4. In a decision that should make it more difficult for defendants to secure dismissals on
mootness grounds in citizen enforcement cases, the Supreme Court made clear that such a case is
not (necessarily) moot simply because the defendant’s violations have ended and are unlikely to
recur. Rather, the Court held, the case does not become moot until it is clear that there is no
relief the court could award that would redress the “actual injury” alleged by the citizen plaintiff.
In See [Decker v. Northwest Environmental Defense Center, ___ S.Ct. ___, 2013 WL 1131708
(2013) (discussed in the updates to Chapter 8), a citizen group had filed a Clean Water Act
citizen enforcement suit against a number of logging companies, alleging that they were
discharging contaminated stormwater to surface waters in Oregon without an NPDES permit.
The defendants argued that, under EPA’s longstanding interpretation of its stormwater
regulations, runoff from logging operations does not require a permit. On appeal, the Ninth
Circuit Court of Appeals held that such discharges do require a permit, and the defendants then
appealed to the Supreme Court. EPA then modified its stormwater rules to make clear that
stormwater runoff from logging is not covered, and the defendants (and the United States, as
amicus curiae) argued that the case was now moot, because it was clear that their activities no
longer violated the CWA. All eight members of the Supreme Court deciding the case (Justice
Breyer did not participate in the decision) disagreed:

A case becomes moot only when it is impossible for a court to grant any effectual
relief whatever to the prevailing party. Here, despite the recent amendment, a live
controversy continues to exist regarding whether petitioners may be held liable
for unlawful discharges under the earlier version of the Industrial Stormwater
Rule. …

The parties…have litigated the suit extensively based on the earlier version of the
Industrial Stormwater Rule; and that version governed petitioners' past
discharges, which might be the basis for the imposition of penalties even if, in the
future, those types of discharges will not require a permit.

If the Court of Appeals is correct that petitioners were obligated to secure NPDES
permits before discharging channeled stormwater runoff, the District Court might
order some remedy for their past violations. The Act contemplates civil penalties
of up to $25,000 per day, as well as attorney's fees for prevailing parties. NEDC
[the plaintiff], in addition, requests injunctive relief for both past and ongoing
violations, in part in the form of an order that petitioners incur certain
environmental-remediation costs to alleviate harms attributable to their past
discharges. Under these circumstances, the cases remain live and justiciable, for
the possibility of some remedy for a proven past violation is real and not remote.

2013 WL 1131708 at *8-*9 (citations and internal quotes omitted). Similarly, if a defendant
violates an environmental regulation or permit provision, but comes into sustained compliance
sometime after a citizen plaintiff files an enforcement suit, the court’s ability to award relief that would redress the citizen plaintiff’s injuries (such as remediation of the environmental harm caused by the defendant’s violations) should be sufficient to keep the controversy “live” for Article III purposes. In other words, the issues of whether the defendant’s past conduct violated applicable law, and of what judicial relief is appropriate if such violations are proven, would remain before the court for resolution. Such an approach is consistent with the First Circuit’s *Atlantic Salmon* decision, discussed earlier in this chapter.