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ARTICLES

THE APPLICATION OF THE FEDERAL FIVE-YEAR STATUTE OF LIMITATIONS FOR PENALTY ACTIONS TO WETLANDS VIOLATIONS UNDER THE CLEAN WATER ACT

by Joseph G. Theis*

I. INTRODUCTION

A number of judicial decisions in recent years have considered the application of the general federal five-year statute of limitations for penalty actions under 28 U.S.C. § 2462,1 in the context of environmental regulation.2 One area where the case law is particularly muddied is with respect to the application of 28 U.S.C. § 2462 to violations arising from the discharge of dredged or fill material into wetlands3 and other waters of the United States, which are regulated under § 4044 of the Clean Water Act (CWA).5 A number of courts recently deciding the issue have reached contradictory results as to how 28 U.S.C. § 2462 should be applied to such cases.6

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2. See, e.g., 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994).
3. Wetlands are defined by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” 40 C.F.R. § 230.3(t) (1996); 33 C.F.R. § 328.3(b) (1996).
There are three reasons generally given for statutes of limitations: (1) to ensure fairness to defendants; (2) to enhance the effectiveness and efficiency of the judicial system; and (3) to promote societal stability. With respect to the CWA, there are, however, several factors which argue for a modified approach rather than a strict application of the federal five-year statute of limitations imposed under 28 U.S.C. § 2462. The first is the fact that violations of the CWA, and wetlands violations in particular, are inherently difficult for the government to detect. The second is the fact that the CWA is a remedial statute aimed at “restoring the chemical, physical, and biological integrity of the Nation’s waters,” and applying a strict reading of 28 U.S.C. § 2462 may impede the remedial nature of the statute. Finally, such an approach is more consistent with the long-stated legal principle that statutes of limitations should be strictly construed in favor of the government. Thus, the question of the application of the statute of limitations to dredge and fill violations involves a balancing of the need for defendants and society to be free from the indefinite threat of legal action over unsettled claims, and the objectives of the CWA and the public’s interest in the protection of wetlands.


8. See infra notes 146-60 and 188-94 and accompanying text.


10. See, e.g., Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 288 (N.D.N.Y. 1986) (stating that “[t]o hold that the statute of limitations begins to run when violations actually occur, as opposed to when they are discovered, would impede, if not foreclose, the remedial benefits of the [Clean Water Act].”)


12. For a general discussion of the many benefits provided by wetlands including flood and storm damage control, water purification, habitat for fish and wildlife, and recreational opportunities, as well as the threat posed by the continued destruction of
A number of courts have held in various contexts that the discharge of dredged or fill materials into the waters of the United States constitutes a continuing violation of the CWA, as long as such materials remain in place.\(^{13}\) At least one court has ruled that such a violation is continuous for purposes of the five-year statute of limitations imposed under 28 U.S.C. § 2462 as well.\(^{14}\) Another possibility is that such a violation is not continuing and the statute of limitations begins to run at the time of the initial discharge when all the elements of the violation are met. One court has recently interpreted 28 U.S.C. § 2462 to arrive at this result in the wetlands context.\(^{15}\)

An alternative approach adopted by several other courts with respect to the accrual of dredge and fill violations is to apply a due diligence discovery rule.\(^{16}\) Under this approach, the statute of limitations imposed under 28 U.S.C. § 2462 is deemed to accrue at the time the government knew, or in the exercise of due diligence, should have known of the violations in question. Such an interpretation is again more consistent with the general purposes of the CWA and other environmental statutes, and the principle that statutes of limitations should be strictly construed in favor of the government, than is a strict construction of 28 U.S.C. § 2462. Such an interpretation also provides an objective standard as to when the statute of limitations should apply and

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\(^{13}\) See infra sections III., pt. A.


\(^{15}\) See United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995). It is worth noting here the distinction between the “accrual” of a plaintiff’s claim, and the “tolling” of a statute of limitations, which are often confused. The term “accrual” refers to the date on which the statute of limitations begins to run. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (6th Cir. 1990). While this may be the date on which the initial wrong occurs, federal courts commonly apply a later date — the date when the injury is discovered — to postpone the beginning of the limitations period. \(Id.\) Tolling doctrines, such as the fraudulent concealment doctrine, on the other hand, stop the statute of limitations from running, postponing the effect of the statute even if the accrual date is past and the limitations period would otherwise have expired. \(Id.\)

addresses, to some degree, concerns that a statute of limitations should be applied to provide repose and prevent the prosecution of stale claims.

In addition to the courts’ inconsistent interpretation of the statute of limitations, the courts have also varied with respect to whether 28 U.S.C. § 2462 applies to government claims for injunctive relief under the CWA. Although two courts have recently ruled that the statute applies to government claims for injunctive relief, the vast majority of courts addressing the issue have held that 28 U.S.C. § 2462 does not apply to such claims.\(^{17}\)

Part II of this article examines the regulatory structure of the CWA, provides an overview of the purposes of statutes of limitations, and discusses the general applicability of 28 U.S.C. § 2462 to the CWA. Section III examines case law relating to whether wetlands violations constitute continuing violations in the statute of limitations context. Section IV discusses the application of a discovery rule to the federal five-year statute of limitations for penalty actions in CWA cases generally, and with respect to wetlands violations in particular, and argues that the D.C. Circuit’s decision in 3M Co. should not be read to prevent the application of a discovery rule to penalty actions under the CWA. Part V examines the issue of whether the federal five-year statute of limitations applies to claims for injunctive relief under the CWA and concludes that the cases so holding are inconsistent with the statute and the decisions of the majority of courts which have addressed the issue. Part VI concludes with an argument that courts should not apply a strict construction of 28 U.S.C. § 2462 to bar actions for dredge and fill violations, and provides recommendations to allow for a consistent approach to such cases.

II. BACKGROUND

A. The Regulatory Framework of the Clean Water Act

The congressional objective for establishing the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” with the national goal of eliminating the discharge of pollutants into navigable waters by 1985.\(^{18}\) To

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17. See infra section V.
achieve this goal, Congress established a regulatory framework which prohibits the discharge of any pollutant unless it is otherwise permitted under the Act. Section 301 of the CWA prohibits the discharge of any pollutant from any point source into navigable waters, except in compliance with the Act. Congress defined the term "navigable waters" broadly to mean all "waters of the United States." The term "waters of the United States" has in turn been interpreted by the EPA and the Army Corps of Engineers (Corps) as well as the courts, to include virtually all wetlands.

21. Section 301 as well as §§ 402 and 404 were enacted as part of the FWPCA Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).
24. The term "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1994).
27. The Corps and the EPA have promulgated identical definitions of "waters of the United States." See 33 C.F.R. § 328.3(a) (1990) and 40 C.F.R. § 230.3(a) (1990). The Corps and the EPA define waters of the United States to include all interstate wetlands, wetlands adjacent to waters of the U.S., and all other wetlands, the use, degradation or destruction of which could affect interstate commerce. Id. The Corps and the EPA regulatory interpretations, that this definition includes any wetlands that are or could serve as habitat for migratory birds, have been upheld by the courts. See Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 260-61 (7th Cir. 1993); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), cert. denied, Cargill Inc. v. United States, 116 S. Ct. 407 (1995).
28. See Rueth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993) (stating that "[a]s our decision in Hoffman Homes, Inc. v. EPA makes clear, . . . nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland. Decisions such as Hoffman Homes, give full effect to Congress' intent to make the Clean Water Act as
Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit program and provides the EPA with the authority to issue permits for the "discharge of any pollutant, or combination of pollutants." Under the NPDES program, the EPA or authorized states issue permits to dischargers which enumerate effluent limitations and other requirements that must be met by the permittee. The NPDES permit holder is required to report the results of self-monitoring to the EPA or the state agency issuing the permit.

Section 404 creates an exception to the EPA's general permitting authority by establishing a separate permitting program for the discharge of dredged or fill material. This exception is administered by the Corps. The EPA, however, maintains shared responsibility with the Corps for developing guidelines for § 404 permit issuance, and has authority to veto the issuance of any § 404 permit if a proposed discharge of dredged or fill material would have unacceptable adverse impacts. Both the Corps and the EPA can bring civil enforcement actions seeking civil penalties and injunctive relief for the unauthorized discharge of dredged or fill material into wetlands or other waters of the United States.

far-reaching as the Commerce Clause permits." (citations omitted)).

31. Id.
32. Section 404(a) provides: "The Secretary [of the Army, acting through the Chief of Engineers] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1994).
34. 33 U.S.C. § 1344(c) (1994).
36. 33 U.S.C. § 1319(a), (b), (d) (1994).
37. Although only EPA has express authority under the CWA to enforce against unauthorized discharges, as opposed to violations of § 404 permit conditions, the Corps routinely takes enforcement actions for such discharges. See Michael C. Blumm and D. Bernard Zaleha, Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform, 60 U. COLO. L. REV. 695, 746 (1989).
B. Statutes of Limitations

1. The General Purposes of Statutes of Limitations

Statutes of limitations are creations of legislation not of judicial invention, as there were no statutes of limitations under the common law. From the English belief that immunity from limitation periods was an essential prerogative of sovereignty, there developed the common law principle that statutes of limitations do not bind the United States, unless Congress expressly provides. As a corollary to this general principle, the United States Supreme Court has ruled that statutes of limitations sought to be applied to the government "must receive a strict construction in favor of the Government.

As stated previously, there are three main reasons generally given for statutes of limitations: (1) to ensure fairness to defendants; (2) to enhance the effectiveness and efficiency of the judicial system; and (3) to promote societal stability. The primary purpose of statutes of limitations is to provide fairness to defendants "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." The theory underlying such limitations periods is that even where one has a just claim, "the right to be free of stale claims in time comes to prevail over the right to prosecute them." Such limitations periods thus balance a plaintiff's right to assert a just claim against the unfairness to the defendant of being indefinitely vulnerable to the threat of legal action.

42. See McKinney, supra note 7, at 202.
44. Order of R.R. Tel., 321 U.S. at 349.
45. See McKinney, supra note 7, at 202. In United States v. Kubrick, the Supreme Court stated:

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified peri-
Statutes of limitations also serve to promote the efficiency and effectiveness of the courts by ridding court systems of stale tenuous claims, and by ensuring that the fact finding process is not impaired by the loss of evidence, faded memories, and the disappearance of witnesses. Finally, statutes of limitations contribute to the stability of society by avoiding the disruptive effects that unsettled claims may have on commercial transactions and help to provide security over property rights.

2. 28 U.S.C. § 2462 and Its General Applicability to the CWA

The general five-year statute of limitations contained in 28 U.S.C. § 2462 applies to federal actions for fines, penalties, and forfeitures. The provision states:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

As with other federal statutes of limitations, 28 U.S.C. § 2462 provides an exception from the general rule exempting the sovereign from statutes of limitations, as the United States is not subject to a statute of limitations unless Congress explicitly pro-
vides otherwise.\textsuperscript{51}

The CWA itself does not contain a specific statute of limitations. Ordinarily, when a federal statute does not contain a limitations period, federal courts will apply the most appropriate statute of limitations under state law, unless there is a “relevant federal statute of limitations.”\textsuperscript{52} If a relevant general statute of limitations is available, it should be used.\textsuperscript{53} A further caveat to the general rule is that a state statute of limitations should not be applied where its application would frustrate federal policy.\textsuperscript{54} Courts have consistently held that 28 U.S.C. § 2462 applies to federal actions for civil penalties under the CWA, based on the fact that: (1) the CWA does not contain its own specific statute of limitations; (2) 28 U.S.C. § 2462 is arguably a relevant statute of limitations; and (3) application of state statutes of limitations would frustrate the policies underlying the CWA.\textsuperscript{55} Based on these same considerations, the courts have also consistently held that 28 U.S.C. § 2462 applies to citizen suits under the CWA.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{51} See Guaranty Trust Co. v. United States, 304 U.S. 126, 132-33 (1938); United States v. City of Palm Beach Gardens, 635 F.2d 337, 339 (5th Cir. 1981).
\item \textsuperscript{52} Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).
\item \textsuperscript{53} Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 74 (3d Cir. 1990) (citations omitted).
\item \textsuperscript{54} Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).
\item \textsuperscript{55} See, e.g., Public Interest Research Group, 913 F.2d at 73-75; United States v. Hobbs, 736 F. Supp. 1406, 1408-10 (E.D. Va. 1990) (holding that 28 U.S.C. § 2462 is a relevant federal statute of limitations that should be applied to CWA enforcement actions, and furthermore that application of a shorter one-year state statute of limitations would interfere with the implementation of the national policy underlying the CWA by allowing for non-uniform enforcement from state to state).
\end{itemize}
III. APPLICATION OF 28 U.S.C. § 2462 TO DREDGE AND FILL CASES

A. Conflicting Case Law on the Continuing Violations Theory

Although the question of whether 28 U.S.C. § 2462 applies to citizen and government enforcement actions under the CWA has been consistently resolved by the courts, the question of exactly how the statute should be applied has been more complicated. The question of when the statute of limitations accrues is particularly troublesome with respect to wetlands violations. There are several approaches that a court could take in examining this issue. Two recent judicial decisions highlight two of these approaches and provide conflicting answers to this question. In one, the District Court for the Middle District of Florida ruled that where dredged or fill materials are allowed to remain in wetlands, such violations constitute continuing violations of the CWA such that the statute of limitations does not begin to run on the government’s claims. In the second, the District Court for the District of Colorado ruled that such violations are not continuing violations, and that the statute of limitations begins to run on the government’s claims for both penalties and injunctive relief at the time of the actual discharge.

57. The continuous violation theory is used by plaintiffs to establish an alternative date as a starting point for the running of a statute of limitations, for example, where a statute expressly states that the violation is continuing, where there is a continuing obligation, such as a duty to provide notice, that a defendant continuously fails to perform, or where the nature of the injury is such that it may be considered ongoing. The analogous doctrine in the criminal context is referred to as the “continuing offense doctrine” and it is limited in criminal cases to situations where the “explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” Toussie v. United States, 397 U.S. 112, 115 (1970).

58. United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996). In the alternative to finding that the statute of limitations had not begun to run at all, the court could also have held that the statute of limitations had run on those violations which were more than five years old, but as a new violation accrued for each day that fill remained in place, a new limitation period began to run for each new day of the continuing violation. See United States v. SCM Corp., 667 F. Supp. 1110, 1123 (D. Md. 1987). This issue represents yet another area of conflict in courts’ application of 28 U.S.C. § 2462. For a further discussion of this issue, see Timothy E. Shanley, Applying a Strict Limitations Period to RCRA Enforcement: A Toxic Concept with Hazardous Results, 10 PACE ENVTL. L. REV. 275, 307-12 (1992).

cases represent opposite extremes in the analysis of this issue, still other courts have taken a more middle of the road approach and applied a due diligence discovery rule, holding that the statute of limitations begins to run at the time the government knew or should have known of such violations.60

1. United States v. Reaves and Section 404 Continuing Violation Cases

In United States v. Reaves, the District Court for the Middle District of Florida held that an unpermitted discharge of dredged or fill material into wetlands is a continuing violation as long as the fill remains in place.61 The court thus found that the five-year statute of limitations in 28 U.S.C. § 2462 had not begun to run on the government’s claims for civil penalties, although the actual activity resulting in the discharge of dredged or fill material occurred thirteen years prior to the filing of the government’s complaint.62

In reaching its conclusion, the Reaves court relied on a number of decisions which have held in various contexts that a § 404 violation is continuing as long as the dredged or fill material remains in the wetlands. The first cases to adopt the continuing violation approach to wetlands violations appear to be cases that apply the approach for penalty assessment purposes. One example, United States v. Cumberland Farms of Connecticut,63 involved discharges of fill material for conversion of wetlands to agriculture. In determining the appropriate penalty, the court stated: “[a] day of violation constitutes not only a day in which Cumberland was actually using a bulldozer or backhoe in the wetland area, but also every day Cumberland allowed illegal fill

60. See infra section IV, pts. A and B.
61. Reaves, 923 F. Supp. at 1534.
62. Id. at 1632-33.
63. 647 F. Supp. 1166 (D. Mass. 1986), aff’d, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988). In its decision, the Cumberland Farms court cites to United States v. Tull, 615 F. Supp. 610, 626 (E.D. Va. 1983), aff’d, 769 F.2d 182 (4th Cir. 1985), rev’d on other grounds, 481 U.S. 412 (1987), which appears to be the first decision applying a continuing violation theory to a wetlands violation for any purpose. Tull involved an action brought by the United States against a developer for discharge of fill material associated with the development of mobile home lots. In assessing the penalty, the court stated that “more than 365 day’s violation has taken place in allowing the illegal fill to remain.” Id. at 626. No analysis or explanation is provided by the court for its conclusion. Id.
material to remain therein.64

A number of other courts have followed this continuing violation approach for assessing penalties for wetlands violations,65 most recently the U.S. District Court for the Southern District of Texas in United States v. Fina Oil and Chemical Co.66 This case involved discharges of dredged material in violation of an Army Corps of Engineers' permit, resulting from activities associated with the installation of an oil well and two pipelines.67 Defendant Fina moved for summary judgment on the method of penalty calculation arguing that penalty liability should be limited to the actual days, if any, that Fina discharged pollutants.68 The United States urged that the penalty calculation should include not only the days in which pollutants were discharged through the redeposit of dredged soil onto seabed, but also each day that the dredged material remained in the water.69 After finding that the defendant's activities in causing portions of the seabed to be redeposited, killing acres of sea grass, was a discharge of dredged material in violation of the CWA, the court stated: "Since the discharges, Defendants have not removed the illegally discharged material. Every court that has ruled on the question of such a continuing violation with this type of pollutant has calculated penalties based on each day the illegally discharged dredged or fill material is left in place."70

Although the Reaves court did not cite to these cases directly,71 the primary case on which the court did rely, the Fourth Circuit's decision in Sasser v. Administrator,72 in turn relies on

64. Cumberland Farms, 647 F. Supp. at 1183.
65. See United States v. Ciampitti, 669 F. Supp. 684, 700 (D.N.J. 1987). This case involved a contempt action brought by the United States for failure by a developer to remove unauthorized fill and for additional fill activities in wetlands. In assessing a daily penalty of $100,000 for violation of the CWA, the court cited to the Cumberland Farms decision for the proposition that "[a] day of violation constitutes every day that a violator allows illegal fill to remain in place." Id. at 700; United States v. Key West Towers, Inc., 720 F. Supp. 963, n.1 (S.D. Fla. 1989) (stating that "[a] daily fine can be imposed for each day that the defendant allows illegal fill material to remain on the wetlands.").
67. Id. at 2.
68. Id. at 9.
69. Id. at 10.
70. Id. at 11.
72. 990 F.2d 127 (4th Cir. 1990).
the penalty assessment cases. 73 In Sasser, the plaintiff challenged the EPA’s administrative assessment of a penalty for unauthorized discharges of dredged or fill material used to restore dikes around a seventy-six acre lake in order to impound water for duck hunting. 74 The EPA had filed an administrative complaint, alleging that the defendant had discharged pollutants into wetlands without a permit in December 1986. 75 Sasser did not remove the fill material and the complaint alleged a continuing violation. 76 At the time the pollutants were originally discharged in 1986, EPA’s sole means of recovering a civil penalty under the CWA was through a civil judicial action. In 1987, however, Congress amended the Act to allow for the assessment of administrative penalties by the EPA. In Sasser, the EPA acted pursuant to the statutory provision established by the amendment. 77 Sasser alleged that the government lacked subject matter jurisdiction over his case and asserted that a district court action was the only means of imposing a civil penalty for the discharging of pollutants into wetlands in 1986. To allow otherwise, Sasser contended, would be to permit an unlawful retroactive application of the amendment. 78

The Fourth Circuit Court of Appeals dismissed Sasser’s arguments finding that the defendant’s violation was a continuing one, even though additional fills did not occur after December 1986. 79 The court, relying on the penalty assessment line of cases, stated that “[e]ach day that the pollutants remain in the wetlands without a permit constitutes an additional day of violation.” 80 Since the defendant’s violations were found to be continuing ones, the court held that the EPA had acted within its authority in issuing the order, and that the court had jurisdiction to review the Administrator’s assessment. 81 The court then found that the EPA had not abused its discretion in determining

73. Id. at 129.
74. Id. at 128.
75. Id. at 129.
76. Id.
77. Sasser, 990 F.2d at 129.
78. Id.
79. Id.
80. Id.
81. Id.
the penalty amount in the order.\textsuperscript{82}

The Reaves court also relied on a CWA citizen suit case, \textit{North Carolina Wildlife Federation v. Woodbury},\textsuperscript{83} holding that failure to remove unlawful fill from waters of the United States constitutes a continuing violation of the CWA sufficient to confer federal jurisdiction for purposes of the citizen suit provision of the Act.\textsuperscript{84} In \textit{North Carolina Wildlife Federation} (NCWF), the court found a violator, who had illegally discharged dredged and fill material into wetlands as part of a planned large scale peat mining operation, was in continuing violation of the CWA for purposes of the citizen suit provision of that statute, § 505(a), where both the citizen group and the federal government contended that the private defendant's failure to remove fill constituted a continuing violation.\textsuperscript{85} As discussed below, the court's reliance on this aspect of the continuing violation case law is arguably misplaced, as continuous noncompliance for citizen suit purposes is not necessarily the same thing as a continuing violation for penalty assessment or statute of limitations purposes.\textsuperscript{86}

Arguably, however, if a violation is a continuing one for purposes of penalties or for purposes of whether the EPA is authorized to prosecute a claim under an amended statutory provision, it should be considered a continuing violation for statute of limitations purposes.\textsuperscript{87} The Reaves decision relies on this case law to reach the conclusion that dredged or fill remaining in place constitutes a continuing violation of the CWA. The court in \textit{Telluride}, however, came to the exact opposite conclusion — holding that such violations are not continuing violations and that the statute of limitations begins to run at the time of the initial discharge.\textsuperscript{88}

2. \textit{The United States v. Telluride Co. Decision}

In \textit{Telluride}, the United States brought an enforcement action against the Telluride Company and its subsidiaries (Telluride),

\begin{itemize}
\item \textsuperscript{82} Sasser, 990 F.2d at 131.
\item \textsuperscript{83} 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989).
\item \textsuperscript{84} Id. at 1943.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} See infra notes 100-104 and accompanying text.
\item \textsuperscript{87} See infra section III, pt. B.
\item \textsuperscript{88} United States v. Telluride, 884 F. Supp. 404, 408 (D. Colo. 1995).
\end{itemize}
for unpermitted discharges of dredged or fill material in connection with a land development and ski resort project in Telluride, Colorado. The United States filed its original complaint in October 1993 for violations that had occurred on the site from 1981 through 1994. The parties then entered into a settlement agreement which the court rejected. Subsequently, Telluride filed a motion for summary judgment arguing that all claims dating from more than five years prior to the filing of the government’s complaint were time barred under 28 U.S.C. § 2462. In response to Telluride’s motion, the United States argued that the discharge of dredged or fill material into waters of the United States was a continuing violation as long as the adverse effects from the discharge continued, and thus argued that the statute of limitations would not begin to run until the fill was removed.

Citing 3M Co., the Telluride court ruled that “for the purpose of the statute of limitations under 28 U.S.C. § 2462, the unlawful discharge of pollutants under the CWA, 33 U.S.C. § 1311, does not constitute a continuing violation; the five year statute begins to run at the time of the discharge.” The court distinguished the cases cited to it by the government, which included the continuing violation penalty line of cases, on the grounds that they did not address the statute of limitations issue.

The Telluride court held that the Sasser decision was distinguishable because it addressed the continuing nature of a dredge and fill violation with respect to whether the court had subject matter jurisdiction, not with respect to whether there was a continuing violation for statute of limitations purposes. The court asserted that the issue was not whether the “EPA had belatedly prosecuted a stale claim, but whether the EPA was

89. Id. at 405.
90. Id.
91. Id.
92. Id.
93. Id. at 406.
94. 3M Co. v. Browner, 17 F.3d 1453, 1460-61 (D.C. Cir. 1994).
95. Telluride, 884 F. Supp. at 408.
96. Id. at 406-407.
97. Id.
authorized to prosecute such a claim at all.” The court's logic is not obvious. If, as the Fourth Circuit found in Sasser, a violation continues as long as dredged or fill material remains in a wetland, why would such a violation not be continuing for statute of limitations purposes? If there truly was an actionable violation in the former situation, it seems that there would have to be a continuing violation such that the statute of limitations would not bar the claim. Either there is a continuing violation or there is not. The same is true with respect to the penalty cases. If there is a continuing violation, such that each new day that dredged or fill material remains in a wetland represents a new cause of action for assessing penalties, then why and how would the statute of limitations completely bar such a claim?

There does appear to be some basis, however, for the court's distinction, with respect to what is a continuing violation such that a court has subject matter jurisdiction in a citizen suit case. Citizen suits may not be brought under the CWA for past violations. In order for a court to have subject matter jurisdiction, the citizen must allege that there is a "continuous or intermittent violation" of the CWA. For citizen suit purposes, a violation may arguably be considered continuing, if the effects of the violation can still be remediated. The distinction between continuing violation for citizen suits purposes is made clear by the court in North Carolina Wildlife Federation v. Woodbury (NCWF) in which the court applied a continuing violation analysis for purposes of deciding whether the citizen group which had filed the case had standing to sue, but did not apply a continuing violation analysis at the same time to determine whether the statute of limitations barred the citizen group's claim. With respect to when the statute of limitations began to run, the court instead applied a discovery rule analysis and found that 28 U.S.C. § 2462 began to run only when the EPA

98. Id. at 407.
101. Id. at 49.
103. Id. at 1942-44.
received reports documenting CWA violations. If the court had been applying a continuing violation analysis to the statute of limitations issue, there would have been no need to apply a discovery rule.

It does seem clear that whereas impact of the violation is relevant to the citizen suit standing question, the mere ongoing impact from a dredge and fill violation does not constitute a continuing violation for penalty or statute of limitations purposes. Thus, the court in the Reaves case and the government in Telluride were incorrect in citing to NCWF to support the proposition that as long as the impact of a dredge and fill violation continues on a wetland, the violation continues. Section 301 of the CWA clearly regulates discharges, not mere impacts on wetlands. An argument that a wetlands violation continues as long as the ill effects of that violation continue can not be supported by the language of § 301. In addition, ill effects could persist even if a violator removed dredged or fill material. Thus, an ill effects argument does not appear to be a legitimate basis for establishing a continuing violation of § 301 of the CWA. But if the ill effects of a violation are not sufficient to establish a continuing violation, is there any other basis for finding that, where dredged or fill material are allowed to remain in place in wetlands or other waters of the United States, this constitutes a continuing violation of the CWA?

B. Analysis of a Continuing Violation Theory for Dredge and Fill Violations

In reaching its decision, the Telluride court found that the defendant was not presently discharging pollutants, and thus no present or continuing violations existed for statute of limitations purposes. Whether or not the court's conclusion is correct, it is clear that the court was focusing on the key issue, namely,

104. Id. at 1944.
105. See McDougal v. County of Imperial, 942 F.2d 668, 674-75 (9th Cir. 1991) (holding that mere continuing impact from past violations is not actionable).
107. Save Our Community v. EPA, 971 F.2d 1155, 1167 (5th Cir. 1992) (holding that mere draining of a wetland without a discharge is not regulated under the CWA).
whether there is a continuing violation of § 301 of the CWA. As this is the provision that the government must enforce in such cases, there must arguably be a discharge of pollutants on each day for there to be a continuing violation.

The term "discharge of pollutants" is defined in § 502(12) of the CWA to mean "any addition of pollutants to navigable waters from a point source."\(^{109}\) Unless there is a point source discharge, there is no violation of the CWA.\(^{110}\) The question that the Telluride and Reaves courts faced was once there is a point source discharge of pollutants in the form of dredged and fill material into a waters of the United States, does a violation of the CWA occur each day that dredged or fill material is allowed to remain in place? The crucial question thus becomes whether there is a "discharge" on each day in question. The answer is not totally clear. Certainly, the Sasser decision and the cases holding that a penalty can be assessed for each day that dredged or fill material is allowed to remain in a wetland provide some precedent for finding that such a discharge continues until the dredged or fill materials are removed. However, a thorough review of those cases does not reveal an underlying rationale for why the courts adopted this position. If there is a basis for finding a continuing violation, it needs to be found in the statute or regulations interpreting the statute.

As previously noted, § 502(12) of the CWA defines a “discharge of pollutants” as “any addition of any pollutant from any point source.”\(^{111}\) Courts have given a broad interpretation of the terminology of the CWA to fully effectuate the remedial purposes of the Act.\(^{112}\) Thus, courts have broadly construed the term “dis-

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110. See Theis, supra note 12, at 25-27.
111. 33 U.S.C. § 1362(7) (1994). One place to start when examining the question of whether a wetlands violation is continuing is to focus on what is an “addition” of pollutants. Unfortunately, the statute does not provide a further definition of this term. Case law suggests that the term was added to clarify that pollutants had to be added from the outside world to make clear that dams and other similar structures were not required to have NPDES permits. See National Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580, 583-84 (6th Cir. 1988); National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 174-75 (D.C. Cir. 1982).
112. United States v. ALCOA, 824 F. Supp. 640, 645 (E.D. Tex. 1993) (holding that the CWA is entitled to a broad construction to implement its purposes); See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (giving a broad interpretation of the term “point source” and holding that it circumvents the intent and structure of the CWA to exempt from regulation any activity that emits
charge of pollutants.” Given this, it is not surprising that the Fourth Circuit Court of Appeals in *Sasser* and other courts have interpreted the CWA broadly to find that dredged or fill material remaining in place constitutes a continuing violation. Given the remedial purposes of the CWA, it is a fair reading that a “discharge of pollutants” continues as long as dredged or fill material remains in a wetland or other waters of the United States.

The EPA and the Corps’ regulations provide separate definitions of the terms “discharge of dredged material” and “discharge of fill material,” each of which provides some additional basis for a continuing violation approach. Although portions of both of these definitions suggest that a present action is required for a discharge, each, however, also contains language defining

113. Avoyelles Sportman League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (holding that the word “addition” as used in the definition of the term “discharge” can reasonably be understood to include “redeposit” and that the term “discharge,” thus, includes the redepositing of materials taken from wetlands). See United States v. Akers, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20243 (E.D. Cal. 1985), aff’d, 785 F.2d 814 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) (finding that farmer’s construction of ditches, roads, channel fills as well as discing, which leveled the land so as to fill channels or convert wetlands to uplands, to convert a large wetland area to farmland involved the discharge of dredged or fill material and holding that heavy equipment used to move and deposit earth were point sources); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1506 (11th Cir. 1985), reh’g en banc denied, 778 F.2d 793 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1985), “redeposit” analysis readopted on remand, 848 F.2d 1133 (11th Cir. 1988) and 863 F.2d 802 (11th Cir. 1989) (holding that redeposit of spoil dredged by the propellers of tug boats constituted a “discharge of a pollutant”); Rybachek v. EPA, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (upholding EPA regulation of placer mines on the basis that resuspension of materials from a stream bed during mining activities was an “addition of a pollutant” under the CWA, since the word addition may reasonably be understood to include redeposit); United States v. Sinclair Oil Co., 767 F. Supp. 200 (D. Mont. 1990) (holding that the redeposit of indigenous river bed materials during channelization activities in the Little Bighorn River constituted a discharge of a pollutant).

114. See infra note 232.


116. For example, the definition of “discharge of dredged material” includes the “addition of dredged material to a specified disposal site.” 40 C.F.R. § 232.2 (1996) (emphasis added). This language suggests that dredged material must be added to
discharge in a broader sense suggesting that dredged and fill material left in place is a violation. The discharge of dredged material is defined as “any addition of dredged material” including “runoff or overflow, associated with a dredging operation” as well as “redemption of dredged material including excavated material.”\(^{117}\) In addition, the definition of “discharge of fill material” suggests that certain “fills” by their existence constitute a discharge of fill material.\(^{118}\) These definitions can be interpreted to mean that simply leaving fill in place in such situations is a “discharge” requiring a § 404 permit. The regulations thus tend to support a more expansive reading of the term “discharge of pollutants” in the § 404 regulatory context.

An alternative argument for finding a continuing violation is based on the fact that dredged or fill material discharged into a wetland may continue to be redeposited and resuspended by natural forces. Redeposit and resuspension of pollutants have been held to be discharges of pollutants under the CWA.\(^{119}\) In *Fina Oil*, which was discussed previously, the court provided the framework for such an argument.\(^{120}\) The court stated:

Plaintiff points out that there is a difference between discharged effluents and dredged or fill material . . . By its intrinsic nature, the dredged or fill material never dissipates entirely nor completely remains in place. Rather, the material will settle onto adjacent areas as small portions are continually moved by natural forces. Because dredged material remains largely in place, it can be re-

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\(^{117}\) Id.

\(^{118}\) Most notably the definition states:

The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes . . . site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

\(^{119}\) See supra note 113.

moved. The continuing violation rule for penalties works as an
incentive to get a violator to quickly remove the illegal material.
Fina's approach would encourage and protect a recalcitrant viola-
tor.\footnote{121}

The Fina court's reasoning applies as much for statute of limita-
tions purposes as it does for penalties. Implicit in the court's
reasoning is that where dredged or fill material remains in a
wetland, there continue to be discharges of such materials, albeit
by natural forces. The mere fact that natural forces would convey
the discharge does not mean it is not a discharge for which the
violator is responsible under the CWA.\footnote{122}

A stricter reading of the CWA, on the other hand, would re-
quire a new addition of pollutants from a point source each day
to constitute a continuing violation. This was certainly the hold-
ing of the Telluride court. As each of these elements is needed to
successfully allege a violation of the CWA, and since the court
found that there was no new addition of pollutants from a point
source on subsequent days, the Telluride court ruled that there
was no continuing violation.\footnote{123} The implication of these conflict-
ing interpretations is significant. If § 404 violations continue as
long as dredged or fill material remains in place, then the stat-
ute of limitations will not be an issue in most cases where the
defendant has not removed such materials. If, on the other hand,
the Telluride decision is adopted by the courts (without benefit of
a discovery rule), there are significant adverse implications to
the § 404 program. Because wetlands violations are inherently
difficult to detect,\footnote{124} the government will be precluded from
bringing an enforcement action for penalties in wetlands cases
where the violations are not discovered until more than five
years after the dredge and fill activity takes place.

\footnotetext{121}{\textit{Id.} at 11 n.6.}\
\footnotetext{122}{\textit{See, e.g.,} United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir.
1979) (holding that overflow of mine sump was a discharge even though the overflow
was caused by rainfall or snow melt). In response to defendant's argument that the
overflow in question was accidental and the CWA only regulated intentional discharg-
es, the Earth Sciences court stated: "The Act would be severely weakened if only
intentional acts were proscribed. We will not interpret it that narrowly, particularly
when the legislative history is clear Congress intended strong regulatory enforce-
ment." \textit{Id.}}\
\footnotetext{123}{United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995).}\
\footnotetext{124}{\textit{See} United States v. Windward Properties, Inc., 821 F. Supp. 690, 694-95
(N.D. Ga. 1993).}
The Fina court makes another important point with regard to a strict construction of § 301 and dredge and fill violations, namely, that such an interpretation would encourage and protect a recalcitrant violator. It might encourage persons to conceal their violations, or at least not check with the Corps as to whether their property contains jurisdictional wetlands or whether the activity they plan to engage in requires a permit, before they begin to discharge. Further, such a strict interpretation of the statute would encourage individuals to complete their discharge activities as quickly as possible to limit their liability under the CWA. Finally, it would remove an incentive for a recalcitrant violator to remedy the violation as quickly as possible by removing the dredged or fill material.

The Telluride court relied on case law brought to its attention by the defendants with respect to the “continuous offense” doctrine, as a basis for narrowly reading the statute. These decisions state that to find a continuing offense the statute must expressly provide for it, or the nature of the offense must be such that it is clear that Congress intended that it be treated as a continuing violation. Arguably, this case law is not directly relevant because these cases deal with criminal prosecutions, and the inquiry for determining whether a violation is continuing in the criminal context would not be the same. Even so, there is a strong argument that dredge and fill violations would meet the higher standard of the continuing offense doctrine.

While the CWA does not expressly provide that a discharge continues as long as dredged or fill materials remain in place in waters of the United States, the nature of dredge and fill violations does support a continuing violation approach. Unlike an effluent discharge regulated under § 402 of the Clean Water Act, where pollutants are introduced to a receiving water and dispersed, dredged and fill materials remain in the waters of the United States and in some cases completely destroy wetlands. As such, allowing dredged or fill materials to re-

127. Toussie, 397 U.S. at 115 (stating that criminal limitations statutes are to be liberally interpreted in favor of repose).
129. See 40 C.F.R. § 232.2 (1996). Section 232.2 further defines “discharge of
main in place is analogous to a § 402 discharger who allows the continual overflowing of a pond following rainfall, or a person who allows contaminated runoff from his facility to enter waters of the United States, both of which the courts have held to be a point source discharge. Thus, the nature of wetlands violations, the remedial nature of the CWA, and the broad interpretation given by the courts to effectuate that purpose, all support the contention that a discharge of dredged or fill material into wetlands or other waters of the United States continues as long as such materials remain in place.

Based on the regulatory definitions of what constitutes a "discharge" of dredged or fill material and the case law holding that the terminology of the CWA should be broadly construed, as well as the existing case law treating wetlands violations as continuing where dredged and fill material are allowed to remain in place, it is not surprising that the Reaves court decided the issue as it did. Given the lack of clarity in the statute, as well as the EPA and Corps' regulations, it is also not altogether surprising, that a court could reach the result, as did the Telluride court, that such violations are not continuing. In any event, the Reaves court's interpretation that such violations are continuing is more consistent with the general maxim of statutory construction that statutes protecting the public health and safety are to be construed so as to effectuate their remedial purposes. Certainly dredged material" by stating that "an activity associated with a discharge of dredged material destroys an area of waters of the United States, if it alters the area in such a way that it would no longer be a waters of the United States." Id. The definition also notes that unauthorized discharges do not eliminate CWA jurisdiction even where such discharges have the effect of destroying waters of the United States. Id.

130. See United States v. Earth Sciences, Inc., 599 F.2d 368, 373-74 (10th Cir. 1979) (overflow of mine sump caused by rainfall was a discharge); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981) (liquid leachate from a landfill which entered a nearby creek by natural phenomena such as rainfall and gravity, once channeled or collected, constitutes discharge by a point source).

such an interpretation gives fuller effect to the "declared goal and policy" of the CWA.\textsuperscript{132} Finally, such an interpretation is more consistent with the long stated principle that statutes of limitation "must receive a strict interpretation in favor of the government."\textsuperscript{133}

Given the conflicting precedents, it is not clear how courts in the future will choose to decide the issue. Should courts follow the \textit{Telluride} court's reasoning, however, these same general considerations argue for applying a discovery rule, as opposed to finding that claims are automatically barred under 28 U.S.C. § 2462 if they occurred more than five years before the initiation of an enforcement action.

\textbf{IV. APPLICATION OF A DISCOVERY RULE}

If a court finds that a wetlands violation is not a continuing violation, then when does a claim for civil penalties accrue for purposes of the statute of limitations? The \textit{Telluride} court, relying on the decision in \textit{3M Co.}, held that the five-year statute of limitations begins to run at the time of the initial discharge.\textsuperscript{134} In relying on the \textit{3M Co.} holding, the \textit{Telluride} court implicitly rejected the application of a "discovery rule" for purposes of deciding when the statute of limitations under 28 U.S.C. § 2462 begins to run.\textsuperscript{135} A number of courts examining this question

\begin{itemize}
\item 132. See Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) (stating that under the Commerce Clause, the CWA is designed to fully regulate sources emitting pollution into rivers, streams, and lakes).
\item 135. The court quoted language from the \textit{3M Co.} decision stating that "[b]ecause liability for the penalty attaches at the moment of violation, one would expect this to be the time when the claim for the penalty 'first accrued.'" \textit{Telluride}, 884 F. Supp. at 408. The court then immediately followed the quote with this holding: "I conclude, for purpose of the statute of limitations under 28 U.S.C. § 2462, the unlawful discharge of pollutants under the CWA, 33 U.S.C. § 1311, does not constitute a continuing violation; the five year statute begins to run at the time of the discharge. Any contrary interpretation would render § 2462 nugatory, a position neither party advances." \text{Id. (emphasis added). Through this statement in combination with the reference to \textit{3M Co.}, as well as the court's failure to apply a discovery rule after rejecting the government's argument of a continuing violation, the court arguably rejected a

\end{itemize}
with respect to the CWA, however, have applied a "discovery rule" under which a claim for penalties does not accrue until a plaintiff knew, or should have known, of the violation.\textsuperscript{136}

A. Clean Water Act Precedent for a Discovery Rule

1. CWA Cases Applying a Discovery Rule to NPDES Violations

The initial cases applying a discovery rule to claims for civil penalties under the CWA involved actions brought for violations of NPDES permits, where courts have consistently held that a violation accrues when it is reported, not when it actually takes place.\textsuperscript{137} The first case to so hold was \textit{Atlantic States Legal Foundation v. Al Tech Specialty Co.}\textsuperscript{138} which involved a citizens suit against a steel product manufacturer for discharges of pollutants in excess of the effluent limits of its permit. In that case, the defendant asserted that most of the plaintiff's claims were barred under the five-year statute of limitations of 28 U.S.C. § 2462. The plaintiff argued that the statute of limitations did not begin to run at the time the violations actually occurred, but when the reports that documented those violations were filed with the EPA.\textsuperscript{139} The court agreed with the plaintiff's argument, observing that it would have been practically impossible

\textsuperscript{137} Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 75 (3d Cir. 1990) (claim against NPDES permit holder did not begin to run until report listing the violation was filed); United States v. ALCOA, 824 F. Supp. 640, 645-47 (E.D. Tex. 1993) (NPDES violation accrues upon reporting of Discharge Monitoring Reports (DMRs)); Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480, 1493 (9th Cir. 1987), \textit{vacated and remanded on other grounds}, 485 U.S. 931 (1988), \textit{judgment reinstated and remanded}, 853 F.2d 667 (9th Cir. 1988); Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986) (statute of limitations did not begin to accrue when NPDES violation occurred, but when reports that documented those violations were filed).
\textsuperscript{138} 635 F. Supp. at 287-88.
\textsuperscript{139} \textit{Id.} at 287.
for the plaintiff to have discovered the alleged violations on its own, and that it is only when reports are filed with the EPA that the public becomes aware that violations have occurred.\textsuperscript{140} The rationale for the court's decision was that "[t]o hold that the statute of limitations begins to run when violations actually occur, as opposed to when they are discovered, would impede, if not foreclose, the remedial benefits of the statute."\textsuperscript{141}

The Third Circuit Court of Appeals subsequently adopted this same reasoning in \textit{Public Interest Research Group v. Powell Duffurn}.\textsuperscript{142} In \textit{Public Interest Research Group}, the plaintiff citizen group argued that the five-year statute of limitations contained in 28 U.S.C. § 2462 should only begin to run when the defendant filed its discharge monitoring reports (DMRs),\textsuperscript{143} rather than at the time of the discharge of pollutants.\textsuperscript{144} The court stated that this made sense since the responsibility for monitoring effluent rested with the defendants, and "the public cannot reasonably be deemed to have known about any violation until the permit holder files its DMRs."\textsuperscript{145}

2. CWA Cases Applying a Discovery Rule to Dredge and Fill Violations

Several courts considering the application of 28 U.S.C. § 2462 to discharges of dredged or fill material into wetlands have adopted similar reasoning to the NPDES cases cited above, and have applied a discovery rule to such violations.\textsuperscript{146} In \textit{NCWF},

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 288.
\item Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 75 (3d Cir. 1990).
\item Discharge monitoring reports (DMRs) are self-monitoring reports that NPDES dischargers are required to make of the violations the discharger's facility has experienced during the reporting period (usually monthly).
\item Public Interest Research Group, 913 F.2d at 75.
\item Id.
\item United States v. Windward Properties Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993); United States v. Hobbs, 736 F. Supp. 1406, 1409-10 (E.D. Va. 1990); North Carolina Wildlife Federation v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941, 1944 (E.D.N.C. 1989). There arguably is a conflict between the holding of these cases and a holding that dredge and fill violations constitute continuing violations as long as the fill is left in place. Although none of these cases address the issue of continuing violations specifically, in each case plaintiffs sought injunctive relief (i.e., to restore the properties), thus there was an opportunity to apply a continuing violation approach. The \textit{Windward} court expressly declined to address the issue because it held
\end{enumerate}
\end{footnotesize}
the District Court for the Eastern District of North Carolina extended the Atlantic States rationale to violations involving the discharge of dredged or fill materials. In response to the private defendant's arguments that the statute of limitations barred claims for violations of the CWA for defendant's ditching and draining activities associated with a planned large scale peat mining operation, the court noted that the defendant's argument assumed that 28 U.S.C. § 2462 accrued at the time that the defendant actually physically ditched and drained the property.

The court, citing to the Atlantic States decision, stated that "[t]his overlooks the fact that claims under the [CWA] do not accrue, for statute of limitations purposes, until reports documenting the violations have been filed with the EPA." The court found that the statute of limitations accrued at the time the EPA received a report from a Fish and Wildlife Service biologist, who first formally documented the violations.

In United States v. Hobbs, the District Court for the Eastern District of Virginia, also citing the Atlantic States rationale, applied a discovery approach and held that "accrual, for statute of limitations purposes under the CWA, occurs not when the violations actually occurred, but when the reports that document those violations are filed with E.P.A." The court found that the statute of limitations accrued at the time the EPA received a report from a Fish and Wildlife Service biologist, who first formally documented the violations.

In addition, in United States v. Windward Properties Inc., the court also followed a discovery rule approach. The court ap-

that there was a question of fact as to when the government knew or should have known of the violation (under the discovery rule approach applied by the court). Windward, 821 F. Supp. at 696 n.8. Had the court applied a continuing violation approach, however, there would have been no reason to reach this question. While arguably both a continuing violation and discovery rule could be applied at the same time (i.e., after someone has removed fill material a court could hold that the statute of limitations did not begin to run five years from the placement of fill, but five years from the discovery), these courts certainly did not attempt to apply a continuing violations approach contemporaneously with the discovery rule.


148. Id.

149. Id. (citing Atlantic States Legal Found., 635 F. Supp. at 289).


151. Id. at 1410.

plied an objective discovery approach holding that the statute of limitations contained in 28 U.S.C. § 2462 should run from the date that the government knew of the violation, or through the use of reasonable diligence should have discovered the violation. The court's reasoning is instructive.

The court first found that implementation of a discovery rule in CWA actions was grounded on a number of valid policy concerns. The court cited to the objectives of the CWA and asserted that wetlands play a significant role in achieving those objectives. The court then pointed out that due to the nature of many CWA violations, immediate detection was difficult, if not impossible. The court concluded that "[a]ccordingly, a strict interpretation of § 2462 which provides that a claim accrues at the time of the violation would have the effect of significantly thwarting the purpose of the CWA." The court flatly rejected the defendant's argument that application of a discovery rule under the CWA should be limited to NPDES cases and not extended to dredge/fill violations, since in the defendant's eyes such violations were "generally overwhelmingly obvious and easily observed." The court disagreed with the defendant's contention and instead found that, although some dredge and fill violations might be easily observable, many may not be easily detected. The court further noted that the "typical § 404 violation involves the unpermitted filling of a wetland, after which the former

153. Id. at 695.
154. Id. at 694.
155. The Windward court stated:

It appears to the Court that implementation of a discovery rule in CWA actions is grounded on a number of valid policy considerations. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in order to "provide ... for the protection and propagation of fish, shellfish and wildlife ..." 33 U.S.C. § 1251(a) & (a)(2). Protection of wetlands clearly plays a significant role in achieving this objective, as wetlands filter and purify water, prevent flooding and erosion by slowing the flow of surface runoff into lakes, rivers, and streams, support such significant natural biological functions as food chain production, and provide general habitat and nesting, spawning, rearing, and resting sites for aquatic species. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134-35 (1985).

Windward, 821 F. Supp. at 694.
156. Id.
157. Id. at 694-95.
158. Id. at 695.
wetland resembles uplands to the naked eye." 159 Noting that generally in NPDES situations the government was already on notice due to the NPDES permitting and reporting process, the court stated that "the typical § 404 violation occurs without a permit or report by the violator, arguably making detection more difficult." 160

B. 3M Co. v. Browner and the Discovery Rule

In rejecting a continuing violation approach, it would have been logical for the Telluride court to apply a due diligence/objective discovery rule in light of the substantial precedent applying some form of a discovery rule to CWA violations, and given the inherent difficulties in detecting dredge and fill violations, and the fact that a strict application of the statute of limitations would impede the remedial purposes of the Act. The Telluride court did not apply a discovery rule, and implicitly rejected such an approach through its reliance on 3M Co. 161

1. The 3M Co. Decision

In 3M Co., 162 the D.C. Circuit Court of Appeals expressly rejected a discovery rule approach for applying 28 U.S.C. § 2462, in the context of an administrative penalty action under the Toxic Substances and Control Act (TSCA). 163 The 3M Co. decision involved an appeal of an administrative assessment by the EPA for 3M's failure to file premanufacture notices with the Agency

159. Id.
160. Windward, 821 F. Supp. at 695. The court went on to state that if a particular wetland violation were easily detectable, that fact could be taken into account by the objective nature of the discovery rule, which the court was adopting. Id.
161. United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995). See supra note 135. It is not totally clear whether the court intended to reject a discovery rule or simply did not address the issue because it was not argued by the government. The court did state, however, that "[a]ny contrary interpretation [to finding that the statute begins to run at the time of the violation] would render § 2462 nugatory . . . ." Id. (emphasis added). But see United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *12 n.4 (N.D. Ill. Sept. 30, 1996) (applying a discovery rule to a CWA action for dredge and fill violations and distinguishing the Telluride decision on the grounds that it contained no mention of the discovery rule or to the line of CWA cases upholding it).
162. 3M Co. v. Browner, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994).
as required by TSCA. In its defense, 3M argued that the government’s penalty claims were barred under 28 U.S.C. § 2462, since the violations had occurred more than five years prior to the initiation of the administrative penalty action.

The government argued initially that 28 U.S.C. § 2462 should not be applied to administrative penalty actions under TSCA.

The court rejected this argument. In the alternative, the government contended that if 28 U.S.C. § 2462 did apply, its claims for penalties first accrued when it discovered, or in the exercise of due diligence should have discovered, the violations.

The D.C. Circuit rejected this argument as well.

First, the court noted the general rule that a claim normally accrues for statute of limitations purposes when the factual and legal prerequisites for filing suit are in place. The court noted that the “discovery rule” exception to this general principle was developed for cases involving latent injuries or injuries that were difficult to detect. The court asserted that the rule was based on the idea that plaintiffs in such situations cannot have a tenable claim for recovery of damages unless and until substantial harm matures, and thus claims in such cases are viewed as not accruing until the harm becomes apparent. The court, while noting that the rule has not been restricted to personal injury cases, contended that “the rule has only been applied to remedial, civil claims.”

The court then proceeded to distinguish these “discovery of injury,” “remedial” cases from the approach which the government sought to have applied in the case before it, which it referred to as a “discovery of violation” rule. The court found

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164. 3M Co., 17 F.3d at 1454-55.
165. Id. at 1455.
166. Id. at 1460.
167. Id. at 1455-59.
168. Id. at 1460-61.
169. Id. at 1462.
171. 3M Co., 17 F.3d at 1460.
172. Id.
173. Id.
174. The government argued that the statute of limitations should run from the date the government knew, or in the exercise of due diligence should have known, of the violation. Id. at 1460-61. As is discussed later, see infra note 211 and accompanying text, this is a typical statement of the federal discovery rule as it has been
that the discovery rule was not appropriate to apply to the statute of limitations under 28 U.S.C. § 2462, since that statute exclusively restricted the time for fines, penalties, and forfeitures which may be considered forms of punishment.\textsuperscript{175} The court found that the rationale supporting the discovery rule, that a plaintiff cannot have a tenable claim until he has been harmed, was inapposite, because in an action for civil penalties the government must only prove a violation — injuries and damages resulting from the violation are not part of the cause of action — and suit can be brought regardless of damage immediately upon the violation.\textsuperscript{176}

The court provided several additional bases for its decision. The court rejected the idea that its interpretation of 28 U.S.C. § 2462 should be influenced by considerations with respect to the particular substantive statute under consideration, such as the difficulty an agency experiences in assessing violations, and concluded that nothing in the language of 28 U.S.C. § 2462 supported such an interpretation.\textsuperscript{177} Finally, the court examined judicial interpretations of the term "accrued" in 28 U.S.C. § 2462 and concluded that these precedents consistently interpreted the term to mean "that the running of the limitations period in penalty actions is measured from the date of the violation."\textsuperscript{178} The court thus concluded that the discovery rule should not be applied.

2. \textit{The Effect of 3M Co. on CWA Discovery Rule Cases}

Given the D.C. Circuit's categorical rejection of a discovery rule under 28 U.S.C. § 2462 for penalty actions,\textsuperscript{179} but the court's conflicting statement that it neither agreed nor disagreed with the CWA line of cases discussed above,\textsuperscript{180} it is not clear what impact the 3M Co. decision will have on the application of 28 U.S.C. § 2462 to CWA cases in general, and dredge and fill violation cases in particular. At least one district court has con-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{175} 3M Co., 17 F.3d at 1460.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id. at 1461.
\item \textsuperscript{178} Id. at 1462 (citations omitted).
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. at 1462 n.16 (citations omitted).
\end{itemize}
\end{footnotesize}
cluded that a discovery rule is appropriate in CWA dredge and fill cases, even after the 3M Co. decision.\footnote{United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996).} In Material Serv. Corp., the District Court for the Northern District of Illinois held that a discovery rule should be applied in an action brought by the government seeking penalties and injunctive relief for dredge and fill violations.\footnote{Id.} In its decision, the court expressly found that its conclusion, that a discovery rule under 28 U.S.C. § 2462 should be applied in such cases, was left undisturbed by 3M Co.\footnote{Id. at *1-2.}

The Material Serv. Corp. case involved an action brought by the United States against the Material Service Corporation (MSC) for CWA violations associated with land clearing and subsequent mining operations, as part of an expansion of defendant's mine adjacent to the Des Plaines River near Romeoville, Illinois, which destroyed approximately 37 acres of wetlands. The government had first learned of the violations when the defendant requested the Corps to inspect the site to determine whether their quarry was in jurisdictional wetlands, and if so, whether a § 404 permit was needed for mining activities on the site.\footnote{Id. at *2.} After inspecting the site, the Corps issued a cease and desist order, and the United States subsequently filed an action seeking to enjoin further activity, to require restoration and mitigation, and to impose penalties.\footnote{Id. at *5.} MSC subsequently moved to dismiss certain violations under the five-year statute of limitations in 28 U.S.C. § 2462.

In reaching its conclusion that a discovery rule, based on when the government first knew or should have known of the violations, should apply, the court noted that the Seventh Circuit had yet to decide whether the discovery rule applied to CWA cases.\footnote{Id. at *2 (citing Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir.))} The court pointed out, however, that the Seventh Circuit had expressed a generally favorable attitude toward the discovery rule, in the absence of a contrary directive from Congress.\footnote{Id. at *5.} The court then discussed the CWA case law establish-
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The court found that this case law was premised on the inherent difficulty of detecting these violations and that "the discovery rule is necessary if the goals of the [Clean Water Act] are to be realized."\(^{188}\)

The court then noted that courts have applied the same reasoning to CWA cases involving discharges of dredged or fill material, citing to the *Hobbs* and *Windward* decisions.\(^{189}\) The court observed that the courts in *Hobbs* and *Windward* had compared § 404 dredge and fill violations and § 402 discharge violations, and had found that application of a discovery rule was even more appropriate in dredge and fill cases since § 404 violations may be even less discoverable.\(^{190}\) The court concluded that it was appropriate to apply a discovery rule with respect to both § 402 and § 404 violations, and that to find otherwise (that accrual begins at the date of the violation) would seriously undermine the EPA's enforcement efforts.\(^{191}\) The court then asserted that this conclusion was "left undisturbed" by the *3M Co.* decision.\(^{192}\) The court noted that the *3M Co.* decision had declined to disagree with the application of the discovery rule to CWA violations,\(^{193}\) and the court further read the *3M Co.* decision as conceding that the discovery rule can be applied where violations are "inherently undiscoverable."\(^{194}\)

It may be that courts will read the *3M Co.* decision, as did the court in *Material Serv. Corp.*, as allowing for application of a discovery rule to 28 U.S.C. § 2462 in CWA cases. The *3M Co.* court did state in its decision that it was unnecessary for it to "agree or disagree" with these CWA opinions.\(^{195}\) On the other hand,

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188. *Id.* at *8.
189. *Id.* at *9.
190. *Id.* at *9-10.
191. *Id.* at *11.
192. *Id.*
193. *Id.* at *4* (citing 3M Co. v. Browner, 17 F.3d 1453, 1462 n.16 (D.C. Cir. 1994)).
194. *Id.* (citing 3M Co., 17 F.3d at 1462 n.15).
195. 3M Co., 17 F.3d at 1462 n.16. The 3M court stated:

None of the [CWA] decisions purported to adopt any general interpretation of "accrued." Each decided only when a claim accrued under the particular provi-
the reasoning of the 3M Co. court’s decision, arguably undercuts the theory of applying a discovery rule to cases under the CWA.\textsuperscript{196} The rule that the 3M Co. court refused to apply to TSCA violations and derisively referred to as an “open ended discovery rule,” appears to be the same one that the \textit{Material Serv. Corp.} court and other courts have applied in the CWA context, namely, that the statute of limitations is deemed to accrue on the date that the government knew or should have known of the violation.\textsuperscript{197} In addition, it should be noted that the court categorically rejected the application of a discovery rule under 28 U.S.C. § 2462.\textsuperscript{198} In rejecting the government’s arguments for application of a discovery rule, the 3M Co. court (despite its footnote saying it was not ruling on CWA case law) did not distinguish between TSCA and any other statute, environmental or otherwise.\textsuperscript{199} Furthermore, the D.C. Circuit has itself interpreted the 3M Co. decision as rejecting a discovery rule under 28 U.S.C. § 2462 without reference to the substantive statute involved,\textsuperscript{200} and irrespective of public policy concerns.

\textsuperscript{196} Id. at 1461 n.15. In footnote 15 of its decision, the 3M Co. court noted that the EPA might be able to invoke the fraudulent concealment doctrine to toll the statute of limitations if a violator improperly certified that it had met the reporting requirements in question. \textit{Id.} This doctrine would still be available to toll the statute of limitations in the CWA context even if a discovery rule were not applied, provided the conditions for invoking the doctrine were met. \textit{See, e.g.,} Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990). \textit{See also} Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480 (9th Cir. 1987).


\textsuperscript{198} 3M Co., 17 F.3d at 1462-63.

\textsuperscript{199} Id.

\textsuperscript{200} See MCI Telecomm. v. Federal Commerce Comm’n, 59 F.3d 1407, 1416-17 (D.C. Cir. 1995) (applying a discovery rule to damage claim under 47 U.S.C. § 206 (1994) of the Communications Act). In this decision the court reiterated a concern expressed in the 3M Co. decision:

\textbf{If the discovery-of-injury rule were applicable to an agency-initiated civil penalty case, then the court would have to determine whether the agency, with the}
that might argue for a more expansive reading of 28 U.S.C. § 2462.\textsuperscript{201}

\textbf{C. An Analysis of the 3M Co. Court’s Narrow Interpretation of the Discovery Rule}

Although the 3M Co. court did not explicitly contradict the CWA cases discussed above, courts may in the future still rely on the reasoning of the decision as the basis for rejecting the use of a discovery rule for all CWA cases,\textsuperscript{202} or to reject the rule for dredge and fill cases and limit the rule to § 402 type cases only.\textsuperscript{203} In addition, it will no doubt be used to reject the use of a

exercise of due diligence should have detected the violations earlier than it had
— an oversight activity that (at least absent a statutory directive to the contrary) is better suited to the legislature than to the court.


\begin{quote}
In 3M Co., without employing qualifying language to suggest that the time of “first accrual” might vary depending upon the statute involved, the D.C. Circuit held that § 2462 requires that “an action, suit or proceeding [for a civil penalty] must be commenced within five years of the date of the violation giving rise to the penalty.”
\end{quote}

\emph{Id.}).

\textsuperscript{201} See Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996) (holding that a Securities and Exchange Commission (SEC) proceeding censuring defendant and imposing a six-month suspension was a “proceeding for enforcement of a penalty” and thus barred under 28 U.S.C. § 2462, relying on 3M Co. to reject arguments by the SEC that public policy considerations warranted a different result, and stating that “any public policy concerns . . . are greatly attenuated because § 2462 applies [except as otherwise provided by Act of Congress,’ and thus Congress, should it believe a five-year statute of limitations is too burdensome in any particular situation, can simply put in a longer limitations period.”) (citations omitted).

\textsuperscript{202} See United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995) (stating that “for the purpose of the statute of limitations under 28 U.S.C. § 2462, the unlawful discharge of pollutants under the CWA . . . does not constitute a continuing violation; the five year statute begins to run at the time of the discharge.”).

\textsuperscript{203} A distinction between § 402 and § 404 cases could be based on the fact that the 3M Co. court did not expressly disagree with the § 402 discovery cases cited to it, possibly because in those cases the courts found that the claims involved “accrued . . . at a discrete time: when the reports were filed.” 3M Co. v. Browner, 17 F.3d 1453, 1462 n.16 (D.C. Cir. 1994). There is no analogous reporting requirement under the § 404 program. Such an interpretation would read subsequent decisions such as \textit{Windward} and \textit{Material Serv. Corp.}, which have applied an objective discovery rule (based on when the government knew, or otherwise should have known of the violations) as an expansion of the earlier § 402 precedent. This distinction is
discovery rule under other statutes. At a minimum, there appears to be a conflict between circuits on the issue of whether the discovery rule may be applied to civil penalty actions under environmental statutes. A close examination of the merits of the 3M Co. decision raises some interesting questions as to the appropriateness of the court's reasoning on this issue, and provides additional basis for distinguishing or rejecting the 3M Co. approach in the context of the CWA and other environmental statutes.

1. Discovery of Injury vs. Discovery of Violation Distinction

In its decision, the 3M Co. court relies heavily on the distinction between the terms "injury" and "violation," in determining whether a discovery rule should apply to the statute of limitations imposed under 28 U.S.C. § 2462. The court asserts that the discovery rule was appropriate for latent injury cases or injuries difficult to detect because the harm has not fully matured until the discovery of the injury. The court contends that in a penalty action there is no need to wait until the injury fully matures as in a latent injury case, because penalties may immediately be assessed for a "violation" regardless of whether any damage has manifested itself. The court acknowledged that the discovery rule has not been restricted to personal injury actions, but asserted that "the rule has only been applied to remedial, civil claims.

The 3M Co. court's distinction between "injury" and "violation" in applying the discovery rule, however, is questionable in light of the case law interpreting the rule. The court's admission, that

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questionable since the § 402 cases arguably did apply a discovery rule. See infra note 223-30 and accompanying text.


205. See Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 75 (3d Cir. 1990) (statute of limitations under 28 U.S.C. § 2462 accrues when EPA receives report of violation); Cf. 3M Co., 17 F.3d at 1462 (action accrues for purposes of 28 U.S.C. § 2462 at the time of the violation, not when the EPA first knows of the violation).

206. 3M Co., 17 F.3d at 1460.

207. Id.

208. Id.

209. Id.
the discovery rule has not been restricted to personal injury cases is a bit of an understatement. Not only has the discovery rule not merely been applied to cases other than personal injury actions, it has in fact been applied as a general rule by the federal courts to both federal and state statutes of limitations in absence of a contrary direction from Congress. Many courts have not made a distinction between "injury" and "violation" in discussing the discovery rule, and a number of courts have in fact expressly used the term "violation" in stating the rule. Thus, prior judicial pronouncements do not provide the clear basis that the court would assert for its distinction between a "discovery of injury" rule from a "discovery of violation" rule. In addition, on a more analytical level, it is hard to see a basis for the distinction the court makes between penalty actions and the types of cases where the courts have applied the discovery rule. For example, a decision by the D.C. Circuit itself several years

210. See, e.g., Cada v. Baxter Healthcare, Corp., 920 F.2d 446, 450 (7th Cir. 1990) (stating:
The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into statutes of limitations in federal-question cases [even when those statutes of limitations are borrowed from state law] in the absence of a contrary directive from Congress.

Id.).

211. See Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 75 (3d Cir. 1990) (stating, "the five year statute of limitations does not begin to run until . . . [reports] listing the violations are filed.") (emphasis added); Alcorn v. Burlington Northern R.R., 878 F.2d 1105, 1108 (8th Cir. 1989) ("[a] limitations period accrues when a claimant knows, or should know through an exercise of reasonable diligence, of the acts constituting the alleged violation.") (emphasis added); Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir. 1988) (stating that "[i]n federal law, the limitations period commences when 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof.'") Id. (quoting Vigman v. Community Nat'l Bank & Trust, 635 F.2d 455, 459 (5th Cir. 1981)) (emphasis added); Breen v. Centex Corp., 695 F.2d 907, 911 (5th Cir. 1983) (holding that under federal law the period of limitations "begins running only when the plaintiff discovers, or in the exercise of reasonable diligence should discover the alleged violations.") (emphasis added); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 893 (5th Cir. 1979) (holding that "[a] matter of federal law, the period of limitations . . . begins running only when the plaintiff discovers, or in the exercise of reasonable diligence should discover, the alleged violations.") (emphasis added); NLRB v. Allied Prods. Corp., 548 F.2d 644, 650 (6th Cir. 1977) (holding that a limitations period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].") (emphasis added).
previously, **Connors v. Hallmark & Son Coal Co.**, which the **3M Co.** court cites as an appropriate use of the discovery rule, does not support this distinction.

In **Connors**, the D.C. Circuit applied the discovery rule to an action brought by trustees of union worker health and retirement funds for failure of coal companies to report and pay pension fund contributions under national industry wage agreements. In their complaint, the trustees alleged "violations" of the Labor Management Relations Act and the Employment Retirement Income Security Act. Defendants moved to dismiss on the grounds that the applicable statute of limitations barred the claims, arguing that the statute of limitations ran at the time each monthly payment became due. The trustees argued that the general rule in federal courts is the discovery rule under which a claim for relief does not accrue until the plaintiff discovers or with due diligence should have discovered the injury. The defendants argued that a "time of injury" rule should be applied, according to which a claim accrues when a plaintiff's right to resort to a court is complete, regardless of whether the plaintiff had discovered the injury. The defendants further argued that the discovery rule, which it admitted the courts had applied in personal injury cases, should not be applied, since the statute of limitations in question applied to claims for breach of contract and not tort actions. The court rejected the defendants' arguments and held that the trustees' claims for relief did not accrue until they became aware, or reasonably should have become aware of defendants' delinquencies and false reports. In reaching its decision, the court stated that "the discovery rule is to be applied in all federal question cases 'in the absence of a contrary directive from Congress.'"

The claims before the court were for breach of the defendants' contractual obligations to contribute and report, and these claims...

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213. Id. at 342.
214. Id. at 337-38.
215. Id. at 341.
216. Id.
217. Id. at 339 n.4.
218. Id. at 340-41.
219. Id. at 341-42 (citing Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990)).
were clearly complete at the time they occurred. They were in this way similar to a claim for a civil penalty, to which the 3M Co. court found the discovery rule should not apply, because "liability for the penalty attaches at the moment of violation." The Connors court focused on the fact that the breach of the contractual obligations were "likely to be a hidden injury, similar to the type of injury that has long triggered the discovery rule." Using the term injury in a general sense, the court did not even consider whether the injury was fully mature or whether damages were ascertainable at the time of the breach. Thus, in a case where the defendants tried to focus on the time of injury and argued that the date of accrual of the statute of limitations was on the date that the plaintiffs' right to sue was complete, the court found that the discovery rule should apply.

The time of the cause of action for a breach of the employers' contractual obligations in the Connors case arose at the time of the wrong and not at some later time (and had no relation to when damages were ascertainable). The cause of action was just as immediate as a cause of action for a civil penalty. The 3M Co. court’s focus on the time of the injury is arguably misguided. The focus instead should be on the wrong itself. What is important is if the wrong, whether described as an injury or violation, is of the type that it would not be easily discovered, as is the case with CWA violations in general, and wetlands violations in particular.

2. The 3M Co. Court’s Reading of Discovery Rule as Applying Only to Remedial, Civil Claims

The 3M Co. court stated that the discovery rule "has only been applied to remedial, civil claims." It is not immediately clear what the court meant by this. If the court meant by its statement that the rule has not been applied to penalty actions under 28 U.S.C. § 2462, then the court was mistaken. Contrary to the court's assertion, courts have applied a discovery rule under 28 U.S.C. § 2462 specifically to penalty actions under the CWA. In the footnote, in which the 3M Co. court discusses

220. 3M Co. v. Browner, 17 F.3d 1453, 1460-61 (D.C. Cir. 1994).
221. Connors, 935 F.2d at 343.
222. See supra note 152-60 and 188-94, and accompanying text.
223. 3M Co., 17 F.3d at 1460.
224. See, e.g., Public Interest Research Group of N.J., Inc. v. Powell Duffry
the CWA cases which have held that CWA violations do not accrue until the EPA receives reports of the violations, the court makes the statement that none of the cases cited, “mention a discovery rule” with the implication that these cases were not applying a discovery rule, or at least not as it has been applied in the past by courts. Even a superficial review of the three CWA cases cited by the government in 3M Co. clearly contradicts such a view. Even though the three cases do not use the term “discovery rule” the cases they cite make clear that they were applying a discovery rule.

In the Atlantic States case, which was the first CWA case to hold that the discovery rule should apply to CWA penalty actions, the court cited to classic cases where the discovery rule had been applied by federal courts. The basis for applying the discovery rule in CWA cases was the recognition “that it is virtually impossible for the public to discover violations until reports have been filed with the EPA.” The court in Atlantic States expressly stated that “[t]o hold that the statute of limitations begins to run when violations actually occur, as opposed to when they are discovered, would impede, if not foreclose the remedial benefits of the statute.” The Public Interest Research Group and Hobbs courts, in turn, cited to the Atlantic States decision. It is, thus, quite clear that each of these cases was applying a “discovery rule.” Subsequent cases interpreting

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225. 3M Co., 17 F.3d at 1462 n.16.
227. Atlantic States, 635 F. Supp. at 288 (citing Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982) (applying a discovery rule to allow an action for wrongful death under the Federal Tort Claims Act); Nichols v. Hughes, 721 F.2d 657, 659 (9th Cir. 1984) (applying the general test for the federal discovery rule to a civil rights action for wrongful discharge by the U.S. Navy, but holding that the plaintiff knew or should have known his discharge was wrongful from the outset and thus holding that the cause of action accrued at the time of discharge); Dubose v. Kansas City S. Ry., 729 F.2d 1026, 1029 (5th Cir. 1984) (applying the discovery rule to a wrongful death action under the Federal Employers’ Liability Act)).
228. North Carolina Wildlife Federation v. Woodbury, 29 Env’t Rep. Cas. (BNA) 1941, 1944 (E.D.N.C. 1989) (citing to Atlantic States for the proposition that “claims under the Clean Water Act do not accrue, for statute of limitations purposes, until reports documenting the violations have been filed with the EPA.”).
these CWA cases have correctly interpreted them as applying a discovery rule. These cases have applied a discovery rule for reasons analogous to why the D.C. Circuit applied a discovery rule in Connors: They recognized that application of a discovery rule was necessary to give full effect to the remedial nature of the substantive statute involved, and that the application of the discovery rule was consistent with Congressional intent.

If the 3M Co. court's distinction is that the term "violation" as used in prior judicial pronouncements of the discovery rule is referring only to injury claims but not to penalty claims based on a violation, the distinction is still misplaced. Civil penalties actions are brought under the CWA to address and to deter injury to the environment. Courts have acknowledged the remedial purposes of the CWA in giving an expansive reading to its provisions, and courts have cited to these remedial purposes in applying a discovery rule to the CWA in both the § 402 and § 404 context. The stated goals of the CWA including the objective "to restore and maintain the biological integrity of the Nation's waters" bears out the remedial nature of the statute. Enforcement actions under the CWA have the effect of


231. See Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 343 (D.C. Cir. 1991) (stating that "application of the discovery rule is consistent with Congress' intent in ERISA to provide 'broad remedies' . . . to [program] participants."); Material Serv. Corp., 1996 U.S. Dist. LEXIS, at *3 (stating that "because of the inherent difficulty of detecting these violations, the discovery rule is necessary if the goals of the Clean Water Act are to be realized.").

232. See, e.g., United States v. Earth Sciences, 599 F.2d 368, 373 (10th Cir. 1979) (broadly defining the term "point source"); Quivera Mining v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (broadly defining the term "navigable waters" under the CWA); Shanty Town Assoc., Ltd. v. EPA, 843 F.2d 782, 792 (4th Cir. 1988); United States v. Hamel, 551 F.2d 107, 112 (6th Cir. 1977).

233. See, e.g., United States v. ALCOA, 824 F. Supp. 640, 645 (E.D. Tex. 1993) (stating that "[t]he CWA is entitled to a broad construction to implement its purpose[,] . . . " and thus, finding that application of a discovery rule was appropriate to CWA enforcement action for NPDES permit violations).


deterring noncompliance and thereby providing protection for the environment. In addition, penalty actions under the CWA may be considered remedial because they have the effect of recovering the economic benefit of noncompliance. Thus, CWA penalty actions still meet the more narrow "civil, remedial" description used by the 3M Co. court for the type of cases to which the discovery rule has been applied.

In summary, the courts have not made a distinction between "violation" and "injury" in applying the discovery rule. Just because the rule originated with personal injury cases does not mean it has been or needs to be limited as such, and there is not a consistent logical basis for doing so. Courts clearly have applied the rule to CWA penalty actions prior to 3M Co., and as explained by the Windward and Material Service Corp. courts, the application of the rule in dredge and fill cases makes sense and is consistent with how the rule has been applied in the past. The remedial nature of the CWA and the fact that the statute of limitations is being applied to the federal government are additional reasons for broadly construing the statute of limitations.

3. Additional Grounds for Rejecting the 3M Co. Interpretation of the Discovery Rule

The 3M Co. court provided several additional arguments for why the discovery rule should not be applied to penalty enforcement actions under TSCA. First, the court made the assertion
that it had a limited role and it could not take into consideration the underlying statute in determining whether the discovery rule applied to 28 U.S.C. § 2462. In so holding, the court ignored Supreme Court precedent with regard to the interpretation of statutes of limitations. In *Crown Coat Front Co. v. United States*, the Supreme Court stated:

The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

Thus, it is appropriate for courts to look at the general purposes of the underlying statute (i.e., the CWA) when deciding when an applicable statute of limitations should be deemed to accrue. This is in fact what the D.C. Circuit panel did in the *Connors* case when it found that a discovery rule was consistent with the underlying statute, in that case ERISA. Courts have also looked to the underlying purposes of the CWA in holding that a discovery rule should apply to wetlands violations.

The *3M Co.* court also stated that it would not read a discovery rule into 28 U.S.C. § 2462 because "nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in

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239. 386 U.S. 503, 517 (1937).
240. Id.
241. See Klein, supra note 131, at 583-84.
detecting violations."\textsuperscript{244} This argument is not persuasive in light of the fact that the discovery rule is a judicially applied doctrine of relatively recent origin, and one would not expect a statute enacted prior to application of the doctrine by federal courts to include an express reference to the rule. As the Seventh Circuit Court of Appeals has noted, "the 'discovery rule' of federal common law... is \textit{read} into statutes of limitations in federal-question cases... in the absence of a contrary directive from Congress."\textsuperscript{246} The discovery rule, as applied by the federal courts, was first set out by the Supreme Court in \textit{Urie v. Thompson} in 1949.\textsuperscript{247} Thus, it is not surprising that a statute of limitations enacted in 1948 would not contain a recitation of the doctrine. Nor is it surprising that prior federal cases cited by the 3M Co. court under the precursors to 28 U.S.C. § 2462 do not reference the discovery rule.\textsuperscript{247}

The 3M Co. court reviewed judicial precedents and concluded that the case law was clear that the term "accrued" in 28 U.S.C. § 2462 means that the statute of limitations runs from the time of the violation, and that this conclusion "has been accepted without question" in the case law.\textsuperscript{248} The cases cited by the 3M Co. court to support this proposition were cases that either pre-dated application of the discovery rule by the federal courts or were cases where the discovery rule was never raised as an issue.\textsuperscript{249} In addition, the 3M Co. court's analysis fails to recog-

\textsuperscript{244} 3M Co. v. Browner, 17 F.3d 1453, 1461 (D.C. Cir. 1994).
\textsuperscript{245} Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (emphasis added). See Connors, 935 F.2d at 342.
\textsuperscript{246} See Dubose v. Kansas City S. Ry., 729 F.2d 1026, 1029 (5th Cir. 1984) (stating that "[t]he Supreme Court created and supplied the rationale for the federal discovery rule in Urie v. Thompson, 337 U.S. 163 (1949)..."). See also United States v. Kubrick, 444 U.S. 111, 120 n.7 (1979).
\textsuperscript{247} See 3M Co., 17 F.3d at 1462 (citing to cases under the 1839 and 1874 versions of the statute now found at 28 U.S.C. § 2462).
\textsuperscript{248} Id.
\textsuperscript{249} See United States v. Core Labs., 759 F.2d 480, 482 (5th Cir. 1985) (stating that "the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute [28 U.S.C. § 2462] began to run."). At issue in this case, however was whether the statute began to run on the date the claims first accrued or on the date of the final administrative order assessing a penalty — the question of whether a discovery rule should apply was not raised in the case. Id. at 482. See also United States v. C & R Trucking, 537 F. Supp. 1080, 1083 (N.D. Va. 1982) (stating that the government had instituted the action "within five years" prescribed by 28 U.S.C. § 2462). The violations in question in \textit{C & R Trucking} clearly occurred, as the court found, within five
nize the fact that courts have in effect applied two different times for accrual of statute of limitations: (1) when the wrong first occurred, if the defendant knew or should have known of the injury/violation; and (2) the date of discovery of the wrong, if the injury/violation was such that it was inherently difficult to detect. 250  As a general statement, it is thus correct to say that a statute of limitations such as 28 U.S.C. § 2462 accrues at the time of the violation, however, if the wrong is such that it is difficult to detect, the courts will read the discovery rule into the statute and use the date of discovery as the date of accrual. 251

years of the commencement of the suit, and there was thus no need for the government to argue that a discovery rule should be used, and hence the applicability of the discovery rule was not at issue. Id. Cf. United States v. Sharon Steel Corp., 30 Env't Rep. Cas. (BNA) 1778 (N.D. Ohio 1989) (case not cited in 3M Co. or Core, holding that violations of the CWA that occurred more than five years prior to commencement of enforcement action were barred — but again there is no indication that the discovery rule was raised by the government in that case).

250. See Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 341-42 (D.C. Cir. 1991) (stating that the “time of injury rule” (according to which a claim accrues when the plaintiff's right to resort to the courts is complete):

[C]an be considered analytically as but a particular instance of the discovery rule: if the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time ... [b]ut if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commences, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Id.); see also Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990).

251. Connors, 935 F.2d at 342. The 3M Co. court cites two cases (not involving 28 U.S.C. § 2462) for the proposition that the Supreme Court has rejected a discovery rule approach for agency penalty actions. 3M Co., 17 F.3d at 1461 n.14. Neither of these cases can be read as such. The first, Unexcelled Chem. Corp. v. United States, 345 U.S. 59 (1953), did not address the discovery rule, as the issue as framed by the parties was whether the two year statute of limitations at issue began to run only after an administrative determination of liability. Id. Thus, the court's passing statement that “[a] cause of action is created when there is a breach of a duty [and] ... [i]t is that breach of duty, not its discovery, that normally is controlling,” can only be read as dicta. Id. at 65. If taken at face value, the Court's statement would have to be read as a Supreme Court rejection of any discovery rule. This is clearly not the case, as the second case cited by the 3M Co. court, United States v. Kubrick, 444 U.S. 111 (1979), clearly demonstrates. In Kubrick, the Supreme Court acknowledged the discovery rule as applied by the federal courts, but refused to extend the rule to a situation where the plaintiff was aware of both his injury and its cause, but who was as yet unaware, that the defendant's action constituted medical malpractice. Id. at 120-22. The Court refused to apply the discovery rule in this situation stating that “the prospects are not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.” Id. at 122.
The courts should apply the same reasoning to the five-year catch-all statute of limitations of 28 U.S.C. § 2462.

Arguably, there is nothing inherent to a civil penalty action that precludes similar reasoning from being employed to allow application of a discovery rule. The 3M Co. court, however, asserted that such a due diligence discovery rule was unworkable in the context of agency penalty assessments, suggesting that a determination of whether an agency knew or should have known of a violation was, in the court’s view, more appropriately the subject of a Congressional oversight committee. The court's reasoning seems to be that there is something unique about agency penalty assessment such that courts could not practically apply such a rule.

The best response to this is that courts apply the discovery rule frequently to complicated tort actions and other cases, and have in fact applied the discovery rule to penalty actions without apparent difficulty. In addition, given the nature of CWA violations, generally the first time that the government could be said to be aware of such violations is when a report documenting those violations is received. Thus, in most cases, the only

This language actually supports an argument that it is appropriate to apply the discovery rule to a situation, such as a CWA enforcement action, where the government does not have knowledge of the violation, or who caused the violation.

252. 3M Co., 17 F.3d at 1461. The 3M Co. court stated:

[in this case, EPA suggests a remand for an evidentiary hearing . . . and proposes a test: whether "in the exercise of due diligence," EPA should have discovered 3M's violations earlier than it did . . . . The subject matter seems more appropriate for a congressional oversight hearing. We seriously doubt that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations. Nor do we understand how any of this relates to the reasons why we have a statute of limitations in penalty cases. An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered.]

Id.


254. See Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986) (stating that "it would have been practically impossible for the plaintiff to have discovered the alleged violations of the defendant on its own. It is only when reports are filed with the E.P.A. that the public becomes aware that violations have occurred."); United States v. Hobbs, 736 F. Supp. 1406 (E.D. Va.
question will be when did the government receive a report of the violation. In situations where a given dredge and fill violation would be easier to detect than an NPDES discharge violation, the application of an objective discovery rule could take this into account. Where a given wetlands violation was more easily detectable, the limitations period could be deemed to run sooner.

To the extent that penalty actions are unique in that they are a form of punishment, this factor should be weighed against the remedial purposes of the CWA and the fact that statutes of limitations should be strictly construed in favor of the government. To the extent that a defendant may be subject to a pecuniary forfeiture for an extended period of time, this is not logically different from the situation where a defendant in a latent injury case is exposed to liability for an extended period of time, and an action may be brought many years after the defendant's alleged wrongdoing. Such a result seems even less unfair to a potential defendant in a CWA penalty action when balanced against the harm to the public and the environment that would result from the EPA or the Corps not being able to prosecute a wetland violation that they were not aware of, simply because the dredge and fill activity occurred more than five years previously. Furthermore, application of an objective discovery rule would help to balance any unfairness against the defendant by ensuring that the government does not sleep on its rights.


255. Material Serv. Corp., 1996 U.S. Dist. LEXIS 14471, at *10. In apparent response to the 3M Co. court's view of the due diligence portion of the discovery rule as requiring an analysis of whether an agency's enforcement branch had effectively detected violations, the Material Serv. Corp. court stated that the EPA has no other means to detect violations under the § 402 or § 404 regulatory programs, other than by receiving reports, "not because of mismanagement or budgetary shortfalls, but because violations such as the one in this case often take place on isolated stretches of private property." Id. at *10-11. The court further stated that "(t)he discovery rule should apply in this case." Id.

256. Id.

257. ALCOA, 824 F. Supp. at 645-47.
The proper test for application of the federal discovery rule should arguably be whether the injury/violation is of a kind that is easily discovered. If not, the due diligence rule should apply except where Congress has expressed a contrary directive. Because penalty actions for wetlands violations are brought to help remedy a harm to the public and are inherently difficult to detect, courts should apply a discovery rule when applying the statute of limitations in 28 U.S.C. § 2462 to wetlands enforcement actions, if they find that such violations are not continuing violations.

V. INAPPLICABILITY OF 28 U.S.C. § 2462 TO INJUNCTIVE RELIEF

A. Plain Language of the Statute Precludes its Application to Injunctive Relief

In its decision, the Telluride court held that the statute of limitations contained in 28 U.S.C. § 2462 barred the claims brought by the government for both civil penalties and injunctive relief. The plain language of § 2462 contradicts the court’s position. On its face, 28 U.S.C. § 2462 applies only to actions, suits, or proceedings "for the enforcement of any civil fine, penalty, or forfeiture." It is a long settled principle of law that the express language of a statute is controlling, absent a clearly expressed legislative intention to the contrary, and courts have applied this rule to 28 U.S.C. § 2462 to find that it does not apply to government claims for injunctive relief. The D.C.

259. 28 U.S.C. § 2462 (1994). In its brief in support of its motion to dismiss, Telluride argued that the plain language of the statute is broad enough to include injunctive relief focusing on the words "pecuniary or otherwise," in § 2462, as in "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." Reply Brief in Support of Defendant’s Motion for Partial Summary Judgment at 14 n.10, United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995) (No. 93-K-2181). What the phrase "pecuniary or otherwise" in 28 U.S.C. § 2462 arguably refers to, however, is non-monetary sanctions which nonetheless are penal, rather than equitable, in nature. See Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996) (holding that SEC order censuring defendant and imposing six-month disciplinary action was a proceeding for enforcement of a penalty under 28 U.S.C. § 2462).
260. Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 107-109 (1980); see also Johnson, 87 F.3d at 486 (stating that "absent sufficient indication to the contrary" by Congress, courts should apply the "ordinary, contemporary, common
Circuit recognized this fact in the 3M Co. decision when it stated that "[t]he statute of limitations . . . is aimed exclusively at restricting the time within which actions may be brought to recover fines, penalties, and forfeitures." The plain language of 28 U.S.C. § 2462 makes clear that it only applies to "fines, penalties, and forfeitures," and thus courts have consistently held that it should not be applied to government claims for injunctive relief.

B. Punitive v. Remedial Claims

The Telluride court's position also ignores the fact that the terms used in § 2462, "fine," "penalty," and "forfeiture" are punitive in nature, while injunctive relief is not. The statute of limitations in § 2462 does not apply to government claims for
injunctive relief because the action is not in the nature of a penalty.\textsuperscript{265} This distinction was made clear by the D.C. Circuit in \emph{Johnson v. SEC}.

In \emph{Johnson v. SEC}, the D.C. Circuit held that an SEC proceeding, resulting in a censure and six-month disciplinary suspension of a securities manager, was a proceeding for the enforcement of a penalty to which 28 U.S.C. § 2462 applied.\textsuperscript{266} In finding that the general five-year statute of limitations applied to the proceeding in question, the court examined the question of what was a “penalty” for purposes of the statute.\textsuperscript{267} The court found that the censure and six-month suspension in question were penal in nature, and thus were a penalty under 28 U.S.C. § 2462.\textsuperscript{268} In reaching its decision, the court noted that a “sanction which only remedies the damage caused by the defendant does not trigger the protections of § 2462.”\textsuperscript{269} It should be noted that one of the long line of decisions cited to by the court was a Third Circuit decision affirmed without opinion by the Supreme Court.\textsuperscript{270}

The Supreme Court has held as a general rule that actions by the United States are not subject to statute of limitations in the absence of Congressional enactment expressly imposing such a limitations period.\textsuperscript{271} In addition, the courts have held that

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\textsuperscript{266} Johnson v. SEC, 87 F.3d 484, 492 (D.C. Cir. 1996). In this case, the SEC argued that 28 U.S.C. § 2462 should not apply because the proceeding in question was not seeking a civil penalty, but only remedial injunctive relief. \textit{Id}. at 486.

\textsuperscript{267} \textit{Id}. at 487.

\textsuperscript{268} \textit{Id}. at 492.

\textsuperscript{269} \textit{Id}. at 488. \textit{See also} Meeker v. Lehigh Valley R.R., 236 U.S. 412 (1915) (a decision under the precursor to 28 U.S.C. § 2462 holding that the terms “penalty and forfeiture” referred to “something imposed in a punitive way for an infraction of a public law” and thus the statute did not bar the action in question because it was not punitive but strictly remedial); Peerless Casualty Co. v. United States, 344 F.2d 486 (D.C. Cir. 1964) (government action for forfeiture of bail bond not barred under 28 U.S.C. § 2462); United States v. Perry, 431 F.2d 1020, 1025 (9th Cir. 1970) (government’s action to recover sums allegedly paid in violation of Anti-Kickback Act not barred under 28 U.S.C. § 2462); United States v. Doman, 255 F.2d 865 (3d Cir. 1958) (action for damage payments for violation of the Surplus Property Act), \textit{affd sub nom.}, Koller v. United States, 359 U.S. 309 (1959).

\textsuperscript{270} See \textit{Koller}, 359 U.S. at 309; \textit{Doman}, 255 F.2d at 865 (Third Circuit case affirmed by the Supreme Court where the circuit court found 28 U.S.C. § 2462 inapplicable to the compensatory provisions of the Surplus Property Act which were found to be remedial in nature).

\textsuperscript{271} \textit{See} Badaracco v. Commissioner, 464 U.S. 398 (1984); E.I. Du Pont de
"statutes of limitation are not controlling measures of equitable relief," and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Given these longstanding principles of law, the plain language of 28 U.S.C. § 2462, as well as the distinction the courts have consistently made between a claim for penalties and a "sanction to remedy damages," it is not surprising that "[i]n the context of § 2462 courts have consistently held that the government's claims for equitable relief 'be subject to no time bar.'" From the plain language of the statute, it is clear that Congress has not expressly imposed a limitations period on claims for injunctive relief under § 2462, and thus, they should not be held barred under the statute.

In reaching its decision, the Telluride court followed the holding in Windward, which relied on a line of cases holding that where equitable and civil remedies are concurrent, the applicable statute of limitations will apply to both types of relief. Ac-
cording to the Telluride court, the Windward court distinguished the rule in exclusive and concurrent situations by citing to Russell v. Todd,278 which distinguished exclusively equitable remedy cases from those that allowed concurrent remedies. Relying on these cases, the Telluride court refused to follow the authority cited by the government, namely Hobbs.279 The Telluride court reasoned that Hobbs relied on cases which involved purely equitable remedies and did not address the established concurrent remedy rule, that equity follows the legal remedy, and thus, the court ruled that both the government's penalty claims and injunctive relief claims were barred.

It should be noted that the cases relied on by the Telluride court involved private suits that did not address the direct applicability of 28 U.S.C. § 2462. In addition, neither the Telluride nor the Windward decisions cited to Koller v. United States, in which the Supreme Court affirmed a Third Circuit opinion finding 28 U.S.C. § 2462 inapplicable to the compensatory provisions of the Surplus Property Act, which were remedial in nature.280 Most significantly, the Windward and Telluride courts failed to address both the rule that the plain language of a statute is normally controlling and the rule that statutes of limitations should be strictly construed in favor of the government. Applying these rules to 28 U.S.C. § 2462 negates the possibility that the more general rule cited by the Telluride court necessitates a different result. The case law holding to the contrary, even in concurrent remedy situations,281 overwhelmingly bears this out, and demonstrates the incorrectness of the holdings in Windward and Telluride.282

O'Hare Chicago Corp., 592 F.2d 351, 354-55 (7th Cir. 1979); Saffron v. Department of Navy, 561 F.2d 938, 942-43 (D.C. Cir. 1977).
278. 309 U.S. 280 (1940).
280. Koller v. United States, 359 U.S. 309 (1959); United States v. Doman, 255 F.2d 865 (3d Cir. 1958); see also United States v. Perry, 431 F.2d 1020 (9th Cir. 1970) (court refused to apply § 2462 to the Anti-Kickback Act where remedies were found to be compensatory, instead of penal in nature, citing to the Supreme Court decision in Koller).
282. Further undermining the Telluride decision is the fact that a recent federal
VI. CONCLUSION

It is not clear whether courts will find that wetlands violations, where dredged or fill material is allowed to remain in place, are continuing violations under 28 U.S.C. § 2462. If they do find such violations continuing, the five-year statute of limitations should not be an issue in most cases. If a court finds such violations are not continuing, however, the discovery rule should be applied. The 3M Co. decision should not be followed to prevent application of a discovery rule under the CWA for NPDES or wetlands violations. Given the potential impact of the 3M Co. decision on wetlands enforcement actions, Congress may wish to consider adding language to the CWA making clear that wetlands violations continue each day that “unauthorized” dredged or fill material is allowed to remain in place. Given the potential impact of the 3M Co. decision on enforcement of other environmental statutes and government-wide agency initiated penalty actions, Congress may wish to add a tolling provision to 28 U.S.C. § 2462 similar to the one that applies to the statute of limitations for government contract and tort actions. That provision tolls the statute of limitations “where facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances.”

Finally, courts should not find that the government’s claims for injunctive relief in wetlands enforcement actions are barred under 28 U.S.C. § 2462, as such an interpretation is contrary to the express language of the statute and the remedial purposes of the CWA.

district decision, holding that § 2462 does not apply to claims for injunctive relief, explicitly rejected the Windward decision relied on by the Telluride court. Federal Election Comm’n v. National Republican Senatorial Comm., 877 F. Supp. at 20-21. The Federal Election Comm’n case involved a government enforcement action where both civil and equitable relief were sought. The defendant moved for summary judgment and dismissal on the grounds that the action was barred by 28 U.S.C. § 2462. While the court found that civil penalties were barred, the court ruled that the government’s claims for injunctive relief were not. Id. The court, citing to Holmberg and Hobbs, found that the statute of limitations was not applicable to equitable relief. The court explicitly rejected the Windward decision relied on by the Telluride court finding that the decision was “contrary to the express language of the statute.” Id. It reasoned that the language of the statute is controlling, absent a clearly expressed legislative intention to the contrary. Id. (citing Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)).

CITIZEN ENFORCEMENT Suits: WILL AN OLD TOOL TAKE ON NEW IMPORTANCE?

by Jack D. Shumate*

I. INTRODUCTION AND OVERVIEW

Congress has provided authority for private citizens to file suit, under certain circumstances, to enforce most of the major federal environmental regulatory statutes, including the Clean Air Act ("CAA"),1 the Federal Water Pollution Prevention and Control Act ("Clean Water Act" or "CWA"),2 the Toxic Substances Control Act ("TSCA"),3 the Resource Conservation and Recovery Act ("RCRA" or "Solid Waste Act"),4 the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"),5 and the Emergency Planning and Community Right to Know Act ("EPCRA").6

The citizens suit provisions were intended by Congress to complement federal and state regulatory authority, permitting private citizens to enforce federal regulations if the regulatory authorities did not. Thus, in reporting the 1972 amendments to CWA, Congress explained, "It should be noted that if the Federal, State and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of Section 505." Congress explained this purpose somewhat more expa-

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sively when it reported the 1984 RCRA amendments:

[The bill] ... confers on citizens a limited right ... to sue to abate an imminent and substantial endangerment ... The Committee believes this expansion of the citizens suit provisions will complement, rather than conflict with, the Administrator's efforts to eliminate threats to public health and the environment, particularly where the Government is unable to take action because of inadequate resources. ...  

Since the citizen suit was intended to be a supplemental enforcement tool, Congress placed certain restrictions upon the institution and maintenance of citizens suits. First, a suit cannot be filed under any of the citizens suit provisions unless the plaintiff has provided at least sixty days written notice of intent to sue to the defendant, appropriate federal authorities and, under some of the statutes, state authorities having jurisdiction.  

The citizens suit provisions also all provide that no suit may be maintained if federal or state authorities have instituted, and are diligently prosecuting, an action based upon the alleged violation. This requirement seems to logically follow the Congressional purpose of using citizens suits as supplemental enforcement tools - there is no purpose to be served by such a suit if governmental authorities are diligently enforcing the statute.  

The citizens suit provisions are limited in their purview and remedies. They apply only to existing or recurring violations. They do not provide authority, similar to that provided to United States Environmental Protection Agency ("EPA"), to bring an action to penalize past violations, in most cases. The federal courts are authorized to enjoin conduct which violates the statute, issue mandatory cleanup orders where appropriate and impose civil penalties upon the violator. The courts also have

9. While there is a handful of cases in which federal courts have tried to excuse a failure to comply with the 60 day notice requirement, the vast majority of decisions hold that the notice requirement is mandatory and is a condition precedent for filing suit. City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974), aff'd, 519 F.2d 681 (7th Cir. 1975), cert. den., 424 U.S. 927 (1976).
10. The EPCRA citizens suit provision appears to be an exception. See discussion infra.
discretion to award attorney fees to a “prevailing or substantially prevailing” party in these cases. The court does not have jurisdiction, however, to award damages to a successful plaintiff in a citizen suit.¹¹

Citizens suits have long been a favored, and effective tool of environmental public interest groups and other associations of concerned citizens. Such suits have permitted them to move quickly to gain access to the federal courts without incurring lengthy delays while regulatory agencies determined whether to take action against, or even investigate, reported violations. The fee shifting provisions of the statutes have encouraged such groups where they felt they had a strong case, because they could ultimately recover the cost of investigating, developing and prosecuting the action. Furthermore, the prospect of an award of attorney fees has sometimes encouraged counsel to accept such cases where there otherwise would be little or no hope of compensation.

While citizens suits may be expected to remain an important weapon in the arsenal of environmental public interest groups, there is some evidence that a growing number of businesses are turning to citizens suits to deal with environmental problems. An increased public sensitivity to environmental issues and the requirement for adequate environmental assessments by proposed purchasers, lessees, and mortgage lenders of industrial and commercial property have resulted in the identification of increased numbers of environmental problems. These numbers are clearly beyond the ability of federal and state regulators to respond with timely investigation and enforcement efforts. A property owner or operator may thus be left with only two choices when it discovers that its property has been contaminated by the activities on neighboring land.

The aggrieved owner or lessee may file a citizen enforcement suit. In many cases, its only alternative is to expend considerable sums of money to clean up and then seek to recoup its costs under the cost recovery sections of CERLCA.¹² There are several drawbacks to this second course of action, including the delay and uncertainty in recovery of costs and the fact that, in many cases, remediation by the aggrieved property owner is simply not

a technically viable option. In such cases, the property owner, faced with destruction of the value and possible use of the property (and the possibility of mortgage default) essentially has no choice but to pursue its remedies in a citizens suit.

This article will address the major issues commonly encountered in such suits and the principles by which the federal courts resolve those issues. It must be borne in mind that environmental cases are very much driven by the facts, so one can only develop general principles, illustrated by the facts of specific cases. It is necessary to carefully investigate and develop the facts of each case and apply the general rules to those facts.

This article does not address the issue of citizens suits against governmental regulators for failure to perform a non-discretionary duty or citizen intervention in government enforcement actions. It is limited to a discussion of private citizens suits based upon alleged violations of other private citizens.

II. SCOPE OF THE STATUTES AND ELEMENTS OF THE ACTION

All of the citizen suit provisions authorize an action against a person who “is in violation” of the requirements of the statute. To this extent, their language is consistent, but there are some significant additions or variations in some of the statutes.

The TSCA citizens suit provision provides that any person may commence a civil action

against any person (including (a) the United States, and (b) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of this chapter or any rule promulgated under Section 2603, 2604 or 2605 of this title or order issued under Section 2604 of this title to restrain such violation . . . .

In a similar manner, the CWA citizens suit provision authorizes an action

13. For example, the author is presently representing the owners of an apartment complex in a RCRA citizen suit resulting from migration of contaminated groundwater from adjoining property. Any attempt to treat the contamination on the plaintiff's property, without the installation of appropriate up-gradient treatment and containment facilities, would actually exacerbate the problem by promoting increased migration of contaminants onto the plaintiff's property.

against any person (including (i) the United States, and (ii) any other government instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation...  

The citizens suit provision of the Clean Air Act originally read much the same as the TSCA and CWA provisions, but Congress expanded its applicability with the 1990 amendments. The expanded language, authorizes a civil action (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,...  

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.  

Thus, the CAA uses language in the past tense, relating to a past violation, but makes it the basis for a citizens suit only if the violation is alleged to have been repeated.  

The EPCRA provision employs language which arguably encompasses only past violations, authorizing a suit against "(A) an owner or operator of a facility for failure to do any of the following: (i) submit a follow-up emergency notice ... (ii) submit a material safety data sheet or a list ... (iii) complete and submit an inventory form [if required by the statute] ... (iv) complete and submit a toxic chemical release form ...".  

While one court has held that citizens suits may not be maintained under EPCRA for a past violation which has been correct-  

Ed, the remainder of the courts in the few cases which have interpreted EPCRA have held that a past violation can provide the basis for citizens suits. Williams v. Leybold Technologies, Inc., even held that a failure to timely submit a required report provided the basis for citizens suit, despite the fact that, prior to the time of filing the suit, EPA had revised its regulations in such a way that EPCRA no longer applied to the defendant. The Seventh Circuit has also recently rejected the Sixth Circuit's interpretation, holding that a past violation can provide the basis for citizens suits under EPCRA, even if the defendant has corrected the violation prior to the filing of suit. The CERCLA citizens suit provision also follows the TSCA-CWA format, authorizing citizens suits

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title relating to Federal facilities).

There are very few reported CERCLA citizens suit cases. This probably stems from the fact that there are no generally applicable standards or requirements under CERCLA (as there are under the other environmental statutes), because CERCLA's thrust is the cleanup of contaminated sites rather than the proper management of on-going processes. As a result, there are no requirements absent an EPA order or a Consent Decree between EPA and liable parties. When EPA has proceeded to issue enforcement orders or enter into a Consent Decree, it is difficult to argue that the government is not diligently prosecuting the violation. Also, the courts have found in several instances that the CERCLA provisions barring, or restricting the timing of, judicial review of EPA actions prevent the use of CERCLA citizens suits

21. Id.
22. Citizens for a Better Env't v. The Steel Co., 90 F.3d 1237 (7th Cir. 1996).
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to challenge EPA's remediation decisions.

RCRA has a unique, two pronged citizens suit provision. This provision authorizes suits against parties who are in violation of the Act or regulations promulgated pursuant thereto, like the TSCA-CWA provisions, but it also provides an additional basis for suits against people whose prior acts have caused or contributed to an existing hazard. Thus, the citizens suit provision authorizes an action

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

This second basis for jurisdiction is especially powerful because it permits plaintiffs in citizens suits to address past violations which create current problems. It is this provision which is of particular interest to businesses and has provided the basis for a large number of citizens suits in recent years.

A. What Constitutes "In Violation"?

As noted, all of the citizens suits provisions (except for the EPCRA language) authorize suit against one who is "in violation of" a requirement, standard, order, et cetera. The determination of when a defendant is, in fact, "in violation of" a statute is not as simple and clear cut as it might appear. Certainly, if there is a demonstrable, on-going violation at the time suit is filed and it is still on-going at the time of trial, the matter is a simple one. It

appears much more common, however, for violations to occur on an intermittent, or episodic, basis. It is these episodic violations which have caused the courts difficulty.

In the seminal case of Gwaltney v. Chesapeake Bay Foundation, Inc.,25 a divided Supreme Court wrestled with this issue in a CWA action.26 In Gwaltney, the district court held that the CWA authorizes citizens to bring enforcement actions on the basis of wholly past violations.27 The Fourth Circuit affirmed, expressly rejecting the Fifth Circuit's ruling to the contrary in Hamker v. Diamond Shamrock Chemical Co.28 The Court noted that after the Fourth Circuit affirmed in Gwaltney, the First Circuit had occasion to address the issue. In Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.,29 the court rejected the positions of both the Fourth and Fifth Circuits, holding that jurisdiction of a citizen suit under CWA will lie when "the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act."30 The Supreme Court noted that it granted certiorari to resolve the conflict between the three circuits.31

The Court began by conceding that the "in violation" language of the statute may be ambiguous, observing, "We must agree with the Court of Appeals that § 505 is not a provision in which Congress' limpid prose puts an end to all dispute."32 The Court then concluded that the "to be in violation" language was intended to provide only prospective relief, relying upon a comparison of that language with the language of other sections of the statute and of other environmental statutes (particularly RCRA) which contained "past or present" violation language.33 Further, the Court found that to permit citizens suits for wholly past violations in the absence of a specific authorization by Congress would interfere with the regulatory functions of government.34

26. Id.
27. Id.
28. 756 F.2d 392 (5th Cir. 1985).
29. 807 F.2d 1089 (1st Cir. 1986).
30. Id. at 1094.
31. Gwaltney, 484 U.S. at 52.
32. Id. at 57.
33. Id. at 57-59.
34. Id. at 60-61.
The Court then noted, however, that its interpretation of the CWA provision did not dispose of the suit because the plaintiffs alleged continuing violations by Gwaltney of its National Pollutant Discharge Elimination System (NPDES) permit and that the district court found this was a good faith allegation. The Court concluded that allegations of multiple past violations combined with an allegation of continuing violations or an allegation that violations would occur in the future was sufficient to invoke jurisdiction.

Gwaltney argued that evidence of changes in its processes and equipment establishes that it had eliminated the potential for future violations; consequently, the Court concluded that there was an unresolved question of fact in the case. It remanded to the Court of Appeals:

Because the Court below erroneously concluded that respondents could maintain an action based on wholly past violations of the Act, it declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner. We therefore remand the case for consideration of this question.

Justices Scalia, Stevens and O'Connor joined in an opinion concurring in part and concurring in the judgment. Their separate opinion took technical issue with the majority opinion in a manner which, they conceded, would not produce a different result in the particular case. It contained two statements, however, which subsequently proved to be significant to other courts. Their opinion observed:

The phrase in § 505(a), "to be in violation,"... suggests a state rather than an act — the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. It

35. Id. at 64.
36. Id.
37. Gwaltney, 484 U.S. at 66.
38. Id. at 67.
39. Id.
40. Id. at 69.
does not suffice to defeat subject-matter jurisdiction that the suc-
cess of the attempted remedies becomes clear months or even
weeks after the suit is filed. . . . It is this requirement of clarity of
cure for a past violation . . . rather than a novel theory of subject-
matter jurisdiction by good-faith allegation, that meets the court's
concern for "the practical difficulties of detecting and proving
chronic episodic violations," . . . ¶ Thus, I think the question on
remand should be whether the petitioner had taken remedial
steps that clearly achieved the effect of curing all past violations
by the time suit was brought.41

Gwaltney thus established a rule which is simple enough to
state but has produced diverse results in application. One is
alleged to be "in violation" if there are allegations of repeated
prior violations combined with allegations (or, in the more de-
manding formulation, evidence) suggesting the possibility (or
likelihood, depending upon how demanding the court chooses to
be) of future violations.42

It has been held that a citizen suit complaint under CWA is
sufficient to invoke jurisdiction if the complaint alleges that the
discharges were the result of practices and procedures that the
defendants were continuing to follow,43 or where the activity
that created the condition that led to a CWA violation may have
stopped, but the condition triggering improper releases had not
been corrected.44

On the other hand, in Atlantic States Legal Foundation v. Pan
American Tanning Corp.,45 the court held that a CWA action
may be sustained where the defendant was guilty of violations
that continued past the date on which the complaint was filed,
but thereafter entered into a settlement with a regulatory agency
which could be expected to result in preventing future viola-
tions.46

In Glazer v. American Ecology Environmental Services,47 a

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41. Gwaltney, 484 U.S. at 69-70 (Scalia, J., concurring) (emphasis added) ( cita-
tions omitted).
42. Id. at 64.
45. 993 F.2d 1017 (2d Cir. 1993).
46. Id.
CAA action, the court held that allegations of intermittent violations of the Act satisfied the *Gwaltney* standard and invoked jurisdiction. A somewhat different result was obtained in *Satterfield v. J.M. Huber Corp.* *Satterfield* involved a situation where the defendant had constructed a new plant and obtained a permit from the Georgia Environmental Protection Division ("GEPD"). Both Huber and GEPD believed, based on projected emissions calculations, that the plant would not exceed the limitations on either particulate matter or volatile organic compounds. When these assumptions proved incorrect, GEPD pursued an enforcement action against Huber. Huber paid a penalty, made modifications to its plant and processes satisfactory to GEPD, and received a new final operating permit. The citizens suit under CAA was filed after completion of the plant modifications and issuance of the new permit.

The court held that the allegations were insufficient to establish a cause of action because all of the allegations of releases related to actions occurring before issuance of the final permit and there was no evidence that the violations were capable of repetition. The court also emphasized that allegations of repeated violations must refer to the same violation occurring more than once. It concluded that one type of violation and then another different type of violation on another occasion cannot be interpreted as repeated violations satisfying the CAA pleading requirements.

*Gwaltney* was also found to be controlling in dismissal of a

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48. *Id.*
50. *Id.* at 1562-63.
51. *Id.* at 1563.
52. *Id.*
54. *Id.*
55. *Id.* at 1567. It would seem that the court could have disposed of this case on two other grounds. First, Georgia had certainly initiated and diligently prosecuted an enforcement action with respect to the alleged violations. Second, if future violations did occur, they would be different ones, since they would constitute violations of the standards of a new, final permit rather than violations of the prior, interim permit. The court did not address either of these issues directly, however, although it discussed the GEPD action and the fact of the new permit.
56. *Id.* at 1566-67.
57. *Id.*
citizens suit under RCRA and CERCLA. In \textit{Lutz v. Chromotex, Inc.}, plaintiff alleged that defendant had failed to give EPA notification of releases and submitted falsified records to the Pennsylvania Department of Environmental Resources. The plaintiff did not make allegations seeking to come within the "imminent endangerment" provisions of RCRA. The court held that the failure to notify was a singular, past event and, therefore, did not provide the basis for a citizen suit.

A TSCA citizen suit has been dismissed because it was based on a wholly past violation involving a single incident of improper shipment of PCB-contaminated oil, even though the oil had not yet been properly disposed.

Citizens suits also will not lie for anticipated violations which have not yet occurred. In \textit{Citizens for Clean Air, Inc. v. Corps of Engineers, United States Army}, the plaintiff filed a suit attempting to set aside a permit granted by the Corps for construction of a water intake and discharge facility at an electric generating plant. There was a count under the citizens suit provision of CAA, alleging that construction should be halted because operation of the plant would degrade air quality in the area. The court dismissed this count, holding that the Act applies only to actual violations of emissions standards and orders of the Administrator of EPA. Suit will not lie before a violation occurs.

\textbf{B. The Objective Standards Problems Under the Clean Water Act}

A recurring problem for the courts in citizens suits under CWA is the question of what standards to apply, i.e., if there is no federal effluent limitation, can there be a violation of the Act. Differently stated, the question is whether a substance discharged to navigable waters is a "pollutant" if EPA has not de-

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59. \textit{Id.} at 415.
60. \textit{Id.} at 424 n.4.
61. \textit{Id.} at 425.
64. \textit{Id.} at 15.
65. \textit{Id.} at 16.
66. \textit{Id.} at 21.
CITIZEN ENFORCEMENT SUITS

When CWA was initially enacted, it prohibited discharges of "pollutants" which impaired acceptable water quality standards. Congress found that this standard, alone, presented enforcement problems and sought to improve enforcement capabilities in the 1972 amendments. Those amendments provided for a system of permitting releases and authorized EPA to set effluent standards. The NPDES permitting process resulted from those amendments. At the same time, Congress left the general language concerning "pollutants" that impair water quality in the statute.

Early decisions under the revised statute held that Congress intended the courts to enforce the objective standards created by the EPA-adopted effluent discharge limits. In *Student Public Research Group v. AT&T Bell Laboratories*, 67 the court held that in the 1972 amendments, Congress abandoned permit limits based on the impact of discharges on water quality and instead adopted permit limits based on technological controls. 68 Citing that decision, the court in *Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc.*, 69 concluded:

Congress . . . has already made a determination of what effluents it considers violative of the Clean Water Act — these effluents are limited in accordance with the defendant's discharge permit. Under the statutory scheme set up by Congress, it is not the court's role to determine whether defendant is polluting . . . rather the court's role [is] to determine whether the [Act] . . . has been violated. 70

This interpretation seems consistent with the legislative history of the 1972 amendments. In reporting out the amendatory history bill, Congress explained:

Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provi-

68. Id. at 1202.
70. Id. at 1083.
sions. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.\textsuperscript{71}

The committee went on to explain:

The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy. Whether abatement is sought by an agency or by a citizen, there should be a considerable record available to the courts in any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures. Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.\textsuperscript{72}

The courts have frequently departed from this seemingly clear direction, however. It has frequently been held that alleged injury to aesthetic, conservational or recreational interests in bodies of water is sufficient to support a citizen CWA suit.\textsuperscript{73} Other decisions have held that citizen suits can enforce non-objective state water quality maintenance provisions incorporated into an NPDES permit.\textsuperscript{74}

Recently, the Fifth Circuit held that a CWA citizens suit would lie for the discharge of produced water from operation of an oil well, even though EPA had not determined that the produced water was a "pollutant" and adopted an effluent limitation.\textsuperscript{75} Employing a convoluted analysis, the court concluded that, based upon definitions in CWA, it could determine whether a substance is a "pollutant," in the absence of an EPA determination, without the necessity of considering any technical evidence on the subject:

[T]hese rare cases where courts are called upon to determine whether a substance is a pollutant do not require a "complex balancing" of biological, technological and economic factors, such


\textsuperscript{72} Id. at 3746.


\textsuperscript{74} Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995).

\textsuperscript{75} See Sierra Club v. Cedar Point Oil Co. Inc., 73 F.3d 546, (5th Cir. 1996).
as EPA must undertake when promulgating effluent standards. That is, the court will not be asked to analyze the level of discharge, the character of the receiving waterway, and the cost of achieving various permit limitations. Rather, Congress has already set the permit limitation in such cases — zero discharge. A court need only apply the statutory definition to determine if the substance in question is a pollutant. If it determines that the substance is a pollutant, and the defendant is discharging it at all without a permit, then there has been a violation . . . . We do not think that this task is beyond the competence of a court. 76

In other words, it seems that the Cedar Point court would set a zero discharge level for substances which EPA did not consider sufficiently harmful to be the subject of an effluent limitation. This result may seem absurd to the rational observer. It certainly belies Congress' assurance that citizen suits under the CWA will not result in "inconsistent policy." Perhaps more alarming, it invites courts to enter an area in which they have no expertise. This concern was voiced in 1973 by the court in Citizens for Clean Air, Inc. v. Corps of Engineers, when it said:

To ask a court to review each adverse comment by an agency and to determine its weight as the criterion for injunctive relief would make of the judge an administrator. It would ascribe to him more scientific knowledge than he possesses. It would make of him an intermeddler in the serious business of environmental control. 77

C. Determination of "Imminent Endangerment" in RCRA Citizen Suits

The second basis for RCRA citizens suits, the authorization for suits against, inter alia, persons whose prior acts contributed to conditions having a continuing impact, is a powerful tool. Not only does it implement Congress' intention that parties who caused or contributed to the problem should pay to correct it, but it also gives private citizens the opportunity to maintain an action against a party which may have created dangerous conditions and then disposed of the property.

This provision was added to the statute in the Hazardous and Solid Waste Amendments of 1984. When Congress reported the

76. Id. at 567 (emphasis original).
amendatory bill, it noted that there had been inconsistency in
the interpretation and enforcement of RCRA by the federal
courts and that the amendments were intended to clarify Con-
gressional intent. 78 One of the issues with which Congress ex-
pressed concern was the uncertainty of some courts in dealing
with whether prior disposal could form the basis for a RCRA
enforcement action. Congress emphasized that prior disposal,
even disposal before the enactment of RCRA, could constitute
current disposal if it resulted in on-going leaking, leaching or
seepage. The committee reports cited with approval the decision
in United States v. Price, 79 in which the court held that disposal
of hazardous waste, prior to the enactment of RCRA, which re-
resulted in current leaching and seeping of hazardous chemicals
constituted "current disposal." 80

The courts have had little difficulty with the concept of hold-
ing a party liable for its past actions, so long as those actions
caused or contributed to an imminent and substantial endanger-
ment. The difficulty has come in determining what constitutes
such an endangerment and the extent to which the courts should
involve themselves in an evaluation of the danger, i.e., risk as-
ssessment. 81 Dague v. City of Burlington, provided an excellent
discussion of how "imminent" a threat must be to support a
RCRA citizens suit. 82 Dague was one of the first cases after the
1984 amendments and it has been widely cited and followed.

Dague involved a municipal landfill operated by the defendant
under a state permit. 83 The landfill had a leachate collection
system that the parties agreed was effective to capture approxi-
ately ninety percent of the leachate. 84 Plaintiffs claimed that
the remaining leachate was being discharged to the environment
and constituted an imminent and substantial endangerment. 85

The defendant presented an expert witness who testified that

80. Id.
1343 (2d Cir. 1991), cert. allowed only to address other issues, 112 S. Ct. 2638
82. Id.
83. Id. at 1347.
85. Dague, 935 F.2d at 1348.
there was no evidence of vegetative stress or other harm to the environment in the vicinity of the landfill. The plaintiff’s expert testified that the particular type of vegetation in the vicinity of the landfill would not show visible signs of stress until the harm to it reached the point where it might well be irreversible. He also testified that actual harm to the environment might, therefore, be presently occurring.

After reviewing this testimony, the *Dague* court concluded: 

[W]e hold that a finding of imminent and substantial endangerment does not require actual harm. Because the standard applied by defendant’s expert was more stringent that is legally required, we think his opinion is not persuasive in this instance. Even though the leachate collection system is approximately 90% effective, hazardous wastes are still being discharged into the soil, groundwater and surface water in and around the Landfill . . . . [W]e find that the Landfill is now in violation . . . as it may present an imminent and substantial endangerment to health or the environment.

A somewhat different approach was taken by the court in *Gache v. Town of Harrison, New York*. The court first held that a showing that the operation of defendant’s municipal landfill may present an imminent and substantial endangerment is sufficient to establish a RCRA violation and support a citizens suit. The court went on to say, however, that “[a] violation of RCRA does not mean that a permanent injunction necessarily follows.” It required the plaintiff to still offer evidence establishing irreparable harm before it would consider an injunction.

This result seems peculiar in light of the facts that (1) Congress indicated that supplemental enforcement, to achieve compliance with the Act, is the purpose of the citizens suit provisions and (2) an injunction requiring compliance action is the only

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87. *Id.* at 468.
88. *Id.*
91. *Id.* at 1041.
92. *Id.* at 1044.
93. *Id.*
effective relief which the court can grant. (It is true that the
court can impose a penalty for violation but, unless accompanied
by a compliance order, a penalty might be characterized, in the
vernacular, as a "license to steal." ) While other courts have cited
Gache for the proposition that there is a RCRA violation if there
may be an imminent and substantial endangerment, the author
has located no other cases where the court required one level of
proof to find a violation and another, higher, level of proof in
order to obtain relief.

Few of the reported cases have involved an excursion by the
courts into the scientific and technical issues presented by the
facts. An exception which illustrates the evidentiary difficulty of
evaluating the risk is Price v. United States Navy.94 That case
involved a situation where the Navy had done a partial cleanup
of residential property on which it had previously buried waste
containing lead and asbestos.95 Contaminated soil was removed
from the front and back yards of several houses and replaced
with clean soil, however, the side yards were paved over.96
Plaintiff brought suit complaining that contaminants left in place
constituted an imminent and substantial endangerment, and
sought a mandatory injunction for further remediation.97

As a preliminary matter, the court held that RCRA requires
that there be a threat which is present now, although the impact
of the threat may not be felt until later; thus, the court impliedly
rejected cases which hold that a realistic risk of release, even
though it had not yet occurred, constitutes an imminent and
substantial endangerment.98

The court then went on to list the technical questions which it
felt must be satisfied before an imminent and substantial endan-
germent could be found. It identified four criteria: (1) there must
be a population at risk; (2) the contaminants at issue must be
listed as "hazardous" under RCRA,99 (3) the level of contami-

95. Id. at 1325.
96. Id.
97. Id. at 1324.
98. Id. at 1325.
99. The opinion leaves it unclear whether the court's unfortunate use of the word
"listed" means that the hazardous substance in issue must be a "listed hazardous
waste" under the RCRA regulations, 40 C.F.R. §§ 261.31-261.33, or whether a waste
which qualifies as a "characteristic" hazardous waste under 40 C.F.R. §§ 261.21-
nants must exceed the level considered acceptable by environmental authorities having jurisdiction; and (4) there must be a pathway of exposure.  

The court found that, with respect to the particular contaminants in the case, there was no pathway of exposure when they were buried; therefore, they did not present an imminent and substantial endangerment.

When the court's approach to assessment of risk is compared with the sophisticated assessments typically done by EPA at RCRA and CERCLA sites, it seems overly simplistic. Perhaps this is one illustration of why the court in Citizens for Clean Air, cautioned against making the judge "an intermeddler in the serious business of environmental control."  

The cases also make it clear that a prior owner of property, as well as a current owner or operator, can be held liable for creating or contributing to conditions that result in an imminent and substantial endangerment. It has also been held that a current property owner may sue a former owner for creating and abandoning conditions on the property which may constitute an imminent and substantial endangerment.

City of Toledo v. Beazer Materials and Service, Inc., addressed the question of the extent of detail which a plaintiff must plead. It held that an allegation in the complaint of past illegal disposal of waste, in violation of RCRA, combined with an allegation that the prior acts may present an imminent and substantial endangerment is sufficient to defeat a motion for summary judgment.

In Vernon Village, Inc. v. Gottier, however, the court indicated the limitations of relying upon conclusory allegations in the complaint. In Vernon Village, the complaint alleged that

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261.24 would satisfy the court's requirement.

100. Price, 818 F. Supp. at 1325.
101. Id. at 1325-26.
106. Id.
108. Id.
defendant's operation resulted in the release of contaminants into the groundwater which posed an imminent and substantial endangerment to the water supply of plaintiff's trailer park. The defendant filed a motion for summary judgment, attaching copies of two letters from the Connecticut Department of Health Services saying that the drinking water in the trailer park was of satisfactory quality. The court held that the two letters from the State might not be enough to insulate the defendant from liability in all circumstances, but in the absence of anything beyond the bare conclusory allegations of the complaint they were not a sufficient basis for granting summary judgment. The court did not address the question of whether defendant's operation might pose a threat of future impact to plaintiff's drinking water wells, i.e., whether plaintiff could establish that defendant's operations may constitute an imminent and substantial endangerment.

It seems clear that the vast majority of courts which have addressed the question thus find that if there has been a past release which has resulted in on-going migration constituting current disposal under the rationale of Price v. United States Navy, or having the realistic potential to migrate in the future, or if conditions can be demonstrated suggesting the possibility of a future release (such as the rusted, bulging barrel scenario), this is sufficient to find that there is an imminent and substantial endangerment. In other words, an on-going release or threat of release to which RCRA would apply is sufficient for a grant of relief in a RCRA action. The majority of courts appear reluctant to engage in the type of risk assessment undertaken in Price v. United States Navy.

III. STANDING

The courts have generally been quite liberal in finding that plaintiffs have standing to maintain the action. They have held that it is necessary for a plaintiff to be a person, or a representative of a person, who is or may be injured by the alleged illegal conduct. Once that condition is satisfied, standing to maintain

109. Id. at 1144.
110. Id. at 1153.
111. Id.
the action is found.

The Supreme Court made it clear in Middlesex County Sewerage Authority v. National Sea Clammers Association,\textsuperscript{112} that citizens suit provisions apply only to grant relief to persons who can claim some sort of injury.\textsuperscript{113}

As explained in Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.,\textsuperscript{114} "A plaintiff must allege 'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."\textsuperscript{115} The court then went on to find that general allegations in the complaint of injury to members of the plaintiff organization combined with affidavits of some of the members listing specific adverse effects on them of the contamination was sufficient to confer standing upon the organizational plaintiff.\textsuperscript{116}

In The Pymatuning Watershed Citizens for a Hygienic Environment v. Eaton,\textsuperscript{117} the court held that the plaintiff had standing to sue where it demonstrates that it and its members have a special interest in the Pymatuning Reservoir.\textsuperscript{118}

More recently, some of the cases seem to have been even more liberal in finding standing. For example, in Sierra Club v. Chemical Handling Corp.,\textsuperscript{119} the court first pointed out that a citizen organization must show that at least one of its members has been injured or is threatened with injury in order to have standing.\textsuperscript{120} It then concluded, however, that an alleged injury to aesthetic, conservational or recreational interests is sufficient, concluding that the following allegation was "clearly sufficient" to establish standing: "Sierra Club members use and enjoy the air and soils surrounding defendant's facility. . . . Defendant's RCRA violations, alleged herein, injure Sierra Club members by diminishing the members' use and enjoyment of the air and soils in the neighborhood of defendant's facility and threatening the

\textsuperscript{112} 453 U.S. 1 (1981).
\textsuperscript{113} Id.
\textsuperscript{114} 591 F. Supp. 345 (N.D.N.Y. 1984).
\textsuperscript{115} Id. at 348 (emphasis added) (citations omitted).
\textsuperscript{116} Id.
\textsuperscript{117} 506 F. Supp. 902 (W.D. Pa. 1980).
\textsuperscript{118} Id.
\textsuperscript{120} Id. at 25.
members' health and welfare."\textsuperscript{121}

There are, however, some limitations upon the standing of a public interest group to maintain a citizens suit. For example, in \textit{Chesapeake Bay Foundation v. Bethlehem Steel Corp.},\textsuperscript{122} the court found that the co-plaintiff, the Natural Resource Defense Council ("NRDC"), did not have standing to sue in its own name:

NRDC is a national, not a regional organization dedicated to pursuing legal actions against many sorts of environmental violations. It has no geographical or philosophical ties to the Maryland area or to Chesapeake Bay and it has declined to publicly name any of its members who are affected by defendant's actions in the Patapsco River area. NRDC erroneously claims that it has standing to pursue this action in its own right.\textsuperscript{123}

Similarly, in \textit{Sierra Club v. SCM Corp.},\textsuperscript{124} the court held that there was no standing to sue where the plaintiff did not plead some injury to one or more of its members ("plaintiff would have this Court presume some injury to some of its members without providing the necessary fact basis in support of such a theory.").\textsuperscript{125}

\section*{IV. FEE SHIFTING PROVISIONS}

The citizens suit sections of the statutes contain a fee shifting provision. It reads: "The court, in issuing any final order in any action brought pursuant to (this Act) may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."

While this authority is discretionary with the courts, there are no reported cases in which a court has failed to make an award of attorney fees to a prevailing or substantially prevailing party. This seems consistent with the Congressional intent. Congress obviously intended that attorney fees should be routinely granted to successful plaintiffs in citizens suits. This intent was most

\begin{itemize}
\item \textsuperscript{121}. \textit{Id.} (quoting Complaint at 8).
\item \textsuperscript{122}. 608 F. Supp. 440 (D. Md. 1985).
\item \textsuperscript{123}. \textit{Id.} at 446.
\item \textsuperscript{124}. 580 F. Supp. 862 (W.D.N.Y. 1984).
\item \textsuperscript{125}. \textit{Id.} at 865 (W.D.N.Y. 1984); 42 U.S.C. \textsection 7604(d) (1994); 33 U.S.C. \textsection 1365(d) (1994); 15 U.S.C. \textsection 2649(b) (1994); 42 U.S.C. \textsection 6972(e)(1994); 42 U.S.C. \textsection 9659(f) (1994); 42 U.S.C. \textsection 11046(f) (1994).
\end{itemize}
clearly manifested in reporting the 1972 amendments to CWA: "The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party."\textsuperscript{126}

Fee shifting provisions in federal statutes are neither new nor unique to environmental regulatory acts. Indeed, much of the body of federal case law concerning fee shifting provisions has resulted from actions under civil rights statutes. Those decisions have frequently been cited in environmental cases because the Supreme Court has held that a common body of case law applies to all federal fee shifting provisions.\textsuperscript{127}

In \textit{Stoddard v. Western Carolina Regional Sewer Authority},\textsuperscript{128} a citizens suit to enforce the provisions of CWA, the court noted, in awarding attorney fees:

The landowners have pursued and obtained remedies under the Act in the manner provided ... and \textit{their actions will tend to ensure compliance with the Act in the very manner contemplated by Congress in enacting this provision}. Therefore, the landowners have served the public interest by insisting that the Clean Water Act be adequately enforced.\textsuperscript{129}

In \textit{National Wildlife Federation v. Hanson},\textsuperscript{130} the court found that it was "appropriate" to award attorney fees to parties which only partially prevailed where their action served to promote the purposes of the statute.\textsuperscript{131}

The cases which deny a recovery of attorney fees are those in which the court found that the plaintiff has not prevailed or substantially prevailed. Of course, if the case is dismissed, there is no question of an award of attorney fees to the plaintiff.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{127} City of Burlington v. Dague, 505 U.S. 557, 562 (1992).
\item \textsuperscript{128} 784 F.2d 1200 (4th Cir. 1986).
\item \textsuperscript{129} \textit{Id.} at 1209 (emphasis added) (citations omitted).
\item \textsuperscript{130} 859 F.2d 313 (4th Cir. 1988).
\item \textsuperscript{131} \textit{Id.} at 316.
\item \textsuperscript{132} In reporting the 1972 Amendments to CWA, Congress suggested that there was no fear of frivolous citizens suits being brought in hopes of obtaining a fee award as a bounty, because the Court would have authority to award attorney fees to a prevailing defendant. S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), \textit{reprinted in} 1972 U.S.C.C.A.N. 3668, 3747. The author is aware of no case, however, in which a court has awarded attorney fees to a prevailing defendant under the fee shifting
The problem arises where the plaintiff has had some success but has not prevailed on all its claims. The court must then determine whether the plaintiff is a "substantially prevailing" party. This requires a detailed analysis of the relief sought and that obtained, i.e., a detailed analysis based on the facts of each case.

An excellent example of such an analysis is contained in United States v. Hooker Chemicals & Plastics Corp. In that case, two citizen groups intervened, under the citizens suit provisions, in an enforcement action which the government had brought against Hooker. After the court had approved a consent judgment between the government and Hooker, the citizen intervenors sought an award of attorney fees. They argued that they were prevailing parties because of their success in intervening in the action and because they had allegedly brought about significant modifications in the consent judgment.

The court, citing Ruckelshaus v. Sierra Club, held that successes in purely procedural matters, such as obtaining leave to intervene, would not trigger an award of attorney fees under CWA. It then reviewed in detail each of the four modifications which the intervenors claimed they had brought about and concluded that none of them were significant. Consequently, it denied the request for attorney fees.

In Washington Public Interest Research Group v. Pendleton Woolen Mills, the plaintiff successfully appealed a dismissal by the district court of its citizens suit. When the court of appeals set aside the dismissal and remanded to the lower court for further proceedings, the plaintiff sought an award of attorney fees. The court denied the award of fees because, while the

provisions of the statutes. Of course, the court could award attorney fees as a sanction, pursuant to Rule 11, Federal Rules of Civil Procedure, but the threshold for recovery under Rule 11 is much higher than the "prevailing party" standard.

134. Hooker, 591 F. Supp. at 967.
135. Id.
136. Id. at 968.
139. Id. at 968-71.
140. Id. at 967.
141. 11 F.3d 883 (9th Cir. 1993).
142. Id.
143. Id. at 887.
plaintiff had prevailed on appeal, it had not yet prevailed in what the lawsuit originally sought to accomplish. Final relief had not been granted and no final order had been entered; therefore, the court found the request for award of attorney fees premature.

When the court decides that an award of attorney fees is appropriate, it must then determine what constitutes a "reasonable" cost of litigation. This determination, of course, has spawned a good deal of litigation, but the courts have developed presumptions and procedures to simplify the process. The determination of a reasonable attorney fee begins with the determination of a so-called "lodestar" amount. It is calculated by multiplying the number of hours which attorneys reasonably expended on the litigation times a reasonable hourly fee. As the Supreme Court explained in *City of Burlington v. Dague*, "The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. *We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee . . . ." The lodestar calculation, in fact, begins in most cases with a consideration of the fees actually billed to the prevailing party. The court may then enhance the fee or decrease it, depending upon the circumstances of the case.

The court will normally approve the hourly rate of the attorneys if it is established that the rate is within the normal range for attorneys of similar competence and experience who do similar work in the same geographical area. It will normally approve all of the hours which actually contribute to bringing about the successful result. *United States v. Environmental Waste Control, Inc.*, presents an excellent item by item analysis of the services performed by lead counsel and a determination of which did and did not contribute to the success of the action. For example, the court found that time spent on public relations matters, briefing procedural issues which never arose in the case, and participating in extraneous environmental administra-

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145. Id.
148. Id.
tive proceedings did not contribute to the successful result in a significant way and therefore were excluded.\textsuperscript{149}

\textit{Environmental Defense Fund, Inc. v. EPA,}\textsuperscript{150} is an example of a case in which the court first reduced billed charges to establish the lodestar amount, deleting what it felt were clearly excessive hours by some junior lawyers in performing certain tasks, then enhanced the lodestar amount in the final award by approximately fifteen percent.\textsuperscript{151} The court's rationale was that the attorneys for the public interest group had worked at a reduced rate and the quality and results of their efforts justified an enhanced award.\textsuperscript{152}

V. CONCLUSION

Citizens suits under federal environmental statutes are a powerful tool which promise to become even more important in light of identification of increasing numbers of contaminated sites and budgetary restrictions limiting the ability of federal and state regulators to deal with those sites.

The courts have been fairly liberal, for the most part, in finding standing to sue and determining that allegations in complaints state a claim upon which relief can be granted.

While environmental litigation is usually enormously expensive and the cost of developing and successfully presenting a citizens suit may be substantial, the fee shifting provisions of the statutes present an incentive to potential plaintiffs.

The citizen suit may become an increasingly attractive option for businesses faced with the alternatives of cleaning up contamination of their property resulting from the acts of others, and then suing to recover the cost or seeking the protection of environmental regulatory agencies and then waiting, usually for months or years, to determine whether the agency will pursue the matter at all.

\begin{thebibliography}{99}
\bibitem{} Id. at 1495.
\bibitem{} 672 F.2d 42 (D.C. Cir. 1982).
\bibitem{} Id.
\bibitem{} Id. at 50.
\end{thebibliography}
After the white man crossed the ocean, it was once agreed that:

The Indian has also made boats to travel on these waters. The two parties will each put their boats parallel to each other. The white man’s boat will be on the left, and the Indians’ boat will be on the right. Each party will put his laws and religion into his boat. We have different laws and religion and from this time on and forever they will be separated. The white man’s boat will carry his laws and religion, and the Indians’ boat will carry Indian law and religion.¹

Somehow, since then, everything has changed. At some point, “the tribes’ sovereign spheres came to overlap with the United States.”² As a result of these changes, “American Indians have been forced to live within a political/legal no man’s land from which there seems to be no possibility of extrication.”³

The history of Indian-United States relations for the past one hundred and fifty years has been marked by oppressive laws and policies often designed to undermine the autonomy of Indian nations and to weaken their cultures. At one time or another, almost every aspect of the internal and external relations of Indian nations has been subjected to the unrestrained authority of the United States . . . . The historical record is a critical part of this discussion because it shows that the original relationship between the United States and Indian nations was based on equality and the mutual respect accorded sovereign nations under international law and practice.⁴

4. Curtis G. Berkey, United States — Indian Relations: The Constitutional Basis,
In almost every case involving Native Americans, the issue of sovereignty arises either expressly or implicitly. "The unsettled issue of tribal sovereignty... cannot be separated from the interaction of three entities that typically exhibit competing interests: the federal government, the state, and the tribe." Since the regulatory power of the federal government over the Native American nations is based on sovereign power, or lack thereof, an overview of sovereignty doctrine is necessary to determine not only whether state and federal environmental regulations will apply to tribes, but more importantly, whether such regulations should apply.

The evolution of traditional sovereignty doctrine is rife with inconsistency and inequity, primarily as a result of racism and revisionist history. Since many of us are victims of Eurocentric history, a few points of correction/elaboration are needed to fully understand what Native American sovereignty is, and what it should be. The atrocities committed against the Native Americans by the United States and its predecessors are far too numerous to detail. Therefore, this comment will touch on the most prominent and most egregious of them, beginning with a brief history and evolution of sovereignty.

Prior to the onslaught of the white man, many of the Natives of North America, later to be characterized as savages, existed...
with a peace and civility unknown to the supposedly superior Europeans. Nevertheless, the Europeans claim to have "discovered" America. The word "discover" is defined as: "To be the first to find, learn of, or observe;" "[t]o uncover that which was hidden, concealed, or unknown from everyone." The definition necessarily requires that no one in fact knew of the existence of North America, which is quite apparently incorrect. The Europeans were "[i]ncapable of conquering true wilderness . . . . They did not settle a virgin land. They invaded and displaced a resident population." As a result, the whole "doctrine of discovery," as a basis for abrogating Native sovereign rights is void ab initio.

Nevertheless, "discovery" has been the basis for moral and legal wrongs committed by the United States government, and has been approved as justification by the courts. In the case of Johnson v. McIntosh, the first case of what was later named the Marshall Trilogy, Justice Marshall discussed the doctrine of discovery:

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it . . . . They were admitted to be the rightful occupants of the soil . . . [but] their power to dispose of the soil . . . was denied by the original fun-


8. THE GAYANESHAGOWA, a rare pre-Christian form of government existing in the northeastern part of what is now the United States is the earliest surviving governmental tradition in the world that we know of based on the principle of peace; . . . . prevalent among the Haudenosaunee [Iroquois Nation] before the arrival of the white man." Lyons, supra note 1, at 33.

The Iroquois Confederacy as a whole, and those communities still governed by traditional laws and institutions, form one of the oldest governments in the world functioning under a continuous set of laws. At a time when Europe was engulfed in incessant warfare and experiencing increasing political fragmentation, the Haudenosaunee consciously created a "United Nations" with a sophisticated structure and explicit ideology.

Howard R. Berman, Perspectives on American Indian Sovereignty and International Law, 1600 to 1776, in Exiled in the Land of the Free, supra note 1, at 125, 135.

9. THE AMERICAN HERITAGE DICTIONARY 403 (2d ed. 1982).


12. 21 U.S. (8 Wheat.) 543 (1823).


hecotorb." Id. at 48 (citing TZVETAN TODOROW, THE CONQUEST OF AMERICA 133 (Harper & Row) (1982)).

8. "The Gayaneshakgowa, the Iroquois Great Law of Peace . . . is the earliest surviving governmental tradition in the world that we know of based on the principle of peace; . . . prevalent among the Haudenosaunee [Iroquois Nation] before the arrival of the white man." Lyons, supra note 1, at 33.

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damental principle, that discovery gave exclusive title to those who made it.... The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.  

Justice Marshall's conclusion is clearly based on an erroneous "fundamental principle," and his characterization of "discovery" is such that only Europeans can be discoverers. Above all, Marshall's most offensive ideology is that of "universal recognition," where it can only include the universe of non-Native peoples. Justice Marshall's basis is "wholly a fiction deriving from earlier claims by Spain and Portugal that the [P]ope, as Christ's representative on earth, had given them claim to the lands of the Western Hemisphere." Further, his justification is that "this claim to property titles was valid because to do otherwise would disrupt everything that had previously occurred."

Justice Marshall continued on to provide a lengthy historical dissertation in which the European nations fought over who "discovered" what, but eventually agreed, among the "civilized" people, that the lands of America were the property of the United States, claiming that "all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians." Again, this reasoning provides absolutely no voice whatsoever for the Native people. Likewise, Justice Marshall claimed that the "territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." However, it is beyond doubt that the Native people would have had, and still have, serious doubt as to the right of the United States to extinguish title in their land.

Finally, Justice Marshall rationalized the harm done by the invaders by falsely stating that:

[T]he tribes of Indians inhabiting this country were fierce savages,

15. Deloria, supra note 3, at 299.
16. Id.
18. Id. at 584.
19. Id. at 686.
whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.\textsuperscript{20}

Not only does this statement refute any future argument that the tribes voluntarily succumbed to the power of the great white nation, but it also implies that the theft of an entire country was a good thing, because after all, the "savages" were not worthy enough to exploit the resources. Justice Marshall acknowledged that "[t]he potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity."\textsuperscript{21} It seems that Justice Marshall found no difficulty in convincing himself of it either.

In addition to the "doctrine of discovery," the invaders also justified their crimes based on the "ideology of the Christian right to dominate non-Christian peoples of the world."\textsuperscript{22} This type of ethnocentric thinking often serves as justification for destruction of the Native government.\textsuperscript{23}

\[T\]he Euroamerican pleads "not guilty" to killing tribal government. He could not have committed such a crime, he says, because the victim never lived . . . . The logic is simple, faulty, and compelling as that of most other fallacies: Civilization is that quality possessed by people with civil government; civil government is Europe's kind of government; Indians did not have Europe's kind of government; therefore, Indians were not civilized. Uncivilized people live in wild anarchy; therefore Indians did not have any government at all. And therefore Europeans could not have been doing anything wrong — were in fact performing a noble mission — by bringing government and civilization to poor savages.\textsuperscript{24}

The ethnocentric view of history, which now seems to be accepted by many, without question, has had a deteriorating effect on tribal sovereignty.

\begin{thebibliography}{9}
\bibitem{20} Id. at 590.
\bibitem{21} Id. at 573.
\bibitem{22} Mohawk, supra note 6, at 47.
\bibitem{23} Id. at 55.
\bibitem{24} Id.
\end{thebibliography}
Recall in Johnson v. M'Intosh,25 Justice Marshall claimed that "the exclusive right of the United States to extinguish [Native] title, ..., has never, we believe, been doubted."26 However,

the connections between pre-colonial indigenous self-determination and contemporary status and rights have been clouded by racial and legal concepts of the colonial era. The Eurocentric arrogance and social Darwinism of the late nineteenth century and early twentieth centuries effectively erased the memory of a centuries-old historical record of indigenous peoples functioning on the international plane, and of a definite if grudging recognition of indigenous rights in principle and state practice.27

Even in colonial times, "Indian nations were territorially defined political entities functioning on the international plane."28 The tribes were seen as "political communities created by the original inhabitants, ..., [they] possessed inherent, preexisting sovereign rights and conducted political relations in their own interests on the international plane."29

At the time of the Continental Congress, the sovereignty of the tribes was respected, and tribes were treated as independent nations.30 "There is abundant evidence that Congress, both before as well as after the Articles of Confederation, recognized that Indian tribes were inherently sovereign nations."31 However, the Continental Congress had difficulty instilling this respect in the various states.

The directives of the Continental Congress were often hindered by recalcitrant state governments seeking to enrich themselves at the expense of the union. Not unexpectedly, the mistreatment of Indian nations by the states during this period endangered the safety of the union as a whole. Congressional policy, therefore, focused on securing the supremacy of confederal authority over Indian affairs to the complete exclusion of the states.32

25. 21 U.S. (8 Wheat.) 543 (1823).
26. Id. at 586.
27. Berman, supra note 8, at 127.
28. Id. at 129.
29. Id. at 131.
30. Berkey, supra note 4, at 204.
31. Id. at 197.
32. Id. at 195.
In response to continuing encroachments of Indian lands by the states, in particular New York, North Carolina, and Georgia, in 1783, the Continental Congress, following George Washington's proposal, issued "a proclamation forbidding, without the authority of Congress, settlements or purchases of Indian lands outside the limits or jurisdiction of any particular state." 33

Moreover, at the time of the Constitutional Convention of 1787, "the exclusive authority of Congress and the President was understood to extend only to those matters necessary to conduct foreign, or external, relations with Indian tribes." 34 The framers did not envision a "general, open-ended power over Indian affairs," but rather a limited authority, "specifically designed to remedy the kinds of problems that had crippled the federal government under the Articles of Confederation." 35 Among the problems was "the need to establish a stronger constitutional basis for preventing state encroachments on Indian lands ...."36 James Madison named Georgia as an example of state encroachment. 37 Likewise, John Jay said that "there are several instances of Indian hostilities having been provoked by the improper conduct of individual states, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants." 38

Another of the problems was the need for a national defense against military attack. 39 Arguing for a common defense, Alexander Hamilton stated, "The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia." 40 Hamilton clearly considered the tribes in the same way as Britain and Spain, as independent sovereigns.

Certainly it is clear that no one of that day believed that Congress had acquired the authority to violate the sovereignty of Indian

33. Id. at 203-04 (citation omitted).
34. Id. at 191.
35. Berkey, supra note 4, at 209.
36. Id.
37. Id. at 210.
39. Berkey, supra note 4, at 209.
nations by intruding on their internal affairs . . . . Congress' au-
thority extended only so far as necessary to manage the relations
among Indian nations, the federal and state governments, and
their citizens. 41

The twin objectives of the framers were first to equip the national
government with exclusive and effective authority to manage
Indian relations, unburdened by the restrictions under the Arti-
cles of Confederation; and second, to incapacitate the states legally
and politically from carrying on relations with Indian nations. All of the evidence points to the conclusion that the framers in-
tended to strengthen, to the exclusion of the states, those powers
that the national government had been exercising . . . . The fram-
ers appear to have been more concerned with making federal authority supreme as against the states than with the precise scope of congressional authority . . . . [M]ost of the delegates assumed that congressional authority would be quite limited . . . [and] encompass only those matters touching on the intergovern-
mental relationships between Indian nations and the United States as a whole . . . . [T]he Constitution gave Congress supreme and absolute power within the narrowly defined sphere of con-
ducting external relations with Indian governments, to the exclusion of the states separately. 42

By constitutionally giving the federal government the exclu-
sive power to negotiate with the tribes, and the Congress the
exclusive power to regulate trade with the tribes, the framers
clearly sought only to prevent further state encroachment, not to usurp inherent tribal sovereignty in any manner.

Despite the intent of the framers and the constitutional re-
strictions placed on the government, when the Cherokee nation
requested injunctive relief from the Court, to prevent further encroachment by the State of Georgia, Justice Marshall made
the often quoted statement that has continued to erode Native sovereignty for over a century:

[Tribes] may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States

41. Berkey, supra note 4, at 219-20.
42. Id. at 224.
resembles that of a ward to his guardian... They and their country are considered by foreign nations, as well as by ourselves, as being... completely under the sovereignty and dominion of the United States.43

As expected, the Court refused to protect the tribe by declining jurisdiction over the matter.44 However, the following year, when it came to protecting a white man living in the Cherokee nation, Justice Marshall’s tone changed considerably. In interpreting the standard treaty article in which the tribe acknowledged the protection of the United States, the Court held that it must be viewed in relation to, and as against, the other European powers.45 In other words, the tribe was not submitting to the power of the United States per se, but just to the extent that other countries were involved. The protection, Marshall stated, as perceived by the Indians, involved “no claim to their lands, no dominion over their persons.”46 Remarkably, the perception of the Native was now relevant. Further, although Justice Marshall described the tribes as “necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country,”47 he confirmed that “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection.”48

In addition, Justice Marshall construed the treaty expression “managing all their affairs” as only giving the United States government exclusive right to regulate trade; any other interpretation constituting a “surrender of self government, would be, we think a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them.”49 Yet, the most pertinent language of the opinion is as follows:

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states... From the commencement of our government, Congress has passed

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44. Id. at 20.
46. Id. at 552.
47. Id. at 555.
48. Id. at 560-61.
49. Id. at 553-54.
acts to regulate trade and intercourse with the Indians; which
treat them as nations, . . . [and] as distinct political communities,
having territorial boundaries, within which their authority is
exclusive.50

The Indian nations had always been considered as distinct, inde-
pendent political communities, retaining their original natural
rights, as the undisputed possessors of the soil, from time imme-
memorial. . . . The word “treaty” and “nation” . . . [have a] definite
and well understood meaning. We have applied them to Indians,
as we have applied them to other nations of the earth. They are
applied to all in the same sense.561

It is quite a jump to go from domestic dependent nations, and
wards of the government, to their guardian, to independent polit-
cal communities with exclusive authority over their territory.
Unfortunately, the Worcester language appears to have fallen by
the wayside, and the “domestic dependent nations” language of
Cherokee Nation has continued on to wear away at Native sover-
eignty. The Worcester decision is but one instance of the inconsis-
tency of decisions regarding Native sovereignty. The only histori-
cal constant seems to be that the courts and government invoke
Native sovereignty when it suits their purpose. Another exam-
ple of inconsistency involves tribal sovereignty with regard to
criminal jurisdiction. Initially, the Supreme Court held that the
United States had no jurisdiction over crimes committed by Na-
tives, against Natives, in “Indian Country.”562 The reasoning was
that the Native population consisted of:

[S]emi-independent tribes whom our government has always rec-
ognized as exempt from our laws, whether within or without the
limits of an organized state or territory, and, in regard to their
domestic government, left to their own rules and traditions, in
whom we have recognized the capacity to make treaties, and with
whom the governments, state and national, deal, with a few ex-
ceptions only, in their national or tribal character, and not as
individuals.563

To invoke such jurisdiction would require “a clear expression of

51. Id. at 559-60.
53. Id. at 572 (citing United States v. Joseph, 94 U.S. 614, 617 (1876)).
the intention of Congress." Taking its cue from the Court, Congress subsequently enacted the Major Crimes Act, which was held to be constitutional by the Supreme Court in *United States v. Kagama*.

In *Kagama*, a Native was charged with the murder of another Native, allegedly occurring on reservation land. The Court's analysis began with an evaluation of the Constitution. The Court found that the "Constitution of the United States is almost silent in regard to the relations of the government ... to the numerous tribes of Indians within its borders." The phrase "excluding Indians not taxed" appears twice, but "[n]either of these shed much light on the power of Congress over the Indians ... " The only other direct mention of Indians in the Constitution is in the Indian Commerce Clause, which provides: "The Congress shall have Power ... [t]o regulate Commerce with ... the Indian Tribes."

The *Kagama* Court rejected the United States' argument that the statute at issue was a regulation of commerce with the tribes. In fact, the *Kagama* Court was unable to find any constitutional "delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians ... " Instead, amazingly, the *Kagama* Court held that Congress' power to make laws governing the territories within the geographical bound of the United States "arises, not so much from the clause in the Constitution ... as from the ownership of the country in which the territories are ... " Further, the Court's Eurocentric version of history characterizes the relationship between Natives and colonists as one where the Indians "roamed and hunted" while the colonists "asserted an ultimate title in the land itself."

54. Id.
56. 118 U.S. 375 (1886).
57. Id.
58. Id. at 378.
60. *Kagama*, 118 U.S. at 378.
61. U.S. CONST. art. I, § 8, cl. 3.
63. Id. at 379.
64. Id. at 380.
65. Id. at 381.
Court concluded that since the United States had forbidden the tribes to sell their land without consent of the government, that a treaty was the only means to accomplish such a sale.\textsuperscript{66}

The Court's reasoning is apparently flawed when one considers that if the colonists actually asserted such valid absolute title, then there would have been no need for the subsequent treaties to effectuate a land purchase. The Court continued on to characterize the relationship of the government to the Natives in a way that would haunt generations to come:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes.\textsuperscript{67}

The final meaning of the \textit{Kagama} case, and a conclusion that most legal scholars and judges are reluctant to draw, is that the Supreme Court has held a federal statute applying to Indians to be constitutional, while rejecting every possible constitutional clause and phrase that would connect it to the document.\textsuperscript{68}

In keeping with the decision in \textit{Kagama}, the power of Congress evolved into the plenary power doctrine,\textsuperscript{69} which has been described as "all-encompassing,"\textsuperscript{70} "convoluted and complex."\textsuperscript{71} It "has come to mean literally unrestricted authority over Indian nations: [I]t is said that Congress can do whatever it pleases with the lands, governments, and cultures of Indian nations, with practically no constitutional restraint."\textsuperscript{72}

When Congress initially began to infringe on Native sovereign-

\textsuperscript{66.} Id.
\textsuperscript{67.} \textit{Kagama}, 118 U.S. at 384-85.
\textsuperscript{68.} Deloria, supra note 3, at 298.
\textsuperscript{69.} In Stephens v. Cherokee Nation, 174 U.S. 445 (1899), the Court "assumed that Congress possessed 'plenary power of legislation' in regard to Indian tribes, and said such power is 'subject only to the Constitution of the United States.'" \textsc{Felix S. Cohen, Handbook of Federal Indian Law} 217 (citations omitted) (1982 ed.).
\textsuperscript{71.} Id.
\textsuperscript{72.} Berkey, supra note 4, at 225. \textit{See also} Mohawk, supra note 6, at 54.
Neither the executive branch nor the judicial branch did anything to exert their constitutional powers against this usurpation of power by the Congress. No president wished to place his own program or political career in jeopardy by opposing Congress on behalf of Indians; the federal courts, led by the Supreme Court, merely shrugged and espoused the doctrine that Congress possessed plenary power in the field of Indian affairs. The carefully designed system of checks and balances that would have prevented the abuse of citizens simply did not function for the American Indians. 73

Until 1871, the United States government made treaties with American Indian nations. Even before the suspension of federal Indian treaty making, a new era had begun, one marked by wholesale congressional intervention, resulting in the near extinction of meaningful Indian autonomy and Indian national self-government. . . . Plenary power thus subjects Indians to national powers outside ordinary constitutional limits. 74

As if the court system did not do enough to extinguish the sovereignty of Native people, the Congress sought to do further damage, under the guise of civilizing the poor savages, by enacting the General Allotment Act (GAA), 75 which merely "codified as national policy what had been taking place for many years." 76 Under the GAA, the government took away Native land, and then allotted a small part of it back to the Native people.

Each head of an Indian family received 160 acres, while unmarried Indians received eighty acres of reservation lands. Allotments were transferred by fee patent, held in trust by the federal government for twenty-five years. After that period, the individual received the legal title. Unallotted or "surplus" lands were sold off to non-Indians. 77 Further deterioration of the tribal land base resulted

73. Deloria, supra note 3, at 288.
76. Hauptman, supra note 74, at 321.
when Indian allottees disillusioned with farming sold their lands. In addition, much allotted land was not arable, leaving the particular allottees destined for failure.\footnote{Id. (citing Felix S. Cohen, Handbook of Federal Indian Law 211-12 (reprint 1986) (1942)).}

“All 'surplus' reservation lands after the allotment process was completed would be up for sale. This idea of surplus land was obviously a way of rationalizing the theft of Indian land.\footnote{Hauptman, supra note 74, at 321.} The "land theft machinations of the allotment policies"\footnote{Id. at 322.} severely diminished Native land holdings. "In 1887, Native American tribes and their members owned 138 million acres; in 1934, they owned 48 million acres as a result of the operation of the General Allotment Act."\footnote{Willoughby, supra note 70, at 602 (citing Cohen, supra note 78, at 138).} In addition to the loss of millions of acres of land, the GAA "added to the growing trend toward federal control over Indian affairs and was another attempt at acculturation under duress."\footnote{Hauptman, supra note 74, at 322.}

In another "benevolent" attempt to help the "poor savages," in 1934 Congress repealed the GAA by enacting the Indian Reorganization Act of 1934 (IRA).\footnote{48 Stat. 984 (1934).} The IRA purported to provide the tribes with self-government.\footnote{Hauptman, supra note 74, at 328.} However, since the lands previously allotted were held in trust by the government, the IRA

served mainly to increase the personnel and supervisory responsibility of the Interior Department and its agency, the BIA. In effect, the IRA "added a new layer of permanent administration to the agency [BIA], while all the staff and activities established by the General Allotment Act were continued for the benefit of the remaining allottees."\footnote{Id. (citing Russell L. Barsh, The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense, 7 Am. Indian L. Rev. 1, 12 (1980)).}

"The IRA was not designed to recognize native sovereignty, nor did its operation encourage it. The [S]ecretary of [I]nterior, after all, had the final voice in every major policy decision made by the Indians."\footnote{Id. at 329.} Sadly, after forty years under the IRA, "only 595,157 acres were purchased for tribal use, while government agencies condemned 1,811,010 acres of Indian land for other purposes
during this period.\textsuperscript{87} Unfortunately, the ancient European doctrines and inconsistencies of the centuries past still find their way into modern courts, and continue to chip away at what remains of Native sovereignty. As recently as 1978 the Supreme Court has held that tribes do not have criminal jurisdiction over non-Indians, even on reservation land.\textsuperscript{88} The Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian[s] . . . ."\textsuperscript{89} Notwithstanding the erroneous implication that the Indians voluntarily submitted to the United States,\textsuperscript{90} when viewed in light of the Court's decision in another case decided that same month, the decision rings of racial prejudice. Amazingly, when an individual Native American was indicted by a federal grand jury for conduct which was previously punished under tribal law, the Supreme Court held that the "double jeopardy"\textsuperscript{91} provision of the Constitution did not prevent a second prosecution, because the tribe acted as an independent sovereign.\textsuperscript{92}

It is quite apparent that the legal and moral history of this country has enured to the detriment of Native Americans. The Constitution and the real history dictate that tribes are inherently sovereign, and have exclusive jurisdiction over all lands that are or ever were within their control. However, the reality is that Native Americans are not a political force to be reckoned with by the government. As such, the doctrines that have evolved are not likely to be changed, and Natives will have to deal with them as best they can, by opposing any further action by the government that would take away any small part of what is left of their sovereignty.

In the regulatory context, the greatest area of contention for tribal sovereignty has been with regard to lands which are within reservation boundaries, yet owned by non-members. A tribe cannot effectively regulate the reservation environment unless it has authority over all reservation inhabitants, including non-Indi-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 326 (citing 1 American Indian Policy Review Commission, Final Report 309-10 (1977)).
\item Id. at 210.
\item Willoughby, supra note 70, at 604 n.74.
\item U.S. Const. amend. V.
\end{enumerate}
\end{footnotesize}
Theoretically, non-Indians living within reservation boundaries should be subject to the laws and regulations of the tribe. However, again, in reality, such is not always the case. "Federal environmental legislation provides a threshold or baseline way to measure environmental quality nationwide, however it also transposes Euro-American values and norms on the American Indian nations." Consequently, the decisions in this area are consistent with tradition to the extent that they are inconsistent and inequitable.

In spite of the doctrine that treaties must be construed as a grant of rights from the Indians, not to them, and that those not granted are reserved, in 1981 the Supreme Court held that Indian tribes had no power to regulate hunting and fishing on non-Indian lands within reservation boundaries, because such rights were not expressly reserved in any prior treaty. The Montana Court held that tribes have power to regulate non-Indian conduct within reservation boundaries only "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." This decision has been criticized as "remarkable for its abandonment of traditional doctrines of treaty interpretation" and as "abruptly counter[ing] one-and-a-half centuries of precedent . . . ." However, the Court has apparently set new precedent which has

94. Symposium, supra note 2, at 504. Symposium speaker Richard Monette reveals the contents of a hypothetical letter sent by the federal government to Charles Ingalls, from the archives of Little House on the Prairie:

Dear Mr. Ingalls, the federal government has been informed that you and your family have settled upon land in contravention of federal law. The U.S.A. has not yet acquired the territory on which your parcel sits. As Chief Justice John Marshall has said, Indian territory may be acquired by purchase or conquest. And since the territory is yet to be purchased, we fear that Laura's writings may give the tribe the indication that we think we have conquered them, which we have not. . . . You can, however, live there, Charles, but you take the property subject to the laws and the title and all the regulation of the Indian tribe.

Id. at 505.
95. Id. at 506.
98. Id. at 566 (citations omitted).
100. Id.
been followed in subsequent cases.\textsuperscript{101} Furthermore, "[r]ecent Supreme Court decisions regarding tribal regulatory jurisdiction over the lands and resources within Indian Country reflect the Court's continuing allegiance to these late Nineteenth Century principles of federal Indian law."\textsuperscript{102} In \textit{Brendale v. Confederated Tribes and Bands of the Yakima Nation},\textsuperscript{103} the Court held that the tribe may not impose zoning regulations on land owned by non-members in an open area within reservation boundaries.\textsuperscript{104} The Court's ruling was based on the probable effect of the activity sought to be regulated: "The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe."\textsuperscript{105} The opinion was a plurality, but the bottom line was that when a reservation or an area of a reservation is closed, is sufficiently "Indian," whatever that might mean, the tribe retains full land use planning authority throughout the entirety of that reservation or that area regardless of ownership—regardless of title to any particular parcel of land. Where a reservation or a part of a reservation is open, is not sufficiently "Indian," of sufficiently Indian character, whatever that might mean, the Court said that primary land use planning authority rests with the state. . . . [The Court declined] to look at the fact that the tribe was asserting its power of land use planning, comprehensive land use planning, which, if done right, is what zoning is all about . . . . [C]omprehensive land use planning . . . is something which under any set of circumstances has a direct and substantial impact on tribal interests, on tribal health and welfare.\textsuperscript{106} Furthermore, "land use planning is a first-line environmental defense and . . . the Supreme Court has removed from tribes much of their ability to engage in that first-line environmental defense . . . ."\textsuperscript{107} If the tribe is authorized to plan comprehensively,
“it can create green-belt zoning,”¹⁰⁸ which would “control nonpoint source pollution.”¹⁰⁹ “It is almost axiomatic that the quality of the reservation environment goes directly to the economic security and health and welfare of a tribal community.”¹¹⁰

“The Brendale decision has been decried by leading Indian law scholars . . . as the product of ‘perhaps unconscious racist assumptions about the nature and distribution of both power and property.’”¹¹¹ Further, the Brendale decision has been criticized as being “derive[d] from a nineteenth century view that tribal governments’ status as ‘domestic dependent nations’ render them permanently subordinated governmental entities within the federal system.”¹¹² “Brendale represents a serious intrusion into the heart of tribal sovereignty: Indian control of land within reservation boundaries. Those tribes whose reservations contain significant amounts of non-Indian land ownership have apparently lost the authority to regulate reservation land use planning through zoning.”¹¹³

The courts’ decisions have yielded the result that “[t]ribal sovereignty does not bar completely the assertion of state authority in Indian country.”¹¹⁴ In fact, at times, the Court has held the states and tribes have what amounts to concurrent jurisdiction, in the context of taxation.¹¹⁵ However, under the preemption doctrine, “state regulatory laws cannot be applied to Indian reservations if their application interferes with the policy goals underlying federal laws relating to Indians.”¹¹⁶ Accordingly, “[b]y providing assistance for tribal regulatory programs and by assuming — perhaps even mandating — that those programs

¹⁰⁸. Id. at 503.
¹⁰⁹. Id.
¹¹². Id. at 14.
¹¹³. Sitkowski, supra note 5, at 258.
¹¹⁴. Walker & Gover, supra note 93, at 235.
¹¹⁵. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that a non-Indian lessee of reservation oil production was subject to both state and tribal taxes).
¹¹⁶. Walker & Gover, supra note 93, at 235.
apply to non-Indian lands within the exterior boundaries of Indian reservations, Congress' tribal amendments and EPA's Indian Policy preempt the states from enforcing their environmental laws on Indian reservations.\footnote{117}

Even though the Court has limited tribal jurisdiction over non-members, the EPA can delegate regulatory jurisdiction to the tribes, where Congress has expressly provided.\footnote{118} However, before 1986, "most environmental laws did not mention tribes or reservations, and none provided for program delegation to tribal governments."\footnote{119} As a result, the "EPA was forced to develop special rules and practices concerning environmental regulation on Indian reservations . . . .\footnote{120} Presently, however, Congress has expressly provided regulatory authority for tribes in several environmental statutes, in the form of "tribes as states" clauses, which authorize the EPA to treat the tribes who meet the criteria as it would treat states. Through amendments, "tribes as states" clauses now appear in federal statutes such as the Clean Air Act (CAA),\footnote{121} the Clean Water Act (CWA),\footnote{122} the Safe Drinking Water Act (SDWA),\footnote{123} and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\footnote{124} However, one major statute, the Resource Conservation and Recovery Act (RCRA)\footnote{125} contains neither a "tribes as states" clause, nor a provision for tribal participation.\footnote{126}

The EPA is authorized to treat tribes as states

for purposes of setting standards and receiving program grants, if

(1) the tribe has a governing body carrying out substantial powers and duties; (2) the functions to be exercised by the tribe are within its jurisdiction; and (3) the tribe is reasonably expected, in the EPA Administrator's judgment, to be capable of carrying out the functions to be exercised in a manner consistent with the terms and

\footnotesize{117. Id. at 236.}
\footnotesize{118. United States v. Mazurie, 419 U.S. 544 (1975).}
\footnotesize{119. Stetson & Gover, supra note 110, at 24-25.}
\footnotesize{120. Id. at 25.}
\footnotesize{121. 42 U.S.C. § 7601(d) (1994).}
\footnotesize{122. 33 U.S.C. § 1377(e) (1994).}
\footnotesize{123. 42 U.S.C. § 300j-11 (1994).}
\footnotesize{124. 42 U.S.C. § 9626 (1994).}
\footnotesize{125. 42 U.S.C. §§ 6901-6992k (1994).}
purposes of the federal environmental laws and all applicable regulations.\textsuperscript{127}

Additionally, under the CWA, tribes may be treated as states for purposes of:

(a) grants for pollution control programs under Section 1256; (b) grants for construction of treatment works under Sections 1281-1299; (c) water quality standards and implementation plans under Section 1313; (d) enforcement of standards under Section 1319; (e) clean lake programs under Section 1324; (f) certification of National Pollutant Discharge Elimination System ("NPDES") permits under Section 1341; (g) issuance of NPDES permits under Section 1342; and (h) issuance of permits for dredged or fill material under Section 1344.\textsuperscript{128}

Furthermore, in 1991, the EPA promulgated the procedures for a tribe's treatment as a state under the CWA.\textsuperscript{129}

The EPA is not willing to come right out and say that tribes have authority over the entire territory of the reservations, but the EPA wanders its way around and ends up close to that. The EPA says basically that most tribes should in all instances have the authority to regulate the waters throughout the territorial boundaries of the reservation because it finds under Montana/Brendale that Congress has said that water pollution has such substantial and direct impacts on tribal health and welfare that this is necessarily something over which tribes retain authority on non-Indian fee lands as well as on trust lands.\textsuperscript{130}

The EPA's policy and the amendments to the CWA have spawned recent litigation. For instance, the EPA approved the application of Confederated Salish and Kootenai tribes to adopt their own water quality standards; the EPA's action was challenged by the state of Montana as it applies to non-Indian land owners living within the reservation boundaries.\textsuperscript{131} The Montana District Court rejected the State's challenge and upheld the EPA's decision.\textsuperscript{132} Similarly, the State of Wisconsin has, for the fourth

\textsuperscript{127. Stetson & Gover, supra note 110, at 25.}
\textsuperscript{128. Walker & Gover, supra note 93, at 234 n.14 (citing 42 U.S.C. § 1377 (1988))).}
\textsuperscript{129. 56 Fed. Reg. 64,876 (1991).}
\textsuperscript{130. Symposium, supra note 2, at 503-04.}
\textsuperscript{131. Cross, supra note 102, at 3 (citing Montana v. EPA, CV-95-56-M-CCL (D. Mt. May 4, 1995)).}
\textsuperscript{132. Tribes May Set Own Environmental Standards, Rules Montana Court, West's Legal News, April 18, 1996, 1996 WL 259911.}
time, challenged EPA approval of “tribes as states” for purposes of the CWA. All four of those cases are still pending; however, the Montana court appears to have set clear precedent.

Likewise, under the CAA, the EPA is authorized “to treat Indian tribes as states for federal air protection programs and to provide tribes grants and contract assistance.” Prior to the 1990 amendments to the CAA, a tribe could affect air quality only by redesignating its lands under the Prevention of Significant Deterioration (PSD) program; however, such redesignation was ineffective because the EPA still retained ultimate control in evaluating violations.

Under CERCLA, “tribes have the right and the responsibility to regulate the disposition of both solid and hazardous wastes on tribal lands; however, until quite recently, tribes were neither required nor permitted to exercise such right or to meet such responsibility.” Additionally, despite the fact that the EPA’s policy and tribal amendments “clearly preempt the States from enforcing their environmental laws on Indian reservations,” in a 1995 decision, a California District Court held that the State could sue for cleanup costs under the California version of CERCLA, even though the site was on a reservation. In this instance, federal preemption did not protect the tribe; however, one commentator advocates holding the United States liable as an “owner/operator,” based on the tribal trust relationship. This would provide incentive for the government to protect and preserve tribal land.

Although RCRA does not contain a “tribes as states” provision, courts have nonetheless held tribes liable for clean up costs. The Blue Legs court imposed liability “despite both the

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134. Walker & Gover, supra note 93, at 234 n.16.
136. Stetson & Gover, supra note 110, at 24.
137. Id.
141. Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989).
ineligibility of tribes to assume primary responsibility for RCRA enforcement on their reservations and the inability of tribes to benefit from the considerable sums of federal dollars spent to support state environmental programs.\textsuperscript{142} The decision in \textit{Blue Legs} has been criticized as “present[ing] tribes with a classic ‘Catch-22’,”\textsuperscript{143} and as an example of how “modern courts are further eroding sovereignty principle and the requirement that Congress expressly waive sovereign immunity.”\textsuperscript{144}

“RCRA regulations\textsuperscript{145} require states seeking primary enforcement responsibility on Indian lands to submit to EPA a statement analyzing their jurisdiction over Indian lands.”\textsuperscript{146} In 1982, the State of Washington submitted such an application, asserting jurisdiction over all Indian lands within the state.\textsuperscript{147} However, the EPA refused to approve Washington’s program because “RCRA does not authorize the states to regulate Indians on Indian lands.”\textsuperscript{148} The Ninth Circuit Court of Appeals affirmed the EPA’s refusal, holding that since RCRA was silent as to state authority on Indian reservations, and since the EPA’s interpretation of RCRA was reasonable, then deference to the EPA was required.\textsuperscript{149}

However, a seeming victory for the tribe has created a practical problem: since there is no federal permitting system, and since “state standards and permitting procedures do not apply to Indian reservations and RCRA does not anticipate tribal regulatory programs, there is effectively a regulatory void on many reservations.”\textsuperscript{150} According to EPA rules, “any noncomplying landfills may be classified as open dumps. Because the open dump prohibition in RCRA applies to Indian tribes, this final rule imposes serious and important new obligations on tribes; however, no new resources are made available to the tribes. The inequity of

\begin{itemize}
\item[142.] Sitkowski, supra note 5, at 251. See also Walker \& Gover, supra note 93, at 230-31.
\item[143.] Sitkowski, supra note 5, at 255.
\item[145.] 40 C.F.R. § 271.7(b) (1996).
\item[146.] Walker \& Gover, supra note 93, at 238 (citing 42 U.S.C. §§ 6921-34 (1988)).
\item[147.] Washington v. EPA, 752 F.2d 1465, 1467 (9th Cir. 1985).
\item[148.] Id. at 1467-68.
\item[149.] Id. at 1469.
\item[150.] Stetson \& Gover, supra note 110, at 26.
\end{itemize}
this situation is obvious ...\textsuperscript{151}

"If tribes are to bear RCRA's burdens, they should be able to enjoy its benefits as well."\textsuperscript{152} One commentator advocates "amending RCRA to acknowledge tribal jurisdictional authority [which] undoubtedly would enable tribes to establish the only regulatory system governing solid and hazardous waste disposal on Indian lands."\textsuperscript{153}

An amendment to RCRA may be needed in order to put the tribes at least on equal footing with states. However, in the meantime, by its rulemaking, the EPA is making great strides in protecting Native sovereignty. The EPA may import a reasonable interpretation to "fill in the gaps" in statutes which are silent on a particular issue.\textsuperscript{154} It appears that is exactly what the EPA has done in regard to RCRA, and other environmental statutes and their application to Indian tribes. In December 1994, the EPA made it easier for tribes to obtain EPA approval under the CWA, the SDWA, and the CAA, by eliminating the "burdensome, time consuming, and offensive" process of prequalification.\textsuperscript{155} Likewise, in 1995, the Yankton Sioux tribe sought to enjoin construction of a solid waste facility on non-Indian land within their reservation.\textsuperscript{156} The court refused to grant the injunction, holding that the tribe had no jurisdiction over non-Indian land within the reservation,\textsuperscript{157} and that Federal EPA regulations would apply.\textsuperscript{158} Subsequently, in September 1996, the EPA approved South Dakota's application under RCRA, with the exclusion of non-Indian lands within the exterior boundaries of the Yankton Sioux Reservation.\textsuperscript{159}

Additionally, in January 1996, the EPA proposed a rule regarding the material solid waste standards: The "State/Tribal
Implementation Rule” (STIR). The EPA stated that RCRA is the legal basis for the proposed STIR and that the purpose was to make management of waste equally protective on Indian lands; the STIR also gives Indian tribes the right to apply for EPA approval of their landfill permit programs. Likewise, in June 1996, the EPA proposed a rule which would establish procedures by which tribes can be eligible to implement hazardous waste programs under RCRA Subtitle C and obtain federal grant money. However, in September 1996, the EPA granted requests to extend the comment period on that proposed rule for an additional thirty days. By its own actions, it is clear that the “EPA's Indian Environmental Policy rejects the nineteenth century's pessimistic view that tribal governments should be regarded as permanently subordinated governments and dependent federal wards.” As of the date of this publication, the final rule has not yet been promulgated, but where hope had previously existed, that hope has since been severely impaired by a recent decision of the District of Columbia Circuit Court of Appeals.

On October 29, 1996, the court in Backcountry Against Dumps v. EPA made an incredible decision. The Backcountry court held that the EPA did not have authority to treat tribes as states for purposes of solid waste permitting plans under RCRA. In 1993, the Campo Band of Mission Indians filed an application with the EPA seeking approval of its solid waste program under Section 6945(c) of RCRA. In 1995, the EPA approved the Campo Band’s permit, finding that the tribe’s program set forth “stringent standards” that met or exceeded federal standards, and that “the program as a whole ensured compliance with federal solid waste management criteria.” However, pursuant to a petition for review, the court in Backcountry vacated the EPA’s approval, holding that RCRA defines Indian tribes as municipalities, not as

161. Id.
164. Cross, supra note 102, at 16.
165. 100 F.3d 147 (D.C. Cir. 1996).
166. Id. at 148.
167. Id.
168. Id. at 150.
169. Id.
states; as such, RCRA is not silent as to Indian tribes, and the court need not defer to the EPA’s interpretation of the statute.\footnote{170}{Id.}

The fact that RCRA defines a municipality as, among other things, an Indian tribe,\footnote{171}{42 U.S.C. § 6903(13) (1994).} is not dispositive of the issue. The \textit{Backcountry} court claimed that under RCRA, “Indian tribes are defined as municipalities.”\footnote{172}{\textit{Backcountry}, 100 F.3d at 150.} However, nowhere does RCRA ever \textit{define} an Indian tribe; it defines a municipality. The court in \textit{Backcountry} has applied judicial restraint in favor of congressional intent, reasoning that “it is significant that when Congress wants to treat Indian tribes as states, it does so in clear and precise language.”\footnote{173}{Id.} To prove its incomplete reasoning, the court cited the various “tribes as states” provisions of the Clean Air Act,\footnote{174}{42 U.S.C. § 7601(d) (1994).} the Safe Drinking Water Act,\footnote{175}{42 U.S.C. § 300j-11 (1994).} and the Clean Water Act,\footnote{176}{33 U.S.C. § 1377(a) (1994).} as evidence of congressional intent to treat tribes as states.\footnote{177}{\textit{Backcountry}, 100 F.3d at 150.} However, the fact is that the “tribes as states” clauses were added by subsequent amendment as an afterthought; prior to amending said Acts to include “tribes as states” clauses, the EPA made special rules and practices to accommodate Congress’ omissions, which ultimately resulted in the aforementioned amendments.\footnote{178}{See Stetson & Gover, supra note 110; see also supra text accompanying note 120.}

Consequently, the process by which the “tribes as states” clauses came into existence was not by Congress’ original intent, but by codification of the EPA’s gap filling measures, on a subject that Congress obviously had not considered. As evidenced by United States history, traditional Eurocentric views and the major environmental statutes, on the occasions where Congress has considered the tribes, it has considered them to be of \textit{de minimis} concern. Therefore, it is indisputable that Congress merely forgot to address the tribes in the context of independent nations that are capable of implementing the waste management criteria set forth in RCRA. Accordingly, RCRA is silent on the issue of whether a tribe may submit a waste management plan, and the
EPA's reasonable interpretation, in approving the Campo Band's permit, should stand.

There is one other problem in the genre of "tribes as states" clauses, which relates to RCRA, as well as the other environmental statutes. Many people feel that granting tribes the authority to regulate waste will further the exploitation of Native lands. However, "a commercial solid or hazardous waste project may represent an appropriate and workable form of economic development for some tribes and can provide extraordinary opportunities for development in Indian Country."\(^{179}\) In practice, "the tribes exerting significant local control have been the most successful in creating sustainable economic activity."\(^{180}\) Furthermore,

[for tribes considering developing commercial waste projects on their reservations, the major issue they face will not be an environmental one, but instead one of power and racism. Much of the environmental community seems to assume that, if an Indian community decides to accept such a project, it either does not understand the potential consequences or has been bamboozled by an unprincipled waste company. In either case, the clear implication is that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests. This is clearly a racist assumption; the same assumption that guided federal policies that very nearly eradicated Indian people in the late nineteenth and early twentieth centuries.\(^{181}\)

Even though progress has been made in the area of environmental regulation and tribal sovereignty, a great deal of inequity and inconsistency still exists. In a 1978 decision, the Supreme Court held that tribes had sovereign immunity from suit, absent clear congressional intent to abrogate that immunity.\(^{182}\) In 1993, the District Court of Arizona held that tribal sovereign immunity was waived by the "citizen suit" provisions under the CWA and RCRA.\(^{183}\)

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180. \textit{Id.} at 244.
However, a recent Supreme Court decision involving the Indian Gaming Regulatory Act\textsuperscript{184} has been said to have a substantial effect on environmental law.\textsuperscript{185} In \textit{Seminole Tribe v. Florida},\textsuperscript{186} the Court held that a state's sovereign immunity will not be abrogated, despite clear congressional intent to do so.\textsuperscript{187} The decision in \textit{Seminole Tribe} has been criticized as "invalidat[ing] provisions of CERCLA [which allow] individuals to sue states for cleanup costs."\textsuperscript{188} In effect, even with the "tribes as states" provisions in most federal environmental statutes, the result is that tribes will be subject to suit, while states will not. Even if one buys into the "domestic dependent nations"\textsuperscript{189} rhetoric, the result is clearly the opposite of what it should be.

In conclusion, Indian tribes are, and have always been, separate nations, distinct political communities, inherently sovereign in their own right, with or without Congress' approval, and regardless of any European agreements to the contrary. The time has come to recognize what has always been so. However, in light of the fact that American legal history has dictated a different result, the tribes will attempt to preserve what remains of their sovereignty. The EPA's policy has facilitated retention of remaining sovereignty in the environmental context. Unfortunately, however, for the EPA's one step forward, the courts take two steps back. The more things change, the more they stay the same.

\begin{thebibliography}{99}
\bibitem{185} 26 \textit{Env't Rep.} 2263 (BNA 1996).
\bibitem{186} 116 S. Ct. 1114 (1996).
\bibitem{187} \textit{Id.} at 1119.
\bibitem{188} 26 \textit{Env't Rep.} 2263 (BNA 1996).
\bibitem{189} \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 17 (1831).
\end{thebibliography}
NOTE

THE SUPREME COURT "MISSED THE FOREST FOR THE TREES" IN MEGHRIG V. KFC WESTERN, INC.

by Barbara L. Barber

I. INTRODUCTION

On March 19, 1996, the United States Supreme Court crafted an asylum for petroleum-polluting land sellers, who might have otherwise faced the wrath of innocent purchasers of petroleum-contaminated property in court. Unanimously, the Court reached its decision after a handful of words in the Resource Conservation and Recovery Act\(^1\) ("RCRA") sent the Court on a grammatical crusade in search of Congressional intent.

In its ruling, which comforted worried oil marketers,\(^2\) the Supreme Court held that a land owner cannot use RCRA\(^3\) to recover cleanup expenses at sites that no longer pose a threat of endangerment at the time the suit is filed.\(^4\) The Court's denial of KFC Western, Inc.'s ("KFC") RCRA claim has left KFC without a remedy at federal or state environmental law,\(^5\) since the only other applicable environmental statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") contains a "petroleum" exclusion.\(^6\) RCRA and CERCLA are the primary federal environmental statutes which cover the regulation of waste sites.\(^7\) KFC filed a similar claim in

\(^2\) Kimberley Music, Oil Marketers Get Big Win at Supreme Court in Ruling on Hazardous Waste Cleanup Costs, 46 The Oil Daily 1, No. 53 (1996) (quoting comments made by Philip R. Chisholm, executive vice president of the Petroleum Marketers Association of America, immediately after the Supreme Court's decision in Meghrig v. KFC Western, Inc.).
\(^3\) 42 U.S.C. § 6972(a) (1994).
\(^5\) KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 & n.6 (9th Cir. 1995). See also, High Court Refuses to Allow Recovery of Response Costs in RCRA Citizen Suit, 26 ENV'T. REP. CURRENT DEV. No. 45, Mar. 22, 1996, at 2191.
\(^7\) LYNN L. BERGESON ET AL., The RCRA Practice Manual, 1994 A.B.A. SEC.
California state court, but the claim was dismissed on the grounds that the action was precluded by a petroleum exclusion contained in the California state statute coupled with expiration of the statute of limitations.8

KFC sued Alan Meghrig and Margaret Meghrig (the "Meghrigs"), under the "citizen suits" provisions in RCRA, seeking to recover expenses incurred in cleaning up gasoline contamination on a site which KFC had purchased from the Meghrigs in 1975 (the "property").9 Thirteen years later, KFC discovered the contamination in the course of making improvements to the real estate.10 KFC immediately cleaned up the site, incurring over $211,000 in cleanup expenses.11 Three years later, KFC sued the Meghrigs in federal court, seeking reimbursement of its costs for which the Meghrigs had refused reimbursement.12 Concurrently, KFC pursued similar remedies in state court.13 The California Appellate Court held that KFC did not have a remedy under the California environmental statute because the statute contained a "petroleum waste exclusion."14

The federal claim was dismissed by the District Court for the Central District of California because "endangerment" did not exist at the time KFC's suit was filed and "monetary relief" is not authorized by RCRA, according to the court.15 In a landmark decision, the Ninth Circuit Court of Appeals reversed and remanded the lower court ruling, holding that KFC was entitled to bring its recovery action, and cited case law from the Eighth Circuit as authority for this proposition.16 A month later, in Furrer v. Brown,17 the Eighth Circuit rejected the approach

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10. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).

11. Id.

12. Id.


14. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 n.6 (9th Cir. 1995).

15. Id. at 519.

16. Id. at 521-524 (citing United States v. Aceto Agric. Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989) as authority for the proposition that a restitutionary remedy is authorized under RCRA in certain circumstances).

adopted by the Ninth Circuit in KFC Western, Inc. v. Meghrig, creating a conflict among the circuits. 18

The Ninth Circuit ruled that RCRA does not contain any requirement as to the timing of the citizen suit with respect to the existence of the "endangerment", and that RCRA does authorize equitable relief to be granted by the courts. 19 The Supreme Court did not agree. 20

Before a post-mortem of the Court's decision can be properly conducted, it is necessary to review exactly what RCRA is — why it was enacted, and what circumstances and policies were in existence at its passage. This will not be easy. RCRA has evolved into one of the most complex areas of environmental law; 21 even the judiciary has found RCRA "mind-numbing." 22

II. LEGISLATIVE BACKGROUND

A. Early Federal Intervention

Prior to 1965, the federal government had a minimal presence in the management of solid waste disposal practices. 23 Early initiatives by the government included recommendations by the U.S. Surgeon General, studies conducted on refuse collection and landfill practices, and the offer of limited technical assistance by the government. 24 Industrialization and urbanization yielded unforeseen consequences to the health and safety of the environment. 25 In 1965, Congress observed that the growing solid waste disposal problem in this country consisted of waste from slaughterhouses, manufacturing plants, commercial establishments, construction refuse, and the like. 26 In its 1965 report to Congress, the Committee on Interstate and Foreign Commerce observed:

18. Id. at 1101.
19. KFC Western, Inc. v. Meghrig, 49 F.3d at 524.
22. BERGESON ET AL., supra note 7, at 223 (citing American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987)).
24. Id.
Solid waste collection and disposal activities create one of the most serious and most neglected aspects of environmental contamination affecting public health and welfare. The efforts now being made to deal with this problem are clearly inadequate. In the opinion of the committee, immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem.

President Lyndon B. Johnson called on Congress to find "better solutions" to address the problem of solid waste disposal. Heeding the President's urging, Congress passed the Solid Waste Disposal Act in October 1965. Among other things, the Solid Waste Disposal Act made provisions for research relating to solid waste disposal, authorized grants for resource recovery systems and improved solid waste disposal facilities, and provided for a national disposal sites study for the storage and disposal of hazardous wastes.

Heretofore, Congress had directed most of its attention to issues involving contamination of the nation's water and air resources, but in 1970, Congress directed its attention to contamination of the nation's land. Mired in research grants, training and planning goals, the 1970 amendments to the Solid Waste Disposal Act of 1965 left the Act still a largely non-regulatory measure. This lack of sufficient regulatory framework with which to track and manage solid waste disposal practices led to a proliferation of "hazardous wastes," presenting a threat to the well-being of the population and environment. The lawmakers had come to realize, that in tackling the solid waste crisis, the traditional term, "solid waste," would no longer be
suitable. The term "hazardous waste" was then coined by a legislature in the midst of crisis.

B. Enactment of RCRA: "Cradle-to-Grave" Hazardous Waste Management

Coming to terms with widespread hazardous waste dumps, approximating 30-35 million tons of hazardous waste per year, such waste threatening to "blind, cripple or kill" humans, Congress quickly passed a rigorous hazardous waste management and tracking system via an amendment to the Solid Waste Disposal Act, titled: "The Resource Conservation and Recovery Act of 1976." Subtitle C of RCRA creates a "cradle-to-grave" regulatory framework for managing hazardous wastes, by imposing compliance requirements upon generators and transporters of hazardous wastes, as well as owners and operators of treatment, storage, and disposal facilities. Subtitle C of RCRA applies only to solid wastes which are characterized as "hazardous."

C. Blind-spot in RCRA's Framework: Abandoned and Inactive Hazardous Waste Sites — "CERCLA" is Enacted

RCRA had been rushed into law to offset future hazardous wastes, but the vast number of abandoned dump sites containing hazardous wastes had been mistakenly overlooked. These unregulated, abandoned hazardous waste sites bred human and environmental calamity, touching many lives and communities: for example, "Love Canal" in Niagara Falls and the "Valley of

35. Id.
the Drums" in Louisville, Kentucky. The post-RCRA environmental disasters naturally alarmed many who had placed confidence in the "cradle-to-grave" regulatory scheme of RCRA.

Administratively, RCRA did not appear to be suited to remediying the effects of abandoned, unsound disposal practices. RCRA authorized the Environmental Protection Agency ("EPA") to handle imminent hazardous wastes, but additional measures were needed to regulate cleanup, damages, and compensation of abandoned inactive sites. Many in Congress perceived the abandoned sites as potential "time-bombs," admonishing the legislature to act quickly — whether this would require making new laws or amending old ones. However, Congress was adamant that no new legislation be permitted to create "loopholes" to relieve past, present or future disposers of liability for negligence in dealing with hazardous substances.

In a lame-duck session of Congress, a few weeks after the presidential election of Republican Ronald Reagan, hurriedly and with very limited debate — under a suspension of the rules, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. CERCLA, as initially created and amended, was designed to regulate liability, compensation, and emergency response for the cleanup of inactive and abandoned hazardous waste disposal sites. Congress also extensively amended RCRA in 1984, establishing a

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43. Id.
44. See id. at 43 (statement of Thomas C. Jorling, Assistant Administrator for Water and Hazardous Materials, Environmental Protection Agency).
45. Id. at 92-97.
46. Id. at 287.
47. Id. at 333.
series of controls to seal “loopholes” and “gaps” in RCRA’s initial construction. 52

D. Federal Compliance with RCRA & CERCLA

RCRA and CERCLA are the primary federal environmental statutes which regulate hazardous waste sites. There is substantial overlapping of federal jurisdiction with these two statutes. 53 RCRA requires the EPA Administrator to integrate “all” provisions of the solid waste federal laws with other related regulatory Acts of Congress which grant enforcement authority to the EPA, and which are consistent with RCRA’s goals. 54 This section of the note will describe in bare bones fashion, the compliance required under RCRA and CERCLA.

First, RCRA and CERCLA are designed to control “hazardous” wastes. Hazardous wastes under RCRA include solid wastes 55 which threaten human health unless properly treated. CERCLA envelopes the RCRA hazardous waste terminology, 56 with the exception of petroleum wastes. 57

Second, there are a variety of compliance measures incorporated under RCRA and CERCLA. Compliance under RCRA involves, (1) obtaining a permit for “treatment, storage or disposal of hazardous waste,” 58 (2) compliance by generators 59 and transporters 60 of hazardous waste, with stringent reporting, re-

52. Id.
53. BERGESON ET AL., supra note 7, at 7.
55. 42 U.S.C. § 6903(27) (1994) states:
The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges . . . .

Id.
59. “Generators” of hazardous waste are subject to EPA regulations which are codified at: Standards Applicable to Generators of Hazardous Waste, 40 C.F.R. §§ 262.10, 262.11 (1995).
60. “Transporters” of hazardous waste are subject to EPA regulations which are codified at: Standards Applicable to Transporters of Hazardous Waste, 40 C.F.R.
cord-keeping and labeling practices. CERCLA, on the other hand, involves the undertaking of various responses to abate the "release” or "threat of release" of a hazardous substance into the environment.

When compliance measures of RCRA or CERCLA are violated, criminal or civil action may be undertaken.

E. Enforcement Options: Noncompliance With RCRA & CERCLA

The failure to undertake proper remedial action under RCRA, or the failure to conduct a proper cleanup of a CERCLA site, can constitute actionable noncompliance. As discussed below, criminal or civil redress may be pursued by the EPA, the states, or by private citizens acting as "private attorneys general."

1. EPA and State Action

RCRA authorizes the EPA Administrator to bring suits "against any person" to restrain an "imminent and substantial endangerment to health or the environment," to issue orders and assess civil penalties for any past or current violation of

§ 263.10 (1995).
61. 42 U.S.C. § 9601(25) (1994) states that "The term . . . 'response' means . . . remove, removal, remedy, and remedial action, all such terms [including the terms 'removal' and 'remedial action'] include enforcement activities related thereto." Id.
62. 42 U.S.C. § 9601(22) (1994) states that "The term 'release' means any spilling, leaking, pumping, pouring, . . . dumping, or disposing into the environment [including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant] . . . .” Id.
64. 42 U.S.C. § 9601(8) (1994) states:
The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.S. §§ 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.
Id.
regulations or EPA enforcement orders, and to issue criminal penalties for "knowing" violations and "knowing endangerment." States may also enforce hazardous waste programs pursuant to the RCRA framework, so long as such programs carry standards equal to or greater than those imposed under federal law.

CERCLA authorizes the EPA Administrator to seek a judicial order requiring liable parties to abate an actual or threatened release of a hazardous substance presenting "imminent and substantial endangerment to the public health or welfare or the environment."

2. Citizen Suits: The "Private Attorney General" Concept

The "private attorney general" model of citizen suits is somewhat analogous to the traditional "bounty hunter" concept. Congress views the citizen suit provisions as an efficient policy instrument, functioning as a participatory, democratic mechanism which permits concerned citizens to obtain redress for wrongdoing, while helping to protect the environment. Within the past twenty years, Congress has greatly expanded environmental citizen suit provisions, such that most major federal environmental statutes now permit private citizens to enforce federal environmental laws.

RCRA and CERCLA are vital links which complement each other in the chain of federal protection of air, water and land. Since enactment of the Clean Air Act of 1970, which was the first federal environmental law to permit private citizens to sue

72. Id. at 340.
74. Id. at 506 n.32.
for violations of federal environmental law,\textsuperscript{76} the Clean Air Act citizen suit has served as the model for other federal environmental statutes.\textsuperscript{77}

\textbf{a. RCRA}

Under RCRA, "any person" may bring a civil suit on his own behalf,\textsuperscript{78} against anyone alleged to be in violation of RCRA,\textsuperscript{79} or pertaining to a matter of "imminent and substantial endangerment to health or the environment,"\textsuperscript{80} or against the Administrator\textsuperscript{81} for failure to perform any duty under the Act.\textsuperscript{82} Certain "notice" requirements apply as well: a plaintiff is barred from bringing suit against a violator of RCRA without having first given sixty days notice of the violation to the Administrator, to the state in which the violation occurred, and to the alleged violator.\textsuperscript{83} Similarly, a plaintiff is barred from bringing a suit pertaining to a matter of "imminent and substantial endangerment to health or the environment" unless the plaintiff has first given ninety days notice to the Administrator, to the state in which the violation occurred, and to any person alleged to have contributed or to be contributing to the past or present disposal of hazardous waste.\textsuperscript{84} If the plaintiff's suit is against the Administrator for alleged neglect of duty,\textsuperscript{85} then sixty days notice by the plaintiff to the Administrator is required.\textsuperscript{86}

A plaintiff is also barred from bringing a suit relating to a matter of "imminent and substantial endangerment to health or the environment"\textsuperscript{87} when either the Administrator\textsuperscript{88} or the

\textsuperscript{76} 42 U.S.C. §§ 7401-7642 (1994).
\textsuperscript{78} 42 U.S.C. § 6972(a) (1994).
\textsuperscript{81} 42 U.S.C. § 6903(1) (1994) (the term "Administrator" refers to the Administrator of the Environmental Protection Agency).
\textsuperscript{86} 42 U.S.C. § 6972(c) (1994).
state\textsuperscript{89} is already prosecuting a civil or criminal action under RCRA\textsuperscript{90} or CERCLA,\textsuperscript{91} or is actually engaging in removal of waste at the CERCLA site,\textsuperscript{92} or is diligently proceeding with a remedial action for expenses under CERCLA,\textsuperscript{93} or if the Administrator has obtained a judicial decree under RCRA\textsuperscript{94} or CERCLA\textsuperscript{95} and the responsible party is proceeding with remedial action.\textsuperscript{96} The RCRA "endangerment" citizen suit is the subject of the litigation between KFC and the Meghrigs.

b. CERCLA

Analogous to RCRA's citizen suits statutory framework, CERCLA authorizes "any person"\textsuperscript{97} to bring civil action against a violator,\textsuperscript{98} or neglectful Administrator.\textsuperscript{99} Liability may also attach to any current owner or operator of a facility.\textsuperscript{100} The plaintiff is barred from bringing suit unless the plaintiff gives sixty days notice of the violation to the violator as well as others who are required to be notified.\textsuperscript{101} Judicial review is also barred where the EPA is in the process of taking remedial action on the CERCLA site.\textsuperscript{102}

F. Relief Available Through Citizen Suit Action

Under RCRA's citizen suits statute,\textsuperscript{103} a court may order the defendant to comply with regulations being violated, or may order injunctive relief, or may order "such other action as may be necessary."\textsuperscript{104} RCRA also permits the prevailing party to recov-

\begin{itemize}
\item 89. 42 U.S.C. § 6972(b)(2)(C) (1994).
\item 90. 42 U.S.C. § 6973 (1994).
\item 91. 42 U.S.C. § 9604 (1994).
\item 95. 42 U.S.C. § 9606 (1994).
\item 97. 42 U.S.C. § 9659(a) (1994).
\item 100. 42 U.S.C. § 9607(a) (1994).
\item 104. 42 U.S.C. § 6972(a) (1994).
\end{itemize}
er legal fees. 105

Under CERCLA's citizen statute, 106 a separate statute outlines the remedies available to private CERCLA plaintiffs. 107 Remedies under CERCLA include all costs of removal action and damages. 108

RCRA and CERCLA often overlap on liability assessment provisions as well as remedies. Nevertheless, RCRA requires "integration [of] all [RCRA] provisions" with other similar environmental law statutes which promote RCRA's goals. 109 Likewise, CERCLA states that a person's liability under another federal or state environmental law shall not be affected or modified by CERCLA's provisions. 110

III. FACTUAL BACKGROUND OF THE KFC WESTERN, INC. V. MEGHRIG DECISION

In September 1975, the Meghrigs sold a parcel of land, located in Los Angeles, California, to KFC Western, Inc. 111 KFC paid the Meghrigs $152,000 for the property. 112 There had been a gas station in operation on the property from 1917 to 1962 preceding the March 1963 date on which the Meghrigs became owners of the property. 113 "Unbeknownst to KFC at the time of the sale, the underground soil upon which this property was located was contaminated with elevated levels of refined petroleum substances." 114 "This contamination is alleged to have resulted from the Meghrigs' negligent operation of a gas station on the property," 115 although the Meghrigs refute this allegation. 116

One year after the Meghrigs took title to the property, certain

108. Id.
113. Respondent's Brief, Joint Appendix at 24aa-27aa, Meghrig (No. 95-83).
114. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).
115. Id.
underground tanks were excavated from the property. The following year, a strip mall was built on this property and commercial space was leased to KFC by the Meghrigs. The Meghrigs leased the space to KFC from 1965 until they sold the property to KFC in 1975. KFC has owned and operated a restaurant on the property for the past twenty years.

In October 1988, in the course of making improvements to the land, KFC discovered that its restaurant had been built on and was surrounded by contaminated soil. This contamination was alleged to have been caused by leakage from underground tanks and other petroleum spills and seepage. The City of Los Angeles Department of Building and Safety ordered KFC to discontinue construction; KFC voluntarily cleaned up the site. Cleanup of the contamination was completed in 1989, at an expense of more than $211,000. The following year, KFC asked the Meghrigs to reimburse the cleanup costs, but the Meghrigs refused. Six years of litigation has thus ensued between the parties with respect to this property.

IV. THE PROCEDURE BELOW

A. Initial State Law Claims

In December 1991, KFC filed an environmental cost recovery action under California's Hazardous Substance Account Act, and later amended its complaint to include causes of action based on private and public nuisance. The trial court found KFC's entire complaint defective, sustained the demurrer filed by the Meghrigs urging dismissal on the grounds that the action was precluded by a petroleum exclusion contained in the state statute coupled with expiration of the statute of limitations, and dis-

117. See Respondent's Brief, Joint Appendix at 25aa, Meghrig (No. 95-83).
118. Id.
119. Id.
121. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).
122. Id.
124. KFC Western, Inc., 49 F.3d at 519.
125. Id.
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missed KFC's claim. The appellate court permitted KFC to file an amended complaint for continuing nuisance and continuing trespass, but otherwise affirmed the lower court's dismissal of KFC's claim. In the meantime, KFC had already launched a claim for restitution in federal court, ultimately presenting the Ninth Circuit with a case of first impression and an opportunity to more evenly balance the scales of law and equity for innocent purchasers of petroleum-contaminated property who have cleaned up the contamination.

B. Procedure in the Federal Courts

On May 29, 1992, KFC filed a complaint against the Meghrigs in the United States District Court for the Central District of California. KFC petitioned the district court for recovery of its expenses incurred in the cleanup of the contaminated property pursuant to RCRA's citizens suit statute. In turn, the Meghrigs filed a motion to dismiss KFC's claim on two grounds: (1) that there was no "imminent and substantial endangerment" because KFC had completed the cleanup of the property three years before filing suit, and (2) RCRA only authorized suits for injunctive relief, not for damages.

The district court granted the motion to dismiss with leave to amend. KFC amended its complaint by deleting the phrase "DAMAGES" as a component of its First Cause of Action, and instead petitioned the district court for an award of "EQUITABLE RESTITUTION." KFC also added language to the effect that at the time of filing, it had incurred and would continue to incur costs associated with the off-site disposal of the contami-

127. Id.
128. Id. at 686.
131. Id.
132. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).
133. Id.
135. Id.
nated soil.\textsuperscript{136}

The Meghrigs filed a second motion to dismiss, positing substantially the same theories as before.\textsuperscript{137} The court granted this motion without leave to amend,\textsuperscript{138} holding that the RCRA citizens suit provision\textsuperscript{139} only authorizes injunctive or equitable relief — and this only in cases involving an existing "imminent danger" to public health or the environment.\textsuperscript{140} KFC appealed the dismissal of its case to the Ninth Circuit Court of Appeals.

\textbf{C. The Short-lived Crescendo of the Ninth Circuit Appellate Decision}

Upon a \textit{de novo} review of the facts,\textsuperscript{141} the Ninth Circuit reversed and remanded the district court decision.\textsuperscript{142} The Ninth Circuit held that "imminent and substantial endangerment" citizen suits under RCRA\textsuperscript{143} does authorize the court to award restitution of past cleanup costs, and that a private party can proceed with such a suit upon an allegation that the hazardous waste presented an "imminent and substantial endangerment" at the time it was cleaned up.\textsuperscript{144} Judge Brunetti dissented.\textsuperscript{145} Among other things, Judge Brunetti considered the decision a poorly reasoned decision borne from an overly-broad reading of the statute, but conceded that the decision was a practical one.\textsuperscript{146}

The Ninth Circuit decision broke the historic trend of federal decisions which had allowed injunctive relief but denied recovery of damages under this citizen suit provision of RCRA.\textsuperscript{147} Most significantly, the Ninth Circuit decision provided a channel

\begin{thebibliography}{99}
\bibitem{136} Respondent's Brief, Joint Appendix at 12aa-20aa, Meghrig (No. 95-83).
\bibitem{137} Respondent's Brief at 4, Meghrig (No. 95-83).
\bibitem{138} \textit{Id.}
\bibitem{140} KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).
\bibitem{141} \textit{KFC Western, Inc.}, 49 F.3d at 520.
\bibitem{142} \textit{Id.} at 519.
\bibitem{144} Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1253 (1996); see \textit{KFC Western, Inc.}, 49 F.3d at 524.
\bibitem{145} \textit{KFC Western, Inc.}, 49 F.3d at 524-528.
\bibitem{146} \textit{Id.}
\end{thebibliography}
through which relief might be obtained for the large class of plaintiffs which had been "stranded" without a remedy by the CERCLA petroleum exclusion. 148

The Ninth Circuit's decision was largely arrived at by attaching significance to the symmetry of the relief available under RCRA, with respect to the EPA Administrator149 and private plaintiffs.150 First, the court found that KFC's suit was not precluded by the "imminent and substantial endangerment to health or the environment"151 language simply because KFC had already cleaned up the contaminated property.152 According to the court, this statutory clause only described the nature of the harmfulness which would invoke jurisdiction under RCRA, but did not serve to limit the time for filing an action.153 The court's stated authority for this proposition was the Eighth Circuit decision United States v. Aceto Agricultural Chemicals Corp.,154 which held that the language of RCRA155 "does not require the EPA to file and prosecute its RCRA action while the endangerment exists."156 However, one year later, the Eighth Circuit sharply criticized the Ninth Circuit's interpretation of this Eighth Circuit case, which the Ninth Circuit used to support its proposition that private citizens are entitled to the same remedies as the EPA.157 The Eighth Circuit stated that the opinions were misconstrued by the Ninth Circuit, and that no case law authority actually existed for the proposition fashioned by the Ninth Circuit in KFC Western, Inc. v. Meghrig.158

Second, the Ninth Circuit determined that KFC's action for restitution of cleanup costs fell within the ambit of the statute's plain words, "such other action as may be necessary... ."159

148. Id.
150. 42 U.S.C. § 6972 (1994); see also KFC Western, Inc., 49 F.3d at 523.
152. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 520-21 (9th Cir. 1995).
153. Id.
154. 872 F.2d 1373 (8th Cir. 1989).
156. KFC Western, Inc., 49 F.3d at 521 (quoting United States v. Aceto Agric. Chemicals Corp., 872 F.2d at 1383).
159. 42 U.S.C. § 6972(a) (1994); see KFC Western, Inc., 49 F.3d at 521.
The court surmised that Congress did not intend to grant a narrower right of action to citizens than to the EPA Administrator. The court was persuaded by its review of legislative history that Congress intended the expansion of citizen suits to compliment the tasks of the EPA in working to eliminate threats to public health and the environment. The Ninth Circuit also recognized that snippets of legislative history supported a contrary view.

Fourth, the Ninth Circuit viewed it as no mere coincidence that the statutes governing the EPA Administrator's and the private citizen's right to sue were worded virtually the same. The court went on to address the jurisdictional requirement of notice, finding this requirement not inconsistent with recovering cleanup costs from past polluters, even pointing out that the EPA Administrator must comply with notice requirements as well.

Fifth, the Ninth Circuit dismissed the Meghrigs' contention that the lack of a statute of limitations provision for RCRA citizens suits was evidence of the unavailability of reimbursement action under RCRA. Here, the Ninth Circuit, in its opinion, simply directed counsel to the equitable defense of laches, which, in an appropriate case, would be available to a court in order to alleviate the possibility of an unfair result created by the absence of a limitations period.

The final thrust from the Ninth Circuit in KFC's favor came in the form of a public policy argument. KFC is an "innocent buyer" in this case; has no remedy under CERCLA because CERCLA contains a petroleum exclusion; has no remedy at California state law because a similar statutory petroleum exclusion

160. KFC Western, Inc., 49 F.3d at 522.
162. Id. The court stated: "Still the legislative history cuts both ways because other language supports Meghrigs' contention that Congress intended to allow citizens to sue only for injunctions when it added the endangerment provision. The House Committee stated that citizens have a [']limited right . . . to sue to abate an imminent and substantial endangerment." Id.
163. Id. at 522; see 42 U.S.C. §§ 6972-73 (1994).
165. KFC Western, Inc., 49 F.3d at 522.
166. Id.
exists;\textsuperscript{167} and KFC is not likely to prevail under a state common law tort claim because of the burdensome proof requirements and court delays.\textsuperscript{168} Therefore, the court concluded that "[i]t would be unfair and poor public policy to interpret [the citizen suit provision in RCRA] as barring [this] restitution action."\textsuperscript{169}

In his dissent,\textsuperscript{170} Judge Brunetti acknowledged that the wording of the RCRA provisions governing the EPA Administrator's and private citizen's right to sue were identical,\textsuperscript{171} but, among other things, denounced the majority opinion as having exceeded the role of the bench. KFC's precarious and unfortunate situation of being an innocent land purchaser without a remedy for expenses incurred in cleaning up of hazardous petroleum waste is an issue that Congress should address, but the court should not simply create new law which rests on judicial inferences that have not been enacted into legislation, opined Judge Brunetti.\textsuperscript{172}

The Meghrigs appealed the Ninth Circuit ruling against them. The United States Supreme Court granted the Meghrigs' petition for a writ of certiorari\textsuperscript{173} in order to resolve the conflict between the Ninth and Eighth Circuits, and to consider the correctness of the Ninth Circuit's decision in this case.\textsuperscript{174}

V. ARGUMENTS

A. The Meghrigs' Argument

The main emphasis of the Petitioner's argument was four-fold: (1) statute 6972(a) only grants injunctive relief, not monetary relief; (2) the structure of CERCLA is evidence that Congress intended to limit RCRA's relief to injunction only; (3) the legislative history supports the view that the rights of private plaintiff's under RCRA are limited; application of the \textit{Cort v. Ash}\textsuperscript{176} test shows that there is no implied right to damages un-

\textsuperscript{167} KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 683 (1994).
\textsuperscript{168} KFC Western, Inc., 49 F.3d at 523 n.6.
\textsuperscript{169} Id.
\textsuperscript{170} KFC Western, Inc., 49 F.3d at 524-528.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{175} 422 U.S. 66 (1975); see Touche Ross & Co. v. Redington, 442 U.S. 560, 575-
der statute 6972(a); and (4) parallels between EPA enforcement rights and citizen's right to sue do not mean that Congress intended citizens to have the same remedial rights as the EPA.

There being no case law precedent, as the issues presented to the Supreme Court were novel, the Meghrigs used case law representing similarly decided issues in other branches of environmental law. Citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, a Federal Water Pollution Control Act (“FWPCA”) case, the Meghrigs supported their contention that RCRA only applied to present or future harms, by using the court’s analysis that the FWPCA only applied to present violations—not violations wholly past, because FWPCA contains the language “to have violated.”

Additionally, Meghrigs pointed to the fact the RCRA has no statute of limitations or expense caps, whereas CERCLA does include these mechanisms. Therefore, argued the Meghrigs, the lack of these mechanisms demonstrates that Congress did not intend the citizen suit provision of RCRA to operate as a cost-recovery measure.

Referring to legislative debates and memoranda, articulating a reluctance by certain legislators to include damages as a remedy in the Clean Air Act, the Meghrigs argued that Congress did not intend to include a private damages remedy in citizen suit provisions.

Next, exhausting the four-factor analysis of *Cort v. Ash*, which guided courts in the past, in determining whether or not a

576 (1979), (holding the four-factor test subordinate to the central inquiry of determining legislative intent).


179. *Id.* at 24-25.

180. *Id.* at 28.

181. 422 U.S. 66, 78 (1975). Here, the Court said that four factors should be considered in determining whether to imply a private remedy: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is any indication of legislative intent to either create or deny such a remedy; (3) whether it would be consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.*
private right was implied in a statute, the Meghrigs argued that the Supreme Court did not have proper jurisdiction to create a private remedy in this case. However, *Cort v. Ash* was effectively overruled nearly seventeen years ago by the Supreme Court.\(^\text{182}\)

Finally, the Meghrigs argued that the Ninth Circuit erred in attaching weight to the parallels between the RCRA provisions directed to the EPA and to those provisions directed to private citizens. To bolster their case, criticisms by the Eighth Circuit of the Ninth Circuit's ruling in *KFC Western, Inc. v. Meghrig* were generously utilized.\(^\text{183}\)

**B. KFC's Argument**

The Respondent formulated what amounts to a two-track argument: first, decades old legislative history is largely irrelevant in deciding current issues; notwithstanding that however, courts are cloaked with full inherent equitable jurisdiction to award restitutionary relief to a plaintiff.\(^\text{184}\) Second, even if legislative history is used to decide this issue in this case, nothing in the legislative history suggests that Congress intended to prohibit restitutionary awards in RCRA citizen suits.\(^\text{185}\) The posture of this note is that this is the better view; therefore, a significant amount of this note espouses KFC's argument in great detail.

**VI. THE OPINION OF THE UNITED STATES SUPREME COURT**

In its reversal of the Ninth Circuit decision, the Supreme Court unanimously held that section 6972 of RCRA does not authorize a private cause of action for recovery of prior costs of cleaning up toxic waste which does not, at the time of the suit, continue to pose an endangerment to health or the environment.\(^\text{186}\)

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182. See Thompson v. Thompson, 484 U.S. 174, 189 (1988) (concurring with the majority, Justice Scalia wrote, "[It could not be more plainer that we effectively overruled the Cort v. Ash analysis in Touche Ross & Co. v. Redington . . . .").
183. Petitioners' Brief at 41-42, Meghrig (No. 95-83).
185. Id. at 38.
Justice O'Connor, writing the opinion for the Court, stated that KFC's claim was fatally defective because it was brought after the endangerment had been abated by KFC, and it sought remedies which were unavailable under statute 6972. The Court strayed little from what it perceived to be the "plain reading" of section 6972, stating that section 6972 is simply not directed at providing compensation for past cleanup efforts.

The Supreme Court briefly considered Congress' intent behind enactment of RCRA. The Court began with Congress' design of CERCLA's citizen suit statute and analogized the CERCLA remedies to those of RCRA. The Court concluded that CERCLA "mimicked" RCRA, because where CERCLA specifically authorizes recovery of "all costs or removal or remedial action," RCRA merely authorizes the courts "to order such action as may be necessary." Additionally, the Court rationalized that if Congress had intended section 6972 to operate as a cost-recovery mechanism, it would have incorporated a statute of limitations period as done in CERCLA. Furthermore, RCRA's requirement that the private plaintiff give up to ninety days notice to the EPA and others, coupled with the jurisdictional requirement barring the right to sue where the EPA or the state has already begun enforcement action, suggests that the right of private parties to sue under RCRA is a limited one, and that restitution for past acts was not intended, so rationalized the Court.

In conclusion, the Court was simply not willing to invoke principles of equity in deciding this case, because it found section 6972 to be unambiguous and devoid of any specific language authorizing a monetary remedy for the wrongs complained of by KFC.

187. Id.
188. Id.
VII. ANALYSIS

Although the Supreme Court reasoned that the remedial scheme of section 6972 was so clear that it did not require judicial inferences, in the same breath, the Court managed to liberally reconfigure one of the most important passages of the RCRA citizen suits statute. The citizen suit provision in RCRA grants the district court jurisdiction to, among other things, "order [any alleged violator of RCRA] to take such other action as may be necessary." 95

Ironically, the Court's interpretation of this same passage is, "a private citizen suing under section 6972(a)(1)(B) c[an] seek a mandatory injunction, i.e. one that orders a responsible party to [']take action['] by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e. one that [']restrains['] a responsible party from further violating RCRA . . . [But n]either remedy, however, . . . contemplates the award of past cleanup costs, whether these are denominated [']damages['] or [']equitable restitution.['] 96 In short, the Court said that section 6972 only addresses present or future harms, not past ones.

Nowhere in section 6972, is there language that even hints that Congress intended to prohibit equitable restitution to private citizens for past cleanup costs. It is difficult for this author to fathom how it furthers RCRA's goal of eliminating hazardous waste, 97 by "encouraging delay on the part of the person [who discovers the contamination] . . . [and] say[ing] to that person, don't clean it up because if you do, it's going to be out of your own pocket . . . let the contamination increase and go sue somebody else." 98 Yet, that is the message sent by this Court's decision; a chagrin in the face of a national crisis begging for the conscientiousness of us all.

196. Meghrig, 116 S. Ct. at 1254.
A. Purported Plain-Meaning Analysis

1. Prima Facie Elements of “Endangerment” Citizen Suits Under Section 6972(a)(1)(B)

The Court declined to award KFC recovery of its cleanup expenses under RCRA, because the Court said that RCRA plainly did not authorize recovery in cases where the endangerment no longer exists at the time that the suit is filed. The actual wording of RCRA's citizen suit provision, upon which KFC based its claim, reads as follows:

[A]ny person may commence a civil action on his own behalf . . . against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . .

In addition, the plaintiff is barred from bringing suit where proper notice has not been given and abatement action has already been commenced by the EPA or the state.200

A prima facie “endangerment” cause of action under section 6972(a)(1)(B) then requires: (1) past or present conduct of the defendant, which (2) contributed or is contributing to hazardous waste, where (3) the hazardous waste may present an imminent endangerment to the environment, and (4) where jurisdiction is not barred based on noncompliance with notice requirements or where abatement of the endangerment is already underway.201

The fourth element was not litigated; obviously KFC gave the Meghrigs notice which prompted the Meghrigs' refusal to reimburse KFC for the cleanup expenses, and the cleanup efforts had been concluded by the time the federal suit was filed.202

202. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 519 (9th Cir. 1995).
As to the first element (conduct), the Meghrigs, having been made aware of the petroleum operations of the prior owner(s), removed certain underground storage tanks in conjunction with construction of their strip mall. Allegedly, the soil had been contaminated by the release of hazardous petroleum substances which leaked from these underground storage tanks. It is then a reasonable assumption that the Meghrigs either knew or should have known about the problem with the contamination of the soil under their mall. The statute captures the "conduct" which perpetuates the endangerment without regard to the degree of fault.

Next, the statute clearly states that the defendant's conduct can be past (i.e. "contributed") or in the present tense (i.e. "contributing"). Black defines a "contributing cause" as "any factor which contributes to a result." Additionally, petroleum solid wastes are included in the category of the "hazardous waste," as defined under RCRA. The Meghrigs' past conduct in handling the hazardous petroleum wastes on their property squarely meets this second prima facie element.

The third element, which requires a showing that the hazardous waste "may" present an imminent and substantial "endangerment" to health or the environment, was interpreted by the Court as excluding all waste which no longer presents an endangerment at the time the citizen suit is filed. It seems to this author, that if Congress intended to require "endangerment" to be in existence at the time of filing suit, Congress would have said so. Congress could have simply worded the statute to read: "must now" or "may now" present an endangerment. When the Court read the words "may now" into the statute, it created new law, something it said it could not do in this case, but did anyway, and in a retroactive manner.

204. KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 679 (1994).
During oral argument by Daniel Romano on behalf of KFC, the "may present" wording of the statute invoked a vigorous exchange between the Justices and Romano.\textsuperscript{211} Getting mired in the details of whether this passage referred to simply the type of solid waste covered under the statute — as plead by KFC, or whether this phrase referred to present or future tense — as argued by the Meghrigs, the bench short-circuited the exchange by simply announcing that the former was simply "bad English" and could not be accurate because Congress does not use "bad English."\textsuperscript{212} The Court then scoffed Romano along in his argument with, "[w]hen we say may exist, ... what we mean is may exist, now."\textsuperscript{213} So much for the "plain-reading" of the statute.

For the Court to later turn a deaf ear on equity principles pleaded by KFC, a consequence of the Court's stance on the clarity of the plain words of the statute, seems rather disingenuous.

A few years ago, the Supreme Court said, "[a] statute's plain meaning must be enforced ... [b]ut a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."\textsuperscript{214} In \textit{John Hancock Mutual Life Insurance v. Harris Trust & Savings Bank},\textsuperscript{215} the Supreme Court explained that comprehension of a statute begins with an examination of the language of the governing statute, but that this examination should not be guided by a single sentence, but rather the provisions of the whole law should be examined in conjunction with the objectives and policies of the statute.\textsuperscript{216} Additionally, a court is not to substitute its will for that of the legislature.\textsuperscript{217} In \textit{Meghrig v. KFC Western, Inc.}, the Supreme Court appears to have ignored its own words.

RCRA was passed twenty years ago in crisis-management fashion to arrest the problem with solid waste dump sites. The portion of RCRA upon which KFC rests its claim was added

\begin{itemize}
\item \textsuperscript{212} \textit{Id}.
\item \textsuperscript{213} \textit{Id} (emphasis added).
\item \textsuperscript{215} 114 S. Ct. 517 (1993).
\item \textsuperscript{216} \textit{Id} at 523.
\item \textsuperscript{217} Church of the Holy Trinity v. United States, 143 U.S. 457, 459-472 (1892).
\end{itemize}
nearly twelve years ago. Colloquialisms are not a constant throughout time, so it seems reasonable that unless a given statute is truly plain on its face, an automatic presumption by the Court of what Congress meant is an unwarranted usurpation of judicial power which sabotages society's faith in the notion that justice is blind. Besides, twenty years ago, Congress did not even fully know how to articulate into law what it meant in terms of environmental regulation at the federal level; upon what authority does the Supreme Court derive its clairvoyance two decades later?

The Court "missed the forest for the trees" with this decision. The Court's lethargic examination of RCRA and its objectives has led to a totally absurd result. In the past, the Court has condemned such absurdities: for example, in Public Citizen v. United States Department of Justice, the Supreme Court criticized an incident involving a sheriff who was prosecuted for obstructing the mails even though the sheriff was executing a warrant to arrest the mail carrier for murder. The Supreme Court illustrated another absurdity involving a case where a law from the Middle Ages, which forbade the drawing of blood in the streets, was to be applied against a physician who came to the aid of a man who had taken ill. These are examples of absurd results — the consequence of tunnel vision and judicial expediency.

The absurdity of the Court's decision in Meghrig v. KFC Western, Inc. is that proactive cleanup efforts by innocent landowners directly help protect lives and the environment by placing public health and safety ahead of costly delays associated with litigation: this furthers the goals of RCRA. The environmentally sound objectives of RCRA, which foster practices designed to eliminate hazardous solid waste, have been frustrated by the

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221. Id. at 471.
222. Id.
Court's ruling in *Meghrig v. KFC Western, Inc.*

2. Remedies Available Under Statute 6972(a)(1)(B)

The second reason that the Supreme Court declined to award KFC recovery under RCRA of its cleanup expenses, was its conclusion that RCRA's citizen suit provision was not directed at providing compensation for past cleanup efforts. The actual wording of RCRA's remedial scheme is:

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in [(a)](1)(B), [or] to order such person to take such other action as may be necessary, or both . . . .

RCRA was enacted on Congress' mistaken impression that the elimination of the solid hazardous waste problem could be done by addressing current and future hazards. Congress' intent was not to overlook the abandoned waste site problem; to the contrary, Congress had hoped RCRA would cover all incidents of open dumping. That was the whole idea behind the "cradle-to-grave" theory; one statute would envelope all the incidents of hazardous waste control, with no exclusions on inactive sites.

Unfortunately, there were unforeseen gaps in RCRA pertaining to control of inactive, abandoned waste sites. Although CERCLA was enacted to address the problem of inactive waste sites, CERCLA does not regulate petroleum waste sites at all — but RCRA does. CERCLA "picks up where RCRA leaves off, i.e. when untoward emergencies occur, or when spills occur at current or no longer active sites, and by making provisions for

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226. Id. at 271, 326.
227. Id. at 326.
228. Id.
protection after a site has been closed. 230 There is nothing in the language of RCRA or CERCLA that prohibits this safety cycle from going in the opposite direction, whereby RCRA would cover a hazardous waste site not covered under CERCLA. In fact, RCRA contains an integration statute, integrating all provisions of RCRA with other Acts of Congress which grant the EPA with the authority to enforce similar environmental laws. 231 Likewise, CERCLA contains a savings clause which says that the existence of CERCLA does not modify the enforcement of obligations or liabilities under other federal or state environmental laws. 232 Therefore, a cause of action based on the release of hazardous waste into the environment, where such contamination is not covered under CERCLA — but is covered under some other federal or state law, is not a matter automatically precluded from review by a court simply because CERCLA has been enacted into law.

The plain words of section 6972(a)(1)(B) grant jurisdiction to the courts to order “other action” from the responsible party, as may be necessary. Without a liberal reconstruction of this particular provision in RCRA, there is no plausible way to eke out of section 6972(a)(1)(B), a flat prohibition of an award of equitable restitution to an innocent or injured party.

B. The Scope of the Federal Court’s Jurisdiction to Fashion an Equitable Remedy

The Supreme Court decided that the remedial framework of RCRA was so elaborate and plain, that judicial implications as to additional remedies for private citizens suing under RCRA was precluded. 233 The Court rather cryptically makes “equitable restitution” a synonym for “damages,” neither of which are available under section 6972, according to the Court. 234 According to the Court, only “injunctive relief” is available under section 6972. 235 Here again, the Court has inferred language into the statute which is plainly not there.

234. Id. at 1254-56.
235. Id.
1. Ordering a Responsible Party to Pay Their "Fair Share" of the Property Cleanup is a Form of Injunctive Relief

Basically, KFC asked the Court to order the Meghrigs to pay their fair share of the cleanup. In one sweep, the Court simply concluded that no matter how KFC characterized its request for recovery of past cleanup costs, monetary compensation was not available, only injunctive relief for present or future harm was available under section 6972. Actually, this Court does understand that "money damages" and "equitable relief" are not the same. In *Bowen v. Massachusetts* the Supreme Court explained,

> Our [holdings] have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief — which may include an order providing for . . . recovery of . . . monies . . . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ["money damages.".*237]

In federal court, a prima facie set of facts for the awarding of injunctive relief involves demonstration of irreparable injury and inadequate legal remedies, and unless a statute expressly restricts the court's jurisdiction in equity, the full scope of well-established principles governing the award of equitable relief is to be recognized.*239* Here, the bargain between KFC and the Meghrigs involved the Meghrigs collecting $152,000 from KFC for the sale of the property. This bargain did not include an additional expense in excess of $211,296 to be paid by KFC in contaminated property cleanup costs.*241* These costs "are not economic damages[,] [r]ather, [this civil action sought] an [o]rder that would make the defendant[s'] responsible for their "fair share" of the [p]roperty clean up."*242* Furthermore, KFC is left without any alternative remedy at federal or state

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237. Id. at 893-94 (emphasis added).
239. Id. (emphasis added).
241. Id. at 18aa.
The Supreme Court has said that "[t]he general rule... is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," and where the interests of the public are involved, the equity powers of the court are even more flexible. Why the Supreme Court decided to retrench from its traditional equity practices is not at all clear.

RCRA clearly authorizes federal courts with jurisdiction to "order such action" as deemed necessary, and nothing in section 6972 restricts the Court from awarding restitution of past cleanup costs. By denying the remedy of restitution to KFC, this Court invites asylum to environmental polluters from the consequences of their acts or their failure to act.

2. The Courts Were Designed to be an Intermediate Body Between the People and the Legislature

Our founding fathers said that the courts must declare the "sense" of the law; must ascertain the "meaning" as well as the meaning of acts proceeding from the legislative body. But the courts should not substitute their own pleasure to the intentions of the legislature, as could happen in the adjudication upon any single statute. Nor should "[t]he great principles of equity, securing complete justice... be yielded to light inferences, or doubtful construction."

The task of ascertaining the intent of Congress can be arduous, as can be the case with "mind-numbing" environmental law issues, but this is exactly the task that the bench has been entrusted to perform. A "plain meaning" analysis is often an easy way out, and that appears to have been the way taken by the Supreme Court in Meghrig v. KFC Western, Inc.

243. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 528 (9th Cir. 1995) (Brunetti, J., dissenting).
247. THE FEDERALIST NO. 78 (Alexander Hamilton).
248. Id.
VIII. CONCLUSION

The Supreme Court has already foreshadowed what the ramifications of this decision will be. In the Supreme Court's own words, the Justices were clearly aware of and concerned about the possibility that a favorable outcome for the Meghrigs individually could jeopardize proactive cleanups in the future, thus placing whole communities at risk. The Court's concern for the public welfare was apparently short-lived. The Court's decision will "encourage[] delay" on the part of the innocent land purchaser, now forced by Meghrig v. KFC Western, Inc. to first litigate, rather than voluntarily remediate hazardous waste.

Congress should amend RCRA's citizen suit statute to make the scope of the remedial rights for private citizens more clear. However, RCRA, as it exists today, contains obvious latitude for a court to use discretion in striking a reasonable balance between equity and law.

252. Id.
253. Id.
SPECIAL FEATURE

INTRODUCTION TO THE BEST PETITIONER AND RESPONDENT BRIEFS FROM THE FOURTH ANNUAL SALMON P. CHASE COLLEGE OF LAW NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

The Salmon P. Chase College of Law Moot Court Board hosted the Fourth Annual National Environmental Law Competition on February 29-March 2, 1996. This year's event attracted law student teams from across the United States. Law schools participating in the three-day competition included: Brigham Young University-J. Reuben Clark Law School; Ohio Northern University-Claude W. Pettit College of Law (two teams); Seattle University School of Law; University of Akron School of Law (two teams); University of Cincinnati College of Law; University of Dayton School of Law (two teams); Duke University School of Law; University of Toledo College of Law (two teams); Wayne State University Law School, and Widener University School of Law.

Each team submitted an appellate brief and argued a minimum of four rounds. The fictitious case originated from actual debate in the environmental law community surrounding the Environmental Protection Agency's (EPA) supplemental environmental projects (SEP) policy. This policy enables polluters to mitigate financial penalties by taking on pollution clean-up projects. The case explored whether the plain language of the Miscellaneous Receipts Act strictly applied to preclude EPA's SEP policy. The legal debate included discussion of judicial interpretations of conflicts in statutory law and the means for conflict resolution, taking into account the roles played by administrative agencies, legislative branches, and the judiciary. Additionally, the case included issues pertaining to tolling the statute of limitations by the existence of continuing ill-effects of the contaminants as well as by negotiations between the polluters and EPA.

Seven of the area's finest environmental law practitioners and members of the judiciary presided over the final round. This prestigious bench included: Judge Sara Walter Combs, Commonwealth of Kentucky Court of Appeals, Stanton, Kentucky; Magistrate Judge J. Gregory Wehrman, United States District Court,
Eastern District of Kentucky, Covington, Kentucky; Phillip J. Shepherd, Esq., Former Secretary, Kentucky Natural Resources and Environmental Protection Cabinet, Frankfort, Kentucky; Philip J. Schworer, Esq., environmental law practitioner, Dinsmore & Shohl, Cincinnati, Ohio; Steven E. Martin, Esq., Chief Assistant Hamilton County Prosecutor, Environmental Crimes Unit, Cincinnati, Ohio; David A. Owen, Esq., environmental law practitioner, Greenebaum, Doll & McDonald, Lexington, Kentucky; and Henry L. Stephens, Jr., Professor of Law and former Dean of the Salmon P. Chase College of Law, Highland Heights, Kentucky.

Mark Bogard, Gretchen Croniser and Christopher D’Amato from the University of Toledo College of Law won First Place. Matt Kirsch, Tim Profeta and Rob Phocas from Duke University School of Law took Second Place honors and were also awarded Best Petitioner’s Brief. Best Respondent’s Brief honors went to Richard Berkowitz, Keith D. Church and Philip Gulisano from the University of Akron School of Law. Beth Kostic from the Ohio Northern University-Claude W. Pettit College of Law was named Best Oralist.

The Salmon P. Chase Moot Court Board was organized in 1971 by professors Frederick Schneider and Frederic Gray. Professor Kamilla Mazanec currently serves as the faculty advisor. The student-run board was led by Chief Justice Paul T. Lawless during the 1995-96 school year. The 1996 Chase National Environmental Law Competition was chaired by Craig Farrish. Jill Meyer served as Vice-Chairperson. Moot Court Board members Mark Medice and Mike Keeling wrote the problem for this year’s competition.

Both the Chase National Environmental Law Moot Court Competition and the Natural Resource and Environmental Law Issue of the Northern Kentucky Law Review are funded by a gift from Greenebaum, Doll & McDonald, PLLC, of Louisville, Lexington, and Covington, Kentucky. Salmon P. Chase College of Law expresses its thanks to the firm for its support.

Robert Shannon Morgan
Moot Court Board Chief Justice
1996-97
CHEMCO CORP.,
   Petitioner,

-against-

UNITED STATES DEPARTMENT OF JUSTICE,
   Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Matt Kirsch
Rob Phocas
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QUESTIONS PRESENTED

I. Did the court of appeals err in concluding that the statute of limitations had not run on the Department of Justice’s (DOJ’s) claim, where the Department’s claim accrued more than five years earlier on the date of CHEMCO Corporation’s actual discharge and equity does not support tolling the statute of limitations?

II. Did the CHEMCO Supplemental Environmental Project (CSEP) violate the Miscellaneous Receipts Act, where CHEMCO Corporation’s cleanup and restoration actions would not be “money [received] for the Government,” no money would be “constructively received” by the Environmental Protection Agency (EPA), and the Environmental Protection Agency’s actions in negotiating the Supplemental Environmental Project were not arbitrary, capricious, or an abuse of discretion?

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STATEMENT OF THE CASE

Procedural History

In the United States District Court, Eastern District of Chase, the United States Department of Justice (DOJ) brought an action seeking declaratory judgment that the Miscellaneous Receipts Act (MRA), 31 U.S.C. § 3302(b) (1994), prohibits the Environmental Protection Agency (EPA) from negotiating a Supplemental Environmental Project (SEP) with defendant CHEMCO Corporation (CHEMCO) in lieu of pursuing civil penalties under the Clean Water Act (CWA), 33 U.S.C. § 1319 (1994). CHEMCO moved for summary judgment under the theory that the applicable statute of limitations, 28 U.S.C. § 2462 (1994), had run. The district court denied CHEMCO's motion for summary judgment but found that the EPA was not barred by the MRA from negotiating the CHEMCO SEP (CSEP). The district court held that the DOJ's action was not time barred because (1) the continuing adverse effects of CHEMCO's mercury discharge constituted a continuing violation, and (2) the five year statute of limitations was equitably tolled due to CHEMCO's material misrepresentation to the EPA. However, the court held that the CSEP was valid because it would achieve the stated objectives of the CWA and therefore was well within the purview of the EPA's discretion.

The DOJ appealed and CHEMCO cross appealed to the United States Court of Appeals for the Fourteenth Circuit. The court of appeals also denied CHEMCO's motion for summary judgment, but it reversed the district court and found that the CSEP violated the MRA. It held that whereas no continuing violation existed, the district court's finding that equitable tolling occurred due to CHEMCO's material misrepresentation was correct. Furthermore, the court held that the CSEP directly violates the MRA.

Facts

CHEMCO produces polyvinyl chloride piping and fittings. As part of this production process, CHEMCO manufactures a vinylchloride monomer at its facility in Cancer City, Chase, on

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1. All of the facts were obtained from the district court's opinion. 95 Civ. 1000.
the Bratto River. To produce the chlorine gas needed in the monomer manufacturing process, CHEMCO operates a chlorine separation plant at its Cancer City facility. The separation process occurs in a specially designed separation vessel, which holds over a million liters of a rock salt and water slurry mixture that passes over a "bed" of mercury.

In September 1989, the CHEMCO plant manager, Mr. Malone, was notified by the chief engineer for the chlorine separation section, Ms. Tortelli, that the separation vessel needed refurbishment. The refurbishment was approved. Ms. Tortelli, believing the slurry mixture and mercury could be separated, directed the plant's employees to empty only the slurry mixture into a specially constructed outdoor containment pond while leaving the mercury for removal by a hazardous waste removal subcontractor.

The separation vessel was successfully emptied and repairs had begun by December 1989. At this time, the plant's environmental compliance officer, Mr. Clavin, began monitoring the containment process by taking water samples from the underlying aquifer and the containment pond. The samples contained elevated levels of mercury which Mr. Clavin reported to Mr. Malone in a document dated December 1989.

In August 1990, an EPA inspector, Mr. Peterson, visited CHEMCO's facility to take water samples from the underlying aquifer; he detected the elevated levels of mercury. He notified Mr. Malone of the mercury levels. Mr. Malone told Mr. Peterson that the company was aware that mercury had entered the aquifer as a result of the refurbishment project. Mr. Peterson then informed Mr. Malone that a release of hazardous substances of this magnitude was in violation of CWA section 301 and that the civil penalties could run in excess of $1,000,000.

The next day, Mr. Malone telephoned the regional director of the EPA, Mr. Crane, and they discussed a mitigated penalty to be paid in conjunction with a SEP. In reliance on the EPA's authority to develop SEPs, CHEMCO entered into extensive and detailed negotiations with the agency. These negotiations led to a settlement embodied in the CSEP, which was finalized and signed in January 1995. Soon after, Mr. Frazier learned of the December 1989 mercury report and confronted Mr. Malone with this fact. Mr. Malone immediately conceded that the report was accurate. Even in light of the discrepancy between the initial
mercury discharge dates, however, Mr. Frazier and Mr. Malone agreed that the CSEP would be maintained as previously negotiated.

Under the CSEP, CHEMCO is required to take three steps: (1) restore and protect 600 acres of land adjacent to CHEMCO's facility as a wetlands and wildlife refuge; (2) clean up and restore the Bratto River, the adjacent aquifer, the area surrounding the now-drained containment pond, and any other contaminated areas of CHEMCO's plant; and (3) pay a gravity penalty to the United States Treasury. The net after-tax costs would be: (1) $300,000 for the wetlands and wildlife refuge; (2) $200,000 for the cleanup and restoration projects; and (3) $200,000 for the gravity penalty. Both CHEMCO and the EPA intended the CSEP to improve the water quality of the entire Bratto River watershed and further the public's use and enjoyment of the area.

In April of 1995, the United States Treasury Department received CHEMCO's payment and was informed of the CSEP. After reviewing the CSEP, the Treasury Department registered its objections with the EPA, the DOJ, and CHEMCO. The DOJ then filed this action.

SUMMARY OF ARGUMENT

CHEMCO's motion for summary judgment should be granted because the DOJ raises no genuine issue of material fact. The statute of limitations contained in section 2462 governs the DOJ's claim. This statute bars any claim not brought within five years from the date on which it accrued. The best construction of the date of accrual for CWA claims is the date of discharge. Congress' definition of a violation in the CWA, especially in comparison to other environmental protection laws, strongly suggests a discrete event rather than a continuing violation. The policy interest in preventing parties from defending against stale claims also supports this construction. In addition, there is no reason to equitably toll the statute of limitations for the DOJ. The negotiations between CHEMCO and the EPA concerning the CSEP were not extraordinary circumstances that prevented the DOJ from filing its claim. Nor did wrongful conduct by CHEMCO prevent the DOJ from filing its claim on time.

If summary judgment is not granted, the CSEP should be affirmed as a valid exercise of the EPA's discretionary authority. The CSEP does not violate the MRA. The CSEP's gravity penalty
was deposited in the Treasury, as required by the MRA. Other funds that CHEMCO is required to spend under the CSEP would not be covered by the MRA, as they would not be “money received for the government.” This interpretation accords with the general policy in favor of settlement, the legislative history of the CWA, and the interpretative history of the MRA. The EPA also would not “constructively receive” any funds under the CSEP. Finally, the EPA’s policy decision to use SEPs, including the CSEP, should be upheld as a reasoned exercise of the EPA’s discretion.

ARGUMENT

I. CHEMCO’S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE STATUTE OF LIMITATIONS HAS RUN ON THE DOJ’S CLAIM.

Summary judgment is proper where a party’s claim presents no “genuine issue of material fact.” Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The non-moving party must point to specific facts other than those in “the mere pleadings themselves” in order to defeat a motion for summary judgment. Celotex, 477 U.S. at 324. The “mere existence of a scintilla of evidence” in support of the non-moving party’s position will be insufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). “There must be evidence on which the jury could reasonably find for the [non-moving party].” Id.

The DOJ’s claim in this case is governed by the five-year statute of limitations found in 28 U.S.C. § 2462 (1994).! See 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C. Cir. 1994); United States v. Telluride Co., 884 F. Supp. 404, 406 (D. Colo. 1995). The relevant part of section 2462 reads: “Except as otherwise provided by an Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.” 28 U.S.C. § 2462 (1994). The mercury discharge from CHEMCO’s plant occurred during or before December of 1989. United States Dep’t of Justice v. CHEMCO Corp., 95 Civ. 1000 at 2 (E.D. Chase 1995). The DOJ did not file its claim until April 1995, more than five years after the discharge. Id. at 3. Summary judgment for
CHEMCO is proper because the DOJ can prove no genuine issue of material fact concerning the expiration of section 2462's statute of limitations.

A. The statute of limitations on the DOJ's claim has expired, because the claim accrued more than five years ago on the date of CHEMCO's discharge.

This Court's ruling on CHEMCO's motion should be guided by its determination of the date on which the DOJ's claim accrued. The DOJ suggests that its claim is perpetually accruing because the effects of CHEMCO's mercury discharge constitute a continuing violation. This suggestion is incorrect. The language of the CWA and the policy considerations underlying section 2462's application to the CWA support a determination that the DOJ's claim accrued on the date of discharge.

A statute levying punishment should not be construed to include conduct that might be considered a continuing offense unless it clearly contemplates prolonged conduct. See Toussie v. United States, 397 U.S. 112, 120 (1970). Fines and penalties, such as the one the DOJ seeks against CHEMCO, may be considered a form of punishment. See Austin v. United States, 509 U.S. 602, 611 (1993). Therefore, the CWA should be narrowly construed so that claims brought under it accrue only at the time of the initial, triggering event. See id.

Even without a narrow construction, the CWA's relevant language suggests that the date of accrual of claims brought under the Act should be the date of discharge. Section 301 of CWA makes "the discharge of any pollutant by any person" unlawful if made without a permit. 33 U.S.C. § 1311(a) (1994). "Discharge" is defined as "a discharge of a pollutant, and the discharge of pollutants." 33 U.S.C. § 1362(16) (1994). Both versions of this definition describe a discrete event. This event, the act of discharge, is the event that constitutes a violation under the plain language of the statute. Telluride, 884 F. Supp. at 407-08. It is only logical to conclude that the government's claim accrued on the date of CHEMCO's violation. See United States v. Lindsay, 346 U.S. 568, 569 (1954); 3M, 17 F.3d at 1461.

CWA Section 301's silence regarding the ongoing effects of a violation further supports a narrow construction. Congress is fully capable of writing environmental protection statutes under
which claims clearly accrue on the date of discovery. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), for example, creates liability for a "release, or a threatened release" of hazardous substances. 42 U.S.C. § 9607(a)(4) (1994). A "release" is defined as, among other things, a "discharge." See 42 U.S.C. § 9601(22) (1994). Despite defining a violation in terms very similar to those used by the CWA, however, CERCLA bars actions for the recovery of natural resource damages not commenced within the latter of three years from the date of promulgation of relevant regulations or from "the date of discovery of the loss and its connection with the release in question." See 42 U.S.C. § 9613(g)(1)(A) (1994). Had Congress wanted claims under the CWA to accrue in an analogous fashion, it would have written that statute accordingly.

The policy considerations underlying section 2462 also support a construction of the date of claim accrual under the CWA as the date of discharge. Statutes of limitations are designed to ensure fairness to defendants by preventing the loss of evidence, the fading of memories, and the disappearance of witnesses. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). Only by requiring that penalty actions by the government be brought promptly, may defendants like CHEMCO be assured of a fair trial with reliable evidence. As the 3M court noted, "[a]n agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents." 17 F.3d at 1461.

The DOJ's allegations of a "continuing violation" are completely contrary to this policy interest. The court of appeals and the Telluride court noted the importance of analyzing continuing violations in the context of the appropriate statute of limitations. See United States Dep't of Justice v. CHEMCO Corp., Docket No.

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2. The CWA's enforcement provision might appear to contradict this position, since it authorizes the EPA Administrator to bring enforcement actions "whenever on the basis of any information available to him [he] finds that any person is in violation of Section 1311." 33 U.S.C. § 1319(a)(3) (1994). But this provision is irrelevant to the date of claim accrual. Rather, the legislative history of and cases interpreting this section make it clear that it merely describes the Administrator's duty to investigate and enforce the CWA. See, e.g., H.R. CONF. REP. NO. 1465, 92d Cong., 2d Sess. (1972), reprinted in HOUSE COMM. ON PUB. WORKS, 93d Cong., 1st Sess., Laws of the United States Relating to Water Pollution Control and Environmental Quality (1973); Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987).
95-659, at 11 (14th Cir. 1995); Telluride, 884 F. Supp. at 405-08. Courts faced with claims that a statute of limitations should be extended because of the continuing ill effects of an act have almost unanimously rejected such claims, holding instead that only continuing unlawful acts constitute a continuing violation. See, e.g., United States v. Payne, 978 F.2d 1177, 1180 (10th Cir. 1992), cert. denied, 508 U.S. 950 (1993); McDougal v. County of Imperial, 942 F.2d 668, 674-75 (9th Cir. 1991); Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981). The only cases the DOJ cites in support of its contention of a continuing violation did not examine this policy interest. See Sasser v. Administrator, 990 F.2d 127, 129 (4th Cir. 1993) (examining continuing violation in relation to subject matter jurisdiction); North Carolina Wildlife Fed'n v. Army Dep't, 29 Env't Rep. Cas. (BNA) 1941, 1943 (E.D.N.C. April 25, 1989) (examining continuing violation in relation to standing). Finally, both courts that have most recently examined the specific application of section 2462 to environmental suits brought by the government have used the “date of discharge” construction. See 3M Co., 17 F.3d at 1462; see also Telluride, 884 F. Supp. at 408.¹

Other courts have held that the statute of limitations for CWA violations begins to run on the date on which a violation is reported to the EPA. See Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3d Cir. 1990); Northwest Envtl. Defense Ctr. v. United Sewerage Agency, 30 Env't Rep. Cas. (BNA) 1117, 1119 (D. Or. July 7, 1989); North Carolina Wildlife Fed'n, 29 Env't Rep. Cas. (BNA) at 1943; Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 288 (N.D.N.Y. 1986). Each of these cases, however, involved suits brought by citizens. All were based on the rationale that citizens are incapable of discovering violations until they are reported. This rationale does not support the application of the date of discovery rule to the government, because it can inspect facilities and discover violations at any time it chooses. See 33 U.S.C. § 1318(a)(4)(B)(i) (1994). The only court to hold that a claim brought by the government accrued on the date of reporting to the EPA, explicitly based its holding on this inappropriate rationale. See United States v. Hobbs, 736 F. Supp. 1406,

¹ This construction was also used in an early CWA case, United States v. C & R Trucking Co., 537 F. Supp. 1080, 1083 (N.D.W. Va. 1982).
1410 (E.D. Va. 1990) (citing Al Tech, 635 F. Supp. 284). This ill-considered decision notwithstanding, a “date of discharge” rule does not ask the impossible of the government in the same way that it would of ordinary citizens.

A final possibility for construction is an “objective discovery” rule. Two courts have held that the government’s claim accrues on the date on which “through the use of reasonable diligence [it] should have discovered” the violation. United States v. Windward Properties, Inc., 821 F. Supp. 690, 695 (N.D. Ga. 1993); see also United States v. Aluminum Co. of America, 824 F. Supp. 640, 646 (E.D. Tex. 1993) (following Windward). Although this interpretation is more reasonable for the situation at bar than that found in the cases discussed supra, Section 2462 does not indicate any Congressional sympathy for the EPA’s failure to discover violations. As the 3M court concluded, “nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.” 3M Co., 17 F.3d at 1461. Congress was aware that immediate detection of CWA violations could be “difficult, if not impossible,” Windward, 821 F. Supp. at 694, but it chose not to create a separate statute of limitations despite this fact. The courts should not violate the separation of powers the United States Constitution mandates, see Morrison v. Olson, 487 U.S. 654, 693 (1988), by reading a requirement of judicial oversight of agency activity into a statute which is plainly void of any such suggestion. See MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1417 (D.C. Cir. 1995). Congress, not the courts, should determine if and how section 2462 should be changed. See Unexcelled Chem. Corp. v. United States, 345 U.S. 59, 66 (1953) (unanimous opinion).

B. Equity does not support tolling the statute of limitations.

The inquiry used to determine if a statute of limitations should be tolled is whether tolling will effectuate congressional purpose in a given set of circumstances. Burnett, 380 U.S. at 427. This determination is made on a case-by-case basis. Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989). Most importantly, this inquiry must be made dispassionately. “Procedural requirements established by Congress for gaining access to the federal courts are

The legislative history of the CWA does not explicitly address this question. Still, an analysis of the policies behind statutes of limitations reveals no reason to conclude that Congress would have considered equitable tolling appropriate for CWA claims. Tolling would force CHEMCO to defend a stale claim with all the accompanying problems discussed *supra* at 10. It is also unlikely that Congress contemplated either of the standard rationales supporting equitable tolling: extraordinary circumstances that make it impossible for a party to file suit on time or wrongful conduct by the defendant that prevents a plaintiff from filing suit on time. *See Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991), *rev'd on other grounds*, 503 U.S. 429 (1992).

The court of appeals correctly held that the statute of limitations was not tolled during CHEMCO's negotiations with the EPA. *See Docket No. 95-659 at 12*. These negotiations were not the kind of extraordinary circumstances that normally justify equitable tolling. *Cf., e.g., Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947) (tolling statute of limitations for plaintiff unable to file claim while held in Japan during World War II). Nor does the version of the primary jurisdiction doctrine used in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980), *cert. denied*, 499 U.S. 831 (1980), apply here. The *Mt. Hood* court held that the Clayton Act's statute of limitations tolled while an administrative agency “decides determinative issues within its primary jurisdiction.” *Id.* at 406. The first reason that *Mt. Hood* is inapposite is that its tolling theory applies only if prior resort to an agency is required to gain access to a federal court. *Higgins v. New York Stock Exch.*, 942 F.2d 829, 833 (2d Cir. 1991). Second, *Mt. Hood* is regarded even within the Ninth Circuit as “at best a very narrow ruling, at worst a wholly anomalous decision.” *Higgins*, 942 F.2d at 833. This is largely because the primary jurisdiction doctrine is meant to apply after a suit has been filed, not before. *Id.* at 834. Applying the doctrine to this case would completely frustrate the Congressional objective expressed in section 2462. It would allow the government to toll the limitations period at will and force CHEMCO to defend an otherwise untimely, stale claim. *See id.*
The second rationale, wrongful conduct by the defendant, should be resolved in CHEMCO's favor as well. Both lower courts in this case held that the statute of limitations should be tolled because CHEMCO "actively misled" the EPA. See Johnson, 861 F.2d at 1481. Both courts also held that Mr. Malone's original statement about the date of discharge was "material" because EPA relied on it during negotiations and settlement with CHEMCO. Docket No. 95-659 at 12; 95 Civ. 1000 at 6. These holdings are not supported by the facts.

First, CHEMCO never actively misrepresented any facts to the DOJ, the plaintiff in this case. From the moment it became involved with the case, the DOJ had access to accurate information about the actual date of the discharge. See 95 Civ. 1000 at 3. The fact that the DOJ became involved after the statute of limitations had run is inconsequential.

Even assuming, arguendo, that the EPA and the DOJ are both agents of the same entity, the United States, the DOJ's misrepresentation argument fails. Congress entrusted the EPA, not the DOJ, with monitoring and enforcement responsibilities under the CWA. See 33 U.S.C. § 1251(d) (1994). The EPA was acting as the statutorily-authorized agent of the United States when it decided not to sue, despite knowledge of CHEMCO's misrepresentation. Because the DOJ is also an agent of the United States, EPA's decision effectively waived the DOJ's right to assert that CHEMCO's misrepresentation tolled the United States' claim. 2A C.J.S. Agency § 244 (1972).

Finally, nothing in the record indicates that CHEMCO's misrepresentation was "material." The EPA did not rely on the date of discharge originally given by Mr. Malone. In fact, the EPA's continued acceptance of the settlement's original terms, despite now knowing that the first date given by Mr. Malone was incorrect, strongly implies that the EPA considered the date of discharge virtually irrelevant.

In summary, this issue presents no genuine issue of material fact. Congress clearly prescribed a five-year statute of limitations in section 2462 for claims brought under the CWA. The foregoing arguments demonstrate that claims "accrue" for this purpose on the date of discharge of a pollutant, making the DOJ's claim untimely. Even if this Court feels a "vague sympathy" for the DOJ, the Department cannot present a compelling legal reason to overcome the procedural requirements Congress laid out in
section 2462, see Baldwin County, 466 U.S. at 152, and the presumption of narrow construction operative in this case. For these reasons, CHEMCO's motion for summary judgment should be granted.

II. THE CSEP DOES NOT VIOLATE THE MISCELLANEOUS RECEIPTS ACT AND IS NOT AN ARBITRARY AND CAPRICIOUS EXERCISE OF THE EPA'S DISCRETION.

EPA actions are reviewed by the courts under a very deferential standard. Unless an agency decision is found to be explicitly contrary to the law, judicial intervention should only occur when the action is found to be arbitrary, capricious or an abuse of the Administrator's discretion. 5 U.S.C. § 706(2)(A) (1994); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Oljato Chapter of Navaho Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) (stating that the Administrator's decision on the imposition of civil penalties under the Clean Air Act must stand unless it was arbitrary, capricious or an abuse of discretion). This deference is at its "zenith" when, as in the instant case, "the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." Niagara Mohawk Power Corp. v. Federal Power Comm'n, 379 F.2d 153, 159 (D.C. Cir. 1967).

Moreover, judicial review of a consent decree has provided great discretion to administrative agencies. Although the CSEP did not require judicial consent, its function was similar to a consent decree. Thus, an analogous analysis is appropriate. A reviewing court should approve a consent decree if it is "fair, adequate, reasonable and appropriate under the particular facts" and does not violate the law or public policy. Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125-26 (D.C.Cir. 1983), cert. denied, 467 U.S. 1219 (1984). This Court should apply the same standard when reviewing the CSEP.

Both the EPA's policy of pursuing SEPs and the SEP in the instant case meet these deferential standards. The court of appeals incorrectly held that the CSEP runs contrary to the MRA. Docket No. 95-659. The CSEP is not "money [received] for the Government," and therefore is not covered by the MRA. Furthermore, the CSEP has been crafted in order to ensure that no
funds are "constructively" received by EPA. Finally, EPA's actions with regard to SEPs have not been arbitrary, capricious or an abuse of discretion.

A. CHEMCO's cleanup and restoration actions are not "money [received] for the Government."

The MRA states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b) (1994). In the instant case, however, the only money "received" for the government was the CSEP's negotiated $200,000 gravity penalty. It was immediately deposited into the Treasury. The EPA did not have any claim to additional penalties unless and until it prevailed in a judicial action for the funds. As the one million dollars sought by the DOJ exceeds the maximum amount EPA is allowed to impose for administrative penalties, 33 U.S.C. § 1319(g) (1994), it would have to be imposed as a civil penalty by a district court in an enforcement action. 33 U.S.C. § 1319(d) (1994). Even if a penalty of this amount were sought, the district court would have the opportunity to mitigate the penalty for multiple considerations, including "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, . . . and such other matters as justice may require." Id. See also Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) (setting out the procedure for the district court to consider mitigating factors). The only money "received for the Government" under the CSEP was deposited in the Treasury "as soon as [was] practicable." No additional amount was due because the EPA did not seek and no court imposed a civil penalty.

A recent decision by the Ninth Circuit would actually go further and deny the DOJ's claim to any funds not imposed as part of a civil penalty. In Sierra Club v. Electronic Controls Design, Inc., the court upheld a consent judgment in a CWA citizen suit. 909 F.2d 1350, 1356 (9th Cir. 1990). In the judgment, Electronic Controls Design had agreed to pay $45,000 to various private environmental organizations. Id. at 1352. The DOJ objected to the agreement because it did not contain a requirement that any money be deposited in the U.S. Treasury. Id. The court ruled that since "no liability was ever judicially established," the pay-
ment was not a "civil penalty." Id. at 1356. Without a "civil penalty," there was no requirement to deposit the money into the Treasury. Id. Similarly, no liability was judicially established in the instant case. Under the same logic, no requirement to deposit the CSEP funds into the Treasury should follow. Even the $200,000 gravity penalty was the result of a voluntary settlement and was not required.

Another reason that the CSEP should be construed to avoid conflict with the MRA is the judicial system's policy in favor of settlement. Settlement is encouraged as a general rule, particularly when it "will contribute significantly toward the ultimate achievement of statutory goals." United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). See also Airline Stewards Local 550 v. American Airlines Inc., 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978) (holding the same). As a result, great deference has been given to terms set by negotiating parties in settlement agreements such as the CSEP. This Court's decision in United States v. Armour & Co., 402 U.S. 673 (1971), has been interpreted to allow settling parties to choose to distribute funds to recipients other than the U.S. Treasury. See Powell Duffryn, 913 F.2d at 81 n.32 ("Of course a party may compromise its claim however it sees fit . . . . Once penalties are imposed, the legislative history is clear that the funds are to be paid to the Treasury"); Atlantic States Legal Found., Inc. v. Simco Leather Corp., 755 F. Supp. 59, 60 n.2 (N.D.N.Y. 1991) ("[E]ven if a court cannot order that civil penalties be paid other than to the Treasury, the parties to a lawsuit are free to determine settlement terms.")

The CSEP is a classic example of a settlement as envisioned by the above courts. By mitigating the penalties to be assessed to CHEMCO, the EPA is not giving up money that will definitely be awarded to the U.S. Treasury. Rather, the EPA has decided that, considering factors such as litigation costs and agency resources, the SEP agreement is preferential to a drawn-out court battle. This is within the EPA's discretion. Powell Duffryn, 913 F.2d at 81 n.32. Moreover, the CSEP should be particularly encouraged, as it will "contribute significantly towards the ultimate achievement of the statutory terms." Hooker Chem., 540 F. Supp. at 1072. One of the CWA's stated goals is the attainment of water quality in the nation's waters sufficient to allow fishing and swimming. 33 U.S.C. § 1251(a)(2) (1994). This goal will be fur-
thered by requiring CHEMCO to use its funds to restore wetlands and clean up the Bratto River rather than to pay for legal transaction costs. The CSEP directs all funds spent by CHEMCO toward the achievement of the Act's goals. 4

A third reason to construe the MRA as inapplicable to the CSEP funds is because Congress authorized arrangements such as the CSEP. The Conference Report on the 1986 CWA Amendments states:

In certain instances, settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act . . . . Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. Although this practice has been used on a selective basis, the conferees encourage this procedure where appropriate.

H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 139 (1986). The report excludes any reference to the necessity of compliance with the MRA. In addition, in keeping with the report's call for the preservation of the punitive nature of enforcement actions, the CSEP was negotiated to include a $200,000 gravity penalty. The remaining $500,000 that CHEMCO will pay under the CSEP also will have a punitive effect, since it represents funds that it would not have had to spend without the agreement. The $700,000 minimum cost of the CSEP should provide a sufficient incentive for future pollution control by CHEMCO or other private parties.

Finally, a historical analysis reveals that the MRA was never intended to limit the EPA's authority to come to settlement terms with regulated bodies such as CHEMCO. In an 1883 opinion of the Attorney General regarding the Navy's authority to mitigate penalties for depredations of public lands, the Attorney General concluded that the MRA "does not touch the powers of the Secretary as regard to the superintendence [sic] of suits, or

4. The CSEP advances the maintenance and improvement of water quality as an objective of the agreement, pursuant to the EPA's legal guidelines for Supplemental Environmental Projects. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856, 24,858 (1995) ("A project must advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action.")
the mitigation of penalties." 17 Op. Att'y Gen. 592. Rather, the MRA's purpose upon enactment was to limit the discretion of tax collectors to reap personal gain from taxes before turning them over to the Treasury. See United States v. Forsythe, 25 F. Cas. 1152, 1153 (C.C.N.D. Ohio 1855) (No. 15,133). Thus, the general intent of the MRA was to prohibit agents of the government from supplementing their own budgets through collected money. The CSEP does not contradict this intent. The EPA's exercise of prosecutorial and settlement authority to further the purpose of the CWA did not result in the EPA receiving any money to supplement its own budget.

B. The CSEP was constructed to ensure that no money was "constructively received" by the EPA.

The language of the MRA precludes its applicability to all settled agreements such as the CSEP. However, several authorities exist that apply the MRA to money acquired in settlement that is "constructively" given to the EPA. See, e.g., In re Stueart Transp. Co., 4 Op. Off. Legal Counsel 684 (1980) (holding that settlement terms giving the government discretion over the distribution of the funds were "constructively" received by the government); Motor Coach Indus. v. Dole, 725 F.2d 958, 965 (4th Cir. 1984) (holding that funds in a settlement trust set up between the FAA and the airline industry with the FAA as a beneficiary were public assets). The EPA has structured its SEP policy in order to avoid conflicting with these cases. The CSEP has been stipulated to be consistent with this policy. 95 Civ. 1000 at 6.

In both of these cases, several factors led the decision makers to conclude that the funds were constructively received. In Stueart, the DOJ imported the concept of constructive receipt from tax law into its analysis, stating that constructive receipt occurs when the receiver has unfettered control or command of the money. In re Stueart, 4 Op. Off. Legal Counsel at 684. The DOJ concluded that the monies paid in Stueart constituted public funds because the United States retained nearly exclusive authority to control the use of the funds from the trust. Id. Similarly, the court in Motor Coach Indus. found a settlement trust to be public money because the FAA had exclusive control over the designation of the trust funds. Motor Coach Indus., 725 F.2d
at 965. The fact that both actions were initiated on behalf of the public was also found to be evidence of the trusts' public nature. *Stueart*, 4 Op. Off. Legal Counsel at 684; *Motor Coach Indus.*, 725 F.2d at 965.

The EPA's SEP policy has been carefully crafted so as to avoid conflict with these opinions. First, several guidelines assure that the EPA does not exercise any control over SEPs. For example, the guidelines state that the “EPA or any other federal agency may not play any role in managing or controlling funds that may be set aside or escrowed for the performance of the SEP.” *Interim Revised EPA Supplemental Environmental Projects Policy Issued* (hereinafter *Interim Policy*), 60 Fed. Reg. 24,856, 24,858 (1995). The guidelines also prevent the EPA from “retain[ing] authority to manage or administer the SEP.” *Id.*

Second, the guidelines ensure that the EPA does not appear to be supplementing its appropriations in any other way, stating that “[a] project may not be something that EPA itself is required by its statutes to do.” *Id.* This addresses the concern raised in *In re NRC's Authority to Mitigate Civil Penalties*, 70 Comp. Gen. 17 (1990), which involved a negotiated agreement between the NRC and private parties that required the private parties to make donations to research institutions. The opinion held that the arrangement impermissibly augmented the Commission's appropriations, as it was statutorily authorized to award contracts to the same institutions. *Id.* By preventing the EPA from exercising any control over the SEP or using the SEP to carry out a statutory obligation, this guideline circumvents this pitfall.

The guidelines do allow for the EPA to receive progress reports from the party agreeing to the SEP and stipulate penalties for noncompliance, *Interim Policy*, 60 Fed. Reg. at 24,861-62, but this does not amount to control over the project. Rather, it provides a reasonable assurance of the private party's compliance with the SEP.

Finally, the SEP policy ensures that a SEP will not occur in response to an action instituted as a result of injury to the public. The guidelines state that SEPs may only be negotiated in lieu of actions for civil penalties, which are instituted for punitive reasons, not on behalf of the public. *Id.* at 24,857. SEPs may not be used to mitigate more public-oriented claims for damages or injunctive relief. *Id.*
C. The EPA's actions were not arbitrary, capricious, or an abuse of discretion.

As the SEP is not contrary to the MRA, the EPA's policy must be upheld under the Administrative Procedure Act if it is not arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A) (1994); Overton Park, 401 U.S. at 416. This finding requires a reviewing court to consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. Because the EPA has considered the relevant factors and has not made any error in judgment, this Court should approve the SEP policy as established. Moreover, since the CSEP has been stipulated to be consistent with the SEP policy, 95 Civ. 1000 at 6, an approval of the policy will likewise be an approval of the CSEP.

The EPA's published policy reflects a reasoned review of all potential concerns arising from SEPs. Several specific considerations merit attention. First, the EPA considered all possible rationales for the imposition of civil penalties and required that they be represented in SEPs. In particular, the SEP policy mandates that a monetary penalty be included in all SEPs in order to preserve the punitive function of the civil penalties that otherwise would be imposed. Interim Policy, 60 Fed. Reg. at 24,856 ("Without penalties, companies would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by other members of the regulated community."). However, the EPA also realized that good faith efforts by regulated parties usually result in the mitigation of civil penalties. Hence, the policy lowered the penalties to be imposed on parties engaged in SEPs, both in recognition of the lower penalties that cooperating defendants would receive and as an incentive for settlement. Id.

In addition, EPA considered all possible sources of law that might impact a SEP. In particular, the EPA's policy ensures that SEPs comport with the Pollution Prevention Act of 1990 and Executive Order 12,898 on environmental justice. Id. at 24,857. The EPA also considered all prior cases on the issue, and crafted a conservative policy to avoid any litigation. See supra discussion at 24-26.
Having considered all relevant factors, the EPA's SEP policy represents a well-reasoned, proactive approach to addressing environmental degradation. The EPA recognized that litigation too often shifts significant private resources away from efforts to protect the environment to legal transactions costs. Second, the EPA understood that its own limited resources could benefit from a decrease in litigation. Third, the EPA realized that any policy encouraging settlement would help reduce the demand on the overburdened federal court dockets. By encouraging a resolution of environmental claims through settlement, the SEP policy has refocused resources on the true objectives of the environmental statutes, relieved the encumbered EPA staffers, and reduced the demand on the federal court dockets. As such, the policy should be upheld as a laudable initiative that is anathema to a "clear error in judgment."

Finally, in its review of the CSEP, this Court should approve the settlement if it is "fair, adequate, reasonable and appropriate under the particular facts" and does not violate the law or public policy. Gorsuch, 718 F.2d at 1125-26. The same analysis that was used in considering the SEP policy as a whole would apply. The EPA's policy, which was drafted with credence to all relevant factors, should be considered "fair, adequate, reasonable and appropriate" in its application to this particular instance. The CSEP does not violate the MRA. See supra discussion at 19-23. Finally, the CSEP is consistent with public policy because it preserves the punitive function of civil penalties while advancing the important goals of environmental preservation and encouraging settlement.

CONCLUSION

For all the reasons set forth above, this Court should (1) grant CHEMCO's motion for summary judgment because the statute of limitations has run on the DOJ's claim and (2) find that the CSEP is a valid exercise of the EPA's discretionary authority.

APPENDIX A


"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty,
or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."


"Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."


§ 1251(a)(2) "[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."

§ 1251(d) "Except as otherwise provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter."

§ 1311(a) "Except as in compliance with this . . . title, the discharge of any pollutant by an person shall be unlawful.

§ 1319(d) " . . . In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."

§ 1362(16) "The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."
No. 96-100

In the
Supreme Court of the United States
October Term, 1995

CHEMCO CORP.

Petitioner,

vs.

UNITED STATES DEPARTMENT OF JUSTICE
Respondent.

On Writ of Certiorari to The United States
Court of Appeals for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether, pursuant to 28 U.S.C. § 2462, the five year statute of limitations has expired on the United States Department of Justice's claim, thus effectively barring this action.

II. Whether the Environmental Protection Agency may assess penalties under the Clean Water Act pursuant to its Supplemental Environmental Projects Policy.

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A. The continuous mercury discharge by CHEMCO constituted a "continuing violation" of the Clean Water Act, thus preventing the statute of limitations from ever accruing. 181

B. The doctrine of "equitable tolling" should be applied because of CHEMCO's material misrepresentation concerning when the mercury contamination actually first occurred. 185

1. Assuming the cause of action accrued in December of 1989, the decision of both lower courts holding that equitable tolling occurred should be affirmed because the doctrine of equitable tolling has consis-
tently been applied by federal courts to cases similar to the one at hand, where a plaintiff was “actively misled or lulled into action.”  

C. Finding that either a continuing violation has occurred or that the doctrine of equitable tolling applies will further the purposes of Congress in enacting both the Clean Water Act and the limitations period for filing.  

1. Finding that the present action is not barred pursuant to 28 U.S.C. § 2462 does not frustrate the traditional purpose of the statute of limitations.  

2. Finding that the present action is not barred pursuant to 28 U.S.C. § 2462 allows the Congressional purposes behind the Clean Water Act to be effectuated.  

D. Assuming arguendo, that no continuing violation exists or that the doctrine of equitable tolling is not applicable, the statute of limitations accrues when the EPA discovers the violation or when the violation is reported, not when the initial violation occurred.  

1. The statute of limitations, 28 U.S.C. § 2462, did not begin to run and the claim did not accrue until the government knew (or reasonably should have known) of the violation, which in this case, would be August 1990.  

2. 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), which fails to follow the discovery rule, is in the minority, and this Court should not be persuaded to follow its controversial and provisional holding, especially when the facts of the case at bar only remotely resemble those discussed in the 3M decision. As an issue of first impression in the jurisdictions below (R. at 10), this Court should base its decision on sound, traditional and widely accepted
II. Whether the Environmental Protection Agency may assess penalties under the Clean Water Act pursuant to its Supplemental Environmental Projects Policy

A. The Environmental Protection Agency's Supplemental Environmental Projects Policy is void as a matter of law

1. The EPA is not entitled to judicial deference in cases where the agency fashions a remedy under the Clean Water Act that violates the Act itself.

2. By its plain language, the Miscellaneous Receipts Act applies when an entity violates the Clean Water Act. Thus, penalties levied under the Clean Water Act must be paid into the United States Treasury.

3. The EPA's Supplemental Environmental Project Policy provides for remedies that violate MRA and exceed the EPA's prosecutorial discretion.
   a. The General Accounting Office has long held the view that federal agencies lack the authority to create enforcement schemes that provide for penalties unrelated to the underlying violation.
   b. The EPA's SEPP, in practice, violates the MRA and exceeds the EPA's prosecutorial discretion as the instant case demonstrates. The EPA mitigated CHEMCO's liability under the CWA by means of the CSEP which provided for civil penalties to be paid to parties other than the United States Treasury in a manner unrelated to CHEMCO's violation of the CWA.
B. The EPA lacks the authority to administratively enforce any remedy outside of those expressly provided by the authorizing statute

CONCLUSION

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STATEMENT OF THE CASE

Statement of the Facts:

Appellant CHEMCO Corporation ("CHEMCO") is engaged in
the multi-state production of polyvinyl chloride piping and fit-
tings, which involves the production of a vinylchloride monomer
as an initial step. (R. at 1). This vinylchloride monomer is the
sole product of CHEMCO's Cancer City Plant ("Plant"), which is
located in the State of Chase in the midst of an industrial park
on the banks of the Bratto River. (R. at 1).

One of the raw materials needed for the reaction process dur-
ing the synthesis of the vinylchloride monomer is chlorine gas,
which CHEMCO produces itself. (R. at 1-2). To produce the chlo-
rine gas, CHEMCO places a slurry mixture of salt and water in
a large separation vessel, capable of holding over a million liters
of liquid, whereby the mixture passes over a layer of mercury.
(R. at 2). The mercury creates a strong electric field which separ-
ates the sodium and chlorine ions in the mixture, which in turn
produces chlorine gas. (R. at 2).

In September 1989, Sam Malone, CHEMCO Plant manager,
received a report from Carla Tortelli, chief engineer for the
Plant's chlorine separation division. (R. at 2). The report stated that the Plant's separation vessel needed repair due to its continuous exposure to corrosive materials. (R. at 2). In order to accomplish the repair, Tortelli, believing the mercury and slurry mixture could be separated, directed the Plant's employees to empty the mixture into an outdoor containment pond specifically dug for the project. (R. at 2). The layer of mercury was left for removal by a hazardous waste removal subcontractor. (R. at 2). By December 1989, all contents were removed from the vessel and the outdoor containment pond was filled. (R. at 2).

In December 1989, Clifford Clavin, the Plant's environmental compliance officer, discovered what ultimately became the source of this pending litigation. Since the contents from the vessel had been placed in the containment pond, Clavin monitored the soil around the pond, taking water samples from the underlying aquifer, which is hydrologically connected to the nearby Bratto River. (R. at 2). The tests discovered extremely high levels of mercury in the water samples, mercury levels of almost three times the MCLs allowed by the Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA"). (R. at 2). Clavin found the same elevated levels of mercury upon testing the water from the outdoor containment pond. (R. 2). Clavin notified CHEMCO Plant manager Malone of the mercury contamination in a report dated December 1989. (R. at 2). However, upon receipt and review of the report, Malone chose not to cure the mercury contamination at that time. (R. at 2). Instead, Malone decided to wait for the next annual EPA inspection before taking any action. (R. at 2).

During a routine inspection in August 1990, after taking water samples from the aquifer of the Plant's facilities, EPA Inspector Norm Peterson discovered the same high levels of mercury contamination. (R. at 2). The Inspector questioned Malone about the contamination. (R. at 2). Malone knew of the December 1989 inspection and report, but lied to the EPA Inspector, claiming that the contamination had occurred in the past week as a result of a plant shutdown. (R. at 2). The Inspector informed Malone that a release of hazardous substances of this magnitude was in violation of Section 311 of the CWA and that the civil penalties could run in excess of one million dollars. (R. at 2). Malone then contacted Frazier Crane, the regional director of the EPA. (R. at 2). The two then discussed the possibility of a mitigated penalty
to be paid in conjunction with a supplemental environmental project. (R. at 2).

The EPA and CHEMCO entered into negotiations that resulted in a settlement agreement which included a document entitled “CHEMCO Supplemental Environmental Project” (“CSEP”). (R. at 3). The CSEP was finalized and signed by both parties in January 1995. (R. at 3). The CSEP agreement contained specifications for restoration and protection of the 600 acre unused tract of land adjacent to CHEMCO’s Plant, which was to be made into a wildlife refuge, as well as for the cleanup of the Bratto River, contaminated containment pond and any other contaminated areas of the Plant. (R. at 3).

The net present after-tax cost of the CSEP for the wildlife refuge and contamination was $500,000, including $200,000 for cleanup and $300,000 for the wildlife refuge. (R. at 3). In addition, it was agreed that a 20% gravity penalty component would be assessed against CHEMCO at a cost of $200,000. (R. at 3). The gravity penalty was to be paid as a fine directly to the United States. (R. at 3). The final total cost to CHEMCO was $700,000, thereby mitigating the original penalty of $1,000,000 by $300,000. (R. at 3).

However, it was not until after the signing of the CSEP that EPA officials were anonymously informed for the first time of Clavin’s mercury contamination report completed in December of 1989, which indicated the initial mercury contamination occurred on or before December of 1989. (R. at 3). Despite the anonymous tip, which Malone confirmed as true, the parties carried out the CSEP. (R. at 3).

Statement of the Proceedings:

This case was brought upon the United States Treasury Department’s discovery of the CSEP agreement after it received CHEMCO’s $200,000 fine in April 1995. After objecting to the CSEP and attempting to reconcile with the parties, the United States Department of Justice (“DOJ”), on behalf of the Treasury Department, filed this action for declaratory judgment seeking a resolution to its claim that the CSEP is prohibited by the Miscellaneous Receipts Act (“MRA”). The DOJ additionally seeks to recover the deficit from the original penalty. (R. at 3). CHEMCO, via motion for summary judgment, asserts that the DOJ’s claim
is time-barred by the statute of limitations. CHEMCO alternatively alleges the CSEP agreement is valid and should be approved.

Judge Smuckers, of the United States District Court for the Eastern District of Chase, found against CHEMCO upon its motion for summary judgment, but upheld the validity of the CSEP agreement. (R. at 9). The court held that there was a continuing violation in that the mercury continued to poison the aquifer and surrounding ecosystem. (R. at 5). Thus, the DOJ’s claim was not time-barred. Additionally, the court held that because CHEMCO misled the EPA, the doctrine of equitable tolling applied. (R. at 6). As a result, the statute of limitations equitably tolled for nine months, the period of time between the actual discharge date and the falsified discharge date given to the EPA by Malone. After denying CHEMCO’s motion for summary judgment, the court addressed the DOJ’s claim that the CSEP was invalid. Applying the standards set forth in case law and by reviewing the legislative history of Congress in its enactment of the CWA, the court held that the EPA’s actions were not an arbitrary and capricious abuse of discretion, and that the CSEP was well within the purview of the EPA’s discretion. (R. at 9). As a result, the district court upheld the validity of the CSEP. (R. at 9).

The United States Court of Appeals for the Fourteenth Circuit affirmed in part and reversed in part. (R. at 13). The circuit court found no continuing violation, thus reversing the district court’s finding. (R. at 11). Yet, the circuit court agreed that equitable tolling occurred due to the material representation by CHEMCO in its negotiations with the EPA. (R. at 12). As a result, the circuit court held the action was not time-barred and the denial of summary judgment by the district court was affirmed. (R. at 12). The circuit court then reversed the district court’s determination that the CSEP agreement was valid. (R. at 13). The circuit court held that the MRA applies to the penalties assessed by the CWA and that EPA policies that mitigate penalties are not excluded under the Act because it is within the purview of Congress to expressly provide for that exclusion. (R. at 13). The circuit court, after invalidating the CSEP agreement, directed CHEMCO to pay the full fines in correspondence with its violations of the CWA. (R. at 13).
SUMMARY OF ARGUMENT

The circuit court erred when it failed to follow the holding of the district court and find that a continuing violation existed. The well established rule is that an action accrues under the statute of limitations each time a new violation occurs. In this case, each time the mercury contaminated water was discharged from the containment pond to the surrounding soil and underlying aquifer, a new cause of action arose, thus, effectively creating a "continuing violation."

Additionally, this Court should affirm both lower courts' holdings which found the applicable five-year statute of limitations was "equitably tolled" based on CHEMCO's material misrepresentations, and the EPA's and the DOJ's reasonable reliance thereon. The doctrine of "equitable tolling" is routinely applied in cases such as the one at hand, where the plaintiff was misled or lulled into inaction based on reliance on another party's statements. Here, CHEMCO lied to the EPA, stating that the mercury contamination occurred some nine months after the actual occurrence.

Congress clearly did not create the CWA with the intention of creating a loophole whereby an advantage is realized by a party for its dishonesty. Congress enacted the CWA to restore and maintain the chemical, physical and biological integrity of the nation's waters. If this Court finds, as CHEMCO would like, that the CWA is time-barred because CHEMCO lied as to when the "initial violation" occurred, this Court will trample Congress' purpose in creating the CWA. Additionally, none of the traditional purposes underlying the statute of limitations will be offended if this cause of action is allowed.

Furthermore, should this Court find neither of the above doctrines applies, the CWA claim is still viable based on the widely accepted "discovery of violation" rule. Pursuant to the rule, the statute of limitations does not accrue until the violation is discovered or reported to the applicable agency. This rule furthers two important societal interests. First, it will allow for greater certainty in determining when an action accrues, in turn reducing litigation and tax dollar expenses. Second, it will disgorge any benefit received from the wrongdoer, who in this case, chose not to report the violation in the hopes that the statute of limi-
tions would expire before the violation was discovered.

The district court erred when it failed to declare the EPA's Supplemental Environmental Projects Policy ("SEPP") void for violating the Miscellaneous Receipts Act ("MRA"). The lower court erred in two respects in coming to this conclusion.

First, the district court gave too much deference to the EPA's decision regarding the settlement with CHEMCO. The court held that the proper standard of review was whether the EPA's decision constituted an "arbitrary and capricious abuse of discretion." The court failed to recognize that this case involves a decision of an agency that is in direct violation of federal law. Therefore, broad deference to the EPA is not due in the case at bar.

Second, the district court erred in holding that the "performance of a CSEP does not fall into the category of 'penalties' which must be turned over to the treasury or violate the Miscellaneous Receipts Act." The lower court misapplied the applicable case law. Because the CSEP included a "penalty component" for CHEMCO's violations of the CWA, the CSEP itself, was a "penalty" which must be turned over to the Treasury. Thus, the CSEP demonstrates that the EPA's SEPP can and does violate the MRA in practice, if not on its face, and therefore, should be declared void by this Court.

ARGUMENT

I. WHETHER, PURSUANT TO 28 U.S.C. § 2462, THE FIVE YEAR STATUTE OF LIMITATIONS HAS EXPIRED ON THE UNITED STATES DEPARTMENT OF JUSTICE'S CLAIM, THUS EFFECTIVELY BARRING THIS ACTION.

A. The continuous mercury discharge by CHEMCO constituted a "continuing violation" of the Clean Water Act, thus preventing the statute of limitations from ever accruing.

Continual unlawful acts constitute a "continuing violation." Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981); Collins v. United Airlines, Inc., 514 F.2d 594, 596 (9th Cir. 1975). A continuing violation prevents the applicable statute of limitations from running because each day constitutes a new violation. In the present case, the applicable statute of limitations states "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfei-
ture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462 (1994)(emphasis added).¹ Thus, a finding of a continual violation would prevent the above statute of limitations from running. Pursuant to the Clean Water Act² ("CWA"), "a discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1994). Thus, a "discharge of pollutant" constitutes a violation of the CWA. As a result, in order for there to be a "continuing violation," this Court must find continual discharges, each in violation of the CWA.

Pursuant to the CWA, the term "discharge" includes "a discharge of pollutant, and the discharge of pollutants," 33 U.S.C. § 1362(16) (1994), and means "any addition of any pollutant to navigable waters from any point source . . . [and] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft," 33 U.S.C. § 1362(12) (1994). The term "discharge," in its plain meaning, is synonymous to the terms "release" and "liberate." See BLACK'S LAW DICTIONARY 463 (6th ed. 1990). There is no evidence of Congressional intent to indicate that the term "discharge" should be interpreted in any way other than its plain meaning.

The facts of the case at hand indicate that CHEMCO "discharged" pollutants. (R. at 2). Specifically, high levels of mercury were found by both the CHEMCO Plant environmental compliance officer and EPA inspector in the soil around the containment pond and in water samples taken from the underlying aquifer which is hydrologically connected to the nearby Bratto River. (R. at 2). The same elevated levels of mercury were found in the CHEMCO containment pond. (R. at 2). The contamination was initially discovered by CHEMCO in December 1989. (R. at 2). Yet, no action was taken with respect to the contamination until, at the very earliest, August 1990. (R. at 2). It is undisputed that the contamination of the soil and underlying aquifer was

¹. 28 U.S.C. § 2462 is the statute of limitations that has been routinely applied to proceedings with respect to violations of the Clean Water Act.
². 33 U.S.C. §§ 1251 (1994) et seq. The CWA is also referred to as the Federal Water Pollution Control Act, which is the title used by Congress in its second water pollution control endeavor. The Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, ch. 750, 62 Stat. 1155.
a result of CHEMCO's placement of the "slurry mixture" into the containment pond. The record does not indicate, nor does CHEMCO ever assert, the contrary.

It is uncertain when exactly the initial violation occurred, but it is certain that it occurred some time after the placement of the contaminated mixture into the containment pond. Thus, after the contaminated mixture was placed in the containment pond, it leaked or was released from the inside of the containment pond to the outside and into the soil and underlying aquifer, i.e., there was a "discharge." The "discharge" triggered a violation of the CWA. Yet, this "initial discharge," whenever it first occurred, was not the only discharge. The contaminated mixture continued to discharge from the inside of the containment pond to the outside and into the soil and underlying aquifer each day, thus triggering an additional violation of the CWA. This contention is supported by the facts in the record. It is undisputed that at least one discharge occurred. From the time the contamination was discovered in December 1989, to August 1990, (a period of nine months), no action was taken to prevent or cure the contamination. (R. at 2). Therefore, once the initial discharge occurred, which happened in December 1989, there was no reason to believe additional releases of the contamination did not occur since nothing was done to remedy the situation for at least nine months. (R. at 2).

What naturally happened was that the containment pond had a defect or flaw which allowed leakage of the contaminated mixture. Since the defect was not cured, leakage occurred on a continual basis. Every time the contaminated mixture was discharged from the inside of the containment pond to the outside, into the soil and underlying aquifer, a violation of the CWA occurred. This is clear from the plain meaning of the term "discharge," as used in the CWA. Every time CHEMCO violated the CWA, a new statute of limitations began for that particular violation. See 28 U.S.C. § 2462 (1994) (providing that the five year statute of limitations begins upon the creation of a cause of action).

This case is not about adverse effects of an initial violation. The facts here are different from cases where there is a hazardous waste spill and then the contamination seeps throughout the soil and water. In fact, it is not the "effect" of the violation that should be the focus—it is the actual violation itself.
Upon reviewing the above facts and law, the United States District Court for the Eastern District of Chase held a continuing violation existed, and thus, the action was not time-barred under 28 U.S.C. § 2462. The United States Court of Appeals for the Fourteenth Circuit reversed, relying on United States v. Telluride, 884 F. Supp. 404 (D. Colo. 1995). However, the circuit court’s reliance on Telluride is misplaced, and thus should be reversed.

In Telluride, the United States Government brought an action against Telluride Company, Mountain Village Company, Inc., and Telluride Ski Area, Inc. (collectively “Telco”) under CWA §§ 301 & 404, 33 U.S.C. §§ 1311 & 1344 Rule 12.9(B), alleging Telco caused unpermitted discharges of dredged or fill materials into wetlands. Telluride, 884 F. Supp. at 405. Telco moved for partial summary judgment, contending that some of the government’s claims were precluded under 28 U.S.C. § 2462, the applicable five year statute of limitations. Id. In response, the government argued that “the discharge of dredged or fill materials into waters of the United States is a ‘continuing violation’ as long as the adverse effects of the fill continue” and that the statute of limitations does not run until the fill is physically removed. Id. at 406. While the court did recognize the doctrine of “continuing violation,” the court failed to apply the doctrine to cases where there is merely an ongoing adverse impact from past violations. Id. at 407-8. In its reasoning the court stated:

It is undisputed the damage caused by filling wetlands continues long beyond the actual discharge. Nevertheless, to adopt the government’s position, would be to rob 28 U.S.C. § 2462 . . . of any meaning in the CWA context . . . . If the statute of limitations were to begin to run only when the defendant has removed fill and restored the wetland, it might never begin to run at all.

Id. at 408.

While the Telluride court raises a valid concern, it is not applicable to this action. In Telluride, the Government and the court both focus on the effect of the violation. In the instant case, the proper focus is on the violation itself. DOJ does not contend that the statute of limitations will not run until the contamination is cleaned up, as is the case in Telluride. Rather, the DOJ contends that the statute of limitations accrues anew for every discharge of hazardous materials that violates the CWA. Thus, the operative violation is the last violation that occurs, for that is really
from when the five years will be measured. For example, if CHEMCO, in January 1990, sealed the containment pond so that no more discharges occurred, a cause of action would have to be brought within five years of the last discharge that occurred prior to the sealing of the contamination pond. Because it is logical to conclude from the facts that violations of the CWA continued until at least August 1990, this action should not be barred by the five year statute of limitations.

B. The doctrine of “equitable tolling” should be applied because of CHEMCO’s material misrepresentation concerning when the mercury contamination actually first occurred.

Both the United States District Court for the Eastern District of Chase and the United States Court of Appeals for the Fourteenth Circuit found that equitable tolling occurred due to a material misrepresentation by CHEMCO in its negotiations with the EPA. The result of the material misrepresentation was to cause the EPA to incorrectly calculate the limitations period. (R. at 6). Based on equitable principals of fairness and justice, their decisions effectively tolled the statute of limitations for the time gap between the actual initial discharge date to the date Malone gave to the EPA. Because of the well-settled authority of the courts to grant equitable tolling and the strong policy reasons involved in this case, the holdings of the lower courts finding the statute of limitations tolled should not be disturbed.

1. Assuming the cause of action accrued in December 1989, the decision of both lower courts holding that equitable tolling occurred should be affirmed because the doctrine of equitable tolling has consistently been applied by federal courts to cases similar to the one at hand, where a plaintiff was “actively misled or lulled into inaction.”

Courts have a well-settled equitable power to toll statutes of limitations and thereby preserve otherwise untimely claims under the proper circumstances. Under the equitable tolling doctrine, “the strict command of the limitation period” may be “suspended” in the interests of fairness. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974). “Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of
cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."


Federal courts have traditionally applied the doctrine of equitable tolling in two different kinds of situations. Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), rev'd on other grounds, 503 U.S. 429 (1992); Forti, 672 F. Supp. at 1549. The first, is where the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. Id. The second situation involves extraordinary circumstances beyond the plaintiff's control. Id. Because we are dealing with a situation where the EPA was misled into believing the cause of action accrued at a later date than it may have, this case is concerned with the former situation.

Both lower courts properly identified what has been recognized as the equitable tolling standard for a court to apply when a plaintiff is prevented from asserting its claim as a result of some kind of wrongful conduct on the part of the defendant. (R. at 5, 11). Equitable tolling will generally be allowed when a plaintiff is "actively misled or lulled into inaction." Jarrett v. US Sprint Communications Co., 22 F.3d 256, 260 (10th Cir. 1994) (citing Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989)); see also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) ("We have allowed equitable tolling in situations ... where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."). The misleading information upon which the plaintiff relies must have been received from the defendant, a government agency or the court. Woods v. Denver Dep't of Revenue, 818 F. Supp. 316, 318 (D. Colo. 1993).

Once it is accepted that equitable tolling may be available in some circumstances, it is clear, as both courts held below, that it should be available here. As the facts indicate, in a report dated December 1989, CHEMCO Plant environmental compliance
officer Clavin indicated he discovered mercury levels almost three times the MCLs allowed by the EPA under the CWA. (R. at 2). While CHEMCO Plant manager Malone was aware of these levels, he chose not to take any action, and indicated that he would wait until the next annual EPA inspection. (R. at 2). In August 1990, nine months after the time the contamination was discovered by CHEMCO, EPA inspector Peterson discovered the same high levels of mercury contamination. (R. at 2). When confronted about the contamination by Peterson, Malone lied, responding that the contamination had occurred just one week prior as a result of a Plant shutdown. (R. at 2). Based on Malone’s misrepresentation, it was reasonable for both Peterson and the EPA to believe the cause of action for the CWA violation accrued in August 1990. Furthermore, that “reasonable belief” was still held by the EPA at the time the CSEP was finalized and signed by the EPA and CHEMCO. Therefore, this Court should affirm the lower courts’ holdings in this matter, and find the DOJ’s claim under the CWA was equitably tolled based on CHEMCO’s material misrepresentation, and the EPA’s and DOJ’s reasonable reliance thereon.

C. Finding that either a continuing violation has occurred or that the doctrine of equitable tolling applies will further the purposes of Congress in enacting both the Clean Water Act and the limitations period for filing.


[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations. In order to determine congressional intent, . . . [the court] . . . must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.
Mount Hood Stages, Inc., 616 F.2d at 396 (quoting Burnett, 380 U.S. at 427).

While Mount Hood Stages, Inc. involved a determination of whether a federal statute is tolled during the pendency of a prior judicial or administrative proceeding, 616 F.2d at 396, its rationale suggesting the court analyze whether tolling will further the purposes of Congress in creating the cause of action and in limiting the period for filing should also apply in determining whether the court should find a continuing violation, thus similarly “tolling” the statute until the violations cease.

1. Finding the present action is not barred pursuant to 28 U.S.C. § 2462 does not frustrate the traditional purpose of the statute of limitations.

“The primary purpose of a statute of limitations is ‘to assure fairness to defendants.’” Mount Hood Stages, Inc., 616 F.2d at 400 (quoting Burnett, 380 U.S. at 428). “The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations.” Mount Hood Stages, Inc., 616 F.2d at 400 (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)); see also United States v. Kubrick, 444 U.S. 111, 117 (1979) (observing that statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, ... fading memories, disappearances of documents, or otherwise”); Note, Developments in the Law-Statutes of Limitations, 63 HARV. L. REV. 1177, 1185 (1950) (stating there comes a time when a potential defendant “ought to be secure in his reasonable expectations that the slate has been wiped clean of ancient obligations”). “Limitations provisions are also designed to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.” Mount Hood Stages, Inc., 616 F.2d at 400 (quoting Burnett, 380 U.S. at 428); see also United States v. Kubrick, 444 U.S. at 117 (“[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.”) (quoting Order of R.R. Telegraphers v. Express Agency, Inc., 321 U.S. 342, 349 (1944)). Yet, while statutes of limitations are designed “to assure fairness to defendants,” flexibility in applying a limitations period to bar actions is necessary to further the inter-

The facts of the case at bar indicate that CHEMCO was aware of the contamination, but chose to take no action to cure it. In fact, the contamination was ignored by CHEMCO for at least nine months until EPA officials tested the soil and water surrounding the containment pond. This Court is simply being asked to find that either a continuing violation existed or equitable tolling of the statute of limitations occurred. If the Court finds as such, the DOJ will be able to bring the proper action for CHEMCO’s violations of the CWA.

This result is not unfair to CHEMCO, and fairness has been a concern of past courts in deciding whether a claim is barred. This is not a case where a defendant was in an accident, forgot about it, and then was sued over five years later. Here, CHEMCO continued to violate the CWA and was well aware of these violations. Also, there were no claims of a lack of evidence or witnesses, or other factors which would have resulted in hardship or unfairness on the part of CHEMCO.

Should this court find that the DOJ’s claim is time-barred, two terrible consequences will result: (1) CHEMCO’s willful and wanton misconduct and concealment of evidence will be rewarded and supported by this Court, i.e., this Court will be encouraging contaminators to lie and conceal the truth until the statute has run; and (2) the government will be punished because it does not have the resources to immediately discover every single violation of a federal law as soon as it occurs.

2. *Finding the present action is not barred pursuant to 28 U.S.C. § 2462 allows the Congressional purposes behind the Clean Water Act to be effectuated.*

Congress enacted the CWA, 33 U.S.C. §§ 1251 et seq., to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (1994); see also *American Mining Congress v. EPA*, 965 F.2d 759, 762 (9th Cir. 1992); *United States v. Windward Properties, Inc.*, 821 F. Supp. 690, 694 (N.D. Ga. 1993). It was Congress’ intention in enacting the CWA to remedy the cumulative industrial and institutional practices that have spoiled much of the nation’s waters and to assure a high quality in our waters. *See S. REP. NO. 1236, 92d Cong., 2d Sess. 99-100 (1972), reprinted in 1972 U.S.C.C.A.N.*
reprinted in 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, at 282-83 (1973) (explaining that the congressional intent behind CWA § 101, 33 U.S.C. § 1251 was to eliminate pollutant discharge, restore chemical, physical and biological integrity of the nation's waters, set water quality goals, prohibit toxic discharges and develop waste treatment projects and plans). In light of the above Congressional intent, courts have held the CWA is entitled to broad construction to implement its purpose. If CHEMCO's CWA violation is time-barred, the only benefited party would be CHEMCO. Certainly that could not have been the intent of Congress. By implementing the CWA, Congress intended to create an affirmative set of regulations to reduce and eliminate pollution to the nation's waters and to restore the natural environment, not a "don't ask, don't tell" environmental loophole.

D. Assuming arguendo, that no continuing violation exists or that the doctrine of equitable tolling is not applicable, the statute of limitations accrues when the EPA discovers the violation or when the violation is reported, not when the initial violation occurred.

1. The statute of limitations, 28 U.S.C. § 2462, did not begin to run and the claim did not accrue until the government knew (or reasonably should have known) of the violation, which in this case, would be August 1990.

A majority of courts "that have interpreted § 2462 in the context of alleged violations of the CWA have adopted some type of 'discovery rule' under which the claim does not accrue until the [P]laintiff knew (or, perhaps, reasonably should have known) of

3. The purpose of the statute can be seen as an affirmative attempt, through legislation, to preserve the nation's waters by eliminating the discharge of pollutants and managing the restoration of areas which have been adversely affected. See 33 U.S.C §§ 1251 (1994) et seq.
the violation.” United States v. Windward Properties, Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993) (emphasis added). When determining when a claim first accrues, taking into account the applicable statute of limitations,

[t]he language of a statute of limitations must be “interpreted in the light of the general purpose of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.”


In deciding when the statute of limitations begins to run under the CWA against the EPA, courts have acknowledged the undue hardship upon the EPA if statutes of limitations were to always run at the time an actual contamination occurred, as opposed to implementing the “discovery rule.” As the ALCOA court put it, to allow a benefit “from the EPA’s failure to inspect and immediately discover violations would frustrate the purposes of the CWA.” 824 F. Supp. at 647; see United States v. Windward Properties, Inc., 821 F. Supp. 690, 695 (N.D. Ga. 1993) (“An objective discovery rule adequately balances the interests found in CWA cases. Under such a rule, many of the policy benefits of statutes of limitations are preserved as the government cannot unreasonably delay in bringing an action, while the public is not harmed by an inability to prosecute claims for violations that could not reasonably have been discovered.”).

The objective discovery rule should be applied to the current cause of action against CHEMCO, allowing the statute of limitations to accrue to August 1990, the time the violation was discov-

4. Faced with the same dilemma of when a cause of action accrues, the court in United States v. Aluminum Co. of America, 824 F. Supp. 640, 645 (E.D. Tex. 1993) stated that after considering the purposes and legislative history of such acts as the CWA, the following have held such a claim accrues when the appropriate agency receives the statutorily mandated report: Public Interest Research Group of N. J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991); Sierra Club, Inc. v. Union Oil Co. of Cal., 813 F.2d 1480 (9th Cir. 1987), vacated and remanded on other grounds, 665 U.S. 931 (1988), judgment reinstated and remanded, 853 F.2d 667 (9th Cir. 1988); United States v. Windward Properties, Inc., 821 F. Supp. 690 (N.D. Ga. 1993); Natural Resources Defense Counsel, Inc. v. EPA, 806 F. Supp. 1283 (E.D. Va. 1992); Atlantic States Legal Found. v. Al Tech Specialty Steel, Corp., 635 F. Supp. 284 (N.D.N.Y. 1986).
erred by the government. This would disgorge from CHEMCO the benefit it received, having the CWA time-barred, when it purposefully failed to report its known violation. Considering the purposes, goals and objectives of Congress when creating both the CWA and 28 U.S.C. § 2426, allowing the discovery rule to apply would be fair and equitable.

If CHEMCO’s violations of the CWA are not held to be a continuous violation and if this Court finds the doctrine of equitable tolling inapplicable to these facts, the statute of limitations should accrue at the time the violation was reported to the government, not when the violation first occurred. By holding that the statute of limitations accrued at the time that the violation was reported, this Court would incorporate the purpose, goals and objectives of Congress when it created the CWA, i.e., to create an affirmative set of regulations meant to “restore and maintain the chemical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251 (1994). At the same time, this Court would not be frustrating the purpose behind 28 U.S.C. § 2462, the statute of limitations.

2. 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), which fails to follow the discovery rule, is in the minority and this Court should not be persuaded to follow its controversial and provisional holding, especially when the facts of the case at bar only remotely resemble those discussed in the 3M decision. As an issue of first impression in the jurisdictions below (R. at 10), this Court should base its decision on sound, traditional and widely accepted case law, not on a single circuit court’s holding.

In 3M Co. v. Browner, the court was willing to adopt a “discovery of injury” rule. 17 F.3d 1453, 1460 (D.C. Cir. 1994). The rule has been consistently applied in cases involving latent injuries or injuries difficult to detect. Id. The rationale is that plaintiffs “cannot have a tenable claim for the recovery of damages unless and until they have been harmed.” Id. Thus, damage claims in cases involving hidden injuries or illnesses do not accrue until the harm becomes apparent. Id. The EPA in 3M asserted, as does the DOJ in this action, that there is also a “discovery of violation” rule. This rule states that the cause of action does not accrue until the EPA or pertinent government agency discovers the violation or reasonably should have discovered the violation.
Id. The 3M court was unpersuaded by the "discovery of violation" rule. In its opinion, the court reasoned that the "statutory period may begin either when the defendant commits his wrong or when substantial harm occurs." Id. Yet, in the case of a violation of the CWA, the wrongful act and the harm presumably happen simultaneously. Id. Therefore, the court concluded that because the suit may actually be maintained regardless of damages, and "because liability for the violation attaches at the moment of the violation," one would expect the time when the claim accrues to be the time of the initial violation. Id. at 1461.

However, the 3M decision cuts against strong public policy. This can be illustrated by an example. Company "X" owns and operates a large outdoor containment facility. On one particular day, which cannot be determined, a hazardous waste storage container ruptures and spills hundreds of gallons of hazardous materials into the soil at once. During an annual inspection, an EPA official discovers the violation. When did the claim accrue:6 The day after the EPA's prior annual inspection? The day before the EPA's recent annual inspection? It is impossible to tell. That is why this Court should adopt the "discovery of violation" rule.

The application of this rule will further two important societal interests. First, it will allow for greater certainty in determining when an action accrues, in turn reducing litigation and tax dollars. Second, it will disgorge the benefit from those wrongdoers who chose not to report a violation in the hopes that the statute of limitations will expire before the violation is discovered. This, in turn, will create an incentive to report violations immediately, allowing hazardous spills to be cleaned up faster and subsequently making the environment safer and cleaner for all its inhabitants.

5. Note that (1) the doctrine of equitable tolling would not apply because there was no material misrepresentation, and (2) there would probably not be a continuing violation since the violation occurred in one instance only, not several instances through the course of time.
II. WHETHER THE ENVIRONMENTAL PROTECTION AGENCY MAY ASSESS PENALTIES UNDER THE CLEAN WATER ACT PURSUANT TO ITS SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY.

A. The Environmental Protection Agency's Supplemental Environmental Projects Policy is void as a matter of law.

1. The EPA is not entitled to judicial deference in cases where the agency fashions a remedy under the Clean Water Act that violates the Act itself.

CHEMCO and the district court have cited various case law which stands for the proposition that federal agencies are to be attributed broad discretion in making settlements on behalf of the United States. Heckler v. Chaney, 470 U.S. 821 (1985); Niagara Mohawk Power Corp. v. Federal Power Comm., 379 F.2d 153 (D.C. Cir. 1966); National Coalition Against Misuse of Pesticides v. EPA, 867 F.2d 636 (D.C. Cir. 1989); NL Indus. v. Department of Transp., 901 F.2d 141 (D.C. Cir. 1990). In Heckler, this Court held that the Food and Drug Administration's decision not to take an enforcement action under the Food, Drug and Cosmetics Act was preemptively unreviewable by the courts. 470 U.S. 821. In NL Industries v. Department of Transportation, the D.C. Circuit held that "an administrative agency is entitled to substantial deference in assessing the civil penalty appropriate for a violation of its regulations." 901 F.2d at 144. However, a court is given broad latitude to evaluate an agency's decision when it is called upon to enter a settlement judgment, like the one at bar, that affects "the public interest." Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986). In Local 93, International Association of Firefighters v. City of Cleveland, this Court held parties to a dispute may not agree to take action that "conflicts with or violates the statute upon which the complaint is based." 478 U.S. 501, 526 (1986).

In the instant case, the district court erred when it examined the EPA's settlement with Petitioner under an arbitrary and capricious standard of review. Such deference to the agency was unwarranted because the settlement agreement violated the law upon which the action brought by the EPA was based. Section
309(d) of the CWA states, in relevant part, that “[a]ny person who violates [any applicable section of the CWA, permit or administrative order] shall be subject to a civil penalty not to exceed $25,000 per day for each violation.” 33 U.S.C. § 1319(d) (1994). Any action by the EPA that circumvents these penalty provisions results in a direct violation of the CWA itself. While Congress did make a broad delegation of discretion to the EPA in the CWA via 33 U.S.C. § 1251(d) (1994), this does not alleviate the EPA’s responsibility to act within the bound of the CWA’s penalty provisions. Thus, if the EPA determines, in its discretion, that penalties are required under the CWA for a violation of the CWA, it may not, itself, violate the CWA by mitigating those penalties away or by diverting penalty funds from the Treasury and placing them into its own projects.

2. By its plain language, the Miscellaneous Receipts Act applies when an entity violates the Clean Water Act. Thus, penalties levied under the Clean Water Act must be paid into the United States Treasury.

The Miscellaneous Receipts Act (“MRA”) requires, except as provided by other law, that “an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as is practicable....” 31 U.S.C. § 3302(b) (1994). The MRA extends these depository requirements to persons “having custody or possession of public money.” 31 U.S.C. § 3302(c)(1) (1994). Thus, all public funds held or received for the government must be deposited as “miscellaneous receipts” in the general fund of the Treasury. See 62 Op. Comp. Gen. 70, 71 (1982).

Civil penalties imposed by statute must be paid to the Treasury under the MRA. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 53 (1987); Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 14 n.25 (1981). The CWA mandates civil penalties for violations of its provisions. Section 309(d) of the CWA states that “[a]ny person who violates [any applicable section of the CWA, permit or administrative order] shall be subject to a civil penalty not to exceed $25,000 per day for each violation.” 33 U.S.C. § 1319(d). These civil penalties are due to the government and, thus, are “public funds” within the meaning of the MRA. Therefore, the
MRA requires that they be deposited into the Treasury whether they are in the possession of a government official or a private citizen. 31 U.S.C. § 3302(c)(1) (1994). The EPA's Supplemental Environmental Project Policy ("SEPP") violates the MRA and runs afoul of Gwaltney because, in its operation, it may allow penalties levied under the CWA to be paid to a party other than the United States Treasury. For example, in the instant case, penalties in excess of $1,000,000 were authorized under the CWA for Petitioner's violations. (R. at 2). Petitioner agreed to pay $700,000 in a settlement made with the EPA. Pursuant to the MRA, all funds collected from Petitioner for violations of the CWA should have been paid to the United States Treasury. However, of the $700,000 settlement, only $200,000 was paid into the Treasury. (R. at 3). More importantly, $500,000 was to be paid to parties other than the Treasury, in direct violation of the MRA. (R. at 3).

3. The EPA's Supplemental Environmental Project Policy provides for remedies that violate MRA and exceed the EPA's prosecutorial discretion.

a. The General Accounting Office has long held the view that federal agencies lack the authority to create enforcement schemes that provide for penalties unrelated to the underlying violation.

In 1992, the Comptroller General, in his capacity as the head of the General Accounting Office ("GAO"), concluded that the EPA lacked the authority to allow funding of public awareness programs in lieu of penalties under the Clean Air Act ("CAA").6 1992 WL 726317, at *4 (C.G.). In reaching that conclusion, the Comptroller General relied on two earlier GAO decisions which held that the Nuclear Regulatory Commission ("NRC") and the Commodity Futures Trading Commission ("CFTC") lacked au-

6. The issue phrased by the Comptroller General in its decision was as follows: "[W]hether the . . . EPA . . . has legal authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act (the Act), as amended, 42 U.S.C.A. § 7524 (West Supp. 1991) by entering into certain settlement agreements." 1992 WL 726317, at *1 (C.G.). The settlement agreement allowed alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them. Id.
authority to adopt enforcement schemes similar to the EPA’s alternative payment policy at issue in the 1992 CAA decision. See 70 Op. Comp. Gen. 17 (1990); and B-210210, Sept. 14, 1983, respectively.

At issue in the 1990 decision was whether the NRC could permit a licensee who violated NRC requirements to fund nuclear safety research projects at universities or other nonprofit institutions in lieu of paying a penalty or a portion of a penalty. 70 Op. Comp. Gen. 17 (1990). The NRC argued that its enforcement proposal would further another statutory objective, i.e., in the NRC’s case, its authority to award contracts to nonprofit educational institutions to conduct nuclear safety-related research. Id. Unconvinced, the Comptroller General concluded that the NRC’s “discretionary authority to ‘compromise, mitigate, or remit’ civil penalties empowered it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but that its authority did not extend to remedies unrelated to the correction of the violation in question.” Id. at 19. The Comptroller General reasoned that “such an interpretation would require us to infer that the Congress had intended to allow the NRC to circumvent 31 U.S.C. § 3302(b) [the MRA] and the general rule against augmentation of appropriations,” and correctly stated that the MRA requires agencies to deposit money received from any source into the Treasury in order to ensure that Congress retains control of the public purse. Id. The enforcement scheme proposed by the NRC would have resulted in an augmentation of NRC’s appropriations, allowing it to increase the amount of funds available for its nuclear safety research program, a result inconsistent with the intent of Congress. Id.

The 1983 CFTC decision, also cited by the Comptroller General in 1992, concerned a similar impermissible extension of agency discretion. In 1983, the CFTC asked the GAO to examine a proposed enforcement scheme which would have allowed the CFTC to mitigate penalties due in an action brought by CFTC within its prosecutorial powers under the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9 & 13b in return for the violator’s promise to make a donation to an educational institution. B-210210, Sept. 14, 1983. The CFTC, using a strategy mimicked later by the NRC, contended that its proposed enforcement scheme would further its congressionally mandated educational
goals. *Id.* The Comptroller General, however, concluded that the proposed scheme exceeded the prosecutorial authority given the CFTC by the Commodity Exchange Act based on the reasoning echoed in its 1990 NRC decision. *Id.*

Based on the GAO's past analysis, the Comptroller General, in its 1992 EPA decision, found that the EPA's alternative payment plan, which allowed violators of the CAA to fund public awareness programs in lieu of full civil penalties, violated the MRA and exceeded the EPA's prosecutorial discretion under the CAA. 1992 WL 726317, at *2 (C.G.). The Comptroller General reasoned that the EPA's prosecutorial power was not broader than that of the NRC or CFTC. *Id.* Despite the EPA's argument that public awareness programs "further the goals expressed in . . . the Clean Air Act," the Comptroller General concluded that such programs violated the penalty provisions of the CAA as well as the requirements of the MRA. *Id.* at *3. Furthermore, in a 1993 decision, the Comptroller General addressed the same issue in light of the EPA's SEPP which purported to authorize public awareness programs as part of a comprehensive guide to penalty mitigation. While the Comptroller General recognized that the "nexus requirement" of the SEPP seemed to address the issue of a program's relationship to the particular violation upon which it was based, the Comptroller General noted that public awareness programs fell outside this requirement and, therefore, were still outside the bounds of the EPA's prosecutorial discretion. 1993 WL 798227, at *1 (C.G.). Moreover, the Comptroller General restated the GAO's contention, as indicated in the above Comptroller General decisions, that any payment to a party other than the United States Treasury in lieu of a civil penalty violates the MRA and, thus, is impermissible. *Id.* at *2.

**b. The EPA's SEPP, in practice, violates the MRA and exceeds the EPA's prosecutorial discretion as the instant case demonstrates.** The EPA mitigated CHEMCO's liability under the CWA by means of the CSEP which provided for civil penalties to be paid to parties other than the United States Treasury in a manner unrelated to CHEMCO's violation of the CWA.
The EPA's SEPP, in practice, violates the MRA and exceeds the EPA's prosecutorial discretion as evidenced by the CSEP. The CSEP sanctions the payment of $300,000 to the EPA for a project which is unrelated to CHEMCO's violation of the CWA in lieu of a civil penalty due under the CWA. Further, the CSEP calls for payment of $500,000 to a party other than the United States Treasury in lieu of a civil penalty under the CWA and thus violates the MRA. CHEMCO claims that the CSEP does not fall into the category of a civil penalty, citing Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990) ("Sierra II"). However, CHEMCO's reliance upon Sierra II is misplaced.

Sierra II stands for the proposition that out-of-court agreements which result in payments being made to environmental organizations are not civil penalties within the meaning of the CWA so long as they do not involve any admission of liability. Sierra II, 909 F.2d at 1354. Sierra II involved a "citizen's suit" filed under Section 505 of the CWA, 33 U.S.C. § 1365. See Sierra Club, Inc. v. Electronic Controls Design, Inc., 703 F. Supp. 875, 875-76 (D. Or. 1989), rev'd 909 F.2d 1350 (9th Cir. 1990) ("Sierra"). The parties agreed that Electronic Controls Design, Inc. ("ECD") would, among other things, pay $45,000 to various identified environmental organizations and $5,000 to the Sierra Club to cover attorney and expert witness fees. The district court concluded that the payments in the proposed settlement were civil penalties within the meaning of the CWA, (and therefore payable only to the Treasury), and refused to order the "Entry of Consent Judgment." Sierra, 703 F. Supp. at 876-877. The Ninth Circuit Court of Appeals agreed with the district court stating "that if payments under the proposed consent decree [were] civil penalties within the meaning of the Clean Water Act, they may be paid only to the United States Treasury." Sierra II, 909 F.2d at 1354. However, the circuit court held that the payments were not civil penalties within the meaning of the CWA. Id. Rather, the circuit court held the payments were "simply part of an out-of-court settlement which the parties are free to make." Id. The Sierra II court reasoned that the payments were not civil penalties because the settlement did not include any admission of liability by the defendant. Id. Because the settlement did not state any violation of the CWA, the CWA's civil penalty provision did not come into play. Id. However, presumably the EPA
could still sue ECD for any violations of the CWA it found. *Id.*

Thus, the circuit court concluded that while "consent decrees
bear some of the earmarks of judgments entered after litigation,
[at] the same time, because their terms are arrived at through
mutual agreement of the parties, consent decrees also closely
resemble contracts." *Id.*, (citing *Local 93, Int'l Ass'n of
Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986)).

A clear and critical distinction can be drawn between the case
at bar and *Sierra II*. In *Sierra II*, the government was not a
party to the settlement. Also, there was no admission or finding
of liability in the defendant. In the instant case, the government,
specifically the EPA, was a party to the CSEP agreement. (R. at
3). That agreement included a $200,000 "gravity penalty compo-
nent." (R. at 3). This was a mitigated penalty, mitigated down
from the "original penalty of $1,000,000." (R. at 3). This civil
penalty suggests that the EPA regarded CHEMCO as being
liable under the CWA's penalty provisions. In *Sierra II*, the
court implied that an admission of liability in an agreement
would make the required payments civil penalties, payable only
to the Treasury. See *Sierra II*, 909 F.2d at 1353-54. Furthermore,
this reasoning is echoed by the CSEP itself, in that the gravity
penalty was a "component" of the entire CSEP. (R. at 3). Thus,
the entire agreement serves to mitigate CHEMCO's liability
under the CWA, and in doing so, the whole agreement takes on
the punitive character of a civil penalty. This is consistent with
the DOJ's contention that all payments made under the CSEP
should be made to the Treasury pursuant to the MRA.

B. The EPA lacks the authority to administratively enforce any
remedy outside of those expressly provided by the authorizing statute.

Section 309(g) of the CWA authorizes the EPA Administrator
to enforce the Act's provisions by assessing civil penalties sub-
ject only to an obligation to provide an opportunity for an adjudic-
atory hearing. 33 U.S.C. § 1319(g) (1994). However, the EPA
has no authority to fashion an administrative enforcement
scheme that is not provided for by the CWA. As Professor Stever
states, "[a]dministrative agencies possess no authority similar to
that of a court to fashion equitable remedies outside of statutory
strictures." Donald Stever, *Environmental Penalties and Envi-
ronmental Trusts-Constraints on New Sources of Funding for Environmental Preservation, 17 ENVTL. L. REP. 10356, 10361 (1987). Stever further identifies the problem of administrative enforcement as follows:

Thus, under a statute that authorizes the agency to issue orders securing compliance with regulatory requirements and to levy civil forfeitures, the agency is not free to require something else of the respondent. Although EPA and an entity subject to a civil penalty could in theory agree to an in-lieu payment scheme, which would stand unchallenged since no one would appeal it, were the entity subsequently to default on its obligation the agency could not compel it to act pursuant to the agreed order.

Id. Rather, Professor Stever makes the very sensible observation that the "EPA could reasonably take the position that it simply is not afforded sufficient discretion to enter into such an arrangement and thus may not do so." Id. Because the settlement in the instant case was made between the Petitioner and the EPA by means of the EPA's administrative authority, there is no way for the EPA to enforce it. Thus, the settlement and the guidelines that produced it, the EPA's SEPP, should be struck down on grounds that they violate public policy. Clearly, Congress did not intend to authorize the EPA to settle violations of the CWA in a manner that renders the settlement unenforceable. If Congress did intend to confer upon the EPA such power, it could have expressly provided for such authority by legislative act.

The SEPP allows, indeed promotes, unenforceable settlements like the one in the instant case. In the case at bar, the EPA is attempting to fashion an equitable remedy in the form of the CSEP through an administrative enforcement action. The CWA authorizes the Administrator to levy a penalty against CHEMCO. It does not authorize the Administrator to allow CHEMCO to fund a project unrelated to its violation of the CWA in lieu of administrative penalties. The CSEP calls for CHEMCO to pay $300,000 to establish a "wetlands and wildlife refuge" on a site that has no relationship to CHEMCO's violation of the CWA or the cleanup of that violation. (R. 3). The EPA exceeded its authority to administer a penalty for the Petitioner's CWA violation because the CSEP contains provisions that are unrelated to CHEMCO's violation. Thus, the EPA abused its discretion in creating the CSEP and the SEPP upon which the CSEP is based. Therefore, both the settlement at issue and the SEPP
should be struck down by this Court.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests the following:

(1) That the judgment of the United States Court of Appeals for the Fourteenth Circuit, holding a continuing violation does not exist, be reversed;

(2) That the judgment of the United States Court of Appeals for the Fourteenth Circuit, holding the CWA claim was equitably tolled, be affirmed; and

(3) That the judgment of the United States Court of Appeals for the Fourteenth Circuit, holding the EPA's SEPP invalid as a violation of the MRA, be affirmed.