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Environmental Conservation Organization v. City of Dallas Creates Unnecessary Burdens for Citizen Suits under the Clean Water Act

Catherine Mongeon[*]

In Environmental Conservation Organization v. City of Dallas*, the Fifth Circuit creates obstacles for environmental citizen suits by imposing a "realistic prospect" standard for the mootness test. The realistic prospect standard shifts the burden of proof in a mootness test from the defendant to the citizen group filing suit, requiring the citizen group to prove that there is a "realistic prospect" that a defendant will continue to violate the statute in question. This Note argues that the Fifth Circuit erred in its decision to impose the "realistic prospect" standard and also in its application of the standard to the facts of that case. This Note concludes that the Fifth Circuit's decision exacerbates existing ambiguity in the Clean Water Act's citizen suit provision and could ultimately undermine the utility of citizen suits as supplemental enforcement mechanisms within the field of environmental law.*

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INTRODUCTION

Citizen suits are a fundamental component of environmental enforcement and play a vital role in overseeing agency behavior and enforcement. They are best executed when the procedure for bringing such suits is clearly defined by both statutory provisions and judicial interpretation. However, the recent Fifth Circuit case, *Environmental Conservation Organization v. City of Dallas* (*ECO v. Dallas*),[1] increases ambiguity regarding statutory authorization of citizen suits by creating a mootness standard which shifts the burden of proof to the plaintiffs in cases where compliance is compelled by government agencies after

1. 529 F.3d 519 (5th Cir. 2008).

the plaintiff files suit. This Note argues that the Fifth Circuit's decision to impose this "realistic prospect" standard in *ECO v. Dallas* creates unnecessary obstacles to citizen suits that will ultimately frustrate effective Clean Water Act (CWA) enforcement.

Part I of this Note examines the legal framework of *ECO v. Dallas*, including the history and purpose of citizen suit provisions in environmental regulation. Part II explains the background of *ECO v. Dallas* and provides context for discussion of the mootness standard and how it affects citizen suit litigation. Part III argues that the Fifth Circuit wrongly imposed the realistic prospect standard to the facts of the case. First, sparse precedent exists supporting the realistic prospect standard, and other circuits have explicitly rejected it in other cases. Second, the standard is not in line with the intent of the CWA citizen suit provision. Third, the court's policy justifications did not justify the adoption of the standard. Finally, the Fifth Circuit misapplied the standard to the facts and improperly dismissed on summary judgment. This Note concludes that the unfortunate precedent set in *ECO v. Dallas* could unduly burden future citizen suit litigation by creating needless hurdles that ultimately provide no real policy gains. The Fifth Circuit's decision creates unnecessary obstacles and undermines the role of citizen groups attempting to incite enforcement of environmental regulation in a time when citizen suits are more valuable then ever.

I. LEGAL FOUNDATION OF *ECO V. DALLAS*

A. Framework of Citizen Suits under the CWA

In the 1970s, when Congress created the first environmental laws, it introduced citizen suit provisions that granted private citizens the right to sue any business or individual for violating those laws, or a government agency for failure to enforce those laws. Today, citizen suit provisions exist in most federal environmental statutes,[2] and they have become an established component of environmental law.[3]

2. *See e.g.*, Clean Air Act § 304, 42 U.S.C. § 7604 (2006); Clean Water Act § 505, 33 U.S.C. § 1365 (2006); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (2006); Comprehensive Environmental Response Compensation and Recovery Act, 42 U.S.C. § 9659 (2006); Emergency Planning and Community Right to Know Act (EPCRA) § 206, 42 U.S.C. § 11046(a)(1) (2006); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (2006); Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (2006). However, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), does not contain a citizen suit provision. 7 U.S.C. §§ 136–136y (2006). Other federal laws include citizen suit provisions, such as the Americans with Disabilities Act, but environmental citizen suits are by far the most adjudicated and will be the focus of this Note.

3. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

Citizen suits have been used more prevalently in enforcing the CWA than in any other federal environmental statutory scheme.[4] This is because the CWA and its citizen suit provisions are unique in certain respects.[5] For instance, the CWA created a system of National Pollution Discharge Elimination System (NPDES) permits which strictly limit the amount of pollution that can be discharged into navigable waters.[6] All permit holders are required to monitor and report their pollution discharge, and any violation of a permit is considered a violation of the CWA.[7] Furthermore, permit holders must make all reports available to the public.[8] This recordkeeping requirement allows the public to access information and provides transparency, making CWA violations easier to prove and citizen suits more likely to succeed.[9] Once a suit is filed, the CWA allows citizens to seek not only injunctive relief, but also civil penalties (payable to the U.S. Treasury) and attorneys' fees, which plaintiffs can use to recover their own litigation costs.[10]

The CWA specifies a strict procedure as to how and when a citizen group may proceed with a lawsuit against an alleged violator. In order to file a suit, a citizen group must first provide notice of its intent to sue and specify the cited violation.[11] Notice must be sent to the alleged violator, the relevant state regulatory agency, and the Environmental Protection Agency (EPA).[12] At that point, there is a sixty-day period in which either the violator must come into full compliance or the state regulatory agency or EPA must take action against the alleged violator.[13] Government action could include issuing an order to the violator requiring compliance or prosecuting the alleged violator in a civil or criminal case.[14] A citizen group may file suit only if the sixty-day period passes, the violator has not come into compliance, and neither of the regulatory agencies takes action.[15]

4. *Id.* at 220.

5. *Id.* at 220–21; Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 66 (1985); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 47 (2001).

6. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 174 (2000).

7. *Id.*

8. Fadil, *supra* note 5, at 66.

9. *Id.*

10. 33 U.S.C. §§ 1365(a), (d) (2006). Civil penalties are designated to the U.S. Treasury, and not the citizen group; however, some authors have advocated creating a bounty that would further incentivize citizen suit action. *See, e.g.*, Sunstein, *supra* note 3.

11. 33 U.S.C. § 1365(b)(1)(A).

12. *See id.*

13. *Id.* §§ 1365(b)(1)(A), (B); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 175 (2000) (stating that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit" (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987))).

14. *Id.* §§ 1365(b)(1)(A), (B).

15. *Id.* State and federal agencies do not forfeit their right to intervene once a citizen suit is filed; they may do so at any time.

B. The Role of Citizen Suits in Environmental Regulation

Government agencies are chronically under-funded and often lack the resources to adequately enforce environmental laws.[16] As a result, federal and state enforcement agencies often cannot ensure total compliance by all NPDES permit holders under the CWA.[17] To address this problem, Congress authorized citizen suits to fill enforcement gaps left by state and federal regulatory agencies that lack the resources, information, or political will to adequately enforce all statutory violations.[18] In this way, citizen suits play an essential role in improving compliance; private citizens serve as "private attorneys general" and supplement government enforcement actions.[19]

Citizen suits serve other functions as well. First, they provide an important check on executive power. Executive agencies enjoy nearly absolute discretion when choosing how many and which violators they choose to prosecute. This can lead to problems of under-enforcement if the administration overseeing the agency's activities is hostile to environmental regulation, and therefore less inclined to allocate resources to environmental enforcement. As an example, there was a marked decline in the number of EPA enforcement activities during the Reagan administration.[20] One scholar concluded that this decline was a direct result of that administration's failure to prioritize enforcement of environmental laws.[21]

Citizen suits also enhance agency accountability. By allowing citizens to enforce laws when agencies fail to do so, citizen suits motivate agencies to thoroughly enforce environmental violations or else face strict penalties; indeed the legislative history states that they were intended to do so.[22] In this way, citizen suits protect against "agency capture"—that is, the concern that regulated industries unduly influence regulatory agencies, thus rendering those agencies ineffective in their enforcement responsibilities.[23]

Citizen suits also provide opportunities for meaningful public participation in the political process—specifically, in the enforcement of environmental regulation.[24] This participation begets a more informed citizenry and greater environmental stewardship among the citizens who participate.[25] By promoting

16. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER. L. REV. 1, 46 (2003).

17. *Id.*

18. *Id.* at 6–7.

19. *Id.* at 1.

20. Kristi M. Smith, *Who's Suing Whom?: A Comparison Of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 365 (2004).

21. *Id.*

22. May, *supra* note 16, at 6.

23. Adler, *supra* note 5, at 45.

24. Sunstein, *supra* note 3, at 165.

25. May, *supra* note 16, at 6.

an educated and politically active citizenry, citizen suits may further environmental protection more broadly than just enforcement.

In addition to the above benefits, however, citizen suits also present several concerns and challenges. For example, critics claim that citizen suits allow untrained, politically unaccountable individuals to usurp the enforcement power of skilled agencies; some critics have even claimed that citizen suits violate the principles of separation of powers by giving individuals a major enforcement role.[26] In response, the U.S. Supreme Court has explicitly stated that the role of citizen suits is to supplement, rather than supplant, government enforcement.[27] Furthermore, the existence of important safeguards ensures that citizen suits will not supersede government enforcement. For example, citizen suit provisions include very demanding notice requirements, which have been interpreted strictly by the courts to provide little leeway to a citizen plaintiff that does not comply with these requirements.[28] The sixty-day notice period required to file a suit provides an opportunity for the EPA or state regulatory agencies to step in and assume direct responsibility for enforcement. In this way, the law protects the EPA—and its enforcement role—from being replaced by over-zealous citizen groups.

There are several practical concerns about who can use citizen suit provisions and how such provisions should be applied. Some critics advocate for restricting the role of citizen suits, claiming that citizen suit provisions are not used by citizens in the traditional sense, but rather by large environmental groups against private defendants.[29] These large groups take advantage of the self-reporting requirement and seek out violators that would be easy targets in litigation due to their obvious statutory infractions.[30] Such critics argue that citizen groups often do not have an interest in advancing the overall public good, but rather in gaining economic benefits and wielding undue influence over federal environmental regulatory policy.[31]

However, recent legal scholars have argued that these criticisms are largely outdated or unfounded.[32] Data indicates that the majority of citizen suits are brought by small, local organizations.[33] Furthermore, citizen suits have

26. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992); Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995). *But see* Cass R. Sunstein, Correspondence, *Article II Revisionism,* 92 MICH. L. REV. 131 (1993) (arguing that under Article II, Congress does have the authority to give citizens this role).

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

28. May, *supra* note 16, at 12.

29. Smith, *supra* note 20, at 371.

30. *Id*.

31. *Id*.

32. *Id*. at 361–362; May, *supra* note 16, at 13–14.

33. May, *supra* note 16, at 392.

been largely effective and fulfill the essential role that Congress intended—to spur and supplement enforcement of environmental regulation.[34]

In addition to the practical concerns about citizen suits, critics also question citizens' standing, or legal right, to initiate a lawsuit.[35] In two important cases, the Supreme Court articulated standing-based limits on citizen suit enforcement. The first, in 1992, *Lujan v. Defenders of Wildlife*,[36] involved a group of conservationists seeking to enforce statutory requirements under the Endangered Species Act. In *Lujan*, the Supreme Court restricted the availability of citizen suits by holding that plaintiffs must suffer a concrete and discernable harm in order to fulfill constitutional standing requirements.[37] In 2000, the Supreme Court revisited the standing issue in *Friends of the Earth v. Laidlaw*.[38] In that case, involving alleged CWA violations, the Court held that citizens have standing to sue when the "aesthetic and recreational value" of an area is threatened.[39]

Standing is vital because it ultimately determines how many citizen suit claims are allowed into court. The *Laidlaw* decision relaxed some aspects of the strict standing requirements of *Lujan*, opening the door for more citizen suit claims.[40] However, another component of standing—the mootness doctrine (characterized as "standing in time")—remains a source of tension. *ECO v. Dallas* focuses on the mootness doctrine as applied to citizen suits, and, as discussed below, uses that doctrine to limit the role citizen suits play in supplementing enforcement of environmental regulations.

II. *ECO V. CITY OF DALLAS*

In *ECO v. Dallas*,[41] a citizen group sued the city of Dallas after it violated the terms of its CWA permit by discharging pollutants into a river without a permit.[42] On appeal, the Fifth Circuit unexpectedly adopted a mootness test that shifted the burden of proof to the plaintiffs.[43] Finding that the plaintiffs could not meet this burden, the Fifth Circuit ultimately ruled in favor of the city, remanding the case with instructions to dismiss as moot.[44]

34. May, *supra* note 16, at 12; James R. May, *Forward*, 10 WIDENER L. REV. xi (2004) (describing a series of law review articles which argue that citizen suits play an essential role in environmental enforcement).

35. *See* BLACK'S LAW DICTIONARY: POCKET EDITION 671 (Bryan A. Garner, ed., 3rd ed. 2006).

36. 504 U.S. 555 (1992).

37. *Id.*

38. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000).

39. *Id.* at 183.

40. For more information on standing in citizen suits, see generally Adler, *supra* note 5, and Sunstein, *supra* note 3.

41. 529 F.3d 519 (5th Cir. 2008).

42. *Id.* at 522–23.

43. *Id.* at 529.

44. *Id.* at 531.

A. The District Court Granted Summary Judgment Based on Claim Preclusion

The City of Dallas, Texas, operated a municipal storm sewer system pursuant to a CWA permit.[45] In the summer of 2003, the Environmental Conservation Organization (ECO), a local nonprofit environmental watch group, observed noticeable degradation in the Trinity River's water quality, and found that the city was violating its CWA discharge permit by discharging illicit pollutants in the river.[46] In September of 2003, ECO gave notice of its intent to initiate a citizen suit against the city.[47] Neither the Texas Commission on Environmental Quality nor the EPA took action within the following sixty days.[48] In December, after the required sixty-day time period had lapsed, ECO filed a complaint listing one hundred and fifty violations, and specifically alleging that the city had ignored its NPDES permit obligations by failing to properly manage and control pollution discharged by the municipal storm sewer system.[49] ECO sought declaratory and injunctive relief, compensation for reasonable costs, and civil penalties amounting to $27,500 per day for each violation.[50]

After ECO initiated its citizen suit in December 2003, the EPA began an investigation into the city's storm sewer system. In February 2004, the EPA issued an administrative compliance order that identified several violations of the city's NPDES permit.[51] Following the issuance of the compliance order, the EPA and the city negotiated the terms of a settlement; ECO attended preliminary meetings but ultimately declined to join negotiations.[52] In May 2006, the EPA filed a CWA enforcement action and a proposed consent decree that contained the terms of the settlement agreement.[53] The settlement agreement required the city to pay $800,000 in civil penalties and invest $1.2

45. *Id.* at 522.

46. *Id.*

47. *Id*.

48. *See* 33 U.S.C. §§ 1365(b)(1)(A), (B) (2006).

49. Envtl. Conservation Org. v. City of Dallas, 516 F. Supp. 2d 653, 655 (N.D. Tex. 2007). In its original complaint, ECO alleges that in addition to operating the storm sewer system in a manner that violated its permit, the city was also discharging pollution from municipal facilities without a permit. Original Complaint, ¶ 2, Envtl. Conservation Org. v. City of Dallas, 516 F. Supp. 2d 653, (N.D. Tex. 2007) (No. 03CV02951M), 2003 WL 23890342. According to the complaint, the pollution washed into the storm sewer system or was directly discharged into tributaries of the Trinity River and it included oil and fuel spills from aircraft at the municipal airport, municipal waste washing off from a landfill, and animal waste from the zoo. *Id.* ¶¶ 20–21, 25–26. These claims were dismissed by the District Court for failure to provide adequate notice. Envtl. Conservation Org. v. City of Dallas, 516 F. Supp. 2d 653, 655 n.2 (N.D. Tex. 2007).

50. Original Complaint, *supra* note 49, ¶ 40.

51. Envtl. Conservation Org. v. City of Dallas., 529 F.3d 519, 523 (5th Cir. 2008).

52. *Id.*; Telephone Interview with Frederick W. Addison, III, Shareholder, Munsch, Hardt, Kopf & Harr, in Berkeley, Cal. (Dec. 10, 2008).

53. *Envtl. Conservation Org.*, 529 F.3d at 523.

million in supplemental environmental projects designed to create wetlands around the Trinity River.[54] The city was also required to meet minimum staffing requirements in its environmental monitoring departments and provide ongoing compliance reports to the EPA.[55]

During the public comment period, ECO submitted comments expressing concern with the punitive and remedial provisions of the settlement.[56] Specifically, ECO was concerned that although the settlement stated in general terms that the city would comply with its permit in the future, the settlement did not present a detailed plan for compliance. Apart from increased investment in personnel, the settlement lacked any provisions that would make the city more likely or able to comply with its NPDES permit in the future.[57] Despite ECO's objections, it did not formally oppose the settlement agreement.[58] In August 2006, the district court granted EPA's motion to enter the consent decree.[59]

After the consent decree was granted, the city filed a motion for summary judgment to dismiss the ECO citizen suit.[60] The city argued that the suit should be dismissed for two reasons. First, the suit would re-litigate the same claims addressed in the EPA's enforcement action and therefore should be barred by claim preclusion.[61] Alternatively, the city argued that EPA's enforcement action made ECO's claims redundant and irrelevant, and therefore ECO's claims should be dismissed as moot.[62] ECO argued that the requirements of neither claim preclusion nor mootness had been satisfied.[63] It also asserted that since the text of the CWA denotes specific limits to citizen suits, it was incorrect to read in additional limits, such as mootness, that are not explicit in statutory text.[64]

54. Consent Decree ¶¶ 9, 24, United States v. City of Dallas (N.D. Tex. n.d.), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/dallas-cd.pdf.

55. *Envtl. Conservation Org.*, 529 F.3d at 523; Consent Decree *passim*, *supra* note 54.

56. *Envtl. Conservation Org.*, 529 F.3d at 523.

57. *See generally* Consent Decree, *supra* note 54; Telephone Interview with Frederick W. Addison, III, *supra* note 52.

58. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 523 (5th Cir. 2008); Telephone Interview with Frederick W. Addison, III, *supra* note 52. Mr. Addison explained that ECO found the terms of the consent decree to be inadequate—the penalties assessed were a fraction of what could reasonably be assessed under the CWA provision, and there was no detailed plan or timetable to end violations of the permit. *Id.* He explained that ECO did not oppose the consent decree because it did not want to be on record as opposing any type of remedy. *Id.*

59. United States v. City of Dallas, No. 3:06-cv-00845 (N.D. Tex. Aug. 28, 2006).

60. *Envtl. Conservation Org.*, 529 F.3d at 524.

61. Claim preclusion, or *res judicata*, is a judicial doctrine which prohibits parties from relitigating an issue. BLACK'S LAW DICTIONARY: POCKET EDITION, *supra* note 35, at 618.

62. *Envtl. Conservation Org.*, 529 F.3d at 524.

63. *Id.*

64. *Id.* at 526.

The district court rejected ECO's textual argument and ultimately granted the city's motion to dismiss based on claim preclusion.[65] After finding claim preclusion, the court declined to address the mootness argument.[66]

B. The Fifth Circuit Reversed the District Court's Ruling on Claim Preclusion and Dismissed ECO v. Dallas *Based on Mootness*

1. The Fifth Circuit Refused to Dismiss on Claim Preclusion Grounds

ECO appealed the district court's ruling and the Fifth Circuit reviewed the dismissal de novo.[67] The Fifth Circuit first addressed the district court's ruling that the case should be dismissed on claim preclusion grounds. In reviewing precedent, the Fifth Circuit cited contradictory rulings that indicated disagreement amongst the circuits as to whether claim preclusion could be applied to citizen suits under the CWA, and if so, how it should be applied.[68] The court then concluded that because of unclear precedent, *ECO v. Dallas* was "not 'a textbook case for immediate [res judicata] dismissal,'" and therefore not appropriate for dismissal on summary judgment.[69] Reversing the district court's ruling on claim preclusion, the Fifth Circuit then considered the city's mootness argument.

2. The Fifth Circuit Dismissed ECO v. Dallas *as Moot*

a. Mootness as Applied to the CWA Citizen Suit Provision

Turning to the mootness issue, the court attempted to determine if the EPA's consent decree ultimately resolved ECO's complaints, so as to make any remedy redundant and further litigation moot. The Supreme Court has stated that mootness is "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[70] A case becomes moot when "'there are no longer adverse parties with sufficient legal interests to maintain the litigation' or 'when the parties lack a legally cognizable interest in

65. *Id.* at 524.
66. *Id.*
67. *Id.*
68. *Id*. at 525. The phrase "how it should be applied," refers to the privity test—that is, what standard to use to determine whether the United Sates and ECO are close enough in relationship as to have a legally similar interest in the outcome of the consent decree. BLACK'S LAW DICTIONARY: POCKET EDITION, *supra* note 34, at 565–66.
69. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 524 (5th Cir. 2008) (alteration in original) (quoting Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 435 (2007)).
70. *Id.* at 524–525 (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)).

the outcome' of the litigation."[71] The Fifth Circuit in *ECO v. Dallas* emphasized that even a case that was "alive" at the time of filing can be dismissed when parties no longer have a personal stake in the outcome.[72]

ECO argued that under a straightforward reading of the CWA, mootness should not be applied to citizen suits brought under the statute.[73] According to ECO, the fact that the statute contained explicit limits on how a suit may be initiated indicated that no other limitations should be implied or read into the statute.[74] The court, however, disagreed, stressing that mootness is "applicable to all suits filed in federal court," including citizen suits.[75] The court admitted that standing in citizen suit provisions is "confer[red] . . . to the full extent allowed by the Constitution," but is not altogether limitless; the Constitution does not allow any case to proceed without establishing standing, including proving that the case is not moot.[76] Accordingly, the Fifth Circuit concluded that the concept of mootness must apply to CWA citizen suits, and continued its analysis to determine the appropriate mootness standard.[77]

b. The Fifth Circuit Adopted a Mootness Standard that Shifts the Burden to the Plaintiffs

The mootness standard establishes not only who must bear the burden of proof, but also how great that burden should be. In establishing a standard to determine whether ECO's claim was moot, the Fifth Circuit looked to precedent amongst the circuits and compared two separate tests for determining mootness: one that placed the burden of proof on the defendant and another that placed the burden on the plaintiff.[78]

In its briefs, ECO argued for a stringent mootness standard followed by the Fifth Circuit in *Carr v. Alta Verde Industries.*[79] The *Carr* standard required the defendant to bear a "formidable burden" in showing that any allegedly wrongful behavior could not be expected to recur.[80] In *ECO v. Dallas*, however, the Fifth Circuit rejected the *Carr* standard, holding that it only applied to cases where the defendant has voluntarily taken remedial actions.[81]

71. *Id.* at 527 (quoting *In re* Scruggs, 392 F.3d 124, 128 (5th Cir. 2004)).
72. *Id.* (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477–78 (1990)).
73. *Id.* at 526.
74. *Id.*
75. *Id.*
76. *Id.* (quoting Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000) (en banc)).
77. *Id.*
78. *Id.* at 527–28.
79. Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991).
80. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 527 (5th Cir. 2008).
81. *Id.*

Thus, the court held that reliance on *Carr* was inappropriate since the city was bound to come into compliance under its consent decree with the EPA.[82]

Finding the holding in *Carr* to be inapplicable to ECO's claim, the Fifth Circuit turned to a different test, used in the Second and Eighth Circuits and discussed in *Comfort Lake v. Dresel Contracting*.[83] In *Comfort Lake*, a CWA citizen suit was brought against an NPDES violator at a construction site.[84] After the plaintiff filed suit but before the trial began the state enforcement agency took action and construction at the site finished soon thereafter.[85] When construction finished, the defendant terminated his permit, essentially ceasing all permit violations.[86] The Eighth Circuit emphasized that the defendant's compliance was not voluntary, but rather was mandated both by the state enforcement action and by completing the project and consequently terminating the permit.[87] Because repeat violations were then unlikely, the court shifted the burden of proof to the plaintiff by requiring it to show a realistic prospect that the defendant would continue the violations alleged in the original complaint.[88]

The Fifth Circuit defined the *Comfort Lake* standard in *ECO v. Dallas*, stating that when a violator takes action to come into compliance involuntarily or is compelled to do so by an enforcement action, the citizen-suit plaintiff must "prove[] that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree."[89]

c. The Court Defends the Adoption of the Realistic Prospect Test with Policy Arguments

The court chose a test that burdened the plaintiff and justified its choice with several policy arguments.[90] First, the Fifth Circuit argued that the *Comfort Lake* standard fulfills the congressional intent of the CWA by ensuring that citizen suits supplement rather than supplant government action.[91] Second, the court argued that the standard decreases the likelihood that a violator will be penalized twice.[92] According to the court, double penalties could disincentivize parties from entering consent decrees with enforcement agencies.[93] Third, by

82. *Id.* at 528.
83. Comfort Lake Ass'n v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998).
84. *Id.* at 353–54.
85. *Id.* at 354.
86. *Id.*
87. *Id.* at 355.
88. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 528–29 (5th Cir. 2008) (quoting Comfort Lake Ass'n v. Dresel Contracting, Inc. 138 F.3d 351, 355 (8th Cir. 1998)); *see also* Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124 (2nd Cir. 1991).
89. *Envtl. Conservation Org.*, 529 F.3d at 527–28.
90. *Id.* at 528–29.
91. *Id.* at 529.
92. *Id*.
93. *Id*.

reigning in the scope of citizen suits and deferring to agency expertise regarding consent agreements, the *Comfort Lake* standard also eases discomfort with shifting enforcement responsibility from skilled agencies to courts.[94] Lastly, the court justified this burden shifting aspect by declaring it consistent with other rules, such as the burden to prove diligent prosecution, which also place the ultimate burden of proof on the plaintiff.[95]

C. Applying the Realistic Prospect Test to ECO v. Dallas

Applying the *Comfort Lake* test, the Fifth Circuit found that ECO was unable to produce any evidence showing a realistic possibility that the city would continue to commit violations despite its consent decree with the EPA.[96] ECO argued that since the city violated the law in the past, there was a reasonable likelihood that it would do so again in the future; however, the court dismissed this claim as an unjustifiable inference.[97]

According to the court, there was no guarantee that ECO would receive immediate injunctive relief or greater civil penalties than those imposed by the consent decree.[98] Because the consent decree achieved "some court-ordered mandatory relief that is injunctive in nature" and given that "ECO [was] not *entitled* to any particular form of injunctive relief under the CWA . . . [ECO] was not guaranteed . . . any other form of relief in its citizen suit than that imposed under the consent decree."[99] Therefore, the court held ECO's claims for injunctive relief were moot.[100]

In addition, since the consent decree "represent[ed] the federal government's discretionary resolution" of the appropriate level of penalties, ECO "no longer needed to raise the issue of the proper civil penalty."[101] The court concluded that although "ECO might have sought stiffer penalties against the City [this fact] does not change the result; ECO is not permitted to upset the primary enforcement role of the EPA by seeking [additional] civil penalties."[102]

Ultimately, the Fifth Circuit ruled that by filing an enforcement action and securing a consent degree from the city, the EPA adequately addressed all of

94. *Id*.
95. *Id*. The Court's policy arguments are discussed in more detail in Part III, *infra*.
96. *Id*.
97. *Id*.
98. *Id*. at 530.
99. *Id*. (emphasis in original).
100. *Id.*
101. *Id.* at 531.
102. *Id.*

the interest that ECO had in the suit.[103] Thus, since ECO no longer had a stake in the litigation, the case was dismissed as moot.[104]

III. THE FIFTH CIRCUIT WRONGLY ADOPTED THE REALISTIC PROSPECT STANDARD

The Fifth Circuit erred in its decision to impose the realistic prospect standard that shifted the burden of proof to the plaintiffs. The decision to adopt the realistic prospect standard was weakly supported by precedent, not in line with the intent of the CWA citizen suit provision, and not adequately justified by policy considerations. Furthermore, the Fifth Circuit exacerbated this poor decision by misapplying the standard to the facts of the case and improperly dismissing on summary judgment. The unfortunate precedent in this case could unduly burden future citizen suit litigation by creating needless hurdles that inhibit citizen suits from serving their role in supplementing enforcement.

A. The Court Wrongly Shifted the Burden of the Mootness Test to the Plaintiffs

1. Weak Precedent Supporting the Realistic Prospect Standard

There is no clear consensus among the circuits in favor of the realistic prospect test that the Fifth Circuit ultimately adopted in *ECO v. Dallas*. The Fifth Circuit pulled the standard from *Comfort Lake*, a district court case in the Eighth Circuit.[105] The court in *Comfort Lake* relied on the Second Circuit case *Atlantic States Legal Foundation, Inc. v. Eastman Kodak*, where the realistic prospect language was first used.[106] Like *Comfort Lake*, *Eastman Kodak* was a CWA citizen suit that ruled on mootness after state enforcement agencies had taken official action against a permit violator.[107]

However, as ECO argued before the Fifth Circuit, the realistic prospect test in *Eastman Kodak* was explicitly rejected in *Natural Resources Defense Council v. Loewengart* (*NRDC*), a Third Circuit CWA citizen suit with the same basic fact pattern as *ECO v. Dallas.*[108] The defendant in *NRDC*, who had negotiated a consent decree with a state regulatory agency, asked the court to apply the realistic prospect standard from *Eastman Kodak*.[109] Instead, the Third

103. *Id.*

104. *Id.*

105. *Id.* at 528–29; Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998).

106. *Comfort Lake*, 138 F.3d, at 355; Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1991).

107. *Eastman Kodak*, 933 F.2d 124.

108. Natural Res. Defense Council, Inc. v. Loewengart & Co., Inc., 776 F. Supp. 996, 1000 (M.D. Pa. 1991).

109. *Id*. at 999.

Circuit held that *Eastman Kodak* had been wrongly decided and the standard should not be used.[110] The Second and Fourth Circuits have similarly held that citizen suits, properly filed before any agency enforcement actions begin, need not meet the heightened mootness standard.[111] The fact that there are a number of cases with similar fact patterns where circuit courts ruled strongly both for and against the realistic prospect standard demonstrates a genuine unresolved circuit split.

Supreme Court cases addressing the mootness test for citizen suit actions have never supported a realistic prospect test. In fact, all Supreme Court decisions involving environmental citizen suits have supported a stringent mootness test that places the burden of proof on the defendant. For instance, in the CWA citizen suit *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, the Court stated, "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.'"[112] And in *Laidlaw*, discussed above, the Court declared that "a heavy burden of persua[sion] . . . lies with the party asserting mootness."[113]

Neither *Gwaltney* nor *Laidlaw* involved defendants who submitted to "involuntary compliance" as a result of an agency consent decree. However, in both cases, the Court stated the mootness test in absolute terms and did not caution that the standard may change based upon whether a defendant's behavior was voluntary or involuntary.[114] Notably, in his *Laidlaw* dissent, Justice Scalia advocated for a burden-shifting mootness standard that favors defendants in cases of involuntary compliance.[115] However, the majority did not endorse Scalia's distinction between voluntary and involuntary actions and therefore his dissenting comments should not be construed as strong authority.[116] Even so, the Fifth Circuit cited Scalia's dissent from *Laidlaw* in *ECO v. Dallas* as authority for its choice to adopt the burden-shifting standard.[117] For all the above reasons, the strength of the precedential authority used by the Fifth Circuit was very weak.

In an attempt to defend its decision, the Fifth Circuit emphasized that it was not grafting a "judicially-created" doctrine of mootness onto the CWA, but

110. *Id.* at 1000.

111. *See* Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208 (4th Cir. 1985); *see also* Conn. Fund For The Env't v. Job Plating Co., 623 F.Supp. 207, 216 (D. Conn. 1985).

112. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987) (alteration in original) (quoting United States v. Phosphate Export Assn., 393 U.S. 199, 203 (1968)).

113. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000).

114. *See id; Gwaltney of Smithfield, Ltd.*, 484 U.S. at 66.

115. *Friends of the Earth, Inc*., 528 U.S. at 214 (Scalia, J., dissenting).

116. *See id.*

117. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 529 n.4 (5th Cir. 2008) (citing *Friends of the Earth, Inc*., 528 U.S. at 214 (2000) (Scalia, J., dissenting)).

rather that it was applying the constitutionally required mootness analysis.[118] However, the sparse support for employing the realistic prospect standard does indeed suggest that, while the mootness doctrine may be constitutionally required, the standard itself is not. If nothing else, the Fifth Circuit endeavored to limit citizen suits by electing to adopt this burden-shifting standard—it was not compelled to do so by precedent.

2. Congressional Intent for Citizen Suits under the CWA

The Fifth Circuit argued that applying the *Comfort Lake* burden-shifting standard would promote Congress's intent to allow CWA citizen suits only when necessary to supplement regulatory enforcement efforts.[119] In *ECO v. Dallas*, the Fifth Circuit quoted the Supreme Court to support the idea that Congress's aim in allowing citizen suits was to "supplement" state enforcement, not "supplant" it.[120] Therefore, a citizen suit is only proper if "[f]ederal, state, and local agencies fail to exercise their enforcement responsibility" within the sixty-day notice period.[121]

However, ECO was not trying to supplant the role of a regulatory agency, but was merely pursuing its original plea for the EPA to fulfill its duties under the CWA. The Fifth Circuit greatly exaggerated the situation by concluding that using ECO's "'voluntary cessation' standard . . . would effectively cede primary enforcement authority under the CWA to citizens acting in the role of private attorneys general."[122]

ECO's citizen suit would not have interfered with the government's enforcement action, and could have placed an important check in addition to the government enforcement by ensuring that the consent decree was thorough and complete. In instances such as this, where a defendant enters into a consent decree with a government agency only after the plaintiff has filed a citizen suit, courts can—and most likely will—take the decree into consideration when determining what, if any, remedy is appropriate. Plaintiffs have little incentive to pursue an action that has been resolved by a comprehensive consent decree. Indeed, plaintiffs could be penalized by denying attorneys' fees if they are seeking duplicative penalties. But allowing plaintiffs who "spur" agency

118. *Id.* at 526.

119. The Fifth Circuit may have stressed the Congressional intent because the language of the statute itself is not favorable to its interpretation. Some suggest that a plain language reading of the statute would allow for any citizen suit, properly filed, to proceed so long as the government has not begun diligent prosecution prior to the suit being filed. *See, e.g.*, Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208 (4th Cir. 1985).

120. *Envtl. Conservation Org.*, 529 F.3d at 529 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

121. *Id.* at 528 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

122. *Id.* at 529.

enforcement with a timely-filed citizen suit to continue their suits will likely only serve to provide them with slightly more leverage in settlement negotiations.

The risk that a citizen group, which often lacks resources to begin with, would somehow abuse this leverage is minimal considering the number of checks that are in place throughout the citizen suit process. For instance, during settlement negotiations, citizen groups will have both an adversary and a state agency to contend with, and the final agreement must be approved by the court. Because of such checks, plaintiffs do not have incentives to pursue litigation unless they believe that the settlement agreement was woefully inadequate. In this way, ECO's suit would not serve to "supplant" agency power, but would merely fulfill the role of citizen groups to "ensure that the agencies fulfill their duties under the CWA responsibly."[123]

3. No Convincing Policy Reasons for Adopting the Comfort Lake *Standard*

a. Realistic Prospect Standard Does Not Encourage Consent Decree Negotiations

The Fifth Circuit stated that allowing citizen groups to continue litigating CWA claims after violators entered into consent decrees would expose those violators to duplicative penalties and therefore remove incentives for cooperation with enforcement agencies.[124] However, given that there are already checks in place to ensure that citizen groups will not overstep their supplemental role, it is unlikely that this threat of continued litigation would actually discourage cooperation. Government agencies already use the promise of reduced penalties as an effective incentive for violators to cooperate with enforcement actions. And the risk of duplicative penalties is mitigated by the fact that any further penalties from continued litigation will be decided by a judge with the consent decree in mind.

On the other hand, it is possible that the risk of further litigation could provide incentives to violators and, more importantly, enforcement agencies to make sure that consent agreements are more thorough, and to actively seek out the cooperation and approval of citizen groups who bring claims against violators. Violators may concede more ground in negotiations in order to secure citizen groups' approval and guard against a very narrow risk of continued litigation for elements not covered by the consent decree (in this case, the injunction). Granting citizen groups leverage in the negotiating process to advocate for thorough consent decree conditions that provide sufficient

123. *Id.* (quoting Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 317 (4th Cir. 1988)).

124. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 528 (5th Cir. 2008) (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

remedies could spur better enforcement. Further, because the CWA citizen suit provision requires all penalties to be paid to the U.S. Treasury,[125] a citizen group is unlikely to be personally or selfishly motivated to seek higher penalties purely for personal gain.

Most importantly, the procedural guidelines in place for citizen suits ensure that the risk of duplicative penalties would be very rare. Only in cases such as *ECO v. Dallas*—where a citizen group brought a complaint in accordance with the rules of procedure before any enforcement actions had begun, provided proper notice to the violator and the enforcement agency, and successfully began its suit—would a citizen group even be given this kind of influence. Because the procedural requirements of citizen suits are so strictly enforced by the courts, once citizens have met those requirements, they should secure the right to advocate for their interests and be afforded some influence at the negotiation table.

b. Citizen Suit Defendants Are Best Able to Bear the Burden

In its *ECO v. Dallas* decision, the Fifth Circuit cited instances where a citizen suit plaintiff must bear the burden of proof, such as in proving that a prosecution is not diligent, and it used those examples as justification for shifting the burden of proof under the mootness standard.[126] However, the court did not address the costs and benefits of placing this burden on the plaintiff. Because defendants in citizen suit cases typically have more resources and more information than citizen groups, they are better able to bear the burden than plaintiffs. This is especially true when the citizen suit plaintiffs are small, nonprofit organizations or local community groups.

There is little doubt when defendants violate the law—the self-monitoring and reporting structure of the CWA make evidence of violations irrefutable.[127] However, the defendant is in the best position to understand why the violations occurred and what is needed to stop them. In order to encourage compliance, defendants who have violated the law in the past should bear the burden to explain how they will cease their violations. If a defendant has entered into a thorough and comprehensive consent decree, it will only aid their argument that violations could not be expected to recur.

It is unreasonable to force a citizen group working as a watchdog—in the public interest and often with limited resources—to take that burden upon itself. Thus, the burden-shifting selected by the Fifth Circuit works a disservice to the CWA citizen suit provision.

125. *See* 33 U.S.C. §§ 1365(a), (d) (2006).
126. *Envtl. Conservation Org.*, 529 F.3d at 529.
127. Sunstein, *supra* note 3, at 221.

B. The Fifth Circuit Erred in Its Application of the Realistic Prospect Standard to the Facts

In *ECO v. Dallas*, the Fifth Circuit first reviewed and rejected the district court's ruling on claim preclusion. In doing so, the court cited conflicting precedents, eventually concluding that summary judgment was not appropriate at this stage of the trial.[128] Surprisingly, however, when addressing the question of mootness and again finding a circuit split, the court held that summary judgment was appropriate.[129]

Analyzing the result of *ECO v. Dallas*, the first major issue to consider is whether it was proper for the court to have attempted to apply the mootness standard at all. Even accepting the *Comfort Lake* burden-shifting standard as appropriate, it was improper for the court to apply it in *ECO v. Dallas*. The court looked outside circuit precedent to apply an alternative standard that fundamentally changed how the plaintiff needed to argue its case.[130] As a result, the court ruled against ECO because it was unable to meet this new mootness burden.[131] It is unclear if ECO had any real notice that this was indeed its burden to bear since case law had already established the burden of proof as the defendant's.[132] A better ruling would have been to remand for argument on the issue of mootness. This would have given notice to ECO that it must show a realistic prospect that the city would again violate the terms of its NPDES permit.

Instead, the court applied the standard to the briefs as they were presented. In addressing the issue of injunctive relief, ECO maintained that its claim should not be moot, as the consent decree did not require an immediate end to the city's violations.[133] As such, ECO argued that since the city had knowingly violated its NPDES permit in the past, there was a realistic prospect that it may violate the consent decree in the same way.[134] However, the court dismissed ECO's argument as mere speculation, and ruled that since ECO was neither entitled to, nor likely to receive, complete injunctive relief, its claim for injunctive relief was moot.[135] According to the court, "the consent decree

128. Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 531 (5th Cir. 2008).

129. *Id.* at 527.

130. *Id.* at 528.

131. *Id.* at 529.

132. *See* Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987).

133. *Envtl. Conservation Org.*, 529 F.3d at 530.

134. *Id.* at 529. In this case, if the City violated the terms of its consent decree with the EPA, it would ultimately continue committing the violations alleged in ECO's complaint, and thus, fulfill the *Comfort Lake* standard.

135. *Id.* at 530.

achieved some court-ordered mandatory relief that is injunctive in nature" and that was enough to satisfy the burden.[136]

However, a summary judgment standard is very deferential to the plaintiff in that it requires a court to look at all the evidence "in the light most favorable to the non-moving party."[137] Under this standard, there does seem to be a realistic prospect that a party that repeatedly violates its permit will continue to do so in the future. Violations may even be unavoidable. For instance, in some cases the permit might be too stringent to ensure full adherence, or compliance may be impossible or out of the institution's control (e.g., influenced by weather phenomena) if the violator is chronically underfunded, understaffed, or lacks the man-power, technology, expertise, or will to comply with the law. These circumstances do not instantly change under a consent decree. Thus, a plaintiff who has repeatedly violated the CWA in the past very often has a realistic prospect of violating it again in the future, even if such violations may be involuntary. This argument should be sufficient to survive a summary judgment motion to dismiss for mootness.

C. ECO *Sets a Dangerous Precedent*

ECO properly filed its suit, and gave state and federal enforcement agencies sixty days to initiate an enforcement action and fulfill their non-discretionary duty under the law.[138] If an agency had begun a diligent prosecution within the sixty-day notice window, ECO would have had to withdraw its suit. But the EPA did not begin its prosecution until after the sixty-day period had passed.[139] It is likely ECO's pursuit of the litigation that spurred EPA's eventual involvement. However, when the EPA belatedly joined the ongoing proceedings, ECO was then effectively shut out of its own complaint.

Some critics may argue that the court in *ECO v. Dallas* was practicing judicial economy in dismissing a suit that it felt would ultimately lose on the merits at a later stage. Or, that while the court misapplied the mootness standard, it still facilitated a good outcome since, consent decrees often provide the most effective and efficient way to achieve compliance. Even if these arguments were true, however, they do not justify making bad law that will be used as precedent in future cases.

The Fifth Circuit has set a dangerous precedent with its mootness standard. Future CWA violators in the Fifth Circuit, when next confronted with a citizen suit, may decide that striking a deal with the government is the easiest way out, rather than face consequences from a citizen suit that may end up

136. *Id.*
137. Fed. R. Civ. P. 56(c); *Envtl. Conservation Org.*, 529 F.3d at 524.
138. Envtl. Conservation Org. v, City of Dallas, 529 F.3d 519, 523 (5th Cir. 2008).
139. *Id.*

more stringent and costly. The likelihood that consent decrees between regulatory agencies and violators will be given special deference by courts makes this even more troubling, as there is no check on a system that could be manipulated by defendants.

Environmental advocates have many reasons to be concerned: agency capture could compromise the neutrality of an enforcement agency, a lack of resources could compromise the ability of agency representatives to negotiate and oversee a thorough settlement, or political indifference (or outright hostility) towards environmental litigation could cause agencies to be sympathetic to a defendant. Allowing government enforcement action to preclude so easily a properly filed citizen suit is particularly worrying because it could virtually gut the citizen suit provision of its ability to play its supplemental role in environmental litigation.

To illustrate the problem, imagine that a citizen group is successfully pursuing a suit against a CWA violator. Years into the case, after notice and standing have been argued and summary judgment motions have been denied, the defendant, sensing that it will lose, seeks out state or federal enforcement action through a consent decree. The government agency, for any number of reasons, allows the defendant to enter into a consent decree that is very generous, forgiving many of the penalties and ultimately failing to guarantee compliance. Established rules of administrative law generally require judicial deference to agencies if their action is reasoned and supported; accordingly district courts reviewing government-sponsored consent decrees will likely yield to agencies. As such, if a court now holds the citizen group's case as moot, such a result would deny the plaintiff a chance to argue the merits before a court and eliminate a very important check on the system. It is also fundamentally unfair to a citizen group that has invested time and resources into the case not to be given due process. Worst of all, the mootness standard could undermine citizen suits when state or federal agencies are receptive to defendants, and will provide defendants with an escape hatch.

The previously discussed fears of over-enforcement and "citizen group capture" are legitimate, but largely exaggerated. Courts, in providing the final remedy to a complaint, limit this possibility by ultimately deciding how the law should be enforced. Furthermore, it is not in the best interests of citizen groups to litigate claims where sufficient remedies are already in place. Research has suggested that environmental nonprofit organizations are sensitive to their public image and therefore unlikely to pursue litigation that is not deemed to be in the public interest.[140] In addition, many citizen suit attorneys do not rely on

140. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 205 (2000).

legal suits for their income, and are therefore more likely to settle than to hold out for greater financial gain through litigation.[141]

Recent research also suggests that citizen suits are more important than ever due to a downward trend in environmental enforcement action by government agencies.[142] For example, in the first half of this decade, trends show that EPA referrals for civil enforcement of the Clean Air Act had fallen by 25 percent and referrals for enforcement of the CWA had fallen 55 percent in a five-year period.[143] Other indicators, such as the number of enforcement actions filed by the U.S. Department of Justice, the value of civil penalties and injunctive relief, and state enforcement actions, have all shown marked decreases as well.[144] While the Bush administration played a large role in this, some believe this trend is independent of an administration's perceived political will.[145] For example, during the Clinton administration, despite giving wide environmental enforcement power to agencies, Congress did not provide the funds necessary to exercise this power.[146] For this reason, the administration openly supported citizen suits to fill in the gaps.[147]

Ultimately, citizen suits have proven an effective and vital tool in the enforcement of environmental laws.[148] Any ambiguity in the rules governing how citizen groups may use this tool harms both those who might bring citizen suits as well as potential violators who may not understand what incentives should guide their behavior. In *ECO v. Dallas*, the Fifth Circuit exacerbated existing legal ambiguity by imposing an unnecessary mootness standard and a muddy application of the law.

CONCLUSION

If the purpose and intent of citizen suits is to supplement government enforcement agencies, which are unequipped to monitor and prosecute all violations on their own, then citizen groups should be allowed all the tools necessary to do so. In *ECO v. Dallas*, the Fifth Circuit placed barriers to ECO's citizen suit by applying a burden-shifting mootness test and lowering the otherwise stringent summary judgment standard in favor of the defendants. The

141. Jenny R. Rubin, *Rule 68: A Red Herring in Environmental Citizen Suits*, 12 GEO. J. LEGAL ETHICS 849, 854 (1999).

142. "Statistical trends showing declines in EPA enforcement referrals and DOJ filed actions, values for civil penalties, SEPs, injunctive relief, and administrative penalties, and state environmental enforcement actions, support the thesis we need citizen suits now more than ever." May, *supra* note 16, at 39.

143. *Id.* at 40.

144. *Id.* at 40–47.

145. *Id.*

146. Smith, *supra* note 20, at 396. The lack of funding was in large part caused by Congressional Republicans and their power over the budget.

147. *Id.*

148. May, *supra* note 16, at 46–47.

Fifth Circuit's decision to impose this standard was weakly supported by existing precedent, not consistent with the intent of the CWA citizen suit provision, and not justified by policy considerations. Consequently, the court's holding unjustifiably frustrates the ability of citizen groups to fulfill their supplemental role effectively.

In fall of 2008, ECO's application for certiorari was denied by the Supreme Court.[149] As a result, uncertainty remains which will make citizen suits a more difficult endeavor for everyone involved—defendants, plaintiffs, and government agencies alike. If the Supreme Court does not choose to clarify this area in future citizen suit litigation, then Congress should take it upon itself to amend the CWA's citizen suit provision and make its intentions clear. Congress must clarify and replenish the vital role of citizen suits by explicitly rejecting the *Comfort Lake* mootness standard that the Fifth Circuit would have them bear.

149. Envtl. Conservation Org. v. City of Dallas, 129 S. Ct. 418 (5th Cir. 2008).

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