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HAS THE CITIZEN-SUIT PROVISION OF THE CLEAN WATER ACT EXCEEDED ITS SUPPLEMENTAL BIRTH?

JONATHAN S. CAMPBELL*

The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant governmental action “[T]he Committee intends the great volume of enforcement actions [to] be brought by the State,” and that citizen suits are proper only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility.”¹

I. INTRODUCTION

When Congress enacted the Clean Water Act² (“CWA” or “the Act”) in 1972, it intended “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ Passed in response to America’s increased pollution of its waterways and water supplies, the Clean Water Act prohibits discharging any pollutants except as otherwise allowed in the Act.⁴ The National Pollution Discharge Elimination System (“NPDES”) is one such exception. Under the NPDES the Environmental Protection Agency (“EPA”) is charged with the duty of issuing NPDES permits, which allow pollutant discharge within specified limits.⁵ When a discharger fails to comply with its permit, the Act

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¹ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), quoted in S. REP. NO. 92-414, at 64 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973).

² Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994 & Supp. IV 1998)).

³ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251(a) (1994).

⁴ See *id.* § 1311(a).

⁵ See *id.* § 1342(a). EPA may delegate this permit-issuing authority to states with approved programs. See *id.* § 1342(b). In fact, most states have been delegated such authority and are therefore the primary enforcers of discharge limitations.

authorizes the EPA to enforce the permit through civil, criminal, or administrative means.⁶

In addition to enforcement by the EPA or another administrative agency, section 505 of the CWA delineates in detail the manner in which a citizen can initiate a citizen-suit against anyone "who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."⁷

Under the Clean Water Act, individual citizens⁸ or groups have statutory standing to bring an action against an alleged violator.⁹ The citizen must give notice to the state government in which the violation occurs before the citizen may file the suit.¹⁰ After the state has notice for at least sixty days, the citizen may commence the action.¹¹ The citizen suit provision of the Clean Water Act serves to supplement both state and federal government enforcement actions.¹²

Problems arise when a citizen group gives notice, properly files an action, and the state government then decides to begin its own enforcement action. Many times the government enforcement will conclude with the violator and the state agency entering into a consent decree.¹³ Pursuant to the consent decree, the violator will generally endure penalties, payable to the United States Treasury, and cease all present and future illegal conduct. Although the violator will pay such penalties, the citizen plaintiff may want to continue the citizen suit due to the consent decree's allegedly minimal sanctions. To avoid duplicative litigation, however, the defendant will argue that the citizen suit should be moot or precluded as a matter of law, thus dismissing the action. The citizen plaintiff often believes that the consent decree did not fulfill the

⁶ See *id.* § 1319. In order to be delegated NPDES issuance authority, states must have in place mechanisms "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement" *Id.* § 1342(b)(7).

⁷ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(a)(1) (1994).

⁸ The Act defines a citizen as a "person or persons having an interest which is or may be adversely affected." *Id.* § 1365(g).

⁹ See *id.* § 1365.

¹⁰ See *id.* § 1365(b).

¹¹ See *id.* § 1365(b)(1)(A).

¹² See S. REP. NO. 50, 99th Cong., 1st Sess. 28, reprinted in ENVIRONMENTAL AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 1149 (1988) [hereinafter LEGISLATIVE HISTORY].

¹³ A consent decree may be defined as a "judgement entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing. [It is an] agreement by defendant to cease activities asserted as illegal by [the] government." BLACKS LAW DICTIONARY 410-11 (6th ed. 1990).

intention of the Clean Water Act, and that the defendant deserves harsher penalties. Courts confront such situations with increasing frequency and decide the fate of the citizen-suit in varying manners.

A citizen's power to file suit has prescribed limitations.¹⁴ Congress amended section 1319(g)(6), which precludes the filing of a citizen suit under certain circumstances as follows:

[A]ny violation—

- (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
- (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
- (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under . . . section 1365 of this title.¹⁵

Although this section limits a citizen's ability to file a suit, subparagraph (B) of the same section formulates two exceptions to the citizen-suit's preclusion under the Act.¹⁶ Specifically,¹⁷ the citizen-suit will not be precluded if 1) the action under section 1365(a)(1) is filed after the commencement of the citizen suit,¹⁸ or 2) before action has commenced under section 1365(a)(1), the citizen has given notice of an intent to bring action and the citizen files suit within 120 days after giving such notice.¹⁹

¹⁴ See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1319 (1994).

¹⁵ *Id.* § 1319(g)(6)(A).

¹⁶ See *id.* § 1319(g)(6)(B).

¹⁷ Although the language of the Act does not preclude the filing of and continuation of a valid citizen-suit, the legal tools of mootness and preclusion may warrant a dismissal. The Clean Water Act specifically provides that common law rights and statutory rights are not restricted. "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law." *Id.* § 1365(f). This Note will address instances where a citizen-suit may proceed under the language of the Act, but where common law legal principles should intervene and find the citizen-suit moot for lack of redressability or precluded because of a prior valid consent decree.

¹⁸ See *id.* § 1319(g)(6)(B)(i).

¹⁹ See *id.* § 1319(g)(6)(B)(ii). To avoid preclusion, a citizen plaintiff must give potential governmental agencies sixty days to file suit against the polluter. See *id.* § 1365(a)(1).

The lack of clarity in this section poses many problems of interpretation for courts. Although some courts take a strict preclusion approach to citizen-suits, others liberally apply the preclusion section of the Act and often allow duplicative citizen-suits.²⁰ In light of such varied interpretations, future courts may find it difficult to address the effect of state negotiated consent decrees commenced after a valid citizen-suit is filed in federal court.

This Note analyzes the specific circumstances in which a citizen plaintiff files a state and federal claim against an alleged violator under the Clean Water Act, and a state agency subsequently enters into a consent decree with the polluter in state court. Specifically, the hypothetical of this Note presupposes that the consent decree imposes substantial penalties and forces the defendant to stop all present and future pollution. The thrust of this analysis focuses on whether the state consent decree precludes or moots the continuance of the federal citizen suit in federal court. Section I provides an overview of various cases discussing arguments both for and against mooting or precluding the federal claim after a valid state consent decree. Section II addresses the application of the mootness doctrine and the application of *res judicata* in the context of a state consent decree. This section provides a comparison of various cases regarding the preclusive effect of consent decrees and the standards by which to judge the citizen-suits. Section III provides a context for which courts may still award litigation costs²¹ to the citizen-suit plaintiff, even if the court found the citizen-suit moot for lack of standing or precluded by *res judicata*. Finally, section IV concludes that the Supreme

The citizen plaintiff must then file the citizen suit before the 120th day after the date upon which such notice to the agencies was given. See *id.* § 1319 (g)(6)(B)(ii).

²⁰ A court's interpretation of the preclusion section often hinges on its determination of comparable state law and what constitutes a penalty under the Act warranting preclusion. For a general discussion of the courts' interpretation of section 309 and preclusion of citizen-suits, see Heather L. Clauson, *How Far Should the Bar on Citizen Suits Extend Under § 309 of the Clean Water Act?*, 27 ENVTL. L. 967 (1997) and Elizabeth McKinney, *Preclusion of Citizens' Suits Under the Clean Water Act*, 10 J. NAT. RESOURCES & ENVTL. L. 357 (1995). In contrast to the Clauson and McKinney articles though, this Note discusses the *specific instance* when a citizen validly files a citizen suit under the Act and a state agency subsequently enters into a consent decree with the alleged polluter. Under most circumstances, this Note argues, the citizen suit should be moot or precluded as a matter of law. Furthermore, this Note advocates a totality of circumstances approach rather than a bright line rule approach to determine when the courts should find the citizen suit moot or precluded.

²¹ The Clean Water Act affords "any prevailing or substantially prevailing party" litigation costs, "including reasonable attorney and expert witness fees." Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(d) (1994).

Court should address the role of a valid state consent decree in mootng or precluding a citizen-suit in federal court in order to clear the murky waters polluting the lower courts.

II. PROBLEMS FACED BY COURTS REGARDING PRINCIPLES OF MOOTNESS AND PRECLUSION UNDER THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT

The Clean Water Act specifically fails to address a consent decree's effect on a citizen-suit.²² An interpretative analysis of the Act could equate a consent decree with an "action" under section 1319.²³ This interpretation would then allow the continuance of a citizen-suit if the government enters into the decree *after* the citizen files suit. The statute's plain language, however, does not expressly dictate that courts should interpret a consent decree as an "action."²⁴ Precedent also fails to provide future courts with clear guidelines to apply the preclusion or mootness principle of law when a citizen-suit is filed and followed by a state agency's valid consent decree with the same polluter. The lack of a clear Supreme Court decision²⁵ has led to varied holdings in federal courts

²² See *id.* § 1365.

²³ See *id.* § 1319(g)(6)(B). Under the language of the Act, a citizen-suit will not be precluded when:

- (i) a civil action under section 1365(a)(1) of this title has been filled prior to commencement of an *action* under this subsection, or
- (ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an *action* under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Id. (emphasis added).

²⁴ Courts find the term "action" difficult to interpret. Without clear statutory language, the challenge of deciphering the meaning of a provision confronts courts. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 22 (1997). The legislative intent of the Clean Water Act serves as guidance for an interpretation of such ambiguous language. The Supreme Court acknowledged the importance of legislative intent as well, explaining that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940)).

²⁵ Although the Court specifically addressed the role of citizen-suits, under the Clean Water Act as a supplemental tool rather than a device to supplant the government's role, the holding fails to provide clear guidelines for lower courts. See *generally* Gwaltney of

regarding the continuation of citizen-suits under this specific circumstance. Although some courts have dismissed citizen-suits after a governmental agency intervenes and creates a consent decree,²⁶ others have allowed the redundancy of the citizen-suit to continue.²⁷ The 1987 amendments to the Clean Water Act, which permit the filing of citizen suits, sought to "balance two opposing concerns: allowing citizen-suits to continue as a proven enforcement tool while preventing violators from being subject to dual enforcement actions or penalties for the same violation."²⁸ Unfortunately, due to the lack of clear Supreme Court precedent, the second concern has swallowed the first and ultimately undermined the incentive for polluters to enter into consent decrees and cease violations.

A. *Mootness Doctrine*

1. Precedent Supporting Dismissal of the Citizen-Suit

In *Atlantic States Legal Foundation v. Eastman Kodak Company*²⁹ the United States Court of Appeals for the Second Circuit found a citizen-suit moot after a consent decree between the state government and the polluter.³⁰ The citizen plaintiff followed the guidelines of the Clean Water Act and filed a valid citizen-suit against Eastman Kodak.³¹ Atlantic States Foundation alleged that Eastman Kodak violated the NPDES permit by discharging pollutants into a nearby river.³² After the commencement of the citizen action, the New York Department of Conservation ("DEC") entered into a consent decree with Kodak, which required the polluter to

Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987). More importantly, this Note suggests that the Supreme Court should address instances that fall outside the scope of the Clean Water Act, but the policies and intent behind the role of citizen-suits should find the citizen action precluded or moot.

²⁶ See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 149 F.3d 303 (4th Cir. 1998); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991).

²⁷ See, e.g., *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017 (2d Cir. 1993); *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985); *Public Interest Research Group of New Jersey, Inc v. Elf Atochem N. Am., Inc.*, 817 F. Supp 1164 (D.N.J. 1993).

²⁸ Clauson, *supra* note 20, at 969 (1997).

²⁹ 933 F.2d 124 (2d Cir. 1991).

³⁰ See *id.* at 128.

³¹ See *id.* at 125-26.

³² See *id.*

admit liability and pay a fine totaling one million dollars.³³ The citizen plaintiff, Atlantic States Foundation, argued that New York forfeited its right to preclude a citizen-suit by ignoring the sixty-day window³⁴ before the citizen-suit commenced.³⁵ Although the citizen had a statutorily granted right to proceed with the suit, the court held that a continuance of the citizen plaintiff's suit would not redress an injury after the consent decree.³⁶

Seven years after *Eastman Kodak* was decided, the Supreme Court, in *Steel Co. v. Citizens for a Better Environment*,³⁷ addressed a similar situation in which an environmental group brought an action against a steel manufacturer under the Emergency Planning and Community Right-To-Know Act of 1986³⁸ for failure to make required reporting.³⁹ Although the facts of this case did not specifically address the Clean Water Act, the Court's approach to the redressability issue proves analogous to citizen-suits' continuance under the Clean Water Act. In *Steel Company*, the Court chose to focus on whether the alleged violations ceased, and if they did, whether the continuation of the citizen-suit should proceed.⁴⁰ This basic, yet fundamental approach laid the foundation for the court's interpretation of the "case" or "controversy" requirement. If a valid state consent decree essentially extinguishes all of the citizen-suit's claims, the suit can no longer redress a cognizable injury.

Argued in the United States Court of Appeals for the Fourth Circuit only one day after the *Steel Company* decision, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*⁴¹ addressed the issue of whether a citizen-suit should continue after a lower court previously assessed penalties against the polluter.⁴² The plaintiffs alleged continuous violations of Laidlaw's NPDES permit.⁴³ Although the district court held that Laidlaw violated the NPDES permit and imposed penalties upon the

³³ See *id.* at 126.

³⁴ See 33 U.S.C. § 1365 (b)(1).

³⁵ See *Atlantic States Legal Found. Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

³⁶ See *id.* at 126-27.

³⁷ 523 U.S. 83 (1998).

³⁸ 42 U.S.C. § 11021(a)(1) (1994).

³⁹ See *Steel Co.*, 523 U.S. at 86-88.

⁴⁰ See *id.* at 88-103.

⁴¹ 149 F.3d 303 (4th Cir. 1998).

⁴² See *id.* at 304.

⁴³ See *id.* at 305.

defendant, the court denied the plaintiff's request for injunctive and declaratory relief.⁴⁴

The court focused its analysis primarily on standing and held that the citizen plaintiff did not meet the Article III "case" or "controversy" requirement due to a lack of a cognizable injury.⁴⁵ Adhering to *Steel Company*, the court found the citizen action moot because any additional civil penalties assessed against Laidlaw would be payable to the United States Treasury, not the plaintiff.⁴⁶ Therefore, such penalties could not redress any injury suffered by the citizen plaintiff.⁴⁷

It is extremely important to note that this case has been fully overturned by the Supreme Court.⁴⁸ Thus, the importance of the Fourth Circuit's decision lies not in its precedential value, but in the court's persuasive analysis of the mootness issue. Although the Supreme Court reversed the case, its holding may be confined to its facts and does not address an instance where a state consent decree ceases *all* pollution and assesses large penalties to deter future conduct.⁴⁹

2. *Precedent Against Dismissal of the Citizen-Suit*

In *Chesapeake Bay Foundation v. American Recovery Co.*,⁵⁰ the Fourth Circuit held that a subsequent government suit did not bar an environmental group's suit and that the group had standing.⁵¹ The Chesapeake Bay Foundation ("CBF") gave notice to both the state and federal government of their intent to sue the defendant for effluent discharge violations.⁵² CBF filed suit on the same day, but before the government filed its action against the polluter.⁵³ Overruling the district court, the Fourth Circuit held that the mere commencement of a concurrent state or federal action should not moot a duplicative citizen-suit.⁵⁴

⁴⁴ See *id.* The court did not give the plaintiff declaratory and injunctive relief because it found that at the time of Laidlaw's final order, it had been in compliance for several years and had not harmed the environment. See *id.* at 305.

⁴⁵ See *id.* at 306-07.

⁴⁶ See *id.*

⁴⁷ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998).

⁴⁸ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693 (2000).

⁴⁹ For further discussion of *Laidlaw*, see *infra* notes 71-82 and accompanying text.

⁵⁰ 769 F.2d 207 (4th Cir. 1985).

⁵¹ See *id.*

⁵² See *id.* at 208.

⁵³ See *id.*

⁵⁴ See *id.* at 208-09.

Rendering a similar verdict, the Second Circuit revisited a citizen-suit's standing in light of a subsequently filed state consent decree in *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*⁵⁵ Unlike its previous holding in *Eastman Kodak Co.*, the Second Circuit held that the defendant's settlement with a local enforcement agency did not moot a citizen-suit for civil penalties.⁵⁶ The defendant, Pan American, operated a tannery and discharged pollutants, which were governed by a local sewer board and federal regulations.⁵⁷ Before the local agency entered into a consent decree with the defendant, the citizen group filed suit under the citizen-suit provision of the Clean Water Act.⁵⁸ This court made a distinction between claims for injunctive relief and claims for civil penalties.⁵⁹ The court held that post complaint compliance with the Clean Water Act will not render a citizen-suit for civil damages moot.⁶⁰ In

⁵⁵ 993 F.2d 1017 (2d Cir. 1993).

⁵⁶ See *id.* at 1018. This holding did not overturn *Eastman Kodak*; rather, the court distinguished the *Eastman Kodak* decision primarily on the amount of penalties assessed against the polluters under the consent decree. See *id.* at 1022. The court explained that where the *Eastman Kodak* holding hinged on "[w]hether [a citizen-suit] may continue in the face of a dispositive administrative and criminal settlement," the current consent decree of only \$6,600 did not warrant a dismissal of the citizen-suit. *Id.* (quoting *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991)).

⁵⁷ See *Pan Am. Tanning Corp.*, 993 F.2d at 1018.

⁵⁸ See *id.* at 1019.

⁵⁹ See *id.* at 1020. This court relied primarily on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), in which the Supreme Court held that the Clean Water Act does not allow a citizen-suit to proceed for "wholly past violations." *Id.* at 64. The Court in *Gwaltney* further explained that a citizen-suit no longer has standing unless there is a "reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. In *Pan American Tanning Corp.* the Second Circuit addressed the question left open by *Gwaltney*: whether mootness bars only claims for injunctive relief or whether it also bars claims for civil penalties. See *Pan Am. Tanning Corp.*, 933 F.2d at 1020. Most of the circuits that have addressed this issue have come to the same conclusion that post-complaint compliance does not necessarily render claims for civil damages moot. 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, 453 (1995). See also *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) ("If the parties are able to make a valid request for injunctive relief at the time the complaint is filed, then they may continue to maintain a suit for civil penalties, even when injunctive relief is no longer appropriate."). Cf. *NRDC v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 503 (3rd Cir. 1993) ("[C]laims for damages are not moot because an intervening NPDES permit eliminates any reasonable possibility that Texaco will continue to violate specified parameters."); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) ("Even had the improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties.").

⁶⁰ See *Pan Am. Tanning Corp.*, 993 F.2d at 1021.

reaching its decision, the court expressed concern for the "language of the Act," but offered no analysis regarding such language.⁶¹ Contrary to this court's analysis, the plain language of the Act does not directly address such a situation.

In a similar fashion to *Pan American*, the district court of New Jersey, in *Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc.*⁶² encountered a situation in which the citizen group filed suit well before the statutory deadline.⁶³ In this case, the EPA delegated the responsibility of administering NPDES programs in New Jersey to the New Jersey Department of Environmental Protection and Energy ("NJDEPE").⁶⁴ The state issued a permit to the defendant, which manufactured fluoropolymers and treated its own waste before discharging into either Little Mantua Creek or the Delaware River.⁶⁵ Following the proper procedural steps under the Clean Water Act, the plaintiffs filed a citizen-suit alleging that the defendant had violated and continued to violate the effluent standards set forth in the NPDES.⁶⁶

After the filing of the citizen-suit, the NJDEPE entered into negotiations with the defendant, which eventually led to a settlement.⁶⁷ Under the terms of the consent decree, the defendant paid a penalty totaling \$275,000 in return for an exemption from further liability for certain violations.⁶⁸ The district court of New Jersey overruled the defendants motion for summary judgment.⁶⁹ In overruling the motion, the court held that a consent decree between the state government and the violator entered into after the citizen plaintiffs gave notice to sue and under which the polluter paid large fines, did not moot the citizen-suit under the Clean Water Act.⁷⁰ In so holding, this court ignored the fundamental principles of standing and enlarged the power of a citizen-suit beyond its initial intentions.

⁶¹ See *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020 (2d Cir. 1993).

⁶² 817 F. Supp 1164 (D.N.J. 1993).

⁶³ *Id.* at 1169.

⁶⁴ *Id.* at 1168.

⁶⁵ *Id.* at 1169.

⁶⁶ See *Elf Atochem*, 817 F. Supp. at 1169.

⁶⁷ *Public Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1169 (D.N.J. 1993).

⁶⁸ See *id.* The court acknowledged the fact that the alleged violations in the citizen-suit's complaint virtually mirrored the violations for which the consent order had provided immunity.

⁶⁹ See *id.* at 1183.

⁷⁰ See *id.*

The most compelling argument in support of allowing the continuance of the citizen suit derives from the very recent Supreme Court decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*. This Supreme Court decision directly overturned the Fourth Circuit decision, which had upheld the dismissal of the citizen suit for lack of standing.⁷¹ Although the Court refused to extend the holding in *Steel Company* to uphold a mootness argument, *Laidlaw* may be held only to its facts, which do not discuss the instances of a consent decree that ceases all pollution.⁷²

In 1986, Laidlaw Environmental Service purchased a hazardous waste incinerator in South Carolina, which included a means for treating wastewater.⁷³ The South Carolina Department of Health and Environmental Control ("DHEC") soon granted Laidlaw an NPDES permit, which authorized the discharge of treated water into the North Tyger River.⁷⁴ In 1992, the Friends of the Environment and the Citizens Local Environmental Action Network, Inc filed a notice to Laidlaw informing the company of their intention to file a citizen suit based on alleged violations of the NPDES permit.⁷⁵ To avoid the citizen suit, the Court held, Laidlaw contacted the DHEC one day before the 60 day notice period ended asking whether the DHEC considered filing suit against Laidlaw.⁷⁶ The DHEC agreed to file the suit so Laidlaw's lawyer drafted the complaint on behalf of the DHEC and paid the filing fee.⁷⁷ Shortly after, the DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 and make "every effort" to comply with its permit obligations.⁷⁸

Meanwhile, the district court determined that injunctive relief was inappropriate because of substantial compliance, but imposed a civil

⁷¹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 149 F.3d. 303 (4th Cir. 1998).

⁷² The Court distinguished between the inability of a citizen plaintiff to bring or maintain a suit for wholly past violations and establishing standing because the polluters violations "existed at the time of the complaint and . . . could continue into the future if undeterred." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 120 S. Ct. 693, 707 (2000). This characterization does not circumvent the instance where a state agency enters into a consent decree with the polluter, which ceases all pollution and accesses heavy penalties that serve to deter. Under that set of circumstances, as this Note proposes, both legal jurisprudence and logic dictates that the citizen suit should become moot.

⁷³ See *id.* at 701.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 120 S. Ct. 693, 701 (2000).

penalty of \$405,800.⁷⁹ The Fourth Circuit, however, reversed the lower court's determination, holding that the case became moot after the defendant complied with the permit.⁸⁰ The Supreme Court took great exception with the Fourth Circuit's conclusion that a citizen suit's claim for civil penalties must be dismissed if the defendant comes into compliance with NPDES permit.⁸¹ The Court explained that a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to a moot a case."⁸² This assessment, however, fails to take into account *legitimate* consent decrees between a polluter and a state agency, which require the defendant to stop all pollution and impose large penalties, which serve to deter future conduct. Under these circumstances, the Court truly failed to address whether the citizen suit should continue in federal court.

B. *Preclusion Doctrine*

Although a citizen-suit may not fit the criteria of mootness, recent case law suggests that courts should still preclude the continuation of a citizen action under some circumstances. If a valid consent decree has addressed the alleged violation under the Clean Water Act, future courts should not allow duplicative litigation as a result of the citizen action.

The United States Court of Appeals for the Eighth Circuit rendered a decision in *United States Environmental Protection Agency v. City of Green Forest, Arkansas*⁸³ that took a decisive step toward upholding Congress's intent⁸⁴ for the citizen suit provision of the Clean Water Act. In response to the defendants' violations of their NPDES permits, citizens sent notice to Tyson Food, Inc. and the City of Green Forest, co-defendants in the suit, informing them of their intent to file suit, as mandated by section 1365(b)(1)(A) of the Clean Water Act.⁸⁵ Subsequent to this notice, in September of 1987, the EPA filed suit against the State of Arkansas and the City of Green Forest for violations of the Clean Water Act.⁸⁶ This enforcement action on behalf of the state government resulted

⁷⁹ See *id.* at 700.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² *Id.*

⁸³ 921 F.2d 1394 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991).

⁸⁴ See AMENDING THE CLEAN WATER ACT, HEARINGS ON S. 53 AND S. 652 BEFORE THE SUBCOMM. ON ENVTL. POLLUTION OF THE SENATE COMM. ON ENV'T AND PUB. WORKS, 99th CONG. 9 (1985).

⁸⁵ See *City of Green Forest*, 921 F.2d at 1400.

⁸⁶ See *id.* at 1397.

in a consent decree with the City of Green Forest.⁸⁷ The citizen-suit, however, proceeded to trial where the court found against Tyson under the Clean Water Act and for Green Forest on the citizen group's allegations.⁸⁸ The Eighth Circuit affirmed the district court's holding that the consent decree precluded the citizen-suit from continuing.⁸⁹

The Eighth Circuit again addressed the issue and reinforced the *City of Green Forest* holding through a different analysis in *Comfort Lake Association, Inc. v. Dresel Contracting, Inc.*⁹⁰ In that case, the defendants were issued an NPDES permit, which required corrosion and sediment control facilities to protect nearby water supplies from run-off.⁹¹ The citizen plaintiff issued a notice of intent to sue.⁹² During the sixty-day window in which the citizen plaintiff must wait before filing suit, the Minnesota Pollution Control Agency ("MPCA") inspected the site and issued a Notice of Violation to the defendant.⁹³ The citizen plaintiff then filed suit against the defendant for violating the NPDES permit.⁹⁴ After construction of the store, however, the MPCA negotiated a proposal of sanctions and eventually settled with the polluters, assessing \$12,203 in civil penalties including \$6,100 payable to the City of Forest Lake.⁹⁵ The district court granted the defendants' motion for summary judgement and dismissed the citizen-suit.⁹⁶

While reiterating much of the analysis from *City of Green Forest*, the Eighth Circuit extended the preclusion principle to informal agreements between a state or federal agency and the polluter.⁹⁷ This bold step toward recognizing the intent of a citizen-suit under the Clean Water Act reinforced precedent that precluded citizen-suits in the face of valid state consent decrees. In *Comfort Lake*, the court made the distinction between a consent order, which precludes a citizen-suit through *res judicata*, and the informal stipulation agreement present in this case.⁹⁸ Nonetheless, the court held that in order to achieve the Clean Water Act's

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *United States Env'tl. Protection Agency v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1403-05 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991).

⁹⁰ 138 F.3d 351 (8th Cir. 1998).

⁹¹ See *id.* at 353.

⁹² See *id.* at 353-54.

⁹³ See *id.* at 354.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d. 351, 357-58 (8th Cir. 1998).

⁹⁷ See *id.* at 357.

⁹⁸ See *id.*

goal of sustaining "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" the preclusion principle must extend to informal agreements.⁹⁹

III. AN ANALYSIS OF THE PRINCIPLE OF MOOTNESS, RES JUDICATA, AND A STATE CONSENT DECREE UNDER THE CLEAN WATER ACT

A consent decree has been characterized as a "judicial act [that] 'possesses the same force and character as a judgement rendered following a contested trial.'"¹⁰⁰ Thus, when a court approves a consent decree, it has the same effect as a judgment at trial. As previously discussed, if the state action commences before the citizen suit, the citizen plaintiff is statutorily precluded from bringing suit. The problem, however, arises when the citizen files a suit and the state subsequently enters into a consent decree with the violator. Based on congressional intent and recent court precedent, courts should frequently render a citizen-suit moot or precluded after a state agency negotiates a consent decree with an alleged violator, which ceases all pollution and imposes substantial penalties to deter future misconduct.

A. *Mootness Principle*

Under Article III, section 2 of the United States Constitution, a federal court must have jurisdiction to entertain a claim.¹⁰¹ To establish jurisdiction, a "case" or "controversy" must exist before the Constitution will extend this "judicial power."¹⁰² To proceed on the merits of a case, a plaintiff must have standing to sue in federal court.¹⁰³ The Court has recognized that the mootness principle "protects defendants from the maintenance of suit . . . based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from

⁹⁹ *Id.*

¹⁰⁰ U.S.C.S.R. Civ. P. 54 n.3 (citation omitted) (quoting *United States v. Homestake Mining Co.*, 595 F.2d 425 (8th Cir. 1979)).

¹⁰¹ *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 86-103 (1998).

¹⁰² *See id.* The Court explained the Constitutional demand thus: "Article III, § 2 of the Constitution extends the 'Judicial Power' of the United States only to 'Cases' and 'Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process." *Id.* (quoting *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911)).

¹⁰³ *See id.*

defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'"¹⁰⁴

The Supreme Court has required that a party meet a three-pronged test to achieve constitutional standing.¹⁰⁵ First, the plaintiff must allege an "injury in fact" or a specific and "concrete" instance of injury that is not "conjectural."¹⁰⁶ Secondly, the plaintiff must establish causation by showing a "fairly traceable" connection between the defendant's actions and the plaintiff's alleged injury.¹⁰⁷ Third, the relief that the plaintiff seeks must likely redress the alleged injury.¹⁰⁸ The plaintiff filing the citizen-suit under the Clean Water Act bears the burden of proving all three of these elements: injury in fact, causation and redressability, in order to achieve standing in federal court.¹⁰⁹ Although the plaintiff must prove all three elements, this Note analyzes only the redressability prong of the case or controversy triad.

1. Citizen-Suit's Failure to Satisfy the Redressability Prong

The Court in *Steel Company* focused its holding on the citizen-suit's lack of redressability following a valid state consent decree.¹¹⁰ The Court suggested that lower courts should analyze redressability in terms of whether a plaintiff "personally would benefit in a tangible way from the court's intervention."¹¹¹ One may argue that if a consent decree does not exactly mirror the citizen-suits' complaint or prayer for damages then the injury has not been fully redressed. Thus, the citizen would benefit from the additional penalties assessed. The Court, however, quickly debunked such a bright line theory. It explained that such penalties *might* be viewed as a means by which to compensate the plaintiff if the proceeds were paid directly to the respondent.¹¹² However, as specifically addressed in the Clean Water Act, the penalties resulting from governmental enforcement

¹⁰⁴ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (quoting *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952)).

¹⁰⁵ *See Lujan v. Defenders of Wildlife*, 540 U.S. 555, 560 (1992).

¹⁰⁶ *Steel Co.*, 523 U.S. at 103.

¹⁰⁷ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 101-09.

¹¹¹ *Id.* at 104 n.5. Justice Scalia, writing for the majority, contested Justice Stevens's concurrence, which interpreted redressability as judicial activism. Instead of viewing it as such, Justice Scalia suggested that redressability has been "ingrained in our jurisprudence from the beginning" and that the standard of personal benefit has always existed. *Id.*

¹¹² *See id.* at 106.

are payable *only* to the United States Treasury.¹¹³ Therefore, the Court held, the respondent seeks redemption not for his own personal injury, but for a "vindication of the rule of law."¹¹⁴ This analysis also proves true under the Clean Water Act's citizen-suit provision.¹¹⁵

Congress did not intend for the citizen plaintiff to police the waterways in hopes of personal gain. Rather, the congressional amendments of 1985 included the provision to help protect our nation's water¹¹⁶ and vindicate "undifferentiated public interest."¹¹⁷ The use of this provision by overzealous plaintiffs who wish both to punish violators twice for the same mistake and to accumulate large refundable litigation costs¹¹⁸ does not further the goals of the Clean Water Act.¹¹⁹

In response to the Court's refusal to allow actions based only on personal gain, a citizen may also argue that he derives satisfaction at the thought of contributing to our nation's treasury and by punishing a polluter. The Court in *Steel Company*, however, explained that although a citizen "may derive great comfort and joy from the fact that . . . a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."¹²⁰ In reference to the Clean Water Act, a citizen-suit cannot continue if the plaintiff will gain only a "psychic satisfaction" from the suit's continuance, and the suit does not redress a cognizable injury.¹²¹

Without proof of present and continuing detrimental effects, a citizen-suit cannot proceed based solely on past violations of the Clean

¹¹³ See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1319 (1994); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 106 (1998).

¹¹⁴ *Steel Co.*, 523 U.S. at 106.

¹¹⁵ Cf. *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 120 S. Ct. 693, 715 (2000) (Scalia, J. dissenting) (asserting that to allow a public penalty to support standing cuts across the grain of Supreme Court jurisprudence).

¹¹⁶ CLEAN WATER ACT AMENDMENTS OF 1985, S. REPT. NO. 99-50, at 28 (1985).

¹¹⁷ *Steel Co.*, 523 U.S. at 106. See also *Local Env'tl. Awareness Dev. v. Exide Corp.*, No. CIV.96-3030, 1999 WL 124473, at *15 (E.D. Pa. Feb. 19, 1999) (holding that civil penalties under the Clean Air Act do not redress a citizen plaintiff's injuries "if there is no ongoing compliance problem and no possibility of a future one").

¹¹⁸ As authorized by the CWA, the court may award litigation costs to "any prevailing or substantially prevailing party." 33 U.S.C. § 1365(d). The application and analysis of litigation costs will be discussed further *infra* part III.

¹¹⁹ See S. REPT. NO. 99-50 at 28 (1985).

¹²⁰ *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 107.

¹²¹ *Id.* at 107.

Water Act.¹²² The ability of a state consent decree to moot a citizen-suit's claim in federal court, therefore, hinges on the consent decree's effectuation of the citizen plaintiff's redressable claims.¹²³

A court should disregard the timing of the consent decree and focus on whether the agreement effectively penalized the violator and stopped the violation.¹²⁴ If the governmental agency fulfills its responsibility under the Act, reprimands the violator, and stops all misconduct, present and future, courts should find the citizen suit moot.

Unfortunately, the Supreme Court's recent decision in *Laidlaw* undermines and confuses the intent of the Clean Water Act's citizen suit provision. The Court makes a sweeping statement, which dictates that under most circumstances civil penalties will support a plaintiff's citizen suit.¹²⁵ The Court's analysis and holding, however, neither addresses nor applies to instances where a state consent decree requires the present and future cessation of pollution and imposes substantial penalties. The opinion fails to recognize the long standing jurisprudence of mootness, yet ironically appears to support the expansion of generalized grievances to include actions under the citizen suit provision of the Clean Water Act.

¹²² See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987). See also *Steel Co.*, 523 U.S. at 109 (holding the same for EPCRA violations).

¹²³ Subsequent courts have interpreted the holding in *Steel Company* to address only instances in which the violations have ceased. See, e.g., *San Francisco Baykeeper v. Vallejo Sanitation and Flood Control Dist.*, 36 F. Supp. 2d 1214, 1215 (E.D. Cal. 1999) (holding that even after state action, a citizen plaintiff achieved constitutional standing for civil penalties relating to *ongoing* or *continuous* violations of the defendant). The Supreme Court held in *Laidlaw* that standing will be met if the violations are "ongoing at the time of the complaint *and* that could continue into the future if undeterred." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 120 S. Ct. 693, 707 (2000) (emphasis added). The court did acknowledge, however, that a case could become moot if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 708 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

¹²⁴ Although a claim will not automatically become moot due to the defendant's voluntary compliance subsequent to the filing of a citizen-suit, a court should dismiss the action as moot if the defendant demonstrates that the alleged violation has ceased and the wrong will not occur again. See *Anderson v. Farmland Indus., Inc.*, 45 F. Supp. 2d 863, 872 (D. Kan. 1999).

¹²⁵ See *Laidlaw*, 120 S. Ct. at 706-07.

2. Reaffirmation of *Steel Company* and its Analysis

In *Laidlaw*, the Fourth Circuit reinforced and reaffirmed the redressability approach laid forth in *Steel Company*.¹²⁶ Although the lower court in this case penalized the defendant company \$405,800, it denied the citizen plaintiff's request for declaratory and injunctive relief.¹²⁷ This court focused its analysis solely on the redressability element of standing and rejected the plaintiff's request that the defendant suffer additional penalties.¹²⁸

In a decisive opinion, the Fourth Circuit followed *Steel Company* and held that the citizen plaintiff suffered no injury sufficient to sustain an Article III "case" or "controversy."¹²⁹ The court based its decision primarily on the fact that any additional penalties assessed against the defendant would be paid to the United States Treasury.¹³⁰ Therefore, the court applied the Supreme Court's reasoning and held the "action [was] moot because the only remedy currently available to Plaintiffs—civil penalties payable to the government—would not redress any injury Plaintiffs have suffered."¹³¹

Although *Laidlaw* did not specifically address the effect of a state consent decree on a citizen plaintiff's standing in federal court, the Fourth Circuit's holding reinforced *Steel Company*'s emphasis on redressability. This decision provides guidance to future courts that a citizen plaintiff's mere desire to punish a polluter more severely does not "constitute a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."¹³² Therefore, following the analysis reaffirmed in the Fourth Circuit, future courts should find a citizen-suit moot if a valid state consent penalizes a polluter and thus redresses the only cognizable injury allegedly suffered by the citizen plaintiff.

¹²⁶ See *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 149 F.3d 303, 305-07 (4th Cir. 1998). See also *Dubois v. United States Dep't of Agric.*, 20 F. Supp 2d 263, 266-68 (D.N.H. 1998) (holding that a citizen plaintiff's action is moot under the Clean Water Act because a previous injunction stopped the defendant's alleged violations).

¹²⁷ See *Laidlaw*, 149 F.3d at 305.

¹²⁸ See *id.* at 306-07.

¹²⁹ See *id.*

¹³⁰ See *id.* at 306.

¹³¹ See *id.* at 306-07.

¹³² *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 149 F.3d 303, 306 (4th Cir. 1998).

As discussed above, however, the Supreme Court directly overturned this Fourth Circuit decision.¹³³ The Court focused on the application of *Steel Company* and held that when violations have not fully ceased, then a citizen suit may continue for only civil penalties.¹³⁴ The implications of this decision will be discussed below.

In *Eastman Kodak Company*, the Second Circuit followed congressional intent and common law principles of mootness to correctly find the citizen action moot for lack of redressability.¹³⁵ Following many of the same principles in *Steel Company*, that court stated that “if the state enforcement proceeding has caused the violations alleged in the citizen-suit to cease without any likelihood of recurrence—has eliminated the basis for the citizen-suit—we believe that the citizen action must be dismissed.”¹³⁶

Congress envisioned a limited role of citizen-suits,¹³⁷ allowing the state or the EPA to intervene in the citizen-suit at any time.¹³⁸ Based upon Congressional intent and Supreme Court precedent, this standard should be clarified to hold a citizen-suit moot even if the consent decree did not eliminate the basis for the citizen-suit entirely. The *Eastman Kodak* court, for example, cited *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,¹³⁹ which did not allow citizen-suits to address “wholly to past violations nor seek to recover fines and penalties that the government has elected to forego.”¹⁴⁰ The Supreme Court in *Gwaltney* held that the citizen-suit cannot proceed even if its complaint sought higher fines and penalties.¹⁴¹ Although the court in *Eastman Kodak*

¹³³ See generally *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 120 S. Ct. 693 (2000).

¹³⁴ See *id.* at 706-07.

¹³⁵ See *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2d Cir. 1991).

¹³⁶ *Id.* at 127. See also *Long Island Soundkeeper Fund, Inc. v. New York City Dept. of Env'tl. Protection*, 27 F. Supp. 2d 380, 385 (E.D.N.Y. 1998) (holding that a citizen plaintiff lacks standing to enforce a state standard for wastewater that is stricter than standards mandated by the Clean Water Act). If enforcement under the Act occurs and the violations cease, then the citizen plaintiff may not continue his suit to penalize the defendant under a stricter state standard. See *id.*

¹³⁷ Congressional concern included the ability of the citizen-suit to “heighten the chances for dual penalties under the act,” thus “undermin[ing] the authority of State officials and make the States shy away from spending any money at all to enforce the provisions of the [A]ct.” 131 CONG. REC. S8099 (daily ed. June 13, 1985) (remarks of Sen. Wallop), reprinted in LEGISLATIVE HISTORY, *supra* note 23, at 1353-54.

¹³⁸ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(c)(2) (1994).

¹³⁹ 484 U.S. 49 (1987).

¹⁴⁰ *Id.* at 60-61.

¹⁴¹ See *id.*

suggested this logical approach, the Second Circuit failed to adequately clarify its stance.¹⁴² This lack of strong precedent serves to further cloud the already muddy precedential waters.

3. Rejection of the Redressability Analysis

The federal district court for the District of New Jersey, in *Elf Atochem*, failed to follow *Eastman Kodak*'s unstable analysis.¹⁴³ Although this court focused on determining whether the consent order triggered preclusion under the Clean Water Act, the importance of *Elf Atochem* to this Note lies in its analysis of the citizen-suit's constitutional mootness. In this case, the district court, like the Second Circuit, recognized civil penalties as separate and distinct from a claim for injunctive relief.¹⁴⁴

In *Elf Atochem*, the state consent decree ceased the violations and assessed large penalties against the defendant.¹⁴⁵ The defendant correctly argued that because the consent decree levied fines and the pollution ceased, the court should dismiss the plaintiff's citizen-suit as moot.¹⁴⁶ The court, however, rejected *Eastman Kodak* as simply unconvincing.¹⁴⁷ Instead of properly analyzing the precedent, this court dismissed *Eastman Kodak*, claiming that the court only interpreted the statutory preclusion provision of the Act, which is irrelevant to a constitutional mootness issue.¹⁴⁸ This judicial gloss undermined the purpose of the Clean Water Act and principles of mootness by ignoring the role of a citizen-suit to supplement, not supplant state and federal enforcement of the Act.¹⁴⁹ Although *Elf Atochem* stated that the proper analysis depended on

¹⁴² See *Atlantic States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 129 (2d Cir. 1991).

¹⁴³ See *Public Interest Research Group of N.J., Inc. v. ELF Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1171 (D.N.J. 1993).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 1169-70.

¹⁴⁶ See *id.* at 1171.

¹⁴⁷ The court explained, "[w]e do not find *Eastman Kodak* convincing. Its reasoning is based on policy arguments invoking the purposes behind the Clean Water Act, which may be instructive in interpreting the statutory preclusion provisions of the Act itself but are irrelevant to the constitutional mootness issue." *Id.* (citation omitted).

¹⁴⁸ See *id.*

¹⁴⁹ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

establishing a "live" case or controversy for Article III standing,¹⁵⁰ *Eastman Kodak* also used a similar approach.¹⁵¹

The court's failure to properly analyze the *Eastman Kodak* holding led to a decision that failed to address the redressability prong of mootness. As discussed above, in order for a citizen-suit to continue in federal court after a state consent decree, there must exist a concrete, cognizable, and redressable injury. The court in *Elf Atochem* concluded that the prayer for additional penalties above and beyond the government's settlement with the polluter constitutes a live case or controversy that can be redressed by continuation of the citizen-suit.¹⁵² This court based its opinion on the legal theory that a court should not render the action moot unless the court cannot grant "any effectual relief whatever" to the plaintiff.¹⁵³

Although the court's decision may fulfill the general deterrence function of the Act's penalties, it failed to uphold the principle of redressability. Furthermore, the court rejected the principles laid forth in *Eastman Kodak* and *Gwaltney*.¹⁵⁴ Moreover, since the holding in *Elf Atochem*, the Supreme Court has clarified the same issue in *Steel Company*.¹⁵⁵ The Court's explanation of penalties under the EPCRA, which can be logically analogized to the Clean Water Act, directly negates the court's analysis in *Elf Atochem*.

Although the *Elf Atochem* court allowed the continuance of the citizen-suit after a state consent decree because the alleged violations could accumulate more penalties, the Supreme Court rejected this approach.¹⁵⁶ *Steel Company* rendered the citizen action moot because the

¹⁵⁰ See Public Interest Research Group of N.J. v. Elf Atochem N. Am., Inc. 817 F. Supp. 1164, 1171 (D.N.J. 1993).

¹⁵¹ See Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1991). Much like the current court's focus on a constitutional standing issue to determine mootness, the *Eastman Kodak* court also held that the case will not be moot if there is "a realistic prospect that the violations . . . will continue notwithstanding the settlement." *Id.* Although not couched in terms favorable to the court at hand, this holding emphasized the need for a live case or controversy that can be redressed. The court, however, concluded that because the polluter had paid large penalties already, the citizen-suit would not redress any cognizable injury. A continuance of the citizen's action would serve to punish a defendant twice for the same offense. See *id.* at 127-28.

¹⁵² See *Elf Atochem*, 817 F. Supp. at 1172.

¹⁵³ See *id.* at 1171.

¹⁵⁴ The court explicitly stated that it "[did] not find *Kodak* convincing." *Id.* at 1171. Furthermore, the court rejected *Gwaltney* as providing "little, if any, support for the defendant's position." *Id.*

¹⁵⁵ See *Steel Co.*, 523 U.S. at 105-10.

¹⁵⁶ See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

penalties did not remediate the citizen; instead, the United States Treasury collects all penalties assessed.¹⁵⁷

The Supreme Court, however, has recently confused the issue in *Laidlaw*, where it appeared to ignore the holding in *Steel Company*. The Court simply disregarded the language contained in *Steel Company*, which explained that the citizen suit could not continue because the citizen did not seek redemption for his own personal injury, rather for the "vindication of the rule of law."¹⁵⁸ The Court simply discounted the application of *Steel Company's* analysis to the ability of a citizen plaintiff to establish standing through civil penalties.¹⁵⁹ The Court further implied that when a complaint is filed and violations exist, then the citizen plaintiff's suit will *never* become moot because he established standing at the outset.¹⁶⁰ Ironically, the Court then explained that a case might become moot if actions subsequent to the filing of the suit make it clear that the pollution "could not reasonably be expected to recur."¹⁶¹

Instead of clarifying the issue for lower courts, the Supreme Court further clouded the river of dispute. This case should be limited to its facts where the Court felt that the defendant's post complaint compliance and small fines did not moot the citizen plaintiff's suit. The ambiguous implications and language of the holding clearly supports a reading that if a state agency enters into a consent decree with the polluter subsequent to the citizen's suit, then the citizen plaintiff's action may be moot if the decree imposed large fines to deter future misconduct and forced the defendant to cease all pollution, so that it "could not reasonably be expected to recur."

To allow the continuation of citizen-suits in the face of valid state consent decrees could wreak havoc on government enforcement of the Clean Water Act. As the Supreme Court held in *Gwaltney*, the role of the citizen-suit is to "supplement rather than to supplant" the role of the government as the prosecutor.¹⁶² The Supreme Court's holding in *Laidlaw* does not necessarily undermine the legitimacy of a state consent decree if it deters and stops present and future pollution. To apply *Laidlaw's* reasoning to every citizen suit would devastate the enforcement

¹⁵⁷ See *id.* at 106-08.

¹⁵⁸ *Id.* at 106.

¹⁵⁹ See *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 707 (2000). The Court merely explained that *Steel Company* does not apply because it held that "citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit." *Id.*

¹⁶⁰ See *id.* at 708.

¹⁶¹ *Id.*

¹⁶² *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

of the Clean Water Act. If the citizen-suit takes precedence over state enforcement, state agencies have no incentive to intervene and fulfill their duties under the Clean Water Act. Such apprehensiveness will ultimately lead to under-enforcement of the Act and an inevitable deterioration of our nation's waterways.¹⁶³

4. Advantages of a Totality of Circumstances Approach to Mootness

Although the above analysis provides some guidance for lower courts to find a citizen-suit moot under the discussed circumstances, several courts have rejected such an approach. In *American Recovery*, the Fourth Circuit's analysis proved more important than its ultimate dismissal of the citizen-suit.¹⁶⁴ As discussed above, section 1365(b)(1)(A) of the CWA gives the government the right of first refusal to bring an action against an alleged polluter. The defendant argued that the citizen-suit was moot, but not precluded under this provision of the Clean Water Act.¹⁶⁵ The court's decision hinged on its bright line ruling that a subsequently filed state or federal suit against the polluter will not bar a citizen-suit.¹⁶⁶ The reasoning of the Fourth Circuit in that case, however, appears dubious at best.

The court in *American Recovery* conclusively established that a "district court has available means, including consolidation, citizen intervention, and intervention by the Administrator to manage its docket and to protect defendants from duplicative litigation, but dismissal of a previously filed citizen-suit is not an appropriate remedy."¹⁶⁷ Such a strict approach directly contradicts the analyses in *Steel Company* and *Eastman Kodak*, which focused primarily on the inability of a continued citizen-suit to redress the alleged violation. The Fourth Circuit's establishment of a bright line rule ignored precedent to the contrary and violated the spirit of

¹⁶³ See *Atlantic States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

¹⁶⁴ Although the court dismissed the citizen-suit, it rejected using "dismissal of a previously filed citizen-suit" as an appropriate remedy. *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 209 (2d Cir. 1993). Therefore, although the court reached a just result, it did so by ignoring a totality of circumstances approach and focusing on the citizen plaintiff's approval of the consent decree. See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* See also *Long Island Soundkeeper Fund, Inc. v. New York City Dept. of Env'tl. Protection*, 27 F. Supp. 2d 380, 384 (E.D.N.Y. 1998) ("[S]tate prosecution of the same claims[,] no matter how diligent, will not preclude a properly filed private action[] or require its dismissal.").

¹⁶⁷ *American Recovery*, 769 F.2d at 209.

the Clean Water Act. In response to this case, future courts may find it difficult to balance the goals of ensuring our nation's clean waters and avoiding duplicative and costly litigation.

The Act intended for the citizen-suit to aid in the enforcement of its guidelines to protect our Nation's waterways and water supplies.¹⁶⁸ It did not, however, envision a citizen-suit taking precedence or preeminence over the government's role as chief prosecutor.¹⁶⁹ In fact, the citizen-suit's role was to simply complement the government's role so as to further the ideals and spirit of the Clean Water Act.¹⁷⁰ In *American Recovery's* dicta, the court seemed to recognize the congressionally intended role of the citizen-suit when it dismissed the plaintiff's suit after the government entered into a consent decree with the polluter.¹⁷¹ Since the initial filing of the appeal with the court, the defendant and the government entered into a "good settlement," to which the citizen plaintiff had no objections.¹⁷² Appearing to grant much importance to the citizen plaintiff's approval of the consent decree, the court dismissed the citizen-suit as moot.¹⁷³

This dependence on the citizen plaintiff, however, proves problematic to lower courts as the Supreme Court itself cautioned against empowering the citizen-suit so as to change "the citizens' role from interstitial to potentially intrusive."¹⁷⁴ The Fourth Circuit, in *American Recovery* undermined its own ability to analyze the totality of the circumstances, including the citizen plaintiff's complaint, the terms in the consent decree, and any remaining violations. Under the circumstances of this case, the court did not address such elements in detail because citizen plaintiff approved of the consent decree. Based on *American Recovery*, however, lower courts have little guidance in situations where the citizen plaintiff objects to the consent decree. In light of the spirit of the Clean Water Act's citizen-suit provision, courts should take the totality of circumstances into consideration and focus on the citizen-suits' redressability or lack thereof. If the consent decree redresses the injury to

¹⁶⁸ See AMENDING THE CLEAN WATER ACT; HEARINGS ON S. 53 AND S. 652 BEFORE THE SUBCOMM. ON ENVTL. POLLUTION OF THE SENATE COMM. ON THE ENV'T AND PUB. WORKS, 99th CONG. 9 (1985).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 209 (2d Cir. 1993).

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987).

society,¹⁷⁵ rather than the individual plaintiff, then a court should dismiss the citizen-suit as moot. The citizen plaintiff's approve of the consent decree is immaterial to the mootness of the citizen-suit.

5. Inadequacy of a Bright Line Approach to Mootness

As discussed above, according to the principles of standing and Article III, a court should render a citizen action moot if, after the consent decree, a furtherance of the action would no longer redress the citizen-suit's alleged injury.¹⁷⁶ This concept does not contradict the language of the Clean Water Act, rather it "has been ingrained in our jurisprudence from the beginning."¹⁷⁷ Arguably, if a consent decree with a governmental agency forces the violator into post-complaint compliance, the agreement then comports with the Act's requirement that any person violating the permit allowances "shall be subject to a civil penalty."¹⁷⁸

The Second Circuit in *Pan American*, however, appeared to have ignored the principle of standing and the intent of the Clean Water Act.¹⁷⁹ The court's decision established a harsh bright line rule, which suggested that although the consent decree assessed penalties and injunctive relief, the citizen-suit is not moot if filed before the state agreement.¹⁸⁰ This logic contradicts the congressional intent of the citizen-suit as a complement to the government, not a controlling factor in the sanctioning of Clean Water Act violators.

The defendant in *Pan American* relied heavily on the Second Circuit's decision in *Eastman Kodak*.¹⁸¹ The *Pan American* court, nonetheless, rejected the use of this precedent, but did not overturn its precedential value.¹⁸² *Eastman Kodak* offered valuable insight into why

¹⁷⁵ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998).

¹⁷⁶ See *id.* at 109-10.

¹⁷⁷ See *id.* at 104 n.5 (explaining that the triad of injury in fact, causation and redressability has been at the core of the Article III standing requirement since the beginning). The concept of redressability is not the product of judicial activism, rather the interpretation of a "case" or "controversy." *Id.*

¹⁷⁸ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 890 F.2d 690, 697 (4th Cir. 1987), quoted in *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020 (2d Cir. 1993).

¹⁷⁹ Since Congress intended for the Clean Water Act to redress pollution in our nation's waters, the *Pan American Tanning Corp.* court's failure to dismiss the citizen-suit after a consent decree redressed the injury oversteps the Act's purpose. See *Federal Water Pollution Control (Clean Water) Act*, 33 U.S.C. § 1251(a) (1994).

¹⁸⁰ See *Pan Am. Tanning Corp.*, 933 F.2d at 1021-22.

¹⁸¹ See *id.*

¹⁸² See *id.* at 1022.

the *Pan American* decision strayed from the spirit of the Clean Water Act and ignored the basic legal principles of mootness. As discussed above, the facts of *Pan American* parallel *Eastman Kodak* closely. The same court in 1991 found a citizen-suit moot because of no "realistic prospect that Kodak [would] continue to violate the Clean Water Act as alleged in the complaint".¹⁸³ The court in *Eastman Kodak* provided this clear legal guidance based on the theory that no injury can be redressed if the violator has 'ceased its infractions'.¹⁸⁴ Thus, the citizen-suit's grievances are satisfied and the case should be moot for lack of standing.

The inherent problem with the *Pan American* decision stems not from its ultimate decision allowing the citizen-suit to proceed, but rather from its language suggesting that under *no circumstances* will post-complaint compliance render a citizen-suit moot.¹⁸⁵ In distinguishing *Eastman Kodak*, this court emphasized the large size of the penalties assessed against Eastman Kodak under the consent decree as compared to Pan American's mere fine of \$6,000 and \$250,000 to upgrade the wastewater treatment.¹⁸⁶ The *Pan American* court reiterated *Eastman Kodak* and upheld the idea that a citizen plaintiff has no power to "'revisit the terms of a settlement reached by competent state authorities' or to 'further investigat[e] and monitor[] the state compromise absent some realistic prospect of the alleged violations continuing.'"¹⁸⁷ The court, nonetheless, glossed over such powerful guidance because it believed no such facts existed in this case. In such a conclusive analysis, however, the court failed to acknowledge the lack of evidence suggests that *Pan American* would likely continue to violate the Clean Water Act after the consent decree.

The recent Supreme Court decision in *Steel Company* implied that although a state agency did not assess fines as substantial as the plaintiff desired, this does not establish a redressable injury sufficient to sustain the case or controversy requirement in federal court.¹⁸⁸ *Steel Company* also directly negates the ruling in *Pan American*.¹⁸⁹ The defendant in *Pan*

¹⁸³ See *id.*

¹⁸⁴ See *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1022 (2d Cir. 1993).

¹⁸⁵ See *id.* at 1021-22.

¹⁸⁶ The *Pan American Tanning Corp.* court gave great weight to the extraction of \$2 million from Kodak and the fact that the panel's mootness discussion focused on the impact of the state settlement. See *id.* at 1022.

¹⁸⁷ *Id.* (quoting *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2d Cir. 1991)) (alteration in original).

¹⁸⁸ See *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 106-08 (1998).

¹⁸⁹ See *id.* at 105-06.

American specifically relied on a redressability argument, which proposed that the plaintiff could not establish an injury based on monetary penalties because the United States Treasury, rather than the citizen plaintiff, would reap the benefits of such penalties.¹⁹⁰

The decision in *Pan American* leads to a reinforcement of outrageous citizen-suit damages. Based on the court's analysis of damages and the similarities between the consent decree and the citizen plaintiff's prayer,¹⁹¹ future citizen plaintiffs would be wise to increase their amount of damages so as to ensure the probability of continued fines and increased litigation costs. Instead of the bright line ruling in this case, which forbids a court to moot a citizen-suit after post-complaint compliance by the defendant;¹⁹² future courts should utilize a totality of the circumstances standard. If the state enforcement agency and the defendant act collusively so as to avoid true penalties, then the citizen-suit should proceed. Or, perhaps if a consent decree only slightly penalizes an egregious violation, the citizen-suit should continue. Nonetheless, if future courts intend to uphold the true purpose behind both the Clean Water Act and the citizen-suit provision, they would be wise to focus primarily on the state consent decree's ability to redress the citizen-suit's injury, thus mooting any further claim in federal court.

Although the Supreme Court refused to extend the *Steel Company* analysis to the facts in *Laidlaw*, the Court appears to support a totality of circumstances approach to determining mootness. In fact, the Court expressly explained that it "recognize[d] that there may be a point at which the deterrent effect for a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing."¹⁹³ The Court noted that in the case at bar, the state settlement did not take into account the defendant's economic gain from noncompliance and did not impose a penalty that would serve to deter future violations.¹⁹⁴ Furthermore, *Laidlaw* itself initiated the DHEC lawsuit, drafted the

¹⁹⁰ See *id.* The *Steel Company* case held that only the United States Treasury would acquire any penalties authorized under EPCRA (analogized to the Clean Water Act). Therefore, the citizen plaintiff's prayer for such penalties are not to remedy his own injuries, but that of the "undifferentiated public interest." *Id.* If a consent decree has already assessed penalties, merely protecting the United States Treasury from collecting insufficient fines does not empower a citizen plaintiff to continue suit in federal court. See *id.* This is not a redressable injury. See *id.*

¹⁹¹ See *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1022 (2d Cir. 1993).

¹⁹² See *id.* at 1021.

¹⁹³ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 120 S. Ct. 693, 707 (2000).

¹⁹⁴ See *id.* at 707 n. 2.

complaint, and paid the filing fee.¹⁹⁵ The Court focuses more on the deterrence aspect of the civil penalties rather than the redressability approach followed in *Steel Company*.¹⁹⁶ Nonetheless, the holding in *Laidlaw* supports a totality of circumstances approach to determine the mootness of a citizen suit under the Clean Water Act.

Although proponents of bright-line rules¹⁹⁷ may find the sharp pain of judicial activism at their side, the resolution of when a state consent decree moots a citizen-suit's federal claim must rest on a case-by-case analysis. Perhaps one could argue that citizen-suit plaintiffs need guidance in determining whether to bring a suit against a polluter. The inherent problem with the establishment of bright line rules providing such guidance, however, stems from Congress's intent for the role of citizen-suits.¹⁹⁸ Congress envisioned the citizen-suit to aid in the enforcement of our nation's waterways *only* when the governmental hammer fell short.¹⁹⁹ To force a defendant to suffer dual sanctions because the governmental agency decided to enforce its laws seems counter-intuitive.

A court should allow a citizen suit to proceed in federal court only when, in light of the totality of circumstances, a consent decree in state court fails to redress a cognizable injury. The Supreme Court has established that a citizen group's desire to sanction the defendant more heavily than the governmental agency for its own satisfaction or hard line principles does not establish Article III standing.²⁰⁰ Having failed to establish standing, a citizen-suit should be dismissed as moot. Without a flexible totality of circumstances approach to the continuation of citizen-suits and a strict redressability requirement for standing, many defendants may suffer double sanctions due to an overzealous and possibly vengeful plaintiff.

¹⁹⁵ See *id.* at 707.

¹⁹⁶ See *id.* at 706-07.

¹⁹⁷ The decisions in which courts have clearly held that a citizen-suit is not moot in certain circumstances clearly undermine the role of the citizen-suit and constitutional principles of mootness and redressability. See, e.g., *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017 (2d Cir. 1993); *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985); *Public Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164 (D.N.J. 1993).

¹⁹⁸ Congress intended for the federal, state and local agencies to enforce the Clean Water Act. The role of the citizen suit is secondary. See S. REP. NO. 92-414, at 64 (1971), 1972 U.S.C.C.A.N., 3668-3730, reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973).

¹⁹⁹ See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991).

²⁰⁰ See *Steel Co v. Citizens for a Better Env't*, 523 U.S. 83, 105-06 (1998).

B. *The Preclusive Effect of State Consent Decrees on the Continuation of a Citizen Suit in Federal Court*

If the circumstances of future cases do not lend themselves to dismissing a citizen-suit as moot after a consent decree, recent case law offers guidance for lower courts to preclude the continuation of the citizen-suit under certain circumstances.²⁰¹ A consent decree that addresses the citizen-suit's grievances leaves nothing for the citizen plaintiff to continue litigating.²⁰² Therefore, courts should adhere to the longstanding principle of *res judicata* and dismiss a citizen-suit even if the valid state consent decree did not moot the citizen's action.

1. Requirements of *Res Judicata*

The doctrine of *res judicata* dictates that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."²⁰³ *Res judicata* serves to bar all claims that arose in a previous lawsuit.²⁰⁴ In the context of a settlement between parties, "[it] is clear that the doctrine of *res judicata* does apply to cases in which a consent decree was entered."²⁰⁵ A valid consent decree, therefore, carries with it the weight of a final judgement in court,²⁰⁶ which in turn may preclude the citizen-suit by means of *res judicata*. To apply the doctrine of *res judicata*, four prerequisites must be met: 1) a final judgement on the merits must have been rendered in the first action, 2) the court in the first action must have had proper jurisdiction, 3) causes of action in both suits must be the same, and 4) the parties in both actions must be identical or in privity.²⁰⁷

²⁰¹ See *United States Env'tl. Protection Agency v. City of Green Forest, Ark.*, 921 F.2d 1394 (8th Cir. 1990); *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998).

²⁰² See *City of Green Forest*, 921 F.2d at 1404.

²⁰³ BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

²⁰⁴ See 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.01 (3d ed. 1997).

²⁰⁵ *Smith v. State*, 996 F. Supp. 1203, 1206 (M.D. Ala. 1998).

²⁰⁶ See *United States v. Homestake Mining Co.*, 595 F.2d 421, 425 (8th Cir. 1979).

²⁰⁷ See *Smith*, 996 F. Supp. at 1206; see also *City of Green Forest*, 921 F.2d at 1403 (citing *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983)).

The first two requirements normally do not pose problems for courts in determining the outcome of a citizen-suit's fate. A citizen plaintiff may argue that a consent decree did not decide the judgment on the merits because the court did not actually litigate all the issues; rather, it only approved the settlement. This approach, however, falls short because historically, preclusion applies to issues that *could* have been litigated, not only to those that *were* litigated.²⁰⁸ The second requirement mandates only that the state court in which the first action took place had proper subject matter jurisdiction,²⁰⁹ personal jurisdiction²¹⁰ and venue.²¹¹

The third stipulation mandates that both the citizen-suit and the consent decree share the same cause of action that arise out of "the same nucleus of operative fact."²¹² Citizen suits normally mirror the claims the government presents against the Clean Water Act violator. The citizen plaintiff, however, often contests the consent order as not preclusive because the civil penalties assessed do not equal those of the citizen-suit's complaint, and they fail to sufficiently sanction the polluter for its actions.²¹³ Logic dictates that regardless of the penalties involved in the sanctioning of the violator, the issues remain the same between the state or federal agency and the citizen plaintiff—protecting our waterways by enforcing the requirements of the Clean Water Act.

The fourth requirement of privity, which is purportedly required to establish the consent decree's preclusive effect on a duplicative citizen-suit, often proves problematic for America's lower courts. To preclude an impending suit, the action must involve identical parties or the parties must share privity.²¹⁴ If a court does not recognize the citizen-suit as being in privity with the state or federal enforcement agency, then historically, *res judicata* cannot apply and the citizen-suit may continue.²¹⁵ Under the common law approach, although "mutuality has been for the most part abandoned in cases involving collateral estoppel, it has remained

²⁰⁸ See 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.20[1] (3d ed. 1997).

²⁰⁹ See *id.* ¶ 108.04[1].

²¹⁰ See *id.* ¶ 108.02[1].

²¹¹ See *id.* ¶ 108.04[3].

²¹² NAACP v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990).

²¹³ Every case discussed in this Note involves citizen plaintiffs who disagree with the sanctions assessed by the state or federal enforcement agency. This argument, however, now appears moot after the Supreme Court's holding in *Steel Company*, which distinguished these penalties as payable to the United States Treasury and thus not at issue for further determination by the courts.

²¹⁴ See *Smith v. State*, 996 F. Supp 1203, 1206 (M.D. Ala. 1998).

²¹⁵ See *id.* at 1206.

a part of the doctrine of *res judicata*.”²¹⁶ Although this approach follows a plain language interpretation of *res judicata*, several recent courts have extended the preclusion doctrine past this confining application.²¹⁷ Based on the intent of a citizen’s statutory grant to file suit under the Clean Water Act and the role of the government enforcement mechanism, recent precedent correctly precluded a citizen-suit after a state or federal agency entered into a consent decree with the polluter.²¹⁸

Pursuant to the Clean Water Act, a citizen-suit should proceed only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility.”²¹⁹ The Act intended that governmental agencies serve as its primary enforcers.²²⁰ To expand the citizen-suit’s role would undermine the “supplementary role envisioned for the citizen-suit.”²²¹ A polluter would inevitably lose all incentive to settle costly litigation if courts allow a citizen-suit to continue after a consent decree sufficiently addressed the citizen plaintiff’s complaint. No violator would settle, often incurring large penalties and criminal sanctions, only to find themselves returning to the same courtroom to face the *same* issues with a *different* plaintiff. The incentive to enter into a consent decree, therefore, hinges on an assurance that the violations will not be revisited.

The Clean Water Act never intended to supply an angry citizen plaintiff with a means to gain revenge on a polluting company. Congress created the CWA with the intention of creating a system by which the government could ensure the clarity of our nation’s water.²²² To allow a citizen-suit to continue after the Act’s primary enforcer settles with the polluter, therefore, strikes contrary to the very grain of the Clean Water Act’s purpose.

²¹⁶ Nevada v. United States, 463 U.S. 110, 143 (1983) (citation omitted) (emphasis added).

²¹⁷ See United States Env’tl. Protection Agency v. City of Green Forest, Ark., 921 F.2d 1394, 1403-05 (8th Cir. 1990). Although the doctrine of *res judicata* generally requires identical parties or privity to preclude a subsequent action, these courts disposed of the requirement and precluded the citizen suit. See *id.*

²¹⁸ See *id.*

²¹⁹ See *id.* at 1403 (quoting S. REP. No. 92-414, at 64 (1971), reprinted in 1972 U.S.C.A.N. 3668, 3730, and in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973)). The report echoes the Supreme Court’s holding in *Gwaltney*, which frames the citizen suit as a secondary enforcement mechanism that aids but does not overpower the role of the government. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

²²⁰ See *Gwaltney*, 484 U.S. at 60.

²²¹ *Id.*

²²² See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251(a) (1994).

2. Lower Court's Dismissal of the Privity Requirement for *Res Judicata*

In *City of Green Forest*, the court focused primarily on the intent behind the Clean Water Act.²²³ The court precluded the citizen-suit after determining that the state acted in a *parens patriae* capacity.²²⁴ The court explained that "once a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgement entered in such a suit is conclusive upon those citizens and is binding upon their rights."²²⁵ This approach to the preclusion principle wisely reinforced the ideals underlying the purpose of a citizen suit.²²⁶ The citizen plaintiff should not replace the role of the government in protecting the welfare of the waters, rather it should simply aid in its protection. Although the court framed its discussion in terms of the EPA's role as chief prosecutor, the same rationale should apply to state agency enforcement.²²⁷ Therefore, if a state agency, which enforces NPDES permits on behalf of all citizens, intervenes and negotiates a consent decree with a violator, there remains "little left to be done" by the continuance of a citizen-suit.²²⁸

The *City of Green Forest* court's analysis of the citizen plaintiff's request for additional penalties virtually echoed what the Supreme Court was to hold eight years later in *Steel Company*. The court in *City of Green Forest* held that the United States Treasury will obtain any fines recoverable under the Clean Water Act, not the citizen plaintiffs in their individual capacities.²²⁹

²²³ See *United States Env'tl. Protection Agency v. City of Green Forest*, Ark., 921 F.2d 1394, 1403-04 (8th Cir. 1990).

²²⁴ See *id.* at 1404. The *parens patriae* doctrine is a concept of standing used to protect governmental interests such as welfare of the people, water rights and water quality. See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

²²⁵ See *City of Green Forest*, 921 F.2d at 1404.

²²⁶ The *City of Green Forest* court acknowledged that other cases in other circuits have disagreed with its holding, including *Atlantic States Legal Foundation, Inc. v. Koch Refining Co.*, 681 F. Supp. 609, 614 (D. Minn. 1988), and *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555, 1555 (M.D. Fla. 1987). The court, however, focused on the role of the governmental agencies as chief enforcers of Clean Water Act violations. It did so based on the legislative history of the Clean Water Act and the Supreme Court's recognition of such intent in *Gwaltney*. See *City of Green Forest*, 921 F.2d at 1403-04.

²²⁷ Congress intended for the federal, state, and local agencies to enforce the Clean Water Act. The role of the citizen suit is secondary. See S.REP. No. 92-414, at 64 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3730, and in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973).

²²⁸ See *City of Green Forest*, 921 F.2d at 1404.

²²⁹ See *United States Env'tl. Protection Agency v. City of Green Forest*, Ark., 921 F.2d 1394, 1404 (8th Cir. 1990).

In a unique but accurate analysis, the court further held that although the citizen plaintiff may have enjoyed harsher penalties than the state or federal agency assessed, "such citizens are no more aggrieved than citizens who are precluded from commencing an action in the first instance because of pending agency action."²³⁰ This analysis provides a logical viewpoint for future courts to follow. Under the statutory language of the Clean Water Act, if an agency brings suit against the polluter, the citizen plaintiff would be precluded as a matter of law if the governmental agency diligently prosecuted the violation.²³¹ With this foundation, to deny the use of the preclusion doctrine after a binding settlement between this chief enforcer of the Clean Water Act and the polluter would conflict with the Act's primary delegation of enforcement duties specifically to governmental agencies.²³² This unsound denial would allow a citizen plaintiff to effectively "boot-strap" jurisdiction and avoid preclusion by commencing with the suit prior to the government's intervention. This non-preclusive effect would serve to discourage governmental agencies from negotiating with polluters after a citizen-initiated a suit, realizing the violator will not settle for fear of dual sanctions.

Pursuant to the *City of Green Forest* and *Steel Company* decisions, the court in *Comfort Lake Association v. Dresel Contracting, Inc.* held that if an agency "diligently prosecuted its enforcement demands, the civil penalties it elected to extract in settling those demands may not be reconsidered in [a] citizen-suit."²³³ Citizen plaintiffs may argue that the sanctions assessed in a consent decree fail to sufficiently represent their claims. Thus, they still deserve their "day in court" as a plaintiff to assert their claims not addressed by the decree. Although this argument is grounded in the rules of civil procedure,²³⁴ in the context of a citizen-suit such an approach weakens dramatically.

In light of this recent precedent, citizen plaintiffs will have a difficult challenge proving the governmental agency did not represent

²³⁰ See *id.*

²³¹ See Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365 (b)(1)(B) (1994).

²³² Neither *City of Green Forest* nor this Note advocates precluding a citizen suit if the governmental agency did not conclude its suit or enter into a consent decree with the polluter. As the court explained in that case, such a proposal "flies in the face of the clear language of the citizens' action provision of the CWA, as well as the legislative history, which make clear that agency inaction is precisely the circumstance in which private action is appropriate." *City of Green Forest*, 921 F.2d at 1405.

²³³ *Comfort Lake Assoc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998).

²³⁴ See *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996); *Tice v. American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998).

their interests.²³⁵ The *Comfort Lake* court even extended the preclusive effect by dismissing a citizen-suit if a governmental agency entered into an informal agreement with a polluter as the result of a diligently prosecuted enforcement process.²³⁶ An adherence to this strong precedent, which precluded the citizen-suit, would fulfill the legislative intent behind the Clean Water Act. Furthermore, following this approach does not undermine the citizen's statutory rights; rather it allows the governmental agency to represent the citizen in taking steps to penalize violators and cease the pollution of our nation's waterways.

To uphold the intent of the Clean Water Act and to ensure the quality of America's water, state administrators require the power to enforce the Act to protect the community. Under certain circumstances, an administrator may agree not to assess civil penalties if the violator takes other extreme corrective measures to ensure its compliance with the Act.²³⁷ After such compliance, however, a citizen plaintiff may still desire to impose harsher penalties which the administrator chose to forego. To allow this citizen-suit to proceed would have a chilling effect on the state's ability to use alternative means of enforcement.²³⁸ The continuance of a citizen-suit under these circumstances ignores the reality that an "[a]dministrator [who is] unable to make concessions is unable to obtain them."²³⁹ Without affording the state's statutory right to enforce the Act, future courts may effectively appoint the citizen plaintiff as "captain of the litigation."²⁴⁰

The judicial system allows for a plaintiff to obtain his day in court or a bite of the apple.²⁴¹ However, to allow a citizen plaintiff to attack the defendant for the same violations to which he has paid civil and/or criminal penalties sacrifices the entire judicial apple orchard. The citizen-suit provision should only serve to supplement the role of the government

²³⁵ Although *City of Green Forest* used a *parens patriae* approach, and *Comfort Lake* focused primarily on the policy behind the citizen-suit, both precedents ultimately hold that a citizen-suit's concerns are redressed by the governmental agency. See *Comfort Lake*, 138 F.3d at 355-57.

²³⁶ See *Comfort Lake*, 138 F.3d at 358. See also *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1322 (S.D. Iowa 1997) ("[A] citizens suit may be barred even absent formal administrative proceedings where . . . the state has authority to issue orders and assess penalties for violations but chooses instead to order compliance and settle informally with the violator.").

²³⁷ See *Williams Pipe Line Co.*, 964 F. Supp. at 1322.

²³⁸ See *id.*

²³⁹ *Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992).

²⁴⁰ *Id.*

²⁴¹ See *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996).

as chief prosecutor.²⁴² The purpose and intent behind the Clean Water Act never "intended to enable citizens to commandeer the federal enforcement machinery."²⁴³

As several courts have improperly overfed an already obese citizen-suit provision an overabundance of frivolous lawsuits and possible dual sanctions followed.²⁴⁴ In simplistic terms of fairness, a defendant who has entered into a consent decree with a state agency and has paid appropriate penalties should find sanctuary in the judicial doctrine of preclusion. It hardly appears harsh or Draconian for a court to bar the redundancy of a duplicative citizen-suit if a state agency diligently upholds the goal of the Clean Water Act.²⁴⁵ To force a defendant to endure punishment twice for the same violation runs, contrary to the fundamentals of the American judicial system.

IV. LITIGATION COSTS AWARDED UNDER THE CLEAN WATER ACT

The American legal tradition dictates that a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."²⁴⁶ The Clean Water Act, however, affords "any prevailing or substantially prevailing party" litigation costs, "including reasonable attorney and expert witness fees."²⁴⁷

If future courts, subsequent to a valid state consent decree, render a citizen suit moot or precluded in federal court, the citizen plaintiff should still receive litigation costs under certain circumstances. To always deny a citizen plaintiff litigation costs after he initially files suit would serve to follow the same bright line rulings to which many courts have unwisely adhered in regard to the continuance of citizen-suits.²⁴⁸ The determination

²⁴² See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

²⁴³ *Dubois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987).

²⁴⁴ See Elizabeth McKinney, *Preclusion of Citizens' Suits Under the Clean Water Act*, 10 J. NAT. RESOURCES & ENVTL. L. 357, 365-66 (1995).

²⁴⁵ See *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997).

²⁴⁶ *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 554 (1986).

²⁴⁷ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(d) (1994).

²⁴⁸ This Note vehemently argues against the courts establishing bright line rules in its interpretation of the Clean Water Act. A case-by-case analysis or a totality of circumstances approach would serve to uphold better the ideals of the Act. To suggest now that under no circumstances a citizen plaintiff, even if found moot or precluded, is not entitled to litigation costs would reflect the hypocrisy of a solely defendant-oriented approach.

of whether a citizen plaintiff deserves litigation costs hinges on the future courts' interpretations of "prevailing."

A district court has the power to award litigation costs that are "reasonable in relation to the results obtained."²⁴⁹ Section 1365(d) of the Clean Water Act, however, empowers a district court to award litigation costs at its discretion upon a proper motion.²⁵⁰ The central dispute in awarding litigation costs lies in a determination of whether a precluded or dismissed citizen-suit can nonetheless be characterized as "prevailing." One argument holds that only the state or federal agency actually negotiating a consent decree with the violator is "prevailing" and should be awarded litigation costs. On the other hand, a strong counter argument proposes that "but for" the initial filing of the citizen suit, the governmental agency never would have acted, and the violations would still exist.²⁵¹ In light of strong precedent and the policies of the Clean Water Act, the latter proposition appears most convincing.

Although a plaintiff may fail to prevail on every issue raised in the lawsuit, courts should not automatically reduce or extinguish an award of litigation costs.²⁵² Thus, even if the governmental consent decree, which precluded or mooted the citizen suit, did not redress *every* issue, the citizen plaintiff should still enjoy an award of litigation costs. The thrust of future courts' analysis, however, should focus most heavily on the actual degree of success obtained.²⁵³ Utilizing a totality of circumstances approach to the settlement of the violations, courts should compare the outcome of the consent decree with the citizen plaintiff's initial prayer for relief.

Under the plain language of the CWA, a court should still find the citizen plaintiff as "prevailing" before statutorily awarding litigation costs. Generally speaking, if a defendant stops violating a law or alters his conduct subsequent to the pressure of a lawsuit, the plaintiff prevailed.²⁵⁴ Therefore, although a state consent decree may preclude or dismiss the federal citizen-suit, the citizen plaintiff's initial claim may have spurred the final settlement.

In *Armstrong v. ASARCO*,²⁵⁵ a polluter and the EPA entered into a consent decree following the filing of a citizen-suit.²⁵⁶ The court

²⁴⁹ *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

²⁵⁰ See *Jones v. City of St. Clair*, 804 F.2d 478, 481 (8th Cir. 1986).

²⁵¹ See *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 719 (1987).

²⁵² See *Hensley*, 461 U.S. at 432.

²⁵³ See *id.*

²⁵⁴ See *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (explaining situations in which a court has deemed a plaintiff to have prevailed in a civil rights case).

²⁵⁵ 138 F.3d 382 (8th Cir. 1998).

reinforced the theory that “[w]hen a polluter settles with government authorities following the commencement of a citizen-suit, it is permissible to infer that the citizen-suit motivated the settlement, thereby making the plaintiff a prevailing party.”²⁵⁷

The holding in *Comfort Lake* also reflected this judicial sentiment. In that case, after a consent decree precluded the continuance of a citizen-suit, the court held that the citizen plaintiff should still receive litigation costs “if its citizen-suit was the catalyst for agency enforcement action that resulted in the cessation of Clean Water Act violations.”²⁵⁸ Although the court dismissed or precluded the action, the citizen-suit nonetheless served its statutory function of redressing Clean Water Act violations.²⁵⁹

Unfortunately, the Supreme Court in *Laidlaw* refused to visit the issue even though it was argued by the citizen plaintiffs.²⁶⁰ The Court simply explained that the district court has the duty to award such fees.²⁶¹ This prudential approach to the catalyst argument only serves to further the uncertainty concerning attorney’s fees following dismissal of the citizen’s action. Both *Armstrong* and *Comfort Lake*, however, provide a strong legal foundation to award litigation costs to “prevailing” plaintiffs in citizen-suits, although the court dismissed the action subsequent to a state consent decree.

Future courts should carefully analyze the government’s interaction with the polluter before the citizen plaintiff officially filed the citizen-suit. Precedent suggests that if a governmental agency began enforcing or merely discussing enforcement with the violator, this may serve to deny the citizen-plaintiff litigation costs.²⁶² Under the preceding circumstances, the citizen-suit did not act as a “catalyst” to the cessation of Clean Water Act violations, and accordingly, the court should not award litigation costs. Although this hair splitting approach may appear difficult for a court to ascertain, the judicial system would protect the integrity of the Clean Water Act and the rights of the defendants by correctly determining the true catalyst—the governmental agency or the citizen-suit.

²⁵⁶ See *id.* at 382.

²⁵⁷ *Id.* at 387.

²⁵⁸ *Comfort Lake Ass’n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998).

²⁵⁹ See *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991).

²⁶⁰ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 711 (2000).

²⁶¹ See *id.*

²⁶² See *id.*

V. LITIGATION COSTS AS ESTABLISHING STANDING

In terms of litigation costs, the Clean Water Act does not create standing to continue the citizen-suit based solely on pursuing such costs. As discussed above, the consent decree in federal court should extinguish any Article III case or controversy, thus mooted the citizen-suit. An argument proposing that a citizen-suit may continue in federal court based solely on the pursuit of litigation costs lacks precedent and policy support.

In *Steel Company*, the Court distinctly explained that the "reimbursement of the costs of litigation cannot alone support standing."²⁶³ If on the face of the record, the only interest in the continuance of the citizen-suit terminated as a result of the state consent decree, courts must exercise "reasonable caution" to ensure the mooted citizen-suit does not proceed solely to obtain litigation costs.²⁶⁴

Future courts should carefully analyze the true purpose behind the citizen plaintiff's motive to continue its suit after a state consent decree. To allow a citizen plaintiff to achieve standing to litigate a Clean Water Act violation by continuing the suit for the cost of bringing suit runs counter to the goals of the Clean Water Act and the purpose of section 1365.²⁶⁵ The Clean Water Act envisioned the citizen-suit to aid in the enforcement of the Act's regulations and to enjoy an award of litigation costs if it prevailed in the action.²⁶⁶ This incentive encourages citizen-plaintiffs to analyze carefully the likelihood of actual violations before filing a frivolous or already moot claim. Supreme Court precedent provides a clear guideline for lower courts to dismiss a citizen-suit under the Clean Water Act if its continuance depends solely on an award of litigation costs to establish standing.²⁶⁷

Although a state consent decree with violators of the Act should moot or preclude a federal claim, the award of litigation costs remains a distinct issue. Litigation costs serve to prevent excessive filings in our already overbooked courts by rewarding only those suits that "prevail." The vital issue in future courts' determinations of litigation costs, therefore, hinges on a clearer definition of "prevail." If a citizen-suit acted as a catalyst to the state consent decree, case law and logic dictate that future courts should find a citizen-suit prevailing and award litigation

²⁶³ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998).

²⁶⁴ *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

²⁶⁵ See *Steel Co.*, 523 U.S. at 109-10.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

costs.²⁶⁸ To refuse an award of litigation costs simply because a state agency intervened and enforced the Clean Water Act would serve to diffuse any incentive for the filing of citizen-suits.

Future courts, however, should take the award of litigation costs into consideration when assessing penalties or approving consent decrees. In doing so, a court recognizes both the importance of upholding the Clean Water Act's purpose and the injustice of sanctioning a defendant twice for the same violation. This approach also avoids instances, as in the case of publicly owned water treatment centers ("POTW"), in which high litigation costs practically render the institution judgment proof. Under this situation, if the court awards high litigation costs in addition to already extreme penalties under the Act, the POTWs may raise citizen's taxes to pay for such costs. The citizens of this nation, therefore, not only sacrifice the clarity of their water due to a lack of funds, but also personally pay for its murky outcome.

VI. CONCLUSION

The congressional amendments to the Clean Water Act intended to supplement the state and federal agencies' role as chief enforcer.²⁶⁹ As the Supreme Court established in *Gwaltney*, Congress never intended for the newly created citizen-suit provision to supersede the power of the governmental agencies and supplant their role under the Act.²⁷⁰ Without clear guidance from the Supreme Court, several courts have allowed citizen suits to continue after the creation of a state consent decree that redressed the alleged injuries. Although the Court held in *Laidlaw* that a citizen suit, under certain circumstances, would not be moot subsequent to a state agreement, the decision only serves to muddy the issues. On one hand, the Court establishes a bright line allowing the continuance of the suits, yet it also implies that the citizen suit could be moot if it only sought civil penalties.

Such deviation from congressional intent and the plain language of the Act results in an overabundance of citizen-suits flooding the already polluted dockets. Based upon the role of the citizen-suit provision and the purpose of governmental agencies, a citizen action normally should not

²⁶⁸ See *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998).

²⁶⁹ See AMENDING THE CLEAN WATER ACT: HEARINGS ON S. 53 AND S. 652 BEFORE THE SUBCOMM. ON ENVTL. POLLUTION OF THE SENATE COMM. ON ENV'T AND PUB. WORKS, 99th CONG. 9 (1985).

²⁷⁰ See *id.*

continue in federal court following a state court consent decree, which imposes substantial penalties and stops present and future misconduct. However, if a dismissed citizen plaintiff initiated the government's action and spurred the settlement with the polluter, then the court should award the citizen litigation costs. A strong Supreme Court decision, which uses a totality of circumstances approach to determining a citizen-suit's standing in light of a state consent decree, would uphold the integrity of the Clean Water Act and provide lower courts with a solid foundation. Without future direction from the Court, the role of the citizen-suit will inevitably expand past its supplemental birth and muddy the waters of the Act with vengeance and personal self-interest.