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The Application of the Federal Five-Year Statute of Limitations for Penalty Actions to Wetlands Violations under the Clean Water Act

by

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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 wetlands[3] and other waters of the United States, which are regulated under § 404[4] 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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1. 28 U.S.C. § 2462 (1994).
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).
4. 33 U.S.C. § 1344 (1994).
5. Federal Water Pollution Control Act (FWPCA) Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1386 (1994)). Following the Clean Water Act Amendments of 1977, the Act has been commonly referred to as the Clean Water Act. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).
6. *Compare with* United States v. Reaves, 923 F. Supp. 1530, 1534 (M.D. Fla.

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.[7] 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.[8] 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,"[9] and applying a strict reading of 28 U.S.C. § 2462 may impede the remedial nature of the statute.[10] 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.[11] 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.[12]

1996) (unpermitted discharge of dredged or fill materials into wetlands constitutes a continuing violation for statute of limitations purposes as long as fill remains); United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995) (discharge of dredge or fill materials does not constitute a continuing violation for statute of limitations purposes, and 28 U.S.C. § 2462 begins to run at the time of the discharge); United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *12 (N.D. Ill. Sept. 30, 1996) (applying discovery rule and holding that 28 U.S.C. § 2462 first accrued when the violations were reported to the government by defendant).

7. Carie Goodman McKinney, *Statute of Limitations for Citizen Suits under the Clean Water Act*, 72 CORNELL L. REV. 195, 202-03 (1986); *see also Developments in the Law-Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) (Hereinafter *Developments*); Teresa A. Holderer, *Enforcement of TSCA and the Federal Five-Year Statute of Limitations for Penalty Actions*, 91 MICH. L. REV. 1023, 1045 (1993).

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

9. United States v. Riverside Bayview Homes Inc., 474 U.S. 121, 132 (1985).

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].").

11. Badaracco v. Commissioner, 464 U.S. 386, 391 (1984).

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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wetlands, *see* THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP'T OF THE INTERIOR, REPORT TO CONGRESS: WETLANDS STATUS & TRENDS IN THE CONTERMINOUS U.S. MID-1970'S TO 1980'S (1991). *See also* Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 2-3 (1991).

13. *See infra* sections III., pt. A.

14. *See* United States v. Reaves, 923 F. Supp. 1530 (M.D. Fla. 1996).

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.*

16. *See* United States v. Windward Properties Inc., 821 F. Supp. 690, 695 (N.D. Ga. 1993); United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *12 (N.D. Ill. Sept. 30, 1996).

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

17. *See infra* section V.
18. 33 U.S.C. § 1251(a) (1994).

achieve this goal, Congress established a regulatory framework which prohibits the discharge of any pollutant unless it is otherwise permitted under the Act.[19] Section 301[20] of the CWA[21] prohibits the discharge[22] of any pollutant[23] from any point source[24] into navigable waters, except in compliance with the Act.[25] Congress defined the term "navigable waters" broadly to mean all "waters of the United States."[26] The term "waters of the United States" has in turn been interpreted by the EPA and the Army Corps of Engineers (Corps)[27] as well as the courts, to include virtually all wetlands.[28]

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19. *See, e.g.*, Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1519 (9th Cir. 1987).

20. 33 U.S.C. § 1311 (1994).

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).

22. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (1994).

23. The term "pollutant" is expressly defined to include dredged spoil, as well as rock, sand, and cellar dirt. 33 U.S.C. § 1362(6) (1994). "Fill material" also constitutes a pollutant within this statutory definition. United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd* 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987).

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).

25. Section 301 states: "Except as in compliance with [the Act] . . . the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1994).

26. 33 U.S.C. § 1362(7) (1994). *See* Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (stating that "Congress by defining the term 'navigable waters' . . . to mean 'waters of the United States, including the territorial seas,' asserted jurisdiction over the nation's waters to the maximum extent permissible under the Commerce
Clause of the Constitution.").

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(s) (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."[29] 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.[30] The NPDES permit holder is required to report the results of self-monitoring to the EPA or the state agency issuing the permit.[31]

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.[32] The EPA, however, maintains shared responsibility with the Corps for developing guidelines for § 404 permit issuance,[33] 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.[34] Both the Corps[35] and the EPA[36] 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.[37]

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

29. 33 U.S.C. § 1342(a)(1) (1994).

30. *See generally* 33 U.S.C. § 1342(b) (1994) and 40 C.F.R. pt. 122 (1996).

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).

33. 33 U.S.C. § 1344(b)(1) (1994). The present § 404(b)(1) guidelines are codified at 40 C.F.R. pt. 230 (1996).

34. 33 U.S.C. § 1344(c) (1994).

35. 33 U.S.C. § 1344(s) (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,[38] as there were no statutes of limitations under the common law.[39] 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.[40] 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.'"[41]

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.[42] 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."[43] 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."[44] 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.[45]

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38. 51 AM. JUR. 2D *Limitations of Actions* § 9 (1970 & Supp. 1996).

39. 51 AM. JUR. 2D *Limitations of Actions* § 1 (1970 & Supp. 1996).

40. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 133 (1938); E.I. Du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924).

41. Badaracco v. Commissioner, 464 U.S. 386, 391 (1984) (citing *E.I. Du Pont de Nemours & Co.*, 264 U.S. at 462).

42. *See* McKinney, *supra* note 7, at 202.

43. Order of R.R. Tel. v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944). *See also Developments, supra* note 7, at 1185.

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.[46] 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.[47]

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.[48] 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.[49]

As with other federal statutes of limitations,[50] 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-

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> od of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

444 U.S. 111, 117 (1979) (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879); *Order of R.R. Tel.*, 321 U.S. at 329 (citations omitted)).

46. *Id. See also* McKinney, *supra* note 7, at 202.

47. *See Developments*, *supra* note 7, at 1186.

48. 28 U.S.C. § 2462 also applies to *qui tam* actions, which are civil proceedings in which an informer sues on behalf of the government, as well as himself, to recover a penalty under a particular statute. Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987).

49. 28 U.S.C. § 2462 (1994).

50. *See, e.g.*, 28 U.S.C. § 2415 (1994) (general statute of limitations for tort actions (three years) and contracts (six years)); 18 U.S.C. § 3282 (1994) (five-year general statute of limitations for non-capital criminal offenses).

vides otherwise.[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."[52] If a relevant general statute of limitations is available, it should be used.[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.[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.[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.[56]

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).

52. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

53. Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 74 (3d Cir. 1990) (citations omitted).

54. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).

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).

56. *See Public Interest Research Group*, 913 F.2d at 73-75; Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987); National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989, 1110 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988); Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 450 (D. Md. 1985); Sierra Club v. Simkins Indus. Inc., 617 F. Supp. 1120, 1125 (D. Md. 1985); Connecticut Fund for the Env't v. Job Plating Co., 623 F. Supp. 207, 213 (D. Conn. 1985); Friends of the Earth v. Facet Enters. Inc., 618 F. Supp. 532, 536 (W.D.N.Y. 1984). *See also* McKinney, *supra* note 7; Gretchen W. Anderson, *Uniformity in Clean Water Act Enforcement: Applying a Five Year Federal Statute of Limitations to Citizen Suits*, 6 TEMPLE ENVTL. L. & TECH. J. 49 (1987).

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[57] of the CWA such that the statute of limitations does not begin to run on the government's claims.[58] 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.[59] If these

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).

59. *See* United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995).

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.").

66. No. H-93-0691, slip op. at 1 (S.D. Tex. Apr. 1, 1995).

67. *Id.* at 2.

68. *Id.* at 9.

69. *Id.* at 10.

70. *Id.* at 11.

71. United States v. Reaves, 923 F. Supp. 1530, 1533-34 (M.D. Fla. 1996).

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.[82]

The *Reaves* court also relied on a CWA citizen suit case, *North Carolina Wildlife Federation v. Woodbury,*[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.[84] In *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.[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.[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.[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 *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.[88]

2. *The United States v. Telluride Co. Decision*

In *Telluride,* the United States brought an enforcement action against the Telluride Company and its subsidiaries (Telluride),

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82. *Sasser,* 990 F.2d at 131.
83. 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989).
84. *Id.* at 1943.
85. *Id.*
86. *See infra* notes 100-104 and accompanying text.
87. *See infra* section III, pt. B.
88. United States v. Telluride, 884 F. Supp. 404, 408 (D. Colo. 1995).

for unpermitted discharges of dredged or fill material in connection with a land development and ski resort project in Telluride, Colorado.[89] The United States filed its original complaint in October 1993 for violations that had occurred on the site from 1981 through 1994.[90] The parties then entered into a settlement agreement which the court rejected.[91] 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.[92] 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.[93]

Citing *3M Co.*,[94] 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."[95] 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.[96]

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.[97] The court asserted that the issue was not whether the "EPA had belatedly prosecuted a stale claim, but whether the EPA was

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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."[98] 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,[99] 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.[100] 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.[101] For citizen suit purposes, a violation may arguably be considered continuing, if the effects of the violation can still be remediated.[102] 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.[103] 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.
99. Sasser v. Administrator, 990 F.2d 127, 129 (4th Cir. 1990).
100. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 50 (1987).
101. *Id.* at 49.
102. North Carolina Wildlife Federation v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941, 1943 (E.D.N.C. 1989).
103. *Id.* at 1942-44.

received reports documenting CWA violations.[104] 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.[105] 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[106] of the CWA clearly regulates discharges, not mere impacts on wetlands.[107] 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.[108] Whether or not the court's conclusion is correct, it is clear that the court was focusing on the key issue, namely,

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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).

106. 33 U.S.C. § 1311 (1994).

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).

108. United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995).

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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109. 33 U.S.C. § 1362(12) (1994).

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."[113] 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.[114]

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.[115] Although portions of both of these definitions suggest that a present action is required for a discharge,[116] each, however, also contains language defining

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pollution from an identifiable point); Sierra Club v. Colorado Refining, Co., 838 F. Supp. 1428 (D. Colo. 1993), *rev'd on other grounds*, 852 F. Supp. 1476 (D. Colo. 1994) (ruling that the CWA regulates discharges migrating to surface waters through groundwater and stating that "the Tenth Circuit has chosen to interpret the language of the Clean Water Act broadly to give full effect to Congress' declared goal and policy 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'").

113. Avoyelles Sportsman 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"); Rybacheck 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.

115. *See* 40 C.F.R. § 232.2 (1996); 33 C.F.R. § 323.2(d), (f) (1996).

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 "redeposit 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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navigable waters for a discharge to occur. Discharge of fill material is defined to include "the *placement* of fill that is necessary for construction of any structure in water of the United States" as well as "the *building* of any structure or impoundment." *Id.* This language suggests that a present activity is required for a "discharge."

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.

Id.

119. *See supra* note 113.

120. *See*, United States v. Fina Oil and Chem. Co., No. H-93-0691, slip op. at 11 (S.D. Tex. Apr. 1, 1995).

> 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 violator.[121]

The *Fina* court's reasoning applies as much for statute of limitations 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.[122]

A stricter reading of the CWA, on the other hand, would require a new addition of pollutants from a point source each day to constitute a continuing violation. This was certainly the holding 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.[123] The implication of these conflicting interpretations is significant. If § 404 violations continue as long as dredged or fill material remains in place, then the statute 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,[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.

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121. *Id.* at 11 n.6.

122. *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 discharges, 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 enforcement." *Id.*

123. United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995).

124. *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.[125] 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.[126] 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.[127] 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,[128] 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.[129] As such, allowing dredged or fill materials to re-

125. *Telluride*, 884 F. Supp. at 407.

126. *See* Toussie v. United States, 397 U.S. 112, 122-23 (1970); United States v. Payne, 978 F.2d 1177, 1180 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993).

127. *Toussie*, 397 U.S. at 115 (stating that criminal limitations statutes are to be liberally interpreted in favor of repose).

128. *See* §§ 301 and 502 of the CWA, 33 U.S.C. §§ 1311, 1362 (1994).

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.[130] 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.[131] Certainly

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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).

131. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (broadly construing the Security and Exchange Act); United States v. Advance Machine Co., 547 F. Supp. 1085 (D. Minn. 1982) (broadly construing the Consumer Product Safety Commission Act to create a continuing violation such that the five-year statute of limitations in 28 U.S.C. § 2462 did not bar a penalty action against defendants for failing to make required report); United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) (broadly construing the Resource Conservation and Recovery Act and stating that "Courts should not undermine the will of Congress by either withholding relief or granting it grudgingly."). *See also* Roger M. Klein, *The Continuing Nature of Notification Viola-*

such an interpretation gives fuller effect to the "declared goal and policy" of the CWA.[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."[133]

Given the conflicting precedents, it is not clear how courts in the future will choose to decide the issue. Should courts follow the *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.

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 *Telluride* court, relying on the decision in *3M Co.*, held that the five-year statute of limitations begins to run at the time of the initial discharge.[134] In relying on the *3M Co.* holding, the *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.[135] A number of courts examining this question

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tions Under Environmental Statutes, 26 ENVTL. L. 565, 583-84 (1996).

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).

133. Badaracco v. Commissioner, 464 U.S. 386, 391 (1984) (citing E.I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).

134. United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995). *See* 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C. Cir. 1994) (rejecting the application of a discovery rule under 28 U.S.C. § 2462 to determine when violations accrued under the Toxic Substances Control Act).

135. The court quoted language from the *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.'" *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." *Id.* (emphasis added). Through this statement in combination with the reference to *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

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.[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.[137] The first case to so hold was *Atlantic States Legal Foundation v. Al Tech Specialty Co.*[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.[139] The court agreed with the plaintiff's argument, observing that it would have been practically impossible

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discovery rule for statute of limitations purposes. Since the *Telluride* court did not mention the discovery rule or discuss the relevant CWA case law on the rule, it is arguable that it may be distinguished. *See* United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996). However, the court appears to have been aware of the discovery rule case law, since the Court relies heavily on the *Windward* decision with respect to the injunctive relief issue, and the *Windward* opinion contains an extensive discussion of the basis for a discovery rule in the wetlands violation context.

136. *See, e.g.*, United States v. Windward Properties Inc., 821 F. Supp. 690, 694-95 (N.D. Ga. 1993).

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), *vacated and remanded on other grounds*, 485 U.S. 931 (1988), *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).

138. 635 F. Supp. at 287-88.

139. *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.[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."[141]

The Third Circuit Court of Appeals subsequently adopted this same reasoning in *Public Interest Research Group v. Powell Duffryn.*[142] In *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),[143] rather than at the time of the discharge of pollutants.[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."[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.[146] In *NCWF*,

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140. *Id.*

141. *Id.* at 288.

142. Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 75 (3d Cir. 1990).

143. 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).

144. *Public Interest Research Group*, 913 F.2d at 75.

145. *Id.*

146. 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 *Windward* court expressly declined to address the issue because it held

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.[147] 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.[148] 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."[149]

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."[150] 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.[151]

In addition, in *United States v. Windward Properties Inc.*, the court also followed a discovery rule approach.[152] The court ap-

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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.

147. *North Carolina Wildlife Federation*, 29 Env't Rep. Cas. (BNA) at 1944 (citing Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 289 (N.D.N.Y. 1986)).

148. *Id.*

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

150. *Hobbs*, 736 F. Supp. at 1409 (citing *Atlantic States Legal Found.*, 635 F. Supp. at 284).

151. *Id.* at 1410.

152. United States v. Windward Properties Inc., 821 F. Supp. 690, 694-95 (N.D. Ga. 1993).

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.[153] 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.[154] The court cited to the objectives of the CWA and asserted that wetlands play a significant role in achieving those objectives.[155] 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."[156] 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."[157] 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.[158] The court further noted that the "typical § 404 violation involves the unpermitted filling of a wetland, after which the former

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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

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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).

163. 15 U.S.C.A. §§ 2601-2692 (1994).

as required by TSCA.[164] 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.[165] The government argued initially that 28 U.S.C. § 2462 should not be applied to administrative penalty actions under TSCA.[166] The court rejected this argument.[167] 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.[168] The D.C. Circuit rejected this argument as well.[169]

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.[170] 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.[171] 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.[172] 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."[173]

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.[174] 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.
170. *Id.* at 1460 (citing United States v. Lindsay, 346 U.S. 568, 569 (1954)). *See generally* 51 AM. JUR. 2D *Limitations of Actions* § 107 (1970 and Supp. 1996).
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.[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.[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.[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."[178] The court thus concluded that the discovery rule should not be applied.

2. *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,[179] but the court's conflicting statement that it neither agreed nor disagreed with the CWA line of cases discussed above,[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-

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applied by the courts.

175. *3M Co.*, 17 F.3d at 1460.

176. *Id.*

177. *Id.* at 1461.

178. *Id.* at 1462 (citations omitted).

179. *Id.*

180. *Id.* at 1462 n.16 (citations omitted).

cluded that a discovery rule is appropriate in CWA dredge and fill cases, even after the *3M Co.* decision.[181] 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.[182] 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.*[183]

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.[184] 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.[185] 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.[186] 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.[187] The court then discussed the CWA case law establish-

181. United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996).
182. *Id.*
183. *Id.*
184. *Id.* at *1-2.
185. *Id.* at *2.
186. *Id.* at *5.
187. *Id.* at *2 (citing Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir.

-ing a discovery rule in the NPDES context. 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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1990) (stating that "[t]he 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 . . . in the absence of a contrary directive from Congress.")).

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.[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 *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.[197] In addition, it should be noted that the court categorically rejected the application of a discovery rule under 28 U.S.C. § 2462.[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.[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,[200] and irrespective of public policy concerns

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> sion of the Clean Water Act. The courts do not mention a discovery rule, and they most certainly do not make the running of limitations period dependent on the agency's enforcement capacity, as EPA proposes in this case. Each court simply determined that the claim before it "accrued" at a discrete time: when the reports were filed. It is unnecessary for us to agree or disagree with these opinions. It is enough to say that they do not support the EPA's argument for an open-ended discovery of violation rule under § 2462.

Id.

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. *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. *See, e.g.*, Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990). *See also* Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480 (9th Cir. 1987).

197. United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *10 (N.D. Ill. Sept. 30, 1996); United States v. Windward Properties Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993).

198. *3M Co.*, 17 F.3d at 1462-63.

199. *Id.*

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:

> 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.[201]

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,[202] or to reject the rule for dredge and fill cases and limit the rule to § 402 type cases only.[203] In addition, it will no doubt be used to reject the use of a

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> 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.

Id. at 1417. *See also* Federal Election Comm'n v. National Right to Work Comm., 916 F. Supp. 10, 14 (D.C. Cir. 1996) (holding that under 28 U.S.C. § 2462, an action for violation of the Federal Election Commission Act accrued at the time the alleged offense occurred, and stating:

> [I]n *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."

Id.).

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 '[e]xcept 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).

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.").

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 *Windward* and *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.[204] 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.[205] 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.[206] 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.[207] 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.[208] 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."[209]

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.

204. *See* MCI Telecomm. v. Federal Commerce Comm'n, 59 F.3d 1407, 1416-17 (D.C. Cir. 1995) (D.C. Circuit interpreting *3M* as rejecting any application of a discovery rule to 28 U.S.C. § 2462 for agency-initiated civil penalty actions).

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.[210] 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.[211] 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 "[u]nder 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]s 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.*,[212] 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.[213] 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.[214] 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.[215] 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.[216] 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.[217] 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.[218] 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.'"[219]

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

212. 935 F.2d 336 (D.C. Cir. 1991).
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."[220] 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."[221] 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 argüed 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.[222]

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."[223] 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.[224] 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 Duffryn Ter-

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.[225] Even a superficial review of the three CWA cases cited by the government in *3M Co.* clearly contradicts such a view.[226] 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.[227] 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."[228] 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."[229] 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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minals Inc., 913 F.2d 64, 75 (3d Cir. 1990).

225. *3M Co.*, 17 F.3d at 1462 n.16.

226. The three cases cited were: *Public Interest Research Group*, 913 F.2d at 75; United States v. Hobbs, 736 F. Supp. 1406, 1409 (E.D. Va. 1990); Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287-88 (N.D.N.Y. 1986).

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. 1983) (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.").

229. *Atlantic States*, 635 F. Supp. at 288 (emphasis added).

these CWA cases have correctly interpreted them as applying a discovery rule.[230] 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.[231]

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,[232] and courts have cited to these remedial purposes in applying a discovery rule to the CWA in both the § 402[233] and § 404 context.[234] 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.[235] Enforcement actions under the CWA have the effect of

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230. *See, e.g.*, United States v. Windward Properties Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993); United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *7 (N.D. Ill. Sept. 30, 1996).

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 Assocs. 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).

234. *See, e.g.*, *Windward*, 821 F. Supp. at 694; *Material Serv. Corp.*, 1996 U.S. Dist. LEXIS 14471, at *7.

235. 33 U.S.C. § 1251(a) (1994). *See, e.g.*, United States v. Hobbs, 736 F. Supp. 1406, 1409 (E.D. Va. 1990) (stating that "Congress designed the CWA to recapture and preserve the 'integrity of the Nation's waters' . . . . Indeed, a primary objective of the CWA is the 'national goal' of eliminating the discharge of pollutants into navigable waters."); P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370, 1381 (D.C. Cir.

deterring noncompliance and thereby providing protection for the environment.[236] In addition, penalty actions under the CWA may be considered remedial because they have the effect of recovering the economic benefit of noncompliance.[237] 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.[238] 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

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1975); United States v. Holland, 373 F. Supp. 665, 668 (M.D. Fla. 1974).

236. *See* Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs., 617 F. Supp. 1190, 1201 (D.N.J. 1985) (stating that "[t]here is little doubt that Congress intended deterrence as a purpose of sanctions under the FWPCA . . . . The first goal of penalty assessment is to deter people from violating the law . . . . Successful deterrence is important because it provides the best protection for the environment.").

237. Section 309(d) of the CWA lists "economic benefit [if any] resulting from the violation as a factor which courts 'shall' consider in determining a penalty for a violation of the Act." In addition, EPA policy specifies that the economic benefit should generally be recovered in any penalty assessment. *See* E.P.A. Policy on Civil Penalties 3 (Feb. 16, 1984) (stating that "it is Agency policy that penalties generally should, *at a minimum*, remove any significant economic benefits resulting from failure to comply with the law.") (emphasis original).

238. *See, e.g.*, Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982) ("The diligence-discovery rule of accrual is not often applied outside the medical malpractice area . . . but may be appropriate in non-malpractice cases . . . where plaintiffs face comparable problems in discerning the fact and cause of their injuries.").

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*,[239] 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.[240]

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.[241] 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.[242] Courts have also looked to the underlying purposes of the CWA in holding that a discovery rule should apply to wetlands violations.[243]

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

239. 386 U.S. 503, 517 (1937).

240. *Id.*

241. *See* Klein, *supra* note 131, at 583-84.

242. Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 (D.C. Cir. 1991). The fact that a state rather than a federal statute of limitations was at issue should not matter in light of the *Crown Coat* and *Cada* decisions. In addition, courts look to the purposes of the underlying statute when deciding whether a state statute of limitations applies in a given situation. If the state statute of limitations would impede a federal purpose, it is not applied. Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 74 (3d Cir. 1990). If the purposes of the underlying statute can be taken into account when determining if a court should apply a state statute of limitations at all, then why should not such considerations be taken into account in how courts apply statutes of limitations, i.e., allowing for a discovery rule.

243. United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996); United States v. Windward Properties Inc., 821 F. Supp. 690, 694-95 (N.D. Ga. 1993); United States v. Hobbs, 736 F. Supp. 1406, 1409 (E.D. Va. 1990).

detecting violations."[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 *read* into statutes of limitations in federal-question cases . . . in the absence of a contrary directive from Congress."[245] The discovery rule, as applied by the federal courts, was first set out by the Supreme Court in *Urie v. Thompson* in 1949.[246] 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.[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.[248] The cases cited by the *3M Co.* court to support this proposition were cases that either predated application of the discovery rule by the federal courts or were cases where the discovery rule was never raised as an issue.[249] In addition, the *3M Co.* court's analysis fails to recog-

244. 3M Co. v. Browner, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

245. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (emphasis added). *See Connors*, 935 F.2d at 342.

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).

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).

248. *Id.*

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 *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]

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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.[252] 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.[253] 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.[254] Thus, in most cases, the only

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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:

> [I]n 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.

253. *See* United States v. Windward Properties Inc., 821 F. Supp. 690, 695-97 (N.D. Ga. 1993); United States v. Material Serv. Corp., No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *1 (N.D. Ill. Sept. 30, 1996).

254. *See* Atlantic States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986) (stating that "[i]t 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.[255] Where a given wetlands violation was more easily detectable, the limitations period could be deemed to run sooner.[256]

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.[257] 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.

1990) (statute of limitations accrued for purposes of dredge and fill violations when EPA received report documenting the violations); United States v. ALCOA, 824 F. Supp. 640, 645-47 (E.D. Tex. 1993); *Material Serv. Corp.*, 1996 U.S. Dist. LEXIS 14471, at *6-11.

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]o find that accrual begins at the date of the violation would seriously undermine the EPA's enforcement efforts. The court thus concludes that the 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.[258] 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."[259] 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.[260] The D.C.

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258. United States v. Telluride Co., 884 F. Supp. 404, 410 (D. Colo. 1995).

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."[261] 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[262] that it should not be applied to government claims for injunctive relief.[263]

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.[264] The statute of limitations in § 2462 does not apply to government claims for

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meaning" of terms, and holding that "a sanction that only remedies the damage caused by the defendant does not trigger the protections of § 2462." *Id.* at 487.); Federal Election Comm'n v. National Republican Senatorial Comm., 877 F. Supp. 15, 21 (D.C. Cir. 1995) (declining to follow the holding in *Windward*, which was the primary case relied on by the *Telluride* court on the injunctive relief issue, and stating that the *Windward* decision "is contrary to the express language of the statute, which is ordinarily controlling, absent a clearly expressed legislative intention to the contrary."); United States v. Hobbs, 736 F. Supp. 1406, 1410 (E.D. Va. 1990) (stating that 28 U.S.C. § 2462 "by its own terms, has no bearing on suits in equity" and holding that government claims for injunctive relief in wetlands enforcement action were not barred); North Carolina Wildlife Federation v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941, 1944 (E.D.N.C. 1989) (holding that the express terms of 28 U.S.C. § 2462 apply only to suits for enforcement of a civil fine, penalty or forfeiture and thus did not apply to government claims for injunctive relief in wetlands enforcement action).

261. 3M Co. v. Browner, 17 F.3d 1453, 1460 (D.C. Cir. 1994). The *Telluride* decision is thus inconsistent with the *3M Co.* decision which it purports to follow, to the extent that it applies § 2462 to bar government claims for injunctive relief.

262. The *Telluride* decision, and the *Windward* decision on which it relies, appear to be the lone exceptions.

263. SEC v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995) (stating that "[b]y the terms of the statute, the five year limitations period applies only to 'suits or proceedings for the enforcement of any civil fine, penalty or forfeiture.' In the context of § 2462, courts have consistently held that the government's claims for equitable relief 'be subject to no time bar.'") (citing United States v. Incorporated Village of Island Park, 791 F. Supp. 354, 368 (E.D.N.Y. 1992)); Catellus Dev. Corp. v. L.D. McFarland Co., 910 F. Supp. 1509, 1518 (D. Or. 1995) (stating that 28 U.S.C. § 2462 "only applies to an 'action, suit or proceeding for the enforcement of any *civil fine, penalty, or forfeiture*' which do not encompass restitution of response costs.") (emphasis original).

264. SEC v. Williams, 884 F. Supp. 30, 31 (D. Mass. 1995); *see also* Shanley, *supra* note 58, at 321 n.258.

injunctive relief because the action is not in the nature of a penalty.[265] This distinction was made clear by the D.C. Circuit in *Johnson v. SEC.*

In *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.[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.[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.[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."[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.[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.[271] In addition, the courts have held that

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265. Shanley, *supra* note 58, at 322 n.261. *See* United States v. Davio, 136 F. Supp. 423, 426 (E.D. Mich. 1955).

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. *Id.* at 486.

267. *Id.* at 487.

268. *Id.* at 492.

269. *Id.* at 488. *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 495 (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), *aff'd sub nom.*, Koller v. United States, 359 U.S. 309 (1959).

270. *See Koller*, 359 U.S. at 309; *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).

271. *See* Badaracco v. Commissioner, 464 U.S. 398 (1984); E.I. Du Pont de

"statutes of limitation are not controlling measures of equitable relief,"[272] 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."[273] 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.'"[274] 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.[275]

In reaching its decision, the *Telluride* court followed the holding in *Windward*,[276] 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.[277] Ac-

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Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924); United States v. Beebe, 127 U.S. 338 (1888); United States v. Weintraub, 613 F.2d 612, 619 (6th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); United States v. Davio, 136 F. Supp. 423 (E.D. Mich. 1955) (holding that statutes of limitations do not ordinarily run against the United States, and therefore, 28 U.S.C. § 2462 must be strictly construed).

272. Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (Court held that suit in equity may lie although a comparable action at law is time barred).

273. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

274. SEC v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995) (holding that 28 U.S.C. § 2462 did not apply to a disgorgement action nor to injunctive relief generally) (citing United States v. Incorporated Village of Island Park, 791 F. Supp. 354, 368 (E.D.N.Y. 1992) (28 U.S.C. § 2462 did not bar equitable relief claims in government enforcement action)); Federal Election Comm'n v. National Republican Senatorial Comm., 877 F. Supp. 15, 21 (D.C. Cir. 1995) (stating that § 2462 does not apply to injunctive relief); SEC v. Glick, No. Civ-LV-78-11, 1980 WL 1414 (D. Nev. June 12, 1980) (holding that no statute of limitations applies where government seeks equitable relief); *see also* United States v. Hobbs, 736 F. Supp. 1406, 1410 (E.D. Va. 1990) (injunctive relief claims in wetlands enforcement action under CWA not barred under 28 U.S.C. § 2462).

275. *See Hobbs*, 736 F. Supp. at 1410; North Carolina Wildlife Federation v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941, 1944 (E.D.N.C. 1989).

276. United States v. Windward Properties Inc., 821 F. Supp. 690, 693 (N.D. Ga. 1993).

277. Cope v. Anderson, 331 U.S. 461 (1947); *see also* Russell v. Todd, 309 U.S. 280, 289 (1940); United Transp. Union v. Florida East Coast Ry., 586 F.2d 520, 524 (5th Cir. 1978); Gilbert v. Cambridge, 932 F.2d 51, 57 (1st Cir. 1991) (stating that "where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy."); Nemkov v.

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).

279. *Hobbs*, 736 F. Supp. at 1410.

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*).

281. *See, e.g.*, United States v. Incorporated Village of Island Park, 791 F. Supp. 354, 368 (E.D.N.Y. 1992) (explaining that 28 U.S.C. § 2462 barred civil penalty claims but did not bar equitable relief claims in government enforcement action); Federal Election Comm'n v. National Republican Senatorial Comm., 877 F. Supp. 15, 21 (D.C. Cir. 1995).

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."[283] 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.

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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)).

283. 28 U.S.C. § 2416(c) (1994).