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NOTES

Enforcement of TSCA and the Federal Five-Year Statute of Limitations for Penalty Actions

Teresa A. Holderer

INTRODUCTION

Congress enacted the Toxic Substances Control Act of 1976¹ (TSCA) to tackle the known and unknown dangers many chemicals pose to human health.² In TSCA, Congress granted the Environmental Protection Agency (EPA or "the Agency") broad authority to promulgate and enforce regulations specifying testing, reporting, and record keeping requirements for manufacturers and processors of chemical substances.³ Congress also granted EPA the power to restrict, regulate, and prohibit the manufacture, handling, processing, and distribution of substances that present an unreasonable risk of injury to human health or the environment.⁴ The Agency can bring an action in federal court for specific enforcement and for seizure of chemicals manufactured, processed, or distributed in violation of TSCA,⁵ but its primary enforcement tool is the assessment of administrative penalties under section 16 of the Act.⁶

Although TSCA prescribes various tools for effective enforcement, neither the statute nor the regulations contain any statute of limitations specifying how quickly EPA must initiate such enforcement activities. The lack of an express statute of limitations leaves entities regulated by the Act unable to experience repose and unsure of when

1. Pub. L. No. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. §§ 2601-2629 (1988)).

2. See 15 U.S.C. § 2601(a) (1988) (findings of Congress).

3. 15 U.S.C. §§ 2603-2604, 2615 (1988). Section 15 of TSCA declares that it shall be unlawful for any person to fail to comply with its provisions or any of EPA's regulations, including reporting and record keeping requirements. It also forbids the use for commercial purposes of any chemical substance or mixture by a person who has reason to know that the substance was manufactured, processed, or distributed in violation of any EPA dictates. 15 U.S.C. § 2614 (1988).

4. 15 U.S.C. §§ 2603-2605 (1988). Probably the best known substances regulated extensively under TSCA are Polychlorinated Biphenyls (PCBs) and asbestos. See, e.g., 40 C.F.R. §§ 761.1-761.218, 763.60-763.179 (1991).

5. 15 U.S.C. § 2616 (1988).

6. 15 U.S.C. § 2615 (1988). Congress also provided citizens the right to bring actions to restrain violations or to compel EPA to perform its duties under TSCA. 15 U.S.C. § 2619 (1988). Citizen suits have not been a factor in TSCA enforcement, however, perhaps because of the public's lack of access to corporate files to detect violations. For an example of a citizen suit under TSCA, see *Pottstown Indus. Complex v. P.T.I. Servs. Inc.*, No. 91-5660, 1992 U.S. Dist. LEXIS 3256 (E.D. Pa. Mar. 11, 1992).

they can discard voluminous records which they might need someday in litigation. Further, in the absence of a statute of limitations, EPA has less incentive to prosecute suspected TSCA violations promptly. In fact, because penalties can reach \$25,000 for each violation, and each day counts as a separate violation for some violations,⁷ the Agency has an incentive to delay enforcement in order to recover higher penalty amounts.

Many years prior to TSCA, Congress enacted a general five-year statute of limitations for actions for the enforcement of civil penalties, fines, and forfeitures,⁸ which, if applicable, would alleviate these problems. Although the Agency claims that no statute of limitations applies, this Note argues that the general five-year statute of limitations, found in section 2462 of title 28, should apply to EPA's administrative proceedings to assess penalties as well as to later collection actions in federal courts. Part I details TSCA's enforcement procedures, which create special difficulties when applying section 2462's statute of limitations. Part I also examines how EPA, industry, and agency judges have interpreted section 2462 as applied to TSCA enforcement. It concludes by summarizing the considerations that a court must address when faced with the issue. Part II analyzes general principles of statutory construction, congressional discussions of section 2462, court decisions in related administrative areas, and general purposes of statutes of limitations. It argues that applying section 2462 to EPA's assessment of penalties as well as to district court proceedings is consistent with established principles and appropriately resolves the issue. Part III asserts that separate five-year periods should apply to the Agency's assessment of penalties and to collection actions in federal court. Part III also discusses when each of these actions should accrue. This Note concludes that applying section 2462 separately to administrative penalty proceedings and to federal court collection actions best promotes the public's interest in enforcing TSCA while protecting industry's right to be free from stale claims.

I. TSCA'S ENFORCEMENT FRAMEWORK FOR CIVIL PENALTIES AND THE GENERAL FIVE-YEAR STATUTE OF LIMITATIONS

To decide whether section 2462 applies to TSCA enforcement, a court must understand both the Act's enforcement mechanism and the language of section 2462. Section I.A describes the Act's enforcement framework for the assessment of penalties. Section I.B examines the

7. 15 U.S.C. § 2615(a)(1) (1988).

8. Act of June 25, 1948, ch. 646, 62 Stat. 974 (codified at 28 U.S.C. § 2462 (1988)). The "Historical and Revision Notes" following 28 U.S.C. § 2462 (1988) make clear the section is based on title 28 U.S.C. § 791 (1940). Further, § 791 itself "appears to have had its genesis in the Act of March 2, 1799, 1 Stat. 627, c. 22 . . ." *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944); see also *United States v. Core Lab., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985).

federal statute of limitations for enforcement of penalties and the debate over its application to TSCA. This Part concludes by identifying the key issues which a court must address to resolve the controversy regarding section 2462's application to TSCA.

A. TSCA's Enforcement Framework

Courts often describe enforcement of civil penalties under TSCA as a two-tier process — an administrative penalty assessment and a collection action in district court.⁹ Section 16(a) of TSCA provides that EPA “shall” assess civil penalties for violations of the Act.¹⁰ Unlike under other environmental statutes, the Agency's administrative action to assess penalties under TSCA is a mandatory prerequisite to an EPA penalty action in federal court.¹¹ In this first, mandatory stage, EPA retains wide discretion in assessing the amount of the penalties and in enforcing payment of the penalty. It must take into account various factors in assessing the penalty, including the nature, circumstances, extent, and gravity of the violation, the violator's ability to pay, and the violator's prior compliance record.¹² TSCA does not, however, require that EPA weigh these factors in any particular manner.¹³ Moreover, the Agency has discretion to modify or compromise any civil penalty assessment with or without conditions.¹⁴

EPA initiates the administrative action under the Act by filing an administrative complaint. After the violator has had the opportunity for a hearing, an administrative law judge (ALJ) assesses a penalty on behalf of the Agency by issuing an order.¹⁵ Either the Agency or the violator can appeal the order to the Environmental Appeals Board.¹⁶ If an alleged violator still believes it has not committed a violation or

9. See, e.g., *United States v. N.O.C., Inc.*, 28 *Env't. Rep. Cas. (BNA)* 1460, 1462-63 (D.N.J. Oct. 14, 1988); *In re 3M Co.*, No. TSCA-88-H-06, 1989 TSCA LEXIS 8 at *20 (Aug. 7, 1989); *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13 at *5 (Apr. 7, 1989).

10. 15 U.S.C. § 2615(a)(2)(A) (1988).

11. Other environmental statutes permit EPA to choose whether to assess a penalty administratively or to file an immediate action in district court. See, e.g., *Clean Water Act (CWA)*, § 2, 33 U.S.C. §§ 1319, 1321 (1988 & Supp. II 1990); *Resource Conservation and Recovery Act of 1976 (RCRA)*, § 2, 42 U.S.C. § 6928 (1988); *Clean Air Act*, § 4(a), 42 U.S.C. § 7413 (1988 & Supp. II 1990). Prior to the 1990 amendments, civil penalties could only be imposed by an action in federal court.

12. 15 U.S.C. § 2615(a)(2)(B) (1988).

13. See 15 U.S.C. § 2615(a)(2)(B) (1988). EPA has issued guidelines on how it will weigh the various factors. *Guidelines for the Assessment of Civil Penalties Under § 16 of the Toxic Substances Control Act*, 45 *Fed. Reg.* 59,770 (1980). In addition, EPA is subject to requirements of the *Administrative Procedures Act*; a reviewing court will set aside a decision that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706 (1988).

14. 15 U.S.C. § 2615(a)(2)(C) (1988).

15. 15 U.S.C. § 2615(a)(2)(A) (1988).

16. Intra-agency appeals were heard by Chief Judicial Officers until March 1992. See *infra* notes 36-39 and accompanying text.

that the penalty is excessive following the administrative appeal, it can contest the Agency's action by appealing to the U.S. Court of Appeals.¹⁷ The penalty assessed becomes final if the alleged violator chooses not to appeal, or upon the Court of Appeal's issuance of its final judgment.¹⁸ The violator thus becomes obligated to pay the civil penalty, and interest begins to accumulate.¹⁹ At this point, the violator can gain no further advantage by delaying payment of the penalty, and therefore, most entities pay the order or judgment without further action by EPA.²⁰

The second stage of TSCA enforcement takes place only if the violator fails to pay the penalty. The Attorney General will file an action in district court on behalf of EPA to recover the amount assessed plus accumulated interest.²¹ At this stage, the court cannot review the validity, amount, or appropriateness of the penalty.²² Therefore, the district court action, if one does become necessary, is purely mechanical and only implements the Agency's enforcement activities.²³

Thus, TSCA enforcement consists of two distinct steps — administrative assessment and collection through a district court. TSCA does not expressly prescribe a statute of limitations for either stage. As the next section describes, however, Congress has enacted a general statute of limitations which potentially applies to TSCA enforcement.

B. *The General Five-Year Statute of Limitations and Its Application to TSCA*

Section 2462 of Title 28 contains a general statute of limitations for actions for the enforcement of civil penalties: "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"²⁴

On its face, section 2462 appears to apply broadly to all proceed-

17. 15 U.S.C. § 2615(a)(3) (1988).

18. 15 U.S.C. § 2615(a)(3)-(4) (1988). This assumes the parties do not appeal the decision to the U.S. Supreme Court.

19. 15 U.S.C. § 2615(a)(4) (1988).

20. As evidence that most violators pay the civil penalty once they can no longer contest its amount, a LEXIS search conducted on January 27, 1993, revealed only three district court collection actions under TSCA. *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989) (stating that TSCA penalties were only part of a larger dispute), *affid.*, 978 F.2d 832 (4th Cir. 1992); *United States v. N.O.C., Inc.*, 28 *Env't. Rep. Cas. (BNA)* 1460 (D.N.J. Oct. 14, 1988); *United States v. Holloway Oil Co.*, 28 *Env't. Rep. Cas. (BNA)* 1190 (M.D. Fla. July 26, 1988).

21. 15 U.S.C. § 2615(a)(4) (1988).

22. 15 U.S.C. § 2615(a)(4) (1988).

23. See *In re* District of Columbia (Lorton Prison Facility), No. TSCA-III-439, 1991 TSCA LEXIS 12, at *15 (Aug. 30, 1991).

24. 28 U.S.C. § 2462 (1988).

ings by the government relating to civil penalties. However, sharp disagreement has arisen between EPA and industry regarding whether the Agency's administrative penalty assessment proceeding is an "action, suit or proceeding for the enforcement" of a civil penalty. EPA claims that its penalty assessment action is not such a proceeding, and thus no statute of limitations applies. It argues that courts must construe section 2462 narrowly because it is a derogation of sovereignty.²⁵ Under a strict construction, only the district court collection stage of TSCA enforcement is a "proceeding for the enforcement" of a civil penalty.²⁶ Industry, on the other hand, takes a more expansive view of enforcement proceedings and would include EPA's administrative proceedings under TSCA.²⁷

EPA also asserts that section 2462's presence in a title of the United States Code regulating federal courts and the lack of direct legislative history linking section 2462 to administrative proceedings militate against its applicability to the Agency's initial assessment of TSCA penalties.²⁸ Industry counters that section 2462's codification in title 28 does not determine its application. It relies on several congressional pronouncements on section 2462's applicability and decisions by courts in other administrative areas to demonstrate that section 2462 should apply to administrative proceedings under TSCA.²⁹

Finally, EPA and industry dispute when a penalty action "accrues." Section 2462 offers no guidance on this issue. The Agency asserts that an action accrues under TSCA only upon EPA's issuance of a final order or the Court of Appeal's issuance of a final judgment,

25. See *infra* text accompanying notes 42-49.

26. *E.g.*, Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss at 9-21, 31-33, *In re CWM Chem. Servs., Inc.*, No. II TSCA-PCB-91-0213, 1991 TSCA LEXIS 21 (Nov. 6, 1991), *revd.*, TSCA Appeal No. 91-6, 1992 WL 90321 (Mar. 23, 1992); EPA's Motion to Strike Affirmative Defense at 11-13, *In re 3M Co.*, No. TSCA-88-H-06, 1989 TSCA LEXIS 8, at *20 (Aug. 7, 1989), *modified*, TSCA Appeal No. 90-3, 1992 TSCA LEXIS 6 (Feb. 28, 1992).

27. *E.g.*, Motion of Bethlehem Steel Corporation to Dismiss, or in the Alternative, for an Accelerated Decision at 11-16, *In re Bethlehem Steel Corp.*, No. TSCA-III-322, 1991 WL 328113 (Dec. 23, 1991), *revd.*, TSCA Appeal No. 92-1, 1992 WL 118,796 (May 12, 1992); Reply Brief of Respondent, Bethlehem Steel Corporation at 9-15, *Bethlehem Steel*, TSCA Appeal No. 92-1; Motion to Dismiss and Memorandum in Support at 8-9, 16-17, *CWM*, No. II TSCA-PCB-91-0213; Response to Complainant's First Motion to Strike Affirmative Defense at 13-22, *3M*, No. TSCA-88-H-06; Response to Complainant's Reply to Response to Complainant's First Motion to Strike Affirmative Defense at 9-17, *3M*, No. TSCA-88-H-06.

28. See Complainant's Memorandum in Opposition to Respondent's Motion to Dismiss at 25-31, *CWM*, No. II TSCA-PCB-91-0213; Complainant's Reply to Response to Complainant's First Motion to Strike Affirmative Defense at 8-13, 21, *3M*, No. TSCA-88-H-06; *infra* notes 98-106 and accompanying text.

29. See Reply Brief of Respondent, Bethlehem Steel Corporation at 60-62, *Bethlehem Steel*, TSCA Appeal No. 92-1; Motion to Dismiss and Memorandum in Support at 9-11, *CWM*, No. II TSCA-PCB-91-0213; Response to Complainant's First Motion to Strike Affirmative Defense at 7-13, *3M*, No. TSCA-88-H-06; *infra* notes 107-08, 114-30 and accompanying text.

whichever occurs later.³⁰ Industry believes the action accrues at the time of the alleged violation.³¹

Until recently, the issue of section 2462's application to TSCA actions remained unsettled even at the agency level. In 1983, the first ALJ to face the issue dismissed one count of EPA's administrative complaint because it related to a violation which had occurred more than five years before the filing of the administrative complaint.³² The ALJ accepted, without discussion, the respondent's assertion that section 2462 barred the claim.³³ Almost six years later, in 1989, several ALJs ruled that no statute of limitations applies to administrative actions to assess penalties under TSCA.³⁴ In 1991, however, two ALJs in three separate matters took a different view and decided that section 2462 does apply to administrative actions under the Act. Accordingly, they dismissed claims relating to violations occurring more than five years before EPA filed its administrative complaint.³⁵

The Agency resolved its internal controversy the following year. In *In re 3M*,³⁶ the Chief Judicial Officer, formerly EPA's appellate level,³⁷ ruled that no statute of limitations applies to administrative proceedings under TSCA. He concluded that the ALJ had ruled properly that section 2462 applies only to an action in district court to recover a penalty, and that the action cannot accrue until the agency has finally determined the amount.³⁸ The newly created Environmen-

30. Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss at 21-25, *CWM*, No. II TSCA-PCB-91-0213; EPA's Motion to Strike Affirmative Defense at 14-15, *3M*, No. TSCA-88-H-06.

31. *E.g.*, Motion of Bethlehem Steel Corporation to Dismiss, or in the Alternative, for an Accelerated Decision at 16-18, *Bethlehem Steel*, No. TSCA-III-322; Reply Brief of Respondent, Bethlehem Steel Corporation at 43-59, *Bethlehem Steel*, TSCA Appeal No. 92-1; Response to Complainant's First Motion to Strike Affirmative Defense at 22-31, *3M*, No. TSCA-88-H-06; Motion to Dismiss and Memorandum in Support at 20-24, *CWM*, No. II TSCA-PCB-91-0213.

32. *In re Commonwealth Edison Co.*, No. TSCA-V-C-133, 1983 TSCA LEXIS 14 (Dec. 1, 1983).

33. *Commonwealth Edison*, No. TSCA-V-C-133.

34. *In re 3M Co.*, No. TSCA-88-H-06; *In re Rollins Env't. Servs., Inc.*, No. II-TSCA-PCB-88-0116, 1988 TSCA LEXIS 12 (Sept. 28, 1990); *In re Energy Sys. Co.*, No. TSCA-VI-408C (June 16, 1989); *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13 (Apr. 7, 1989). Of these, the *3M* and *Tremco* decisions are the more complete, addressing at length the arguments raised by both parties. To underscore the importance which industry and EPA attached to the issue by 1989, the parties to *3M* devoted 124 pages of briefs to discussion of their statute of limitations arguments.

35. *Bethlehem Steel*, No. TSCA-III-322; *CWM*, No. II TSCA-PCB-91-0213; *In re District of Columbia (Lorton Prison Facility)*, No. TSCA-III-439, 1991 TSCA LEXIS 12 (Aug. 30, 1991). *Lorton Prison* is the counterpoint to *3M* and *Tremco*; after examining at length decisions in other administrative areas, congressional comments on § 2462, and general policy, the ALJ reached the opposite conclusion.

36. *In re 3M Co.*, TSCA Appeal No. 90-3, 1992 TSCA LEXIS 6 (Feb. 28, 1992).

37. Chief Judicial Officers formerly handled all appeals from ALJ penalty decisions. On March 1, 1992, they were replaced by the Environmental Appeals Board, which is a three-member panel. 57 Fed. Reg. 5320 (1992) (to be codified in scattered sections of 40 C.F.R.).

38. *3M*, TSCA Appeal No. 90-3.

tal Appeals Board followed *3M* and reversed the two ALJs who had found that section 2462 could bar administrative penalty proceedings.³⁹ *3M* appealed its decision to the Court of Appeals for the District of Columbia Circuit,⁴⁰ which will likely rule in 1993.

The D.C. Circuit will confront a two-tier enforcement process with no express statute of limitations, a federal statute of limitations for penalty actions located in a judicial code, and doctrines of sovereign immunity and strict construction. The next Part considers these factors and concludes that section 2462 applies to EPA's assessment of penalties under TSCA.

II. SECTION 2462 AND EPA'S ASSESSMENT OF PENALTIES

This Part concentrates on section 2462's application to TSCA's administrative proceedings, because there appears to be a consensus among courts, EPA, and industry that section 2462 applies to district court actions to collect penalties.⁴¹ This Part demonstrates that administrative penalty assessments under TSCA are "proceedings for the enforcement of" a civil penalty and that section 2462's presence in the judicial code does not preclude its application to EPA proceedings. Section II.A examines the argument that strict construction should apply when a party asserts a statute of limitations against the govern-

39. See *In re Bethlehem Steel Corp.*, TSCA Appeal No. 92-1, 1992 WL 118796 (May 12, 1992); *In re CWM Chem. Servs., Inc.*, TSCA Appeal No. 91-6, 1992 WL 90321 (Mar. 23, 1992).

40. *3M Co. v. EPA*, No. 92-1126 (D.C. Cir. filed Mar. 27, 1992). *CWM* and *Bethlehem Steel* also filed appeals. *CWM Chem. Servs., Inc. v. Reilly*, No. 92-1177 (D.C. Cir. filed Apr. 21, 1992), dismissed, No. 92-1177, 1992 WL 390882 (Dec. 10, 1992); *Bethlehem Steel Corp. v. EPA*, No. 92-1225 (D.C. Cir. filed May 22, 1992), dismissed, No. 92-1225 (Jan. 29, 1993). Of the three, only *3M* is an appeal of a final order. *CWM* and *Bethlehem Steel* had argued that because the statute of limitations issue is dispositive of the outcome of the litigation, the issue should not await a final order assessing penalties. However, on December 10, the court dismissed the *CWM* appeal as not ready for review. *CWM*, No. 92-1177; see also 16 Chem. Reg. Rep. (BNA) 1583 (Dec. 18, 1992) (discussing *CWM*). Following the *CWM* dismissal, EPA and *Bethlehem Steel* filed a joint motion for dismissal of the *Bethlehem Steel* appeal which the court granted. *Bethlehem Steel*, No. 92-1225 (Jan. 29, 1993).

41. Although *United States Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982), provides some support for an argument that § 2462 does not apply to a mere collection action in district court (see *infra* notes 124-27 and accompanying text), EPA has not seriously questioned the application of § 2462 to district court actions under TSCA. In *United States v. N.O.C., Inc.*, 28 Env't Rep. Cas. (BNA) 1460, 1464 (D.N.J. Oct. 14, 1988), the court noted that both parties correctly acknowledged that § 2462 applied to an action to collect a penalty assessed under TSCA but differed on when the action accrued. See also *In re 3M Co.*, TSCA Appeal No. 90-3, 1992 TSCA LEXIS 6, at *32 (Feb. 28, 1992) (holding § 2462 inapplicable to administrative penalty actions as opposed to court proceedings to enforce an administrative penalty); *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13, at *11 (Apr. 7, 1989) (finding § 2462 inapplicable to administrative actions but appropriate for district court actions). Indeed, courts have applied § 2462 to district court proceedings that followed administrative penalty assessments under a variety of legislative schemes. E.g., *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987) and *United States v. Core Lab., Inc.*, 759 F.2d 480 (5th Cir. 1985) (Export Administration Act); *United States v. McCune*, 763 F. Supp. 916 (S.D. Ohio 1989) (Surface Mining Control and Reclamation Act); *United States v. C & R Trucking Co.*, 537 F. Supp. 1080 (N.D. W. Va. 1982) (Clean Water Act).

ment and concludes that although the government is the plaintiff in TSCA penalty actions, strict construction of 2462 is not appropriate. Section II.B argues that even if a court must strictly construe section 2462, EPA's administrative actions under TSCA are proceedings "for the enforcement of" civil penalties within the meaning of section 2462. Section II.C rebuts the argument that section 2462's codification in the judicial code implies a congressional intent to exclude administrative proceedings from its purview. The section explains that every time a congressional committee addressed section 2462 in written reports dealing with administrative proceedings, it stated that section 2462 applies. Although no federal court has directly faced the issue, section II.D examines cases in which courts have assumed or stated that section 2462 applies to administrative penalty actions. Section II.D concludes that because courts recognize that section 2462 applies to administrative actions for assessment of penalties in some contexts, its language requires that it must apply to actions under TSCA unless Congress explicitly states otherwise. Finally, section II.E asserts that applying section 2462 only to district court proceedings under TSCA would defeat the purposes of statutes of limitations.

A. *Sovereign Immunity and Strict Construction*

Statutes of limitations do not bind the United States unless Congress expressly so provides.⁴² This common law principle originated from the English belief that immunity from limitations periods was an essential prerogative of sovereignty.⁴³ Today, the principle remains viable because it rests on the important policy of preserving public rights and revenues, vested in the government for the protection of all, from the carelessness of public officers who fail to take timely action.⁴⁴

Congress can, and sometimes does, create a cause of action for the government without specifying a statute of limitations.⁴⁵ If a statute granting the government a cause of action contains no statute of limitations, the courts must examine general statutes of limitations created by Congress.⁴⁶ If none of the general statutes of limitations apply, the

42. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 133 (1938); *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

43. *Guaranty Trust*, 304 U.S. at 132; *United States v. Nashville, Chattanooga & St. Louis Ry.*, 118 U.S. 120, 125 (1886); *Palm Beach Gardens*, 635 F.2d at 339.

44. *Guaranty Trust*, 304 U.S. at 132; *Palm Beach Gardens*, 635 F.2d at 339; *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

45. *Palm Beach Gardens*, 635 F.2d at 339.

46. For example, 28 U.S.C. § 2462 (1988) provides a general statute of limitations of five years for fine, penalty, and forfeiture actions. In comparison, 28 U.S.C. § 2415 (1988) requires the government to bring a tort action within three years and contract or quasi-contract action within six years.

government can bring an action at any time.⁴⁷

As a corollary to governmental immunity, courts accept that statutes of limitations that purportedly apply to the government must be strictly construed in its favor.⁴⁸ This means that courts will read the statute closely and rigidly and will not broaden the statute's reach by implication. Further, where a statute is susceptible to more than one interpretation, courts will choose the reading which favors the government.⁴⁹ The application of strict construction by courts may seem inappropriate when Congress and state legislatures have largely erased the government's immunity from statutes of limitations.⁵⁰ Indeed, courts have occasionally construed statutes of limitations broadly to include the government.⁵¹ Within the past decade, however, the

47. *E.g.*, *United States v. Tri-No Enter.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (holding no statute of limitations applies to actions to collect reclamation fees under the Surface Mining Control and Reclamation Act); *Palm Beach Gardens*, 635 F.2d at 341 (holding no statute of limitations applies to an action by the United States to recover its share of the sale price of a hospital built with federal grant money).

48. *See Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984); *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918); *Mullikin v. United States*, 952 F.2d 920, 926 (6th Cir. 1991), *cert denied*, 113 S. Ct. 85 (1992).

49. *See, e.g.*, *Dupont*, 264 U.S. at 462; *Whited & Wheless*, 246 U.S. at 561. For a definition of "strict construction," see *BLACK'S LAW DICTIONARY* 1422 (6th ed. 1990); *WILLIAM P. STATSKY ET AL., WEST'S LEGAL DESK REFERENCE* 208 (1991).

50. *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1252 (1950) (cited with approval in *Johnson v. Railway Express Agency*, 421 U.S. 454, 467-68 n.14 (1975)). The author argues that "[i]n view of the apparent absence of sound policy ground for the sovereign exemption, complete repudiation of the rule would seem desirable." *Id.* at 1253. One federal judge has argued that the government should not be exempt from limitations periods: "in my judgment, they should sound the horn in other fields and send the hounds to follow trails which are not so stale, for *lex dilationes semper exhorret* ('the law abhors delay') is a better rule than *nullum tempus occurrit regi* [no lapse of time bars the King]." *United States v. Weintraub*, 613 F.2d 612, 626 (6th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980) (Merritt, J., dissenting) (citation omitted).

51. For example, in *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953), the Supreme Court ruled that a statute of limitations which did not explicitly include the government nevertheless barred the government's action to recover liquidated damages under the Walsh-Healey Act, ch. 881 § 1, 49 Stat. 2036 (codified as amended at 41 U.S.C. § 35 (1988)), for the employment of child labor. The Court rejected the government's contention that the statute of limitations at issue only applied to suits by employees. The Court observed that the statute applied to "any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act." *Unexcelled Chem.*, 345 U.S. at 61 (quoting Portal-to-Portal Act of 1947, 61 Stat. 84, 87, (codified as amended at 29 U.S.C. § 255 (1988))). The Court then reasoned that because only the government could bring actions for liquidated damages under the referenced acts, the statute must, *by implication*, include the government. *Unexcelled Chem.*, 345 U.S. at 63. A strict construction of the statute would not have permitted such an implication.

The Court further stated that this construction was proper even if it would prejudice the power of the government to safeguard the public interest. *Unexcelled Chem.*, 345 U.S. at 66; *see also United States v. Gary Bridges Logging & Coal Co.*, 570 F. Supp. 531, 532 (E.D. Tenn. 1983) ("The government's position that no limitation period applies [to an action to collect mine reclamation fees] is untenable."). The *Gary Bridges* court held that either the general six-year limitation for federal contract actions or a limitations period in the Internal Revenue Code for the collection of excise taxes must apply. *Gary Bridges*, 570 F. Supp. at 532. Yet the statute of

Supreme Court has acknowledged the existence of this interpretive principle favoring the government.⁵²

But, even if strict construction of statutes of limitations in favor of the government persists, it should not be invoked when considering section 2462's application to a governmental penalty action. As a corollary to the principle that statutes of limitations do not apply against the government unless Congress provides otherwise, strict construction favoring the government should logically not apply when Congress plainly subjects the government to a limiting statute.⁵³ Sutherland's treatise on statutory construction supports the distinction between statutes of limitations like section 2462 that clearly include the government, and those that do not: "Where a statute expressly includes the government there is no room for the operation of the [strict construction] rule, and a statute of this nature, like any other, is entitled to receive a sensible and reasonable treatment."⁵⁴

Often when courts have applied strict construction they were examining statutes of limitations that did not expressly include the government. Significantly, the statute of limitations at issue in *E.I. Dupont de Nemours & Co. v. Davis*,⁵⁵ the leading case cited for the principle of strict construction, did not expressly include the government. The provision construed by the Court provided: "[a]ll actions at law by carriers, subject to this Act for recovery of their charges . . . shall be begun within three years . . ." ⁵⁶ Defendants argued that this provision precluded the government from recovering demurrage charges that accrued during the period of federal control of the railways. The Court observed that title IV of the Transportation Act, which contained the statute of limitations, applied to "common carriers."⁵⁷ On the other hand, provisions relating to government control

limitations in the IRC expressly applies only to excise taxes imposed under the IRC, not to those imposed under other statutes.

52. *Badaracco*, 464 U.S. at 391 (stating that it "long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.'" (quoting *Dupont*, 264 U.S. at 462). However, the statute of limitations which the Court construed in *Badaracco* explicitly excluded actions of the type before the Court, and therefore, the principle of strict construction was not necessary to the result.

53. See, e.g., *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980) ("[A]n exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation period upon itself.").

54. 3 SUTHERLAND STATUTORY CONSTRUCTION § 62.02 (4th ed. 1986). In *Developments in the Law: Statutes of Limitations*, supra note 50, at 1190, the author asserts that where the right involved in the statute may be exercised only by the sovereign, a statute limiting the right will be construed strictly against the state. The author's blanket assertion must be qualified, as this notion appears to have been referenced only in actions against taxpayers. E.g., *United States v. Updike*, 281 U.S. 489, 496 (1930). While *Unexcelled Chem.*, 345 U.S. 59, see discussion supra note 51, may be analyzed on this basis, the Supreme Court never stated that it intended to construe the statute strictly against the government.

55. 264 U.S. 456, 460 (1924).

56. 264 U.S. at 459 (quoting Transportation Act of 1920, 41 Stat. 459, 491-92).

57. 264 U.S. at 460-61 (referring to § 400 of Transportation Act, 41 Stat. at 474).

of the railways were contained in a separate section of the Transportation Act.⁵⁸ Because the Act separated provisions relating to the government from those governing other carriers, the Court held that the United States was not a carrier within the meaning of the statute and therefore could recover demurrage charges accruing more than three years prior to the action.⁵⁹ In contrast to Title IV of the Transportation Act, section 2462 applies primarily to the government and therefore should not be strictly construed.⁶⁰

The remaining category of cases that invoke strict construction involves attempts by defendants to recharacterize the government's cause of action in order to fit within a general statute of limitations.⁶¹ These cases likewise do not dictate application of strict construction to section 2462 for a penalty action. In *United States v. Whited & Wheeler, Ltd.*,⁶² the defendant asked the Supreme Court to bar an action based on a six-year statute of limitations for bringing actions to vacate government grants of public land. The Court held that the limitations period did not apply to the action by the government to recover the value of the land as damages for deceit and fraud by the defendant in procuring the grant.⁶³ Because the government did not bring a cause of action to vacate the grant, the limitations period could not apply. This case can be distinguished from cases that involve causes of action that clearly fit within the statute of limitations. It therefore does not require strict construction of section 2462 for a penalty action.

Similarly, in *United States v. City of Palm Beach Gardens*,⁶⁴ the defendant sought to characterize the government's cause of action either as a contract action barred by the general federal statute of limitations for contract claims⁶⁵ or as an action to recover money diverted from a grant program barred by a limitation contained in the federal grant program. The Fifth Circuit characterized the government's action as an action to recover its share of the sale price of a hospital built with federal grant money, and therefore neither statute of limitations cited by the defendant could apply.⁶⁶ Again, the government's cause

58. 264 U.S. at 461 (referring to title II of Transportation Act).

59. 264 U.S. at 459-60.

60. See *infra* note 94.

61. See, e.g., *United States v. Whited & Wheeler, Ltd.*, 246 U.S. 552 (1918); *United States v. City of Palm Beach Gardens*, 635 F.2d 337 (5th Cir.), *cert. denied*, 454 U.S. 1081 (1981); *United States v. Fire Ring Fuels, Inc.*, 788 F. Supp. 326 (E.D. Ky. 1991); *United States v. Hawk Contracting, Inc.*, 649 F. Supp. 1 (W.D. Pa. 1985); *United States v. Davio*, 136 F. Supp. 423 (E.D. Mich. 1955).

62. 246 U.S. 552, 560 (1918).

63. 246 U.S. at 563.

64. 635 F.2d 337, 341 (5th Cir. 1981).

65. 28 U.S.C. § 2415 (1988).

66. *Palm Beach Gardens*, 635 F.2d at 341.

of action did not clearly fit within the statute of limitations in the way that penalty actions fit within section 2462.

Courts construing section 2462 have generally adopted this reasoning which limits use of strict construction to cases in which defendants attempt to recharacterize an action to fit within a statute of limitations.⁶⁷ Most courts faced with a clear penalty action do not even mention the principle of strict construction.⁶⁸ *Mullikin v. United States*⁶⁹ represents a rare federal case in which the court applied strict construction of section 2462 to a penalty action.

Mullikin, however, is clearly distinguishable from a penalty action under TSCA. *Mullikin* involved an action by the IRS under section 6701 of the Internal Revenue Code⁷⁰ to recover penalties assessed against an accountant who fraudulently prepared a client's tax returns. The court observed that section 2462 does not apply if Congress provides otherwise.⁷¹ Because the Internal Revenue Code expressly contains a statute of limitations, the court found that Congress had "otherwise provided."⁷² Because the statute of limitations contained in the code could have covered actions under section 6701, but did not expressly, no statute of limitations applied to the government's action.⁷³ The court also found that Congress intended that no statute limit actions under section 6701, which was designed to give the IRS substantial latitude to combat fraud by third-party advisers.⁷⁴ In contrast, TSCA does not contain a statute of limitations, and there is no evidence that Congress intended no limitations period to apply to actions under the Act.⁷⁵

67. See, e.g., *United States v. Hawk Contracting, Inc.*, 649 F. Supp. 1 (W.D. Pa. 1985) (finding that an action to collect mine reclamation fees, which is a fee under the Surface Mining Control and Reclamation Act of 1977 on each ton of coal produced, is not a fine or penalty subject to § 2462's limitation); *United States v. Davio*, 136 F. Supp. 423 (E.D. Mich. 1955) (holding that action by government to recover amount which subcontractors paid as kickbacks to obtain the subcontracts was not a penal sanction because the amount of kickback equaled the amount by which the government had been damaged). Both *Davio* and *Hawk Contracting* actually refer to the principle of strict construction. See also *United States v. Fire Ring Fuels, Inc.*, 788 F. Supp. 326 (E.D. Ky. 1991) (reaching the same result as *Hawk Contracting* without reference to the principle); *United States v. Weaver*, 207 F.2d 796 (5th Cir. 1953) (finding without explicit reference to the principle that an action to recover money from defendants for their allegedly obtaining property by fraudulent means is compensatory in nature and not an action for a civil penalty and therefore § 2462 could not bar the action).

68. See, e.g., *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *United States v. Core Lab., Inc.*, 759 F.2d 480 (5th Cir. 1985); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819 (1st Cir. 1965).

69. 952 F.2d 920 (6th Cir. 1991), cert. denied, 113 S. Ct. 85 (1992).

70. I.R.C. § 6701 (1988).

71. *Mullikin*, 952 F.2d at 929.

72. 952 F.2d at 929.

73. 952 F.2d at 929.

74. 952 F.2d at 928.

75. The mere fact that TSCA contains no statute of limitations is not evidence that Congress intended that none apply. The Clean Water Act, the Resource Conservation and Recovery Act,

Finally, from its language, Congress apparently intended section 2462 to constitute a broad waiver of the government's right to be free from the operation of statutes of limitations. Section 2462 declares, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding . . . shall not be entertained . . ."⁷⁶ Such a waiver of government immunity applies across the board, and the principle of strict construction should be rendered inapplicable.⁷⁷ The First Circuit's decision in *H.P. Lambert Co. v. Secretary of the Treasury*⁷⁸ supports this position. In *H.P. Lambert*, the Secretary of the Treasury ordered the forfeiture of a customhouse broker's license due to the broker's misconduct over a thirteen-year period. The broker claimed that section 2462 barred the Secretary from basing forfeiture on misconduct occurring more than five years before commencement of the forfeiture proceeding. The First Circuit agreed with the broker, finding that language in the relevant statute that "[t]he collector . . . may at any time, for good and sufficient reasons, serve notice in writing upon any customhouse broker" could not prevent section 2462's application to the forfeiture action.⁷⁹ Although the First Circuit admitted that the phrase "at any time," if taken literally, might suggest that no time limit applied, it concluded that "the general policy of statutes of limitations is so deeply ingrained in our legal system that a period of limitations made generally applicable to such proceedings, as is section 2462, is not to be avoided unless that purpose is made manifestly clear."⁸⁰

Thus, *Dupont, Whited & Wheless, City of Palm Beach*, and *Mullikin*, the key cases that potentially support a strict construction of sec-

and the Clean Air Act (prior to the 1990 amendments) contain no statute of limitations, yet courts routinely apply § 2462 to them. See *infra* note 94 and accompanying text. Moreover, Congress specifically designed § 2462 to cover penalty actions arising under statutes which do not contain statutes of limitations. See *infra* text accompanying notes 96-97.

76. 28 U.S.C. § 2462 (1988) (emphasis added).

77. See *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819 (1st Cir. 1965); *United States v. N.O.C., Inc.*, 28 Env't Rep. Cas. (BNA) 1460, 1464 n.6 (D.N.J. Oct. 14, 1988) ("The use of limiting statutes against the state is disfavored by courts because it derogates the sovereign function. But since Congress itself has stated that section 2462 applies, absent a contrary legislative command, to the enforcement 'of any civil . . . penalty,' the court must apply section 2462." (citations omitted)). The Fifth Circuit, in *United States v. P/B STCO* 213, ON 527 979, 756 F.2d 364 (5th Cir. 1985), rejected the government's contention that no statute of limitations applied to an action under the Clean Water Act to recover cleanup costs because the CWA contained no statute of limitations. The court acknowledged that the CWA contains no limitations period, but it found that "Congress has enacted a general statute of limitations, however, and it is applicable across-the-board to all actions brought by the United States if they are 'founded upon any contract express or implied in law or fact' (six years) or 'founded upon a tort' (three years)." *P/B STCO*, 756 F.2d at 368 (quoting 28 U.S.C. § 2415 (1982)). The court neither mentioned nor applied strict construction and found that an action to recover cleanup costs is most like an action based on quasi-contract, thus the general six-year statute of limitations contained in 28 U.S.C. § 2415(a) (1982) governed. *P/B STCO*, 756 F.2d at 370.

78. 354 F.2d 819 (1st Cir. 1965).

79. *H.P. Lambert*, 354 F.2d at 822 (quoting 19 U.S.C. § 1641(b) (1964)).

80. 354 F.2d at 822.

tion 2462, do not require such an interpretation in TSCA proceedings. Unlike the statute at issue in *Dupont*, section 2462 clearly applies to the government. Unlike the situations in *Whited & Wheless* and *City of Palm Beach*, the government's cause of action under TSCA is a penalty action, the type covered by the statute of limitations. Finally, TSCA, unlike the tax code analyzed in *Mullikin*, does not contain any statute of limitations, yet there is no evidence that Congress intended that none apply. Moreover, Congress broadly waived the government's immunity from limitation periods for penalty actions when it enacted section 2462. This broad waiver should obviate application of strict construction to section 2462.

B. EPA Proceedings Under TSCA and a Strict Construction of Section 2462

Absent strict construction, EPA's administrative assessment of penalties under TSCA easily falls within the language of section 2462 as an action "for the enforcement of [a] civil . . . penalty."⁸¹ ALJs who found section 2462 inapplicable to TSCA had applied strict construction, while those who held that section 2462 barred administrative complaints issued more than five years after the violation found strict construction inappropriate.⁸² This section asserts that even a strict construction of *enforcement* should include administrative assessments of penalties under TSCA.

The Agency claims that only the district court collection action constitutes an action for the enforcement of a civil penalty.⁸³ It argues that the administrative proceeding is not one which "enforces" a penalty; it merely assesses one. If the defendant refuses to pay, EPA must file a district court action. Thus the district court, not the Agency, compels payment.⁸⁴ EPA further argues that a penalty cannot be "enforced" in the first instance until one has been assessed.⁸⁵

These arguments ignore the common understanding of *enforcement* and the reality of EPA's primary role in TSCA enforcement. *Black's Law Dictionary* defines *enforcement* as "[t]he act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command."⁸⁶ EPA's assessment of penalties

81. 28 U.S.C. § 2462 (1988).

82. Compare *In re 3M Co.*, No. TSCA-88-H-06, 1989 TSCA LEXIS 8 (Aug. 7, 1989), *modified*, TSCA Appeal No. 90-3, 1992 TSCA LEXIS 6 (Feb. 28, 1992) and *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13 (Apr. 7, 1989) with *In re CWM Chem. Servs., Inc.*, No. II TSCA-PCB-91-0213, 1991 TSCA LEXIS 21 (Nov. 6, 1991), *revd.*, TSCA Appeal No. 91-6, 1992 WL 90321 (Mar. 23, 1992) and *In re District of Columbia (Lorton Prison Facility)*, No. TSCA-III-439, 1991 TSCA LEXIS 12 (Aug. 30, 1991).

83. See, e.g., *3M*, No. TSCA-88-H-06, at *19.

84. *3M*, No. TSCA-88-H-06, at *21.

85. *3M*, No. TSCA-88-H-06, at *20.

86. BLACK'S LAW DICTIONARY 528 (6th ed. 1990); see also *In re 3M Co.*, TSCA Appeal No.

under TSCA fits this definition.⁸⁷ Upon discovery of a violation and further investigation, a penalty is put into effect at the administrative level. Once the assessment becomes final, the violator generally pays it.⁸⁸ For the vast majority of TSCA violators, then, EPA's administrative proceedings constitute the only enforcement activities they encounter. Moreover, the district court cannot review the amount, validity, or appropriateness of the penalty; it only executes EPA's action.⁸⁹ Thus, the administrative level carries out most, and in some cases all, of the steps necessary to put a penalty "into effect."

Legislative history reveals that Congress considers EPA's assessment of penalties under TSCA to be an enforcement proceeding. The Senate Committee on Environment and Public Works stated in connection with the 1990 amendments to the Clean Air Act:

The bill authorizes the Administrator to issue administrative penalty orders. The government should have the flexibility to *enforce* the Act administratively, in addition to its powers to enforce the Act in court. Administrative *enforcement* authority is provided in numerous other environmental statutes; it often affords a more expeditious and less costly means for resolving compliance problems. See, the Clean Water Act; the Resource Conservation and Recovery Act; and *the Toxic Substances Control Act*.⁹⁰

The Conference Committee on the 1990 amendments also endorsed the view that EPA's activities constitute enforcement actions when it issued the Joint Explanatory Statement. It stated, "EPA is authorized to initiate a range of *enforcement actions* for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders"⁹¹ Consistent with these reports, EPA's authority to assess penalties administratively under the Clean Air Act appears under the section of the statute entitled "Federal enforcement."⁹² The congressional reports on the Clean Air Act amendments indicate that administrative assessment of penalties serves the

90-3, 1992 TSCA LEXIS 6 (Feb. 28, 1992) (quoting definition of "enforce" from same source); *Lorton Prison*, No. TSCA-III-439, at *14 (quoting 5th ed.).

87. See *supra* text accompanying notes 9-23. Including administrative action within the definition of enforcement is not novel. The introductory note of the *Third Restatement of Foreign Relations Law* states, "[e]nforcement is often carried out through executive or administrative rather than judicial action; enforcement is thus not merely an aspect of adjudication" RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 230 (introductory note to pt. IV) (1987). The *Restatement* goes on to define "jurisdiction to enforce" as "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action." *Id.* § 401(c).

88. See *supra* note 20.

89. 15 U.S.C. § 2615(a)(4) (1988).

90. S. REP. NO. 228, 101st Cong., 1st Sess. 364 (1989) (citations omitted) (emphasis added), reprinted in 1990 U.S.C.C.A.N. 3867, 3879.

91. H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. 347 (1990) (emphasis added), reprinted in 1990 U.S.C.C.A.N. 3867, 3879.

92. 42 U.S.C. § 7413 (1988 & Supp. II 1990).

same enforcement purpose as, and is just an alternative enforcement procedure to, an action in federal court.⁹³ Because courts have uniformly construed section 2462 to govern district court actions to assess penalties under the other environmental statutes,⁹⁴ courts should consider TSCA administrative actions to be "enforcement" actions as well.

If an administrative proceeding under TSCA constitutes "an action, suit or proceeding for the enforcement of any civil fine," the language of section 2462 *requires* that it apply to TSCA.⁹⁵ Administrative proceedings under TSCA must be subject to section 2462 unless Congress explicitly states that they are not. Because Congress has not done so, section 2462 must govern administrative assessment of penalties under TSCA.

Moreover, section 2462's language manifests Congress' intent that section 2462 apply to statutes such as TSCA that contain no statute of limitations. As a district court recently noted, the language of section 2462 "strongly implies that the Congress intended Section 2462 to apply precisely to actions . . . in which the substantive right of action under which the United States sues does not contain an express limitations period."⁹⁶ The court stated that it would be absurd to say section 2462 does not apply because the substantive act does not say that it does. By its language, section 2462 establishes a default mechanism

93. See *supra* note 90 and accompanying text.

94. See *United States v. Central Soya, Inc.*, 697 F.2d 165, 169 (7th Cir. 1982) (Rivers and Harbors Act, 33 U.S.C. § 412 (1988)); *United States v. Hobbs*, 736 F. Supp. 1406, 1408-09 (E.D. Va. 1990) (Clean Water Act); *United States v. Sharon Steel Corp.*, 30 Env't. Rep. Cas. (BNA) 1778, 1780 (N.D. Ohio July 12, 1989) ("It is well established that actions for civil penalties under the CWA are governed by the five-year federal statute of limitations, 28 U.S.C. § 2462."); *United States v. SCM Corp.*, 667 F. Supp. 1110, 1123 (D. Md. 1987) (Clean Air Act); *United States v. C & R Trucking Co.*, 537 F. Supp. 1080, 1083 (N.D. W. Va. 1982) (CWA).

Section 2462 was enacted to limit governmental actions to enforce penalties, but courts uniformly apply § 2462 to citizen suits under the CWA rather than borrowing state statutes of limitations in order to be consistent with EPA enforcement. See, e.g., *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (overruling a long line of District of New Jersey cases holding that no statute of limitations applied to citizen suits under the CWA); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987); *National Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1010 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1125 (D. Md. 1985), *aff'd.*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 447-50 (D. Md. 1985). The Ninth Circuit applied § 2462 to citizen suits because § 2462 "clearly applies to enforcement actions brought by the EPA" and applying it to citizen suits "promotes the important federal policy of uniformity and adequately enforcing Clean Water Act." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d at 1521. Likewise, the *Chesapeake* court noted, "[p]roceedings initiated by the EPA would almost certainly be subject to a five-year statute of limitations, 28 U.S.C. § 2462, and the limitations period for citizens should not be shorter." *Chesapeake Bay Found.*, 608 F. Supp. at 448; see also *infra* note 133 (listing administrative actions in which § 2462 was applied).

95. See *supra* notes 76-77 and accompanying text.

96. *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354, 368 (E.D.N.Y. 1992).

that can only apply to actions such as TSCA which do not contain statutes of limitations.⁹⁷

C. Section 2462's Codification in Title 28

EPA frequently argues that section 2462's codification in title 28 precludes its application to purely administrative proceedings.⁹⁸ Title 28, sometimes referred to as the Judicial Code,⁹⁹ contains seven lengthy parts dealing mainly with the judiciary and judicial procedure. The Agency cites sections 451, 1355, and 2461(a) of title 28 as evidence that Congress intended section 2462 to refer only to proceedings in federal courts.¹⁰⁰

Section 451 appears in a chapter entitled "General Provisions Applicable to Courts and Judges" found in part I of title 28, which is entitled "Organization of Courts."¹⁰¹ The section provides the definition of "court of the United States."¹⁰² EPA correctly notes that the definition of court in this chapter about courts does not include administrative tribunals. However, this fact does not clarify section 2462's construction. Section 2462 appears in part VI of title 28 entitled "particular proceedings," in a chapter entitled "Fines, Penalties, and Forfeitures." Section 2462 does not even contain the word "court" as defined in section 451. Instead it refers to "action[s], suit[s], or proceeding[s]," which logically could include administrative proceedings.

If title 28 lacked any reference to administrative proceedings, the argument that Congress only meant proceedings in federal courts might be more persuasive. However, title 28 does contain references to administrative proceedings. Chapter 157 of the title governs Interstate Commerce Commission orders and chapter 158 deals with orders of other federal agencies. These chapters demonstrate that Congress did not totally exclude administrative proceedings from the "judicial title." If Congress intended to limit section 2462 to actions in federal courts, it easily could have drafted the statute that way instead of using the broad language that it did.¹⁰³

97. See *Island Park*, 791 F. Supp. at 367.

98. See *supra* note 28 and accompanying text.

99. *E.g.*, *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2217 n.1 (1992) (Blackmun, J., concurring in the judgment); *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 112 S. Ct. 459, 463 (1991); *Commissioner, INS v. Jean*, 496 U.S. 154, 155 n.1 (1990).

100. Complainant's Memorandum in Opposition to Respondent's Motion to Dismiss at 27, *In re CWM Chem. Servs., Inc.*, No II TSCA-PCB-91-0213, 1991 TSCA LEXIS 21 (Nov. 6, 1991); Motion to Strike Affirmative Defense at 12, *In re 3M Co.*, No. TSCA-88-H-06, 1989 TSCA LEXIS 8 (Aug. 7, 1989) (interlocutory order).

101. 28 U.S.C. § 451 (1988).

102. 28 U.S.C. § 451 (1988).

103. See *Patterson v. Shumate*, 112 S. Ct. 2242, 2246 (1992) ("Congress' decision to use the broader phrase 'applicable nonbankruptcy law' in § 541(c)(2) [of the Bankruptcy Code, 11 U.S.C. § 541(c)(2) (1988)] strongly suggests that it did not intend to restrict the provision" to include only state law.); *United States v. Smith*, 111 S. Ct. 1180, 1189 (1991) ("We must con-

Section 2461(a), the second section cited by EPA, provides: "Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress *without specifying* the mode of recovery or enforcement thereof, it may be recovered in a civil action."¹⁰⁴ EPA argues that this provision, which immediately precedes section 2462, indicates that Congress intended section 2462 to apply only to federal court actions. Section 2461(a), however, cannot control section 2462's construction for TSCA enforcement because TSCA *does* specify the mode of enforcement and recovery. It provides EPA with primary enforcement responsibility and the ability to bring an action in district court for recovery of the penalty. Further, no direct evidence exists that section 2461(a) was intended to restrict section 2462. It is illogical to argue that Congress intended section 2461(a) to limit section 2462 because section 2462 by its language covers all federal punitive actions, not just those for which Congress did not specify the mode of recovery or enforcement.

Finally, EPA points to section 1355, which provides that district courts have original jurisdiction over any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, exclusive of the courts of the states.¹⁰⁵ Nothing in title 28 links this provision with section 2462. Section 1355 appears in a chapter entitled "District Courts; Jurisdiction" in part IV of title 28; the chapter deals only with jurisdiction and venue of federal courts. This provision has two main functions. First, it partially defines the jurisdiction of the district courts as required by Article III of the Constitution.¹⁰⁶ It also states that federal courts, not state courts, have jurisdiction to hear penalty actions arising under federal laws. This section does not say that an administrative proceeding cannot be considered a proceeding for the enforcement of a civil penalty under section 2462.

Unfortunately, direct legislative history surrounding section 2462 sheds no light on whether Congress intended to include administrative proceedings within section 2462. Indirect history, however, implies that Congress did not intend to preclude section 2462's application to administrative proceedings. Since 1948, several congressional committees have stated that section 2462 applies to administrative actions to assess penalties. For example, the Senate Report which accompanied the bill that extended the Export Administration Act (EAA) and

clude that if Congress had intended to limit the protection under the [Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(b)(1)] to employees not covered under the pre-Act statutes, it would have said as much."); *Hamilton v. 1st Source Bank*, 928 F.2d 86, 87-88 (4th Cir. 1990) (holding that statute of limitations for claims of age discrimination did not run from discovery because if Congress had intended a discovery rule, it could have written one); *supra* text accompanying note 73.

104. 28 U.S.C. § 2461(a) (1988) (emphasis added).

105. 28 U.S.C. § 1355 (1988).

106. U.S. CONST. art. III.

provided for the imposition of civil penalties by the Department of Commerce stated:

This bill does not prescribe any period following an offense within which the civil penalty must be imposed. It is intended that the general 5-year limitation imposed by section 2462 of title 28 shall govern. Under that section, the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings.¹⁰⁷

Twenty years later when Congress again extended the EAA, the conference report confirmed the application of section 2462 to the Commerce Department's administrative proceedings.¹⁰⁸

Congressional declarations regarding the application of section 2462 to administrative penalty actions under export controls facilitate an understanding of section 2462's application to TSCA because the enforcement framework under the EAA substantially resembles that under TSCA. Under both statutory schemes, administrative assessment of penalties serves as a mandatory prerequisite to an action in federal court.¹⁰⁹ Although the Supreme Court has stated that subsequent legislative observations do not form part of the legislative history and the intent of the enacting Congress governs,¹¹⁰ they should carry significant weight in the absence of direct evidence of legislative intent.¹¹¹ The reports demonstrate at a minimum that Congress did not intend to preclude absolutely the application of section 2462 to administrative proceedings.

The recent amendments to the Clean Air Act also demonstrate a

107. S. REP. NO. 363, 89th Cong., 1st Sess. 7 (1965), reprinted in 1965 U.S.C.C.A.N. 1826, 1832. The House report accompanying the amendment contains a similar statement. See H.R. REP. NO. 434, 89th Cong., 1st Sess. 5 (1965).

108. H.R. REP. NO. 180, 99th Cong., 1st Sess. 64, (1985), reprinted in 1985 U.S.C.C.A.N. 108, 126. "The intent of the committee of conference is that the Commerce Department must bring its administrative case within 5 years from the date the violation occurred." *Id.*

109. See 50 U.S.C. app. § 2410 (1988). The acts differ in that following an administrative finding, the Export Administration Act requires the district court to determine de novo all issues of liability. If the administrative proceeding under export controls can be viewed as an "enforcement" action when the district court reevaluates the matter, surely EPA's final assessment of penalties under TSCA can be viewed as a proceeding for the enforcement of a civil penalty.

110. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) and *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)). In *Oscar Mayer*, respondent unsuccessfully attempted to override "clear and convincing" evidence of the enacting Congress' intended meaning with a later committee report.

111. Importantly, the *Oscar Mayer* Court did not state that subsequent committee reports are irrelevant. 441 U.S. at 758. Indeed, the Court subsequently recognized the value of post-enactment congressional pronouncements in the absence of other evidence of congressional intent. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) ("[W]hile arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent."); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure.") (citations omitted).

congressional intent not to preclude administrative proceedings from section 2462's time bar. EPA's new authority to issue civil penalties under the Clean Air Act is expressly made subject to section 2462 by statute.¹¹² Yet, extensive reports accompanying the Amendments to the Clean Air Act do not mention the insertion of section 2462 in the statutory language.¹¹³ The lack of explanation and the fact that the reference to section 2462 in the statute is made parenthetically may indicate that Congress believed section 2462 would apply to EPA administrative actions under the Clean Air Act without additional congressional action. Congress presumably inserted the reference to section 2462 for clarification purposes. If true, this is further evidence that Congress does not distinguish administrative proceedings from court actions for application of section 2462.

D. *Federal Courts and Section 2462's Application to Administrative Penalty Actions*

Although no federal court has squarely addressed the issue of whether section 2462 applies to administrative assessment of penalties, several courts have stated or assumed that it does.¹¹⁴ In an unreported decision, *United States v. N.O.C., Inc.*,¹¹⁵ the District Court of New Jersey addressed the issue of when the district court action under TSCA accrues for purposes of section 2462. The court believed section 2462 must apply separately to each prong of TSCA enforcement. Applying section 2462 to EPA's penalty action protected the defendant from stale claims and curbed the potential for agency abuse. On the other hand, the court reasoned, applying section 2462 separately to the district court collection phase and holding that the action accrues upon the completion of the administrative process ensures that the Agency has ample time to collect the penalty it has assessed.¹¹⁶

112. 42 U.S.C. § 7413(a)(1) (1988 & Supp. II 1990). This section provides in part:

At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28) . . . (B) issue an administrative penalty order in accordance with subsection (d) of this section, or (C) bring a civil action in accordance with subsection (b) of this section.

113. H.R. CONF. REP. No. 952, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 3867; S. REP. No. 228, 101st Cong., 1st Sess. (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385.

114. *E.g.*, *United States v. Meyer*, 808 F.2d 912, 914 & n.2 (1st Cir. 1987); *Caldwell v. Gurlley Ref. Co.*, 755 F.2d 645, 651 (8th Cir. 1985); *United States Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982); *Lancashire Shipping Co. v. Durning*, 98 F.2d 751, 752-53 (2d Cir.), *cert. denied*, 305 U.S. 635 (1938); *United States v. N.O.C., Inc.*, 28 Env't. Rep. Cas. (BNA) 1460, 1467-68 (D.N.J. Oct. 14, 1988); *see also* *United States v. McCune*, 763 F. Supp. 916, 918 (S.D. Ohio 1989) (stating that defendant made no argument that the Secretary unreasonably delayed administrative proceedings and therefore action is brought within the time period).

115. 28 Env't. Rep. Cas. (BNA) 1460 (D.N.J. Oct. 14, 1988). *See supra* note 41 and *infra* notes 191-93 and accompanying text.

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

Two court of appeals decisions involving the Export Administration Act (EAA) support the *N.O.C.* court's analysis. As discussed earlier,¹¹⁷ the EAA, like TSCA, contains a mandatory administrative penalty assessment step followed by an optional proceeding in district court. In both *United States v. Core Laboratories, Inc.*¹¹⁸ and *United States v. Meyer*,¹¹⁹ the courts had to decide when section 2462 begins to run for district court actions to recover penalties assessed administratively under the EAA. Both courts recognized that section 2462 applied to the prior administrative action. In *Meyer*, the court stated, "[b]oth parties concede that, as applied to the EAA, this statute at least requires that any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation."¹²⁰

The First Circuit's statements in *Meyer* cannot be dismissed as mere *dicta*. First, the court characterized the question before it as whether section 2462 provides *an additional* five years to enforce a penalty in district court.¹²¹ The Department of Commerce began the administrative action within three and a half years of the violation. By the time the administrative process had ended, more than six years had passed since the violation. Assuming section 2462 applied to the administrative prong, the court believed it would be incongruous for Congress to have allowed the government five years to file an administrative penalty action, while permitting the time to expire before the government could realize the benefits of the administrative proceedings by recovering the penalty in a district court action.¹²² The court also noted that because requiring initiation of the administrative penalty action within five years of the violation abundantly satisfies legitimate concerns for repose, fair notice, and preservation of evidence, its holding that the district court action accrues at the conclusion of the administrative prong causes no injustice to the defendants.¹²³

Similarly, the court in *United States Department of Labor v. Old Ben Coal Co.*¹²⁴ seemed to assume that section 2462 applies to administrative penalty actions when reaching a decision on whether section 2462 barred a district court action to recover a penalty assessed by the

117. See *supra* note 109 and accompanying text.

118. 759 F.2d 480 (5th Cir. 1985).

119. 808 F.2d 912 (1st Cir. 1987).

120. *Meyer*, 808 F.2d at 914. The court expounded, "[a]lthough the analytical underpinnings of this interpretation seem somewhat wobbly, the view is eminently reasonable as a matter of policy and is supported by two distinct pronouncements of subsequent legislative committees that chose to comment on the matter." 808 F.2d at 914. In a footnote, the court noted that the parties' interpretation found substantial support in an earlier decision of the Second Circuit. 808 F.2d at 914 n.2 (referring to *Lancashire Shipping Co. v. Durning*, 98 F.2d 751 (2d Cir.), *cert. denied*, 305 U.S. 635 (1938)).

121. *Meyer*, 808 F.2d at 914.

122. 808 F.2d at 920.

123. 808 F.2d at 922.

124. 676 F.2d 259 (7th Cir. 1982).

Secretary of Labor under the Federal Coal Mine Health and Safety Act of 1969.¹²⁵ The court held that section 2462 did not apply to the Department of Labor's effort to recover a penalty, which was akin to a collection action.¹²⁶ In reaching its conclusion, the court noted that the defendant did not need the protection of a limitations period for the district court action because the administrative penalty action, which had commenced within five years of the violation, had already fulfilled the purposes behind the statute of limitations.¹²⁷

In yet another context, a court suggested, without deciding, that section 2462 may apply to administrative assessment of penalties. In *Caldwell v. Gurley Refining Co.*,¹²⁸ a lessor brought an action against a lessee for a declaratory judgment to determine their respective rights and obligations vis-à-vis liability to EPA under the Clean Water Act.¹²⁹ The lessee claimed that section 2462 barred the government from bringing an action against the lessor, and therefore no controversy existed on which the district court could base jurisdiction to hear the matter. The Eighth Circuit responded that because the Coast Guard had already commenced substantial administrative penalty proceedings within five years of the violation, the government still could prevail.¹³⁰ The court affirmed the trial court's ruling that the lessee was responsible for any liability to EPA.¹³¹

In contrast to these decisions which suggest that section 2462 applies to administrative decisions under a variety of statutes, no federal court has ever said that section 2462 does not apply to administrative proceedings.¹³² Moreover, ALJs within EPA have ruled that section 2462 applies to administrative penalty assessments under other environmental statutes such as the Resource Conservation and Recovery Act (RCRA).¹³³ Under RCRA, EPA can choose whether to file an immediate action in district court or to assess a penalty administra-

125. Pub. L. 91-173, tit. I, § 109(a)(4), 83 Stat. 742, 756 (codified as amended at 30 U.S.C. § 820(j) (1988 & Supp. II 1990)).

126. *Old Ben Coal*, 676 F.2d at 261. The court stated that even if § 2462 did apply to the district court action, the action could not accrue until the administrative proceeding ended because no cause of action exists unless a violator refuses to pay.

127. 676 F.2d at 261.

128. 755 F.2d 645 (8th Cir. 1985).

129. 33 U.S.C. § 1321 (1988).

130. *Caldwell*, 755 F.2d at 651.

131. 755 F.2d at 648. The district court awarded EPA \$76,758.60 for cleanup costs. *United States v. Gurley Ref. Co.*, 788 F. Supp. 1473, 1478-79 (E.D. Ark. 1992).

132. In *Mullikin*, the government specifically raised the issue of whether an administrative penalty assessment constitutes an action for the enforcement of a penalty under § 2462. However, because the court held that Congress did not intend § 2462 to apply to actions under § 6701 of the IRC, the court declined to reach the issue. *Mullikin v. United States*, 952 F.2d 920, 929-30 n.17 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

133. 42 U.S.C. § 6928 (1988). *E.g.*, *In re Waterville Indus.*, No. RCRA-I-87-1086, 1988 RCRA LEXIS 20 (June 23, 1988); *see also In re J.V. Peters & Co.*, RCRA Appeal No. 88-3, 1990 RCRA LEXIS 25 (Aug. 7, 1990). The CJO decided the case on different grounds, but

tively,¹³⁴ but once the Agency decides to proceed administratively, the procedures are nearly identical to those under TSCA.¹³⁵ Because both the administrative procedures and guiding principles between RCRA and TSCA are similar, the language of section 2462 cannot support a distinction between them. If EPA's administrative penalty assessment under RCRA fits within the definition of a proceeding for the enforcement of a civil penalty, so should its action under TSCA.¹³⁶ Thus, EPA actions under TSCA should be subject to section 2462's bar.

E. TSCA Administrative Proceedings, Section 2462, and Purposes of Statutes of Limitations

Just as the language of section 2462 requires its application to EPA's assessment of penalties,¹³⁷ so do its purposes. Statutes of limitations such as section 2462 serve three overlapping functions: (1) to ensure fairness and repose to defendants; (2) to promote the effectiveness and efficiency of the judicial system; and (3) to promote societal stability.¹³⁸ Applying section 2462 only to district court proceedings does not advance these purposes.¹³⁹

Ensuring fairness to the defendant ranks highest among the various purposes of statutes of limitations.¹⁴⁰ The Supreme Court long

noted in a footnote that applying § 2462 to administrative penalty actions would be consistent with Clean Water Act and Clean Air Act enforcement.

134. See *supra* note 11.

135. See 42 U.S.C. § 6928(a) (1988).

136. In *In re Tremco, Inc.*, No. TSCA-88-H-05, 1989 TSCA LEXIS 13 (Apr. 7, 1989), an ALJ explained why he holds that § 2462 *does not* apply to TSCA when he had previously held that § 2462 *does* apply to RCRA. Under RCRA, EPA has a choice of proceeding administratively to assess a penalty or filing an immediate action in district court and § 2462 clearly applies to a RCRA action in federal court. Therefore, the ALJ reasoned, § 2462 also should apply to administrative penalty assessments, presumably to prevent EPA from choosing a forum based on the statute of limitations issue. However, the language of § 2462 cannot support this distinction based on policy.

137. See discussion *supra* section II.B.

138. Carie G. McKinney, Note, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 202 (1986); see also, e.g., Gretchen W. Anderson, *Uniformity in Clean Water Act Enforcement: Applying a Five Year Federal Statute of Limitations to Citizen Suits*, 6 TEMP. ENVTL. L. & TECH. J. 49, 70-71 (1987); M. Patrick McDowell, Note, *Limitations Period for Federal Causes of Action After the Judicial Improvement Acts of 1990*, 44 VAND. L. REV. 1355, 1367 (1992); Neil Sobol, Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 SW. L.J. 895, 897-98 (1987).

139. See *United States Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (recognizing that the administrative proceedings under the federal coal mine health and safety statute, not the district court proceedings, fulfill the purposes of putting the alleged violator on notice and preventing the loss of evidence); see also *United States v. Meyer*, 808 F.2d 912, 922 (1st Cir. 1987) ("All in all, construing § 2462 to require the initiation of administrative proceedings [under the EAA] within five years of the date of the alleged violation . . . abundantly satisfies any legitimate concerns for repose, fair notice, and preservation of evidence.").

140. *United States v. Meyer*, 808 F.2d 912, 921 (1st Cir. 1987) (noting that the primary purpose of statutes of limitations is to prevent unjust surprise through the revival of claims long after evidence has been lost and memories have faded); Sobol, *supra* note 138, at 897.

ago stated:

Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.¹⁴¹

More recently, the Court, relying in part on the above case, declared that "[s]tatutes of limitations . . . represent a *pervasive* legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time"¹⁴² Further, the Senate report concerning the enactment of section 2415, a general statute of limitations for government contract and tort actions, contains a supporting statement by the Comptroller General expressing the belief that "as a matter of fairness, persons dealing with the Government should have some protection against an action by the Government when the act occurred many years previously."¹⁴³ Section 2462, like section 2415, protects entities from government delay.

These Supreme Court and legislative pronouncements embody three separate fairness concerns: repose, notice, and preservation of evidence needed for defense. The concern for repose signifies that at some point, the defendant should have a right, absent fraud or other special circumstances, to be free from stale claims.¹⁴⁴ To accomplish repose, a statute of limitations provides a definite time within which rights must be asserted. But without an application of section 2462 to the administrative action, an alleged violator could never enjoy repose. EPA would have unlimited power to delay bringing penalty actions even for decades after the alleged violation. "An interpretation of a statute purporting to set a definite limitation upon the time of bringing action . . . which would nevertheless, leave defendant subject indefinitely to action for the wrong done, would . . . defeat its obvious purpose."¹⁴⁵

Thus, courts should not interpret section 2462 to exclude EPA ad-

141. Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944); see also Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983); United States v. Kubrick, 444 U.S. 111, 117 (1979).

142. *Kubrick*, 444 U.S. at 117 (1979) (emphasis added).

143. S. REP. No. 1328, 89th Cong. 2d Sess. 7 (1966), reprinted in 1966 U.S.C.C.A.N. 2502, 2508.

144. *United States v. Core Labs., Inc.*, 759 F.2d 480, 483 (5th Cir. 1985).

145. *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926). In *Reading*, the Court construed § 6 of the Federal Employers Liability Act, ch. 149, 35 Stat. 66 (1908) (codified as amended at 45 U.S.C. § 56 (1988)), which provided that no action could be maintained unless commenced within two years from the day the cause of action accrued. The plaintiff insisted that the limitation period ran not from the death of the victim but from the appointment of the estate administrator. The Court rejected the argument because the plaintiff could put off applying for the appointment of the administrator and consequently decide when the statute runs. The Court

ministrative actions, which would result in no definite time limit within which actions must begin. If section 2462 does not require EPA to file its administrative complaint within five years, the violator must look endlessly over its shoulder, waiting for the threatened action to begin, yet ignorant of the extent of its ultimate liability. The uncertainty of liability over an extended period of time may cause it to invest cautiously in its operations, leading to operational inefficiencies and eventual noncompetitiveness. Application of section 2462 prevents EPA from dangling liability over a defendant, chilling its actions.¹⁴⁶

Sometimes an entity does not know that it has violated TSCA. The concern with repose, therefore, does not even come into play. However, in this case, statutes of limitations prevent unnecessary loss to defendants by forcing the agency to act when it learns of the violation, providing notice to the defendant. The defendant can then minimize any harm caused by its actions. *In re CWM Chemical Services, Inc.*¹⁴⁷ best illustrates this point. CWM alleged that as early as 1981 or 1982, EPA knew the composition of certain sludge CWM was receiving for disposal at its facility. The Agency obtained its information from the entity which produced the sludge, and therefore its information may have been superior to that of CWM. Yet, EPA waited until March 1991 to file an administrative complaint against CWM for improper disposal and then sought over seven million dollars in penalties.¹⁴⁸ If true, this is a prime example of unjust surprise to the defendant's and the public's detriment. If EPA had initiated a claim against CWM in 1982, CWM may have been able to correct the problem and avoid massive liability.

While EPA's concern for public health and its reputation may provide some incentive for the Agency to act even in the absence of a statute of limitations, *CWM* demonstrates that agency inertia sometimes can be more powerful. Further, without section 2462, TSCA provides a built-in incentive for EPA to delay notifying the violator. TSCA provides that for continuing violations each day counts as a separate violation; as each day passes, the defendant could be liable for up to an additional \$25,000.¹⁴⁹ The defendant need not even know of

recognized that permitting the plaintiff to control events occurring prior to the running of the statute of limitations defeats its purposes. *Reading*, 271 U.S. at 65.

146. *United States v. N.O.C., Inc.*, 28 Env't. Rep. Cas. (BNA) 1460, 1467 (D.N.J. Oct. 14, 1988).

147. No. II TSCA-PCB-91-0213, 1991 TSCA LEXIS 21 (Nov. 6, 1991), *rev'd.*, TSCA Appeal No. 91-6, 1992 WL 90321 (Mar. 23, 1992).

148. Motion to Dismiss and Memorandum in Support at 23, *CWM*, No. II TSCA-PCB-91-0213.

149. 15 U.S.C. § 2615(a)(1) (1988).

the violation.¹⁵⁰ Thus, permitting EPA to bring actions at any time can lead to astronomical liability even for an entity that did not realize it had committed a violation. The potential for agency abuse under TSCA was a key factor in the *N.O.C.* court's decision that section 2462 applies separately to the administrative enforcement step. The court agreed with the defendant that the potential for abuse "must be checked by a stern application of limiting statutes."¹⁵¹

Finally, fairness to the defendant encompasses the ability to obtain or preserve evidence needed for its defense.¹⁵² No one doubts that claims become more difficult to defend with the passage of time.¹⁵³ This is especially true in the corporate context. Not only does one encounter the usual problems of faded memories and the unavailability of documents, but in the era of corporate cutbacks and early retirements, many witnesses are no longer employed by the defendant.¹⁵⁴ Most employees no longer stay with one employer for their entire career.¹⁵⁵ With the passage of time, "best known addresses" retained by personnel departments may prove unreliable for former employees who are not receiving pension benefits, and fewer of the employees who were familiar with the events giving rise to the violation are easily accessible to the defendant. As employees leave, many documents, which constitute the corporate memory, become lost or destroyed.¹⁵⁶ Yet, historic efforts to comply with TSCA, compliance policies, and the inadvertence of a violation are all relevant to penalty determinations.¹⁵⁷ Without a time limit on EPA, the defendant will have greater difficulty proving these potential mitigating factors. In other cases, a

150. If an entity knowingly violates TSCA, it is subject to criminal prosecution. 15 U.S.C. § 2615(b) (1988).

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

152. See *supra* text accompanying notes 140-41.

153. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *supra* text accompanying notes 140-41; *infra* text accompanying notes 160-64.

154. See e.g., John Burgess, *IBM Plans More Job Cuts, Calls Its First Layoffs Likely*, WASH. POST, Dec. 16, 1992, at A1, A9 (reporting that IBM will cut back 25,000 jobs in 1993 and bring its staffing down to 275,000 from a peak of 400,000 in 1985); Laura Fowlie, *Inefficient Operations Force Big 3 to Rebuild Engines*, FIN. POST, Dec. 26, 1992 (stating that new GM CEO's job will be to cut another 30,000 or so employees, mainly through early retirement and attrition); John Holusha, *Dupont Sets A Charge of \$5 Billion*, N.Y. TIMES, Jan. 5, 1993, at C4 (reporting \$275,000 million charge for plant closings and early retirement).

155. Labor Secretary Lynn Martin hailed a new unemployment benefit law which became effective January 1, 1993, stating, "Because . . . most workers will change careers many times in their lives, pensions that follow workers from job to job and from company to company will add to the flexibility and competitiveness of each individual worker." *Martin Says Employees Will Be Helped by Provisions of Unemployment Benefits Law*, 19 *Pens. Rep.* (BNA) 1269 (July 13, 1992); *Another Take on Corporate Layoffs and Staff Loyalty*, INVESTOR'S BUS. DAILY, Sept. 24, 1992 (Executive Update; Your Employees), at 1 (quoting Peter Drucker as saying that massive layoffs by corporations have "ended middle-management loyalty if there ever was any").

156. For a discussion of these problems, see *In re* District of Columbia (Lorton Prison Facility), No. TSCA-III-439, 1991 TSCA LEXIS 12, at *32 (Aug. 30, 1991).

157. See *In re* 3M, Co., TSCA Appeal No. 90-3, 1992 TSCA LEXIS 6, at *9-25 (Feb. 28, 1992).

defendant may have records dating back several decades without the availability of witnesses to explain apparent inconsistencies.

Potential prejudice to the defendant resulting from these factors becomes particularly pronounced in the administrative arena where the same agency serves as both prosecutor and judge. As one ALJ commented, "exposure to the same field of regulation inevitably results in the development of a point of view which, unconsciously or otherwise, influences the initial decision and, in some cases, the conduct of the hearing."¹⁵⁸ Although Congress and administrative agencies have taken steps to improve the independence of ALJs, their efforts have not achieved total success.¹⁵⁹

EPA may suffer some of the same consequences of delay as defendants. Certainly, the Agency experiences personnel changes and may lose certain records. However, EPA decides which cases to prosecute. While preparing for prosecution, it may concentrate its attention on information it needs and neglect to retain other information which could be useful to the defendant. Once EPA finally issues its administrative complaint, the defendant, not the Agency, will be called upon to explain discrepancies in the records.

The lack of reliable witnesses and documents also frustrates the second purpose of statutes of limitations — promotion of the effectiveness and efficiency of the judicial system. In *United States v. Kubrick*,¹⁶⁰ the Court recognized that statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."¹⁶¹ Fresh testimony ensures more reliable factfinding and enhances the efficiency, accuracy, and effectiveness of the judicial system.¹⁶² Stale claims cannot easily be presented or adjudicated.¹⁶³ This has led the Supreme Court to declare: "Statutes of limitations are not simply technicalities. On the

158. Paul N. Pfeiffer, *Hearing Cases Before Several Agencies — Odyssey of an Administrative Law Judge*, 27 ADMIN. L. REV. 217, 221 (1975).

159. Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REF. 537, 537 (1985) ("At the federal level, each ALJ serves one agency, hearing cases arising under that agency alone. This close association of ALJs with administrative agencies may lead to agency proceedings that are neither objective nor well reasoned."); L. Hope O'Keefe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 612 (1986) (noting that although ALJs are independent of prosecutorial staffs, the number of ALJs, staffs, workloads, vacations, and geographic assignments are within agency control). Kauper further asserts that corrective measures adopted by Congress, such as performance evaluations by an independent agency, have not achieved the goal of ALJ independence. Kauper, *supra*, at 537-38.

160. 444 U.S. 111 (1979).

161. *Kubrick*, 444 U.S. at 117 (emphasis added).

162. Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980).

163. S. REP. NO. 1328, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2502,

contrary, they have long been respected as fundamental to a well-ordered judicial system.”¹⁶⁴ Applying section 2462 to TSCA administrative proceedings promotes adjudicative accuracy and efficiency by ensuring that defendant’s liability and the appropriateness of the penalty are determined before the evidence becomes stale.

In TSCA enforcement, problems caused by stale evidence would fall most heavily on the administrative proceeding because at the district court level EPA only has to prove that it assessed a certain penalty and that the defendant refused to pay it. Nevertheless, whether section 2462 applies still affects the federal courts because prior to the district court proceeding, the defendant can appeal as of right to the court of appeals.¹⁶⁵ The court of appeals would then also have to struggle with the lack of fresh testimony. Requiring EPA to begin its proceedings within section 2462’s time limit avoids this problem.

Finally, statutes of limitation promote societal stability. Third parties may be reluctant to deal with companies that face the uncertainty of unsettled claims.¹⁶⁶ This is particularly true when the amount of the claim can escalate for years. Statutes of limitations require that adverse parties tackle and resolve a dispute or unsettled claim within a reasonable period of time so that entities can devote their energy to their primary business.

Statutes of limitations enhance fairness, judicial effectiveness, and societal stability. As the Court has repeatedly declared: “[a] federal cause of action ‘brought at any distance of time’ would be ‘utterly repugnant to the genius of our laws.’”¹⁶⁷ Courts must apply section 2462 to administrative actions assessing penalties in order to fulfill the purposes of statutes of limitations.

III. ACCRUAL OF SECTION 2462 WHEN APPLIED TO TSCA

This Part explains how courts should apply section 2462 to TSCA. As a court decides how section 2462 applies to one of TSCA’s enforcement steps, it also should examine whether section 2462 applies to the other prong, and if so, when the action accrues. Deciding how section 2462 applies by looking only at the district court proceeding could leave the defendant with effectively no protection from ancient claims by permitting EPA to control events which begin the running of the

2503 (recommending passage of § 2415, a statute of limitations applying to government contract and tort actions).

164. *Tomanio*, 446 U.S. at 487.

165. See *supra* note 17 and accompanying text.

166. McKinney, *supra* note 138, at 202-03; see *supra* text accompanying notes 144-45.

167. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)); see also *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987) (quoting *Wilson* in response to Justice Scalia’s dissent which asserted that since RICO contained no statute of limitations, none applied).

statute. On the other hand, focusing on the administrative phase could permit the defendant to exhaust the time period with administrative appeals and leave the agency with inadequate time in which to bring a collection action.

Several solutions to the problem are possible under section 2462. The administrative enforcement prong could accrue either upon violation or upon its discovery by EPA. As section 2462 is applied to the district court prong,¹⁶⁸ it could accrue upon violation, discovery, or upon final assessment of the penalty by EPA or the court of appeals. Section III.A argues that EPA must file its administrative complaint within five years of the violation. Section III.B asserts that the district court action should not accrue until final administrative assessment of penalties, provided section 2462 applies to the administrative stage as well. Thus, the Agency would have five years to file a district court collection action after the penalty assessment becomes final.

A. *Accrual of the Administrative Action*

In the context of TSCA enforcement, the administrative proceedings determine the extent of a violator's liability for civil penalties.¹⁶⁹ With few exceptions, when referring to actions that determine the extent of defendant's liability for penalties or forfeiture, courts and Congress have interpreted section 2462 and its predecessors to run from the date of violation, not from the time of its discovery.¹⁷⁰ The precedent holding that section 2462 runs from violation is so overwhelming that in 1985, when deciding when a district court collection action should accrue, the Fifth Circuit felt compelled to hold that it too accrues at violation.¹⁷¹ It believed that the date of violation had received universal acceptance as the date when a claim accrued under section 2462, citing no less than sixteen cases for this proposition.¹⁷²

Following this pervasive trend, courts generally have held that section 2462 runs from the date of the violation in the environmental

168. See *supra* note 41 and accompanying text.

169. See *supra* notes 10-23 and accompanying text.

170. *E.g.*, *United States v. Athlone Indus.*, 746 F.2d 977, 982 n.1 (3d Cir. 1984); *Western Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1287 (9th Cir. 1984); *United States v. Ancorp Natl. Servs.*, 516 F.2d 198, 200 n.5 (2d Cir. 1975); *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954); *The Ng Ka Py Cases*, 24 F.2d 772, 774 (9th Cir. 1928) (under 28 U.S.C. § 791, the predecessor to § 2462); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1037 (N.D. Ohio 1981); *FTC v. Lukens Steel Co.*, 454 F. Supp. 1182, 1185 n.2 (D.D.C. 1978); *United States v. Appling*, 239 F. Supp. 185, 194-95 (S.D. Tex. 1965); *United States v. Fraser*, 156 F. Supp. 144, 147 (D. Mont. 1957), *aff'd.*, 261 F.2d 282 (9th Cir. 1958); *United States v. One Dark Bay Horse*, 130 F. 240, 241 (D. Vt. 1904) (applying Revised Statutes § 1047); see *supra* notes 107-08 and accompanying text. *But see infra* notes 177-79 and accompanying text.

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

172. *Core Lab.*, 759 F.2d at 482. Reliance on these cases was misplaced, however, as explained *infra* notes 198-201 and accompanying text.

context as well. As mentioned above,¹⁷³ under other environmental statutes, EPA can choose whether to file an action in district court directly or to assess the penalty administratively. Regardless of which route it chooses to follow to impose penalties, EPA still must file its administrative or civil complaint within five years of the violation to ensure success. This is true for RCRA,¹⁷⁴ the Clean Air Act,¹⁷⁵ and for the majority of courts that have heard penalty actions under the Clean Water Act (CWA).¹⁷⁶

A few courts have deviated from this rule in cases involving permit violations under the CWA. When courts routinely began to apply section 2462 to citizen suits under the CWA, a minority of courts believed it would be unfair to require citizens to begin an action within five years of the violation, given their lack of access to the violator's facility. Until the alleged violator files a discharge monitoring report which reveals the violation, the public would have great difficulty discovering it. Therefore, these courts held that citizens can begin actions within five years of the filing of the report.¹⁷⁷ Nevertheless, even in this situation most courts start the running of the statute from the date of violation.¹⁷⁸ In *United States v. Hobbs*,¹⁷⁹ the court followed the minority approach of the citizen-suit cases and held that the stat-

173. See *supra* notes 11, 133 and accompanying text.

174. *In re Waterville Indus.*, No. RCRA-I-87-1086, 1988 RCRA LEXIS 20, at *9 (June 23, 1988); see also *United States v. Hardage*, 116 F.R.D. 460 (W.D. Okla. 1987):

At the present time, this Court is not satisfied the Government may bring an action under CERCLA or RCRA without regard to the timeliness The Court cannot accept such a view [that the government's cause of action exists ad infinitum] and therefore declines at this time to strike Defendant's statute of limitations defense.

116 F.R.D. at 467.

175. See *supra* note 112 and accompanying text; *United States v. SCM Corp.*, 667 F. Supp. 1110 (D. Md. 1987).

176. *United States v. Sharon Steel Corp.*, 30 *Env't. Rep. Cas. (BNA)* 1778, 1780 (N.D. Ohio July 12, 1989) ("It is well established that actions for civil penalties under the CWA are governed by the five-year federal statute of limitations, 28 U.S.C. § 2462.") (citations omitted); see, e.g., *United States v. C. & R. Trucking Co.*, 537 F. Supp. 1080 (N.D. W. Va. 1982).

177. E.g., *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (overruling a long line of District of New Jersey cases holding that no statute of limitations applied to citizen suits under the CWA); *Northwest Env'tl. Defense Ctr. v. Unified Sewerage Agency*, 30 *Env't. Rep. Cas. (BNA)* 1117 (D. Or. 1989); *Atlantic States Legal Found. v. Al Tech. Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986).

178. See, e.g., *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (9th Cir. 1987) (discussing the district court rulings); *Lykins v. Westinghouse Elec.*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21,498, 21,501 (E.D. Ky. Feb. 29, 1988); *National Wildlife Fedn. v. Consumers Power Co.*, 657 F. Supp. 989 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988); *Connecticut Fund for the Env't. v. Job Plating Co.*, 623 F. Supp. 207, 212-13 (D. Conn. 1985); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985), *aff'd*, 847 F.2d 1109, 1124-25 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440 (D. Md. 1985); *Friends of the Earth v. Facet Enters.*, 618 F. Supp. 532, 535-36 (W.D.N.Y. 1984).

179. 736 F. Supp. 1406 (E.D. Va. 1990), *aff'd*, 947 F.2d 941 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 2274 (1992).

ute of limitations for government actions under the CWA runs from the filing of the discharge monitoring report.

Courts should not follow the *Hobbs* analysis, however, for the reasoning developed in the citizen-suit context is not applicable to EPA actions. Unlike private citizens, the Agency has access to entities' facilities. It has broad authority under environmental statutes to conduct inspections, check records, and request additional information.¹⁸⁰ While EPA's resources are limited, five years should be ample time to discover permit violations. Further, because Congress charged the Agency with responsibility to ensure compliance with environmental statutes, defendants should not suffer because of the Agency's inaction. Finally, if courts condone a lack of diligence by EPA, it may not perform diligently.¹⁸¹ The Agency would have less incentive to inspect or investigate facilities in a timely manner if it can impose a penalty regardless of timing.

No basis exists for distinguishing penalties assessed under TSCA from those assessed under other environmental statutes. In fact, the Senate Committee on Environment and Public Works stated that Congress modeled the recent amendments to the Clean Air Act enforcement framework "after similar provisions in other environmental statutes, including the Toxic Substances Control Act."¹⁸² In TSCA, as in other environmental statutes, Congress provided EPA with all the weapons at its disposal to enable it to discover violations in a timely fashion.¹⁸³ Permitting EPA to delay enforcement until five years after it happens to discover a violation only encourages inaction and additional delays. If EPA diligently performs its responsibilities under TSCA but cannot discover the violation because an entity actively conceals it, equitable tolling would protect EPA's cause of action.¹⁸⁴

Because discovery of the violation ultimately rests in EPA's hands, allowing the action to accrue upon discovery can result effectively in no statute of limitations. The evils that such a policy can cause al-

180. 33 U.S.C. §§ 1318(a)(B), 1319(g)(10), 1369(a) (1988); see also 42 U.S.C. §§ 7414(a), 7607(a) (Supp. II 1990); *infra* note 183.

181. See *supra* notes 142-43 and accompanying text.

182. S. REP. No. 228, 101st Cong., 2d Sess. 361 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3744.

183. See, e.g., 15 U.S.C. § 2610 (1988) (power to inspect and to issue subpoenas).

184. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946); *In re District of Columbia (Lorton Prison Facility)*, No. TSCA-III-439, 1991 TSCA LEXIS 12, at *32 (Aug. 30, 1991). The ALJ in *Lorton* stated:

[I]n response to any argument that a respondent may wrongfully conceal violations of TSCA and thus allow the five year limitation to expire, the equitable doctrine of fraudulent concealment which is read into every statute of limitations could be applied to toll the statute in cases where the required elements of fraudulent concealment are present.

No. TSCA-III-439 at *32 (footnote omitted).

ready have been demonstrated.¹⁸⁵ Starting the running of the limitations period upon discovery would especially compromise the defendant's ability to obtain evidence needed for a proper defense. The majority of record retention requirements under TSCA are five years or less.¹⁸⁶ Thus, initiation of an action only one day past five years places the defendant at a disadvantage. If the defendant destroys records in accordance with statutory retention requirements, it no longer has documents it needs for its defense.

No corresponding benefit from delay outweighs the potential injustice. The public could achieve satisfaction knowing a violator ultimately has been punished and may benefit from the deterrent effect of indeterminate liability. The Supreme Court has admonished, however, "[i]n compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten."¹⁸⁷ Further, the public receives greater benefit from efficient and prompt enforcement of TSCA. The longer EPA delays taking action against entities that improperly use, store, or dispose of toxic substances or fail to disclose risks, the longer the public will be exposed to the risks represented by such improper practices. Both the public and the alleged violator benefit when EPA is required to begin an enforcement action within a specific time after the violation occurs.

In sum, overwhelming authority urges that the administrative action should accrue upon violation.¹⁸⁸ No corresponding policy justifies deviating from this authority. Congress intended that EPA "carry out [TSCA] in a reasonable and prudent manner."¹⁸⁹ Five years provides EPA with a broad period for enforcement while not unduly burdening industry.¹⁹⁰

185. See *supra* notes 139-67 and accompanying text.

186. See, e.g., 40 C.F.R. § 704.11 (1992) (3 years); 40 C.F.R. § 704.25(f) (1992) (5 years); 40 C.F.R. § 704.33(g) (1992) (5 years); 40 C.F.R. § 704.95(f) (1992) (5 years); 40 C.F.R. § 704.104(g)(1) (1992) (3 years); 40 C.F.R. § 710.37 (1992) (4 years); 40 C.F.R. § 720.78(a), (b) (1992) (5 years); 40 C.F.R. § 721.40 (1992) (5 years); 40 C.F.R. § 721.125 (1992) (5 years); 40 C.F.R. § 761.180(c), (e) (1992) (5 years); 40 C.F.R. § 761.209 (1992) (3 years). *But cf.* 40 C.F.R. §§ 717.15(d), 761.180(a),(b),(d),(f), 763.94 (1992) (imposing longer periods for certain records relating to PCBs and asbestos).

187. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

188. Some violations, such as a failure to do something which TSCA requires, can be characterized as continuing violations. For these violations, each day counts as a separate violation for which the violator can be subject to additional penalties. 15 U.S.C. § 2615(a)(1) (1988). One ALJ held that this section only refers to the amount of penalties and not to when the statute runs, and barred all violations beginning more than five years before the complaint even though the violations allegedly continued into the five-year period. *In re Bethlehem Steel Corp.*, No. TSCA-III-322, 1991 WL 328113, at *2-3 (Dec. 23, 1991), *rev'd.*, TSCA Appeal No. 92-1, 1992 WL 118796 (May 12, 1992) (holding general statute of limitations does not apply to TSCA administrative penalty proceedings). Section 2462, however, should bar only those days of violations occurring outside the five-year period in cases of actual continuing violations.

189. 15 U.S.C. § 2601(c) (1988).

190. See *Anderson*, *supra* note 138, at 71.

B. *Accrual of the District Court Action*

The final issue to be resolved is when the district court action accrues, thus starting the second five-year clock. Theoretically, several possibilities exist: upon violation or discovery, with or without tolling during the administrative process, or upon the completion of the administrative process. The best-reasoned court decisions provide that if an administrative proceeding is a mandatory prerequisite to the district court action, and the agency must file the administrative complaint within five years of the violation, the district court action does not accrue until the administrative procedure is complete.

In *United States v. N.O.C., Inc.*,¹⁹¹ the only federal court to decide when the district court action accrues under TSCA held that it accrues upon completion of the administrative process. The court found that an action accrues from the last act necessary to give a party a cause of action. Under TSCA, this occurs when a penalty has been finally assessed and all appeals are exhausted. Until EPA has imposed a penalty it has nothing to recover in district court.¹⁹² The court was particularly concerned that if the clock began running from the time of violation, the period could expire even before the administrative action ended. It found nothing "within the context of [TSCA] actions which would prompt it to . . . adopt a rule which prevents collection of [TSCA] penalties by virtue of the length of the proceeding necessary to assess them."¹⁹³

The *N.O.C.* court relied heavily on the Supreme Court's decision in *Crown Coat Front Co. v. United States*.¹⁹⁴ *Crown Coat* involved a suit by a government contractor contesting the government's rejection of an adjustment under the "changes clause" of the contract. The government contract required parties to submit disputes to a contracting officer with appeal to the Armed Services Board of Contract Appeals, and to exhaust these procedures before filing an action in federal court. The Court held that the action accrued at the end of the administrative process; until then, the plaintiff had no right to file a district court action.¹⁹⁵ When an action accrues must be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any

191. *United States v. N.O.C., Inc.*, 28 *Env't. Rep. Cas.* (BNA) 1460 (D.N.J. Oct. 14, 1988).

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

193. 28 *Env't. Rep. Cas.* (BNA) at 1467. In *N.O.C.*, EPA filed an administrative complaint within a year of the violation and assessed a penalty two years later. However, appeals by the defendant to the CJO, Third Circuit, and the Supreme Court consumed another three and one-half years. EPA gave *N.O.C.* another year in which to pay the penalty after the conclusion of the appeals. By this time, seven years had passed since the violation.

As noted above, the *N.O.C.* decision rests on § 2462's application to the administrative tier as well. See *supra* notes 115-16 and accompanying text.

194. 386 U.S. 503 (1967).

195. *Crown Coat*, 386 U.S. at 511-12.

limitation of the time within which an action must be brought.’”¹⁹⁶ Allowing the limitation period to run from completion of the contract would have an unfortunate impact, the Court noted. The administrative procedure could be so protracted that the plaintiff could lose the right before he had it.¹⁹⁷ Therefore, the action must run from the conclusion of the administrative proceedings. As noted above, this is the same concern that motivated the *N.O.C.* court.

Under the analogous Export Administration Act, two courts of appeals reached conflicting conclusions on when the district court action accrues for purposes of section 2462. The Fifth Circuit in *Core Laboratories*¹⁹⁸ felt compelled by precedent to find that the district court proceeding accrued upon violation. However, the cases on which it relied involved statutes which contained no mandatory administrative step like the EAA and TSCA.¹⁹⁹ The cases cited by the court had held that the initial action which assesses or imposes penalties or forfeitures must begin within five years of the violation.²⁰⁰ The First Circuit recognized this shortcoming in *United States v. Meyer*.²⁰¹ The *Meyer* court found that logic, the plain language of section 2462, and considerations of fairness prevented it from following the *Core Laboratories* result. First, like the *Crown Coat* and *N.O.C.* courts, the *Meyer* court believed the district court action cannot possibly accrue until an enforceable administrative penalty exists.²⁰² The court noted that the use of the word “‘enforcement’ in 28 U.S.C. § 2462 is not without significance; . . . [it] presupposes a penalty to be enforced.”²⁰³ The *Core Laboratories* interpretation could require the government to file an action in federal court before a final penalty had been assessed.

Further, the *Meyer* court found that fairness to the government required that the statute of limitations for the district court action begin running only at the end of the administrative proceedings.²⁰⁴ Once the government begins administrative proceedings, the timing of that process is largely beyond the Agency’s control. If the defendant delayed administrative proceedings, the government could lose its right to recover the penalty in district court through no fault of its own even before it had a right to file.²⁰⁵ The court believed Congress

196. 386 U.S. at 517 (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)).

197. 386 U.S. at 514.

198. *United States v. Coré Lab., Inc.*, 759 F.2d 480 (5th Cir. 1985).

199. *Core Lab.*, 759 F.2d at 482; see *United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987).

200. See *supra* notes 170-72 and accompanying text; see also *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953) (construing Portal-to-Portal Act, not § 2462).

201. 808 F.2d 912, 916 (1st Cir. 1987).

202. *Meyer*, 808 F.2d at 914.

203. 808 F.2d at 915.

204. 808 F.2d at 919.

205. 808 F.2d at 915, 919. The court relied extensively on the Supreme Court’s reasoning in

would not have allowed the government five years to file an administrative action but failed to provide it time to realize the benefits of the administrative proceedings.²⁰⁶ Several subsequent courts, including the *N.O.C.* court, have adopted the *Meyer* rationale when applying section 2462 to district court actions,²⁰⁷ no court has followed *Core Laboratories*.

One earlier district court decision under the CWA is relevant to this inquiry. In *United States v. C & R Trucking Co.*,²⁰⁸ the court held that an action in district court accrued on the date of the oil spill even though a penalty had been first assessed administratively. Courts should not follow this decision in the context of TSCA enforcement. First, the *C & R Trucking* court did not even address the concern that the limitations period could expire before administrative proceedings are exhausted. This concern alone prevented the *Crown Coat, Meyer*, and *N.O.C.* courts from allowing the action to accrue prior to the completion of the administrative process. Second, the enforcement provision construed by the court in *C & R Trucking* concerned oil spills. EPA learns of an oil spill when it occurs — no real time is lost before discovery. In contrast, many TSCA violations involve record keeping or reporting violations which may take longer to detect, or conditions that EPA can only discover upon inspection. To prevent TSCA enforcement from becoming a nullity, the Agency must have the ability to bring an action in district court if it becomes necessary.

Tolling the five-year period during the administrative proceedings, as opposed to starting a separate five-year period, would also preserve indefinitely the Agency's ability to bring an action in district court.

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967). See *supra* notes 194-97 and accompanying text. The *Meyer* court also drew on *United States Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982), in which the court held that even if § 2462 applied, the cause of action could not accrue until the administrative proceeding ended, the penalty was assessed, and the violator refused to pay. For a discussion of the importance of § 2462's application to the administrative stage to the outcome in *Meyer*, see *supra* text accompanying notes 121-23, 139-40.

206. 808 F.2d at 920. In fact, Congress supported this interpretation and criticized the *Core Labs.* result when it amended the Export Administration Act:

[S]ome confusion has arisen concerning the time limits for initiating administrative actions and on bringing action in Federal court to collect civil penalties.

The intent of the committee of conference is that the Commerce Department must bring its administrative case within 5 years from the date the violation occurred. Thereafter, if it is necessary for the Government to seek to enforce collection of the civil penalty, the complaint must be filed in Federal court within 5 years from the date the penalty was due, but not paid. Any other interpretation would have the Commerce Department discover, investigate, prosecute, and file a complaint in U.S. District Court to collect the penalty imposed, but not paid, in the administrative proceeding all within 5 years from the date of the violation. In many instances . . . such a task would be impossible.

H.R. REP. NO. 180, 99th Cong., 1st Sess. 64 (1985), reprinted in 1985 U.S.C.C.A.N. 108, 126.

207. *United States v. McCune*, 763 F. Supp. 916, 918 (S.D. Ohio 1989) (holding "[a] claim to collect an administratively imposed civil penalty cannot accrue until the penalty is administratively imposed"); *United States v. N.O.C., Inc.*, 28 Env't. Rep. Cas. (BNA) 1460, 1467-68 (D.N.J. Oct. 14, 1988).

208. 537 F. Supp. 1080 (N.D. W. Va. 1982).

The plain language of section 2462 and precedent fail to support this approach, however.²⁰⁹ The Fifth Circuit in *Core Laboratories* specifically considered and rejected this tactic, citing the lack of precedent and the fact that tolling is an equitable doctrine which is inappropriate absent dilatory tactics by the defendant.²¹⁰ Moreover, for large penalties, EPA may want to give the violator some time to gather the funds prior to bringing an action to recover the penalty. If a major portion of the five years expired prior to EPA's discovery of the violation, EPA would lose this flexibility. Finally, the Agency has no incentive to delay bringing an action in district court to collect penalties from solvent companies who simply refuse to pay. Thus, the defendant does not need further protection, and the statute should run from the final penalty assessment.

CONCLUSION

When enacting TSCA, Congress provided no indication as to whether it intended section 2462's five-year limitation period to apply to EPA's assessment of penalties. Nor did a much earlier Congress clearly state whether section 2462 was meant to bar administrative penalty actions brought more than five years after the violation. Section 2462's broad waiver of the government's immunity from limitation periods, however, should effectively mute any remnants of the principle of strict construction which might restrict section 2462 only to federal court actions. Even utilizing strict construction, the Agency's administrative assessment of penalties under TSCA must be included within the purview of section 2462 as a "proceeding for the enforcement of a penalty," because nearly all of the enforcement activity under TSCA takes place at the administrative level.

A decision that section 2462 does not apply to EPA's assessment of penalties would be contrary to established precedent and practice under other environmental statutes. Further, applying section 2462 only to district court actions under TSCA results in effectively no limitations period at all. Commencement of the administrative action, which must precede the district court action, lies solely within EPA's control. If the Agency can delay enforcement indefinitely, it can rob industry of the benefits which section 2462 was designed to provide: freedom from having to defend claims when evidence no longer exists, repose, and prevention of an unfair surprise of substantial liability.

Failing to apply section 2462 to EPA's assessment of liability frustrates goals of efficient and effective enforcement of TSCA. A five-year

209. See *supra* notes 191-93 and accompanying text. *But cf.* *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (9th Cir. 1987) (stating that the rule in the Ninth Circuit is that the statute is tolled during administrative proceedings if they are prerequisites to review in federal court).

210. *United States v. Core Lab., Inc.*, 759 F.2d 480, 484 (5th Cir. 1985).

time bar provides EPA with an incentive to inspect, investigate, and promptly enforce alleged violations of TSCA. In contrast, no statute of limitations encourages EPA to do nothing and allow liability to accumulate. When evidence becomes stale with time, both parties must expend more resources to discover evidence and reconstruct events which occurred many years previously and risk unfair determinations of liability.

The optimal solution is to apply section 2462 to EPA's administrative enforcement of penalties from the date of the violation's occurrence to curb potential agency abuse and delay and to protect defendants from having to defend stale claims. Similarly, a determination that the district court action does not accrue until EPA's assessment becomes final ensures that EPA will have ample time to discover a violation, assess liability, and collect a penalty it has assessed.