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As a matter of law, plaintiff cannot demonstrate that Amerace was in violation of any provision of the Act when this action was initiated. Thirteen months prior to that time, Amerace had ceased being the plant's owner or operator, and thus could not have been in violation of any affluent standard or limitation. Although the plant may have been in continuous violation of the Clean Water Act during the period it was owned by both Amerace and Harvard, Amerace was no longer in violation of the Act when plaintiffs commenced this action.

This conclusion is consistent with *Gwaltney*. In *Gwaltney*, the Court held that "the interest of the citizen-plaintiff is primarily forward-looking.... [T]he harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id.* at 318. In accordance, the Court found that the "citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from provisions authorizing agency enforcement." *Id.* Also, the purpose of section 505's notice provision requiring citizens to give alleged violators 60 days notice of their intent to sue, "is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Id.* at 319.

Thus, since including Amerace in this citizen suit can have no prospective effect (even if the plant has in fact been in continuous violation of the Act), it follows that Amerace - as past owner and operator and wholly past violator - is not a proper defendant. [FN2] For example, since Amerace no longer owns or operates the plant, there is no possibility of injunctive relief against it. Also, giving Amerace 60 days notice before commencing this action was superfluous because by that time Amerace was unable to initiate any additional measures to bring the plant into compliance.

Furthermore, in *Gwaltney*, the Court noted that principles of mootness protect defendants "from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing." *Id.* at 323. The mootness doctrine is applicable if defendant can "demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (emphasis added). *Id.* Here, Amerace is covered by the mootness doctrine since it no longer controls the ESNA plant, and therefore, it could not reasonably be expected to repeat its past violations of the Act.

#### B. Harvard

Just as *Gwaltney* forecloses plaintiffs' citizen suit against Amerace for its wholly past violations, as a matter of law, Harvard cannot be held liable for those same violations. Given *Gwaltney*, it would be anomalous to hold Harvard liable for Amerace's violations when Amerace itself could not be held liable for such violations. Moreover, plaintiff's argument that Harvard is liable for

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Amerace's alleged violations of the Act pursuant to principles of successor liability is flawed. Thus, Harvard's motion to dismiss the second amended complaint to the extent that it alleges that Harvard is liable for violations of the Clean Water Act prior to April 12, 1985 must be granted.

Plaintiffs argue that in the absence of any reference to successor liability in either the Act or the legislative history, the contractual agreement between Amerace and Harvard assigning liability to Harvard for Amerace's debts and obligations due or unperformed at the time Harvard purchased the plant should not be disturbed. Plaintiffs' Brief in Opposition to Motions to Dismiss and In Support of Partial Summary Judgment ("Plaintiffs' Brief") at 18. According to plaintiffs, Amerace's Clean Water Act violations were such liabilities. However this is incorrect. As demonstrated above, Amerace's liability for violations of the Clean Water Act under the Act's citizen suit provision was extinguished when its ownership and control of the plant were transferred to Harvard. Thus, Harvard did not acquire Amerace's citizen suit liabilities under the Clean Water Act because no such liabilities existed upon its purchase of the ESNA plant.

In support of their argument that Harvard contractually assumed Amerace's liability for civil penalties resulting from a citizen suit under the Act, plaintiffs wrongly rely on *Philadelphia Electric Company v. Hercules, Inc.*, 76 F.2d 303 [15 ELR 205541 (3d Cir. 1985), cert. denied, 474 U.S. 980 (1985)]. In *Hercules* the court, sitting in diversity, held that under Pennsylvania law a successor corporation can be held responsible for a predecessor's liability in connection with environmental contamination where

(1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation de facto merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability.

Id. at 308.

Plaintiffs only argue that Harvard is liable for Amerace's violations of the Clean Water Act because Harvard contractually agreed to assume Amerace's liability. However, even assuming that such liability existed after Harvard purchased the plant, plaintiffs point to no evidence in the Clean Water Act or its legislative history demonstrating that Congress intended such liability to be assumable.

Instead, any civil penalties assessed against persons in violation of the Act are not transferable because such penalties are penal. See, e.g., *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) ("actions on penal statutes do not survive" person's death) (still the law); *Murphy v. Household Finance Corp.*, 560 F.2d 206, 209 (6th Cir. 1977); *United States v. Edwards*, 667 F. Supp. 1204, 1211-1215 (W.D. Tenn. 1987); *Porto v. Household Finance Corp.*, 385 F. Supp. 336 (S. Ohio 1074). In *Huntington v. Attrill*, 146 U.S. 657, 661 (1892), the Court not

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that "[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be readdressed is a wrong to the public or a wrong to the individual." In *Murphy*, the Sixth Circuit articulated a three-factor test to determine whether actions are penal for the purpose of determining survivability:

(1) whether the purpose of the statute was to address individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered. 560 F.2d at 209. This test is appropriate to determine whether Clean Water Act citizen suit civil penalties are assumable.

Applying the *Murphy* test demonstrates that Clean Water Act citizen suit penalties are not assumable. I agree with the conclusion reached in *Edwards* that the civil penalty provisions of the Clean Water Act are penal: the wrong involved is to the public, and civil penalties are paid to the government. [FN3] 66'7 F. Supp. at 1213-14. Consequently, even assuming that under the Harvard-Amerace purchase agreement's terms Harvard is liable for Amerace's Clean Water Act violations, as a matter of law, this contractual assignment of liability is void.

In *United States v. Metropolitan District Commission*, 23 E.R.C. 1350 [16 ELR 206211 (D. Mass. 1985)], the court held the Massachusetts Water Resources Authority liable for pollution discharge permit violations committed by its predecessor. However, *Metropolitan* is easily distinguishable from the instant action. In *Metropolitan*, the general federal rules on successor liability attached because the Massachusetts Water Resources Authority "was a mere continuation or reincarnation of the old corporation." *Id.* at 1362 (quoting *Cr v. B. Offen & Co.*, 501 F.2d 1145, 1152 (1st Cir. 1974) ("if as a group the same employees continue, without pause to produce the same products in the same plant, with the same supervision, the ownership of the entity which maintains essentially the same name cannot be the sole controlling determinant of liability," *id.* at 1154)). In the action here, plaintiffs have not alleged that Harvard is merely a continuation of Amerace; nor have plaintiffs alleged \*2039 that Harvard's purchase of Amerace's assets amounts to a consolidation or de facto merger, or was part of a fraudulent scheme to escape liability.

Finally, plaintiffs advance imposing successor liability because it would jeopardize no Clean Water Act policies, but would further the Act's deterrence purpose. Plaintiffs' Brief at 26. Plaintiffs argue that applying successor liability would encourage the identification and abatement of ongoing violations when assets are transferred. However, they ignore the fact that in *Gwaltney* the Supreme Court de-emphasized the Act's deterrence purpose - i.e., the Court prohibited Clean Water Act citizen suits for wholly past violations. [FN4] Although Congress wanted to impose successor liability, it would have clearly stated

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this intent as it did in the Comprehensive Environmental Response Compensation and Liability Act. 42 U.S.C. secs. 9607(a) and 9613(f) (1); see *Smithland & Importation Corp. v. Celotex*, 851 F.2d 86, 89 (3d Cir. 1988). For this court to accommodate plaintiffs and impose a per se rule of successor liability would involve usurping the legislative function.

## II. Rule 11 Sanctions

The Third Circuit narrowly interprets Rule 11. 28 U.S.C. 11. In *Gariado v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1988), the court emphasized that Rule 11 targets "abuse" and was not intended to chill creative legal thinking. "The Rule must not be used as an automatic penalty against an attorney or a party advocating the losing side of a dispute." *Id.* at 482. Recognizing that the Rule is "being used as an instrument of harassment" and that it "has become part of the so-called 'hardball' litigation techniques," the court warned attorneys not to distort the Rule. *Id.* at 484, 485. Rather, it should be invoked only in "exceptional circumstances" where there is strong evidence of bad faith, negligence and professional incompetence. *Id.* Thus, in *Gaiardo*, the court specifically refused to impose Rule 11 sanctions on a litigant who was challenging Pennsylvania's at-will employment policy, even though it was well settled that Pennsylvania did not acknowledge the public policy exception to at-will employment. Imposing Rule 11 sanctions is discretionary. *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191 (3d Cir. 1988).

Amerace asks this court to impose Rule 11 sanctions on plaintiffs. This cannot be done given the stringent requirements the Third Circuit has set for imposing such penalties. Given Amerace's continuous violations of the Clean Water Act while it owned and operated the plant and the fact that these same violations continued after it sold the plant, plaintiff did not act unreasonably, frivolously or in a harassing manner by suing Amerace as well as Harvard. Although I reject plaintiffs' predecessor liability theory, if was not brought frivolously even in light of *Gwaltney*. Moreover, even if there is some credence to Harvard's allegations that the Union's underlying intention is to force Harvard to engage in collective bargaining, there is no evidence that this is plaintiffs' only intention. Plaintiffs include four individual persons who claim to be adversely affected by the violations, the New Jersey State Industrial Union Council, an unincorporated association of over fifty industrial unions that works toward improving occupational safety and community health, and the New Jersey Environmental Federation, a chapter of the Clean Water Project with 7,000 to 8,000 members. The latter is a non-profit organization which engages lobbying and other activities directed at enforcing water pollution laws and reducing human exposure to toxic and potentially hazardous substance.

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## Conclusion

For the foregoing reasons, I grant Amerace's and Harvard's motions to dismiss. As I find that Harvard is not liable for violations occurring prior to April 12, 1989, I deny plaintiffs' motion for partial summary judgment. Also, I deny Amerace's motion for Rule 11 sanctions.

Harvard shall submit an appropriate form of order.

FN1. Plaintiffs are the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and its New Jersey affiliate, Local 726 (collectively, the "Union"), the New Jersey Environmental Federation, a non-profit environmental lobbying group, the New Jersey State Industrial Union Council, an unincorporated association of over 50 industrial unions that seeks to further community safety and health, and four individual union members who claim to be adversely affected by the alleged water pollution violations.

FN2. I recognize that applying the citizen suit provision of the Act to past owners and operators responsible for continuous or intermittent violations which began when the plant was under their control would serve a general deterrence purpose. However, this would also be a reason for holding persons liable for wholly past violations. In Gwaltney the Court did not recognize such a general deterrence purpose in the citizens suit provision of the Clean Water Act, and such a purpose cannot be given effect here.

FN3. This court also agrees with Edwards determination that the third factor identified in Murphy (i.e., whether the civil penalty is disproportionate to the harm suffered) is not critical in the context of Clean Water Act cases. 667 F. Supp. at 1213-14.

FN4. While it is true that the combined effect of defendants' motions is to insulate pre-transfer violations from liability under the Act's citizen suit provision, plaintiffs' position is, nonetheless, inconsistent with the Court's holding in Gwaltney.

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