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CITIZEN SUITS AND THE CLEAN WATER ACT: HAS ARTICLE III BECOME A PERMANENT ROADBLOCK TO PRIVATE ENFORCEMENT?

*Natural Resources Defense Council v. Southwest Marine, Inc.*¹

I. INTRODUCTION

Since its enactment in 1972, the Federal Water Pollution Control Act or Clean Water Act ("CWA" or "Act")² has become a powerful force in preventing the illegal discharge of pollutants into the nation's waterways. The CWA provides for both state and private enforcement.³ Initial enforcement action may be effected by the Environmental Protection Agency or an appropriate administrative agency.⁴ Absent any state or federal action, the Act provides for private enforcement through citizen-initiated suits in federal court.⁵ The citizen suit provision has become a powerful tool by which citizen groups have prosecuted parties who illegally pollute in violation of the CWA.

Congress added the citizen-suit provision to the CWA to "address the fear that statutory commitments would be threatened by bureaucratic failure."⁶ The hope was that citizen-suits would provide a supplemental means of enforcing the Act in instances where the government failed to prosecute alleged polluters.⁷ The provision, which for years provided private citizens and organizations with the statutory means to prevent environmental harm has had its viability brought into question. Recent decisions have demonstrated a judicial trend towards limiting the effectiveness of citizen suits by precluding awards of civil penalties in many instances through the doctrines of standing and mootness.⁸

Natural Resources Defense Council v. Southwest Marine, Inc. presents an important opportunity for the role of the citizen suit to be further defined by the courts. The decision will provide future guidance to all those concerned with the practical effectiveness of citizen suits brought to ensure CWA compliance.

II. FACTS AND HOLDING

Plaintiffs Natural Resources Defense Council, San Diego Baykeeper, Inc., and Kenneth J. Moser (collectively "NRDC") brought a CWA action in United States District Court, Southern District of California, against defendant Southwest Marine, Inc. ("Southwest").⁹ Plaintiffs, comprised of two private environmental organizations and a private individual, alleged Southwest, a local San Diego shipyard, violated numerous provisions of the CWA.¹⁰ Specifically, NRDC alleged that Southwest unlawfully discharged pollutants from its bayside facility into the San Diego Bay and the Pacific Ocean and, in addition, failed to prepare and implement several environmental compliance and monitoring programs required by Southwest's National Pollutant Discharge Elimination System ("NPDES") permit.¹¹ NRDC

¹ 28 F. Supp.2d 584 (S.D. Cal. 1998), *aff'd on reh'g*, 39 F. Supp.2d 1235 (S.D. Cal. 1999).

² Federal Pollution Control Act Amendment of 1972, Pub. L. No. 92-500 (codified in 33 U.S.C. §§ 1251-1387 (1994)).

³ *Id.* at §§ 1319(a)(1), 1365(a).

⁴ *Id.* at § 1319(a)(1).

⁵ *Id.* at § 1365(a).

⁶ Cass R. Sunstein, *What's Standing After Lujan?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992).

⁷ *Id.*

⁸ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003 (1998); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1111 (1999); and *Dubois v. U.S. Dep't of Agric.*, 20 F. Supp.2d 263 (D.N.H. 1998), *discussed infra* at notes 18-136.

⁹ *Natural Resources Defense Council v. Southwest Marine, Inc.*, 28 F. Supp.2d 584, 584 (S.D. Cal. 1998), *aff'd on reh'g*, 1999 WL 155914 (S.D. Cal. 1999).

¹⁰ *Id.*

¹¹ *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1330 (S.D. Cal. 1996).

sought injunctive relief as well as civil damages from Southwest.¹² In response to NRDC's suit, Southwest brought a motion in limine to preclude an award of civil penalties ("Motion").¹³

The issue presented was whether citizen-plaintiffs had standing to seek civil penalties against alleged violators of the CWA. Southwest contended in its Motion that NRDC's claim for civil penalties was precluded as a matter of law because plaintiffs in citizen suits lacked standing to seek civil penalties against alleged violators of the CWA.¹⁴ NRDC contended that the Act expressly granted standing to citizens to bring suit for civil damages.¹⁵

The district court denied Southwest's Motion, holding that the citizen-plaintiffs had standing to seek civil penalties under the CWA if they sought injunctive relief for ongoing violations of the Act.¹⁶

III. LEGAL BACKGROUND

A. Citizen Standing under the Clean Water Act

1. An Overview of the Doctrine of Standing

The focus of the court's decision in *Natural Resources Defense Council v. Southwest Marine, Inc.* was whether NRDC had standing to pursue its claim for civil penalties in federal court. Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁷ A key provision within the Act states that the CWA may be enforced through private, citizen suits against alleged violators.¹⁸ This section allows environmental organizations as well as private citizens to enforce the Act through suits filed in federal court.¹⁹

Though the CWA provides for citizen-suit enforcement of the Act, it does not allow any citizen to become a "private prosecutor" who may sue polluters for the common good in the nearest available forum. For a claim to be heard in federal court, it must be both justiciable²⁰ and a valid "case or controversy"²¹ under the U. S. Constitution. Specifically, citizen-plaintiffs must meet the justiciability requirements of standing before enforcing their rights under the Act. Stated generally, the doctrine of standing addresses the basic question of *who* may bring a lawsuit in federal court.²² Standing analysis focuses upon "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."²³ The doctrine requires the court to make a threshold determination as to whether a specific person is the proper party to bring a matter to federal court for resolution.²⁴

¹² *Id.*

¹³ *Southwest Marine*, 28 F. Supp.2d at 584. The procedural history of the instant case may be summarized briefly. In 1996, NRDC filed suit against Southwest for numerous CWA violations. Southwest initially moved to dismiss the suit for lack of subject-matter jurisdiction. *Southwest Marine*, 945 F. Supp. at 1330. The Southern District of California denied Southwest's motion to dismiss. *Id.* Southwest then filed the instant motion to preclude civil penalties. *Id.*

¹⁴ *Id.*

¹⁵ See 33 U.S.C. §§ 1251-1387 (1994).

¹⁶ *Southwest Marine*, 28 F. Supp.2d at 584.

¹⁷ 33 U.S.C. § 1251(a) (1994).

¹⁸ See 33 U.S.C. § 1365(a) (1994). "Except as provided in subsection (b) of this section and section 1319(g) of this title, any citizen may commence a civil action on his own behalf: (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation[.]" *Id.*

¹⁹ *Id.*

²⁰ See *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968). The Court has stated for that for a case to be justiciable, it "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

²¹ U.S. CONST. art. III, § 2, cl. 1.

²² See *Warth v. Seldin*, 422 U.S. 490 (1975).

²³ *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

²⁴ *Id.*

The courts have addressed the issue of standing in citizen suits in numerous decisions since the inception of the CWA.²⁵ What has been at the heart of these decisions is the issue of *what* citizen plaintiffs must allege in their complaint to meet standing requirements. Over time, courts have differed in their interpretations regarding how standing requirements may be satisfied under the Act.²⁶

2. The Gwaltney Decisions

The issue which initially faced federal courts was the requisite sufficiency of a citizen-plaintiff's complaint.²⁷ Specifically, the issue was whether entirely past violations were actionable under the citizen-suit provision of the CWA or whether allegations of ongoing violations were required to confer standing.²⁸ The dispute that defined the courts' reasoning in this area for more than a decade began with *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*²⁹ The District Court for the Eastern District of Virginia's decision in *Gwaltney I*, along with the suit's subsequent appeal and remand, shaped the approach to citizen suit standing until the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment* in 1998.³⁰

In *Gwaltney I*, the plaintiffs filed suit against defendant Gwaltney of Smithfield, Inc. ("Gwaltney of Smithfield") for violations of the CWA.³¹ The plaintiffs alleged violations of Gwaltney of Smithfield's National Pollutant Discharge Elimination System ("NPDES") permit.³² The plaintiffs filed suit alleging that Gwaltney of Smithfield "[had] violated . . . [and would] continue to violate its NPDES permit."³³ Gwaltney of Smithfield moved for dismissal due to lack of subject-matter jurisdiction arguing that the language of the CWA required that a defendant be in violation of the Act at the time of the suit.³⁴ Gwaltney of Smithfield asserted that since it had complied with the conditions of its NPDES permit *before* the plaintiffs filed suit, the district court lacked subject-matter jurisdiction.³⁵ The *Gwaltney I* court rejected Gwaltney of Smithfield's argument, concluding that the CWA authorized citizens to bring enforcement actions on the basis of wholly past violations.³⁶ In *Gwaltney II*, the Fourth Circuit affirmed, concluding that the Act "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present."³⁷

In *Gwaltney III*, the Supreme Court granted *certiorari* to resolve the conflict regarding subject-

²⁵ See *infra* notes 27-83.

²⁶ See *infra* notes 27-83.

²⁷ See Robert Wiygul, *Gwaltney Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L. J. 435, 436 (Summer 1995).

²⁸ *Id.*

²⁹ 611 F. Supp. 1542 (E.D. Va. 1985). Procedural history of *Gwaltney of Smithfield*: *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 611 F. Supp. 1542 (E.D. Va. 1985) ("*Gwaltney I*"); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986) ("*Gwaltney II*"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) ("*Gwaltney III*"); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cir. 1988) ("*Gwaltney IV*"); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690 (4th Cir. 1989) ("*Gwaltney V*").

³⁰ 523 U.S. 83 (1998). See *infra* notes 54-83.

³¹ *Gwaltney of Smithfield*, 484 U.S. at 54.

³² *Id.* Pursuant to the CWA, NPDES permits are issued by the Administrator of the Environmental Protection Agency authorizing the discharge of pollutants into navigable waterways in accordance with specified conditions. 33 U.S.C. § 1342 (1994). Holders of NPDES permits are subject to enforcement action for failure to comply with the conditions of their permit. *Id.* § 1319. Enforcement may be pursued by either federal or state government officials. *Id.* §§ 1319, 1342(b)(7). Germane to this discussion, in the absence of state or federal action, private citizens may pursue civil action against any individual "alleged to be in violation of" the conditions of a NPDES permit. *Id.* § 1365(a)(1).

³³ *Gwaltney of Smithfield*, 484 U.S. at 54.

³⁴ *Id.* at 54-55.

³⁵ *Id.* at 55. *Gwaltney of Smithfield* relied on the Fifth Circuit's decision in *Hamker v. Diamond Shamrock Chemical, Inc.*, 756 F.2d 392, 395 (5th Cir. 1985), which held that a complaint brought under the citizen suit provision of the CWA "must allege a violation occurring at the time the complaint is filed." *Id.*

³⁶ *Gwaltney of Smithfield*, 611 F. Supp. at 1547. The district court found that "[t]he words 'to be in violation' may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present." *Id.*

³⁷ *Gwaltney of Smithfield*, 791 F.2d at 309.

matter jurisdiction under the citizen-suit provision of the CWA.³⁸ The Court rejected the Fourth Circuit's interpretation of "to be in violation"³⁹ in *Gwaltney II*, holding that citizen suits under the CWA may be maintained only to "enjoin or otherwise abate an ongoing violation."⁴⁰ The Court reasoned that the provisions for citizen enforcement "make plain that the interest of the citizen-plaintiff is primarily forward looking."⁴¹

The Court split regarding the issue of sufficiency of "ongoing violations" that must be alleged by citizen-plaintiffs. Justice Marshall, representing the minority, interpreted "to be in violation" to require that citizen-plaintiffs "allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future."⁴² The majority interpreted "to be in violation" as conferring subject-matter jurisdiction for a "good faith allegation" of ongoing violations.⁴³ The majority thus determined that ongoing violations must be alleged in the complaint, but not proven.⁴⁴ Upon the remand of *Gwaltney III* to the Fourth Circuit, the requirements to demonstrate sufficient ongoing violations were further refined in *Gwaltney IV*.⁴⁵

The Supreme Court's decision in *Gwaltney III* was notable in that throughout its discussion of standing, the Court focused solely on statutory standing under the CWA. Critics have noted, "The *Gwaltney* decision is somewhat confusing because it does not clearly distinguish statutory standing requirements and standing requirements under Article III of the U.S. Constitution."⁴⁶ The requirement of an ongoing violation is a statutory requirement which, if met, would satisfy subject-matter requirements in federal court. For standing to be extended, a citizen-plaintiff must not only acquire subject-matter jurisdiction, but they must also establish standing under Article III.⁴⁷ *Gwaltney* provided no discussion of standing requirements under Article III, and it was more than a decade later before the issue was addressed.⁴⁸

3. *Steel Co. v. Citizens for a Better Environment*

In 1998, the issue of citizen-plaintiff standing in environmental suits was addressed by the Supreme Court in *Steel Co. v. Citizens for a Better Environment*.⁴⁹ In *Steel Co.*, the plaintiff, a private non-profit environmental organization ("CBE"), filed suit against the defendant, a steel manufacturer ("Steel Company"), under the Emergency Planning and Community Right-to-Know Act of 1986⁵⁰ ("EPCRA").⁵¹ Generally, EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the existence of hazardous chemicals and provides for emergency response upon the occurrence of a health-threatening release of these chemicals.⁵² In addition, EPCRA imposes specific reporting requirements for users of hazardous chemicals.⁵³ Similar to the CWA, EPCRA

³⁸ *Gwaltney of Smithfield*, 484 U.S. at 49.

³⁹ 33 U.S.C. § 1365(a) (1994).

⁴⁰ *Gwaltney of Smithfield*, 484 U.S. at 59 (emphasis added).

⁴¹ *Id.*

⁴² *Id.* at 57.

⁴³ *Id.* at 65.

⁴⁴ *Id.* The Court's split was important when analyzing future complaints by citizen plaintiffs following *Gwaltney of Smithfield* – but is not germane to this discussion.

⁴⁵ *Gwaltney of Smithfield*, 844 F.2d at 170. The Fourth Circuit provided that citizen-plaintiffs may demonstrate the existence of an ongoing violation either "(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Id.* at 171-172.

⁴⁶ Wiygul, *supra* note 27, at 448.

⁴⁷ *Save Our Community v. U.S. E.P.A.*, 971 F.2d 1155, 1160-61 (5th Cir. 1992).

⁴⁸ Wiygul, *supra* note 27, at 442.

⁴⁹ 523 U.S. 83 (1998).

⁵⁰ Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1994).

⁵¹ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, ___, 118 S. Ct. 1003, 1008 (1998).

⁵² *Steel Co.*, 118 S. Ct. at 1009.

⁵³ 42 U.S.C. §§ 11022, 11023 (1994).

contains a provision for citizen-suit enforcement.⁵⁴ Pursuant to this provision, CBE filed suit against Steel Company for alleged violations of EPCRA seeking injunctive relief and civil penalties.⁵⁵ CBE alleged that Steel Company used and disposed of hazardous chemicals without filing reports required by EPCRA.⁵⁶ Steel Company moved to dismiss the suit, arguing that all EPCRA violations had been cured by the time CBE filed suit, thus CBE's suit could not stand as it alleged solely past violations.⁵⁷ The district court, relying on the Supreme Court's holding in *Gwaltney III*, granted Steel Company's motion.⁵⁸ CBE appealed and the Seventh Circuit reversed.⁵⁹ The Seventh Circuit, refusing to apply the holding of *Gwaltney III*, denied Steel Company's motion to dismiss holding that CBE could maintain a suit for wholly past violations of EPCRA.⁶⁰

The Supreme Court granted *certiorari* and vacated the Seventh Circuit's ruling.⁶¹ In the process, *Steel Co.* redefined the analysis the Court employed in examining standing in citizen-suit cases under environmental statutes. The Court rebutted the reasoning in *Gwaltney III* and established a new process for reviewing standing in citizen-suit cases.⁶² Unlike *Gwaltney III* where statutory subject-matter jurisdiction was discussed first, the Court in *Steel Co.* emphasized that courts should determine whether Article III standing exists before reviewing issues of statutory subject-matter jurisdiction.⁶³

The Court continued by outlining the requirements for standing under Article III and then examined CBE's complaint to determine whether it met those requirements. As stated in *Steel Co.*, the requirements for standing under Article III are injury in fact,⁶⁴ causation,⁶⁵ and redressability.⁶⁶ The Court failed to reach an analysis of the first two requirements finding that CBE failed to meet the third element of standing, redressability⁶⁷ because its complaint failed to allege any ongoing violations.⁶⁸ Had a "continuing violation" been alleged the claim for injunctive relief would have satisfied the redressability requirement.⁶⁹ The Court also reviewed CBE's request for civil penalties.⁷⁰ Additionally, the Court found that civil penalties under EPCRA did not satisfy the redressability requirement of Article III.⁷¹ The Court noted that these penalties, payable to the United States Treasury – not CBE – did not suffice to remedy CBE's injuries.⁷²

⁵⁴ *Steel Co.*, 118 S. Ct. at 1009.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1008-09.

⁵⁷ *Id.* at 1009.

⁵⁸ *Citizens for a Better Env't. v. Steel Co.*, 1995 WL 758122 at *2, *5 (N.D. Ill. 1995).

⁵⁹ *Citizens for a Better Env't. v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996).

⁶⁰ *Id.* at 1244.

⁶¹ See Janet A. Brown, *Spring 1998 Term: Steel Company v. Citizens for a Better Environment*, 4 ENVIRONMENTAL LAWYER 957 (1998).

⁶² *Id.* at 967-69. Justice Stevens in his concurrence argues that the Court should have decided the issue of statutory jurisdiction before reaching the constitutional issue of Article III standing. Stevens cites extensively to *Gwaltney of Smithfield* to support his position. *Id.*

⁶³ *Id.* at 964. "The Court embark[s] [first] on an extended digression in an effort to debunk Justice Stevens' argument in favor of resolving the statutory merits question before the standing issue." *Id.*

⁶⁴ *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

⁶⁵ *Simon v. E. Kentucky Welfare Right Org.*, 426 U.S. 26, 41-42 (1976).

⁶⁶ *Id.* at 45-46.

⁶⁷ *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83 ___, 118 S. Ct. 1003, 1017-19 (1998). CBE's complaint asked for "(1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records . . . ; (3) an order requiring a petitioner to provide respondent copies of all compliance records submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of §§ 11022 and 11023; (5) an award of all respondent's 'costs, in connection with the investigation and prosecution of this matter . . .'; and (6) any such further relief as the court deems appropriate." *Id.* This note will not examine the Court's discussion of claims (1), (5) and (6) above [*Steel Co.*, 118 S. Ct. at 1020].

⁶⁸ *Id.* at 1019. The Court found that the claim for injunctive relief "cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future." *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1018-19.

⁷¹ *Id.*

⁷² *Id.*

But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforce, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.⁷³

Thus disposing of each remedy sought by CBE, the Court concluded that "respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it."⁷⁴

In *Steel Co.*, the Supreme Court detailed its approach to analyzing standing for environmental suits involving citizen-plaintiffs. Though its analysis differed from *Gwaltney III*, the Court in *Steel Co.* reached a substantially similar result.⁷⁵ *Gwaltney III* and *Steel Co.* both concluded that citizen-plaintiff's lack standing to seek civil penalties for wholly past violations of environmental statutes.⁷⁶ In regards to standing, the conclusions reached in both decisions limited citizen claims to suits alleging ongoing violations on the part of the defendant.⁷⁷

B. Mootness in Clean Water Act Citizen-Suits

1. An Overview of the Doctrine of Mootness

It is well established that once a plaintiff demonstrates standing to sue, the court's inquiry into the justiciability of the claim is not closed. The Supreme Court has stated, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies."⁷⁸ Thus, for a case to remain justiciable, a plaintiff must not only satisfy standing requirements at the time the suit is commenced, but must also satisfy these requirements throughout the life of the case. The controversy "must be extant at all stages of review, not merely at the time the complaint is filed."⁷⁹ The requirement that a controversy not be moot is closely tied to that of standing. The Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."⁸⁰ Accordingly, if a once justiciable controversy becomes moot, the court loses jurisdiction over the suit and must dismiss.⁸¹

The doctrine of mootness is crucial to the justiciability of citizen-suit claims under the CWA. This becomes evident when one examines the typical citizen-suit complaint alleging violations of the CWA. In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court established certain requirements that a citizen-plaintiff must satisfy to survive the threshold issue of standing.⁸² Namely, a plaintiff must allege an ongoing violation on part of the alleged violator along with any allegations of past

⁷³ *Id.*

⁷⁴ *Id.* at 1020.

⁷⁵ *Gwaltney of Smithfield* involved a suit brought under the CWA citizen-suit provision. See 33 U.S.C. § 1365(a) (1994). *Steel Co.* involved a suit filed pursuant to the citizen-suit provision or EPCRA. See 42 U.S.C. § 11046(a)(1) (1994). Though the provisions differ in form, they are substantially similar enough to allow a comparison between the two cases. See *Steel Co.*, 523 U.S. 83, 118 S. Ct. 1003 (1998) (Stevens, J., concurring).

⁷⁶ *Steel Co.*, 118 S. Ct. at 1019. Alleged ongoing violations would satisfy the redressability requirement for citizen-plaintiffs injunctive claims. *Id.* It is not apparent whether allegations of ongoing violations would satisfy standing requirements for civil-penalty claims.

⁷⁷ See Philip Wernberg, *Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Action?*, 7 N.Y.U. ENVTL. L. J. 1 (1999); George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028 (1999); Ann E. Carlson, *Standing for the Environment*, 45 U.C.L.A. L. REV. 931 (1998).

⁷⁸ *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

⁷⁹ *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁸⁰ *Id.* at 67.

⁸¹ See *Boston and Maine Corp. v. Brotherhood of Maintenance of Way Employees*, 94 F.3d 15, 20 (1st Cir. 1996).

⁸² See *Steel Co.*, 118 S. Ct. at 1017-20.

wrongdoing.⁸³ The typical citizen-complaint requests relief in the form of civil penalties⁸⁴ for any past and continuing violations of the Act in addition to injunctive relief to force the alleged violator to discontinue its ongoing, unlawful conduct.

Frequently the alleged violator will discontinue its wrongful actions, and a reviewing court must then determine whether the plaintiff's complaint remains justiciable. The key inquiry concerns *when* the alleged violator discontinued its wrongful conduct. There are three likely scenarios of defendant compliance (or noncompliance) and how this will affect justiciability.⁸⁵ The Supreme Court's changing approach to the justiciability of citizen-suits under the CWA may seriously undermine the original purpose of the Act.

2. The Effect of Pre-Complaint Compliance by Defendants

The first scenario is the situation in which the alleged violator of the CWA discontinues its wrongful conduct *before* the citizen complaint is filed. The court's determination in this situation is clear after *Gwaltney III* and *Steel Co.* Both decisions determined that standing would not be conferred in citizen-suits alleging solely past violations of the Act.⁸⁶ Therefore, a citizen-plaintiff's request for civil penalties and injunctive relief would fail, not for becoming moot, but for failure to meet the requirements of standing.⁸⁷

3. The Effect of Non-Compliance by Defendants

A second possible scenario may arise when a complaint is filed by a citizen-plaintiff alleging past and ongoing violations of the CWA and the alleged violator *never* ceases its unlawful conduct. Here is where the courts' interpretation of mootness becomes unclear. Separating the relief requested in the citizen-plaintiff's complaint will aid analysis. It is clear that a plaintiff's request for injunctive relief will survive. Under both *Gwaltney III*⁸⁸ and *Steel Co.*,⁸⁹ allegations of continuing violations will not moot a claim for injunctive relief. Whether the citizen-plaintiff's claim for civil penalties will remain justiciable is unclear after *Steel Co.*⁹⁰

4. The Effect of Post-Compliant Compliance by Defendants

The third and most troublesome scenario arises when the citizen-plaintiff files suit alleging ongoing violations and *after* the complaint is filed, the defendant comes into compliance with the Act. Again, separating the citizen-plaintiff's requested relief will aid analysis. It is clear that at this point the plaintiff's claim for injunctive relief is moot.⁹¹ The key issue remains whether a plaintiff's claim for civil penalties remains justiciable after the mootness of the claim for injunctive relief.

The Supreme Court's decision in *Gwaltney III* did not answer this question. The Court's ambiguous comments on mootness in the context of CWA actions provided little help to the lower courts.⁹² The Court merely commented on compliance after filing of plaintiff's suit, stating: "Longstanding principles of mootness, however, prevent the maintenance of suit when 'there is no

⁸³ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *and, Steel Co.*, 523 U.S. 83 ___, 118 S. Ct. 1003 (1998).

⁸⁴ See 33 U.S.C. § 1319(d) (1994).

⁸⁵ See Jim Hecker, *EPCRA Citizen Suits After Steel Co. v. Citizens for a Better Environment*, 28 ENVTL. L. REP. 10306 (1998). The Note will assume a citizen-plaintiff complaint is seeking solely injunctive relief and civil damages.

⁸⁶ See *Gwaltney of Smithfield*, 484 U.S. at 58; *Steel Co.*, 113 S. Ct. at 1017-20.

⁸⁷ Hecker, *supra* note 91.

⁸⁸ *Gwaltney of Smithfield*, 484 U.S. at 64.

⁸⁹ *Steel Co.*, 118 S. Ct. at 1019.

⁹⁰ An analysis of the justiciability of citizen-suit claims for civil penalties will be deferred until later in this section.

⁹¹ See Jim Hecker, *Citizen Standing to Sue for Past EPCRA Violations*, 27 ENVTL. L. REP. 10561 (1997).

⁹² See *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 507 n.7 (3rd Cir. 1993).

reasonable expectation that the wrong will be repeated.”⁹³ It was not until *Gwaltney III* was remanded that a definitive rule was established regarding the justiciability of civil penalty claims upon the mootness of the injunctive claim. In *Gwaltney V*, the Fourth Circuit concluded that subsequent compliance after the filing of the complaint did not moot the claim for civil penalties.⁹⁴ The court found that civil penalties redressed a citizen-plaintiff's injuries.⁹⁵ The court interpreted the language of the citizen-suit provision in the Act⁹⁶ along with the language of the civil penalty provision⁹⁷ as allowing the court to assess damages once an ongoing violation is shown.⁹⁸ In other words, the court determined that penalties could be assessed for past violations of the CWA if the plaintiff established an ongoing violation *at the time the suit was filed* – subsequent compliance would not moot this right.⁹⁹

Following the Fourth Circuit's decision in *Gwaltney V*, a majority of the lower courts held that post-complaint compliance did not render citizen-plaintiff's claims for civil damages moot under the CWA.¹⁰⁰ Many courts based their findings on the public policy behind the citizen-suit provision of the Act.¹⁰¹ They reasoned that precluding civil penalties in these situations would discourage future citizen-suits if defendants were able to avoid civil damages by simply complying with the CWA after the complaint was filed.¹⁰² For nearly a decade, the Fourth Circuit's decision in *Gwaltney V* was followed nearly unanimously.

The justiciability of civil-penalty claims, which seemed secure following *Gwaltney V*, was put into question by a recent decision out of the Fourth Circuit. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Fourth Circuit changed its reasoning from *Gwaltney V* and determined that a citizen-suit claim for civil penalties became moot upon the mootness of a plaintiff's injunctive claim.¹⁰³

In *Laidlaw*, the plaintiffs brought a CWA action against the defendants for ongoing violations of defendants' NPDES permit.¹⁰⁴ The district court awarded the plaintiffs civil penalties due to the defendants' violations at the time the suit was filed.¹⁰⁵ The court denied the plaintiffs' request for injunctive relief, finding that the defendants had voluntarily complied with their NPDES permit shortly after the plaintiffs filed their complaint, thus making the injunctive claim moot.¹⁰⁶ The plaintiffs subsequently appealed the size of the civil penalty award, but did not appeal the denial of the injunction.¹⁰⁷ The Fourth Circuit, citing *Steel Co.*,¹⁰⁸ stated that the plaintiffs' claim for civil penalties

⁹³ *Gwaltney of Smithfield*, 484 U.S. at 66 (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

⁹⁴ *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989). “In our view, the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance and even though the ultimate judicial remedy is imposition of civil penalties assessed for past acts of pollution.” *Id.*

⁹⁵ *Id.* at 695. “[T]he judicial relief of civil penalties, even if only payable to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury.” *Id.* (citing *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988)).

⁹⁶ 33 U.S.C. § 1365(a) (1994).

⁹⁷ *Id.* at § 1319(d).

⁹⁸ *Gwaltney of Smithfield*, 890 F.2d at 697.

⁹⁹ *Wiygul*, *supra* note 28, at 453.

¹⁰⁰ See *Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1135 (11th Cir. 1990); *Atlantic States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065 n.9 (5th Cir. 1991); *Atlantic States Legal Found. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2^d Cir. 1993); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1406 (D. Haw. 1995); *Beartooth Alliance v. Crown Butte Mines*, 940 F. Supp. 1168, 1176 (D. Mont. 1995); *Public Interest Research Group of N.J. v. Hercules, Inc.*, 830 F. Supp. 1525, 1537 (D.N.J. 1993).

¹⁰¹ See Beverly M. Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1, 57-58 (1989).

¹⁰² See Matthew M. Werner, *Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801, 808-11 (1995).

¹⁰³ 149 F.3d 303 (4th Cir. 1998).

¹⁰⁴ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 305 (4th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1111 (1999).

¹⁰⁵ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 600-11 (D.S.C. 1997).

¹⁰⁶ *Laidlaw*, 149 F.3d at 305.

¹⁰⁷ *Id.*

became moot as well because “the only remedy currently available to Plaintiffs – civil penalties payable to the government – would not redress any injury Plaintiffs have suffered.”¹⁰⁹ Therefore, unlike in *Gwaltney V*, the Fourth Circuit determined that the mooting of an injunctive claim did moot a claim for civil penalties in CWA citizen suits.

Laidlaw is most noteworthy due to its adoption of the Supreme Court’s statement in *Steel Co.* that civil penalties alone could not redress a citizen-plaintiff’s injuries in a CWA suit.¹¹⁰ These two decisions have called into question the viability of all future citizen suits that seek civil penalties – in particular, the justiciability of civil penalty claims following post-complaint compliance by the defendant.

Two different scenarios exist for post-complaint compliance by defendants in CWA citizen suits. A defendant’s compliance may come as a result of voluntary cessation of its unlawful activities or as a result of a court order. As established above, termination of unlawful activities will moot a plaintiff’s claim for injunctive relief.¹¹¹ The question remaining after *Steel Co.* and *Laidlaw* is whether any plaintiff’s claim for civil penalties will remain justiciable.

In the wake of *Steel Co.* and *Laidlaw*, it appears that defendants may avoid the imposition of civil penalties by simply ceasing all unlawful activities after the citizen-plaintiff files suit. Interpreting *Steel Co.* broadly, the discontinuation of unlawful activities would moot a plaintiff’s injunctive claim and accordingly moot its civil-penalty claim.¹¹² Avoidance of civil liability in this circumstance appears manifestly unjust to the plaintiff. Fortunately, voluntary-cessation exception to mootness provides citizen-plaintiffs some protection from this result.¹¹³ The voluntary-cessation exception provides that where a defendant voluntarily ceases illegal activities after the filing of a complaint but before adjudication simply to avoid liability, a plaintiff’s claims will remain justiciable against the defendant despite its compliance.¹¹⁴

The voluntary-cessation exception has been applied in citizen-suits filed under CWA, in which courts have found that mooting of an injunctive claim due to a defendant’s voluntary compliance will not moot an action for civil penalties.¹¹⁵ In *Comfort Lake Association, Inc. v. Dresel Contracting, Inc.*, the Eighth Circuit stated “even if a polluter’s voluntary permanent cessation of the alleged violations moots a citizen suit claim for injunctive relief, it does not moot a related claim for civil penalties.”¹¹⁶ This result appears just and in the spirit of the voluntary cessation exception.¹¹⁷

Following *Steel Co.* and *Laidlaw*, the protection that the voluntary-cessation exception will afford citizen-plaintiffs in the future may be in jeopardy. *Dresel Contracting*, decided before *Steel Co.*, provided that a plaintiff’s civil-penalty claims would remain justiciable upon a defendant’s voluntary cessation of its unlawful conduct.¹¹⁸ *Steel Co.* held that citizen-suit claims for civil penalties alone would not stand for failure to meet Article III redressability requirements.¹¹⁹ *Laidlaw*, in applying *Steel Co.*, determined that the voluntary cessation of illegal activities would moot not only a citizen-plaintiff’s injunctive claim, but

¹⁰⁸ See *supra* note 77.

¹⁰⁹ *Laidlaw*, 149 F.3d at 306-07.

¹¹⁰ *Id.*

¹¹¹ Hecker, *supra* note 91.

¹¹² See *Laidlaw*, 149 F.3d at 306-07.

¹¹³ See *infra* note 120.

¹¹⁴ See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 661 (1993).

¹¹⁵ See *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Resources Defense Council v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502-03 (3rd Cir. 1993); *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2nd Cir. 1993); *Carr v. Alta Verde Indus. Inc.*, 931 F.2d 1055, 1065 n. 9 (5th Cir. 1991); *Atlantic States Legal Found. v. Tyson Foods Inc.*, 897 F.2d 1128 (11th Cir. 1991); *Pawtuxent Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986).

¹¹⁶ *Comfort Lake Ass’n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (4th Cir. 1998).

¹¹⁷ See *Boston Teachers Union, Local 66 v. Edgar*, 787 F.2d 12 (1st Cir. 1986). “This exception is meant to prevent defendants from defeating a plaintiff’s efforts to have its claims adjudicated simply by stopping their challenged actions, and then resuming their ‘old ways’ once the case [becomes] moot.” *Id.* at 16.

¹¹⁸ *Dresel Contracting*, 138 F.3d at 356.

¹¹⁹ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, ___, 118 S. Ct. 1003, 1017-20 (1998).

it would also moot its civil-penalty claim as well.¹²⁰ Clearly, these cases stand in opposition to one another. The applicability of the voluntary-cessation exception after the Supreme Court's decision in *Steel Co.* and the Fourth Circuit's decision in *Laidlaw* will require a reevaluation of the Eighth Circuit's reasoning in *Dresel Contracting*.¹²¹

Another scenario of post-complaint compliance arises when a citizen-plaintiff files suit alleging ongoing violations of the CWA and compliance results from the issuance of a court order. This situation may arise when a plaintiff files suit seeking injunctive relief and civil penalties, and the court, before ruling on the civil penalty claim, grants the plaintiff's injunction terminating the defendant's unlawful conduct. The issue presented after *Steel Co.* is whether the civil-penalty claim remains justiciable. In this situation, it appears clear that a plaintiff should not lose its right to a ruling on the civil-penalty claim because of the court's initial ruling on the plaintiff's injunctive claim. This logic too may be weakening, however, after the recent decision in *Dubois v. U.S. Department of Agriculture*.¹²²

In *Dubois*, the plaintiffs filed suit alleging, among other claims, violations of the CWA, and sought injunctive relief and civil penalties for these violations.¹²³ The district court granted plaintiffs' injunction,¹²⁴ but denied civil penalties.¹²⁵ The procedural context of *Dubois* is notable. By alleging ongoing violations of the CWA that existed at the time the suit was filed, the plaintiffs appeared to have met all standing requirements to recover civil penalties. The court, presented with numerous claims against the defendants, chose to rule on the plaintiffs' claim for injunctive relief first.¹²⁶ The court granted the injunction, then analyzed the remaining claim for civil penalties.¹²⁷ Relying on *Steel Co.* and *Laidlaw*, the court ruled that granting the plaintiffs' injunction mooted its claim for civil penalties.¹²⁸ The court, quoting *Steel Co.*, stated that "civil penalties stemming from a prior injury to a citizen-suit plaintiff, but not payable to that plaintiff, do not redress any legitimate Article III injury."¹²⁹

The reasoning employed in both *Laidlaw* and *Dubois* places all future citizen-suit claims for civil damages under the CWA in jeopardy. After *Laidlaw* and *Dubois*, one must wonder whether any context exists where civil penalties will be recoverable by plaintiffs in CWA citizen-suits. The *Dubois* court clearly recognized the implication of its decision on future citizen-suits, but chose to defer the implications of its decision to another court at a later time.¹³⁰ An appropriate dispute soon arose, and the District Court for the Southern District of California was presented with the opportunity to further define the role of the citizen suit in CWA actions.

IV. INSTANT DECISION

In *Natural Resources Defense Council v. Southwest Marine, Inc.*, the District Court for the Southern District of California held that civil penalties were recoverable in CWA citizen suits if plaintiffs

¹²⁰ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 305 (4th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1111 (1999).

¹²¹ See *supra* notes 190-191.

¹²² 20 F. Supp.2d 263 (D.N.H. 1998).

¹²³ *Dubois v. U.S. Dep't of Agric.*, 20 F. Supp.2d 263, 265 (D.N.H. 1998).

¹²⁴ *Dubois v. U.S. Dep't of Agric.*, CV-65-50-B (D.N.H. May 5, 1997).

¹²⁵ *Dubois*, 20 F. Supp.2d at 268.

¹²⁶ *Id.* at 265.

¹²⁷ *Id.*

¹²⁸ *Id.* at 266-70. "I conclude that the plaintiffs have failed to establish that the imposition of civil penalties against [defendants] would redress any harm that the plaintiffs either have previously suffered or imminently face. Their action, therefore, is moot." *Id.* at 269.

¹²⁹ *Id.* at 266 (quoting *Steel Co.*, 118 S. Ct. at 1019).

¹³⁰ *Dubois*, 20 F. Supp.2d at 267 n. 3. "One could arguably read *Steel Co.* more broadly to provide that civil penalties payable to the government for past violations cannot redress a citizen-suit plaintiff's injuries, regardless of whether violations are ongoing when suit is commenced. [Plaintiff] does not make this argument, however, and I need not address it here as I ultimately conclude that plaintiffs' claim for civil penalties is moot, regardless of whether they had standing to seek such penalties when suit was brought." *Id.*

alleged ongoing violations of the Act at the time the complaint was filed.¹³¹ The court based its decision on the Supreme Court's decision in *Gwaltney III* which concluded that citizen-plaintiffs could seek civil penalties when also seeking injunctive relief against a defendant alleged to be involved in an ongoing violation of the CWA.¹³² The court concluded that *Gwaltney III* was dispositive in the case at bar and the cases cited by Southwest in opposition to NRDC's claim for civil penalties were distinguishable from the instant controversy.¹³³

The court first examined the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*.¹³⁴ The court summarized the holding in *Steel Co.* as follows: "a plaintiff does not have standing to bring a claim for civil penalties with wholly past violations."¹³⁵ The court found that *Steel Co.* did not overturn the Supreme Court's decision in *Gwaltney III* which stated that allegations of ongoing violations would confer standing to citizen-plaintiffs.¹³⁶ In the instant case, NRDC alleged not only past violations of the CWA on Southwest's part but also ongoing violations of the Act.¹³⁷ Accordingly, the court reasoned that *Steel Co.* did not preclude NRDC's claim for civil penalties.

The court next analyzed *Steel Co.*'s analysis of standing in the wake of *Gwaltney*; specifically, *Steel Co.*'s approach to deciding Article III jurisdiction prior to statutory subject-matter jurisdiction.¹³⁸ The court cautiously read the Supreme Court's approach to standing in citizen-suit cases under the CWA.¹³⁹ In *Steel Co.*, the Supreme Court held that a citizen-suit claim for civil penalties alone would not be justiciable for failure to redress a plaintiff's injuries under Article III.¹⁴⁰ The Supreme Court also stated that a claim for injunctive relief would be justiciable if a plaintiff alleged adequate ongoing violations of the Act.¹⁴¹ The court in *Southwest Marine*, though not rejecting *Steel Co.*'s analysis, reasoned that such a searching examination of a citizen-plaintiff's claims was unnecessary.¹⁴² The court found that the language of Article III did not mandate an individualized analysis of each remedy sought by the party.¹⁴³ The court stated: "A party either has standing for the purposes of the 'case or controversy' requirement of Art. III or it does not."¹⁴⁴ Based on the facts of the instant case, the court found that a microscopic analysis of each remedy sought proved unnecessary.¹⁴⁵ Determining that NRDC had standing to bring suit for injunctive relief and civil damages by alleging ongoing violations of the CWA, the court reasoned that justiciability of the injunctive claim would not affect the standing of either remedy sought.¹⁴⁶

The court next discussed the applicability of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* on the instant controversy.¹⁴⁷ *Laidlaw* involved a scenario in which the defendants ceased their wrongful action after the filing of the suit but before trial.¹⁴⁸ The court in *Laidlaw* found the plaintiffs' civil penalty and injunctive claims moot, stating that civil penalties alone would not redress the

¹³¹ Natural Resources Defense Council v. Southwest Marine, Inc., 28 F. Supp.2d 584, 587 (S.D. Cal. 1998), *aff'd on reh'g*, 1999 WL 155914 (S.D. Cal. 1999).

¹³² *Id.* at 586.

¹³³ *Id.*

¹³⁴ 523 U.S. 83, 118 S. Ct. 1003 (1998).

¹³⁵ *Southwest Marine*, 28 F. Supp.2d at 586.

¹³⁶ *Id.*

¹³⁷ *Id.* at 585.

¹³⁸ *Id.* at 586-87.

¹³⁹ *Id.* at 586.

¹⁴⁰ *Steel Co.*, 118 S. Ct. at 1017-20.

¹⁴¹ *Id.* at 1019.

¹⁴² *Southwest Marine*, 28 F. Supp.2d at 586.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The Supreme Court in *Lyons* stated that a court must inquire into the justiciability of an injunctive remedy, irrespective of a damages claim. The court in *Southwest Marine* noted that this requirement is not the same when a plaintiff has standing to pursue injunctive relief and civil damages. *Southwest Marine*, 28 F. Supp.2d at 587 n.3.

¹⁴⁶ *Id.* at 586-87.

¹⁴⁷ 149 F.3d 303 (4th Cir. 1998).

¹⁴⁸ See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 600-11 (D.S.C. 1997).

plaintiffs' injuries under Article III.¹⁴⁹ In *Southwest Marine*, however, the court restated that NRDC had alleged both past and continuing violations of the CWA.¹⁵⁰ Finding no allegations of any discontinuation of Southwest's alleged wrongdoing, the court determined *Laidlaw* to be distinguishable and non-binding on the case at bar.¹⁵¹

The court concluded its discussion of judicial precedent in citizen-suits by stating that "no case holds that a party bringing a citizen suit is precluded altogether by Article III from seeking civil penalties in any circumstance, especially when civil penalties are sought in conjunction with other forms of relief for ongoing violations."¹⁵² In making this assertion, the court expressly referenced *Dubois v. U.S. Department of Agriculture*.¹⁵³ In *Dubois*, a citizen-plaintiffs' claim for civil penalties was dismissed as moot despite plaintiffs' claim for injunctive relief for ongoing violations of the CWA.¹⁵⁴ The court's decision in *Dubois* stands in direct contrast to the above quotation from *Southwest Marine*. In distinguishing *Dubois* from *Southwest Marine*, the court noted that *Dubois* was not on point and non-binding on the instant decision.¹⁵⁵

The court restated the purpose of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁵⁶ The court emphasized the importance of citizen-suits as a valuable tool for enforcing the provisions of the Act,¹⁵⁷ and noted its "duty to follow the plain language" of the CWA.¹⁵⁸ Finding no binding case law in opposition to the statutory language of the Act, the court denied Southwest's motion to preclude civil penalties holding that NRDC had standing to seek civil damages under the CWA because NRDC also sought injunctive relief for ongoing violations of the Act.¹⁵⁹

V. COMMENT

After the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*¹⁶⁰ and the subsequent lower court decisions in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,¹⁶¹ and *Dubois v. U.S. Department of Agriculture*,¹⁶² the question has arisen whether plaintiffs in citizen-suits will ever have standing to pursue civil penalties for violations of the CWA. These cases addressed the justiciability of civil penalties in the context of citizen-suit claims, but have avoided addressing this ultimate issue.¹⁶³ Consequently, the courts have given no definitive answer as to whether citizen-plaintiffs will ever have standing to recover civil penalties in future suits filed under the CWA.

Laidlaw and *Dubois* both indicate that citizen-plaintiffs will have difficulty ever recovering civil penalties for violations of the CWA. After these decisions, an allegation of ongoing violations, though adequate to confer standing, will often be inadequate to lead to an ultimate award of civil penalties. *Laidlaw* and *Dubois* extend the doctrine of mootness to enable defendants to avoid payment of civil penalties by simply coming into compliance with the Act.¹⁶⁴ This compliance will moot the citizen-plaintiff's injunctive claim and leave only the plaintiff's claim for civil penalties. Pursuant to *Laidlaw* and *Dubois*' the court's interpretation of *Steel Co.* in the claim for civil damages will not stand on its own

¹⁴⁹ *Id.*

¹⁵⁰ *Southwest Marine*, 28 F. Supp.2d at 585.

¹⁵¹ *Id.* at 584-87.

¹⁵² *Id.* at 587.

¹⁵³ 20 F. Supp.2d 263 (D.N.H. 1998).

¹⁵⁴ *Dubois v. U.S. Dep't of Agric.*, 20 F. Supp.2d 263, 268 (D.N.H. 1998).

¹⁵⁵ *Southwest Marine*, 28 F. Supp.2d at 586 n.1.

¹⁵⁶ 33 U.S.C. § 1251 (1994).

¹⁵⁷ *Southwest Marine*, 28 F. Supp.2d at 587.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 586-87.

¹⁶⁰ 523 U.S. 83, 118 S. Ct. 1003 (1998).

¹⁶¹ 149 F.3d 303 (4th Cir. 1998).

¹⁶² 20 F. Supp.2d 263 (D.N.H. 1998).

¹⁶³ See *Dubois v. U.S. Dep't of Agric.*, 20 F. Supp.2d 263, 266 n.3 (D.N.H. 1998).

¹⁶⁴ *Id.* at 263; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303 (4th Cir. 1998).

and will become moot for failure to redress the plaintiff's injuries under Article III.¹⁶⁵ Although this result would lead to a temporary discontinuation of the alleged wrongdoing, the preclusion of civil penalties will discourage the filing of citizen-suits in the future.¹⁶⁶

In contrast to *Laidlaw* and *Dubois*, the court in *Natural Resources Defense Council v. Southwest Marine, Inc.* supports the proposition that civil penalties should be recoverable in citizen suits where plaintiffs allege ongoing violations of the CWA at the time the suit is filed.¹⁶⁷ The court's decision sustains the viability of citizen suits by distinguishing *Laidlaw* and *Steel Co.*¹⁶⁸ *Southwest Marine* rejects the proposition that civil penalties may never redress a citizen-plaintiff's injuries. Instead, *Southwest Marine* would preclude recovery of civil penalties only when allegations of wholly past violations are asserted.¹⁶⁹

Though *Southwest Marine* upholds the citizen-plaintiff's right to recover civil damages in the instant case, the decision is incomplete as the court does not reach any conclusion regarding the possible mootness of the plaintiffs' injunctive claim. This discussion was unnecessary in the instant case because the defendants never asserted compliance with the CWA. *Southwest Marine*, though important for upholding a citizen-plaintiff's right to acquire standing to seek civil penalties when alleging ongoing violations of the CWA, is limited in precedential importance as to the issue of mootness. Thus, the key issue of potential post-complaint compliance by defendants remained unaddressed.

Clearly, the federal courts' view of standing and mootness in CWA citizen-suit claims is disjointed and confusing. As of the present date, concerned private citizens and environmental organizations have little guidance regarding their rights to pursue civil penalties against alleged violators of the CWA and other environmental statutes with similar citizen-suit provisions. A more definitive statement of the law would greatly benefit all those concerned with the future viability of citizen-suits to enforce the provisions of the CWA.

The opportunity for the courts to recapitulate their view of standing and mootness in CWA citizen-suit actions has recently presented itself. On March 1, 1999, the Supreme Court granted certiorari to review the Fourth Circuit's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*¹⁷⁰ Under review is whether citizen-plaintiffs in CWA suits have standing to seek civil penalties when a plaintiff's claim for injunctive relief is determined to be moot.¹⁷¹ In *Laidlaw*, the district court determined that because the defendants had discontinued the alleged wrongful acts before trial, the plaintiffs' claim for injunctive relief became moot.¹⁷² On appeal, the Fourth Circuit held that since the plaintiffs' only claim was for civil penalties, the claim was moot for failure to redress the plaintiffs' injuries pursuant to Article III.¹⁷³ Accordingly, the Supreme Court has been presented with the opportunity to address the ramifications of a defendant's voluntary compliance after the filing of a CWA citizen-suit on a plaintiff's civil penalty claim.

For the following reasons, this author asserts that the Supreme Court should overturn the Fourth Circuit's decision in *Laidlaw* and clearly establish that a citizen-plaintiff's claim for civil penalties under the CWA should remain justiciable – even upon the mootness of a plaintiff's claim for injunctive relief due to a defendant's post-complaint compliance. The Court must make evident that ongoing violations of the Act at the time the suit is filed will be sufficient to lead to a determination of the merits of a civil claim for penalties.

First, reversal is warranted because the court in *Laidlaw* appears to have interpreted the Supreme

¹⁶⁵ See *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 118 S. Ct. 1003 (1998).

¹⁶⁶ See Jim Hecker, *Citizen Standing to Sue for Past EPCRA Violations*, 27 ENVTL. L. REP. 10561 (1997).

¹⁶⁷ *Natural Resources Defense Council v. Southwest Marine, Inc.*, 28 F. Supp.2d 584, 585 (S.D. Cal. 1998), *aff'd on reh'g*, 1999 WL 155914 (S.D. Cal. 1999).

¹⁶⁸ *Id.* at 586-87.

¹⁶⁹ *Id.* at 585.

¹⁷⁰ 149 F.3d 303 (4th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1111 (1999).

¹⁷¹ *Id.*

¹⁷² *Id.* at 305.

¹⁷³ *Id.* at 306-07.

Court's holding in *Steel Co.* too broadly.¹⁷⁴ In *Steel Co.*, the Court held that citizen-plaintiffs do not have standing to bring a claim for civil penalties for wholly past violations of the CWA.¹⁷⁵ Nowhere in its decision did the Court state that a citizen-plaintiff may not recover civil penalties for ongoing violations of the Act. As stated in *Southwest Marine*, construing *Steel Co.* to preclude recovery of civil penalties in all cases would "represent a clear deviation from established case law and a major judicial intrusion on remedies clearly provided for by Congress."¹⁷⁶ The Court should take this opportunity to limit its holding in *Steel Co.* to instances where plaintiffs solely allege past violations. In cases where ongoing violations are shown, the Court must make clear that claims for civil penalties may not be avoided by post-complaint compliance. This will ensure the justiciability of a citizen-plaintiff's claim upon a defendant's post-complaint compliance.

Furthermore, the Supreme Court must reassess its own reasoning in *Steel Co.* The *Laidlaw* court expressly adopted *Steel Co.*'s holding that civil penalties paid to the federal government alone would not stand for failure to redress a plaintiff's injuries under Article III.¹⁷⁷ As stated throughout this Note, the implications of this holding are tremendous. Interpreted broadly, *Steel Co.* could be read as precluding civil penalties in *all* citizen-suits, regardless of whether ongoing violations are alleged.

This appeal will allow the Supreme Court to make clear that such a broad interpretation of *Steel Co.* is erroneous. The Court may justify its determination by stating that when a citizen-plaintiff alleges sufficient allegations of ongoing violations to confer standing, its claim for civil penalties will stand on its own, regardless of later mootness of the plaintiff's injunctive claim. The civil-penalty claim will stand individually because, unlike the Court's reasoning in *Steel Co.*,¹⁷⁸ the claim will redress a plaintiff's injury.¹⁷⁹ A plaintiff's injury will be redressed because the imposition of civil penalties payable to the government will deter defendants from committing future violations.¹⁸⁰ This deterrent effect will redress a plaintiff's injuries and allow claims for civil penalties to remain justiciable under Article III.¹⁸¹

Third, a Supreme Court finding that civil penalties remain justiciable in citizen-suits may be supported by important policy considerations. Clearly, allowing civil penalty claims to become moot would weaken the deterrent effect of the CWA.¹⁸² Specifically, citizens would be discouraged from filing citizen suits knowing that defendants could avoid payment of any penalties by simply coming into

¹⁷⁴ See *Natural Resources Defense Council v. Southwest Marine, Inc.*, 1999 WL 155914 at *1 (S.D. Cal. 1999).

¹⁷⁵ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, ___, 118 S. Ct. 1003, 1017-20 (1998).

¹⁷⁶ *Natural Resources Defense Council v. Southwest Marine, Inc.*, 28 F. Supp.2d 584, 585 (S.D. Cal. 1998), *aff'd on reh'g*, 1999 WL 155914 (S.D. Cal. 1999). "A rule denying citizen-plaintiffs standing to seek civil penalties, whether or not there is an allegation of ongoing injury or violation, would be a rather dramatic development in the law given that civil penalties payable to the Treasury are an enforcement tool available in citizen suits under a number of environmental statutes." *San Francisco Baykeeper v. Vallejo Sanitation and Flood Control Dist.*, 1999 WL 115054 n.2 (E.D. Cal. 1999).

¹⁷⁷ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1111 (1999).

¹⁷⁸ *Steel Co.*, 118 S. Ct. at 1018-19. "... the civil penalties authorized by the [EPCRA] might be viewed as a sort of compensation or redress to respondent if they were payable to the respondent. But they are not. ... Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.* (emphasis added).

¹⁷⁹ See Jim Hecker, *Citizen Standing to Sue for Past EPCRA Violations*, 27 ENVTL. L. REP. 10561, __ (1997).

¹⁸⁰ The United States District Court for the Eastern District of California recently adopted this reasoning. "In the context of ongoing violations, civil penalties are similar to injunctive relief. They both deter future violations by a particular defendant thereby redressing threatened harm to the plaintiff." *San Francisco Baykeeper v. Vallejo Sanitation and Flood Control Dist.*, 1999 WL 115054 at *2 (E.D. Cal. 1999) (emphasis added).

¹⁸¹ See *Natural Resources Defense Council v. Southwest Marine, Inc.*, 1999 WL 155914 at *3 (S.D. Cal. 1999). On rehearing, the District Court for the Southern District of California adopts this view. "Defendant is properly focused on the injury, but, for the above stated reasons, i.e. because civil penalties can remedy Plaintiffs' asserted injuries by deterring Defendant's alleged violations, the Court concludes that civil penalties awarded to the U.S. Treasury may remedy the Plaintiffs' injuries." *Id.*

¹⁸² "The availability of civil penalties encourages citizens to bring suits to remedy and deter violations. 'Citizen plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations.' If citizens could not seek civil penalties for past violations, they would be unable to recover their costs of identifying violators. As a result, citizens' incentive to investigate violators and to file citizen suits would be greatly reduced." Hecker, *infra* note 179, at __ (citing *Atlantic States Legal Found. v. Pan Am. Tanning Corp.*, 990 F.2d 1017, 1021 (2nd Cir. 1993)).

compliance with the Act. This would destroy the deterrent effect provided by the imposition of civil penalties.¹⁸³ A policy that would allow such easy avoidance of civil penalties would disserve the purpose of the Act – the protection of the nation’s waterways. The award of civil penalties must be protected to ensure the future viability of the CWA.

Finally, the Court must reverse *Laidlaw* because of the Fourth Circuit’s failure to apply the voluntary-cessation exception. The Fourth Circuit’s decision flies in the face of established judicial precedent. In seven other circuit courts of appeal, the voluntary-cessation exception has been applied in CWA suits to hold that claims for civil penalties remain justiciable even upon the mootness of a citizen-plaintiff’s injunctive claim.¹⁸⁴ More importantly, the Supreme Court itself has applied the exception to cases involving post-complaint compliance by defendants outside the CWA context.¹⁸⁵ In its review of *Laidlaw*, the Court should follow the precedent set by the various circuits and extend the voluntary-cessation exception to cover CWA suits.

By limiting *Steel Co.* to suits alleging solely past CWA violations and by allowing civil penalties to redress a citizen-plaintiff’s injuries, the Court will ensure the applicability of the voluntary-cessation exception to CWA citizen-suits. This will enable a citizen-plaintiff’s civil penalty claim to remain justiciable if ongoing violations are established at the time the suit is filed, regardless of the possible mootness of any injunctive claims due to a defendant’s post-complaint actions.

VI. CONCLUSION

In its review of *Laidlaw*, the Supreme Court must make clear that the mootness of a claim for injunctive relief due to a defendant’s post-complaint compliance does not moot the remaining claim for civil penalties in CWA citizen-suits. By establishing that claims for civil penalties will remain justiciable when ongoing violations are alleged, the Court will ensure the viability of future citizen suits. By extending the voluntary-cessation exception to cover CWA suits, citizens concerned with enforcing the Act will have knowledge that civil penalty claims properly alleging ongoing violation will not be mooted by later compliance by defendants. The Court should follow the lead set by *Natural Resources Defense Council v. Southwest Marine, Inc.* by protecting the rights of citizens to pursue suits under the CWA. A policy such as this will lead to more effective enforcement of the CWA by concerned private citizens and environmental organizations and will serve to further the goals behind the Act.

BRETT A. WILLIAMS

¹⁸³ *Id.*

¹⁸⁴ See *Comfort Lake Ass’n, Inc. v. Dresel Contracting Inc.*, 138 F.3d 351 (8th Cir. 1998); *Atlantic States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Resources Defense Council v. Texaco Ref. & Mktg. Inc.*, 2 F.3d 493, 503 (3rd Cir. 1993); *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2nd Cir. 1993); *Carr v. Alta Verde Indus. Inc.*, 931 F.2d 1055, 1065 n. 9 (5th Cir. 1991); *Atlantic States Legal Found. v. Tyson Foods Inc.*, 897 F.2d 1128 (11th Cir. 1991); *Pawtuxent Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986).

¹⁸⁵ See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993). “. . . [A] defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Id.* at 662, citing *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982).