between Government and Citizen Enforcement Actions*

Although the court in *Hamker v. Diamond Shamrock Chemical Co.* holds the language of section 505 to be unambiguous, the court also finds evidence in the statute as a whole to strengthen its interpretation. In support of its ongoing violation theory, *Hamker* places great reliance on the notice provision contained in subsection 505(b)(1)(A),⁴⁷ which requires a potential citizen-plaintiff, whether

42. If nothing else suggested an ambiguity, the mere fact that so many courts adopted the "any past violation" standard before any court had set forth the ongoing violation theory, *see, e.g.,* *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, (N.D.N.Y. 1984); *Sierra Club v. Raytheon Co.*, 22 Env't. Rep. Cas. (BNA) 1050 (D. Mass. 1984); *Menzel v. County Util. Corp.*, 712 F.2d 91 (4th Cir. 1983), suggests that the phrasing is more ambiguous than the *Hamker* and initial *Pawtuxet* decisions indicate. *Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1195 (D.N.J. 1985).

43. *See, e.g.,* 33 U.S.C. §§ 1319(a)(1), 1319(a)(3) (1982). These sections provide for governmental enforcement against those alleged to be "in violation of" limitations, standards, or orders.

44. *See* *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *United States v. Earth Science, Inc.*, 599 F.2d 368 (10th Cir. 1979); *United States v. Detrex Chem. Indus.*, 393 F. Supp. 735 (N.D. Ohio 1975); *see also* note 55 *infra*.

45. The district court in the *Chesapeake* case, *Chesapeake Bay Found., Inc., v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1547 (E.D. Va. 1985), drew analogy to tax deficiencies, where a taxpayer who failed to pay taxes in 1982 but did pay in 1983 and 1984 is still "in violation" in 1985. *But see Pawtuxet*, 807 F.2d at 1092 (finding "the argument forced, and the [taxpayer] analogy inapt" because a "ceased improper discharge does not 'continue'" and the statute does not "speak in terms of 'taint'").

46. Where the statutory language is ambiguous, the Court will examine other indicia of congressional intent, such as the statutory scheme and legislative history. *See, e.g.,* *Bush v. Lucas*, 462 U.S. 367 (1983).

47. 756 F.2d at 395-96. The notice provision of § 505(b) states:

No action may be commenced —

(1) under subsection (a)(1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the

contemplating a suit for injunctive relief or for civil penalties, to provide the federal government, the state, and the defendant with sixty days notice before filing suit.⁴⁸

While portions of the *Hamker* court's analysis of the notice provision may be persuasive,⁴⁹ the court's guiding interpretation rests upon a mistaken premise. The court assumes that the primary purpose of the notice provision is to provide an offender with a sixty-day grace period for complying with applicable standards and thus avoiding liability.⁵⁰ This interpretation is not supported by either the structure or the purpose of the CWA. Such a reading completely eliminates the punitive aspects of the statute,⁵¹ by which compliance is induced under threat of civil penalties. *Hamker* leaves injunctive relief as the only means for citizens to compel compliance.⁵² Further, an intent to create what amounts to an escape mechanism appears nowhere in the legislative history, where Congress speaks of including the notice provision primarily to induce governmental action.⁵³ Finally, the *Hamker* interpretation makes part of the statute meaningless. If the notice period is designed to give the violator time to come into compliance and avoid liability, there is no reason for a provision requiring

standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

33 U.S.C. § 1365(b) (1982).

48. 33 U.S.C. § 1365(b)(1)(A) (1982).

49. See notes 61-62 *infra* and accompanying text.

50. "[I]t is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a) . . ." *Hamker*, 756 F.2d at 396.

51. While it is true that Congress clearly intended the provision to work primarily as a means of inducing compliance, see note 74 *infra* and accompanying text, Congress would not have included the civil penalty authorization at all if it were not to have some effect as a deterrence mechanism. Enabling a defendant to avoid liability so easily by simply "turning off the spigot" makes the civil penalty aspect of the statute almost meaningless. See notes 86-88 *infra* and accompanying text.

52. See *Fadil*, *supra* note 15, at 80-81.

53. Suits for past violations, "actual or threatened — may serve to prod public authorities into enforcing environmental laws with increased zeal. . . . [This justification] arose repeatedly in congressional debates on the merits of citizen suit provisions." *Fadil*, *supra* note 15, at 24; Note, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 201 (1986). See S. REP. NO. 1196, 91st Cong., 2d Sess. 36-39, reprinted in 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 436-39 (1974); see *Miller I*, *supra* note 6, at 10311 ("[C]itizens were allowed to sue, but could do so only after notifying appropriate regulatory agencies and giving them [the] opportunity to sue first."); *Schwartz & Hackett*, *supra* note 6, at 343; *W. RODGERS*, *supra* note 8, § 1.13; *Village of Kaktovik v. Corps of Engineers*, 12 Env't. Rep. Cas. (BNA) 1740, 1744 (D. Alaska 1978) (notice provision included in order "to encourage agencies to enforce relevant standards").

government enforcers also to give advance notice.⁵⁴ Because the federal government unquestionably is permitted to sue for past violations,⁵⁵ the thirty-day period between notification of suit and the commencement of a government enforcement action cannot be designed to give the violator time to comply and avoid the need for a suit. The system mandating that citizen enforcers give governmental enforcers and defendants sixty days notice, while governmental enforcers must give defendants thirty days notice, makes sense only if the notice provisions serve two purposes: in the case of citizen suits, stimulating governmental enforcement; and, in the case of suits by the federal government, providing both an extra period for the defendant to gather evidence and time for the state to intervene and take charge of enforcement.⁵⁶

The notice provision thus does not support the ongoing violation theory in the manner suggested by the *Hamker* court. At the same time, arguments similar to those used in rejecting the *Hamker* approach indicate that the notice provision also does not support the broader *Chesapeake* standard that permits citizens to sue for civil penalties based on any past violation. While the *Hamker* interpretation improperly restricts citizens by limiting them to injunctive actions, the *Chesapeake* approach goes too far in the opposite direction. Under an "any past violation" standard, citizens are allowed to become the primary enforcers of the CWA, with enforcement powers equal to those granted governmental enforcers. The overall structure and purposes of the CWA, as well as its legislative history, clearly indicate that such a role is inappropriate for citizen enforcers.

The legislative history relating to the notice provision suggests that Congress included this provision primarily as a means of spurring gov-

54. The EPA Administrator is required to notify both the violator and the State. If within 30 days the State has not taken an appropriate enforcement action, the Administrator may bring suit. 33 U.S.C. § 1319(a)(1) (1982).

55. The EPA Assistant Administrator for Enforcement stressed the fact that the governmental enforcement strategy set forth "applies to past and future violations of the . . . requirements of the Clean Air and Water Acts." EPA Assistant Administrator for Enforcement, *EPA Civil Penalty Policy for Major Source Violators of Clean Air Act and Clean Water Act*, 8 Env't. Rep. (BNA) 2011, 2013 (Apr. 11, 1978) [hereinafter EPA Policy Memorandum]. See *Chesapeake*, 791 F.2d at 309; note 44 *supra* and accompanying text.

56. 33 U.S.C. § 1319(a)(1) (1982) allows the federal government to notify the appropriate state when a violation is suspected. Once a state is notified, the Administrator is permitted to bring suit "[i]f beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action." Interestingly, no provision in the CWA explicitly grants to states the power to bring enforcement actions against violators. Because enforcement actions brought in state court are given preclusive effect under § 505(b)(1)(B), however, the statute accommodates state-law claims that reach beyond the scope of the federal statute. Additionally, states that are adversely affected by violations in neighboring states may indirectly bring an enforcement action by commencing a civil action against the Administrator for failing to enforce effluent standards. 33 U.S.C. § 1365(h) (1982). Finally, at least one court has held that a state may qualify as a citizen under § 505(g) capable of bringing citizen suits under § 505(a). *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976). But see *California v. Department of the Navy*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 20618 (N.D. Cal. Apr. 2, 1986).

ernmental action.⁵⁷ The citizen enforcer is required to give the federal and state governments sixty days notice before filing suit so that either government has the opportunity to take over the enforcement action if it so chooses.⁵⁸ Government control of litigation initiated by citizen enforcers is authorized by the preemption provision in subsection 505(b)(1)(B), according to which no citizen is permitted to bring suit, either for penalties or for injunctive relief, if a state or federal enforcement agency is diligently pursuing compliance in a court of law.⁵⁹

Taken together, the notice provision, the federal preemption provision, and the congressional preference for agency enforcement make clear that governments are intended to be the primary enforcers of the CWA's standards, limitations, and regulations.⁶⁰ The *Hamker* court quite logically argues that all of these factors establishing the primacy of governmental enforcement suggest that there must be a distinction between citizen and agency enforcement powers.⁶¹ Because Congress so clearly designated federal and state agencies as the desired enforcers of the CWA's requirements, powers granted to citizens should supplement, but not duplicate or exceed, those granted to governmental enforcers.⁶² To have granted equal enforcement powers would have

57. See Statements of Sen. Muskie, Senate Consideration of the Report of the Conference Committee, Oct. 4, 1972, reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 179; S. REP. NO. 414, 92d Cong., 1st Sess. 79, 80 (1971), reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1497-98 (notice provisions added "[i]n order to further encourage and provide for agency enforcement The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation."). See note 53 *supra* and accompanying text.

58. See 33 U.S.C. § 1365(b) (1982).

59. 33 U.S.C. § 1365(b) (1982) provides in relevant part:

No action may be commenced —

(1) under subsection (a)(1) of this section —

...

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

Courts disagree over the issue of which government enforcement actions are given preclusive effect. See generally notes 104-10 *infra*.

Congress arguably may have included this subsection to ensure that citizens and agencies would not pursue identical enforcement actions simultaneously. If this were the sole purpose, however, primary enforcement capability would have been granted to the first party to bring suit, not exclusively to the government. The constant emphasis on prodding government enforcers suggests that Congress thought governmental enforcement preferable. This preference is expressed in the Conference Report on Federal Water Pollution Control Act Amendments of 1972: "If the Administrator or a State begins a civil or criminal action on its own against an alleged polluter, no court action [can] take place on the citizen's suit." S. REP. NO. 1236, 92d Cong., 2d Sess. 145, reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 328.

60. See *Hamker*, 756 F.2d at 395. See generally Polebaum & Slater, *supra* note 15, at 10013.

61. *Hamker*, 756 F.2d at 395.

62. *Hamker*, 756 F.2d at 396 ("The requirement that notice be given to the responsible officials highlights their primary role in enforcing the Act compared to the supplementary position of the citizen . . ."). But see *Connecticut Fund for the Env't. v. Job Plating Co.*, 623 F. Supp. 207, 213 (D. Conn. 1985) ("the remedies obtainable in citizen suits should be coextensive with

greatly diminished the importance of agency enforcers in the scheme of enforcement. Because the *Chesapeake* "any past violation" standard works to eliminate the differences in government and citizen enforcement powers, the standard does not comport well with the structure of the CWA.

The appropriate standard must preserve the distinction between citizen and government enforcers while preventing the defendant from avoiding liability during the sixty-day notification period. A reasonableness standard accomplishes both objectives. By limiting a citizen-plaintiff's ability to receive an award of civil penalties to situations where it is reasonable to believe the defendant may pollute again,⁶³ the reasonableness standard gives the government superior enforcement capabilities. Agencies are always able to sue for civil penalties, while citizens may only do so when the fear of future violations appears to be well-founded. The reasonableness approach thus preserves the primacy of agency enforcement.

Additionally, the reasonableness standard does *not* permit the defendant to avoid liability merely by ceasing the violative behavior upon receiving notification of suit. Under the ongoing violation standard, no civil penalties can be awarded if a violator stops polluting just before suit is brought and the government chooses not to enforce.⁶⁴ With the *Pawtuxet*-type reasonableness standard, a citizen-plaintiff may still be able to succeed in pursuing a penalty award if there is reason to believe the polluter may violate again. The standard thus prevents the violator from escaping liability by temporarily halting improper discharges, but nevertheless preserves a meaningful difference between citizen and government enforcement powers.

Significant portions of the legislative history accompanying section 505 suggest that Congress intended a reasonableness standard to apply. Although the record of congressional consideration contains few

those available in suits initiated by the federal government"); *Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1198-99 (D.N.J. 1985); Fadil, *supra* note 15, at 80 (arguing for an "any past violation" standard in order to "reduce the present disparity in enforcement authority between private and public enforcers").

Courts and commentators that call for equalization of enforcement powers consistently argue that putting citizens and governmental enforcers on equal footing will increase the ability of citizens effectively to enforce the CWA. If citizen suits for civil penalties do have a substantial deterrent effect, this assertion probably has some validity. However, there are undoubtedly many techniques that, if adopted, would improve enforcement and lead to increased compliance — allowing the government completely to shut down all violators, for example, would have a substantial tremendous deterrent effect. The goal in interpreting this provision is not to devise the most effective enforcement system imaginable, but to implement the system that Congress created, in the way that Congress intended. To do this, the distinction between agency and citizen enforcers must be preserved.

63. See *Pawtuxet*, 807 F.2d at 1094; *Friends of the Earth v. Facet Enters.*, 618 F. Supp. 532, 535 n.1 (W.D.N.Y. 1984).

64. It must be remembered that a defendant's ability to escape citizen suit liability under *any* standard is only meaningful if the Administrator, who may always sue for past violations, chooses not to bring suit. See notes 43-44 *supra* and accompanying text.

specific references to section 505,⁶⁵ it is nevertheless possible to determine the intent of Congress with respect to the workings of the citizen suit provision.⁶⁶ In the course of Senate consideration of the provision, Senator Muskie, the sponsor of the measure, suggested that a citizen is not limited to injunctive relief, but may bring a penalty suit against "any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one."⁶⁷

While Senator Muskie's remarks indicate that a violation need not be continuing on the very day suit is filed for a civil penalty action to be authorized, thus clearly rejecting an ongoing violation standard, his statement may also rule out the *Chesapeake* interpretation, since not all past violations will be "occasional or sporadic."⁶⁸ The critical distinction between "past" violations and "sporadic" violations suggests an intention to permit suits only where such a suit might work to prevent further unlawful discharges. If, for example, a source has a history of polluting only during a particular season (a sporadic

65. Commentators have been troubled by this shortage of pertinent congressional discussion. See, e.g., Schwartz & Hackett, *supra* note 6, at 331 (noting that the addition of civil penalties is a major change from the CAA, but claiming that the "legislative history does not discuss the reasons for that change"); Miller I, *supra* note 6, at 10319.

66. The legislative history surrounding the adoption of the citizen suit provision of the CAA, § 304, 42 U.S.C. § 7604 (1982), would ordinarily provide adequate guidance for the interpretation of subsequent citizen suit provisions. See Miller I, *supra* note 6, at 10311 ("There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others."); Riesel, *Environmental Suits by Citizens*, 8 A.L.I.-A.B.A. COURSE MATERIALS J. 53 (1983) ("[C]ourts have freely cited the legislative history of the Clean Air Act . . . when interpreting subsequently enacted environmental legislation providing for the commencement of citizen suits."). While there are important similarities between the citizen suit provisions of the CWA and the CAA, see H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972), reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 820; Schwartz & Hackett, *supra* note 6, at 328, the legislative history of 42 U.S.C. § 7604 is of limited use when considering the major difference between the two authorizations of citizen action: the CWA allows citizens to sue for civil penalties, while the CAA does not. See H.R. REP. NO. 911, 92d Cong., 2d Sess. 131, reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 820.

67. 1 A LEGISLATIVE HISTORY, *supra* note 11, at 179 (statement of Sen. Muskie). Courts adopting both the reasonableness and "any past violation" standards have placed great emphasis on Sen. Muskie's statement. See *Chesapeake*, 791 F.2d at 311-12; *Pawtuxet*, 807 F.2d at 1094; Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs., 617 F. Supp. 1190, 1196 (D.N.J. 1985); *Chesapeake*, 611 F. Supp. at 1548. The emphasis is well placed. Since Sen. Muskie was the sponsor and the most outspoken advocate of the 1972 amendments, it was his understanding of the measure that was most frequently relied on and his interpretations that were usually adopted. According to Sen. Muskie, "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 1 A LEGISLATIVE HISTORY, *supra* note 11, at 179 (statement of Sen. Muskie).

68. The district court in *Chesapeake* found support for an "any past violation" interpretation of § 505 from omissions in the congressional deliberations. Looking at committee discussions of the civil penalties provision, the court could find nothing indicating a congressional intent to limit the use of civil penalties to ongoing violations, thereby inferring that such a limitation was not envisioned as part of the statute. 611 F. Supp. at 1548 ("[T]he absence of any discussion of such a requirement — in the context of acknowledging the general availability of civil penalties — implies that such a requirement was never contemplated.").

polluter),⁶⁹ a suit for civil penalties may be brought at any time, not just during a seasonal discharge. On the other hand, a citizen could not bring suit against a company that discharged pollutants one time in the past,⁷⁰ unless the discharge was part of an intermittent or sporadic pattern.⁷¹

There is further evidence in the legislative history suggesting that Congress intended such a fine distinction. First, the relationship between the CWA and the CAA argues against an overly broad standard. While the civil penalty authorization distinguishes the CWA from the CAA, congressional discussions nonetheless indicate that the citizen suit provision of section 505 was explicitly modeled on section 304 of the CAA.⁷² The addition of civil penalty requests was intended merely to be a modification of the CAA's citizen suit provision.⁷³ Section 304 of the CAA only authorizes injunctive relief. It would have been a radical departure from, not simply a modification of, this citizen suit scheme had Congress authorized suits for civil penalties under the CWA in situations where no legitimate request for injunctive relief is possible.

Congress further stressed the importance of injunctive actions by focusing almost entirely on inducing compliance. Congressional re-

69. For example, in *Chesapeake*, the defendant corporation had exceeded its permit limitations numerous times during the winter prior to the suit. It was unclear, however, whether the defendant's newly implemented procedure would stop this pattern of violation. 791 F.2d at 308.

70. One-time violations often occur when firms must struggle to bring their systems into compliance with new effluent standards. See, e.g., *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Sierra Club v. Raytheon Co.*, 22 Env't. Rep. Cas. (BNA) 1050 (D. Mass. 1984). Similarly, there may be no reasonable grounds for injunctive relief where a violator has shut down operations or sold its facilities, see *Friends of the Earth v. Archer Daniels Midland Co.*, 24 Env't. Rep. Cas. (BNA) 1993 (N.D.N.Y. 1986), or where the defendant has received a new permit that increases allowable levels of discharge, see, e.g., *Menzel v. County Util. Corp.*, 712 F.2d 91 (4th Cir. 1983).

71. Application of the *Pawtuxet* reasonableness standard would not radically alter judicial authorization of citizen suits. Had the *Hamker* and *Chesapeake* courts applied a reasonableness test, for example, the outcomes of the cases would not have been different. In *Hamker*, a request for injunctive relief for a one-time, past oil leak would have been held unreasonable and the suit for civil penalties dismissed. In *Chesapeake*, the violations were seasonal and thus provided reasonable grounds for issuing an injunction, thereby triggering the possibility of a civil penalties judgment under the *Pawtuxet* rule.

A few notable decisions would have been decided differently under *Pawtuxet*. Cf. *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Friends of the Earth v. Archer Daniels Midland Co.*, 24 Env't. Rep. Cas. (BNA) 1993 (N.D.N.Y. 1986) (facility's previous owner held liable for violations occurring after facility sold); *AT&T Bell Labs.*, 617 F. Supp. 1190 (D.N.J. 1985) (defendant had begun using a nonpolluting sewage treatment facility); *Menzel v. County Util. Corp.*, 712 F.2d 91 (4th Cir. 1983) (violations occurred before NPDES permit received and defendant never violated permit once received).

72. See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975); S. REP. NO. 414, 92d Cong., 1st Sess. 79, reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1497; Schwartz & Hackett, *supra* note 6, at 348-49 (noting that both statutes use identical phrase "in violation of" to authorize citizen suits).

73. S. REP. NO. 414, 92d Cong., 1st Sess. 79, reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1497. See *Pawtuxet*, 807 F.2d at 1094.

ports consistently suggested that the primary purpose behind citizens suits was the abatement of "ongoing" violations,⁷⁴ not the deterrence of future violations through penalty assessments. Permitting citizen-enforced civil penalties for past violations avoids this emphasis on abatement-minded injunctive relief and introduces a new twist — inducing compliance by forcing the violator, before polluting, to consider the threat of quasi-punitive,⁷⁵ economic sanctions.⁷⁶ By including civil penalties in a citizen's legal arsenal, Congress must have intended to make the citizen suit provision effective as a deterrent in limited situations.⁷⁷ However, allowing citizens to focus exclusively on the penalization of individual polluters while ignoring the primary role of citizen-plaintiffs as protectors against future harm contradicts the statute's overriding emphasis on injunctive relief.⁷⁸

74. In discussing attorney's fees, a Senate report stated that attorney's fees should be recoverable by a plaintiff whose suit results in abatement before reaching a verdict. S. REP. NO. 414, 92d Cong., 1st Sess. 81, reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1499. Underlying this statement, and the rest of the congressional deliberations, is the belief that the only proper reason for a citizen to bring a suit is to induce compliance. The First Circuit in *Pawtuxet* stated that support for its interpretation "may be found in congressional references to citizen suit provisions as a means of 'abating' ongoing violations of the Act." *Pawtuxet*, 807 F.2d at 1093 n.2 (citing S. REP. NO. 414, 92d Cong., 1st Sess. 79-82, reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1497-500). Clearly citizen suits are designed to give citizens the capability to force defendants into compliance.

75. Notwithstanding the Supreme Court's treatment of "civil penalties" as distinguished from criminal penalties under *Helvering v. Mitchell*, 303 U.S. 391, 404-05 (1938), the purpose served by the assessment of civil penalties in the CWA is essentially punitive. Traditionally, civil penalties were remedial; however, penalties that are payable to the U.S. Treasury are not merely remedial. Rather, the goals of civil penalties under the CWA are deterrence and penalization — goals normally asserted in connection with criminal sanctions. Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQ. L. REV. 1 (1978-1979); see text at notes 111-16 *infra* (questioning the assumption that civil penalties redress injuries suffered by plaintiffs who are not also suing for injunctive relief).

76. See EPA Policy Memorandum, *supra* note 55, at 2012 (suggesting that civil penalties induce compliance and deter violations by forcing defendants to consider potential economic losses); Roisman, *supra* note 19, at 10163.

77. Few argue with the notion that by including an authorization for civil penalties Congress hoped to introduce a citizen-triggered deterrence mechanism. One analyst has argued, however, that allowing suits for past violations will actually weaken this deterrent effect. Garret, *Citizen Suits: A Defense Perspective*, Env'tl. L. Rep. (Env'tl. L. Inst.) 10162 (July 1986). Garret presumes that a polluter will continue polluting indefinitely if compliance will not exculpate it from liability created by previous wrongs. *Id.* at 10162-63. No courts have accepted this argument, and with good reason. Any penalty assessed against one polluter may conceivably have a deterrent effect on other polluters who realize they too may be liable. The polluter who contemplates violating the statute for only a short time and then coming back into compliance will also be deterred if the polluter believes that such action will result in the assessment of a penalty. While a polluter would not be deterred from polluting if past liability were its only concern, the polluter would certainly want to avoid future liability. The 1987 amendments to the CWA authorize civil penalties of \$25,000 *per day* of violation, *supra* note 10, so that continuing to pollute will cause the violator to incur greater and greater liability. Permitting suits for past violations makes the threat of sanctions much more effective as a deterrent.

78. In addition, permitting citizen-plaintiffs to sue only for deterrent purposes again blurs the distinction between governmental and citizen enforcers discussed above in relation to the notice provision. See notes 60-62 *supra* and accompanying text. This emphasis on injunctive relief applies only to suits brought by private parties. The EPA has made it clear that in governmental

The legislative history thus suggests that an appropriate standard must preserve the preeminence of injunctive action relative to deterrence-related actions without completely removing the availability of civil penalty assessments. Under a reasonableness standard, if the plaintiff has reason to believe injunctive relief is necessary when suit is filed, the court may grant civil penalties even if the violation is not ongoing and the injunctive relief is not granted.⁷⁹ The statute's primary emphasis on abating illegal conduct and its secondary emphasis on punitive, deterrent actions are both preserved only when the reasonableness standard is adopted.

III. POLICY ARGUMENTS

An examination of the general policy considerations implicated by the three alternative interpretations of section 505 strengthens the argument for the reasonableness standard. Application of either the ongoing violation or the "any past violation" standard will create conflicts within the CWA and seriously impair the ability of the statute to function adequately.

A. *The Impossibility of Effective Enforcement Under the Ongoing Violation Standard*

Arguments introduced by courts adopting the *Chesapeake* standard point up shortcomings in the functioning and logic of the *Hamker* approach. These arguments derive from the preliminary steps involved in bringing a citizen suit under the CWA. Every firm that wishes to discharge effluents into water must obtain a permit which limits the amounts and types of discharges allowed.⁸⁰ Every month, each source must file with the EPA detailed monitoring reports that clearly indicate if and when a firm exceeds its permit limitations.⁸¹ The agency then reviews these reports and subsequently makes them available to the public.⁸² While these reports provide very clear evidence of violations and are therefore of tremendous evidentiary value,⁸³ there is nevertheless a substantial passage of time be-

enforcement suits, injunctive and penalty actions are equally important and should not be traded off against each other. EPA Policy Memorandum, *supra* note 55, at 2013.

79. An actual granting of injunctive relief is at the judge's discretion. *Miller II*, *supra* note 9, at 10075; see Schwartz & Hackett, *supra* note 6, at 329.

80. 33 U.S.C. § 1342(a), (b) (1982).

81. 40 C.F.R. §§ 122.21(f), 122.44(i) (1986).

82. 33 U.S.C. § 1318(b) (1982).

83. See *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1485 (D.N.J. 1985); Fadil, *supra* note 15, at 37; Wall St. J., *supra* note 15 (the reports "showing discharges above permitted limits serve as a legal admission of guilt"). Additionally, such reports are easy to comprehend, as "[t]ypically they include on the same line both the permitted and the actual discharge levels of a pollutant. Laypeople can learn quickly how to read the reports" Fadil, *supra* note 15, at 37. Courts have routinely rejected the defenses of violators who attempt to escape liability by asserting that their own discharge monitoring reports (DMRs)

tween the actual improper discharge and its publication,⁸⁴ and, because of the notice provision, an even greater time lag between the violation and the first date upon which a concerned citizen is permitted to bring suit.⁸⁵ A potential plaintiff simply cannot know in advance whether or not the violation found in the reports will be ongoing at the time suit is filed.

In addition, effective, timely enforcement of the regulations, and thus control of pollution, is severely hampered where suits are authorized only for ongoing violations.⁸⁶ According to *Hamker*, a polluter violating pollution control standards or limitations before suit is brought could avoid citizen suit civil penalties by stopping the violation before the suit could actually be filed.⁸⁷ A source that has the financial ability to control its violations would nevertheless have no incentive, until threatened with suit, to spend money to cease violating.⁸⁸

As a justification for adopting this flawed approach, the *Hamker* court placed great emphasis on the fear that allowing suits for past violations would lead to a drastic increase on the burden of federal courts.⁸⁹ The court worried that allowing citizens to sue for past

are inaccurate or unreliable. See, e.g., *Student Pub. Interest Res. Group of N.J., Inc. v. Fritzche, Dodge & Olcott*, 579 F. Supp. 1528, 1538 (D.N.J. 1984).

84. After a violation occurs, it is included as part of a discharger's monthly report of discharges. This report is then submitted to the EPA, or, in the case of a violation of a permit issued under a State Pollutant Discharge Elimination System (SPDES), to the state agency issuing the permit. The data indicating that a violation occurred are formally made available to the public soon thereafter when the agency issues a report that contains all the information from the polluter's DMR. Because the citizen must wait for the filing of two reports before finding out about a violation, a citizen-plaintiff can commence an action no sooner than a month, and often substantially longer, after the actual violation occurs. *Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1194 (D.N.J. 1985); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1549 (E.D. Va. 1985).

85. The notice provision requires an added 60-day delay before a suit may be filed. 33 U.S.C. § 1365(b) (1982); see note 59 *supra* and accompanying text.

86. "For penalties to serve as an effective inducement for compliance, they must be available for past as well as future violations." *Miller II*, *supra* note 9, at 10080; see *Roisman*, *supra* note 19, at 10163; *Monsanto*, 600 F. Supp. at 1475.

87. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985). Such a polluter may still be enjoined, since a request for injunctive relief, according to established common law principles, is moot only when there is no reasonable likelihood the violation will recur. See note 33 *supra* and accompanying text. The fact that courts enforcing environmental statutes have seriously attempted to fashion equitable relief appropriate for the circumstances of each particular case, *Miller II*, *supra* note 9, at 10077, suggests that a court would be more likely to grant injunctive relief where it seems clear that a polluter is timing its compliance to coincide with enforcement suits thereby avoiding civil sanctions.

88. See *Roisman*, *supra* note 19, at 10163. However, the possibility that a particularly bad polluter could become the subject of a government enforcement action for civil penalties limits the attractiveness of this strategy. Government enforcers are not limited, even under the *Hamker* approach, to prospective relief. See note 44 *supra*. Given the infrequency of agency enforcement actions, however, see notes 15-17 *supra* and accompanying text, only the most obvious and harmful polluters would have to consider seriously the threat of governmental enforcement actions.

89. *Hamker*, 756 F.2d at 396.

wrongs would induce large numbers of plaintiffs with state-law environmental damages claims to sue in federal court where attorney's fees are recoverable.⁹⁰

Although allowing suits for past violations might lead to some increase in federal court activity, this increase would not be substantial. In most situations only a successful plaintiff may recover attorney's fees,⁹¹ and the court may force an unsuccessful plaintiff to pay the defendant's attorney's fees as well.⁹² Thus, no plaintiff is likely to risk bringing a suit in federal court when the federal-law claims are not sound. More significantly, the court-clogging scenario envisioned in *Hamker* depends upon the plaintiff's ability to bring state-law claims into federal court. However, because under the Federal Rules of Civil Procedure the granting of pendent jurisdiction is at the court's discretion,⁹³ any federal court can avoid overcrowding by simply refusing to grant pendent jurisdiction. In practice, most courts dealing with the citizen suit issue have, in fact, allowed suits for past violations, but there has been no noticeable increase in the number of suits attempting to append state-law damages claims to federal causes of action under the CWA.⁹⁴

90. *Hamker*, 756 F.2d at 396. The recovery of attorney's fees is authorized by 33 U.S.C. § 1365(d) (1982).

91. See generally Miller III, *supra* note 11, at 10422. The district court of Delaware, however, suggested that in rare but appropriate situations even a losing party may recover attorney's fees. *Delaware Citizens for Clean Air v. Stauffer Chem. Co.*, 62 F.R.D. 353, 355 (D. Del. 1974) (under analogous Clean Air Act). While arguing that "ultimate success in a citizen's suit was not intended to be a prerequisite to an award," 62 F.R.D. at 355, the court did acknowledge that a losing party should be allowed to recover attorney's fees only in those rare instances when the losing party's suit furthers the purposes of the CWA, or when "other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor." 62 F.R.D. at 355.

92. Congress worried about this court-clogging problem, but concluded that the threat of having to pay defendant's attorney's fees would "have the effect of discouraging abuse of [the citizen suit] provision, while at the same time encouraging the quality of the actions that will be brought." S. REP. NO. 414, 92d Cong., 1st Sess. 81, reprinted in 2 A LEGISLATIVE HISTORY, *supra* note 23, at 1499. See Schwartz & Hackett, *supra* note 6, at 329.

93. "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Pendent jurisdiction is made possible by Rule 42(a) of the Federal Rules of Civil Procedure, which allows for consolidation of actions involving a common question of law or fact. FED. R. CIV. P. 42(a).

94. The vast majority of citizen suits share three traits, suggesting that the level of judicial activity under the citizen suit provision is not a direct result of the availability of relief for past wrongs. In most recent cases, the plaintiffs have been environmental groups concerned primarily with protecting the environment as opposed to individuals seeking damages for injury. See Miller III, *supra* note 11, at 10425. No state law claims have been included, and most suits have included requests for injunctive relief as well as civil penalty relief. See, e.g., *Chesapeake*, 791 F.2d at 304; *Connecticut Fund for the Env't. v. Job Plating Co.*, 623 F. Supp. 207 (D. Conn. 1985); *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532 (W.D.N.Y. 1984). But see *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986) (allowing a suit based entirely upon past violations and no request for injunctive relief).

B. *The Danger of Inconsistency Within the Statutory Scheme Under the "Any Past Violation" Standard*

While an ongoing violation interpretation limits the effectiveness of enforcement under the CWA, there are also substantial problems with the "any past violation" approach. A major drawback to this standard is that citizen suits based solely on past violations look very similar to citizen suits for damages brought under state law. The Supreme Court has made it clear that Congress did not authorize a private right of action for damages under the CWA provisions.⁹⁵ Although not enabling citizen-plaintiffs to recover money awards, the "any past violation" standard does permit plaintiffs seeking civil penalties to bring suits which bear a strong resemblance to private, state-law injury claims. In both situations, citizens sue polluters and force them to pay money because of some past, noncontinuing environmental wrong the defendant committed.

Proponents of this *Chesapeake* "any past violation" interpretation argue that Congress, in denying private rights of action, meant only to keep plaintiffs with personal damages claims out of federal court, and *not* to restrict the scope of the CWA by permitting only suits based on continuing violations. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,⁹⁶ the Supreme Court focused primarily on Congress' decision not to provide for a private right of action in the CWA.⁹⁷ The Court considered the issue broadly, suggesting that citizen suits based solely on past wrongs are generally inappropriate because section 505 "authorizes only prospective relief."⁹⁸ The Court saw the citizen's role as limited to situations in which a citizen suit has the potential to affect future behavior.

This limitation supports the argument, suggested by analysis of the notice and preemption provisions,⁹⁹ that civil suits based on past violations are incongruous with the purposes of section 505. Citizens were included in the enforcement provisions in order to encourage agency enforcement¹⁰⁰ and, importantly, to help abate future violations of

95. *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). See generally Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985) (discussing private rights of action under a variety of environmental statutes).

96. 453 U.S. 1 (1981) (fishermen denied recovery under CWA for damages caused by defendant's past polluting).

97. 453 U.S. at 14.

98. 453 U.S. at 6. The Court did not provide any further indication as to which standard is most appropriate. Suits based solely on past violations clearly request more than prospective relief. While suits for ongoing violations do satisfy the court's construction of § 505, the reasonableness standard also limits plaintiffs to prospective relief, since jurisdiction under this standard is dependent upon the plaintiff's request for an injunction, which is a form of prospective relief.

99. See notes 60-62 *supra* and accompanying text.

100. *Village of Kaktovik v. Corps of Engineers*, 12 Env't. Rep. Cas. (BNA) 1740 (D. Alaska 1978). See note 57 *supra* and accompanying text.

CWA regulations.¹⁰¹ Rather than preventing future violations, a citizen suit for penalties based solely on past violations, like a suit for damages, will merely force the defendant to pay money for past misconduct. Such a payment bears no necessary relation to the likelihood that the defendant will violate in the future. The authority to sue for past violations should reside exclusively with the government, leaving citizens with the capacity to sue for civil penalties only as an adjunct to a request for forward-looking, injunctive relief.¹⁰²

Another problem with the *Chesapeake* standard becomes evident when one considers the manner in which the settlement process and the governmental preemption provision work together. Under subsection 505(b)(1)(B), a citizen may not commence an enforcement action if the Administrator or a state is prosecuting an action against the alleged violator "in a court."¹⁰³ While there is disagreement over the interpretation of this provision, most courts interpret the phrase "in a court" narrowly,¹⁰⁴ so that out-of-court enforcement actions taken by

101. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986); see notes 74-76 *supra* and accompanying text.

102. While allowing suits based solely on past violations may thus be inappropriate, one commentator has further suggested that allowing citizens to sue for past violations is unconstitutional. Lewis, *Environmentalists' Authority to Sue Industry for Civil Penalties is Unconstitutional Under the Separation of Powers Doctrine*, 16 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10101 (Apr. 1986). Lewis asserts that allowing citizens to sue for past violations amounts to granting citizens the power to enforce the law. *Id.* at 10104. He argues that, according to decisions such as *Buckley v. Valeo*, 424 U.S. 1 (1976), which denies Congress the power to delegate executive authority, the grant to sue for past penalties is unconstitutional. *Id.* at 10101. The District of Maryland, however, explicitly rejected this argument in *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987). The court noted that the cases relied on by Lewis, and by the defendant in the *Bethlehem* case, addressed separation of powers between Congress and the Executive, not private persons and the Executive. 652 F. Supp. at 624. Additionally, the court held that Congress has wide latitude to determine who enforces the statutory rights that Congress creates. 652 F. Supp. at 625. This debate is not yet fully resolved, but it seems unlikely that any defendant will be able to avoid liability on a separation of powers argument.

103. 33 U.S.C. § 1365(b)(1)(B) (1982); see note 59 *supra*.

104. Most courts have granted some agency actions preclusive effect, but have greatly limited the situations in which such actions will be preemptive. Generally, courts look to see if the governmental enforcement actions provide roughly the same relief as a court order. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) (under a parallel preclusion provision in the CAA, agency actions have preclusive effect so long as the agency is capable of providing "meaningful and effective enforcement"), *cert. denied*, 441 U.S. 961 (1979). The Second Circuit, however, adheres to the literal meaning of the preclusion provisions and suggests that no agency enforcement action is to be given preclusive effect. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985). Although it is unclear how many of the district court opinions remain good law after *Consolidated Rail*, a general test, focusing primarily on two factors, has evolved. Courts look to see whether agencies are capable of imposing the same range of penalty and injunctive relief as courts, see, e.g., *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980); *Student Pub. Interest Res. Group of N.J., Inc. v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394 (D.N.J. 1985), and whether citizens are granted the same right to intervene as they would have in a court enforcement action, see, e.g., *Sierra Club v. SCM Corp.*, 572 F. Supp. 828 (W.D.N.Y. 1983), *aff'd*, 747 F.2d 99 (2d Cir. 1984); *Student Pub. Interest Res. Group of N.J., Inc. v. Fritzche, Dodge & Olcott*, 579 F. Supp. 1528 (D.N.J. 1984). But see *Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.*, 591 F. Supp. 345 (N.D.N.Y. 1984) (failure to grant citizens the right to intervene does *not* deprive an agency

governmental enforcers will not always bind subsequent citizen-plaintiffs.¹⁰⁵

The nonbinding nature of consent agreements reached through out-of-court settlement negotiations takes on great significance when citizens are allowed to sue for one-time past violations. Consent agreements almost always contain clauses in which a defendant promises to cease violating permanently.¹⁰⁶ Although the most prevalent interpretation of the preemption provision does not give preclusive effect to consent decrees reached between violators and agency enforcers, res judicata does prevent a citizen from suing for injunctive relief when the government has already brought and completed a suit designed to curb ongoing violations.¹⁰⁷ Where further injunctive relief is thus precluded, both the reasonableness and the ongoing violation standards would forbid citizen suits.¹⁰⁸

Courts applying the *Chesapeake* interpretation of section 505 have allowed citizen-plaintiffs to sue for civil penalties based on past violations if those violations were not expressly treated in a consent agreement.¹⁰⁹ Unless the defendant and agency enforcer reach an agreement that expressly covers all past violations, defendants will recognize that they cannot avoid all future suits by settling and will thus have a diminished incentive ever to settle out of court. Congress clearly hoped that citizen suits would trigger agency actions that do not require judicial involvement.¹¹⁰ The restrictive reading of the

enforcement action of its preclusive effect), *modified*, 768 F.2d 57 (2d Cir. 1985). See generally Fadil, *supra* note 15, at 44-49; Schwartz & Hackett, *supra* note 6, at 345-48.

105. See, e.g., *Consolidated Rail*, 768 F.2d 57; *Fritzche, Dodge & Olcott*, 579 F. Supp. 1528; *SCM Corp.*, 572 F. Supp. 828.

106. See Miller II, *supra* note 9, at 10080-82 (most decrees in these actions have compliance schedules, setting a date beyond which the defendant agrees to cease violating).

107. Under traditional common law rules, "a consent judgment normally is given full res judicata effect in the absence of a stipulation indicating that it is not on the entire claim." J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 14.7, at 655 (1985) (footnote omitted). See Miller II, *supra* note 9, at 10081 ("Citizen suits . . . cannot be maintained in the face of a completed judicial enforcement action for the same violations. This is true whether an enforcement action is concluded by a decree after full litigation or by consent decree.").

108. At least one court has held, however, that while a consent order would normally preclude citizen suits for injunctive relief, under the CAA, where only injunctive relief is allowed, such suits are allowed if the agency is not diligently enforcing the consent agreement. *Gardeski*, 501 F. Supp. at 1166-67. See Miller II, *supra* note 9, at 10081 (subsequent actions are precluded "[u]nless there is an alleged failure of the plaintiff to enforce such a decree").

109. See, e.g., *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985) (permitting citizens to sue where prior agency enforcement action was only forward looking); *Love v. New York Dept. of Env'tl. Conservation*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981) (permitting citizens to sue when the agency did not enforce "the environmental laws to the fullest extent possible"). If an ongoing violation or reasonableness standard were applied, the extensiveness of agency enforcement would not matter so long as it prohibited future violations, thus barring future requests for injunctive relief in the absence of a subsequent violation.

110. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979); Fadil, *supra* note 15, at 45-46; Note, *Statute of Limitations*, *supra* note 53, at 201.

agency preemption clause under the "any past violation" standard undermines this goal by discouraging effective settlement of citizen suits.

Finally, allowing suits for civil penalties based solely on past violations may conceivably be unconstitutional. This constitutional challenge centers on whether Congress was acting within the scope of its powers when granting citizens the right to sue for past violations. Congress gave citizens standing to sue under section 505 so long as they meet the standard set forth in *Sierra Club v. Morton*,¹¹¹ which makes clear that every plaintiff, whether an individual citizen or an environmental group, must show an "injury in fact."¹¹² A sufficient injury may consist of an adversely affected interest in a general environmental good, such as clean water or unpolluted air.¹¹³ However, in cases further delineating the scope of constitutional standing, the Supreme Court has held that in order to have standing a plaintiff must seek relief that will redress a specific injury.¹¹⁴ If the *Sierra Club* test is modified, as some commentators argue it must be,¹¹⁵ the question arises as to whether penalties paid directly to the U.S. Treasury really redress any injury suffered by the plaintiff. While courts have almost uniformly agreed that any violation of a permit does establish a violation,¹¹⁶ it is difficult to see how forcing a past violator to pay fines to the Treasury provides the citizen-plaintiff any form of redress.

C. *The Elimination of Problems and the Effective Functioning of the Clean Water Act Under the Reasonableness Standard*

Pointing to the problems associated with other standards and noting that the ongoing violation and "any past violation" standards do have serious flaws is only meaningful if a more workable alternative

111. 405 U.S. 727 (1972); see note 17 *supra*.

112. 405 U.S. at 733.

113. 405 U.S. at 734; W. RODGERS, *supra* note 8, at 77; Senate Consideration of the Report of the Conference Committee, reprinted in 1 A LEGISLATIVE HISTORY, *supra* note 11, at 221.

114. "[A]rticle III [of the Constitution] demands that a litigant have suffered some actual injury which may be redressed by a favorable judicial ruling." Schwartz & Hackett, *supra* note 6, at 332; see *Simon v. East Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976) (plaintiff has standing only if he "has shown an injury to himself that is likely to be redressed by a favorable decision").

115. Schwartz & Hackett, *supra* note 6, at 333.

116. Courts' inquiries have focused almost exclusively on questions relating to whose interest is at stake and to whether that interest has been injured. Courts have also tended to hold that every violation of an environmental statute results in an actionable injury. Courts usually will grant relief so long as a plaintiff shows she has an interest at stake and a violation has occurred. This completely ignores the question of whether a court action can redress the injury complained of. See Schwartz & Hackett, *supra* note 6, at 338-41. This issue was raised and rejected once in a lower court proceeding, *Student Pub. Interest Res. Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1196 (D.N.J. 1985), but it has not been conclusively decided. The court found that suits based solely on past violations may provide benefit to the plaintiff at bar by deterring the defendant from polluting again. Additionally, such a penalty could deter others, thereby facilitating a system of economic incentives. 617 F. Supp. at 1200-02. "[I]t is consistent with Congress' intent to allow plaintiffs in citizen suits to redress their injuries by seeking relief in the form of general deterrence." 617 F. Supp. at 1201.

can be discovered. Under the CWA, a reasonableness standard avoids most of the policy problems associated with the *Chesapeake* and *Hamker* approaches, thus more closely serving the purposes intended by Congress.

By linking every request for civil penalties with a reasonable plea for injunctive relief, the *Pawtuxet* approach is forward-looking, operating to abate continuing violations, including intermittent and sporadic violations, while yet deterring potential future violators. The reasonableness standard ensures that plaintiffs will bring suits that are primarily remedial rather than punitive. At the same time, the standard preserves the defendant's incentive to settle, because the citizen-plaintiff will not be able to meet the reasonableness requirement once a consent decree is concluded, and will therefore not be able to sue for civil penalties.

Conversely, a reasonableness standard improves dramatically upon an ongoing violation standard by permitting a plaintiff to sue for civil penalties so long as there is reason to believe injunctive relief is necessary at the time of filing. Application of the reasonableness standard would eliminate the uncertainty caused by delay between occurrence and publication of violations, while enabling the CWA to reach those polluters who may strategically and temporarily halt improper discharges after receiving notice of a threatened suit.

IV. CONCLUSION

The First Circuit's interpretation of section 505 best serves both the purposes and the policies behind the CWA legislation. Congress attempted to establish a meaningful distinction between the enforcement powers of federal and state agencies on the one hand and the powers of citizen-plaintiffs on the other. A reasonableness standard preserves such a distinction by allowing the government to sue to enforce discharge permits or to penalize polluters for past or current violations of effluent standards, while permitting citizens to sue under section 505 only when a violator poses an immediate or chronic threat. The requirement in subsection 505(b) that citizens who intend to sue first notify the federal and state governments encourages agency intervention. Under a reasonableness approach, the agencies will have an additional incentive to intervene, as early intervention may lead to a settlement, obviating the need for litigation.

Ultimately, the primary reason for preferring the *Pawtuxet* reasonableness standard is also the most basic. Citizen-plaintiffs under the CWA, as under its predecessor the CAA, should be concerned primarily with inducing compliance. Suits based exclusively on past violations should not be permitted. Unlike section 304 of the CAA, however, section 505 of the code does contain a provision authorizing citizens to sue for civil penalties. The citizen must have a meaningful

ability to request penalty assessments under section 505, but the *Hamker* ongoing violation standard makes penalty assessments virtually unobtainable. Only under a *Pawtuxet* approach will the citizen focus primarily on inducing compliance while nevertheless retaining the authority to request significant civil penalties.

— James L. Thompson