Ailor v. City of Maynardville, Tennessee: What Constitutes Compliance under the Clean Water Act

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AILOR v. CITY OF MAYNARDVILLE, TENNESSEE: WHAT CONSTITUTES COMPLIANCE UNDER THE CLEAN WATER ACT?

I. INTRODUCTION

More than sixty percent of all major facilities in the United States, including manufacturing, electronic, wastewater treatment and sewage plants, exceeded their Clean Water Act (CWA) permit limits on discharges into waterways at least once between January 1, 2002 and June 30, 2003.¹ In addition, a new study has confirmed that states lack money to fund the regulation of the CWA.² Over the past ten years, water pollution has increased and private citizens affected by the pollution have fewer remedies.³ Reports have concluded that polluters often escape with merely the threat of punishment for violating the CWA, which is attributable to the insufficient tools available for state enforcement officials.⁴ Compounding the problem, in 2003 the number of Environmental Protection Agency (EPA) enforcement officials and the number of inspection staff members fell to its lowest point since the establishment of the

1. See Juliet Eilperin, EPA Faulted on Clean-Water Violations; Consumer Interest Group’s Study Details Lax Enforcement at Major Facilities, WASH. POST, Mar. 31, 2004, at A-8, available at http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A37356-2004Mar30&notFound=try (describing study indicating number of states exceeding NPDES limits). As a result of the study, the U.S. Public Research Interest Group concluded that the Environmental Protection Agency (EPA) is failing to act against violations of the Clean Water Act (CWA) committed by U.S. plants and factories. Id.

2. See Don Thompson, Study: States Too Under-funded to Prevent Water Pollution, ASSOCIATED PRESS, Oct. 11, 2004, http://www.greatlakesdirectory.org/mn/101104_great_lakes.htm (indicating that states lack funds necessary to enforce CWA). Mr. Clifford Rechtschaffen, director of San Francisco’s Golden Gate University’s environmental law program and co-director of its Environmental Law and Justice Clinic, conducted a study and found that the majority of the seventeen states he surveyed lacked the funding to provide sufficient regulation under the CWA. Id. Specifically, Rechtschaffen studied seventeen states’ enforcement of the National Pollutant Discharge Elimination System: Alabama, Arizona, California, Delaware, Florida, Georgia, Hawaii, Maryland, Minnesota, Montana, North Carolina, New Jersey, Nevada, Oregon, Washington, West Virginia, and Wyoming. Id.


agency. Recognizing that a limited number of governmental resources existed to accomplish its goal of keeping the nation's waters clean, Congress enacted a citizen suit provision under the CWA to encourage citizens to assist in the enforcement of environmental laws.

This Note discusses the Sixth Circuit Court of Appeals' holding in Ailor v. City of Maynardville, Tennessee, which concluded that a citizen suit under the CWA was precluded because the citizens did not file their suit until several weeks after the defendant's last recorded violation. Part II of this Note sets forth the facts in Ailor. Part III explains the background of the CWA and the purpose of citizen suits under the CWA. In addition, Part III explores the Supreme Court's decisions and the Sixth Circuit's decisions regarding citizen suits and the CWA. Part IV critically analyzes the Sixth Circuit's decision in Ailor. Part V evaluates the court's decision and reasoning in Ailor. Finally, Part VI considers how the Ailor decision continues the courts' trend of prohibiting citizen suits under the CWA, as well as its possible impact on subsequent litigation.

II. Facts

The citizen suit provision of the CWA was the object of debate in Ailor. In that case, the city of Maynardville (the City) operated and owned a sewage treatment plant along Bull Run Creek that frequently overflowed into the creek. In 1993, the Tennessee De-
partment of Environment and Conservation (TDEC) issued an Order and Assessment against the City for repeatedly violating the terms of its National Pollution Discharge Elimination System (NPDES) permit. Specifically, the Commissioner of the TDEC determined that the City’s self-monitoring information had uncovered many NPDES violations from January 1991 through December 1992. As a result, the Commissioner ultimately found that the City had violated a section of the Tennessee Code which prohibited discharge of any waste in excess of the amount allowed by the permit. The Commissioner issued a preliminary order requiring the City to take certain actions to bring the plant into compliance with the law.

The City and the TDEC eventually reached an agreement and jointly created an Agreed Order. The Agreed Order required the City to submit the following: (1) a corrective action plan addressing a review of “mini-systems,” smoke-testing, dry weather flow measurements, a physical survey of the systems and wet weather flow monitoring; (2) an engineering report evaluating “current hydraulic and organic loading at the wastewater treatment plant” with recommendations for alternatives for additional treatment capacity; and (3) plans and specifications for the expansion of the waste-

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17. See id. (describing TDEC’s permit). Currently, there are two possible ways to obtain NPDES permits: from the United States Environmental Protection Agency or from states with approval to issue these permits. See NORTHWEST ENVIRONMENTAL ADVOCATES, Clean Water Program: Point Source Controls, http://www.northwestenvironmentaladvocates.org/programs/3W.html (describing distribution of NPDES permits). NPDES permits specifically delineate the amount of pollutants that may be “lawfully discharged from each point source.” See id.

18. See Ailor, 368 F.3d at 591 (describing Commissioner’s conclusions). In his Order, the Commissioner, J.W. Luna, stated that the City had committed ninety-nine biochemical oxygen, four total suspended solids, twenty-seven ammonia, nine fecal coliform, and nine chlorine violations. Id. Additionally, the Order stated that the City violated TENN. CODE ANN. §§ 69-3-108(b)(3) and (6) because it discharged “wastewater effluent from the plant in violation of the terms and conditions of the NPDES permit.” Id.

19. See id. (finding that City violated Tennessee Code).

20. See id. (explaining Commissioner’s findings and subsequent Order). Tennessee Code sections 69-3-108(b)(3) and (6) state that it is unlawful for a person to discharge wastes in excess of the permit or to discharge wastes into waters or any location from which it is probable that the wastes will move into waters without a valid period. See TENN. CODE ANN. §§ 69-3-108(b)(3) and (6). Specifically, the Order required the City to (1) begin a “continuous collection rehabilitation program” within sixty days of the Order; (2) bring the plant into compliance with the CWA and the City’s NPDES permit within ninety days of the Order; and (3) pay a civil penalty of twenty-five thousand dollars to the TDEC. Ailor, 368 F.3d at 591-592 (describing Order).

21. See Ailor, 368 F.3d at 592 (stating that Board and City entered into Agreed Order on July 18, 1995).
water treatment plant and the correction of inflow and infiltration.\(^{22}\) Furthermore, the Agreed Order set out a timeline for the City to complete these objectives, specifying that the City complete the remedial activities no later than thirty-six months from the approval of the plans.\(^{23}\) Finally, the Agreed Order levied an $18,750 civil penalty against the City.\(^{24}\)

On January 30, 1998, after the Agreed Order, Betty Lynch and Harry Ailor brought suit against the City in the Eastern District of Tennessee at Knoxville, alleging that the City had violated its NPDES permits.\(^{25}\) The City accomplished each of the Order’s requirements and opened a new wastewater treatment plant in November 2000.\(^{26}\) Ailor gave the City notice of the pending lawsuit on February 7, 2001.\(^{27}\) The City received its final inspection report on February 26, 2001.\(^{28}\)

The district court granted summary judgment to the City under the CWA and the Resource Conservation and Recovery Act (RCRA) on November 5, 2001, concluding that “under the unique facts of the case, a claim under the CWA is moot at this time and was moot at the time it was filed.”\(^{29}\) The district court explained that the relief available to Ailor under both the CWA and the RCRA had already been granted.\(^{30}\)

\(^{22}\) See id. (listing requirements necessary for City to comply with Board’s Order).

\(^{23}\) See id. (listing requirements of Board’s Order).

\(^{24}\) See id. (describing penalty ordered against City). The Order stipulated that the City had to pay $16,875 of the total $18,750 only if the City did not obey the Order. \textit{Id}.

\(^{25}\) See id. at 590 (stating that Ailor and Lynch brought citizen suit against City). Ailor owned approximately thirty-six acres of land along Bull Run Creek, while Lynch owned approximately one hundred acres of land along the creek. \textit{Id}. at 591. Ailor previously owned land along Bull Run Creek before the suit was brought, but did not own the land when he brought suit. \textit{Id}.

\(^{26}\) See \textit{Ailor}, 368 F.3d at 592 (describing how City completed each of Board’s requirements). The City spent approximately 1.7 million dollars to upgrade the plant. \textit{Id}. at 593.

\(^{27}\) See id. at 593 (noting date Plaintiffs gave notice to City). The Sixth Circuit specifically mentioned that the Plaintiffs gave notice two and one-half months after the City’s wastewater treatment plant was in full operation. \textit{Id}.

\(^{28}\) See id. at 592 (stating City completed all required actions under Agreed Order, placed new wastewater treatment plant on line in November 2000, and received inspection report from Board).

\(^{29}\) See id. at 594 (quoting district court’s decision).

\(^{30}\) See id. (restating district court’s holding that relief under CWA and RCRA had already been granted).
On May 16, 2001, Ailor again filed suit against the City, this time in the Sixth Circuit Court of Appeals.\(^3\) The City moved for summary judgment on September 10, 2001, arguing that it was already the subject of an enforcement action diligently prosecuted by the state under Title 33 U.S.C. Section 1319(g)(6)(A)(ii) and that it had also abided by the state's Agreed Order.\(^3\) The Sixth Circuit affirmed the lower court's judgment, holding that the plaintiffs' suit was duplicative of the TDEC's prior actions to prevent the City from violating the CWA.\(^3\)

### III. Background

#### A. The Clean Water Act in a Nutshell

In response to the public's increasing awareness of water pollution and its effects, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act).\(^3\) The Clean Water Act (CWA) was amended in 1977.\(^3\) Congress passed the CWA to "restore the chemical, physical and biological integrity of the nation's navigable waters."\(^3\) To accomplish this goal, Congress

31. See *Ailor*, 368 F.3d at 594 (mentioning date on which Plaintiffs filed suit in federal court).

32. See id. at 593 (restating City's argument). The City supported its motion for summary judgment with affidavits from Hazel Gillenwater (Gillenwater), the City Recorder, and John West (West), an environmental specialist for TDEC. *Id.* In his affidavit, West stated that he was responsible for monitoring, compliance and enforcement of the City's wastewater treatment facilities and the City's NPDES permit. *Id.* West maintained that, as of September 7, 2001, the plant had complied with the laws relating to its operation of the plant and met the effluent standards that the NPDES permit specified. *Id.* The inspector also concluded in his affidavit that the City had complied with the necessary requirements of the Agreed Order. *Id.*

33. See id. at 600 (holding that plaintiffs were not compelled to file suit because City had met its permit obligations). The Sixth Circuit explained that the plaintiffs were not filing a suit against the City because the federal and state governments were failing to take action to prevent the City from violating its NPDES permit. *Id.*


included both regulatory and non-regulatory tools to reduce the amount of pollutants companies and other entities discharge into the waterways.\(^{37}\)

Under the CWA, industrial, municipal or other facilities may only dump their discharge directly into surface waters if they obtain NPDES permits.\(^{38}\) A NPDES permit authorizes an amount of a given pollutant that an entity may lawfully discharge from each point source.\(^{39}\) A point source is "any discernible, confined, and discrete conveyance" of pollutants into a water body.\(^{40}\) In other words, the NPDES program controls water pollution through the regulation of point sources that discharge pollutants into United States waters.\(^{41}\)

B. CWA Citizen Suits

Pursuant to the CWA, individual citizens may bring suits against alleged violators of the CWA.\(^{42}\) Section 505 of the CWA governs these citizen suits.\(^{43}\) Under section 505, a citizen may bring

name for the Federal Water Pollution Control Act Amendments of 1972. *Id.* Congress' goal was to "achieve the broader goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters so that they can support 'the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water.'" *Id.*


38. See U.S. ENVIRONMENTAL PROTECTION AGENCY, National Pollution Discharge Elimination System (NPDES), Dec. 8, 2003, http://cfpub.epa.gov/npdes/ (discussing point in time when facilities must obtain NPDES permits). Only EPA or a state possessing EPA approval may issue NPDES permits. *Id.*

39. See *id.* (giving explanation of NPDES permits).

40. See River Network, Point Source Discharge Permits/NPDES: The National Pollutant Discharge Elimination System, http://www.cleanwateract.org/pages/c3.htm (describing point sources and discrete conveyances). A discrete conveyance includes, but is not limited to, "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged." *See id.*

41. See U.S. ENVIRONMENTAL PROTECTION AGENCY, National Pollution Discharge Elimination System (NPDES), Dec. 8, 2003, http://cfpub.epa.gov/npdes/ (describing how NPDES permits regulate water pollution). A point source is "a specific, identifiable source." See Gail Bellenger, What is The Clean Water Act?, 2002, http://pa.essortment.com/cleanwateract_rgrl.htm. Agencies have been better able to regulate point source pollutants. *Id.* Researchers have only recently begun to regulate non-point source pollutants, such as those from storm runoff. *Id.*


43. See *id.* (stating that § 505 governs citizen suits). Section 505 provides in pertinent part that any citizen may commence a civil action on his own behalf
a suit to enforce any limitation in an NPDES permit. Section 505 defines a citizen as "a person or persons having an interest which is or may be adversely affected." In addition, the citizen or citizens bringing suit against the alleged violator must give sixty days notice to the administrator, the state in which the alleged violation occurred and the alleged violator. This notice gives the alleged violator an opportunity to comply with its permits and provides the state agency with time to pursue further enforcement measures. When examining whether the suit is permitted under the CWA, courts must first decide whether the plaintiff has standing and whether the issue in the case is moot.

1. Standing Under the CWA

In order to establish standing, the Supreme Court requires the plaintiff to prove that: (1) he or she has suffered an "injury in fact" that is concrete, particularized and actual or imminent; (2) the injury is fairly traceable to the defendant’s challenged actions; and (3) it is likely, not speculative, that the injury will be redressed by a favorable decision. In environmental suits, plaintiffs establish "injury in fact" by proving that they use the area the alleged violator has harmed and that the violator has damaged the aesthetic and recreational values of the area.

against any person alleged to be in violation of an effluent standard or limitation under this Act or an order issued by the Administrator or a State with respect to such a standard or limitation, or against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act. Id.

44. See 33 U.S.C. § 1365(g) (stating that citizens can bring suits to enforce NPDES permits).

45. See id. (defining citizens under CWA). Section 1365(g) defines a "citizen" as a person or persons having an interest which is or may be adversely affected. Id. In order for citizens to bring suits under the CWA, they must prove that they have an interest that will be adversely affected. See 33 U.S.C. § 1365(a) (describing what citizens must prove to bring suits under CWA). When the courts analyze whether citizens have proven they have an interest in the litigation that will be adversely affected under the CWA, they cross into the standing analysis. See Friends of the Earth v. Laidlaw, 528 U.S. 167, 181 (2000) (assuming standing inquiry and CWA are related).

46. See Laidlaw, 528 U.S. at 174-75 (describing CWA notice provision).


48. See generally Laidlaw, 528 U.S. 167 (analyzing mootness and standing regarding CWA citizen suit provision).

49. See id. (describing standing requirement).

the Supreme Court established that citizens lose standing if the alleged violations have abated by the time suit is filed. Specifically, the Court held that, in environmental suits, the plaintiffs must prove injury to themselves, not to the environment.

2. Mootness Under the CWA

When describing the legal doctrine of mootness, the Supreme Court has explained that an "actual controversy" must exist at all stages of the case. If an issue is "capable of repetition, yet evading review," the issue is not moot. Establishing mootness in environmental cases is especially complicated because it is difficult to prove that the defendant's violation is capable of repeating itself. The Supreme Court's ruling in *Friends of the Earth v. Laidlaw* directly addressed how courts should decide mootness; however, the Court's decision failed to clarify its preferred method for deciding mootness in environmental cases. Consequently, a court's interpreta-

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52. See id. (describing and rejecting Laidlaw's contention that Supreme Court's reasoning in *Steel Co.* implies that citizen plaintiffs in *Laidlaw* have no standing to seek redress under CWA). See also Robert Meltz, CRS Report for Congress: RS20012: The Future of the Citizen Suit After Steel Co. and Laidlaw, Jan. 5, 1999, http://www.ncseonline.org/nle/crsreports/risk/rsk-38.cfm?&CFTOKEN=19131415&CFTOKEN=66408933 (describing citizen suit provision under CWA and how Supreme Court decided *Steel Co.*).
53. See *Laidlaw*, 528 U.S. at 181 (setting forth requirements plaintiffs must meet to prove Article III standing in environmental cases).
54. See *Roe v. Wade*, 410 U.S. 113, 125 (1973) (explaining that usual rule in federal cases is that actual controversy must exist at stages of appellate or certiorari review). In *Roe*, the Supreme Court held that pregnancy "provides a classic justification for a conclusion of nonmootness" because it could be "capable of repetition, yet evading review." *Id.*
55. See id. (describing mootness).
57. 528 U.S. 167 (2000).
58. See Echeverria, supra note 56, at 192 (explaining two possible interpretations of *Laidlaw*). One could construe the holding to mean that the Court overruled the previous rule that a civil penalty claim can never become moot. *Id.* This interpretation implies that it would be difficult, but not impossible, to prove that a citizen suit seeking civil penalties is moot. *Id.* Another interpretation of *Laidlaw* is that the Supreme Court was not overruling its previous rule, yet simply concluding that a citizen suit under the CWA is not automatically moot when the plaintiff's only remaining claim is for civil penalties. *Id.*
tion of mootness is crucial to determining the outcome of a citizen suit case under the CWA.\footnote{59}

3. Is the Citizen Suit Barred Under the CWA?

Citizen suits under the CWA are subject to additional procedural requirements.\footnote{60} If the state or federal government is "diligently prosecuting" a claim against the defendant, this bars any other actions pertaining to the violations the plaintiff alleged in the suit.\footnote{61} Nevertheless, if the government is diligently prosecuting a state administrative proceeding or a regulatory agency's response action, the CWA does not prohibit a citizen from bringing suit.\footnote{62}

4. The Controversy

In the past, CWA provisions have been the subject of heated debate, particularly the citizen suit provision, which has created a storm of controversy.\footnote{63} The most contested part of section 505 provides that "[n]o action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require

\footnotesize{59. See Laidlaw, 528 U.S. at 192 (reasoning that courts' interpretation of mootness in citizen suits impacts courts' rulings).
60. See Randall S. Abate, Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the Gualtney Standard, 16 TEMP. ENVT'L. L. & TECH. J. 1 (1997) (discussing procedural requirements citizen must meet to bring suit under CWA). Citizens bringing suit under the CWA must give sixty days notice of their action to the EPA Administrator, the state in which the alleged violation occurs and the alleged violator. Id. Furthermore, if the court finds that EPA or the state has "commenced and is diligently prosecuting a civil or criminal action," the court will bar the citizen suit. Id. (citing 33 U.S.C. § 1319(d) (2001)).
63. See Jeffrey G. Miller, Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion, 10 WIDENER. L. SYMP. J. 63, 64 (2003) (noting that courts have considered nearly one dozen legal issues concerning bar element in preclusion device). Id. See also Amanda J. Masucci, Comment, 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, 12 VILL. ENVT'L. L.J. 171, 179-180 (2001) (maintaining that citizen suits under CWA have proven to be controversial issue). See also Matthew M. Werner, Comment, Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment, 25 ENVTL. L. 801 (1995) (noting that, when government fails to force compliance, private citizens' rights to enforce CWA remain unresolved).}
compliance with the standard, limitation, or order . . . .”64 Specifically, courts have debated the interpretation of the words “diligently prosecuting.”65 Some scholars claim that diligently prosecuting an action requires the Administrator or State to accomplish what it set out to do.66 In other words, the Administrator or State must definitively prevent the violator from continuing its abuses of the CWA.67 Thus, in the case of the CWA, the Administrator or State must: (1) guarantee that the violator ceases to exceed its NPDES limits; and (2) ensure that the violator does not continue to violate the permit in the future.68

The public has conflicting views concerning the utility of citizen suits.69 Proponents of citizen suits claim that these suits make the protection of the environment possible when the government fails to do so.70 These same supporters also claim that citizen suits have been essential to advancing environmental enforcement.71 Additional citizen suit advocates assert that citizen suits combat po-

64. See Patrick Kurtas, Casenote, Lowering the Bar: The Sixth Circuit Embraces the Ninth Circuit’s Narrow Interpretation of Section 1319(g)(6) of the Clean Water Act in Rudolph Jones, Jr.; Susan Jones; Tandy Jones Gilliland v. City of Lakeland, Tennessee, 12 Vill. Envtl. L.J. 235, 237 (2001) (stating that courts have conflicting interpretations of intended scope of CWA).


66. See Jeffrey G. Miller, Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions, 28 Harv. Envtl. L. Rev. 401 (2004) (discussing meaning of “diligently prosecuting” under CWA). Scholars have opined that the language of the preclusion device and the purposes of the statutes imply that diligent prosecution is prosecution that has brought or reasonably can be expected to bring about compliance. Id.

67. See id. (explaining some believe that Administrator or State must prevent violator from breaching requirements of CWA in order for Administrator or State to diligently prosecute action).

68. See id. (setting out what state or administrator must do to enforce CWA).

69. See Abate, supra note 60 (describing controversy over CWA).

70. See Defenders of Wildlife, The Public In Action: Using State Citizen Suit Statutes to Protect Biodiversity, Sept. 2000, available at http://www.defenders.org/states/publications/publicaction.pdf (stating that citizen suits made it possible to protect environment when government could not do so). Proponents of citizen suits under the CWA rationalize that public involvement is necessary because federal governmental agencies do not always enforce the CWA. Id.

tential environmental hazards that the government would not otherwise prevent.\(^\text{72}\)

Critics of citizen suits, however, do not believe that citizen suits are more advantageous than agency oversight.\(^\text{73}\) These critics claim that citizen suits do not further the environmental cause because they focus only on technical violations or breaches that a government regulator is presently addressing.\(^\text{74}\) In his congressional testimony, Mayor Jere Melo of Fort Bragg, California claimed that Congress should amend the citizen suit provision under the CWA in order to prevent citizens’ misuse of the provision.\(^\text{75}\) Melo and other critics of citizen suits argue that the money citizens pay lawyers to bring suits against the alleged violators would be better spent improving the environment.\(^\text{76}\)

Scholars have proposed various interpretations of the citizen suit provision of the CWA.\(^\text{77}\) Certain legal scholars claim that


\(^{73}\) See Steincamp, supra note 62 (noting that defendant may claim that citizen suit is unsuccessful in giving plaintiffs unique or additional relief in situations where defendant is conducting remedial activities under agency supervision).

\(^{74}\) See Subcommittee Hearing, supra note 61. “Citizen suits do little or nothing to enhance water quality, because the suits involve violations that are already being addressed in an enforcement action with government regulators and/or that they focus on what can be characterized as minor, sporadic, or technical violations.” Id.

\(^{75}\) See id. (claiming that Congress needs to amend CWA citizen suit provision).

\(^{76}\) See id. (alleging that citizen suits waste money). In California, government officials complained that citizen suits have caused sewer upgrades and have “cost taxpayers millions of dollars for attorneys’ fees.” Id. Many critics of citizen suits claim that the citizens frequently bring CWA suits because they receive financial benefits from these suits. Id. See also U.S. House Transportation & Infrastructure Committee, Communities Outline Misuses of Clean Water Act Citizen Suits At Congressional Hearing, Sept. 30, 2004, http://www.waterchat.com/News/Environment/04/Q4/env_041001-02.htm (noting that many communities targeted by citizen suits settle instead of litigate).

\(^{77}\) See Abate, supra note 60 (discussing fact that courts frequently misinterpret and disagree about extent of citizen suits under Clean Water Act). “The Supreme Court’s decision in Gwaltney is perhaps the most extensively analyzed yet most frequently misunderstood standard in citizen suit jurisprudence under federal environmental laws.” Id.
courts should interpret the citizen suit provision broadly, so as to prohibit citizens from bringing a suit against a violator after an agency has taken action against the violator. Others criticize the courts for attempting to prevent citizen suits by forcing plaintiffs to establish standing to a degree of "scientific certainty." The Supreme Court has taken its own approach to analyzing citizen suits. The Court mandates that, even before deciding whether the plaintiff-citizens have a case under the CWA, plaintiffs must demonstrate that they have standing and that the violation alleged in the suit is not moot. After satisfying these two requirements, the plaintiff-citizens must then fulfill the CWA's requirements.

C. Applicable Cases

1. Gwaltney v. Chesapeake Bay Foundation

Gwaltney has served as guidance for the lower courts to determine the protocol for cases addressing citizen suits under the CWA. In Gwaltney, the Virginia State Water Control Board issued an NPDES permit to ITT-Gwaltney in 1974, allowing Gwaltney to discharge seven pollutants from the company's meatpacking plant on the Pagan River in Smithfield, Virginia. Gwaltney of Smithfield (a different entity from ITT-Gwaltney) took over the obligations of the permit in 1981 and, from 1981-1984, repeatedly ex-

78. See id. (stating that some critics claim citizen suit provision should be broadly interpreted).
79. See Masucci, supra note 63, at 208-09 (noting that heightened requirement will prevent plaintiffs with legitimate claims from obtaining relief, thereby aggravating Congress' purpose for enacting citizen suit provision of CWA).
80. See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16-17 (1981) (stating that CWA's definition of citizen makes it clear that plaintiffs bringing suits under CWA must have standing).
82. See generally Laidlaw, 528 U.S. 167 (noting that plaintiff must fulfill CWA requirements).
84. See Masucci, supra note 63 (explaining that many courts have looked to Gwaltney as authority for citizen suits under CWA).
85. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 53 (1987) (describing permit from Virginia State Water Control Board). This permit also specified effluent limitations, monitoring requirements, and other conditions of discharge. Id. The Board reissued the permit in 1979 and modified it in 1980. Id.
ceed the effluent limitations on five of the pollutants specified in the permit. \(^{86}\) From 1982-1984, Gwaltney installed certain equipment in an attempt to conform to the limitations of the permit. \(^{87}\)

Gwaltney's last substantial violations occurred on May 15, 1984, after it had installed new equipment. \(^{88}\) Chesapeake Bay Foundation (Chesapeake) instituted a suit against Gwaltney, claiming that Gwaltney had and would continue to violate the permit in the future. \(^{89}\) In response, Gwaltney moved for dismissal of the suit, claiming that it had not been in violation of the CWA when Chesapeake brought the suit. \(^{90}\) The district court rejected Gwaltney's argument, concluding that section 505 authorizes citizens to bring enforcement actions on the basis of wholly past violations. \(^{91}\) Consequently, the court concluded that whether Gwaltney was "in violation" at the time of the suit was irrelevant to its decision. \(^{92}\) The Fourth Circuit affirmed the district court's holding. \(^{93}\) The Fourth Circuit's ruling resulted in a three-way circuit split as to when violations must occur for the court to permit citizen suits. \(^{94}\)

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86. See id. (noting Gwaltney's violations). Specifically, Gwaltney violated its total Kjeldahl nitrogen (TKN) limitation 87 times, its chlorine limitation 34 times, and its fecal coliform limitation 31 times between 1981 and 1984. Id. Three of the most substantial violations involved fecal, coliform, chlorine, and TKN. Id.

87. See id. at 53-54 (describing Gwaltney's installment of new equipment). Gwaltney installed new equipment to improve its chlorination system in 1982, and its last reported chlorine violation occurred in October 1982. Id. This chlorination system also helped to control the discharge of fecal coliform, thus Gwaltney's last fecal coliform violation was in February 1984. Id. In addition, Gwaltney installed an upgraded wastewater treatment system in October 1983; its last recorded reported TKN violation occurred on May 15, 1984. Id.

88. See id. at 54 (describing actions that Gwaltney took to prevent itself from violating limitations set by its NPDES permit and results of its actions).

89. See id. (describing Respondents, Chesapeake Bay Foundation and Natural Resources Defense Council's allegations against Petitioner, Gwaltney).

90. See Gwaltney, 484 U.S. at 55 (stating that Gwaltney moved to dismiss suit). The District Court had held that § 505 allows citizens to bring enforcement actions on the basis of wholly past violations. Id. The Court of Appeals affirmed the District Court's decision, and concluded that § 505 "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present." Id. at 56.

91. See id. at 56 (rejecting Gwaltney's argument).

92. See id. at 55 (determining Gwaltney was in violation).

93. See id. at 56 ("... § 505 'can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present.'") (quoting Gwaltney v. Smithfield, 791 F.2d 304, 309 (4th Cir. 1986)). The Fourth Circuit held that § 505 of the CWA could be interpreted to allow citizen suits for violations that occurred only prior to the filing of the suit, as well as unlawful conduct occurring in the present. See Gwaltney, 791 F.2d at 309.

94. See id. (describing three way split). The Supreme Court granted certiorari to resolve the conflicts between the First, Fourth and Fifth Circuits. Id. The First Circuit held that the courts have jurisdiction under § 505 when "the citizen-plain-
The Supreme Court granted certiorari to resolve the circuit split and held that the Fourth Circuit incorrectly concluded that respondents could bring an action based on wholly past violations of the CWA. In reaching its decision, the Supreme Court evaluated methods of interpreting section 505. Specifically, the Court addressed the point at which the violation must occur so that a citizen can bring suit against the violator. By looking at the statute itself and the Senate and House Reports regarding section 505, the Court analyzed the meaning of the statute. The Supreme Court highlighted Congress' intention for the states to bring the majority of suits under the CWA and that citizen suits are proper only "if the Federal, State and local agencies fail to exercise their enforcement responsibility." Ultimately, the Supreme Court in Gwaltney held that the CWA permitted citizen suits for violations, so long as the plaintiff alleged ongoing noncompliance.

2. *Friends of the Earth, Inc. v. Laidlaw*

In 2000, the Supreme Court decided *Laidlaw*, which held that a citizen suit is not moot when the defendant has complied with its permit. The defendant, Laidlaw Environmental Services (Laidlaw), bought a hazardous waste incinerator which included a waste-

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95. See *Gwaltney*, 484 U.S. at 67 (criticizing Fourth Circuit's holding).
96. See id. at 56-64 (analyzing language of § 505 of CWA).
97. See id. at 57. "The most natural reading of "to be in violation" is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation . . . ." Id.
98. See id. (maintaining that courts should first look at language of statutes to interpret them).
100. See *Gwaltney*, 484 U.S. at 65 (determining when citizen suits are permitted under CWA). The Supreme Court concluded that, "[t]he bar on citizen suits when government enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." Id. at 61.
101. See *Laidlaw*, 528 U.S. at 173-74 (stating that appellate court erred when deciding that citizen suitor's claim for civil penalties must be dismissed as moot when defendant has come into compliance after commencement of litigation).
water treatment plant. That same year, the South Carolina Department of Health and Environmental Control (DHEC) granted Laidlaw an NPDES permit to discharge treated water into the North Tyger River. After receiving the permit, Laidlaw began discharging pollutants into the North Tyger River, yet it repeatedly violated the limitations set by the permit. Laidlaw last violated the permit in January of 1995, after the plaintiffs had filed their complaint and two years before the court’s judgment. The Fourth Circuit held that the case was moot because the remedies available to the plaintiffs could not redress the injuries the defendants caused.

The Supreme Court reversed the Fourth Circuit’s ruling, concluding that the Fourth Circuit incorrectly held that courts must dismiss a citizen suitor’s claim for civil penalties as moot when a defendant has come into NPDES compliance after the litigation had already begun. The Court’s ruling in Laidlaw added depth to its previous opinion in Gwaltney.

102. See id. at 174 (stating facts of case).
103. See id. at 176-77 (describing South Carolina’s DHEC permit).
104. See id. at 177 (describing Laidlaw’s violations of permit). In addition to repeatedly exceeding the limitations set by the permit, Laidlaw also repeatedly failed to meet the permit’s daily average limit on mercury discharges. Id.
105. See id. at 178 (stating when Laidlaw violated permit).
106. See Laidlaw, 528 U.S. at 179 (stating Fourth Circuit’s holding).
107. See id. at 195 (reversing Fourth Circuit’s decision). The Supreme Court remanded the case for further proceedings consistent with its opinion. Id. In making its decision, the Supreme Court addressed whether the plaintiffs possessed standing, whether the issue was moot, and whether the citizens were barred from bringing the suit under the CWA. Id. at 180-94. The Fourth Circuit had relied on the Supreme Court’s decision in Steel Co., claiming that the case had become moot because civil penalties payable to the government were the only remedies available to Friends of the Earth, which would not redress Friends of the Earth’s injuries. See id. at 173-74. The Supreme Court contended that the Fourth Circuit incorrectly applied its decision in Steel Co. to the facts in Laidlaw. See id. at 187-88. The Supreme Court claimed that the facts in Steel Co. differed from those in Laidlaw because in Steel Co., the plaintiffs did not allege a continuing or imminent violation. Id. Unlike in Laidlaw, the Supreme Court never reached the issue of standing in Steel Co. Id. at 188. In Steel Co., the Supreme Court did not address whether plaintiffs can seek penalties for violations that are continuing at the time of the complaint and could continue into the future. Id.
108. See id. (comparing decisions in Laidlaw and Gwaltney). In Gwaltney, the Court decided that § 505 does not permit citizen suits for wholly past violations, yet the plaintiffs made a good faith allegation that the violation was continuous or intermittent, so the Court remanded the case for further consideration. Id. at 64.
3. *Jones v. City of Lakeland*¹⁰⁹

The issue of citizen suit provisions under the CWA also arose in *Jones*.¹¹⁰ In this case, the plaintiffs, landowners along Oliver Creek, brought a suit against the City of Lakeland, Tennessee (Lakeland), alleging that Lakeland continuously discharged toxic, noxious and hazardous substances into Oliver Creek in violation of Lakeland’s NPDES permit.¹¹¹ Lakeland claimed that because the TDEC and the Tennessee Water Control Board were already “diligently prosecuting” an action against the City to require compliance with its permit, it precluded the plaintiffs’ actions under Title 33 U.S.C. Section 1365(a).¹¹² The Sixth Circuit rejected Lakeland’s argument, explaining that a citizen suit is precluded only if the EPA Administrator or a state is diligently prosecuting an enforcement action in a court of the United States.¹¹³

Next, the court focused on whether Title 33 U.S.C. Section 1319(g)(A) precluded the plaintiffs’ action against Lakeland.¹¹⁴ Under section 1319(g)(A), the Sixth Circuit analyzed whether the state enforcement provision was comparable to the federal enforcement provision.¹¹⁵ The court concluded that the Tennessee statutes were not comparable to Title 33 U.S.C. Section 1365 (a)(1)(b) and/or Title 33 U.S.C. Section 1319(g)(6) because the Tennessee statutes deny citizens access to the courts and the opportunity to participate at certain stages of the administrative process.¹¹⁶ Consequently, the Sixth Circuit held that the plaintiffs’ action was not barred and thus, remanded the case.¹¹⁷

¹⁰⁹. 224 F.3d 518 (6th Cir. 1999).
¹¹⁰. See McAbee v. Payne, 318 F.3d 1248, 1253-1254 (2003) (noting that issue of citizen suit provisions under the CWA also arose in *Jones v. City of Lakeland*).
¹¹¹. See *id.* at 521 (describing plaintiff’s allegations).
¹¹². See *id.* at 520 (noting Lakeland’s defense).
¹¹³. See *id.* at 522 (rejecting defendant’s argument). In rejecting Lakeland’s argument, the Sixth Circuit adopted the Second Circuit’s reasoning in *Friends of the Earth*. *Id.*
¹¹⁴. See *Jones*, 224 F.3d at 523 (discussing preclusion of citizen suits). 33 U.S.C. § 1319(g)(A) states that if a state has begun or is diligently prosecuting an action under a comparable state law, a citizen cannot bring a suit against the alleged violator. *Id.*
¹¹⁵. See *id.* (analyzing state and federal enforcement provisions).
¹¹⁶. See *id.* at 524 (concluding that state statute is not comparable to prosecution under Act).
¹¹⁷. See *id.* (stating that Fed. R. Civ. P. 12(b)(1) and 12(b)(6) do not bar plaintiffs’ action).
IV. NARRATIVE ANALYSIS

In Ailor, the Sixth Circuit considered whether to uphold the district court's grant of the City's motion for summary judgment.¹¹⁸ The court first considered the validity of Ailor's CWA claim, specifically addressing whether Ailor had standing to bring suit and whether Ailor's claim was moot.¹¹⁹ Next, the court examined Ailor's RCRA claim against the City.¹²⁰ Finally, the Sixth Circuit affirmed the district court's holding granting the City's motion for summary judgment.¹²¹

First, the Sixth Circuit described the CWA and Congress' reasons for enacting it.¹²² Specifically, the court addressed how the section 505 citizen suit provision functioned under the CWA.¹²³ The Sixth Circuit maintained that "citizen suits are merely intended to supplement, not supplant, enforcement by state and federal government agencies."¹²⁴ As a result, the court determined that the CWA "does not permit citizen suits for wholly past violations."¹²⁵ Further, the Sixth Circuit noted that in Jones it held that an action under the Tennessee Water Quality Control Act is not comparable to federal statutes.¹²⁶ As such, a proceeding before TDEC is not a "court enforcement" for purposes of sections 1319(g) and 1365(a).¹²⁷

After its analysis, the court determined that Ailor raised both standing and mootness issues because the State of Tennessee had previously ordered the City to install a new wastewater treatment plant to bring the plant into compliance with the NPDES permit

¹¹⁸. See Ailor v. City of Maynardville, Tennessee, 368 F.3d 587, 595 (6th Cir. 2004) (maintaining that Sixth Circuit will review district court's grant of summary judgment de novo).
¹¹⁹. See id. at 595-601 (examining whether Plaintiffs had standing to bring suit under CWA and whether issue was moot).
¹²⁰. See id. at 601 (examining RCRA claim).
¹²¹. See id. (affirming district court's decision). The court reviewed the district court's grant of summary judgment de novo. Id. at 595.
¹²². See id. at 590-91 (describing background and requirements of Clean Water Act).
¹²³. See Ailor, 368 F.3d at 590-91 (explaining how citizen suit provision fits into Clean Water Act).
¹²⁴. See id. at 590 (citing Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)) (determining that citizen suits should supplement agency action).
¹²⁵. See id. (quoting Gwaltney, 484 U.S. at 64) (holding that citizen suits are precluded for wholly past violations).
¹²⁶. See id. at 602 (noting that Tennessee Water Quality Control Act is not comparable to 33 U.S.C. § 1365(a)(1)(B) and/or 33 U.S.C. § 1319(g)(6)(A)(ii)).
¹²⁷. See id. at 602 (reiterating Sixth Circuit's holding in Jones).
before Ailor brought the federal action.\textsuperscript{128} The Sixth Circuit indicated that if a court could no longer provide "meaningful relief," the case is moot because it is not likely that the court can redress the injury by bestowing a favorable decision.\textsuperscript{129} The court concluded that it was arguable whether the plaintiffs had properly alleged continuing violations, but that it would assume standing.\textsuperscript{130}

Next, the Sixth Circuit examined whether Ailor’s claim was moot.\textsuperscript{131} The court maintained that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."\textsuperscript{132} The Sixth Circuit determined that Ailor’s claim was moot because, during the seven years previous to Ailor’s giving notice of the suit to the City, the State of Tennessee was supervising remedial efforts to prevent violations of the NPDES permit.\textsuperscript{133} Furthermore, the court concluded that when the plaintiffs brought suit against the City, they no longer had an "injury in fact" that was "actual or imminent" because by this point in time "the City had installed and made operational a new wastewater treatment plant . . . to bring it into compliance with its NPDES permit."\textsuperscript{134} The Sixth Circuit added, "... but for the fortuity of four minor discharges in February, March, and May of 2001, Lynch clearly lacked standing, because the relief requested in the complaint was by that time for wholly past violations."\textsuperscript{135} When assessing whether the district court made the proper decision regarding standing, the Sixth Circuit compared Ailor to Gwaltney, noting that

\textsuperscript{128} See Ailor, 368 F.3d at 596-97 (determining that case concerns both standing and mootness issues). Because events occurred after the lawsuit, thereby depriving the court of the ability to give meaningful relief, the case involved mootness and standing concerns. \textit{Id.}

\textsuperscript{129} See \textit{id}. at 596 (describing mootness).

\textsuperscript{130} See \textit{id}. at 599 (concluding that standing is assumed for plaintiffs).

\textsuperscript{131} See \textit{id}. at 599-601 (examining mootness).

\textsuperscript{132} See Ailor, 368 F.3d at 596 (citing Powell v. McCormack, 395 U.S. 486 (1969)). The Sixth Circuit continued to explain that "if events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed." See \textit{id}. (citing Al Najjar v. Ashcroft, 273 F.3d 1390 (11th Cir. 2001)).

\textsuperscript{133} See \textit{id}. at 599-601 (concluding that Plaintiffs’ issue is moot).

\textsuperscript{134} See \textit{id}. at 600 (concluding that Plaintiffs no longer possessed "injury in fact"). ("[T]he case is moot, because the injuries suffered in the complaint had been remedied by events subsequent to the filing of the lawsuit, with no showing of a reasonable likelihood of recurrence."). \textit{Id.}

\textsuperscript{135} See \textit{id}. at 596-97 (determining that Lynch lacked standing because she alleged past violations).
the plaintiffs in both cases failed to file suit in federal court until several weeks after the last recorded violation.136

The Sixth Circuit quoted the Supreme Court in Gwaltney stating that “the most natural reading of ‘to be in violation’ is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”137 It asserted that the citizen suit provision does not indicate that plaintiffs must prove past violations.138 The court used the Supreme Court’s reasoning in Gwaltney to support its theory that the citizen suit provision of the CWA required that the citizen-plaintiff prove that the violation is presently occurring or will occur in the future.139

V. CRITICAL ANALYSIS

The main issues in Ailor were: (1) whether the plaintiffs had standing; (2) whether the issue in the case was moot; and (3) whether the plaintiffs had the authority to bring a suit against the City of Maynardville under the CWA.140 The standing and mootness issues are very much intertwined with the plaintiffs’ ability to bring a suit under the CWA.141

A. Did the Plaintiffs Have Standing?

First, the Sixth Circuit concluded that both plaintiffs lacked standing to bring the suit.142 Then, the court followed the Supreme Court’s guidance in Gwaltney and examined the complaint to see if it included “good faith allegations of continuous or intermittent violations.”143 After examining the complaint, the court approriately concluded that Lynch possessed standing, while Ailor

136. See id. at 597 (determining that facts in Ailor were similar to facts in Gwaltney).
137. See Ailor, 368 F.3d at 597.
138. See id. at 597 (quoting Gwaltney, 484 U.S. at 57).
139. See id. (explaining that citizen suits cannot be brought if violation wholly occurred in past).
140. See id. The cases of Gwaltney, Laidlaw and Jones are helpful in evaluating the Sixth Circuit’s opinion in Ailor. See generally Gwaltney, 484 U.S. 49 (1987); Laidlaw, 528 U.S. 167 (2000); Jones, 224 F.3d 518 (2000) (involving citizen suit provision of CWA in each and when CWA bars these suits).
142. See Ailor, 368 F.3d at 599.
143. See id. (citing Gwaltney, 484 U.S. at 64).
did not. This is because Lynch owned land when she filed suit, while Ailor did not.

The Ailor court likened the facts of the case to those in Gwaltney and concluded that the Supreme Court's holding in Gwaltney strengthened the district court's finding that Ailor's standing was problematic. The Supreme Court previously stated that the CWA's "to be in violation" requirement implies that the plaintiffs must allege a reasonable likelihood that the violator will continue to violate in the future. The Sixth Circuit abruptly concluded that there was no evidence of any violation by the City since November 2000. Despite this conclusion, the court did not recognize that the plaintiffs initially filed suit against the City in state court on January 30, 1998.

B. Was the Issue in Ailor Moot?

The Sixth Circuit failed to consider precedent when it held that the issue in Ailor was moot. In reaching its decision, the

144. See id. at 601-02 (Cole, J., dissenting). The dissenting opinion agreed with the majority's opinion regarding the standing issue. See id. Judge Cole stated that the court correctly dismissed Ailor's suit because Ailor did not have standing, yet the judge believed that the court should have let Lynch proceed to trial. Id. When Ailor and Lynch filed the federal suit on May 16, 2001, Ailor did not own the property that he alleged was adversely affected the City's polluting of the waters. Id. at 597 n.5.

145. See id. at 596. The Sixth Circuit appropriately held that "he [Ailor] no longer had an injury in fact that is fairly redressable by a favorable decision since the CWA does not permit citizen suits for wholly past violations. Id. at 597 n.5.

146. See id. at 597 (comparing facts of Gwaltney to those in Ailor).

147. See Gwaltney, 484 U.S. at 57 (describing "to be in violation" requirement).

148. See Ailor, 368 F.3d at 599 (noting that City had not violated its permit since November 2000).

149. See id. at 593 (failing to recognize plaintiffs' initial filing date).

150. See id. at 596 (claiming that when plaintiffs' suit was initiated they no longer possessed injury in fact that was actual or imminent). The dissenting opinion presented how to correctly analyze the mootness issue. See id. Judge Cole concurred in part and dissented in part with the majority's decision. See id. at 601-02 (Cole, J., dissenting). In dissent, Judge Cole first analyzed the mootness claim by emphasizing that as the Supreme Court stated in Laidlaw, the defendant must satisfy the heavy burden of demonstrating that it is absolutely clear the alleged violations could not reasonably be expected to recur. Id. at 601 (citing Laidlaw, 528 U.S. 167). Further, the judge explained that the City did not meet its burden of proving that the violation will not recur, emphasizing that the Record may have improved the conditions in the plant, but did not definitively establish that the City's violations would not occur again. Id. at 601-02. Judge Cole explained that the City failed to meet the burden the Supreme Court had established in Laidlaw because the state merely "warned of the new plant's 'very limited digester capacity'" six months after the plaintiffs filed suit. Id. at 602. In addition, the judge claimed that "[a]n undefined probability that current plant deficiencies may be cured in the future falls short of the City's burden under Friends of the Earth." Id. Judge Cole also indicated that due to the City's history of non-compliance with its
Sixth Circuit misinterpreted the Supreme Court’s holding in *Laidlaw*, thereby disregarding Supreme Court precedent. To justify its conclusion that the claim was moot, the court distinguished the facts in *Ailor* from those in *Laidlaw*. Additionally, the Sixth Circuit claimed that even though the City was not subject to a court order, Ailor’s claims were moot because the City’s conduct was not voluntary, as it was in *Laidlaw*.

NPDES permits, the City’s six months of compliance with the permit did not establish that the City would not again violate the permits. *Id.* Judge Cole attacked the majority’s emphasis on the fact that the City’s last violation occurred on May 2001, noting that the court granted summary judgment only six months after the last violation occurred. *Id.* The judge added that the state had reported in November that “during the winter and spring . . . the flows may be much higher.” *Id.* Based on the fact that the last violation had only occurred in November and the flows would be higher in other seasons, the judge concluded that the City had not made it “absolutely clear” that it would not violate the permits in the future. *Id.* Finally, the dissent concluded that under *Jones*, the state of Tennessee’s determination that the City substantially complied with its permit did not shield the City from citizen suits. *Id.* The Sixth Circuit noted that “[m]ootness addresses whether the plaintiff continues to have an interest in the outcome of the litigation.” See *id.* at 596 (citing *Cleveland Branch, NAACP v. City of Parma, Ohio*, 263 F.3d 513, 525 (6th Cir. 2001)). The Sixth Circuit clarified its explanation of mootness by explaining that, “if events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed.” *Id.* (citing *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001)).

151. See *id.* at 600 (distinguishing *Laidlaw* from *Ailor*). The court explained that in *Laidlaw*, the citizens brought the suit before a state action, while, in *Ailor*, the state had prompted the City to remedy the problem and the city had fixed the problem before the Ailor brought suit. *Id.*

152. See *id.* (rationalizing that issue is moot). The Sixth Circuit concluded that because the citizen suit in *Laidlaw* was instituted before any state agency’s actions, there was a genuine concern in *Laidlaw* that the defendant would return to its old ways. See *id.* The court claimed that the suit in *Ailor* was not truly supplementary because its “conduct was certainly not ‘voluntary’ in the same sense as the defendant polluter in *Laidlaw.*” *Id.*

153. See *Ailor*, 368 F.3d at 600 (concluding that plaintiffs’ claims were moot because defendants’ actions were not voluntary). In *Laidlaw*, the Fourth Circuit held that the plaintiff had initial standing to bring the action, yet the issue in the case was moot. See *Laidlaw*, 528 U.S. at 173-74. The Supreme Court reversed the decision of the Fourth Circuit and remanded the case for further proceedings consistent with the Supreme Court’s opinion, explaining that a case is not moot when the defendant came into compliance with the CWA after commencement of the case. *Id.* (“The appellate court erred in concluding that a citizen suitor’s claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance.”). In setting forth its opinion in *Laidlaw*, the Supreme Court reiterated its holding in *United States v. Concentrated Phosphate Export Ass’n, Inc.*, 273 F. Supp. 263 (1967), which set forth the standard for determining whether a defendant’s voluntary conduct moots a case. See generally *id.* The Court explained the standard by emphasizing that, “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.” *Id.* at 189.
In its *Laidlaw* opinion, the Supreme Court frequently noted that compliance with the permit requirements or closure of the facility would render the case moot only if "one or the other of these events made it absolutely clear that Laidlaw's permit violations could not be reasonably expected to occur."\(^{154}\) The Sixth Circuit inappropriately applied *Laidlaw* to *Ailor* because the facts in *Ailor* did not make it absolutely clear that the violations would not occur again.\(^{155}\) Thus, the court should not have ruled in favor of the City unless it was *absolutely certain* that the City would not violate its permit in the future.\(^{156}\) If the Sixth Circuit had considered precedent, it would have concluded that the issue in *Ailor* was not moot because the City failed to make it absolutely clear that it would not continue violating its NPDES permit in the future.\(^{157}\) By not doing so, the court failed to appropriately apply precedent to the record.\(^{158}\)

The City did not make it absolutely clear that it would not continue to violate its NPDES permit.\(^{159}\) The Sixth Circuit tactfully sidestepped confronting the City's violations in February, March and May of 2001 by asserting that the City was in compliance with the permit in November of 2001, when the City requested summary judgment.\(^{160}\) The "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*"\(^{161}\) Thus, it was the City's burden to prove that the issue was moot and that the City had completely discontinued violating its NPDES permit.\(^{162}\) The City failed

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154. See *Laidlaw*, 528 U.S. at 193 (citing *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)) (emphasis added).

155. See *Ailor*, 368 F.3d at 601-02 (Cole, J., dissenting) (stating that defendants did not prove that violations would not occur again).

156. See id.

157. See id. In the Appellants' Brief, the Appellants noted, "[i]t is interesting that the defendant continues to insist that it is in compliance with its NPDES permit despite the fact that the defendant admits it was in violation after the plaintiffs gave their statutorily-required pre-filing notice and even during the month in which this action was commenced." See Brief of Appellant at 3; *Ailor*, 368 F.3d 587 (6th Cir. 2004).

158. See *Ailor*, 368 F.3d at 601-02 (Cole, J., dissenting) (mentioning court's failure to appropriately interpret record).

159. See id. at 602 (noting that City's period of compliance was fairly brief, given the City's years of chronic violations).

160. See id. at 599-600 (determining that defendants established that City complied with NPDES permit, at the time of summary judgment in November 2001).


162. See *Ailor*, 368 F.3d at 601-02 (Cole, J., dissenting) (noting City's burden).
to meet this burden; therefore, the court improperly granted summary judgment to the City.\(^{163}\)

C. Did the Plaintiffs Have the Authority to Bring a Suit Against the City of Maynardville Under the CWA?

The Sixth Circuit's 2000 holding in *Jones* is especially germane to its subsequent opinion in *Ailor*.\(^{164}\) In *Ailor*, the Sixth Circuit failed to address how it should interpret its previous holding in *Jones* in light of the facts in *Ailor*.\(^{165}\) The court referenced *Jones* twice in its opinion, but neither time did it grapple with how to apply *Jones* to the case at hand.\(^{166}\) In *Jones*, the Sixth Circuit emphasized that the citizen suit under the CWA was not precluded because the Tennessee Water Quality Control Board (TWQCB) and the TDEC did not rise to the level of a federal or a state court, as is specified under the CWA provisions noting the bars to citizen suits.\(^{167}\) In *Ailor*, the very same administrators, the TDEC and the TWQCB, took actions against the City, yet the Sixth Circuit quickly deemed Ailor's claim moot before even arriving at the analysis under the CWA.\(^{168}\) The Sixth Circuit's decision in *Ailor*, therefore, loosely interpreted the Sixth Circuit's decision in *Jones*.\(^{169}\)

\(^{163}\) See id. at 602 (maintaining that City failed to meet burden of proof).

\(^{164}\) See id. (noting that Sixth Circuit made it clear in *Jones* that approval from state of Tennessee did not automatically bar private individuals from seeking to enforce federal clean-water statutes).

\(^{165}\) See id. at 601-02 (lacking interpretation of its previous holding in *Jones*).

\(^{166}\) See id. at 590-91 (citing *Jones* for proposition that agency suits trump CWA's citizen suit provision when they are initiated prior to the commencement of citizen's suit, are diligently prosecuted and are brought in court of United States or any state court). *Id.* at 594 (recognizing that district court claimed *Jones* holding did not preclude citizen suit under CWA in *Ailor*).

\(^{167}\) See *Jones*, 224 F.3d at 518-22 (6th Cir. 1999) (concluding that actions by TDEC and TWQCB are not comparable to action in federal or state courts).

\(^{168}\) See *Ailor*, 368 F.3d at 599 (agreeing with district court's opinion that "it is undisputed that the expansion of the treatment plant has remedied the overflow problem, since there is no evidence that any overflow has occurred since November 2000."). In *Ailor*, it was the Commissioner of the TDEC who initially commenced an action against the City. *Id.* at 592. The Commissioner concluded that the City had violated Tennessee Code § 69-3-108(b)(3) and (6) because the City had discharged wastes in excess of what its NPDS permit allowed. *Id.* at 591. Then, the TWQCB held meetings and hearings with the City in order to create an Order penalizing the City and mandating that the City take certain corrective actions. See *id*.

\(^{169}\) See id. at 600-01 (distinguishing *Laidlaw* from *Ailor*). In *Laidlaw*, the defendant Laidlaw bought a hazardous waste incinerator, which included a wastewater treatment plant. 528 U.S. at 175 (describing facts of case). After Laidlaw bought the plant, the South Carolina Department of Health and Environmental Control (DHEC) granted Laidlaw a NPDES permit, which permitted Laidlaw to discharge treated water into the North Tyger River. *Id.* at 175-76. Despite receiving its NPDES permit, Laidlaw repeatedly violated its permit by frequently exceed-
VI. Impact

The impact of the Sixth Circuit's decision in *Ailor* by itself may not be far-reaching. Nevertheless, if the circuit courts and the Supreme Court continue to set this high standard for citizen-plaintiffs under the CWA, the number of citizen suits brought under the CWA will likely diminish.\(^{170}\) Since Congress has permitted citizen suits under the CWA, the judiciary has more frequently used a "skeptical eye" to decide the ability of citizens to bring suit.\(^{171}\) This skepticism towards private enforcement will undermine the function of citizen suits.\(^{172}\) If the judiciary increasingly undermines citizen suits under federal environmental laws, the citizen suit provision will have no practical use.\(^{173}\) Furthermore, if the courts continuously forbid citizen enforcement of environmental suits, citizen suits will accomplish nothing and the environment will suffer as a result.\(^{174}\) Because citizen suits arise from a concern for the public welfare, they add strength that agency enforcement does not.\(^{175}\)

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\(^{170}\) Id. at 179. Friends of the Earth ("FOE") sent a letter to Laidlaw, giving sixty-day notice of FOE's intent to sue. *Id.* at 176. After receiving notice from FOE, Laidlaw's lawyer contacted DHEC to ask DHEC if they would file suit against FOE. *Id.*


\(^{172}\) *See* The Environmental Law Institute, *Citizen Suit*, 20 Envtl. Forum 2, at 3 (2003), available at http://64.233.167.104/search?q=cache:rqt8Ffbc8Ss:www.tlpj.org/News_PDF/hecker_profile.pdf+%22citizen+suit%22+and+effect&hl=en ("... [T]he judiciary has become more conservative, and more hostile to private enforcement of public rights and public remedies associated with statutory causes of action. A series of Supreme Court decisions has cast a skeptical eye toward such private enforcement.").

\(^{173}\) *See* id. (claiming that courts enforcement will undermine citizen suits).


\(^{175}\) *See* Eilperin, *supra*, note 1 (stating that enforcement is not a priority for administration, which is doing little deter polluters from breaking the law).