[H]WHY UNITED STATES CLEAN WATER ACT CITIZEN SUIT PROVISION IS MORE DIFFICULT TO IMPLEMENT TODAY? [*]

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Abstract

As a one of the two major statutes governing water quality in the United States, the Clean Water Act, establishes a comprehensive framework for national pollution control standards by providing technical tools and financial assistance in order to protect the integrity of surface waters. The Act itself authorizes the federal government and the state governments to primarily enforce the Act's requirements and standards while citizens only act as a supplement to the governmental authority. However, due to the lack of sufficient and efficient governmental enforcement activities, citizen suits under the Act have become an important enforcement tools to ensure the protection of the nation's waters. This study analyzes the challenges that citizens or environmental organizations have faced while taking actions under the citizen suit provision of the Clean Water Act and argues that this provision is more difficult to litigate today.

Keywords

Clean Water Act (CWA), United States (US), citizen suit, challenge, and enforce

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H Hakem incelemesinden geçmiştir.

* This article is produced from the SJD dissertation of Özge Atıl Kaya submitted to the School of Law of the Pennsylvania State University in 2016. This article is a continuous series of the author's previous articles cited as follows: **Atıl**, Özge: "Adopting the Citizen Suit Provision of the United States Clean Water Act As a Tool for Water Pollution Enforcement in Turkey," J. TRANSNAT'L L. & POL'Y., Vol. 26, 2016-2017, P. 76-120; **Atıl**, Özge: "Vital Protection for Waters: Citizen Suit Provision of the United States Clean Water Act," Law & Justice Review, Vol.15, 2017, P. 97-139.

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NEDEN BİRLEŞİK DEVLETLER TEMİZ SU YASASI VATANDAŞ DAVALARI HÜKMÜNÜN UYGULANABİLİRLİĞİ GÜNÜMÜZDE DAHA ZORLUDUR?

Öz

Birleşik Devletler'de su kalitesini düzenleyen iki temel yasadan biri olan Temiz Su Yasası, yüzey sularının bütünlüğünü korumak adına, teknik araçlar ve finansal yardım sağlayarak, ulusal kirlilik kontrol standartları için kapsamlı bir çerçeve oluşturur. Yasa, federal ve eyalet hükümetlerine Yasa'nın gerekliliklerini ve standartlarını öncelikli uygulama yetkisi verirken, vatandaşlar yanlızca hükümet otoritelerini tamamlayıcı olarak hareket etme yetkisine sahiptir. Fakat, hükümet uygulama araçları yeterli ve verimli bir koruma sağlamadığı için, Yasa kapsamındaki vatandaş davaları ülkenin sularının korunması açısından önemli bir uygulama aracı haline gelmiştir. Bu çalışma, vatandaşların veya çevre kuruluşlarının Temiz Su Yasası vatandaş davaları hükmüne dayanarak açtıkları davalarda karşılaştıkları zorlukları inceleyerek, ilgili hükmün uygulanabilirliğinin günümüzde daha zor olduğunu savunur.

Anahtar Kelimeler

Temiz Su Yasası (CWA), Birleşik Devletler (US), vatandaş davası, zorluk, ve uygulama

I. INTRODUCTION

The federal government, the state governments, and private citizens have authorization to enforce the United States (US) Clean Water Act's (CWA) requirements and standards.[1] Congress intended that the Environmental Protection Agency (EPA) (on behalf of the federal government) and the state governments have primary enforcement authority and citizens only act as a supplement to the governmental authority.[2]

Statistics, however, show that both federal and state authorities have been enforcing the CWA less robustly and less frequently.[3] Since there is a sharp decline in governmental enforcement activities,[4] citizen suits under the CWA would be critical enforcement tools to ensure the protection of the nation's waters.

Judicial trends in CWA citizen suits show constitutional challenges, such as standing, mootness, separation of powers, and sovereign immunity, have allowed courts to preclude a huge number of suits; standing and mootness, however, are the most challenging to citizen plaintiffs among these four.[5] Second, recent case law reveals how difficult it is to overcome the diligent prosecution requirement, which has been interpreting more strictly by courts. In brief, standing, mootness, and diligent prosecution defenses, though not the only challenges citizen plaintiffs encounter while bringing actions under the CWA, are frequently prominent.

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1 **Yates**, Edward E.: "Federal Water Pollution Laws: A Critical Lack of Enforcement by the Enforcement Protection Agency," San Diego L. Rev., Vol. 20, 1983, P. 950; **Battle**, Jackson B. & **Lipeless**, Maxine I.: Water Pollution, Anderson Publishing Co., 3rd ed., 1998, P. 4 (The CWA was primarily created to establish a comprehensive framework for national pollution control standards, providing technical tools and financial assistance in order to protect the integrity of surface waters of the US.)

2 **Appel**, Peter A.: "The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation," Widener L. Rev., Vol.10, 2004, P. 94; **Head, III**, Thomas R. & **Wood**, Jeffrey H.: "No Comparison: Barring Citizen Suits in Dual Enforcement Actions," Nat. Resources & Env't., Vol.18, 2004, P. 57; **Atıl**, Özge: ''Vital Protection for Waters: Citizen Suit Provision of the United States Clean Water Act,'' Law & Justice Review, Vol.15, 2017, P. 133; **Atıl**, Özge: "Adopting the Citizen Suit Provision of the United States Clean Water Act As a Tool for Water Pollution Enforcement in Turkey," J. TRANSNAT'L L. & POL'Y., Vol. 26, 2016-2017, P. 83 ("The utter innovation was that the CWA's citizen suit provision authorized citizens or citizen groups to enforce the standards of the Act. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They would only have to prove that the defendant was out of compliance with the CWA.")

3 **Rechtschaffen**, Clifford: "Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight," Ala. L. Rev., Vol.55, 2004, P. 781-95; Yates, *supra* note 1, at 951- 54.

4 **May,** James R.: "Now More than Ever: Trends in Environmental Citizen Suits,"Widener L. Rev., Vol.10, 2004, P. 9.

5 *Id.* at 33.

The ultimate goal of this article is to scrutinize the challenges that individuals or environmental organizations have faced while taking actions under the citizen suit provision of the CWA. Through an analysis of the standing requirement, ongoing violation and mootness requirements, and the diligent prosecution bar, this study argues that the implementation of the provision is more difficult than ever. The chapter following this introduction is dedicated to the analyses of the standing requirement for citizen plaintiffs under the CWA; it explains constitutional standing and examines judicial trends. The third chapter analyzes ongoing violation and mootness requirements for CWA citizen suits in light of judicial trends. The fourth chapter examines the diligent prosecution bar for citizen suits under the CWA in detail. Finally, the fifth chapter provides the conclusion of the study by presenting the main findings of the research.

II. STANDING

The scope of applicability of environmental citizen suits has been narrowed by the standing doctrine,[6] which is principally defined as a plaintiff's ability to bring a suit against an alleged defendant.[7] The concept of standing is derived from Article III, Section 2 of the Constitution[8]that limits federal judicial power to "*cases andcontroversies*."[9] This language is based on the theory that federal courts are restricted to hearing only those "*who have a genuine stake in the outcome of a particular lawsuit*."[10]

Beyond this constitutional description, however, the Constitution itself remains silent; current standing doctrine and judge-made law mainly shape the implications of standing.[11] The US Supreme Court has heard a large number of

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6 **Benzoni**, Francisco: "Environmental Standing: Who Determines the Value of Other Life," Duke Envtl. L. & Pol'y F., Vol.18, 2008, P. 348.

7 **Lopez**, Alberto B: "Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances," U. Cin. L. Rev., Vol.69, 2001, P. 159.

8 **Longfellow**, Emily: "Friends of the Earth v. Laidlaw Environmental Services: A New Look At Environmental Standing," Environs Envtl. L. & Pol'y J., Vol.24, 2001, P. 8; U.S. Const. art. III, § 2.

9 Sierra Club v. Morton, 405 U.S. 727, 732 (1972); **Dolgetta**, John: "Notes and Comments, Friends of The Earth v. Crown Central Petroleum: The Surrogate Enforcer Must Be Allowed to "Stand Up" For The Clean Water Act", Pace Envtl. L. Rev., Vol.25, 1998, P. 710-11; U.S. Const. art. III, § 2.

10 **Alpert**, Peter A.: "Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?," B.C. Envtl. Aff. L. Rev.,Vol. 16, 1988, P. 286; Lopez, *supra* note 7 ("The concept of standing serves a gate-keeping function that ensures that only those who have an interest in the outcome of litigation be allowed to participate in it.").

11 **Chin**, Courtney: "Standing Still: The Implications of Clapper for Environmental Plaintiffs' Constitutional Standing," Colum. J. Envtl. L., Vol.40, 2015, p. 333; **Gilles**, Myriam E.: "Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation," Cal. L. Rev., Vol.89, 2001, P. 323-25.

environmental cases since the 1970s, and many of them dealt with the issue of standing.[12] The terms of standing, however, have been interpreted differently by circuit courts; consequently, there has been inconsistency regarding the interpretation of the standing doctrine among circuits.[13]

The standing doctrine helps to prevent the courts from being overloaded with cases; additionally, it guarantees that only appropriate parties be allowed to litigate their claims.[14] Based on these objectives, courts should primarily consider whether a plaintiff has standing to sue "*before addressing the merits of a case*."[15]

The citizen suit provision of the CWA defines the term of "*citizen*" as "*a person or persons having an interest which is or may be adversely affected*."[16] This language shows Congress included the doctrine of standing while enacting the citizen suit provision of the Act; citizen plaintiffs, however, are still required to comply with constitutional requirements of the standing doctrine.[17]

To meet constitutional requirements of standing, the Supreme Court has held that a plaintiff must meet a "*three-pronged test*."[18] Accordingly, the plaintiff must show that the plaintiff has suffered an "*actual or imminent*" injury in fact, the injury is "*fairly traceable*" to the defendant's actions, and the relief the plaintiff is seeking is likely to redress the plaintiff's injury.[19] The burden of proof of demonstrating that these three components are met falls on the plaintiff.[20]

Organizational plaintiffs, who frequently participate in the prosecution of environmental citizen suits,[21] are required to establish "*representational*

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12 **Chin**, *supra* note 11, at 334.

13 **Masucci**, Amanda J.: "Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. - Just as Long as You Stand, Stand by Me," Vill. Envtl. L.J., Vol.12, 2001, P. 171.

14 **Berger**, Emily A.: "Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provision of the Clean Water Act," Md. L. Rev., Vol.59, 2000, P. 1372.

15 *Id.*

16 **Atterbury**, Tony L.: "Pollution, Pollution Everywhere, but Not a Plaintiff Found to Be Standing: The Fourth Circuit Judicially Repeals the Citizen Suit Provision of the Clean Water Act," Washburn L.J., Vol.39, 2000, P. 559; 33 U.S.C. § 1362(5).

17 **Atterbury**, *supra* note 16.

18 **Longfellow**, *supra* note 8; **Campbell**, Jonathan S.: "Has the Citizen Suit Provision of the Clean Water Act Exceeded its Supplemental Birth?," Wm. & Mary Envtl. L. & Pol'y Rev., Vol.24, 2000, P. 319; **Werner**, Matthew M.: "Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment," Envtl. L., Vol.25, 1995, P. 805; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

19 **Werner**, *supra* note 18; Campbell, *supra* note 18; **Longfellow**, *supra* note 8; **Lopez**, *supra* note 7.

20 **Chin**, *supra* note 11.

21 **Alpert**, *supra* note 10, at 285.

standing," besides meeting the requirements of the "*three-pronged test*."[22] As a general rule, to establish "*representational standing*," an environmental organizational plaintiff must show that its members have standing under the "*three-pronged test*" to sue for their own rights, the interests that the organization tries to preserve are relevant to the organization's goals, and neither the claim alleged nor the relief demanded requires individual members to join in the litigation.[23]

The formation of the "*three-pronged test*" helped minimize the confusion regarding the standing doctrine in the environmental model, which has created wide controversy for both courts and legal scholars since the 1960s.[24] The application of the three components, however, has not always been harmonious; their application is frequently "*plagued with ambiguity*."[25] Courts have labored hard to find precise standards for the constitutional standing under Article III;[26] they agree that the three components are necessary to have standing, however, they disagree over the description and application of those components.[27]

In addition to these three constitutional requirements, courts require that the injury that the plaintiff has suffered must be within the "*zone of interest*" that the underlying statute was enacted to protect.[28] The mission of the "*zone of interest*" requirement is "*to exclude those plaintiffs whose suits are more likely to frustrate rather than to further statutory objectives*."[29] Because the "*zone of interest*" requirement is prudential, Congress can rule out or adjust it.[30]

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22 **Garrent**, Theodore L.: Overview of the Clean Water Act, in The Clean Water Act Handbook (Mark A. Ryan eds.), ABA Publishing, 3rd ed. 2011, P. 260; Masucci, *supra* note 13, at 182; 504 U.S. 555, 569 (1992).

23 **Masucci**, *supra* note 13, at 182; Garrett, *supra* note 22; **Kalen**, Sam: "Standing on its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases," J. Land Use & Envtl. L., Vol.13, 1997, P. 9-10.

24 **Attwood**, Jason: "ARTICLE III - Standing - Article III Standing is Available To Citizen Group Seeking to Enforce Provisions Of The Clean Water Act Through Citizen Suit Provision - Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000)," Seton Hall Const. L.J., Vol.11, 2000-2001, P. 79; **Barnum**, Cassandra: "Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law," Mo. Envtl. L. & Pol'y Rev., Vol.17, 2010, P. 4 (Standing jurisprudence in the context of environmental cases has been the subject of extensive controversy among legal scholars, with conservative thinkers typically supporting a high bar for standing and more progressive thinkers favoring greater access to courts.).

25 **Chin**, *supra* note 11; **Nichol**, **Jr**, Gene R.: "Standing for Privilege: The Failure of Injury Analysis," 8B.U. L. Rev., Vol.82, 2002, P. 304.

26 **Attwood**, *supra* note 24.

27 **Masucci**, *supra* note 13, at 189.

28 **Salzman**, James & **Thompson**, **Jr**, Barton H.: Environmental Law and Policy, Foundation Press, 3rd ed., 2010, P. 80.

29 Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 397 (1987).

30 **Salzman&Thompson**, **Jr**, *supra* note 28.

Standing has almost always been a problem in environmental citizen litigation.[31] As mentioned previously, the Supreme Court has labored hard to address the issue of standing in the context of environmental citizen suit provisions.[32] This section mainly focuses on five cases – Sierra, Lujan, Laidlaw, Massachusetts, and Summers- as they have provided significant framework for the application of standing in environmental citizen litigation. They have had an extensive effect on judicial development of environmental standing throughout the years. Thus, they are instructive and educational for the application of the standing doctrine in CWA citizen cases though most of them were not brought under the CWA.

2.1. Sierra Club v. Morton

One of the first cases addressing the standing issue was Sierra Club v. Morton.[33] In Sierra Club, the Sierra Club (an environmental organization) sought an injunctive relief to prevent the Forest Service from approving the proposed development of the Mineral King Valley by Disney Enterprises by claiming that some parts of the project violated laws governing the protection of national parks, forests, and game refuges.[34]

The issue before the Supreme Court was whether the Sierra Club had standing to sue as an environmental organization under the Administrative Procedure Act (APA).[35] The Court rejected the Sierra Club's claim that standing based only on the fact that it has interest in the protection of the environment, declaring, "*the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured*."[36] Consequently, the Court affirmed the refusal of Standing to the Sierra Club by stating that the Sierra Club failed to prove that it or its members would be affected by the proposed development.[37]Although the Supreme Court denied standing to the Sierra Club, this case was not "*a total loss*."[38] First, it extended the scope of the "*injury in fact*" element to involve aesthetic injuries by stating that "*aesthetic and environmental well-being, like economic well-*

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31 **May**, James R.: "The Availability of State Environmental Citizen Suits," Nat. Resources & Env't., Vol.18, 2004, P. 55.

32 **Chin**, *supra* note 11, at 334.

33 Sierra Club v. Morton, 405 U.S. 727, 727 (1972)

34 Id. at 728-30.

35 Id. at 731; **Berger**, *supra* note 14, at 1375.

36 **Longfellow**, *supra* note 8, at 17; 405 U.S. 727, 734-35 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.")

37 **Berger**, *supra* note 14, at 1375; 405 U.S. 727, 735 (1972); **Lopez**, *supra* note 7, at 166.

38 **Atterbury**, *supra* note 16.

being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[39] As a result, the Court recognized that an economic injury was not needed to be proved in order to establish standing under Section 505 of the CWA; demonstration of aesthetic and other noneconomic interests could also meet requirements of standing.[40] Second, the Court clarified the standard judges can use in deciding whether environmental organizations meet requirements of standing by holding that environmental organizations would establish standing if any of their members would be able to have standing on their own.[41]

Consequently, environmental plaintiffs' access to courts was expanded by the Supreme Courts's decision in Sierra Club v. Morton in which the Court lowered the standards for environmental standing.[42] After this case, the law of environmental standing "*enjoyed a boom period*" particularly through the 1970s and 1980s until the Supreme Court ruled in Lujan v. Defenders of Wildlife.[43]

2.2. Lujan v. Defenders of Wildlife

In 1992, the Supreme Court decided Lujan v. Defenders of Wildlife,[44] which rigorously restricted standing for environmental plaintiffs.[45] In this case, the plaintiff brought an action under the citizen suit provision of the Endangered Species Act (ESA) in order to compel the US Department of Interior to reconsider its regulations, claiming the regulations violated the Act itself because the ESA was unreasonably interpreted to apply only to governmental projects within the US or the high seas, and not foreign ones.[46]

In addressing whether the plaintiffs had standing, the Court held that three elements (injury-in-fact, causation, and redressability) must be established to satisfy the requirements for constitutional standing.[47] To prove injury in fact, the

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39 405 U.S. 727, 734 (1972).

40 **Salzman&Thompson**, **Jr**, *supra* note 28, at 79; **Lopez**, *supra* note 7, at 166.

41 **Atterbury**, *supra* note 16, at 560; 405 U.S. 727, 739 (1972).

42 **Abate**, Randall S.: "Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond," Wm. & Mary Envtl. L. & Pol'y Rev., Vol.33, 2009, P. 123.

43 *Id.*

44 504 U.S. 555 (1992).

45 **Longfellow**, *supra* note 8, at 19.

46 *Id.* at 19-20; 504 U.S. 555, 557-59 (1992).

47 **Berger**, *supra* note 14, at 1377; 504 U.S. 555, 560-61 (1992) ("First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court." Third, it must be

plaintiff submitted affidavits of two members who had visited the habitat in which endangered animals were likely to be threatened by US agency actions.[48] The members alleged that they intended to go back to that habitat; however, they failed to present a definite departure date.[49] As a result, the Court concluded that Defenders of Wildlife did not meet the injury-in-fact requirement, holding that "*such some day intentions without any description of concrete plans, or indeed even any specifications of when the someday will be do not support a finding of the actual or imminent injury that our cases require*."[50]

The Court also examined the causation requirement of standing, and concluded that the plaintiff must demonstrate "*a direct, specific injury*," which was resulted from the defendant's unlawful conduct in order to commence an action under the citizen suit provision of the ESA.[51] In general, in order to satisfy the caution requirement the plaintiff need not prove to a scientific certainty that the defendant's conduct caused the plaintiff's injury; rather, he is only required to show a substantial possibility that the defendant's action caused his injury.[52]

Furthermore, the Court examined the third prong of standing, redressability, and concluded that Defenders of Wildlife failed to meet the redressability requirement since it did not demonstrate that rearrangements in ESA regulations would significantly change or terminate the overseas projects that were likely to adversely affect the endangered species.[53] The Court added that there was no redressability because the US paid only a small amount of the total cost of the projects; in other words, even though the US did not pay any money, projects would continue and harm such as that predicted would take place.[54]

The law of environmental standing "*entered a backlash period*" after the Supreme Court ruled in Lujan v. Defenders of Wildlife.[55] In 1999, John Echeverria and Jon Zeidler stated that the "*ability of American citizens to vindicate their legal rights to a clean and healthy environment is rapidly*

"likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.").

48 504 U.S. 555, 563 (1992); **Salzman&Thompson**, **Jr**, *supra* note 28, at 81; **Longfellow**, *supra* note 8, at 20.

49 504 U.S. 555, 563 (1992).

50 *Id.* at 564.

51 **Frye**, Russell S.: Citizens' Enforcement of the US Clean Water Act, in Water Pollution Law and Liability (Patricia Thomas ed.), Graham & Trotman & International Bar Association, 1993, P. 187.

52 **Masucci**, *supra* note 13, at 184-85.

53 504 U.S. 555, 568 (1992); **Longfellow**, *supra* note 8, at 20-21.

54 **Atterbury**, *supra* note 16, at 562; 504 U.S. 555, 571 (1992).

55 **Abate**, *supra* note 42, at 124.

eroding."[56] The Supreme Court, however, reversed this situation by ruling in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. in 2000.[57]

2.3. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.

In 2000, the Supreme Court decided in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., and presented a sharp diversion in how courts address standing requirements in environmental cases.[58] It significantly lowered the standards that environmental plaintiffs must meet to prove standing in order to comply with the distinct nature of environmental law.[59]

In this case, the plaintiffs (multiple environmental groups) brought an action under the citizen suit provision of the CWA against the owner of a wastewater treatment plant, who violated his National Pollutant Discharge Elimination System (NPDES) permit.[60] In return, the defendant claimed that the plaintiffs did not establish standing because they failed to meet the injury-in-fact requirement.[61] To demonstrate standing, the plaintiffs submitted affidavits of its members who lived adjacent to the facility and were worried about the possible adverse effects of the defendant's discharge on their activities, such as fishing, swimming, and camping.[62]

Members did not have any evidence that the river or neighboring environment had truly been damaged; plaintiffs, however, presented more than "*general averments*" and showed that members had real intentions to use the influenced environment.[63] Writing for the Court, Justice Ginsburg ruled that *"[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff*."[64] As a result, the Supreme Court held that the plaintiffs had standing, reasoning that the member's concern was completely reasonable and was enough to satify the injury-in-fact requirement of standing.[65]

The Court also found that the possible imposition of civil penalties under the citizen suit provision of the CWA met the redressability requirement of standing. It held that civil penalties payable to the US Treasury redress

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56 **Echeverria**, John D. & **Zeidler**, Jon T.: Barely Standing: The Erosion of Citizen "Standing" to Sue to Enforce Federal Environmental Law, Envtl. Policy Project, Georgetown University Law Ctr., 1999, P. 1.

57 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

58 **Longfellow**, *supra* note 8, at 5.

59 *Id*. at 32.

60 528 U.S. 167, 175-76 (2000) (NPDES program prohibits the discharge of any pollutant from any point source into the nation's waters except as authorized by a permit.).

61 *Id.* at 181.

62 *Id.* at 181-83.

63 *Id.* at 183-84.

64 *Id*. at 181.

65 *Id.* at 184-85.

environmental injuries in cases of ongoing violations because they provide deterrence for future violations.[66]

The Laidlaw case was a victory for environmental citizen plaintiffs; they no longer have to demonstrate harm to the environment, rather they only have to show that their concerns for environmental protection are reasonable.[67] However, it did not end the confusion regarding the standing of environmental citizen plaintiffs. First, the Supreme Court failed to analyze the second prong of standing, causation; this is partly because of the distinct facts of the case, and partly because the Court deliberately left the issue for lower courts.[68] Second, the Court did not expand standing to the extent desired by Congress under the CWA;[69] it failed to alter the fundamental nature of the standing analysis.[70] Thus, potential environmental citizen plaintiffs may encounter the "*danger of being tossed out"* of courts.[71] Seven years later, however, in the case of Massachusetts v. Environmental Protection Agency, the Supreme Court again ruled in favor of environmental plaintiffs.[72]

2.4. Massachusetts v. Environmental Protection Agency

In 2007, the Supreme Court decided in Massachusetts v. Environmental Protection Agency, in which the Court followed the tendency of liberalizing the standards for environmental standing.[73] In this case, some private organizations and the state of Massachusetts as an intervening party sought reconsideration of the EPA's refusal to regulate greenhouse gas emissions from motor vehicles under the CAA.[74] The EPA alleged that neither the private organizations nor Massachusetts had standing to sue.[75] The Court, however, disagreed.[76]

Justice Stevens, writing for the majority, first found that Massachusetts, because of its status as a state and a landowner, held a "*stake in protecting its quasi-sovereign interests*," and deserved "*special solicitude*" in the framework of standing inquiry.[77] Then, examining the "*three-pronged test*" of standing, Stevens found that Massachusetts met all three requirements.[78]

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66 *Id.* at 185.
67 **Longfellow**, *supra* note 8, at 37-38.
68 **Berger**, *supra* note 14, at 1396.
69 **Lopez**, *supra* note 7, at 180.
70 **Echlverria**, John D.: "Standing and Mootness Decisions in the Wake of Laidlaw," Widener L. Rev., Vol.10, 2004, P. 191.
71 **Lopez**, *supra* note 7, at 180.
72 Massachusetts v. EPA, 549 U.S 497 (2007).
73 *Id.*
74 *Id.* at 510-14.
75 *Id.* at 517.
76 *Id.* at 519-25.
77 *Id.* at 519; Chin, *supra* note 11, at 339-40.
78 549 U.S 497, 521-23 (2007).

The Supreme Court held that the loss of coastal land that arose from the rising sea level caused by global climate change provided sufficient injury and therefore satisfied the injury-in-fact requirement.[79] Regarding the causation, it found that the EPA's denial to regulate greenhouse gases not only contributed to climate change but also contributed to Massachusetts' injury and thus met the causation requirement.[80] As to redressability, the Court held that while the regulation of greenhouse gas emissions would not entirely remedy climate change, it would "*slow or reduce*" the process of climate change.[81]

The Massachusetts case was another victory for environmental citizen plaintiffs. The Supreme Court went futher than it had before and considerably expanded its application of the "*three-pronged test*" of standing; like the earlier decisions, however, it left basic questions about the nature of the environmental standing doctrine unanswered.[82] Thus, in its latest decision on the issue of environmental standing, Summers v. Earth Island Institute,[83] the Court presented a more conservative approach and denied environmental citizen plaintiff's standing.[84]

2.5. Summers v. Earth Island Institute

In 2009, the Supreme Court decided in Summers v. Earth Island Institute, in which the Court restricted environmental standing by heightening the standards that apply to the analysis of standing.[85] In this case, some environmental organizations sought an injunctive relief to challenge the US Forest Service's exemption of several activities from procedural rules under the Forest Service Decision-Making and Appeals Reform Act.[86]

The issue before the Supreme Court was whether the plaintiffs had standing to challenge that action.[87] One affidavit submitted by the plantiffs showed that one member had visited several national forests in the past and planned to revisit some national forests in future, but failed to designate any "*particular timber sale or other project*" governed by the challenged regulations that would prevent him from enjoying the forests.[88] In response, the Court found that this was "*insufficient to satisfy the requirement of imminent injury*,"[89] thus,

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79 *Id.*
80 *Id.* at 523.
81 *Id.* at 525.
82 **Barnum**, *supra* note 24.
83 Summers v. Earth Island Inst., 555 U.S. 488 (2009).
84 **Chin**, *supra* note 11, at 334.
85 *Id.*
86 555 U.S. 488 (2009).
87 *Id*. at 492.
88 *Id*. at 495.
89 *Id.* at 496.

Justice Scalia, writing for the Court, held that the plaintiffs did not have standing to pursue to the challenged regulations.[90]

The Court then went further and denied the dissent's argument that imminent harm could involve "*a realistic threat that reoccurrence of the challenged activity would cause harm in the reasonably near future*,"[91] nevertheless the harm was based on a statistical possibility.[92] Justice Scalia held that to grant standing regarding a possible forthcoming injury at least one member had to have "*suffered or would suffer harm*."[93]

The Summers case shows that the Supreme Court's attempts to liberalize the framework of environmental standing doctrine were not adequate nor successful in providing precise and persistent standards for the application of the standing requirements. This is why the Court in Summers reversed its earlier liberal approach and presented a more conservative one.[94]

In summation, five Supreme Court cases - Sierra, Lujan, Laidlaw, Massachusetts, and Summers- describe judicial trends in the application of the standing doctrine in the context of environmental law. These five cases have shaped the standards that judges use for standing inquiry. Sierra, Laidlaw, and Massachusetts displayed liberal attitudes regarding standing and lowered requirements for environmental plaintiffs. Lujan and Summers, however, presented a more conservative and restrictive approach. This inconsistent application of standing requirements appears to be due to the lack of precise and perminent standards for standing analysis and is likely to proceed unless judges form some consensus on uniform standards. Standing, however, is not the only issue causing inconsistency among courts in determining when environmental citizen plaintiffs are allowed to proceed on their claims; ongoing violation and mootness requirements have also been the source of endless controversy and have been interpreted differently by courts throughout the years.

III. ONGOING VIOLATION AND MOOTNESS

3.1. Ongoing Violation

Under the citizen suit provision of the CWA, citizen plaintiffs have been rigorously restricted in their right to bring an action against violators of the Act. The CWA authorizes citizens to file a suit against a person who is "*alleged to be*

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90 *Id.* at 499-500.

91 *Id.*

92 *Id.* at 497-98.

93 *Id.* at 498.

94 The Supreme Court presented a relatively liberal approach while analyzing the environmental standing requirements in the cases of Massachusetts v. Environmental Protection Agency and Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.

in violation" of the Act.[95] The Supreme Court in Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc.[96] found that this language prohibited citizen suits for "*wholly past*" violations.[97] Consequently, violators may be successful in arguing a suit brought under the CWA that is based specifically on violation that occurred only in the past and is detached from any ongoing or forthcoming violation.[98]

In the Gwaltney case, two environmental groups filed a suit against Gwaltney and claimed that Gwaltney had engaged in violations of the CWA by exceeding its NPDES permit limitations and had polluted the Pagan River.[99] In response, defendants claimed that the court did not have subject-matter jurisdiction over the suit because jurisdiction could only be established validly if permit violations were ongoing at the time plaintiffs filed the complaint.[100] They showed that Gwaltney had ceased violating its permit a couple of weeks before the plaintiffs filed the suit.[101]

The Supreme Court overturned both the trial and appeal decisions that allowed citizen plantiffs to sue for past or ongoing violations of the CWA and held that citizens could not sue for wholly past violations of the Act.[102] It restricted citizen suits to cases in which citizen plaintiffs made a good faith allegation of a violation that is ongoing or likely to reoccur.[103]

The Court then remanded the case to the Fourth Circuit Court of Appeals to determine whether the plaintiffs could make a good fatih allegation of ongoing violations at the time the complaint was filed.[104] The appellate court, in answer to this argument, set up a two-part test in which citizens could meet their burden of demonstrating ongoing violations of the CWA either "*by proving violations that continue on or after the date the complaint is filed, or by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition*."[105]

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95 33 U.S.C. § 1365(a)(1).

96 Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 484 U.S. 49 (1987) (*Gwaltney I*).

97 *Id.* at 66.

98 *Id.* at 66-67.

99 *Id.* at 53.

100 *Id.* at 54.

101 *Id.*

102 *Id.* at 55-56.

103 *Id*. at 64 (Citizens were allowed to sue only if they could make a "good faith allegation of continuous or intermittent violation" at the time the complaint was filed.).

104 *Id.* at 67.

105 Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 844 F.2d 170, 171-72 (4th Cir. 1988) (*Gwaltney II*).

The appellate court, additionally, stated that violations are only "*wholly past*" if there is no cognitive and reasonable likelihood for recurrence of violations, regardless of the frequency of violations, but depends on whether or not the violator has taken remedial actions to preclude recurrence.[106]

The great majority of courts addressing the issue of ongoing violations in CWA cases followed the Gwaltney decision. To give one example, in 2003, in American Canoe Association v. Murphy Farms Inc., the US Court of Appeals for the Fourth Circuit admitted both the Gwaltney ruling that a citizen plaintiff must "*show the defendant's violations of the CWA are ongoing*" at the time the suit was filed and its two-part test that established the basis for the demonstration of ongoing violations of the CWA.[107] The court found that American Canoe Association did not meet the Gwaltney requirements because it failed to demonstrate that the Farm's violations were ongoing.[108] To give another example, more recently, in 2011, the Fourth Circuit Court of Appeals decided in Friends of the Earth v. Gaston Copper Recycling Corp. and held that courts have subject-matter jurisdiction over claims in citizen suits brought under the CWA, which are based on good faith allegations of the defendant's ongoing violations of the Act.[109]

Some violations that occurred in the past may be considered as continuing if their consequences still continue in the present.[110] Courts have held that in cases in which there is evidence that past violations arose from "*poor operation and maintenance*" or issues that have not been solved, violations are very likely to recur.[111] Similarly, courts have found that past violations for filling wetlands inappropriately continue as long as the fill is not removed.[112] In brief, some past violations with continuing effects may be deemed as continuing and are very likely to meet the requirements of the Gwaltney test of ongoing violations.

In brief, in light of the Gwaltney, citizen plaintiffs bringing an action under the citizen suit provision of the CWA are very likely to fail to maintain their claims if they can not demonstrate the defendant's violations were ongoing at the time of the suit. Accordingly, in order to maintain a citizen suit, citizens

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106 *Id*. at 172.

107 **Jackson**, **Jr**., Ronald P.: "Recent Development: American Canoe Association v. Murphy Farms, Inc.: The Fourth Circuit Reaffirms That an Environmental Organization with Article III Standing to Sue under the Citizen-Suit Provision of the Clean Water Act Must Satisfy the Requirements of the Gwaltney Test," U. Balt. J. Envtl. L., Vol.11, 2004, P. 91.

108 *Id.*

109 Friends of the Earth v. Gaston Copper Recycling Corp., 629 F.3d (4th Cir. 2011).

110 **Shepherdson**, Melanie, Citizen Suits: in The Clean Water Act Handbook (Mark A. Ryan eds.), ABA Publishing, 3rd ed., 2011, P. 261.

111 *Id.*

112 *Id.*

must meet the Gwaltney requirements; otherwise, it is very likely their cases will be discarded due to the lack of subject-matter jurisdiction over the suit.

If violations of the CWA continue or are very likely to recur at the time a citizen suit is filed, subject-matter jurisdiction over the suit does not disappear if the violator of the Act subsequently comes into compliance. Under this case, however, the suit may become moot.

3.2. Mootness

According to Article III, Section 2 of the US Constitution, courts must have jurisdiction to hear claims, and courts only have jurisdiction over "*cases and controversies*."[113] To proceed with their claims, plaintiffs must have personal interest *("personal stake")* in the litigation under the standing and mootness doctrines.[114]

Having some kind of personal interest in the litigation at the time the claim is brought establishes standing; such interest, however, must continue through the litigation according to the principles of mootness.[115] Otherwise, once the interest in the litigation is lost, the claim is very likely to be discarded because there is no longer any "*case or controversy*."[116]

The principles of mootness apply when the parties to the lawsuit no longer possess any personal interest in the results of the litigation or when the "*claim ceases to be a live controversy*."[117] Generally, the defendant's voluntary cessation of violations will not moot the lawsuit unless the defendant proves that it is "*absolutely clear*" the alleged misconduct will not recur in the future.[118] Consequently, even though the unlawful activities are no longer occurring but there is a probability that the same or similar activities will occur again in the future, the principles of mootness do not apply. In such circumstances, the defendant usually has a "*heavy burden*" to prove that the alleged misconduct could not rationally be anticipated to recur.[119]

The Gwaltney case is the first that will be analyzed regarding the issue of mootness in the context of environmental citizen suits.[120] In this case, the Supreme Court held that citizen suits filed under the CWA become moot once

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113 **Campbell**, *supra* note 18, at 318.

114 **McIntosh**, Ben: "Standing Alone: The Fight to Get Citizen Suits Under the Clean Water Act Into the Courts," Mo. Envtl. L. & Pol'y Rev., Vol.12, 2005, P. 175.

115 U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980).

116 *Id.*

117 **Werner**, *supra* note 18, at 804.

118 484 U.S. 49, 66 (1987).

119 *Id.*

120 *Id*. at 53 (In the Gwaltney case, two environmental groups filed a suit against Gwaltney and claimed that Gwaltney had engaged in violations of the CWA by exceeding its NPDES permit limitations and had polluted the Pagan River.).

the defendant has demonstrated that "*the allegedly wrongful behavior could not reasonably be expected to recur*."[121]

The Court in Gwaltney, however, did not speak to whether the principles of mootness applied only to injunctive claims or also applied to civil penalty claims.[122] The Fourth Circuit Court of Appeals (on remand from the Supreme Court), however, clarified this issue by holding that mootness applied only to claims for injunctive relief and not to claims for civil penalties.[123] The court gave three reasons for this outcome.[124]

First, the court stated that civil penalties provided sufficient redress for citizen plaintiffs by citing its earlier decision in Sierra Club v. Simkins Industries, Inc., in which it found that "*judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiffs injury*."[125] Second, the court made an analogy between citizen suits and government actions, concluding that "*a citizen action, like a government action, cannot become moot once there is assessment of civil penalties, so long as the penalties are for past violations that were part of or which contiguously preceded the ongoing violations*."[126] Third, the court examined the language of section 1319(d) of the CWA, which states that "*any person*" violating specified provisions of the Act, permit conditions or limitations, or administrative orders issued by the Administrator of the EPA "*shall be subject to a civil penalty*,"[127] and held that this language "*virtually obligated [the court] to assess penalties*."[128] Consequently, because of these mentioned reasons, the court in Gwaltney found that claims for civil penalties were not moot.[129]

The wide majority of courts have followed the Gwaltney holding that claims for civil penalties do not become moot, explaining that such

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121 *Id*. at 66-67 ("Long-standing principles of mootness, however, prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated. In seeking to have a case dismissed as moot, however, the defendant's burden is a heavy one. The defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The mootness doctrine thus protects defendants from the maintenance of suit under the CWA based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform.").

122 **Werner**, *supra* note 18, at 801.

123 Chesapeake Bay Found., Inc. v. Gwaltney, of Smithfteld, Ltd., 890 F.2d 690, 696-97 (4th Cir. 1989) *(Gwaltney III)*; **Werner**, *supra* note 18, at 808.

124 **Werner**, *supra* note 18, at 808.

125 890 F.2d 690, 695 (4th Cir. 1989); Werner, *supra* note 18, at 808.

126 890 F.2d 690, 697 (4th Cir. 1989); Werner, *supra* note 18, at 809.

127 33 U.S.C. § 1319(d); Werner, *supra* note 18, at 809.

128 890 F.2d 690, 697 (4th Cir. 1989); Werner, *supra* note 18, at 809.

129 **Werner**, *supra* note 18, at 809.

interpretation is the most compatible with the objectives and the language of the CWA.[130] Many of them have reasoned that claims for civil penalties should not be dismissed as a matter of public policy.[131] They held that the deterrent effect of environmental citizen suits on possible future violations would otherwise be diminished and would discourage citizen plaintiffs from filing a suit for violations of the CWA.[132]

The ruling that claims for citizen suit civil penalties do not become moot once claims for injunctive relief become moot had been favored until the Supreme Court decided in Lujan v. Defenders of Wildlife[133] in 1992.[134] The Lujan case made a notable departure from the earlier assumption that "*Congress could create statutory standing in the public at large*" and has significantly affected the survival of civil penalty claims.[135]

Under the Lujan case,[136] claims for civil penalties in citizen suits become moot once injunctive claims become moot.[137] The Supreme Court found that claims for citizen suit civil penalties alone could not survive because citizen plaintiffs failed to establish adequate standing in that they could not demonstrate redressability.[138] This demonstration required that citizen plaintiffs show that the court's judgment would probably redress plaintiffs' injuries.[139]

The Court then went further and stated that citizen plaintiffs must show that they have individual injury "*beyond just a public injury*," which can be redressed by court actions.[140] According to Matthew M. Werner, when defendants demonstrate that violations have ceased and will not recur again, plaintiffs can only create an "*injury to a general public interest*" and not injury to any particular interest of citizens.[141] Furthermore, he added that civil penalties

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130 *Id.* at 802.

131 **McQueary Smith**, Beverly: "The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation," Case W. Res., Vol.40, 1990, P. 57-58; **Benson**, Reed D., "Clean Water Act Citizen Suits After Gwaltney: Applying Mootness Principles in Private Enforcement Actions," J. Land Use & Envtl. L., Vol.4, 1988, P. 156-64; **Werner**, *supra* note 18, at 810.

132 **Werner**, *supra* note 18, at 810.

133 504 U.S. 555 (1992).

134 **Werner**, *supra* note 18, at 811.

135 *Id.*

136 504 U.S. 555, 557-59 (1992) (In this case, the plaintiff brought an action under the citizen suit provision of the ESA in order to compel the US Department of Interior to reconsider its regulations by claiming the regulations violated the Act itself because the ESA was unreasonably interpreted to apply only to governmental projects within the US or the high seas, not foreign ones.).

137 **Werner**, *supra* note 18, at 803.

138 *Id. at 802.*

139 504 U.S. 555, 561 (1992).

140 **Werner**, *supra* note 18, at 812.

141 *Id.* at 802.

paid to the US general fund rather than to private plaintiffs do not redress environmental citizen plaintiff's injuries; thus, without redressability, plaintiffs no longer have adequate standing, and their claims for civil penalties become moot.[142]

Six years after Lujan was decided, the Supreme Court encountered a similar issue in Steel Co. v. Citizens for a Better Environment.[143] In this case, Citizens for a Better Environment, an environmental organization, filed a suit against the steel manufacturer under the Emergency Planning and Community Right-To-Know Act for the defendant's failure to do required annual reporting.[144] In its analysis, the Supreme Court mainly focused on the interpretation of the "*case and controversy*" requirement and held that the continuance of the citizen plaintiff's suit would no longer redress a cognizable injury because the company had complied with the Act before the suit was brought.[145]

Furthermore, the Supreme Court in Steel Co., apparently relying on its earlier decision in Lujan, held that claims for citizen suit civil penalties should not proceed because penalties payable to the US government rather than to citizen plaintiffs cannot redress citizen's injuries.[146] In brief, the Court supported the dismissal of environmental citizen suits on the grounds that without redressability, citizen plaintiffs no longer satisfy the "*case or controversy*" requirement of Article III of the Constitution, and consequently their claims for civil penalties become moot.

The Lujan and Steel Co. cases show that between the years of 1990 and 2000, the Supreme Court substantially prevented environmental citizen plaintiffs from filing suits on the grounds of mootness. However, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,[147] the Supreme Court overturned this approach by reversing the decision of the Fourth Circuit.[148]

The Fourth Circuit in Laidlaw, apparently relying on the earlier Supreme Court cases, Lujan, and Steel Co., held that citizen suits filed under the CWA become moot if the defendant comes into compliance with the NPDES permit.[149] The Court explained that civil penalties paid to the US government do

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142 *Id*. at 802-03.

143 Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

144 *Id*. at 86-88.

145 *Id.* at 88-102; **Berger**, *supra* note 14, at 1379.

146 523 U.S. 83, 106 (1998).

147 528 U.S. 167, 175-76 (2000) (In this case, multiple environmental groups brought an action under the citizen suit provision of the CWA against the owner of a wastewater treatment plant, who violated his NPDES permit.).

148 *Id.* at 173.

149 *Id.*; **Echlverria**, *supra* note 70, at 191-92.

not redress the citizen plaintiff's injuries and, thus, if such penalties are the only kind of relief that the plaintiff is still seeking, there is no a longer viable case.[150]

Analyzing the Fourth Circuit's mootness decision, Justice Ginsburg, writing for the Supreme Court, stated that the court of appeals failed to distinguish the doctrine of mootness from the doctrine of standing, and then she explained the differences between these two doctrines.[151] First, the Justice held that "*the assignment of the burden of persuasion*" is one of the main differences between the doctrines of mootness and standing, explaining that it is the burden of the plaintiff to show standing at the beginning of a case.[152] However, the defendant has a heavy burden to show the case becomes moot by voluntary cessation of violations. A second significant distinction Justice Ginsburg made between mootness and standing is the "*capable of repetition, yet evading review*" exception to the mootness doctrine.[153] She explained that an exception to mootness exists if an allegedly illegal misconduct is "*capable of repetition, yet evading review*," however, no such exception exists to standing under similar circumstances.[154]Lastly, Justice Ginsburg held that another important difference between the doctrines of mootness and standing is their fundamental functions.[155] She explained that the fundamental function of the standing doctrine is to guarantee that limited judicial resources are saved for "*actual disputes in which each party has a concrete stake in the adjudication of the case*."[156] The Justice, on the other hand, continued her analysis and held that the question of mootness only arises if it is very clear that parties to the litigation lack an ongoing interest in the case.[157]

After explaining the differences between the doctrines of mootness and standing, the Supreme Court concluded that the plaintiff's claims for civil penalties could be mooted by the defendant's substantial voluntary compliance with the NPDES permit requirements.[158] Justice Ginsburg, however, stressed that the "*defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case*,"[159] adding that civil penalty claims

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150 528 U.S. 167, 173 (2000); **Echlverria**, *supra* note 574, at 192.

151 528 U.S. 167, 189-90 (2000); **Attwood**, *supra* note 24, at 813.

152 **Attwood**, *supra* note 24, at 813-14; 528 U.S. 167, 190 (2000) (The Justice added that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.").

153 **Attwood**, *supra* note 24, at 814; 528 U.S. 167, 190 (2000).

154 **Attwood**, *supra* note 24, at 814; 528 U.S. 167, 191 (2000).

155 **Attwood**, *supra* note 24, at 814; 528 U.S. 167, 191 (2000).

156 **Attwood**, *supra* note 24, at 814-15; 528 U.S. 167, 191-92 (2000).

157 **Attwood**, *supra* note 24, at 815; 528 U.S. 167, 191-92 (2000).

158 **Attwood**, *supra* note 24, at 815; 528 U.S. 167, 193 (2000).

159 **Echlverria**, *supra* note 70, at 192; 528 U.S. 167, 173 (2000); **Campbell**, *supra* note 18, at 316.

could only be mooted if it was "*absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur*."[160] Consequently, the Supreme Court in Laidlaw, overturned the earlier ruling that claims for civil penalties become moot by the defendant's voluntary post-complaint actions;[161] thus, it has made it easier for citizen plaintiffs to maintain their claims against violators of environmental laws.

Since the Supreme Court decided against the general rule, the courts of appeals have differed over how to apply the mootness doctrine in CWA citizen suits, and there is still a vigorous debate about whether or not civil penalty claims can become moot by the defendant's post-complaint efforts. [162] Unsurprisingly, this debate has had significant implications for the success or failure of citizen suits filed under the CWA, and will likely be challenged by both companies and environmental supporters.[163]

In summation, citizen suits brought under the CWA may be dismissed on the grounds of ongoing violations and mootness requirements. In addressing the issue of ongoing violations, the wide majority of courts have followed the Gwaltney test. Accordingly, citizen plaintiffs are likely to fail to maintain their claims if they can not show the defendant's violations were ongoing at the time of the suit. However, while plaintiffs might meet the Gwaltney requirements, they may still fail to maintain their claims, due to the mootness doctrine, if the violator of the CWA subsequently comes into compliance. According to the mootness doctrine, to proceed on their claims, plaintiffs must have personal interest in the litigation.[164] Though courts have differed regarding the standards that judges use for mootness inquiry,[165] as a general rule, the defendant's voluntary cessation of violations will not moot the lawsuit unless the defendant proves that it is "*absolutely clear*" the alleged misconduct will not recur in the future.[166] Lastly, if a citizen plaintiff meets the standards of ongoing violations and mootness requirements and manages to maintain his suit filed under the CWA, the suit may still be dismissed on the grounds of the diligent prosecution bar.

IV. DILIGENT PROSECUTION BAR

The citizen suit provision of the CWA includes some limitations in order to make sure that citizen suits help but do not replace governmental enforcement

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160 **Attwood**, *supra* note 24, at 815; 528 U.S. 167, 193 (2000).
161 **Echlverria**, *supra* note 70.
162 *Id.* at 195-98.
163 *Id.* at 198.
164 **McIntosh**, *supra* note 114.
165 **Echlverria**, *supra* note 70, at 195-98.
166 484 U.S. 49, 66 (1987).

actions.[167] One of these limitations is the statutory diligent prosecution bar that limits citizen participation in certain circumstances.[168] According to the Act, a citizen may not file a suit "*if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court*."[169] In other words, the Act bars citizen suits when an agency has initiated a civil action for an injunction or civil penalties, and when the government seeks criminal penalties.[170] This restriction on citizen suits indicates that Congress intended environmental government agencies to primarily enforce the Act.[171]

In 1987, the CWA extended this restriction by adding Section 1319(g)(6)(A), which bars citizen suits under following circumstances:

> "[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 subsection (d) of this section or section 1321(b) of this title or section 1365 of this title."[172]

This section restricts a citizen's ability to bring an action against violators of the Act; subparagraph (B) of the same section, however, provides an exception for this restriction.[173] Accordingly, a citizen suit filed under the CWA cannot be precluded if the suit has been brought prior to commencement of an action under section 1365(a)(1) or if the EPA or state agencies commence the action under section 1365(a)(1) after citizen plaintiffs have given notice of their intent to sue and they file their suit within 120 days after giving such notice.[174] Section 1319(g)(6)(A)'s bar on citizen suits shows that Congress intended to reinforce the enforcement power of environmental government agencies,[175] and

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167 Appel, *supra* note 2, at 91; **Donovan**, Lisa: "Power to the People: The Tenth Circuit and the Rights of Citizens to Sue for Equitable Relief under Section 309(g)(6)(A) of the Clean Water Act," B. C. Envtl. Aff. L. Rev., Vol.34, 2007, P. 149.

168 **Appel**, *supra* note 2, at 91; **Donovan**, *supra* note 167.

169 33 U.S.C. § 1365(b)(1)(B); **Cawley**, Patrick S.: "The Diminished Need for Citizen Suits to Enforce the Clean Water Act," J. Legis. Vol.25, 1999, P. 182.

170 **Cawley**, *supra* note 169.

171 *Id.*

172 33 U.S.C.§1319(g)(6)(A); **Cawley**, *supra* note 169.

173 33 U.S.C.§1319(g)(6)(B); **Campbell**, *supra* note 18, at 307; **Samuels,** David G.: "Precluding Preclusion: A Proposal for a New Way of Addressing Citizen Suit Overfiling," Tul. Envtl. L.J., Vol.26, 2013, P. 268.

174 33 U.S.C.§1319(g)(6)(B); **Campbell**, *supra* note 18, at 307; **Samuels**, *supra* note 173, at 268-69.

175 **Cawley**, *supra* note 169, at 191-92.

apparently they have had more power to protect the nation's waters against violators of the CWA.[176]

Both section 1365(b)(1)(B) and section 1319(g)(6)(A) limitations allow citizen suits to function the way Congress intended: "*as a supplement to primary enforcement by the states or the federal government but not as a primary tool of enforcement*."[177] They are intended to prohibit duplicate litigation.[178] The lack of clarity in these sections, however, has led courts to interpret and apply them differently and has caused many problems for courts.

Most common problems that courts have encountered in interpretation of these sections will be analyzed; in this regard this subsection is divided into four parts. The first part discusses what makes an environmental government agency's action diligent enough to preclude a citizen suit. The second part examines how courts have interpreted the meaning of the word "*court.*" The third part analyzes what kind of pre-enforcement actions are sufficient to preclude a citizen suit. Lastly, the fourth part examines the Fifth Circuit's ruling in Louisiana Environmental Action Network v. City of Baton Rouge,[179] which states that the diligent prosecution bar under the CWA is a nonjurisdictional provision.[180]

4.1. What Makes an Environmental Government Agency's Action Diligent Enough to Preclude a Citizen Suit Under the Clean Water Act

The CWA does not define the criteria for analysis of whether a government action was diligently prosecuted so as to preclude a citizen suit.[181] In spite of the lack of statutory definition, however, courts have commonly held that a state or EPA enforcement action enjoys a presumption of diligence.[182] For example, in 1986, one court held that *"[t]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct ... that could be considered dilatory, collusive or otherwise in bad faith*."[183] More recently, in 2007, the Tenth Circuit in Karr v. Hefner reached a similar conclusion, holding that "*Section 1365(b)(1)(B) does*

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176 *Id.* at 194.

177 **Appel**, *supra* note 2, at 101.

178 **Frye**, *supra* note 51, at 189.

179 La. Envtl. Action Network v. City of Baton Rouge, 677 E3d 737 (5th Cir. 2012).

180 *Id.* at 749.

181 **Leonard**, Arne R.: "When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?," Nat. Resources J., Vol.35, 1995, P. 605.

182 *Id.* at 605-06.

183 **Townsend**, Leonard 0.: "Note: Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusion under the Clean Water Act," Fordham Envtl. L.J., Vol.11, 2000, P. 91.

not require government prosecution to be far-reaching or zealous. It requires only diligence."[184]

Although courts have agreed on the interpretation of the word "*diligently*," they have been more vague in addressing the issue of what kind of actions establish diligence. In the Karr case, for example, the Tenth Circuit held that the EPA's prosecution was diligent because the agency reached a settlement with defendants regarding basically the same violations claimed by citizen plaintiffs.[185] To give another example, the First Circuit in Scituate. N. & S. Rivers Watershed Ass'n v. Scituate found that the defendants' subsequent voluntary compliance with required activities were enough to be considered as diligent prosecution.[186] The Court then went further and held that an enforcement action does not lose its diligence if violations occur again after the action is taken, as long as the government does everything reasonably possible in order to rectify the violations.[187]

4.2. Meaning of the Word "Court" Under the Citizen Suit Provision of the Clean Water Act

Courts have labored to address the issue of whether administrative enforcement actions constitute an action in a court under the diligent prosecution bar of the CWA's citizen suit provision, however, they failed to provide uniform and precise standards for deciding what kind of actions are adequate to preclude a citizen suit.[188] They have not reached a consensus on the interpretation of the language "*in a court*," rather they have been split into two groups.[189]

Many courts addressing this issue have followed the "*functional equivalent*" doctrine and have held that "*any prior diligently prosecuted action in a forum that is the functional equivalent of a court would bar a citizen suit*."[190] According to the functional equivalent rule, an administrative tribunal must be the functional equivalent of a court to preclude a citizen suit.[191]

Obviously, this rule has power to restrict citizen enforcement of the CWA.[192] For example, the Third Circuit in Baughman v. Bradford Coal Co.,

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184 Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007).

185 *Id*. at 1198.

186 Scituate. N. & S. Rivers Watershed Ass'n v. Scituate, 949 F.2d 552, 557 (1st Cir. 1991).

187 *Id.* at 558.

188 **Robinson**, Gail J.: "Interpreting the Citizen Suit Provision of the Clean Water Act," Case W. Res., Vol.37, 1987, P. 516.

189 **Hodas**, David R.: "Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?," Md. L. Rev., Vol.54, 1995, P. 1627.

190 *Id.* at 1627-28.

191 *Id.* at 1628-29.

192 *Id.* at 1629.

applying the functional equivalent rule, found that the Pennsylvania Environmental Hearing Board was not a court, reasoning it had limited sanctioning authority, was not able to ban violations, and did not allow "*intervention as a matter of right.*"[193] Similarly, the Third Circuit in Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc. found that, before the 1987 amendments to the CWA, EPA enforcement actions did not satisfy the standards of the functional equivalent rule.[194]

Other courts, on the other hand, have followed the "*court means a court*" rule, which gives the word *"court"* its broadly understood traditional legal definition.[195] The Second Circuit in Friends of the Earth v. Consolidated Rail Corp., applying this rule, found that an administrative proceeding was not the equivalent of an action in a court and thus would not preclude a citizen suit.[196] The Ninth Circuit reached a similar conclusion in Sierra Club v. Chevron U.S.A., Inc., holding that nonjudicial enforcement action by a state agency does not preclude a citizen suit.[197]

In order to eliminate the confusion arising from the different interpretations of the language "*in a court*," Congress, in its 1987 amendments to the CWA, allowed the EPA to assess administrative penalties.[198] The 1987 amendments to the CWA, with the addition of section 309(g), showed that Congress was aware of the distinction between an administrative agency and a court, and thus took a step toward developing more precise standards for judges to determine what kind of administrative enforcement actions can preclude a citizen suit.[199]

Congress, in this regard, distinguished administrative penalty assessments from administrative compliance orders for the purposes of deciding whether a citizen suit is precluded by an administrative enforcement action.[200] Consequently, the Act states that only administrative penalty assessments by an "*agency tribunal that is the functional equivalent of a court*"may preclude a

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193 *Id*. at 1628; Baughman v. Bradford Coal Co., 592 F.2d 215, 218-19 (3d Cir. 1970).

194 **Hodas**, *supra* note 189, at 1628; Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131, 1137-39 (3d Cir. 1985).

195 **Hodas**, *supra* note 189, at 1629; Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985).

196 **Hodas**, *supra* note 189, at 1629; 768 F.2d 57, 63 (2d Cir. 1985) (The Second Circuit came to its decision based on the clear language of the citizen suit provision of the CWA and congressional intent. It stated that Congress "has frequently demonstrated its ability to explicitly provide that either an administrative proceeding or a court action will preclude citizen suits.").

197 **Hodas**, *supra* note 189, at 1630; Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987).

198 33 U.S.C. § 1319(g).

199 **Hodas**, *supra* note 189, at 1630; 33 U.S.C. § 1319(g).

200 **Leonard**, *supra* note 181, at 584-85.

citizen suit under section 309(g).[201] Administrative compliance orders, on the other hand, are required to be enforced in a court, in other words they require judicial intervention, and thus, do not preclude a citizen suit.[202]

4.3. Which Pre-enforcement Actions are Sufficient to Preclude a Citizen Suit Under the Clean Water Act

Courts have not reached a consensus on what kind of pre-enforcement actions should be considered as the commencement of an assessment of an administrative penalty in order to preclude a citizen suit under the CWA.[203] This is mostly because the Act does not precisely define the meaning of the languge "*commence an assessment of an administrative penalty*." [204] EPA's rules of practice, however, have efficiently filled this major gap in the law, providing a comparatively explicit definition of when an assessment of an administrative penalty has initiated.[205]

Under these rules, an action of an administrative penalty assessment "*is initiated by filing an administrative complaint with a regional hearing clerk, serving the complaint on a respondent, and providing public notice of its service*." Accordingly, pre-enforcement actions such as "*meetings with the violator*" or "*threatening letters*" have not been considered as the commencement of an administrative penalty assessment, and thus do not preclude a citizen suit under the CWA.[206]

Courts, following the EPA's rules of practice, have generally interpreted the meaning of the word "*commence*" strictly. To give an example, in the case of Pub. Interest Research Group, Inc. v. Elf Atochem case, the state environmental agency sent a letter to the defendants including instructions that tell them to take appropriate actions to correct their violations of the conditions of their permit.[207] The district court, addressing the issue of preclusion of the citizen suit, found that this letter could not be treated as the commencement of an enforcement action since it did not mention sanctions, formal charges, or a hearing; rather, the letter only notified and warned the defendants that an enforcement proceeding may be initiated later.[208]

As another example, in Pub. Interest Research Group v. N.J. Expressway Auth. case, the defendant signed a Memorandum of Understanding with the

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201 *Id.* at 585; Hodas, *supra* note 189, at 1630.
202 **Hodas**, *supra* note 189, at 1630.
203 **Leonard**, *supra* note 181, at 601.
204 *Id.* at 602.
205 *Id.*
206 *Id.* at 603.
207 **Townsend**, *supra* note 183, at 87.
208 *Id.*

state agency after being notified of his violations.[209] The district court found that the signing of the memorandum could not be treated as the commencement of an enforcement proceeding for the purposes of precluding the citizen suit.[210] It explained this finding based on the facts that the memorandum "*was not issued in court*," the memorandum "*issued under state law was not comparable to the federal statute*," and no penalty was assessed against the defendant.[211] The Eighth Circuit in Ark. Wildlife Fed'n v. ICI Americas, Inc, however, distinguished administrative orders from memorandums and found that the issuance and signing of a Consent Administrative Order (CAO) was the commencement of an enforcement action because the issuance of the CAO "*was equivalent to a court action*" since it "*would allow intervention, notice, and assessment of future penalties*."[212]

4.4. Analysis of the Fifth Circuit's Ruling in Louisiana Environmental Action Network v. City of Baton Rouge

In Louisiana Environmental Action Network v. City of Baton Rouge,[213] in 2010, the Louisiana Environmental Action Network (LEAN) brought a citizen suit against the City of Baton Rouge, Louisiana, and East Baton Rouge Parish under the CWA.[214] The plaintiff claimed that the defendants were in violation of the terms of their permits issued by the State of Lousiana and sought injunctive relief as well as civil penalties based on this claim.[215]

In response, the US District Court for the Middle District of Louisiana dismissed the case on the grounds of mootness, reasoning that the defendants' compliance with the 2002 consent decree[216] was sufficient to address the plaintiff's concerns; the court, however, failed to address the issue of the diligent prosecution bar for the purposes of precluding a suit, as defendants had alleged.[217]

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209 *Id.* at 88-89; Pub. Interest Research Group v. N.J. Expressway Auth., 822 F. Supp. 174, 178 (D. N.J. 1992).

210 822 F. Supp. 174, 183-84 (D. N.J. 1992); **Townsend**, *supra* note 183, at 89.

211 822 F. Supp. 174, 183-84 (D. N.J. 1992); **Townsend**, *supra* note 183, at 89.

212 **Townsend**, *supra* note 183, at 89-90; Ark. Wildlife Fed'n v. ICI Americas, Inc, 29 F.3d 376, 380 (8th Cir. 1994).

213 La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012).

214 **Samuels,** David G.: "Louisiana Environmental Action Network v City of Baton Rouge: Fifth Circuit Rules Clean Water Act's Diligent Prosecution Bar to Citizen Suits Is Nonjurisdictional," Tul. Envtl. L.J., Vol.26, 2013, P. 111-12.

215 *Id*. at 112; 677 F.3d 737, 742 (5th Cir. 2012).

216 677 F.3d 737, 741 (5th Cir. 2012) (In 1988, the City of Baton Rouge, Louisiana, and East Baton Rouge Parish entered into a consent decree with the federal government to rectify violations of the CWA, and in 2002 they entered into a new consent decree, which provided less strict conditions for the facilities to comply with the terms of the Act.).

217 *Id.* at 743-44; **Samuels**, *supra* note 214, at 112.

On appeal, the Fifth Circuit first found that the district court was erroneous in holding that LEAN's claims were moot because the suit was brought after the consent decrees had been issued.[218] It then held that the diligent prosecution bar of the citizen suit provision of the CWA was a nonjurisdictional rule, distinguished from the issue of the subject matter jurisdiction, and that the suit was needed to be remanded to the district court to decide whether or not the diligent prosecution limitation precludes the citizen suit on the grounds of nonjurisdictional matters.[219]

The Fifth Circuit based its conclusion mainly on the Supreme Court's ruling in the Arbaugh v. Y&H Cor. case,[220] in which the Court held that a rule is jurisdictional "*if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional*," however, in lack of such explicit intention, "*courts should treat the restriction as nonjurisdictional*."[221] The Fifth Circuit, relying on the Supreme Court's finding, first held that nothing in the language of the diligent prosecution provision of the CWA identified "*jurisdictional terms*" nor specified, "*the provision is jurisdictional*."[222] It then held that the provision's placement within the Act showed that "*it is not jurisdictional*."[223] Lastly, the Fifth Circuit held that the Supreme Court has not yet found that the diligent prosecution bar of the CWA or any other environmental law is jurisdictional.[224]

According to David G. Samuels, the Fifth Circuit's ruling that the diligent prosecution bar of the citizen suit provision of the CWA is nonjurisdictional is very likely to give environmental citizens a better chance to maintain their claims.[225] Citizen suits filed under the CWA will still be precluded on the grounds that the government has initiated diligent prosecution, such government performance, however, is no longer critical for "*court's authority to hear the case*."[226] Similarly, Samuel E.P. Perrone noted that the Fifth Circuit's ruling has made it easier for citizen plaintiffs filing under environmental laws to defeat defendants' attempts to dismiss citizen suits.[227] However, he argues that this

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218 **Perrone,** Samuel E. P.: "Louisiana Environmental Action Network v. City of Baton Rougue: The Fifth Circuit Follows the Trend and Finds the Clean Water Act's Diligent Prosecution Bar Is a Nonjurisdictional Rule, to the Benefit of Citizen Suit Plaintiffs," Tul. L. Rev., Vol.87, 2013, P. 1376; **Samuels**, *supra* note 214, at 113.

219 **Perrone**, *supra* note 218; **Samuels**, *supra* note 214, at 113; 677 F.3d 737, 745, 748-49 (5th Cir. 2012).

220 677 F.3d 737, 745, 746-49 (5th Cir. 2012); **Perrone**, *supra* note 218, at 1380-82.

221 **Perrone**, *supra* note 218, at 1378; Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006).

222 **Perrone**, *supra* note 218, at 1381-82; 677 F.3d 737, 745, 748 (5th Cir. 2012).

223 **Perrone**, *supra* note 218, at 1382; 677 F.3d 737, 748-49 (5th Cir. 2012).

224 **Perrone**, *supra* note 218, at 1382; 677 F.3d 737, 749 (5th Cir. 2012).

225 **Samuels**, *supra* note 214, at 121.

226 *Id.*

227 **Perrone**, *supra* note 218, at 1383.

benefit might not be attained in practice due to "*concerns over judicial economy*."[228]

To sum up, both section 1365(b)(1)(B) and section 1319(g)(6)(A) of the CWA bar citizen suits under certain circumstances in order to prevent duplicate litigation.[229] Due to the lack of clarity of these sections, however, courts have encountered many problems while addressing the issue of the diligent prosecution bar for the purposes of precluding a citizen suit filed under the CWA. One of the most common problems is how to interpret the meaning of the word "*diligence*;" and, courts have generally held that a state or EPA enforcement action enjoys a presumption of diligence.[230] Courts also labored to interpret the meaning of the word "*court,*" and have been split into two groups on this issue.[231] Most courts have followed the "*functional equivalent*" doctrine and have held that "*any prior diligently prosecuted action in a forum that is the functional equivalent of a court would bar a citizen suit*."[232] Others, however, have followed the "*court means a court*" rule, which gives the word "*court*" its broadly understood traditional legal definition.[233] Furthermore, courts have labored to determine which pre-enforcement actions are sufficient to preclude a citizen suit; however, they have not reached a consensus on that issue.[234] Lastly, the Fifth Circuit's 2012 decision in Louisiana Environmental Action Network v. City of Baton Rouge, which struck down the earlier ruling, held that the diligent prosecution bar of the citizen suit provision of the CWA is nonjurisdictional.[235] This decision has brought a new perspective to preclusion of a citizen suit, and is very likely to help environmental citizen plaintiffs to maintain their claims.

V. CONCLUSION

Statistics show that there has been a sharp decline in citizen enforcement of environmental laws since 1995;[236] and, with regard to the CWA, judicial trends show that citizen suits under the Act are more difficult to ligitate today due to the lack of precise and uniform standards that judges apply for their inquiries and will probably continue to be difficult unless courts agree on the implementation of both constitutional challenges and requirements of the Act

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228 *Id.* at 1386.

229 **Frye**, *supra* note 51, at 189.

230 **Leonard**, *supra* note 181.

231 **Hodas**, *supra* note 189.

232 *Id.* at 1627-28.

233 *Id.* at 1629.

234 **Leonard**, *supra* note 181, at 601.

235 **Perrone**, *supra* note 218; **Samuels**, *supra* note 214, at 113; 677 F.3d 737, 745, 748-49 (5th Cir. 2012).

236 **May**, *supra* note 4, at 21 ("Citizens sent 25% fewer notices to regulated parties in 2002 than they did in 1995.").

itself. This inference is based on the analysis of judicial trends regarding the standing requirement, ongoing violation and mootness requirements, and the diligent prosecution bar. In this regard, first, five Supreme Court cases - Sierra, Lujan, Laidlaw, Massachusetts, and Summers, which have developed the standards that judges use for standing inquiry, are analyzed. Accordingly, Sierra, Laidlaw, and Massachusetts displayed liberal approach regarding standing and lowered requirements for environmental plaintiffs while Lujan and Summers presented a more conservative and restrictive one. Second, courts, addressing the issue of ongoing violations, have generally followed the Gwaltney test, which requires that citizen plaintiffs demonstrate that the defendant's violations were ongoing at the time of the suit in order to proceed on their claims.[237] While plaintiffs might meet the Gwaltney test, however, they may still fail to maintain their claims due to the mootness doctrine. Generally, the defendant's voluntary cessation of violations will not moot the citizen suit unless the defendant demonstrates that it is "*absolutely clear*" the alleged misconduct will not recur again.[238] Third, due to the unclear language of the CWA, courts, addressing the issue of the diligent prosecution bar, have faced some critical problems arising from the interpretation of the meaning of the words "*diligence"* and "*court.*" With regard to *"diligence,"* courts have generally held that a state or EPA enforcement action enjoys a presumption of diligence[239] while they have been split into two groups on the interpretation of the word *"court."*[240] Most courts have followed the "*functional equivalent*" doctrine and have held that "*any prior diligently prosecuted action in a forum that is the functional equivalent of a court would bar a citizen suit*"[241] while others have followed the "*court means a court*" rule, which gives the word "*court*" its broadly understood traditional legal definition.[242] Additionally, courts have labored to determine which pre-enforcement actions are sufficient to preclude a citizen suit; however, they have not reached a consensus on that issue.[243] Furthermore, the Fifth Circuit's 2012 decision ruled that the diligent prosecution bar of the citizen suit provision of the CWA is nonjurisdictional,[244] which will very likely to help environmental plaintiffs to proceed on their claims.

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237 484 U.S. 49, 55-56 (1987).

238 484 U.S. 49, 66 (1987).

239 **Leonard**, *supra* note 181.

240 **Hodas**, *supra* note 189.

241 *Id.* at 1627-28.

242 *Id.* at 1629.

243 **Leonard**, *supra* note 181, at 601.

244 **Perrone**, *supra* note 218; **Samuels**, *supra* note 214, at 113; 677 F.3d 737, 745, 748-49 (5th Cir. 2012).

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