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COMMENT

**Applying a Strict Limitations Period to  
RCRA Enforcement: A Toxic Concept  
With Hazardous Results?**

**Timothy E. Shanley**

*Congress enacted the Resource Conservation and Recovery Act [RCRA] to deal with the safe and long term disposal of our nations solid and hazardous wastes. RCRA does not include a limitations period within its statutory language. Various federal district and circuit courts of appeal have applied the general five-year statute of limitations to civil penalties under other environmental statutes. RCRA's goals and policies, however, differ from these statutes in many respects.*

*It is likely that the federal courts will also apply the general federal five-year statute of limitations to RCRA civil penalties. The author proposes that courts should be cautious in applying a limitations period to the enforcement of RCRA civil penalties. The author further points out the various events and tools which should toll the running of a limitations period if a court should hold that a limitations period does apply to RCRA civil penalty enforcement.*

*Even if the courts do hold that RCRA civil penalties*

*are limited by the general five-year statute of limitations, this will not apply to RCRA's injunctive relief. RCRA's injunctive relief will not be limited by such a strict limitations period. The equitable doctrine of laches, however, will likely apply to RCRA injunctive relief.*

## I. Introduction

Preventing the improper disposal of hazardous waste is one of the greatest problems facing our nation today. In the past, hazardous waste has been improperly disposed of in landfills and dump sites that were not adequately equipped or licensed to accept these hazardous wastes. The discovery of improperly stored or disposed of hazardous waste is hampered by the fact that it may take years before such wastes begin to leach into groundwater or aquifers, or present some other identifiable environmental harm.

The Resource Conservation and Recovery Act [RCRA]<sup>1</sup> is the federal regulatory program designed to deal with the national hazardous waste problem. RCRA does not explicitly state how long after improper storage, treatment or disposal of waste the Environmental Protection Agency [EPA], citizen groups, or states licensed to administer their own hazardous waste programs<sup>2</sup> may commence RCRA enforcement actions

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1. RCRA §§ 1002-11012, 42 U.S.C. §§ 6901-6992k (1988).

2. Under RCRA, a state may administer its own hazardous waste program in lieu of the federal program as long as the state program is approved by the Administrator of the EPA. RCRA § 3006, 42 U.S.C. § 6926 (1988). Actions taken by the states under EPA approved state programs "shall have the same force and effect as action taken by the Administrator. . . ." RCRA § 3006(d), 42 U.S.C. § 6926(d) (1988).

RCRA also does not totally preempt state and local regulation of hazardous waste, unless these regulations actually conflict with federal law. *Ensco, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986). RCRA's regulation of hazardous waste disposal was intended to establish minimum standards for the states and does not prevent the states from imposing even more stringent regulations on hazardous waste disposal. See *City of Philadelphia v. New Jersey*, 376 A.2d 88 (N.J. 1977), *rev'd on other grounds*, 437 U.S. 617, 620 (1978). (The Supreme Court held that RCRA did not preempt state regulation of hazardous waste. However, since the New Jersey statute banned nearly all out-of-state solid waste it violated the Commerce Clause of the Constitution and was, therefore, void.) "To the contrary, Congress expressly has pro-

against violators to compel cleanup measures and impose civil penalties. Although recent court decisions have applied a general five-year statute of limitations to the imposition of civil penalties under some environmental statutes,<sup>3</sup> there are strong practical and policy reasons why this five-year limitations period should not apply to most cases involving the assessment of civil penalties under RCRA.

### A. Scope of Discussion

Part I of this comment will introduce the argument that a limitations period should not apply to RCRA civil penalties.<sup>4</sup> Since Congress did not include a limitations period within the RCRA language<sup>5</sup> or refer to any limitations period in RCRA's legislative history,<sup>6</sup> the limitations period contained in 28 U.S.C. § 2462 should not apply to enforcement of civil penalties under RCRA. RCRA's purpose and enforcement provisions differ significantly from other environmental statutes to which the general federal five-year limitations period has been applied.<sup>7</sup>

Part II of this article presents a broad overview of the RCRA hazardous waste program. Part III introduces the purposes of statutes of limitations and addresses the applicability

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vided that the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." *City of Philadelphia v. New Jersey*, 437 U.S. at 621 n.4. "A conflict exists when the local enactment 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 621 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Likewise, public nuisance claims under state law are not preempted by RCRA. *See State v. Monarch*, 456 N.Y.S.2d 867, 869 (N.Y. App. Div. 1982). *See generally* WARREN FREEDMAN, *HAZARDOUS WASTE LIABILITY* § 14.21, at 204 (1992).

3. The general five-year statute of limitations can be found at 28 U.S.C. § 2462 (1988). Some federal courts have applied this limitations period to civil penalties under the Clean Water Act and the Clean Air Act. *See infra* notes 75-84 and accompanying text.

4. It likewise should not apply to criminal fines, but that is beyond the scope of this paper.

5. U.S.C. §§ 1002-11012, 42 U.S.C. §§ 6901-6992k (1988).

6. *See* 1976 U.S.C.C.A.N. 6254 and the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. 5526-702.

7. Some federal district courts have applied the statute of limitations to citizen suits under the Clean Water Act or Clean Air Act. *See infra* notes 75-84.

of the general five-year federal statute of limitations for civil penalties<sup>8</sup> to RCRA's civil penalty provisions.<sup>9</sup> Specifically, it will analyze possible application of the five-year limitation period to judicial enforcement proceedings in the federal courts and to EPA administrative enforcement proceedings. Part IV explores both the differences and similarities that may affect the use of the limitations provision in either proceeding.

Part V reviews several statute of limitations tolling theories applicable if the federal courts should decide that the limitations period applies to RCRA enforcement actions for civil penalties. Part V specifically discusses the discovery rule, fraudulent concealment theory, the continuous violations theory, and other procedural tools which can toll the running of the statute of limitations on civil penalties or extend the cause of action beyond five years.

Part VI determines the effect of 28 U.S.C. § 2462 on EPA's remedial and injunctive relief provisions in RCRA. It analyses RCRA's injunctive remedies and compares these actions to CERCLA's injunctive remedies.

## II. Background of RCRA Hazardous Waste Regulation

### A. The Purposes of RCRA

Congress enacted RCRA in 1976 to "eliminate[] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste."<sup>10</sup> Before RCRA's enactment, up to ninety percent of all hazardous waste was improperly disposed.<sup>11</sup> One of RCRA's main objectives is to "assure that hazardous waste management practices are conducted in a manner which protects human health and the environment"<sup>12</sup> by establishing standards ap-

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8. 28 U.S.C. § 2462 (1988).

9. RCRA § 3008, 42 U.S.C. § 6928 (1988).

10. H.R. REP. NO. 1491, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.

11. ROGER W. FINDLEY & DANIEL A. FARBER, *ENVIRONMENTAL LAW IN A NUTSHELL* 231 (3d ed. 1992) [hereinafter *ENVIRONMENTAL LAW IN A NUTSHELL*]. According to an EPA sponsored study that had been conducted in 1983, one in seven generators of hazardous waste were still disposing of their wastes illegally. *Id.*

12. RCRA § 1003(a)(4), 42 U.S.C. § 6902(a)(4) (1988).

plicable to hazardous waste generators, transporters, and hazardous waste treatment, storage, and disposal facilities [hereinafter TSD facilities].<sup>13</sup> If hazardous waste generators, transporters, and TSD facilities comply with the strict mandates of RCRA, it will reduce "the need for corrective action at a future date."<sup>14</sup>

## B. What is a RCRA Hazardous Waste?

Subtitle C of RCRA regulates the management of hazardous waste and mandates that the EPA promulgate criteria and regulations for identifying and listing hazardous wastes.<sup>15</sup> To qualify for regulation under RCRA, a waste must first be classified as a solid waste.<sup>16</sup> Once that prerequisite has been met, the next step is to determine if the waste is hazardous under RCRA and its regulations.

Congress lacked the expertise to identify hazardous waste, so it broadly defined hazardous waste under RCRA<sup>17</sup>

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13. RCRA §§ 3002(a), 3003(a), 3004(a), 42 U.S.C. §§ 6922(a), 6923(a), 6924(a) (1988).

14. RCRA § 1003(a)(5), 42 U.S.C. § 6902(a)(5) (1988).

15. RCRA § 3001(a)-(b), 42 U.S.C. § 6921(a)-(b) (1988).

16. RCRA defines a solid waste as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33 [Clean Water Act], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended . . . .

RCRA § 1004(27), 42 U.S.C. § 6903(27) (1988).

The EPA has also promulgated a solid waste definition which is applicable only to subtitle C of RCRA governing hazardous waste management. This definition states materials are solid waste for subtitle C purposes if they are any discarded material that is not specifically excluded by RCRA or by regulation, any materials which are incinerated or burned, materials that are "accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned" by disposal, burning or incineration. See 40 C.F.R. § 261.2(a)(1), (2)(i)-(iii), (b)(1)-(3), (c), (d) (1992). Certain materials that are recycled, or constitute "inherently waste-like material" may also constitute solid waste. *Id.*

17. See RCRA § 1004(5)(A), (B), 42 U.S.C. § 6903(5)(A), (B) (1988) (statutory definition of hazardous waste).

and directed the EPA to develop and promulgate criteria for identifying hazardous wastes.<sup>18</sup> The EPA followed this congressional mandate by issuing regulations defining hazardous wastes in 40 C.F.R. pt. 261.<sup>19</sup> In general, a solid waste is a hazardous waste if it meets one of the four criteria. A solid waste is a hazardous waste if it is a listed hazardous waste under 40 C.F.R. pt. 261, subpart D;<sup>20</sup> a characteristic hazardous waste under 40 C.F.R. pt. 261, subpart C;<sup>21</sup> a mixture of a solid and a hazardous waste;<sup>22</sup> or "derived-from" the treatment, storage, or disposal of a hazardous waste.<sup>23</sup>

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18. RCRA § 3001(a), 42 U.S.C. § 6921(a) (1988). The EPA was directed to take into account the waste's "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." *Id.* The EPA was then directed to promulgate regulations for these wastes based on the section 3001(a) criteria. RCRA § 3001(b), 42 U.S.C. § 6921(b) (1988). The EPA was further directed to "identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratogens) at levels in excess of levels which endanger human health." *Id.*

19. *See generally* 40 C.F.R. pt. 261, subparts C, D (1992).

20. RCRA § 3001(b), 42 U.S.C. § 6921(b) (1988); *see also* 40 C.F.R. § 261.30-.33 (1992) (as mandated by RCRA, EPA has promulgated regulations listing solid wastes which are considered hazardous).

21. RCRA § 3001(b), 42 U.S.C. § 6921(b) (1988); *see also* 40 C.F.R. § 261.20-.24 (1991). The EPA promulgated, as directed by Congress, four hazardous waste characteristics: ignitability, corrosivity, reactivity, and toxicity. RCRA § 3001(a), 42 U.S.C. § 6921(a) (1988); 40 C.F.R. § 261.21-.24 (1992).

22. *Id.* 40 C.F.R. § 261.3(a)(2)(iii)-(iv) (1992) (better known as the mixture rule). Under the mixture rule, if any hazardous waste is commingled or mixed with a solid waste the entire mixture is a hazardous waste. The mixture rule and the derived from rule have recently been vacated for procedural violations of the Administrative Procedure Act. *See Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), *reh'g denied*, (Feb. 12, 1992). The EPA reissued the mixture and derived from rules on an interim basis on February 18, 1992. 57 Fed. Reg. 7,628 (March 3, 1992). The agency is currently working on new proposals for defining hazardous waste and may change the scope of both the mixture and derived from rules. 57 Fed. Reg. 21,450-534 (to be codified at 40 C.F.R. § 261) (proposed May 20, 1992). The EPA has proposed two possible approaches: 1) the concentration based exemption criteria (CBEC) and 2) the expanded characteristics option (ECHO). *Id.* This discussion is beyond the scope of this paper.

23. 40 C.F.R. § 261.3(c)(2)(i)-(ii) (1992) (better known as the derived-from rule); *see also supra* note 22 (discussion regarding future of the derived from rule).

### C. RCRA Hazardous Waste Requirements

Once a solid waste is classified as hazardous, it is then regulated under the strict confines of subtitle C of RCRA. Subtitle C and the subsequent EPA regulations impose restrictions on hazardous waste generators, transporters, and hazardous waste TSD facilities.<sup>24</sup> It establishes a "cradle to grave" hazardous waste management system which regulates hazardous wastes from the point they are generated to their final place of disposal. The "cradle to grave" objective is accomplished by requiring hazardous waste generators, transporters, and TSD facilities to complete hazardous waste manifests which the EPA can use to track the wastes from the point they are generated to the point of final disposal.<sup>25</sup>

#### 1. Subtitle C Requirements for Generators, Transporters, and TSD Facilities

RCRA requires that the EPA promulgate regulations establishing standards which apply to hazardous waste generators,<sup>26</sup> transporters,<sup>27</sup> and TSD facilities.<sup>28</sup> The EPA has promulgated these regulations and they are published in the Code of Federal Regulations.<sup>29</sup> The statute and regulations require that a hazardous waste generator maintain accurate record-keeping and labeling practices, use appropriate containers, furnish information regarding "the general chemical composition of such hazardous waste to persons transporting, treating, storing or disposing of such wastes," comply with the manifest system, and submit reports to the EPA once every

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24. See RCRA §§ 3002, 3003, 3004, 42 U.S.C. §§ 6922, 6923, 6924 (1988).

25. RCRA § 3002(a)(5), 42 U.S.C. § 6922(a)(5) (1988); see also 40 C.F.R. §§ 262.23, 263.20-.22, 264.71 (1992).

26. Section 3002(a) states that "the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment." RCRA § 3002(a), 42 U.S.C. § 6922(a) (1988).

27. RCRA § 3003(a), 42 U.S.C. § 6923(a) (1988).

28. RCRA § 3004(a), 42 U.S.C. § 6924(a) (1988).

29. 40 C.F.R. pts. 262-264 (1992) (standards applicable to generators, transporters, and TSD facilities).



two years.<sup>30</sup>

RCRA and the EPA regulations require hazardous waste transporters to maintain records regarding the hazardous waste they transport, the sources of the hazardous waste they transport, and the delivery points of such waste.<sup>31</sup> Transporters are also required to comply with the hazardous waste labeling requirements and the hazardous waste manifest system.<sup>32</sup>

Owners and operators of TSD facilities are required to maintain adequate records of all hazardous waste which their facility treats, stores, or disposes of and the manner in which the wastes were treated, stored, or disposed.<sup>33</sup> Owners and operators of TSD facilities must also comply with reporting, monitoring, and inspection requirements; the manifest system; the EPA's treatment, storage, and disposal operating methods, techniques, and practices; the location, design and construction requirements; the contingency plan requirements; operation and ownership requirements; and the permit requirements contained in section 3005.<sup>34</sup>

#### D. RCRA Civil Penalties

RCRA authorizes the imposition of civil penalties for violations of the hazardous waste management requirements discussed in the previous section.<sup>35</sup> Individuals who violate these hazardous waste requirements can be held liable for large civil penalties. RCRA allows the government to recover "\$25,000

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30. RCRA § 3002(a), 42 U.S.C. § 6922(a) (1988); 40 C.F.R. pt. 262 (1992).

31. See RCRA § 3003(a)(2), 42 U.S.C. § 6923(a)(2) (1988); see also 40 C.F.R. pt. 263 (1992) (regulations promulgated for hazardous waste transporters).

32. See RCRA § 3003(a)(2), 42 U.S.C. § 6923(a)(2) (1988); see also 40 C.F.R. pt. 263 (1992).

33. RCRA § 3004(a)(1), 42 U.S.C. § 6924(a)(1) (1988).

34. RCRA § 3004(a)(2)-(7), 42 U.S.C. § 6924(a)(2)-(7) (1988); see 40 C.F.R. pt. 264 (1992) (EPA regulatory standards applicable to owners and operators of TSD facilities). TSD facilities must obtain a permit for the treatment, storage or disposal of hazardous waste. RCRA § 3005, 42 U.S.C. § 6925 (1988) (permit requirements); see also 40 C.F.R. pt. 270 (1992) (regulations governing the permitting program and the requirements for a permit).

35. RCRA § 3008(g), 42 U.S.C. § 6928(g) (1988). For a brief discussion of the hazardous waste requirements under RCRA see *supra* part IIC.

for *each such* violation,” and each day of violation “constitutes a separate violation.”<sup>36</sup> The EPA can also recover “\$25,000 for *each day* of violation” for violations of EPA compliance orders<sup>37</sup> and corrective action orders.<sup>38</sup> In addition, EPA can assess a civil penalty against a RCRA violator in either an administrative or judicial forum.<sup>39</sup>

### III. Statute of Limitations Overview

#### A. Purposes of a Limitations Period

The purpose of a statute of limitations is “to prevent plaintiffs from sleeping on their rights.”<sup>40</sup> Limitation periods are intended to put a defendant on notice of an adversary’s claim.<sup>41</sup> Furthermore, statutes of limitations promote the notion that adversaries shall be put on notice to defend within a specific period of time.<sup>42</sup> “[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.”<sup>43</sup>

Limitations periods “although affording plaintiffs what the legislature deems a reasonable time to present their claims, protect[] defendants and the courts from cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearances of witnesses, fading memories, disappearance of documents, or oth-

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36. RCRA § 3008(g), 42 U.S.C. § 6928(g) (1988) (emphasis added).

37. RCRA § 3008(c), 42 U.S.C. § 6928(c) (1988) (emphasis added).

38. RCRA § 3008(h)(2), 42 U.S.C. § 6928(h)(2) (1988).

39. See RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) (1988) and RCRA § 3008(g), 42 U.S.C. § 6928(g) (1988). Section 3008(g) fails to note whether this civil penalty provision applies to the judicial or administrative forum. The wording “liable to the United States” may assist in determining the appropriate forum for assessing section 3008(g) civil penalties. “Because it is the United States which sues for penalties in court and the Administrator who assesses penalties administratively, the wording is highly suggestive that courts are to assess penalties under section 3008(g).” SHELDON M. NOVICK, LAW OF ENVIRONMENTAL PROTECTION § 8.01(5)(c)(i) (1992).

40. Crown Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983).

41. *Id.*

42. United States v. Kubrick, 444 U.S. 111, 117 (1979) (held that the two-year limitations period contained in the Federal Torts Claim Act barred plaintiff’s suit which was commenced after two years).

43. *Id.* at 117 (quoting Railroad Tel. v. Railroad Express Agency, 321 U.S. 342, 349 (1944)).

erwise."<sup>44</sup> Statutes of limitations, similar to the doctrine of laches, promote justice by preventing surprises caused by "the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."<sup>45</sup>

If Congress puts a specific time limit in a statute, then the matter is concluded and the congressional statute of limitations is definite.<sup>46</sup> However, Congress may create a cause of action and not prescribe a time limit on when the action may be brought.<sup>47</sup> Courts should not construe a statute of limitations so as to reach an absurd result or a result which was not intended by Congress.<sup>48</sup>

## B. Which Limitations Period May Apply

### 1. State versus Federal Law

Generally when a federal statute lacks a limitations period for a cause of action arising under such statute, the federal courts will apply the most relevant limitations period under state law.<sup>49</sup> One exception to this rule, however, is if the application of the state limitations period would frustrate the goals of Congress or cause a lack of uniformity in enforcement.<sup>50</sup> "Especially where there is a relevant federal statute of

44. *Id.*

45. *Railroad Tel. v. Railroad Express Agency*, 321 U.S. 342, 348-49 (1944).

46. *Saffron v. Department of the Navy*, 561 F.2d 938, 941 n.17 (D.C. Cir. 1977) (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)).

47. *United States v. Lutheran Medical Ctr.*, 524 F. Supp. 421 (D.C. Neb. 1981), *aff'd*, 680 F.2d 1211 (8th Cir. 1982). *See also* *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 367 (1977).

48. *Wenning v. Jim Walter Homes, Inc.*, 464 F. Supp. 110, 112 (D.C. Ind. 1978) (quoting *Hamrick v. Indianapolis Humane Soc'y*, 174 F. Supp. 403, 409 (S.D. Ind. 1959), *aff'd*, 273 F.2d 7 (7th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960)).

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

50. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161 (1983). "[W]here state statutes of limitation are 'unsatisfactory vehicles for the enforcement of federal law . . . , it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.' " *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74 (3d Cir. 1990) (quoting *DelCostello*, 462 U.S. at 161); *see also* *Occidental Life Ins. Co.*, 432 U.S. at 367.

limitations, courts need not borrow from state law."<sup>51</sup> Since state legislatures do not devise their limitations periods with national interests in mind, a federal court will not mechanically apply a state statute of limitations where a federal statute lacks its own limitations period.<sup>52</sup>

Most federal case law has consistently applied the federal five-year statute of limitations contained in 28 U.S.C. § 2462 to the enforcement of civil penalties under the Clean Water Act, the Clean Air Act, and the Rivers and Harbors Act.<sup>53</sup> These decisions rejected the application of a state limitations period on the grounds that it would create inconsistencies in federal enforcement.<sup>54</sup> There would be no uniformity in enforcement from state to state if a state limitations applied.<sup>55</sup>

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51. *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d at 74; *see also Occidental Life Ins. Co.*, 432 U.S. at 367; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 462; *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987).

52. *Sierra Club v. Chevron*, 834 F.2d at 1521.

53. *See infra* notes 75-84. The New Jersey District Court had held that the general federal five-year limitations did not apply to the enforcement of civil penalties under the Clean Water Act. *Public Interest Research Group of New Jersey v. United States Metals Refining Co.*, 681 F. Supp. 237, 239 (D.N.J. 1987); *Student Public Interest Research Group of New Jersey v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1202 (D.N.J. 1985); *Student Public Interest Research Group of New Jersey v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985); *but see Public Interest Research Group of New Jersey v. Witco Chem. Corp.*, 31 Env't Rep. Cas. (BNA) 1571, 1579 (D.N.J. May 17, 1990) (this decision applied the general federal five-year limitations period to civil penalties under the Clean Water Act). The Third Circuit, however, overruled the New Jersey District Court decisions which held that no limitations period applied to the enforcement of civil penalties under the Clean Water Act. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74 (3d Cir. 1990) (the five-year limitations period contained in 28 U.S.C. § 2462 applies to citizen suits under the Clean Water Act); *see also infra* notes 75-84.

54. *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d at 74; *Sierra Club v. Chevron*, 834 F.2d at 1522; *see also infra* notes 75-84.

55. *Sierra Club v. Chevron*, 834 F.2d at 1522. This case held that 28 U.S.C. § 2462 applied to both the United States Government and to citizen suit enforcement under the Clean Water Act. The defendant had argued that the three-year California limitations period should apply to this citizen suit. The Ninth Circuit held that applying a different limitations period to citizens under the act: (1) would limit citizens ability to monitor EPA enforcement; and (2) would result in lack of uniformity of enforcement from state to state. *Id.* These concerns would "only lead to confusion and diminish the effective enforcement of the Clean Water Act." *Id.*

One court was also concerned that using a state limitations period would cause some states to adjust their limitations period to either become "very hospitable to industries that violate the Act" or "provide a more hostile attitude towards possible polluters."<sup>56</sup>

If a court is to hold that a limitations period does apply to enforcement of RCRA civil penalties, the court's reasoning will likely be based on case precedent which has applied 28 U.S.C. § 2462 to the Clean Water Act and the Clean Air Act. Therefore, if a court holds that a limitations period does apply to enforcement of RCRA civil penalties, then the court should apply the five-year limitations period and not a relevant state limitations period.

## 2. The Federal Five-Year Statute of Limitations for Civil Penalties, Fines, and Forfeitures

The general five-year federal statute of limitations for civil fines, penalties, and forfeitures contained in 28 U.S.C. § 2462 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.<sup>57</sup>

The federal "courts have long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise."<sup>58</sup> This notion is "derive[d] from the common law principle that immunity from limitations periods

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56. *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 447 (D. Md. 1985).

57. 28 U.S.C. § 2462 (1988).

58. *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir. 1981) (citations omitted).

is an essential prerogative of sovereignty.”<sup>59</sup> When a statute of limitations is sought to be applied against the rights of the United States Government, the courts generally strictly construe such claims<sup>60</sup> in favor of the government.<sup>61</sup>

### 3. RCRA Contains No Limitations Period

RCRA does not contain a limitations period within its statutory language and gives no indication of whether a limitations period applies to enforcement of RCRA civil penalties. Congress has given very little guidance, if any, on this issue. Furthermore, the legislative history is ambiguous as to whether Congress had intended a limitations period to apply to RCRA enforcement actions brought by either the EPA, an environmental citizens group, or a state environmental agency with an approved RCRA enforcement program, seeking civil penalties from alleged RCRA violators.<sup>62</sup>

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59. *Id.*; see also *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33 (1938) (the general rule is that statutes of limitations do not ordinarily run against the United States). “The rule *quod nullum tempus occurrit regi* — that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations — appears to be a vestigial survival of the prerogative of the Crown.” *Id.* at 132 (citations omitted).

60. In *United States v. Davio*, 136 F. Supp. 423, 427 (E.D. Mich. 1955), the court found that the limitations period contained in 28 U.S.C. § 2462 must be strictly construed by the courts. This case involved an action commenced by the U.S. Government under the Anti-Kickback Act against a subcontractor. The government sought to recover from the subcontractor the illegal kickbacks that the subcontractor paid to the contractor to receive numerous subcontracts. The contractor was a prime contractor with the United States Army Air Force. The subcontractor raised 28 U.S.C. § 2462 as an affirmative defense. The court held that the Government’s recovery was not a civil penalty, but a civil damage recovery, and thus, the limitations period contained in 28 U.S.C. § 2462 did not apply to this recovery. *United States v. Davio*, 136 F. Supp. at 426.

61. “Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.” *Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)). The *Badaracco* case involved the application of a three-year statute of limitation contained in the Internal Revenue Code and held that the limitations period did not apply where a false or fraudulent return was filed with the intent to evade taxes. *Id.* In *E.I. Dupont de Nemours & Co.*, the Court strictly construed a limitations period contained in the Transportation Act of 1920. *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. at 456.

62. See RCRA §§ 1002-11012, 42 U.S.C. §§ 6901-6991k (1988); see also 1976

#### 4. Courts Have Yet To Apply a Limitations Period to Actions For RCRA Civil Penalties

To date, the issue of applying a limitations period to RCRA civil penalty actions has not been decided in any federal court. The federal courts have indicated that a limitations period may apply to RCRA civil penalty enforcement actions brought by either the EPA or environmental citizens groups.<sup>63</sup> Administrative decisions suggest that the five-year statute of limitations may apply to assessment of civil penalties in EPA administrative adjudicatory proceedings.<sup>64</sup>

When the EPA is given the opportunity, it will most likely argue that the limitations period should not apply to its enforcement actions under RCRA.<sup>65</sup> However, the EPA should wait until it has a strong case before it argues that the limitations period does not apply to RCRA civil penalties.

When the EPA has knowledge of a RCRA violation and sits on those rights for more than five years, the limitations period should apply to limit its recovery of civil penalties, but only for the penalties the EPA sought to recover during the period of delay. Since the EPA will not likely be barred from bringing an injunctive action to alleviate an imminent and substantial endangerment to human health and the environment caused by an illegal disposal of hazardous waste, and

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U.S.C.C.A.N. 6254 and the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. 5576-5702.

63. See *infra* notes 75-84.

64. See *infra* part IV.B.

65. RCRA is concerned with the safe disposal and storage of hazardous waste over a lengthy period of time. RCRA's objective is to require "that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date . . . ." RCRA § 1003(a)(5), 42 U.S.C. § 6902(a)(5) (1988). Hazardous wastes retain their hazardous characteristics over a lengthy period of time, and their effects are not readily detectable. It may take many years after the five-year limitations period has expired before the illegally disposed of hazardous waste containers begin to leak and leach into groundwater or run-off into a water body where they may be detected. To hold that injunctive relief or civil penalties are time barred would frustrate the goals of Congress that "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment . . ." and "requir[e] that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date . . . ." RCRA § 1003(a)(4), (5), 42 U.S.C. § 6902(a)(4), (5) (1988).

both actions involve substantially the same evidence, it should also be able to collect civil penalties as a deterrent to future illegal conduct.

The typical situation will involve a defendant who improperly disposed of hazardous waste either because the defendant ignored the hazardous waste manifest system or incorrectly determined that the waste was not hazardous.<sup>66</sup> If the limitations provision applied in these circumstances, it would encourage hazardous waste generators, transporters, or owners and operators of TSD facilities to violate the law by disposing of waste illegally and claiming no civil penalty liability after the limitations period has run. That clearly was not a congressional objective of RCRA.

RCRA actions will probably increase in future years as concerns for environmental protection and safe disposal of hazardous waste increase. The limitations period issue needs to be resolved because the EPA, state environmental agencies, and environmental citizens groups have limited enforcement resources; they cannot afford to waste those resources by bringing enforcement actions which may later be held to be time-barred and dismissed. Hazardous waste generators, transporters, and owners or operators of TSD facilities also need the issue resolved to know whether they have a valid affirmative defense against enforcement actions for civil penalties brought by the EPA, a state, or a citizens group.

#### IV. Will a Limitation Period Apply to RCRA Civil Penalty Actions?

##### A. Judicial Proceedings in Federal Court

To date, no court has placed a limitation period on RCRA civil penalties. More specifically, the federal courts have not yet decided whether 28 U.S.C. § 2462 or any other limitations period applies to RCRA civil penalty enforcement actions. In

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66. The failure of a generator to properly identify a hazardous waste may mean that this waste will never be included in the "cradle to grave" management program under RCRA. This could result in improper disposal or management of the waste which would subject the generator to liability. RIDGEWAY M. HALL, JR. ET AL., *RCRA HAZARDOUS WASTES HANDBOOK* 4-1 (7th ed. 1987).



*United States v. Hardage*, however, the district court suggested that some sort of limitations period should apply to RCRA and CERCLA enforcement actions.<sup>67</sup> This court, however, did not indicate what limitations period might or should apply.<sup>68</sup> The *Hardage* case only held that the defendant's statute of limitations defense was not subject to the government's motion to strike on the grounds that it involved mixed questions of law and fact.<sup>69</sup> The court gave no indication that the five-year federal statute of limitations or any other specific limitations period applied to RCRA civil penalties.<sup>70</sup> This case, therefore, does not assist in answering the limitations question that is very likely to arise in the near future.

No other court in the federal system has suggested that RCRA is subject to the limitations provision of 28 U.S.C. § 2462. The *Hardage* case gives only a limited view of how one district court may eventually decide the issue. Nor has any federal appellate court held or given any indication that the general federal five-year statute of limitations for civil penalties, fines or forfeitures<sup>71</sup> applies to RCRA enforcement actions. To determine how the courts may eventually decide this issue, it is necessary to discuss how the limitations period for civil penalties<sup>72</sup> has been applied to other federal environmental statutes and various other federal statutes authorizing civil penalty enforcement.

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67. *United States v. Hardage*, 116 F.R.D. 460, 467 (W.D. Okla. 1987). Since the EPA may have had notice of the violations the court was "not satisfied [that] the Government may bring an action under the provisions of CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] or RCRA without regard to the timeliness thereof." *Id.*

68. *Id.* The court did not believe that the government could wait and bring a RCRA or CERCLA enforcement action whenever it felt like it. *Id.*

69. *Id.*

70. *Id.* The court stated that "the defendant must be allowed to develop the facts, and the court must have the opportunity to settle legal issues, prior to making a determination as to this defense." *Id.* It appears that the court was concerned that the Government had unduly delayed and possibly prejudiced the defendants. Without a factual record the court could not decide the limitations issues. The court may have been considering the doctrine of laches or a statute of limitations but it failed to state it in the opinion.

71. 28 U.S.C. § 2462 (1988).

72. *Id.*

### 1. Application of the Limitation Period to Other Environmental Statutes

Some federal district and circuit courts of appeal have held that the general federal five-year statute of limitations<sup>73</sup> was applicable to other environmental statutes that were also silent on the limitations period issue.<sup>74</sup> Numerous federal court decisions have held that the five-year limitations period applied to citizen suits under the Clean Water Act.<sup>75</sup> These decisions were based on the reasoning that 28 U.S.C. § 2462 applied to actions asserted on behalf of the United States and to *qui tam* actions.<sup>76</sup> Since plaintiffs who bring citizen suits under the Clean Water Act "effectively represent the United States," their suits are also subject to the federal statute of limitations.<sup>77</sup> Under the Clean Water Act's citizen suit provi-

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73. 28 U.S.C. § 2462 (1988).

74. See *infra* notes 75-84.

75. Public Interest Research Group of New Jersey, Inc. (NJPIRG) v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 74 (3d Cir. 1990) (the five-year limitations period contained in 28 U.S.C. § 2462 applies to citizen suits under the Clean Water Act), *overruling* Public Interest Research Group of New Jersey v. United States Metals Refining Co., 681 F. Supp. 237, 239 (D.N.J. 1987) (five-year limitations period contained in 28 U.S.C. § 2462 did not apply to civil penalties under the Clean Water Act); Student Public Interest Research Group of New Jersey v. AT&T Bell Labs., 617 F. Supp. 1190, 1202 (D.N.J. 1985) (same); Student Public Interest Research Group of New Jersey v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1398-99 (D.N.J. 1985) (same); see also Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987) (the five-year limitations period contained in 28 U.S.C. § 2462 applies to citizen suits under the Clean Water Act); Public Interest Research Group of New Jersey (NJPIRG) v. Witco Chem. Corp., 31 Env't Cas. Rep. (BNA) 1571, 1579 (D.N.J. May 17, 1990) (same); National Wildlife Fed'n v. Consumer Power Co., 657 F. Supp. 989, 1010 (W.D. Mich. 1987) (same), *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) (same); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 450 (D. Md. 1985) (same); Sierra Club v. Simkins Indus., Inc., 617 F. Supp. 1120, 1125 (D. Md. 1985) (same); Connecticut Fund for the Env't v. Job Platting Co., 623 F. Supp. 207, 213 (D. Conn. 1985) (same); Friends of the Earth v. Facet Enters., Inc., 618 F. Supp. 532, 536 (W.D.N.Y. 1984) (same).

76. Sierra Club v. Chevron, 834 F.2d at 1522. "A *qui tam* action is a civil proceeding in which an informer sues for the Government, as well as for himself, to recover a penalty under a particular statute." *Id.* at 1522 n.3; see also Sierra Club v. Andrus, 610 F.2d 581, 591 n.17 (9th Cir. 1979).

77. NJPIRG v. Witco Chem. Corp., 31 Env't Cas. Rep. (B.N.A.) at 1579-80.

sion,<sup>78</sup> citizens act as adjuncts to government enforcement actions and "effectively stand in the shoes of the EPA . . . ."<sup>79</sup> Imposing a different limitations period to citizen suits than the limitations period that applies to the United States Government would frustrate national policies.<sup>80</sup> Court decisions have, therefore, reasoned that since the EPA's (the United States Government) enforcement actions under the Clean Water Act were subject to the five-year limitations period,<sup>81</sup> "citizens should be subject to the same limitations period as the government."<sup>82</sup>

The limitations period has also been applied to civil penalty enforcement under the Clean Air Act<sup>83</sup> and the Rivers and Harbors Act.<sup>84</sup> No federal court, however, has ever applied a limitations period to RCRA civil penalties.<sup>85</sup>

## 2. No Limitations Period Should Apply to RCRA Civil Penalties

RCRA's purposes and objectives differ significantly from these statutes to which the limitations period has been applied. RCRA addresses the long-term and permanent disposal of hazardous wastes.<sup>86</sup> It is concerned with the safe disposal of these wastes so that one day CERCLA's Super Fund clean-up

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78. CWA § 505, 33 U.S.C. § 1365 (1988).

79. See *NJPIRG v. Powell Duffryn Terminals*, 913 F.2d at 74; see also *Sierra Club v. Chevron*, 834 F.2d 1522.

80. *Sierra Club v. Chevron*, 834 F.2d at 1521-22.

81. *United States v. Hobbs*, 736 F. Supp. 1406, 1409 (E.D. Va. 1990) (limitations period contained in 28 U.S.C. § 2462 applies to the United States Government's actions for civil penalties under the Clean Water Act); *United States v. Sharon Steel Corp.*, 30 Env't Cas. Rep. (BNA) 1778, 1780 (N.D. Ohio 1989) (same); see also *Sierra Club v. Chevron*, 834 F.2d at 1521-22.

82. *NJPIRG v. Powell Duffryn Terminals*, 913 F.2d at 74 (since the limitations period contained in 28 U.S.C. § 2462 applies to the United States Government's actions for civil penalties under the Clean Water Act it also applies to citizen suits); see also *supra* note 75 and accompanying text.

83. *United States v. SCM Corp.*, 667 F. Supp. 1110, 1123 (D. Md. 1987).

84. *United States v. Central Soya, Inc.*, 697 F.2d 165, 169 (7th Cir. 1982).

85. See *supra* subparts III.B.3, 4.

86. RCRA § 1003, 42 U.S.C. § 6902 (1988). RCRA's objective is aimed at "reducing the need for corrective action at a later date." See RCRA § 1003(5), 42 U.S.C. § 6902(5) (1988).

list will prove unnecessary.<sup>87</sup>

The Clean Air Act and the Clean Water Act govern the emission of pollutants from the stack and point sources, respectively. Whereas RCRA regulates the disposal of hazardous and solid waste over an extended period of time, the Clean Water Act and the Clean Air Act regulate specific discharges from discrete and visible point sources.<sup>88</sup>

Violations of the Clean Air Act and Clean Water Act are generally readily detectable by the EPA, state environmental agencies and citizen groups. Unpermitted releases immediately enter the atmosphere and the navigable waters of the United States and can generally be traced back to the violator quickly and accurately. Both Acts have mandatory monitoring requirements establishing that violations be reported either through Discharge Monitoring Reports (DMRs) or Continuous Emissions Monitoring Reports (CEMRs).

The same, however, does not hold true for violations of RCRA. The average life of a disposal site is approximately twenty years.<sup>89</sup> The illegal disposal of a hazardous waste can remain undetected in the environment by the government and the public for many years to come.

The application of the five-year statute of limitations to RCRA would impede the congressional purpose of RCRA to regulate the disposal of hazardous waste over a lengthy period

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87. CERCLA and its implementing regulations directly complement the RCRA hazardous waste program. RIDGEWAY M. HALL, JR. ET AL., *RCRA HAZARDOUS WASTES HANDBOOK* 1-7 (7th ed. 1987). In theory, if RCRA provisions are complied with, then future CERCLA Super Fund sites can be avoided since the waste will have been allegedly disposed of in an environmentally sound manner. On the other hand, if RCRA is violated and the waste goes undetected, the site may later become a Super Fund site and subject potentially responsible parties (PRPs) to liability for CERCLA clean-up costs, not to mention RCRA liability. "Unless RCRA's solid and hazardous waste programs are properly enforced and implemented, we are doing little more than grooming Super Fund sites [sic] of the future." *Resource Conservation and Recovery Act Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House of Representatives Comm. on Energy and Commerce*, 97th Cong., 2d Sess. at 398 (1982).

88. EPA has promulgated regulations under RCRA which include the monitoring and reporting for a period of 30 years after the time of disposal. 40 C.F.R. § 264.117(a)(1) (1992).

89. See *ENVIRONMENTAL LAW IN A NUTSHELL*, *supra* note 11, at 232.

of time. Subjecting a generator, transporter, or TSD facility to CERCLA response costs and to RCRA civil penalties would act as a further deterrent to illegal disposal of hazardous waste. A potential violator of RCRA's hazardous waste requirements would think twice before committing the violation, knowing he would be subject to both RCRA and CERCLA liability in the future.

## B. EPA Administrative Proceedings Under RCRA: Will 28 U.S.C. § 2462 Apply?

### 1. The Resource Conservation and Recovery Act

An additionally unclear question is whether the general five-year federal statute of limitations applies to administrative civil penalties assessed by the EPA in an administrative forum. Although administrative law judges (ALJs) follow a different set of procedural rules than the federal courts, federal court procedural holdings are influential to an ALJ's final decision.<sup>90</sup> The EPA's administrative law decisions suggest that the limitations period contained in 28 U.S.C. § 2462 applies to RCRA enforcement actions.

In *In re Adolph Coors Co.*,<sup>91</sup> ALJ Nissen held that the civil penalty limitations period contained in 28 U.S.C. § 2462

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90. "Although not binding, federal court decisions interpreting the Federal Rules of Civil Procedure (FRCP) are useful guides in interpreting the Consolidated Rules of Practice." *In re Adolph Coors Co.*, No. RCRA-VIII-90-09 (March 1, 1991). Administrative and judicial decisions have reasoned that:

In considering the motion to strike the statute of limitations defense, it should be noted that the Federal Rules of Civil Procedure (Fed. R. Civ. P.) do not govern the procedure in administrative agencies which are free to fashion their own rules of procedure, so long as those rules satisfy the fundamental requirements of fairness and notice . . . . Nevertheless, consideration of that practice and precedent may provide some insights which could be helpful in disposing of the motion.

*In re Minnesota Mining & Mfg. Co.* (3M Co.), No. TSCA-88-H-06, 1989 WL 253236 (E.P.A.), at \*3 (Aug. 7, 1989) (citing *Katzon Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988)). See also *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977); *Hess & Clark v. F.D.A.*, 495 F.2d 975, 984 (D.C. Cir. 1974); *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 570 F. Supp. 227, 232 (D. La. 1983), *aff'd*, 744 F.2d 1107 (5th Cir. 1984); *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

91. *In re Adolph Coors Co.*, No. RCRA-VIII-90-09 (Mar. 1, 1991).

applied to RCRA administrative penalty actions.<sup>92</sup> The court reasoned that if the limitations period was applicable to judicial enforcement actions then it should likewise be applied to administrative enforcement.<sup>93</sup>

However, this reasoning is flawed and unsupported by federal case law because no federal court has held that 28 U.S.C. § 2462 applied to judicial enforcement of RCRA civil penalties. The ALJ's decision was based on federal court decisions which applied section 2462 to the Clean Water Act, the Clean Air Act and some non-environmental statutes.<sup>94</sup> In the *Coors* decision, ALJ Nissen concluded that because the limitations period had been applied to the Clean Water Act, the federal courts would also apply the statute of limitations to RCRA.<sup>95</sup> Although this may eventually turn out to be the case, this situation has not yet occurred and the ALJ failed to recognize this fact in his opinion.

In *In re J.V. Peters & Co., Inc.*,<sup>96</sup> the Chief Judicial Officer (CJO), without holding that the limitations period applies to the EPA's administrative civil penalty assessment proceeding under RCRA, held that the "relation back" rule<sup>97</sup> precluded the use of the statute of limitations as a defense.<sup>98</sup> The "relation back" rule allows a plaintiff to amend his complaint to include other parties after the initial limitations period has run if the amended complaint contains the same cause of action as the original complaint.<sup>99</sup> The "relation back" rule requires that four conditions be met. First, the ba-

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92. *Id.* at 22.

93. *Id.* at 21.

94. *Id.* at 16.

95. *Id.* The ALJ in this case, although holding that 28 U.S.C. § 2462 applies to administratively assessed civil penalties under RCRA, held that the limitations period did not bar the present action. Since the limitations period did not begin to run against the claim until the violation was discovered, and not when the violation occurred, the action was rightfully brought within five years of discovery and, therefore, was not time barred. See *infra* part V.B. for an explanation of the discovery rule.

96. *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1990 WL 303851 (E.P.A.) (Aug. 7, 1990) (final decision).

97. FED. R. CIV. P. 15(c).

98. *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*4 (Aug. 7, 1990) (final decision).

99. FED. R. CIV. P. 15(c).

sic claim must have arisen out of the conduct set forth in the original pleading.<sup>100</sup> Second, the party to be brought in must have received notice so the party will not be prejudiced in maintaining or presenting a defense.<sup>101</sup> Third, the party must or should have known that but for a mistake concerning identity, the action would have been brought against them.<sup>102</sup> Finally, the second and third requirements must have been fulfilled within the prescribed limitations period, in this case five years.<sup>103</sup>

In *In re J.V. Peters*, the EPA found numerous violations during an inspection in December 1980.<sup>104</sup> When the violations were found, the company was a partnership. Two weeks later, the partnership dissolved and transferred all its assets to the J.V. Peters Company, Inc.<sup>105</sup> EPA filed suit against the corporation on April 17, 1981.<sup>106</sup> On May 12, 1981, the corporation admitted to most of the RCRA violations that the EPA had filed against it.<sup>107</sup> In 1984, however, the corporation moved to dismiss the actions on the grounds that the corporation did not exist when the violations occurred and, therefore, claimed it was not liable for such violations.<sup>108</sup>

In 1985, the Presiding Officer held that the corporation, the partnership, and Shillman were jointly and severally liable.<sup>109</sup> On appeal, the CJO reversed the Presiding Officer's joint and several liability finding on the grounds that the partnership and Shillman were not parties in the proceeding and the corporation was not a proper party to these proceedings.<sup>110</sup> The CJO granted the corporation's motion to dismiss

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*1 (Aug. 7, 1990) (final decision).

105. *Id.* at \*1.

106. *Id.* at \*2.

107. *Id.*

108. *Id.*

109. *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1985 WL 57141 (E.P.A.), at \*15 (May 15, 1985) (initial decision).

110. *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1986 WL 69028 (E.P.A.),

and remanded the decision back to the Presiding Officer.<sup>111</sup> The CJO, however, allowed the EPA to amend its complaint to include both Shillman and the partnership as defendants.<sup>112</sup> The EPA's amended complaint included the corporation, the partnership, and Shillman and its allegations were based on the Presiding Officer's previous ruling on May 8, 1985.<sup>113</sup> The defendants denied the violations and asserted the general federal five-year statute of limitations on civil penalties as an affirmative defense to the charges.<sup>114</sup>

In 1988, the Presiding Officer held that the statute of limitations did not apply to RCRA enforcement actions and that Shillman and the partnership were liable jointly and severally, as owners and operators, for \$25,000 dollars in civil penalties.<sup>115</sup> The parties appealed the Presiding Officer's ruling and again asserted the statute of limitations as an affirmative defense.<sup>116</sup> The final decision held that even assuming that the statute of limitations does apply,<sup>117</sup> it does not apply in this

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at \*6 (May 9, 1986) (remand of the Presiding Officer's joint and several liability holding on May 15, 1985).

111. *Id.*

112. *Id.*

113. See *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1988 WL 236321 (E.P.A.) (Sept. 26, 1988) (initial decision, order on remand); see also *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*2 (Aug. 7, 1990) (final decision).

114. See *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1988 WL 236321 (E.P.A.), at \*5 (Sept. 26, 1988) (initial decision, order on remand); see also *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*2 (Aug. 7, 1990) (final decision).

115. See *In re J.V. Peters & Co.*, RCRA No. V-W-81-R-75, 1988 WL 236321 (E.P.A.), at \*5, 6 (Sept. 26, 1988) (initial decision, order on remand); see also *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*2 (Aug. 7, 1990) (final decision).

116. *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*2 (Aug. 7, 1990) (final decision).

117. *In re J.V. Peters & Co.*, No. RCRA V-W-81-R-75, 1990 WL 303851 (E.P.A.), at \*4 (Aug. 7, 1990) (final decision). The final decision did not address whether the limitations period contained in 28 U.S.C. § 2462 applied to administrative assessment of civil penalties under RCRA. It side-stepped the issue by saying that even if it applies in other situations it does not apply to the case at bar since the present action relates back to the previous action. This may suggest that the limitations period does apply since it would have been easier for the ALJ to hold that the limitations period does not apply. It may also suggest that the courts and the ALJ's will side-step the



case due to the "relation back" rule.<sup>118</sup> This decision, however, did not indicate that the statute of limitations applies. It is interesting to note that the Presiding Officer held that the limitations period does not extend to the RCRA administrative civil penalty actions, while the CJO was not willing to go that far. Instead, the CJO side-stepped the issue and used the "relation back" rule contained in the Federal Rules of Civil Procedure to prevent the limitations period from barring the civil penalty action.<sup>119</sup>

## 2. The Toxic Substance Control Act

### a. *In re Minnesota Mining & Mfg. Co. (3M Co.)*

The limitations period contained in 28 U.S.C. § 2462 has not been uniformly applied to administrative enforcement actions for civil penalties under the Toxic Substances Control Act (TSCA).<sup>120</sup> In *3M Co.*, ALJ Frazier, III held that the federal limitations period was not applicable to administrative assessment of civil penalties under TSCA.<sup>121</sup> The Chief Judi-

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issue until it absolutely must be decided.

118. *Id.*

119. *Id.*

120. Administrative decisions have held that 28 U.S.C. § 2462 does not apply to administrative assessment of TSCA civil penalties. See *In re Minnesota Mining & Manufacturing Co. (3M Co.)*, No. TSCA-88-H-06, 1989 WL 253236, at \*5 (E.P.A.) (Aug. 7, 1989), *aff'd*, 1992 WL 92374, at \*10 (E.P.A.) (Feb. 28, 1992); *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*12 (E.P.A.) (Apr. 7, 1989); *In re Bethlehem Steel Corp.*, No. TSCA-III-322, 1992 WL 118796, at \*1 (E.P.A.) (May 12, 1992); *In re CWM Chemical Services*, No. II TSCA-PCB-91-0213, 1992 WL 90321, at \*1 (E.P.A.) (Mar. 23, 1992).

Some administrative decisions have held that 28 U.S.C. § 2462 does apply to the administrative assessment of TSCA civil penalties. See *In re Dist. of Columbia (Lorton Prison Facility)*, No. TSCA-III-439, 1991 WL 209857, at \*10 (E.P.A.) (Aug. 30, 1991); *In re Commonwealth Edison Co.*, No. TSCA-V-C-133, 1983 TSCA LEXIS 14, at \*6 (E.P.A.) (Sept. 19, 1983). These decisions, however, may have been superseded by the Chief Judicial Officer's opinion in *In re 3M Co.*, No. TSCA-88-H-06, 1992 WL 92374, at \*10 (E.P.A.) (Feb. 28, 1992), and the EPA's Environmental Appeals Board's decision in *In re CWM Chemical Services*, No. II TSCA-PCB-91-0213, 1992 WL 90321, at \*1 (E.P.A.) (Mar. 23, 1992). Currently these decisions are on appeal to the D.C. Circuit. See *infra* notes 163, 165 and accompanying text.

121. *In re 3M Co.*, No. TSCA-88-H-06, 1989 WL 253236, at \*5 (E.P.A.) (Aug. 7, 1989), *aff'd*, 1992 WL 92374, at \*10 (E.P.A.) (Feb. 28, 1992).

cial Officer affirmed ALJ Frazier's holding.<sup>122</sup> The ALJ's decision held that the language, "an action . . . or proceeding for the enforcement of any civil . . . penalty," contained in 28 U.S.C. § 2462 was applicable only after the penalty had been assessed by the administrative law court.<sup>123</sup> In other words, the only purpose of the limitations period was to force the EPA to collect the assessed penalty within five years of its assessment or its collection would be barred.

ALJ Frazier's decision distinguished between "enforcement" of a civil penalty and an "assessment" of a civil penalty.<sup>124</sup> The *3M Co.* decision was based on the District Court of New Jersey's holding in *United States v. Noble Oil Co., Inc. (N.O.C.)*.<sup>125</sup> This is the only federal court decision regarding the applicability of the limitations period to TSCA civil penalties.<sup>126</sup> In *N.O.C.*, the court held that 28 U.S.C. § 2462 did apply to an enforcement action for the previously assessed civil penalty under section 16(a)(4) of TSCA.<sup>127</sup> The limitations period, however, did not bar the EPA's action because it had been filed within five years of the agency's assessment of the civil penalty.<sup>128</sup> The court did state that "section 2462 must be applied separately to both the assessment and the enforcement of TOSCA penalties."<sup>129</sup>

In the *N.O.C.* case, the defendant's TSCA violations occurred, and the EPA became aware of the violations, in 1980.<sup>130</sup> The EPA brought an administrative penalty action in 1981 and an administrative civil penalty was assessed in

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122. See *In re 3M Co.*, No. TSCA-88-H-06, 1992 WL 92374, at \*10 (E.P.A.) (Feb. 28, 1992).

123. *In re 3M Co.*, No. TSCA-88-H-06, 1989 WL 253236, at \*5 (E.P.A.) (Aug. 7, 1989), *aff'd*, 1992 WL 92374, at \*10 (E.P.A.) (Feb. 28, 1992).

124. *Id.*

125. 28 Env't Rep. Cas. (BNA) 1460 (D.N.J. Oct. 14, 1988).

126. *Id.* The issue came close to being resolved by the D.C. Circuit in *Rollins Envtl. Serv., Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991). *Rollins* argued that the complaint was barred by the statute of limitations, but because *Rollins* failed to file an administrative appeal of the ALJ's finding that the limitations period does not apply, the court refused to consider the argument. *Rollins*, 937 F.2d at 652, n.1.

127. *N.O.C.*, 28 Env't Rep. Cas. (BNA) at 1467-68.

128. *Id.*

129. *Id.*

130. *Id.* at 1461.

1982.<sup>131</sup> The defendant appealed and finally exhausted its appeals on June 26, 1986.<sup>132</sup> The EPA commenced a proceeding to collect the administratively assessed civil penalty on August 31, 1987.<sup>133</sup> The defendant claimed that the limitations period began to run on the date that the violations occurred and, therefore, the EPA's action was time barred by 28 U.S.C. § 2462.<sup>134</sup> The EPA claimed that the limitations period only applied after the penalty was assessed at the administrative level.<sup>135</sup>

The only issue that the court was required to decide in *N.O.C.* was whether the EPA's judicial enforcement action was time barred by 28 U.S.C. § 2462. The court was not required to decide whether the limitations period applied to the EPA's administrative penalty assessment proceedings. Therefore, the court's only holdings were: (1) 28 U.S.C. § 2462 applied to judicial enforcement of an administratively assessed penalty; (2) since the agency's assessment of the civil penalty became final on June 26, 1986, and the enforcement action was filed on August 31, 1987, the action was timely, and not barred by 28 U.S.C. § 2462.<sup>136</sup> The court's opinion that 28 U.S.C. § 2462 also applied to the administrative assessment phase has been considered dicta.<sup>137</sup>

Both decisions, *3M Co.* and *N.O.C.*, relied on the reasoning of the First Circuit in *United States v. Meyer*.<sup>138</sup> In the

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131. *Id.*

132. *Id.* The defendant appealed to the United States Supreme Court and was denied certiorari on June 24, 1986. *Id.* The Third Circuit reissued its affirming judgment order on June 26, 1986, thereby exhausting defendant's appeals. *Id.*

133. *Id.*

134. *Id.* at 1464.

135. *Id.*

136. *Id.*

137. *In re 3M Co.*, TSCA-88-H-06, 1989 WL 253236, at \*13 (E.P.A.) (Aug. 7, 1989), *aff'd*, 1992 WL 92374, at \*10; *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*10 (E.P.A.) (Apr. 7, 1989).

138. *United States v. Meyer*, 808 F.2d 912, 914 (1st Cir. 1987). Where administrative assessment of a civil penalty is brought within the five-year limitations period and the penalty assessed at the administrative level is final agency action, 28 U.S.C. § 2462 affords the agency five additional years to commence an action in federal court to collect the assessed penalty. *Id.* at 914.

This reasoning may also be flawed because the parties had stipulated that 28

*Meyer* case, the defendant had violated the Export Administration Act's anti-boycott regulations.<sup>139</sup> The Department of Commerce brought an administrative penalty action against the defendant and the ALJ imposed a \$5,000 civil penalty.<sup>140</sup> When the defendant refused to pay the fine the Government brought an enforcement action in the District Court of Massachusetts to recover the penalty.<sup>141</sup> The district court held that the action was time barred by 28 U.S.C. § 2462 because the limitations period began to run on the date that the violations had occurred.<sup>142</sup> The First Circuit reversed this holding and held that the limitations period commenced after the administrative assessment of the civil penalty became final.<sup>143</sup>

b. *In re Tremco, Inc.*

In another TSCA administrative hearing, *In re Tremco, Inc.*, a similar result occurred.<sup>144</sup> ALJ Vanderheyden held that the EPA's assessment of civil penalties for violations of TSCA is a two-stage process.<sup>145</sup> The first stage is the administrative assessment of the civil penalty.<sup>146</sup> The second stage is the judicial enforcement of the administratively assessed civil penalty.<sup>147</sup> The ALJ based this distinction on the differences between the federal district court's enforcement powers and those of the agency.<sup>148</sup> A district court's powers are "self-executing" and enforced by the federal marshal's office.<sup>149</sup> Ad-

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U.S.C. § 2462 would have applied to the administrative assessment of a civil penalty. *Id.* Since the administrative penalty assessment proceeding was brought within the five-year limitations period this was not an issue the court needed to decide. *Id.* The court's opinion that the limitations period applied to the administrative assessment proceeding was, therefore, dicta.

139. *Id.* at 913.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 914.

144. *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*12 (E.P.A.) (Apr. 7, 1989).

145. *Id.* at \*5.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

ministrative decisions, however, are merely determinations that violations have occurred and require that the successful party go to the district court to obtain payment of the assessed civil penalty.<sup>150</sup>

In *In re Tremco, Inc.*,<sup>151</sup> ALJ Vanderheyden also criticized the *United States v. Noble Oil Co. (N.O.C.)*<sup>152</sup> opinion and held that this case was not dispositive of the TSCA limitations period question.<sup>153</sup> In *N.O.C.*, the court stated in its opinion that the limitations period contained in 28 U.S.C. § 2462 applied to the administrative assessment of TSCA civil penalties.<sup>154</sup> The ALJ criticized the *N.O.C.* opinion because it was not the court's holding, but was only dicta, since the court lacked jurisdiction to decide this issue.<sup>155</sup> Regardless, the ALJ held that the limitations period does not apply to administrative assessment of civil penalties for TSCA violations.<sup>156</sup>

ALJ Vanderheyden distinguished TSCA from RCRA and suggested the result would be different had the case been for enforcement of a RCRA civil penalty.<sup>157</sup> The main difference between RCRA and TSCA enforcement actions for civil penalties is that only RCRA enforcement actions may be brought by the EPA either administratively or judicially.<sup>158</sup> Under

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150. *Id.*

151. *Id.*

152. 28 Env't Rep. Cas. (BNA) 1460 (D.N.J. Oct. 14, 1988).

153. *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*10 (E.P.A.) (Apr. 7, 1989).

154. 28 Env't Rep. Cas. (BNA) 1460 (D.N.J. Oct. 14, 1988).

155. *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*10. The *N.O.C.* decision even stated that the court did not have jurisdiction to determine if 28 U.S.C. § 2462 applied to the administrative enforcement of the TSCA civil penalty, especially since the defendant did not assert any time bar to the EPA's assessment proceeding. *N.O.C.*, 28 Env't Rep. Cas. (BNA) at 1468 n.11.

156. *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at \*12 (E.P.A.) (Apr. 7, 1989).

157. *Id.* at \*13.

158. Section 3008 of RCRA states:

[W]henever on the basis of any information the Administrator determines that any person violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation

RCRA, enforcement of civil penalties can take place at either the administrative level<sup>159</sup> or in the district court in which the violation occurred.<sup>160</sup> Enforcement actions under TSCA must begin at the administrative level with the assessment of the civil penalty, thereafter proceeding to the district court for enforcement.<sup>161</sup> ALJ Vanderheyden sought to distinguish RCRA because, in another administrative decision he decided, *In re Waterville Industries*, the ALJ held that the statute of limitations contained in 28 U.S.C. § 2462 applied to the EPA's administrative assessment proceedings for civil penalties under section 3008 of RCRA.<sup>162</sup>

The distinction between TSCA and RCRA appears to be flawed. Neither statute contains a limitations period. The distinction drawn by ALJ Vanderheyden between mandatory administrative proceedings and optional judicial proceedings seems illogical. A company may be held liable for civil penalties under TSCA for violations occurring more than five years earlier, merely because the statute mandates that the action start at the administrative level, while RCRA actions for civil penalties, which may start in either forum, will be subject to the limitations provision contained in 28 U.S.C. § 2462.

The distinction between administrative assessment and judicial enforcement is also weak. Penalties under RCRA may be assessed administratively, yet may be subject to the statute of limitations under the *Coors* and *Waterville* decisions.<sup>163</sup> In either forum, if the violator refuses to pay a previously assessed civil penalty, the government will have to go to the dis-

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occurred for appropriate relief, including a temporary or permanent injunction.

RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) (1988) (emphasis added).

159. See 40 C.F.R. § 22.01(4) (1992); see also RIDGEWAY M. HALL, JR. ET AL., RCRA HAZARDOUS WASTES HANDBOOK, 10-8 (7th ed. 1987).

160. RCRA § 3008(a), 42 U.S.C. § 6928(a) (1988).

161. "A civil penalty for a violation of section 2614 of this title shall be assessed by the Administrator by an order made of the record after opportunity . . . for a hearing in accordance with section 554 of [this title] . . ." Toxic Substance Control Act (TSCA) § 16(a)(2)(A), 15 U.S.C. § 2615(a)(2)(A) (1988).

162. *In re Waterville Indus.*, No. RCRA-I-87-1086, 1988 RCRA LEXIS 20, at \*9-10 (June 23, 1988).

163. *Id.*; see also *supra* subpart IV.B.1.

strict court to enforce the penalty judgment. It may be easier to enforce the judicial penalty assessment but the distinction between the two forums is too weak to warrant different treatment for limitations purposes. The statute of limitations should be applied or not applied uniformly to administrative and judicial proceedings, since the goals and policies underlying the limitations period should remain the same at both levels.

c. The Future of TSCA Administrative Civil Penalties

The EPA's Environmental Appeals Board has issued two administrative decisions on the applicability of the limitations period to TSCA civil penalties since the CJO affirmed ALJ Frazier's holding in *3M Co.* that no limitations period applied to the administrative assessment of TSCA civil penalties in *3M Co.*<sup>164</sup> Both of these decisions reversed earlier holdings that the limitations period applied to both the administrative assessment of TSCA civil penalty and the enforcement of TSCA civil penalties in federal court. These decisions followed the holding enunciated in the *3M Co.* administrative decision.<sup>165</sup>

On March 27, 1992, 3M Company petitioned the Court of Appeals for the District of Columbia (D.C. Circuit) for judicial review of the administrative determination that no limitations period applies to TSCA civil penalties.<sup>166</sup> CWM Chemical Services and its parent companies, Chemical Waste Management, Inc., and Waste Management, Inc., have similarly asked the

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164. See *In re Bethlehem Steel Corp.*, No. TSCA-III-322, 1992 WL 118796, at \*1 (E.P.A.) (May 12, 1992) (in light of the *In re 3M Co.* decision, this appeal reversed the ALJ's holding that the five-year limitations period contained in 28 U.S.C. § 2462 applied to administrative assessment of civil penalties under TSCA); *In re CWM Chem. Serv., Inc.*, No. TSCA-PCB-91-0213, 1992 WL 90321, at \*1 (E.P.A.) (Mar. 23, 1992) (same); see also Chem. Reg. Daily (BNA) (Feb. 14, 1992) (discussion of original ALJ decision applying 28 U.S.C. § 2462 to TSCA enforcement actions).

165. See *supra* note 164; see also *infra* note 166.

166. Env'tl. L. Update (BNA) (June 24, 1992); see also 16 Chem. Reg. Rep. (BNA) 653 (current report) (June 26, 1992); Chem. Reg. Daily (BNA) (June 24, 1992).

D.C. Circuit to review the administrative ruling.<sup>167</sup> CWM requested that the D.C. Circuit combine its petition with the court's review of the *3M Co.* appeal.<sup>168</sup> The EPA filed a motion to dismiss these two appeals and opposed CWM's request to combine the two decisions.<sup>169</sup>

The limitations question should be decided under TSCA before it is under RCRA. To date, the D.C. Circuit had not issued an opinion in the *3M Co.* or *CWM* appeal. If the D.C. Circuit issues a decision, its decision could have an impact on another court's decision regarding the limitations period and RCRA civil penalties.

### C. Courts May Apply the Limitations Period to RCRA Civil Penalties

Should the courts hold that a limitations period applies to the enforcement of civil penalties under RCRA, courts must determine whether a state or federal limitations period is appropriate. Traditionally, when a federal statute does not contain a limitations period within its language, a state statute of limitations applies.<sup>170</sup> An exception to this general rule is made when national interests are at stake and application of a state limitations period would cause a lack of uniformity in the federal statute's enforcement, frustrate the federal statute's goals or interfere with the implementation of national policy. When such an exception is made, courts should adopt a limitations period from applicable federal law.<sup>171</sup> For example, federal courts have refused to apply a state statute of lim-

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167. See *supra* notes 164, 166. These parties face the potential liability of several million dollars. "In March of 1991, EPA charged CWM Chemical Services and other waste management firms and the General Motors Corp. with improper disposal of PCB-contaminated sludge. The combined proposed fine was \$35.4 million." *Env'tl. L. Update* (BNA) (June 24, 1992).

168. See *supra* notes 164, 166.

169. See *supra* notes 164, 166.

170. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); see also *supra* part III.B.1.

171. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74 (3d Cir. 1990); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 447-48 (D. Md. 1985); *Connecticut Fund For the Env't v. Job Plating Co.*, 623 F. Supp. 207, 212 (D. Conn. 1985).



itations under the Clean Water Act because the application of a state limitations period was found to frustrate the uniform enforcement of the Clean Water Act.<sup>172</sup>

RCRA, like the Clean Water Act, is a federal statute with national environmental policy concerns. RCRA is concerned with the national waste disposal problem facing our country today. If a limitations period applies to RCRA actions for civil penalties, the federal statute of limitations should apply. A state statute of limitations would frustrate RCRA's goals by causing non-uniform enforcement. Without uniformity in RCRA enforcement actions, some states may become pollution havens by virtue of having shorter limitations periods. The Circuit Court of Appeals for the Third Circuit, in *Powell Duffryn Terminals, Inc.*,<sup>173</sup> rejected the plaintiff's argument that since the states may enact stricter standards under the Clean Water Act than those set at the federal level and New Jersey did not have a limitations period for civil penalties, "the more stringent state procedural rule[s] should prevail."<sup>174</sup>

The federal courts will probably hold that the general federal five-year statute of limitations for civil penalties applies to RCRA civil penalty enforcement actions. The courts will likely reason that because the general federal five-year statute of limitations<sup>175</sup> has been applied to other environmental statutes that similarly lack a limitations period, it should also apply to RCRA civil penalties.<sup>176</sup> However, the fundamental differences between RCRA and the other environmental statutes to which the courts have applied 28 U.S.C. § 2462, in particular the Clean Water Act, may persuade the courts to hold that this limitations period should not apply to RCRA enforcement actions. Because RCRA regulates waste from the point it is generated, through its storage and dispo-

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172. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990). *See also* *Sierra Club v. Chevron U.S.A.*, 834 F.2d 1517 (9th Cir. 1987).

173. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990).

174. *Id.* at 73-74.

175. 28 U.S.C. § 2462 (1988).

176. *See supra* notes 75-84.

sal, and continues to monitor the disposal for up to thirty years,<sup>177</sup> a five-year limitations period is far too brief to adequately protect the environment from hazardous waste violations. The five-year limitations period may frustrate the intent of Congress to ensure the safe management, recycling, minimization, and disposal of hazardous wastes.<sup>178</sup> Limiting RCRA enforcement actions to five-years would unduly restrict the EPA's and the public's ability to adequately enforce RCRA and would run counter to the Congress's long-term regulatory intent.

However, a judicial finding that the limitations period applies to civil penalties under RCRA, does not end the inquiry. Plaintiffs may still argue that the running of the limitations period was tolled. A plaintiff, either the EPA or a citizens group, must determine when its cause of action has accrued and what events, if any, may have tolled<sup>179</sup> the running of the statute of limitations. Tolling addresses when the limitations period begins to run and what circumstances suspend the running of the statute of limitations.<sup>180</sup> Tolling theories that may suspend the running of a limitations period include fraudulent concealment, the discovery rule, and the continuous violations theory which will be discussed in detail in Part V below.

## V. Exemptions and Tolling Theories Regarding Statutes of Limitations

### A. The Continuous Violations Theory: An Exemption to the Statute of Limitations

When there is a continuous duty to perform an act, the limitations period does not apply when some portion of the

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177. See 40 C.F.R. § 264.117(a)(1) (1992).

178. RCRA § 1003(a)(4)-(6), 42 U.S.C § 6902(a)(4)-(6) (1988).

179. The term "toll" is defined as: "[t]o bar, defeat, or take away; thus, to toll the entry means to deny or take away the right of entry. To suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority." BLACK'S LAW DICTIONARY 1488 (6th ed. 1990). "To 'toll' a statute of limitations means to show facts which remove its bar of the action." 54 C.J.S. *Limitation of Actions* § 85 (1987).

180. *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978).

offense occurs within the limitations period. The continuous violations theory to the statute of limitations rests on the premise that the statute of limitations runs from each of a series of wrongful acts during the course of a continuing violation.<sup>181</sup> Under this theory, a cause of action accrues only after the occurrence of the last significant event necessary for the claim to be viable occurs.<sup>182</sup> Each time a plaintiff is injured by a defendant's act, a cause of action accrues, and the statute of limitations begins to run on that act.<sup>183</sup> Therefore, a plaintiff may only collect damages occurring within the limitations period.<sup>184</sup>

For example, assuming a five-year limitations period applies, if a continuous illegal act began seven years ago and the plaintiff filed the complaint for civil penalties today, the most the plaintiff could recover in the action is five years' worth of civil penalties. The defendant could raise the limitations defense to the first two years of violations.

In *United States v. SCM Corp.*, the district court of Maryland applied 28 U.S.C. § 2462 to an EPA action brought in 1985 against the corporation. The government's action for civil penalties resulted from violations of the Clean Air Act which occurred between August 7, 1977 and January 2, 1985. The United States filed its complaint in January 1985.<sup>185</sup> The court held that the EPA was still entitled to recover civil penalties for violations occurring from January 3, 1980, until the time it filed its complaint in January 1985.<sup>186</sup> Although the violations were continuous, occurring from 1977 until suit was brought in 1985, the district court only allowed recovery of the civil penalties for violations which occurred within the five-year time period of 28 U.S.C. § 2462 and barred recovery

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181. See *Ames v. Texaco, Inc.*, 568 F. Supp. 1317 (W.D. Mich. 1983); see also *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir. 1979).

182. *Mack Trucks, Inc. v. Bendix-Westinghouse Auto. Air Brake Co.*, 372 F.2d 18, 20 (3d Cir. 1966) (citing *Foley v. Pittsburgh Des Moines Co.*, 68 A.2d 517 (Pa. 1949)).

183. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

184. See *United States v. SCM Corp.*, 667 F. Supp. 1110, 1123 (D. Md. 1987).

185. *Id.*

186. *Id.*

of civil penalties for the time period between August 7, 1977 and January 1, 1980.<sup>187</sup>

However, in a recent criminal case a district court suggested that when a continuous offense occurs, a limitations period may not limit the government's prosecution of that offense as long as a portion of the offense falls within the limitations period.<sup>188</sup> In *United States v. White*,<sup>189</sup> the United States indicted the defendants for illegally storing, treating, and disposing of a hazardous waste without a permit. The defendants had stored rinseates from pesticide tanks in a large evaporation tank from 1982 to 1987 without a RCRA permit.<sup>190</sup> In 1987, the defendants applied these rinseates to land without a hazardous waste disposal permit.<sup>191</sup> The government indicted the defendants in 1990, nearly eight years after the alleged illegal activity had begun.<sup>192</sup> The defendants filed a motion to dismiss in which they raised a statute of limitations defense.<sup>193</sup> The defendants argued that even if this activity was a continuous offense, which they did not concede, they could not be prosecuted for the portions of the offense that occurred more than five years before the filing of the indictment.<sup>194</sup> The court disagreed and concluded that the defendants' actions were continuous offenses.<sup>195</sup> The court further held that RCRA made one act criminal and provided for increased penalties based upon the length of the illegal activity.<sup>196</sup> The court dismissed the defendants' motion to dismiss

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187. *Id.*

188. *United States v. White*, 766 F. Supp. 873, 886-87 (E.D. Wash. 1991).

189. *Id.*

190. *Id.* at 877.

191. *Id.*

192. *Id.* at 886.

193. *Id.*; see also 18 U.S.C. § 3282 (1988). The limitations provision states: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." *Id.*

194. *United States v. White*, 766 F. Supp. at 887.

195. *Id.*

196. *Id.* This holding is puzzling because if RCRA "makes one act criminal," the question is what was that one act. If it was the original illegal storage beginning in 1982, then the five-year limitations statute should have barred the government's en-

and its statute of limitations claim.<sup>197</sup>

This decision is interesting in that it suggests that the government may actually be able to recover criminal fines for almost eight years of violations even though a federal statute of limitations exists that could potentially limit the government's case to five years.<sup>198</sup> On the other hand, this court did not consider the issue of criminal fines and, even though the limitations period contained in 18 U.S.C. § 3282 did not bar prosecution, the limitations period contained in 28 U.S.C. § 2462 may still bar the enforcement of more than five years of civil fines under RCRA.<sup>199</sup>

The *United States v. White* case may be distinguishable from a civil penalty action because *White* only involved a motion to dismiss a criminal prosecution using the statute of limitations. However, when a crime is a continuous one, and Congress intended to treat the crime as continuous, the statute of limitations will "not begin to run until the continuous commitment of the crime ceases."<sup>200</sup> A court should also apply this reasoning to RCRA violations that are continuous in nature. The government, a state, or a citizen group can then use this theory to recover more than five years worth of civil penalty for continuous RCRA violations.

Allowing recovery of more than five years worth of civil penalties will solve many of the problems associated with applying a five-year limitations period. However, it is unclear

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tire prosecution for the offense.

197. *Id.*

198. See 18 U.S.C. § 3282 (1988). This case, however, did not interpret the limitations period contained in 28 U.S.C. § 2462, nor did it consider the issue of criminal fines or civil penalties. The court was only determining if 18 U.S.C. § 3282, the five-year statute of limitations for criminal offenses, barred the government's prosecution of the defendants. The court did suggest, however, that the government may be entitled to pursue violations nearly eight years old.

199. This should have been an important consideration of the court's decision because criminal fines are the primary enforcement tool used in environmental prosecutions.

200. 22 C.J.S. *Criminal Law* § 200 (1989); see also *United States v. Eklund*, 551 F. Supp. 964, 969 (S.D. Iowa 1982) (when dealing with a continuous offense, the limitations period will not begin to run until the offense ceases); *Toussie v. United States*, 397 U.S. 112, 115 (1970) (the Congress must have clearly intended to treat the offense as a continuous offense to bar the running of the limitations period).

whether a court will decide the issue in this manner. As discussed above, the *United State v. SCM Corp.* decision suggests that a court may limit the action to five-years. The *SCM* decision, however, involved air violations resulting from separate and discrete stack violations. In *White* the continuous illegal storage was a single prolonged act. This distinction between the two cases may also explain their different interpretations of the limitations periods. These distinctions may also persuade a court to allow the EPA to recover more than five years worth of civil penalties for hazardous waste storage and disposal violations.

Another potential problem with using the statute of limitations and the continuous violations theory is that a potential RCRA violator will not report its RCRA violations. It is likely that the RCRA violator would have illegally bypassed the hazardous waste manifest provisions and the resulting environmental damage is unlikely to be discovered until long after the five-year limitations period expires. A further problem arises if a court should hold that this illegal activity constitutes an illegal disposal of hazardous waste. Should a court hold that the act was an illegal disposal of hazardous waste it could also hold that this is a completed act and, therefore, no continuous violation exists.<sup>201</sup>

The question then becomes: "when did the limitations period begin to run?". Under the *United States v. SCM* analysis, the continuous violations theory does not toll the running of the limitations period, but only starts a new limitations period for each new offense.<sup>202</sup> Plaintiffs alleging a continuous violation would then only be able to recover a maximum of five years worth of civil penalties. Possible assessment of civil penalties for only a five-year period may not be much of a deterrent since possible violators may take the chance that their violation will go undetected during the five-year time period and the limitations period in 28 U.S.C. § 2462 would then relieve them of liability for civil penalties. This could occur if a court finds that the disposal was a com-

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201. *But see infra* part V.B. (discovery rule section).

202. *United States v. SCM Corp.*, 667 F. Supp. at 1123.

pleted act, and not a continuous violation, and that the limitations period began to run when the violation occurred.<sup>203</sup>

This would be a substantial risk for a violator to take because the daily civil penalty for a RCRA violation is \$25,000 per day, per violation.<sup>204</sup> However, RCRA's main deterrent provision against violations, civil penalties, may not work if the limitations period limits or bars nearly all civil penalty actions where the government fails to bring its action within five years of the violation. Considering the high costs of hazardous waste disposal, this may create an incentive to violate the act and generators, transporters, or TSD facilities may gamble that the government will not bring its action within the five-year limitations period.

### 1. The Storage versus Disposal Distinction and the Continuous Violations Theory

One court that has recognized this problem created a unique solution. In *DeHart v. State*,<sup>205</sup> the court found the defendant could be liable for civil and criminal penalties for hazardous wastes placed in and on the ground in 1977 before the 1980 RCRA storage permit requirements became effective.<sup>206</sup> Hazardous waste listings are retroactive, and once the EPA determines the waste to be hazardous by regulation, its determination applies regardless of when the waste was disposed.<sup>207</sup> Thus, even if wastes are not classified as hazardous

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203. *But see infra* part IV.B. (discovery rule section). This, however, may not occur because the discovery rule may toll the running of the statute of limitations. Also, under the Clean Water Act, the limitations period does not begin to run until the discharger files its Discharge Monitoring Reports. If we apply this reasoning to RCRA, the limitations period should not begin to run until the generator, transporter, and TSD facility completes the manifest requirements. Similar to a DMR, the manifest would give the public adequate notice and opportunity to discover a violation so they can bring a citizen suit against the violator.

204. "Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation." RCRA § 3008, 42 U.S.C. § 6928 (1988).

205. *DeHart v. State*, 471 N.E.2d 312 (Ind. Ct. App. 1984), *reh'g denied* Jan. 15, 1985.

206. *Id.* at 314.

207. *United States v. Conservation Chem. Co.*, 733 F. Supp. 1215, 1223 (N.D.

when placed into a storage unit, all such wastes meeting the hazardous waste description will be deemed hazardous no matter when they were disposed.<sup>208</sup>

Similarly, placing waste in storage without a permit, before the permit requirements became effective, does not constitute a violation. Once the permit requirements become effective, stored hazardous waste is subject to those requirements. Failure to obtain a permit becomes a violation as of the date the regulations come into effect. Each day a permit is not obtained is a separate violation of RCRA.

In *DeHart*, the defendant was found liable even though the hazardous waste was placed in and above the ground in 1977, before the hazardous waste storage regulations were promulgated. The court found that placing hazardous waste in and above the ground did not constitute disposal<sup>209</sup> of waste but constituted storage<sup>210</sup> of hazardous waste without a permit, which violated RCRA storage regulations.<sup>211</sup>

This is a major legal distinction since what traditionally could have been viewed as disposal before the enactment of

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Ind. 1989). Most of RCRA only contemplates prospective application, but "current or continuing violations may be addressed despite the fact that they may have originated in activities occurring before the effective date of the statute." *Id.*; see also *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 739-40 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987); *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981).

208. *Conservation Chem. Co.*, 733 F. Supp. at 1223.

209. *DeHart*, 471 N.E.2d at 314. EPA defines "disposal" as: the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

40 C.F.R. § 260.10 (1992) (note that this definition is the same definition that is found in RCRA); see also RCRA § 1004(3), 42 U.S.C. § 6903(3) (1988).

210. EPA defines "storage" as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." 40 C.F.R. § 260.10 (1992).

Congress defined storage to "mean the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste." RCRA § 1004(33), 42 U.S.C. § 6903(33) (1988).

211. *DeHart*, 471 N.E.2d at 315; 40 C.F.R. § 262.34(a) (1991) (a generator may accumulate hazardous waste on site for ninety days or less without a permit, but after ninety days he must obtain a permit to store the waste).



RCRA was seen as storage by this court.<sup>212</sup> In essence, the court held that maintaining hazardous waste in a condition that does not constitute "safe and proper disposal" will be considered an illegal storage of hazardous waste without a permit and a continuous violation.

Under the *DeHart* reading of the statute, all storage by the defendant after 1980 was a violation of the permit requirements of RCRA. In *DeHart*, the court found that illegal storage was a continuous violation, and defendant could be liable for civil and criminal penalties from the date the permit requirements became effective until defendant obtained a permit.<sup>213</sup> Since the court construed the defendant's actions as storage and not disposal, the defendant had a continuous duty to act by obtaining a storage permit. Thus, the action was brought within the five-year limitations period.<sup>214</sup> The court did not have to rule that the statute of limitations contained in 28 U.S.C. § 2462 applied to RCRA actions for civil penalties since the storage regulations were not more than five years old when the state filed its complaint. A continuous violation finding would act to lessen the rigid effect a five-year limitations period could have on enforcement of RCRA civil penalties.

In *Lykins v. Westinghouse Electric Corp.*, a federal district court similarly refused to dismiss a RCRA enforcement action brought by Kentucky landowners and residents when defendant's violations were ongoing.<sup>215</sup> RCRA requirements apply to ongoing waste disposal practices regardless of when

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212. The brief facts of this case suggest that the court may have accepted the defendant's argument that the waste was disposed of and abandoned before the RCRA regulations were issued and, therefore, constituted a completed act of disposal. Since RCRA does not apply retroactively like CERCLA, this would have dismissed the RCRA claim. The court, however, seized upon the facts that there were substantial amounts of damaged and deteriorated barrels in the soil and standing around the site. The court held that the distinction between the definition of "disposal" and "storage" was intended to prevent "the stockpiling of huge quantities of dangerous material [and] then abandoning . . ." it. *DeHart*, 471 N.E.2d at 315.

213. *Id.*

214. *Id.*

215. 27 Env't Rep. Cas. (BNA) 1590, 1597-98 (E.D. Ky. Feb. 29, 1988).

the disposal began.<sup>216</sup>

A later case, *United States v. Conservation Chemical Co. of Illinois*,<sup>217</sup> also followed the *DeHart* reasoning and held that "the fact that no material was placed in certain basins after the effective date of the [storage] regulations [did] not, in itself, absolve defendant of liability . . ." for the hazardous waste still contained in the basin after the regulations became effective.<sup>218</sup> The determination of whether the waste had been disposed of or was being stored was not an issue in the proceeding, yet the court felt it was important enough to discuss "because the issue will ultimately need to be resolved . . ."<sup>219</sup> Thus, this court has indicated that the fact that no hazardous waste was placed in the land disposal units since the permit regulations became effective and the fact that the site was also an inactive hazardous waste site, was not dispositive of the storage versus disposal issue. Abandonment or inactivity will not automatically constitute a "disposal" of hazardous waste, but may constitute an illegal "storage" of hazardous waste.<sup>220</sup>

It remains to be seen how far other federal courts will go with the distinction between "disposal" and "storage." If other courts follow the same line of reasoning, an owner or operator of a hazardous waste TSD facility that accepted hazardous waste and "stored" it at the facility before the 1980 permit requirements could be subjected to a civil penalty enforcement action for his illegal "storage" without a permit after 1980. This would constitute a continuous violation subjecting the defendant to liability for at least five years of civil penalties under the reasoning of *DeHart*, *Conservation Chemical Co.*, and the continuous duty to act theory.<sup>221</sup>

Under the continuous violation theory, coupled with the storage versus disposal distinction, a disposal facility may be found liable for the illegal storage of waste even when the waste was allegedly disposed of prior to the promulgation of

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216. *Id.* at 1597.

217. 733 F. Supp. 1215 (N.D. Ind. 1989).

218. *Id.* at 1223.

219. *Id.*

220. *Id.*

221. *DeHart*, 471 N.E.2d 315.

the RCRA hazardous waste storage and disposal regulations. Although waste was not considered hazardous waste at the time it was allegedly disposed, it may later be deemed a "storage" of waste without a permit.<sup>222</sup> Under this scenario, the owner or operator of the "storage" facility would then be subject to potential liability for civil penalties for a continuous violation of the storage permit requirements of RCRA.<sup>223</sup>

## 2. A Continuous Unlawful Act versus Continuous Ill-Effects

If a court finds that the activity in *DeHart* and *Conservation Chemical Co.* was a disposal that had ended, the statute of limitations, if applicable, might bar the EPA's, a state's or a citizen's enforcement suit for civil penalties.<sup>224</sup> It is likely that the disposal will be considered a single violation producing continued ill effects rather than a continuous violation of the RCRA requirements.<sup>225</sup> However, a defendant may still be subject to liability if the hazardous waste begins to leak. Any leakage from a container is defined as a disposal. Therefore, as each container of hazardous waste begins to leak, a new violation occurs.

A continuous unlawful act resulting from a continuing violation, not the continued ill-effects from the original violation,<sup>226</sup> tolls the running of a statute of limitations under a

222. See *DeHart*, 471 N.E.2d at 314.

223. See *id.* at 312; *Conservation Chem. Co.*, 733 F. Supp. 1215.

224. In *DeHart* this might have been the case because the suit was commenced more than five years after the hazardous waste had been placed into the ground. *DeHart*, 471 N.E.2d at 313.

225. See *Ward v. Caulk*, 650 F.2d 1114 (9th Cir. 1975). The disposal would be seen as a continued ill effect of the original illegal act of disposal on which the limitations period may have run. If the violation was storage without a permit, then each day of operation without a permit is, in and of itself, a separate and new violation, or a continuous violation of the RCRA permit requirements on which a new limitations period begins.

The *DeHart* court hinted that had this been disposal, it arguably could have been seen as a completed act before the hazardous waste regulations were in effect. *DeHart*, 471 N.E.2d at 315. The court then would have found differently, since RCRA is not applied retroactively like CERCLA.

226. *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *Collins v. United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975). In *Ward*, the court held that the plain-

continuous violations theory.<sup>227</sup> This is the main reason why the court in *DeHart* found a continuous storage in violation of RCRA. The continuous unlawful act in *DeHart* was the storage of hazardous waste without a permit. In short, each day this unpermitted storage of hazardous waste continued, a new violation occurred and a new statute of limitations period began for each of the new violations.

a. The "Leaking" Exception

Improper disposal of hazardous waste has deleterious effects on the environment including contamination of the air, the groundwater, and nearby bodies of water. Under a strict interpretation of the continuous violation theory, these continuing ill-effects resulting from the improper disposal of hazardous waste would not constitute a continuous unlawful act under a continuous violation theory. However, in *United States v. Hardage*,<sup>228</sup> the court held that leaking waste from the defendant's disposal site constituted a disposal of hazardous waste within the meaning of the statute.<sup>229</sup> The fact that

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tiff's action against his employer for denying his promotion on racial grounds in violation of the Civil Rights Act was time barred by the statute of limitations because his continuous unemployment was not a continuous violation of the Act. The court held that the plaintiff had brought the suit after the limitations period had expired because the limitations period had begun to run at the time when the plaintiff had been wrongfully fired. *Ward*, 650 F.2d at 1147.

227. *United States v. Advance Mach. Co.*, 547 F. Supp. 1085 (D. Minn. 1982). A defendant's failure to comply with the mandatory hazard reporting requirements of the Consumer Protection Safety Act was held to be a continuous violation which barred the running of the statute of limitations. In this case, the court held that the statute of limitations would not have started running until the report was filed or the manufacturer acquired knowledge that the Government was adequately informed. *Id.* at 1091.

228. *United States v. Hardage*, 18 Env't Rep. Cas. (BNA) 1687 (W.D. Okla. Dec. 13, 1982).

229. *Id.* at 1695. The statutory definition of "disposal" is:

the discharge, deposit, injection, dumping, *spilling*, *leaking* or placing of any solid waste or hazardous waste into or onto any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

RCRA § 1004(3), 42 U.S.C. § 6903(3) (1988) (emphasis added); *see also supra* note 209 (EPA regulatory definition of "disposal").

this case involved an interpretation of the statutory definition and not the regulatory definition of "disposal" should not make much of a difference, though, since the EPA's regulatory definition of "disposal" is identical to the statutory definition.<sup>230</sup> Therefore, leakage of a previously disposed hazardous waste, in theory, can constitute a second disposal, even though the material was undisturbed after the initial disposal. Arguably, this second disposal would also be a second violation if the owner of the site did not have a permit for the initial disposal.

In *United States v. Conservation Chemical Co.*,<sup>231</sup> the court held that the migration of hazardous wastes from their initial disposal site was, in and of itself, a disposal of hazardous waste under RCRA. A disposal occurs "not only when solid waste or hazardous waste is first deposited, dumped, spilled or placed onto or into the ground or water, but also when such wastes migrate from their initial location."<sup>232</sup>

The holdings in *Conservation Chemical Co.*<sup>233</sup> and *Hardage*<sup>234</sup> can be used to overcome the barrier imposed by the continuous ill-effects restriction<sup>235</sup> to the continuous violation theory. The *Hardage* and the *Conservation Chemical Co.* decisions were both "imminent and substantial" actions and not penalty actions. However, it may be argued that since the regulatory and statutory definition of disposal are identical, a leaking container is an illegal disposal without a permit. Thus, an owner or operator of a leaking hazardous waste disposal site, who prior to the site's leaking was not subjected to civil penalties by reason of the statute of limitations, may now be subject to civil penalties of up to \$25,000 per day, per violation, for the illegal "disposal" of hazardous waste if a plaintiff

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230. Compare RCRA § 1004(3), 42 U.S.C. § 6903(3) (1988) and 40 C.F.R. § 260.10 (1991); see *supra* notes 209 (regulatory definition of "disposal") and 229 (statutory definition of "disposal").

231. 619 F. Supp. 162 (W.D. Mo. 1985).

232. *Id.* at 200.

233. *Id.*

234. *United States v. Hardage*, 18 Env't. Rep. Cas. (BNA) 1687 (W.D. Okla. 1982).

235. *Id.*

brings a civil penalty enforcement action for an illegal disposal of a hazardous waste without a permit.

#### B. Discovery Rule Applied to Toll the Statute of Limitations

The statute of limitations typically begins to run when the act which gives rise to the violation occurred.<sup>236</sup> The discovery rule, as applied to fraudulent concealment of wrongdoing, is one exception to the general rule that the limitations period accrues on the day of the alleged wrong.<sup>237</sup> Where plaintiff's ignorance of a cause of action is the result of the defendant's conduct and not the result of the plaintiff's "neglect or stupidity", the statute of limitations will not run to the benefit of the wrongdoer.<sup>238</sup> The discovery rule has also been called the "blameless ignorance doctrine".<sup>239</sup> The statute of limitations begins to run when the plaintiff discovers or should have discovered, all the facts necessary to determine that there was an invasion of his rights that would support a cause of action.<sup>240</sup>

Under the Clean Water Act (CWA),<sup>241</sup> the statute of limitations for civil penalties<sup>242</sup> begins to run when the manufacturer files its Discharge Monitoring Reports (DMRs)<sup>243</sup> with the EPA and not when the permit violation occurs.<sup>244</sup> In *Si-*

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236. *United States v. Core Lab.*, 759 F.2d 480, 482 (5th Cir. 1985).

237. 51 AM. JUR. 2D *Limitations of Actions* § 146 (1970).

238. *Id.*

239. *Id.*

240. 51 AM. JUR. 2D *Limitations of Actions* § 146 (1970 & Supp. 1992). Generally a cause of action accrues when the plaintiff knew or should have known that a violation of his rights has occurred. *DelCostello v. International Bhd. of Teamsters*, 588 F. Supp. 902, 908 (D. Md. 1984); *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1985).

241. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988).

242. 28 U.S.C. § 2462 (1988).

243. CWA § 308, 33 U.S.C. § 1318(a) (1988). Under the Clean Water Act, a discharger of any pollutant from a point source into a navigable water of the United States is required to file DMRs which state whether the discharger has complied with his permit conditions under the Act. A violation of the permit is to be reported immediately to the EPA. *Id.*; see also 40 C.F.R. § 122.41(j) (1992).

244. *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 288 (N.D.N.Y. 1986); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d Cir. 1990). See, e.g., *United States v.*

*erra Club v. Union Oil Co.*,<sup>245</sup> for example, the court found that the action brought under the CWA<sup>246</sup> was time-barred by the statute of limitations because the Sierra Club knew or should have known of the violations resulting in the cause of action prior to the expiration of the statute of limitations.<sup>247</sup>

### 1. Fraudulent Concealment

The trend of decisions support the general rule:

that [when] a party against whom a cause of action has accrued in favor of another prevents such other, by actual fraudulent concealment, from obtaining knowledge thereof, or the fraud is of such a character as to conceal itself, the statute of limitations will begin to run from the time the right of action is discovered or by the exercise of ordinary diligence might have been discovered.<sup>248</sup>

Furthermore, "[e]quity reads the doctrine of fraudulent concealment into every statute of limitations."<sup>249</sup>

The plaintiff must meet three prerequisites for pleading a claim of fraudulent concealment: "(1) wrongful concealment of their actions by the defendants, (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's [exercise of] due diligence until discovery of the facts."<sup>250</sup>

Fraudulent concealment does not necessarily result from a defendant's silence on a cause of action brought against him, particularly when the defendant owes no legal duty to the

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Advanced Mach. Co., 547 F. Supp. 1085, 1091 (D. Minn. 1982) (under the Consumer Product Safety Act, the statute of limitations was tolled when the defendant failed to make a timely report of his violation as required by the Act).

245. 813 F.2d 1480 (9th Cir. 1987).

246. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988).

247. *Sierra Club*, 813 F.2d at 1493.

248. 51 AM. JUR. 2D *Limitations of Actions* § 147 (1970).

249. *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1036 (N.D. Ohio 1981) (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946)).

250. *Dayco Corp. v. Goodyear Tire and Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (citing *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974); see also 51 AM. JUR. 2D *Limitations of Actions* § 148 (1970)).

plaintiff.<sup>251</sup> "Passive silence . . . is insufficient to trigger the fraudulent concealment doctrine absent allegations that the defendant was in a continuing fiduciary relationship with the plaintiff."<sup>252</sup>

However, mere failure to reveal may be considered fraudulent concealment when a failure to reveal will result in an undue hardship or a wrong.<sup>253</sup> Most of the environmental statutes include a mandatory duty to report violations of the statute, so fraudulent concealment can be applicable to such statutes when a defendant has failed to report his violation. Therefore, since "equity reads the doctrine of fraudulent concealment into every statute of limitations,"<sup>254</sup> the doctrine of fraudulent concealment may eventually be applied to all statutory environmental actions.

## VI. Injunctive Remedies Under RCRA: Will A Limitations Period Apply?

### A. The General Federal Five-Year Statute of Limitations Will Not Apply to Injunctive Relief under RCRA

A statute of limitations will not apply to RCRA injunctive actions.<sup>255</sup> The limitations period contained in 28 U.S.C. § 2462 should not apply to RCRA's corrective action orders<sup>256</sup> or to RCRA's abatement orders.<sup>257</sup> This should hold true regardless of whether the courts eventually find that the 28 U.S.C. § 2462 limitations period applies to the assessment or enforcement of RCRA's civil penalties. Since injunctive relief is not punitive in nature, 28 U.S.C. § 2462 should not apply to injunctive relief under RCRA.<sup>258</sup> The words "penalty" and "for-

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251. 51 AM. JUR. 2D *Limitations of Actions* § 148 (1970).

252. *Bates v. Preble*, 151 U.S. 149 (1894). See also *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir. 1983), cert. denied 464 U.S. 1003 (1983).

253. 51 AM. JUR. 2D *Limitations of Actions* § 148 (1970).

254. *Firestone Tire & Rubber Co.*, 518 F. Supp. at 1036.

255. "Statutes of limitations will apply only to claims for civil penalties and not to equitable claims for injunctive relief." MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6.11 (1991).

256. RCRA § 3008(h), 42 U.S.C. § 6928(h) (1988).

257. RCRA §§ 7002(a)(1)(B), 7003(a), 42 U.S.C. §§ 6972(a)(1)(B), 6973(a) (1988).

258. *United States v. Davio*, 136 F. Supp. 423 (E.D. Mich. 1955).



feiture" contained in 28 U.S.C. § 2462 refer to punitive measures to redress violations of public laws and do not include a liability to redress a private injury, regardless of the fact that the wrongful act was a punishable public offense.<sup>259</sup>

The limitations period contained in 28 U.S.C. § 2462 does not contain any language that would suggest that corrective action orders or abatement orders fall under the limitations statute.<sup>260</sup> Corrective actions and abatement orders are equitable in nature and are not imposed for punitive purposes. The limitations period in 28 U.S.C. § 2462 does not apply to governmental actions to recover damages because the action is not in the nature of a penalty.<sup>261</sup> "Traditionally and for good reasons, statutes of limitations are not controlling measures of equitable relief."<sup>262</sup>

The federal courts have held that 28 U.S.C. § 2462 was applicable to civil penalties under the Clean Water Act.<sup>263</sup> Regardless, the federal courts have not applied it to the Clean Water Act's injunctive provisions.<sup>264</sup> In *United States v. Hobbs*,<sup>265</sup> the court held that 28 U.S.C. § 2462 did not bar the EPA's actions for injunctive relief under the Clean Water Act.

Should the federal courts eventually hold that 28 U.S.C. § 2462 applies to enforcement of civil penalties under RCRA, it is highly likely that such a court's reasoning will rely heavily on case law which has held that the limitations period applied to civil penalties under the Clean Water Act. By the same analogy, the limitations period should not apply to RCRA's injunctive relief provisions since the limitations period did not apply to the Clean Water Act's injunctive provisions.<sup>266</sup>

However, this does not mean that the EPA may sleep on its rights. A suit may still be barred in equity if the court finds that the plaintiff's "lack of diligence is wholly unex-

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259. See, e.g., *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915).

260. See 28 U.S.C. § 2462 (1988).

261. *Davio*, 136 F. Supp. at 426.

262. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946).

263. See *supra* notes 75-84.

264. *United States v. Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990).

265. *Id.*

266. *Id.*

cused; and both the nature of the claim and the situation of the parties was such as to call for diligence.”<sup>267</sup> On the other hand, “[a] suit in equity may lie though a comparable cause of action at law would be barred.”<sup>268</sup>

Even though the general federal five-year statute of limitations on civil penalties<sup>269</sup> was applied to civil penalties under the Clean Water Act,<sup>270</sup> the limitations period was not extended to apply to injunctive relief under that statute.<sup>271</sup> This occurred despite the fact that the federal district and circuit courts of appeal have held that section 2462 applies to civil penalty enforcement under the CWA.<sup>272</sup> Should the courts hold that the limitations provision applies to RCRA’s civil penalties based on the reasoning of the Clean Water Act cases,<sup>273</sup> the courts should then similarly hold that the limitations provision will not extend to injunctive relief under RCRA. This holds true since injunctive relief is not time-barred by any limitations period under the Clean Water Act.

### 1. RCRA Corrective Action Orders

The injunctive provisions of RCRA<sup>274</sup> would be frustrated if a limitations period applied to them. Under section 3008(h) of RCRA, if the Administrator of the EPA determines there is or has been a release of hazardous waste into the environment, then the Administrator may issue a corrective order or order response measures which he deems necessary in order to protect human health and the environment.<sup>275</sup>

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267. *Hobbs*, 736 F. Supp. at 1410 (quoting *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946)).

268. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946).

269. 28 U.S.C. § 2462 (1988).

270. *See supra* notes 75-84.

271. *United States v. Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990); *North Carolina Wildlife Fed’n v. Army Dep’t*, 29 Env’t Rep. Cas. (BNA) 1941 (E.D.N.C. 1989).

272. *See supra* note 75.

273. *See supra* note 75.

274. RCRA §§ 7003, 3008, 42 U.S.C. §§ 6973, 6928 (1988).

275. RCRA provides:

Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Adminis-

Another option available to the Administrator is to commence an action in a district court for a temporary or permanent injunction.<sup>276</sup> Since releases may not be detected until long after they have occurred, section 3008(h)(1) should be read to apply to any release regardless of when it occurred. Such an interpretation is supported by the express language of section 3008(h)(1) which states: "[w]henever on the basis of any information the Administrator determines there *is or has been* a release of hazardous waste . . . the Administrator may issue an order requiring corrective action or such response measures as he deems necessary to protect human health or the environment . . . ."<sup>277</sup> This language suggests that Congress did not intend a limitations period to apply to actions brought under this section. Allowing a limitations period to apply to such a provision would run counter to the intent of the Congress to protect human health and the environment.<sup>278</sup> Furthermore, holding that the five-year limitations period applies to corrective action would ultimately make the government, and in effect the taxpayers of the United States, responsible for corrective costs and the actual cleanup itself. This clearly could not have been the congressional intent of either RCRA or the statute of limitations. The discovery rule discussed in part V could toll the statute of limitations, but according to the expressed language of the statute, it should not apply in the first place.

## 2. RCRA Imminent Hazard Abatement Orders

Applying 28 U.S.C. § 2462 to RCRA's abatement orders under section 7003(a) would similarly work against the pur-

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trator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

RCRA § 3008(h)(1), 42 U.S.C. § 6928(h)(1) (1988).

276. *Id.*

277. *Id.* (emphasis added).

278. RCRA § 1003(a), 42 U.S.C. § 6902(a) (1988).

poses of this provision.<sup>279</sup> The purpose of section 7003 is to abate the imminent hazards inherent in inactive hazardous waste sites. Since these sites are likely to be more than five years old, 28 U.S.C. § 2462, or any other limitations period, would frustrate the purpose of this section. The expressed language of section 7003(a) states:

upon receipt of evidence that the *past or present* handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person (including any *past or present* generator, *past or present* transporter, or *past or present* owner or operator of a treatment, storage, or disposal facility) *who has contributed or who is contributing* to such handling, storage, treatment, transportation or disposal *to restrain* such person from such handling, storage, treatment, transportation, or disposal, *to order* such person to take such other action as may be necessary, or both.<sup>280</sup>

Therefore, the language is clear; the EPA may bring an abatement order against *any past or present* generator, transporter, or owner or operator of a TSD facility for *past or present* handling, storage, treatment, transportation, or disposal that results in an imminent and substantial endangerment to health or the environment. This provision does not in any way suggest that these orders should be limited by a limitations period. Contrary, this language suggests just the opposite. Therefore, in most situations, the EPA should not be limited in bringing an abatement order under RCRA.

Similarly, citizens can bring an imminent hazard action under section 7002(a)(1)(B) regardless of a limitations period.<sup>281</sup> The language in section 7002(a)(1)(B) is nearly identical to section 7003(a).<sup>282</sup> Citizens may commence a civil action

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279. RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988).

280. *Id.* (emphasis added).

281. RCRA § 7002(a)(1)(B), 42 U.S.C. § 7002(a)(1)(B) (1988).

282. Compare RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1988) and RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988).

on [their] own behalf:

against any person . . . including *any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.*<sup>283</sup>

Since plaintiffs who bring suits under section 7002(a)(1)(B) "effectively represent the United States"<sup>284</sup> and "stand in the shoes of the EPA . . .,"<sup>285</sup> their actions are similar to the EPA's section 7003(a) actions. RCRA's citizen suit language in section 7002(a)(1)(B) is nearly identical to the language in section 7003(a). The citizen suit language, "*any past or present generator, past or present transporter, or past or present [TSD] facility*" strongly supports the argument that the Congress did not intend a limitations period to apply to RCRA citizen suits to abate imminent environmental hazards.

Applying a limitations period to section 7002(a)(1)(B) and 7003(a) orders would render the EPA, the states, and citizens powerless to abate imminent hazards affecting human health and the environment. This would contradict the national policy of minimizing "the present and future threat to human health and the environment"<sup>286</sup> and the national objective "to promote the protection of health and the environment."<sup>287</sup> This could not have logically been the intent of Congress. Congress clearly intended to empower the EPA and citizens to abate imminent environmental hazards regardless of when the solid or hazardous waste was last handled, stored,

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283. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (1988).

284. Public Interest Research Group of New Jersey v. Witco Chem. Corp., 31 Env't Cas. Rep. (B.N.A.) 1571, 1579-80 (D.N.J. May 17, 1990).

285. Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64, 74 (3d Cir. 1990); see also Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987).

286. RCRA § 1003(b), 42 U.S.C. § 6902(b) (1988).

287. RCRA § 1003(a), 42 U.S.C. § 6902(a) (1988).

treated, transported or disposed.

### 3. CERCLA

A statute of limitations has not been applied to corrective action under CERCLA. Under CERCLA, the EPA can issue an order compelling the responsible party or parties to clean up a hazardous waste site<sup>288</sup> or the EPA can perform the remedial and response actions itself<sup>289</sup> and recover the costs from the responsible parties.<sup>290</sup> The only limitations period applicable to CERCLA cost recovery actions is the time the EPA has to recover response costs<sup>291</sup> and the time within which the EPA can bring a claim for the recovery of natural resource damages.<sup>292</sup>

Prior to the addition of CERCLA subsections 112(d)(1) and (d)(2), the court in *United States v. Mottolo*<sup>293</sup> refused to apply a limitations period to judicial actions for reimbursements of removal, remedial or response costs. The court held that the statute of limitations did not apply because CERCLA did not contain a limitations period.<sup>294</sup> The claims were equitable in nature, and the legislative history was ambiguous on that subject.<sup>295</sup> However, the court noted that when confronted with a claim which is equitable in nature, the doctrine of laches rather than a statute of limitations period normally applies.<sup>296</sup>

In another case decided before Congress amended CERCLA to include a limitations period, *United States v. Miami Drum Services*,<sup>297</sup> the court held that the six-year statute of limitations contained in 28 U.S.C. § 2415(a) applied to the re-

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288. CERCLA § 104, 42 U.S.C. § 9604 (1988).

289. CERCLA §§ 104, 106, 42 U.S.C. §§ 9604, 9606 (1988).

290. CERCLA § 107, 42 U.S.C. § 9607 (1988).

291. 42 U.S.C. § 9612(d)(1) (1988). The EPA has six years after completion of a response action to recover the cost of such response. *Id.*

292. 42 U.S.C. § 9612(d)(2) (1988). The EPA has three years to recover natural resource damages after the discovery of the loss. *Id.*

293. 605 F. Supp. 898 (D.N.H. 1985).

294. *Id.* at 906-08.

295. *Id.*

296. *Id.* at 909.

297. 12 Chem. Waste Litig. Rep. 899 (S.D. Fla. 1986).

covery of CERCLA response costs after the government had completed the clean-up operation.<sup>298</sup> This limitations period in CERCLA only applied to the government's right to recover its response costs after they had been incurred. It did not apply to the government's original right to incur such cost and recover these clean-up costs from liable parties. In sum, the government may incur costs to clean up hazardous waste sites regardless of when the waste was originally disposed of, as long as they collect the costs within six years after "the completion of all response action."<sup>299</sup>

In conclusion, injunctive relief under CERCLA is not limited by a statute of limitations, except where specifically included within the statutory language. Therefore, the only thing limiting CERCLA injunctive relief is the application of the doctrine of laches. The same reasoning should apply to injunctive relief under RCRA. Since RCRA contains no limitations period within its statutory language and there is none in its legislative history, no limitations period should apply to RCRA injunctive relief. The doctrine of laches, however, will likely apply.

## VII. Conclusion

The question of whether a limitations period applies to RCRA actions has yet to be answered. RCRA does not contain a statute of limitations provision and the legislative history does not offer any assistance. It is likely that the federal courts will eventually hold that the assessment of civil penalties under RCRA is subject to the general federal five-year statute of limitations for civil penalties.<sup>300</sup>

Although no court has held that 28 U.S.C. § 2462 applies to enforcement of civil penalties under RCRA, case law suggests that some sort of limitations period should apply. Some federal court decisions have applied the general statute of limitations to other environmental statutes, but these statutes'

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298. *United States v. Miami Drum Serv.*, 12 Chem. Waste Litig. Rep. 899 (S.D. Fla. 1986).

299. CERCLA § 112(d)(1), 42 U.S.C. § 9612(d)(1) (1988).

300. 28 U.S.C. § 2462 (1988).

regulatory programs differ significantly from those of RCRA.

Administrative decisions also suggest, and some have held, that 28 U.S.C. § 2462 does apply to administrative civil penalty enforcement under RCRA. Certain administrative law judges have avoided answering the question of whether 28 U.S.C. § 2462 applies to the administrative assessment of civil penalties. TSCA administrative decisions indicate that the limitations period in 28 U.S.C. § 2462 does not apply to administrative enforcement of civil penalties under TSCA, but no decision has extended this rationale to RCRA administrative assessment of civil penalties.

Should the five-year limitations period of 28 U.S.C. § 2462 apply to judicial or administrative enforcement of civil penalties under RCRA, plaintiffs should have a number of procedural safeguards that could save their RCRA causes of action. Plaintiffs may avail themselves of the discovery rule, the fraudulent concealment doctrine, the continuous violation theory, and the "relation back" rule.

Under the discovery rule, a plaintiff may prevent the running of the statute of limitations where the plaintiff's ignorance of the cause of action was the result of the defendant's conduct. The limitations period will run only when the plaintiff discovers or should have discovered the facts that will support their cause of action.

Fraudulent concealment occurs when the defendant has prevented the plaintiff from obtaining knowledge of his cause of action through fraudulent or intentional means. Under these circumstances, the statute of limitations is tolled until the plaintiff has knowledge of the facts or should have had knowledge of the facts giving rise to his cause of action.

Under the continuous violations theory, a cause of action exists where the defendant fails to perform a continuous duty required by law regardless of when the offense began. However, it is unclear whether the civil penalty recovery is limited to violations which have occurred within the statute of limitations. The courts have made a major distinction between storage and disposal that has extended the use of the continuous violation theory. Defendants can be held liable for illegal storage violations for waste placed in the ground prior to the ef-



fective date of storage permit requirements once the requirements became effective.

The limitations period contained in 28 U.S.C. § 2462 should not be applied to RCRA's injunctive relief provisions. RCRA's injunctive remedies, such as the corrective action and abatement orders, are equitable in nature. 28 U.S.C. § 2462 is punitive in nature, and thus, should not apply to equitable remedies. CERCLA corrective actions may be brought without regard to the timeliness of the discovery of the improper disposal site. The only limitation on CERCLA corrective actions is the length of time the EPA has to recover the cost of the corrective action. The same rationale should also apply to RCRA injunctive relief.

The federal courts should, therefore, be extremely cautious with the statute of limitations issue when it arises. The courts should not apply a strict limitations period to RCRA enforcement. However, if the federal courts do hold that the federal five year statute of limitations does apply to RCRA civil penalty enforcement, they should liberally construe the tolling theories to promote the interest of justice, deter RCRA violations and protect human health and the environment.