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IS THERE A STATUTE OF LIMITATIONS FOR SKIING ON FILLED WETLANDS? INTERPRETING 28 U.S.C. § 2462 AFTER UNITED STATES V. TELLURIDE CO.

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I. INTRODUCTION

The main objective of the Clean Water Act¹ (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."² The CWA is the primary vehicle through which the federal government can regulate and protect wetlands,³ as well as institute and enforce national pollution control standards.⁴

The two agencies vested with the power to enforce the CWA with respect to wetlands are the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (ACOE).⁵ Through the CWA, Congress empowered the Administrator of the EPA to establish and enforce national effluent standards regarding the discharge of pollutants into waters of the United States, including wetlands.⁶ Similarly, section 404 of the CWA empowers the Secretary of the Army to issue permits for the discharge of dredged

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² Id. § 1251(a).
⁵ Id. §§ 1251(d), 1344.
⁶ Id. §§ 1311, 1319.
or fill materials into waters of the United States, including wetlands.\textsuperscript{7} Both the Administrator of the EPA and the Secretary of the Army possess the ability to commence a civil enforcement action against one who is conducting CWA-regulated activity without a permit or in violation of the terms or conditions of a permit.\textsuperscript{8}

The United States District Court for the District of Colorado, however, in the case of \textit{United States v. Telluride Co.}, has placed in doubt the ability of both the ACOE and the EPA to fulfill their objectives under the CWA.\textsuperscript{9} \textit{Telluride} concerned an action by the EPA against Telluride Company for the filling of sixty acres of wetlands without a permit.\textsuperscript{10} The court narrowly interpreted 28 U.S.C. § 2462, the general five-year statute of limitations used for CWA violations, holding that the statutory period begins to run at the time of the discharge.\textsuperscript{11} The court’s narrow interpretation of § 2462 not only threatens to frustrate effective enforcement of the CWA, but also threatens the future of America’s wetlands. If the \textit{Telluride} decision remains good law, the government will lose the opportunity and ability to prosecute claims that could not be reasonably discovered within the statutory period.\textsuperscript{12}

This Comment examines the \textit{Telluride} case in light of the relevant tolling and accrual doctrines generally employed in statutes of limitations cases, namely, the continuing violation theory and the discovery rule.\textsuperscript{13} Upon a review of the doctrines, this Comment suggests that courts must continue to employ one of these two doctrines when applying the CWA’s statute of limitations. Only through application of one of the doctrines—both of which are logical and fair—can courts ensure sufficient protection of our nation’s wetlands.

Section II of this Comment provides background to statutes of limitations, including their history, purposes, commencement, and tolling. Section II also presents a brief overview of federal courts’ borrowing of state statutes of limitations and a description of § 2462—the federal statute of limitations for civil penalty actions. Sections III and IV discuss the two doctrines often cited by plaintiffs in statutes of limitations issues—namely, the continuing violation theory and the discovery rule. Section V describes the \textit{Telluride} case, examining the

\textsuperscript{7} Id. § 1344.
\textsuperscript{8} Id. §§ 1319(a)(1)–(2), 1344(s).
\textsuperscript{10} Id. at 405.
\textsuperscript{11} See id. at 408.
\textsuperscript{12} See infra section IV.
\textsuperscript{13} See infra notes 80–87 (definition of continuing violation theory) and notes 125–33 (definition of discovery rule) and accompanying text.
arguments regarding statutes of limitations and the court's choice of
the actual date of violation as the time the statute of limitations began
to run. Finally, section VI considers the continuing violation theory
and the discovery rule in light of the Telluride case, concluding with
the suggestion that either of the two theories provides the govern­
ment with an opportunity to preserve America's wetlands without
infringing on the functions and purposes of statutes of limitations.

II. BACKGROUND

A. Statutes Of Limitations

Statutes of limitations first appeared in English law as early as 1236.14 The purpose of these early English statutes of limitations, and
subsequent ones, was to prohibit real property actions that had oc­
curred before a fixed date, such as the coronation of Henry II.15

Like their predecessors, the function of today's statutes of limita­
tions is to establish a time at which a party can no longer bring an
action or suit in law or equity.16 Establishing such a time limit requires
"parties to settle their business matters within certain reasonable
periods."

Black's Law Dictionary defines a statute of limitations as:

[a] statute prescribing limitations to the right of action on certain
described causes of action or criminal prosecutions; that is, declar­
ing that no suit shall be maintained on such causes of action, nor
any criminal charge be made, unless brought within a specified
period of time after the right accrued.18

At common law, no time limits exist within which a party must bring
an action, thus, any time limit placed on a legal action is the result of
statutory enactment.19

14 Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1,177, 1,177 (1950)
[hereinafter Developments].
15 See id.
17 Robert Muscara, Note, Tort Law—Federal Tort Claims Act—Accrual of Medical Malprac­
(1981) (quoting H. Wood, LIMITATION OF ACTION 8 (2d ed. 1883)).
18 Black's LAW DICTIONARY 927 (6th ed. 1990). Statutes of limitations also are defined as:
[s]tatutes of the federal government and various states setting maximum time periods
during which certain actions can be brought or rights enforced. After the time period
set out in the applicable statute of limitations has run, no legal action can be brought
regardless of whether any cause of action ever existed.
19 Jean P. Hannig, Note, Limitation of Actions—Ignorance of Cause of Action—Medical
B. Purposes of Statutes of Limitations

Three basic policies behind statutes of limitations often are cited by courts and scholars: fairness to the defendant, judicial effectiveness, and stability and consistency. First and foremost, statutes of limitations prevent a defendant from being vulnerable to the threat of a legal action indefinitely. Statutes of limitations enable the defendant to rest assured that "the slate has been wiped clean of ancient obligations," and that he or she can avoid bad claims the defendant otherwise could refute successfully if evidence and witnesses had been available. Moreover, even if the claims are "good," statutes of limitations relieve the defendant from the burden of defending, and courts of trying, "stale claims when a plaintiff has slept on his rights."

In addition, statutes of limitations, by encouraging the prompt presentment of claims, ensure that courts remain efficient. Statutes of limitations are "practical and pragmatic devices to spare the courts" of old or stale litigation. In other words, statutes of limitations relieve courts of the duty to "adjudicat[e] inconsequential or tenuous claims," particularly when "evidence has been lost, memories have faded, and witnesses have disappeared."

Finally, statutes of limitations help bring stability and consistency, as well as public convenience, to the parties of much of commercial intercourse and trade, including property transactions. Specifically, statutes of limitations ensure security on the part of a landowner with respect to both the possession and alienation of land. In sum, the purposes behind statutes of limitations are important in cases where the

Malpractice Claim Accrues When Plaintiff Discovers Defendant's Possible Negligence, 60 N.D. L. REV. 295, 296 (1984); Muscara, supra note 17, at 158.


21 Developments, supra note 14, at 1,185; McKinney, supra note 20, at 202.

22 Developments, supra note 14, at 1,185.

23 See Callahan, supra note 20, at 133–34.

24 Id. at 134.


26 See Developments, supra note 14, at 1,185.


28 See Developments, supra note 14, at 1,185.


30 Developments, supra note 14, at 1,185–86.

31 Id. at 1,186.
interpretation of the statute is critical because the purposes influence how a court or legislature will determine when the statutory period accrues.

C. Commencement and Suspension of Statutes of Limitations

Generally, statutes of limitations begin to run when the cause of action accrues or arises when the right to institute and maintain a suit arises, or when there is a demand capable of present enforcement. The statutory period begins either when the defendant commits a wrongful act or when the plaintiff suffers substantial harm or injury. When those two events are not simultaneous, courts generally look to the substantive elements of the case to determine whether the statute began to run with respect to the former or the latter event. If a defendant's conduct constitutes an invasion of a plaintiff's rights such that the same plaintiff could maintain suit regardless of damage, the statute begins to run when the conduct is complete. Where injury or harm is the focal point of the action, however, the occurrence of the harm determines the commencement of the statutory period.

Circumstances may arise, however, that suspend or interrupt the running of the statute of limitations by temporarily nullifying a cause of action until the occurrence of some additional fact. For instance, a defendant might prevent or hinder suit, thereby postponing the start of the statutory period, through fraudulent concealment or absence from jurisdiction. "Ordinarily the acts of concealment must consist of affirmative misrepresentation or active conduct, but inaction or nondisclosure is sufficient if there exists a relationship of a fiduciary nature, sufficiently close to impose an affirmative duty of disclosure." In some instances, however, innocent misrepresentations or misleading conduct amounting to "constructive fraud" have been held sufficient to employ the concealment exception.

32 Id. at 1,200; Muscara, supra note 17, at 158.
34 Muscara, supra note 17, at 158; 54 C.J.S. Limitations of Actions § 81.
35 54 C.J.S. Limitations of Actions § 81.
36 Developments, supra note 14, at 1,200.
37 Id.
38 Id. at 1,200–01.
39 Id. at 1,201.
40 Id. at 1,220; 54 C.J.S. Limitations of Actions §§ 85–92 (1987); see also Black's Law Dictionary 1,488 (6th ed. 1990) (definition of "toll").
42 Id. at 1,221.
43 Id.
In a different context, the infancy, insanity, imprisonment, or death of a plaintiff also are recognized as exceptions to the commencement or continuation of the statutory period. Often a statute of limitations does not commence until the plaintiff's disability ceases. Regardless of whose conduct or status to which the circumstances relate, a plaintiff generally bears the burden of proving that the running of the statutory period should be tolled.

D. The Borrowing of State Statutes of Limitations in Federal Court and the Creation of § 2462, the Federal Statute of Limitations for Civil Penalties

Generally, where a federal law or cause of action created by Congress does not contain an express statute of limitations, courts infer "that Congress intended that a local time limitation should apply." In Occidental Life Insurance Co. v. EEOC, however, the United States Supreme Court warned that state limitations periods are not "our exclusive guide," and that courts should not apply mechanically a state statute of limitations because the federal law lacks an express limitations period. Rather, the Court noted, where a state statute of limitations would inhibit enforcement of a federal law, courts do not need to borrow from state law. The Court reasoned that state legislators generally do not create statutes of limitations with national interests in mind, and thus a federal court should not employ a state statute of limitations if it would "frustrate or interfere with the implementation of national policies." Congress resolved the problems behind borrowing state statutes of limitations in 1948 with the enactment of 28 U.S.C. § 2462, the default federal statute of limitations for civil penalties matters.

The general federal statute of limitations reads, in relevant part: "[e]xcept 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

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44 Id. at 1,229-33.
45 Id. at 1,229.
46 Developments, supra note 14, at 1,220.
48 Occidental, 432 U.S. at 367.
49 Id.
50 Id.
within five years from the date when the claim first accrued . . . ." Section 2462 serves as a “catch-all” statute of limitations for those federal statutes, including the CWA, that specifically do not contain a statute of limitations. This five-year statute of limitations applies to all penalty and forfeiture claims the government brings under the CWA.

Although courts generally have limited § 2462 to apply only to actions on behalf of the United States, some federal courts have held that citizen enforcement actions, which are brought under the authority of section 505 of the CWA, also are subject to the five-year limitations period under § 2462. Courts reason that because plaintiffs in citizen enforcement actions are acting effectively as private attorneys general, and because their suits are adjunct to the government’s suits, they should be subject to the same limitations period as the government. Likewise, in the event a state statute of limitations is shorter than § 2462, citizen plaintiffs “would be handicapped in their ability to act as effective private attorneys general.” Moreover, employing state statutes of limitations for such actions would raise problems of uniformity in enforcing the CWA from state to state, thereby leading to confusion and diminishing effective CWA enforcement.

Congress’s ambiguous language in § 2462, however, has led to inconsistent interpretation and implementation of § 2462 in the context of a variety of federal laws. For example, in United States v. Core Lab., Inc., 759 F.2d 480, 483 (5th Cir. 1985) (holding in action under Export Administration Act that the § 2462 limitations period accurs at time of underlying violation and not tolled during administrative proceedings) with United States v. Meyer, 808 F.2d 912, 922 (1st Cir. 1987) (held in action under Export Administration Act that § 2462 limitations period was tolled during administrative proceedings); compare also United States v. Telluride Co., 884 F. Supp. 404, 408 (D. Colo. 1995) (holding in action under CWA for unpermitted filling of wetlands that § 2462 limitations period accrues at time of discharge) with Sasser v. Administrator, EPA, 990 F.2d 127, 129 (4th Cir. 1993) (holding in action under CWA...
Laboratories, Inc.\textsuperscript{62} and \textit{United States v. Meyer},\textsuperscript{63} the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the First Circuit construed § 2462 with respect to the Export Administration Act\textsuperscript{64} (EAA) in conflicting ways.\textsuperscript{65} Specifically, these two cases revolved around the interpretation of the phrase in § 2462—"date when the claim first accrued."\textsuperscript{66} Interpretation of this phrase would determine when the statute of limitations began to run, and thus whether the government could litigate the action in each case.\textsuperscript{67}

In \textit{United States v. Core Laboratories, Inc.}, the United States Court of Appeals for the Fifth Circuit held that the statute accrued at the time of the violation, not when the government concluded its administrative proceedings.\textsuperscript{68} The court reasoned that using the latter point in time effectively would destroy any reason or purpose of the statute.\textsuperscript{69} The Fifth Circuit supported its holding by citing legislative history which stated that "the time is reckoned from the commission of the act giving rise to the liability . . . ."\textsuperscript{70} In short, the Fifth Circuit held that, in light of congressional intent and the right of a defendant to be free of stale claims for purposes of the EAA, the statute of limitations accrued at the time of the underlying violation.\textsuperscript{71}

In contrast, the United States Court of Appeals for the First Circuit in \textit{United States v. Meyer}, held that if the government brought the administrative proceeding within the limitations period, it would have an additional five years during which to file a civil suit to enforce the administrative penalty.\textsuperscript{72} The court reasoned that a claim for enforcement of an administrative penalty could not "possibly accrue until there was a penalty to be enforced."\textsuperscript{73}

for unpermitted wetlands fill violation that the § 2462 limitations period is tolled as the discharge constitutes a continuing violation).

\textsuperscript{62} 759 F.2d 480.
\textsuperscript{63} 808 F.2d 912.
\textsuperscript{65} \textit{See Meyer}, 808 F.2d at 922; \textit{Core Lab.}, 759 F.2d at 483.
\textsuperscript{66} \textit{Meyer}, 808 F.2d at 914; \textit{Core Lab.}, 759 F.2d at 481; \textit{see} 28 U.S.C. § 2462.
\textsuperscript{67} \textit{See Meyer}, 808 F.2d at 914; \textit{Core Lab.}, 759 F.2d at 481.
\textsuperscript{68} \textit{Core Lab.}, 759 F.2d at 483.
\textsuperscript{69} \textit{See id.}
\textsuperscript{70} \textit{Id.} at 482.
\textsuperscript{71} \textit{Id.} at 483.
\textsuperscript{72} \textit{United States v. Meyer}, 808 F.2d 912, 914, 922 (1st Cir. 1987).
\textsuperscript{73} \textit{Id.} at 914.
The First Circuit rejected the Fifth Circuit's emphasis on the legislative history of the EAA amendments in its interpretation of § 2462, finding the committee reports that the Fifth Circuit cited to be nothing more than "legislative dictum."74 The First Circuit held that the language, "until the date when the claim first accrued," in the context of the EAA, implied that a claim only can accrue after the administrative proceeding has ended "and a final [administrative] decision has resulted."75 The court reasoned that too much of the timing of a case is largely beyond the government's control.76 Moreover, if the Fifth Circuit's interpretation were left to stand—that the statute accrues at the time of the violation77—suspected violators could drag out the administrative process intentionally and employ stalling techniques to preclude any enforcement proceedings.78

In sum, federal courts have reached conflicting results when interpreting § 2462 in the EAA context. Such conflict over § 2462, however, is not restricted to the EAA. Rather, courts applying § 2462 to CWA violations also have reached conflicting results. The source of that conflict, as seen in United States v. Telluride Co.,79 and other federal cases, is two commonly used doctrines to toll statutes of limitations—namely, the continuing violation theory and the discovery rule.

III. THE CONTINUING VIOLATION THEORY

Plaintiffs often invoke the continuing violation theory in statutes of limitations issues, including § 2462 matters, as a way to challenge the accrual of the statutory period.80 The continuing violation theory does not, however, interpret the statute of limitations at all.81 Rather, the continuing violation theory is an attempt to establish a different starting point for the tolling of statutes of limitations like that in § 2462.82 Although some courts have held that a claim to redress a continuous

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74 Id. at 915.
75 Id. at 922.
76 See id. at 919.
77 See United States v. Core Lab., Inc., 759 F.2d 480, 483 (5th Cir. 1985).
78 Meyer, 808 F.2d at 919.
81 See Sasser, 990 F.2d at 129; Reaves, No. 94–925–Civ–J–20 at 6; NCWF, 29 Env't Rep. Cas. (BNA) at 1943.
82 See Sasser, 990 F.2d at 129; Reaves, No. 941–925–Civ–J–20 at 6; NCWF, 29 Env't Rep. Cas. (BNA) at 1943.
wrong accrues on the date of the last wrongful or injurious act, other courts have held that, where a cause of action is based on several acts occurring over an extended period, the cause of action accrues with each act, or at least not until the injury is permanent.

Under the continuing violation theory in the CWA context, each day a pollutant or discharge of dredged or fill material remains in navigable waters of the United States, including wetlands, amounts to a continuing violation. So long as the unpermitted material remains in wetlands, a new violation results: restarting the clock and thereby effectively tolling the statute of limitations. Thus, in CWA enforcement actions under the continuing violation theory, the statute of limitations, for purposes of administering an enforcement or civil penalty, does not begin to run or accrue until the fill physically is removed.

In North Carolina Wildlife Federation v. Army Department [hereinafter NCWF], the United States District Court for the Eastern District of North Carolina held that the continuing violation theory was a "reasonable" argument to assert in statute of limitations cases, including CWA enforcement actions. In NCWF, the government charged the private defendants with violating the CWA during construction of drainage ditches and canals for a large-scale peat mining operation. During construction, the defendants allegedly drained some wetlands and filled other wetlands—both constituting illegal actions under the CWA.

The ACOE decided, after a site inspection, that the majority of the property was not subject to the CWA because the property had lost its wetlands character due to the private defendants' ditching and drainage. Subsequently, NCWF (along with the Sierra Club and

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86 See Sasser, 990 F.2d at 129; Key West Towers, 720 F. Supp. at 964 n.1; Ciampitti, 669 F. Supp. at 700; Cumberland Farms, 647 F. Supp. at 1183.
87 See Sasser, 990 F.2d at 129; Key West Towers, 720 F. Supp. at 964 n.1; Ciampitti, 669 F. Supp. at 700; Cumberland Farms, 647 F. Supp. at 1183.
89 Id. at 1942. The activities in question occurred on 7,500 acres in North Carolina during the years 1979–82. Id.
90 Id.
91 Id.
others) brought suit against the private defendants, the ACOE, and the EPA to enforce compliance with the CWA. The private defendants moved for summary judgment on subject matter jurisdiction and statute of limitations grounds.

Denying the defendants' motion for summary judgment, the court held that, in failing to remove the illegal fill material from the wetlands between the last day of actual discharge and the date of the filing of the complaint, the defendants continually had violated the statute. The court reasoned that application of the continuing violation theory, narrowly applied to only those unpermitted activities that were correctable or susceptible to remedial efforts, was justified in that it served to ensure effective enforcement of and promote the purposes of the CWA. The court stated that holding otherwise would give violators a "powerful incentive" to do all that was possible to conceal any remediable illegal or unpermitted wetlands activity from public and private scrutiny.

Moreover, the court held that the defendants' failure to take remedial measures constituted a continuing violation. Arguing in dicta that "to be in violation," as defined in the CWA, suggests "a state, rather than an act—the opposite of [a] state of compliance," the court implied that although the act of discharging had passed, the presence of the illegal fill in wetlands constituted a continuing violation of the CWA in and of itself. Simply the presence of the fill remaining in wetlands constituted a violation, distinct from the physical discharge of the fill materials.

Courts also have adhered to the continuing violation theory in another environmental context. Specifically, courts have employed the continuing violation theory when enforcing section 10 of the Rivers and Harbors Act of 1899. Judicial adoption of the continuing violation theory in the section 10 context is significant for proponents of

92 Id.
93 NCWF, 29 Env't Rep. Cas. (BNA) at 1942.
94 Id. at 1943.
95 See id.
96 Id.
97 Id.
99 NCWF, 29 Env't Rep. Cas. (BNA) at 1943 (citing Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc., 484 U.S. 49, 69 (1987) (Scalia, J., concurring)).
100 See id.
that theory in the CWA context because of the similarity in the goals of these statutes. Section 10 is the other federal statute the ACOE enforces to protect the waters of the United States.\textsuperscript{102}

In \textit{United States v. Benton \& Co., Inc.}, the ACOE alleged that the defendant had violated section 10 of the Rivers and Harbors Act\textsuperscript{103} when it “did fill, alter, and modify” a navigable water of the United States without a permit or ACOE authorization.\textsuperscript{104} The ACOE contended that the defendant committed acts in violation of section 10 “[b]eginning at a time unknown and continuing until the date of this information.”\textsuperscript{105}

In finding for the government, the United States District Court for the Middle District of Florida, in \textit{Benton}, reasoned that a “continuing offense” can consist of separate acts or a course of conduct that arise “from that singleness of thought, purpose or action, which may be deemed a single ‘impulse.’”\textsuperscript{106} By holding that violations under section 10 are continuing in nature, the court ruled that for purposes of statutes of limitations, the indictment “need not allege the date of the commencement of the violation, but need only allege that the last act in the commission of the crime occurred within the statute of limitations.”\textsuperscript{107}

The United States District Court for the Middle District of Florida followed a similar rationale in \textit{United States v. Reaves}, a case that involved violations of both the CWA and the Rivers and Harbors Act.\textsuperscript{108} In the summer of 1981, Reaves excavated material from a creek abutting his property, creating a canal and filling approximately seventeen acres of wetlands on his property.\textsuperscript{109} The government first became aware of the alleged violations on December 6, 1989, when an ACOE biologist conducted a site visit.\textsuperscript{110} Following a subsequent cease and desist order, the ACOE filed its action on September 21, 1994.\textsuperscript{111}

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{United States v. Benton \& Co.,} 345 F. Supp. 1101, 1102 (M.D. Fla. 1972).
\textsuperscript{105} \textit{Id.} at 1103.
\textsuperscript{106} \textit{Id.} (quoting \textit{United States v. Universal C.I.T. Credit Corp.}, 344 U.S. 218, 224 (1952)).
\textsuperscript{107} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 4.
\textsuperscript{110} \textit{Id.} at 4–5. The site in question is located in a remote, rural area in Nassau County, Florida. The sole access to the site is via a dead-end road, from which the alleged violation is not visible. \textit{Id.} at 4.
\textsuperscript{111} \textit{Id.} at 5.
Reaves admitted that he discharged the materials into the wetlands without a permit or ACOE authorization in violation of section 301 of the CWA.\textsuperscript{112} Nevertheless, Reaves moved for summary judgment, alleging that the federal statute of limitations, § 2462, barred the government from litigating its civil action.\textsuperscript{113} Reaves contended that the claim accrued in June of 1981, the date of the violation, more than thirteen years before the government filed the action in Federal District Court.\textsuperscript{114}

The government, in rebuttal, argued that the action was not barred for any of three reasons, two of which are relevant to this Comment.\textsuperscript{115} The government argued Reaves's unlawful actions constituted a continuing violation such that so long as the illegal fill remained, the statutory period did not begin to run.\textsuperscript{116} In the alternative, the government argued that the statute of limitations did not accrue until it first knew, or had reason to know, of the alleged violation—namely, December 6, 1989.\textsuperscript{117}

Citing NCWF\textsuperscript{118} and Sasser v. Administrator, EPA,\textsuperscript{119} the United States District Court for the Middle District of Florida, in Reaves, found the continuing violation theory to be a viable theory with which to toll the statutory period.\textsuperscript{120} In its order, the court quoted as persuasive authority the Sasser decision which held that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation."\textsuperscript{121} Similarly, the Reaves court held that Reaves's unpermitted discharges of dredged or fill materials would remain a continuing violation so long as the fill remained intact and thus the federal five-year statute of limitations had not yet accrued.\textsuperscript{122}

In short, the continuing violation theory is an effective, legitimate tool for plaintiffs to use to toll a statute of limitations. Successful employment of the continuing violation theory enables a plaintiff to hold a defendant responsible for claims from which the defendant could otherwise hide or escape. The theory which claims greater

\textsuperscript{112} Id. at 4.
\textsuperscript{113} Reaves, No. 94–925–Civ–J–20 at 1, 5.
\textsuperscript{114} Id. at 5.
\textsuperscript{115} Id. at 6.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} NCWF, 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989).
\textsuperscript{119} 990 F.2d 127 (4th Cir. 1993). See infra note 256 for a full discussion of the Sasser decision.
\textsuperscript{120} Reaves, No. 94–925–Civ–J–20 at 6–7.
\textsuperscript{121} Id. at 7 (quoting Sasser, 990 F.2d at 129).
\textsuperscript{122} Id. at 7–8.
application and acceptance in halting the accrual of the statutory period, however, is the discovery rule.

IV. THE DISCOVERY RULE

The date a statute of limitations begins to run or accrues always has been an oft-debated issue in the courts. One way courts, usually at plaintiffs' behest, have attempted to decide this issue is through some form of the continuing violation theory. However, the way most federal jurisdictions have resolved the statute of limitations problem is through use of the discovery rule. Under the discovery rule, the statute of limitations accrues when the plaintiff knew of or discovered, or should have reasonably known of or discovered, the alleged injury or violation. A majority of jurisdictions have adopted the discovery rule by common law decision or statute in both private actions and claims involving the federal government.

In 1949, the United States Supreme Court adopted the discovery rule in Urie v. Thompson to determine when, under the Federal Employers' Liability Act, a cause of action accrued. Since the Urie decision, use of the discovery rule has increased dramatically. Cases employing the discovery rule involve issues ranging from medical

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123 Muscara, supra note 17, at 155.
124 See supra notes 90-125 and accompanying text.
malpractice suits\textsuperscript{130} to § 1983 claims\textsuperscript{131} to age discrimination cases\textsuperscript{132} and beyond.\textsuperscript{133}

A. Non-CWA Violations

Hamilton v. 1st Source Bank involved a terminated employee, Hamilton, suing his former employer, 1st Source Bank (1st Source), under the Age Discrimination in Employment Act\textsuperscript{134} (ADEA) for alleged discriminatory discharge and pay discrimination.\textsuperscript{135} In March 1980, 1st Source had hired Hamilton as a vice-president.\textsuperscript{136} Although Hamilton’s base salary was increased in 1984, 1st Source nonetheless terminated Hamilton’s employment on April 21, 1986 without forewarning for “Failure to Perform.”\textsuperscript{137}

After filing a complaint with the Equal Employment Opportunity Commission (EEOC) within the 180-day statutory period alleging discriminatory discharge because of age, Hamilton filed suit in the United States District Court for the Western District of North Carolina in 1987.\textsuperscript{138} Pre-trial discovery in May 1987 revealed that Hamilton earned a salary far lower than younger executives in the same job category.\textsuperscript{139} As a result of this discovery, Hamilton filed an amended


\textsuperscript{131} See, e.g., Piotrowski v. City of Houston, 51 F.3d 512, 516 (5th Cir. 1995); Gerritsen v. Consulado Gen. de Mex., 989 F.2d 340, 344 (9th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 95 (1993); Hoesterey v. City of Cathedral City, 945 F.2d 317, 318-20 (9th Cir. 1991), cert. denied, 504 U.S. 910 (1992); Vaughan v. Grijalva, 927 F.2d 476, 480 (9th Cir. 1991); see also 42 U.S.C. § 1983 (1994).


\textsuperscript{135} Hamilton, 895 F.2d at 161.

\textsuperscript{136} Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} Id.
complaint with both the EEOC and the District Court to include the additional charge against 1st Source of pay discrimination.140

In its argument, 1st Source contended that Hamilton’s pay discrimination claim was time-barred under § 626(d)141 of the ADEA.142 Briefly stated, 1st Source argued that the 180-day period had begun to run on April 21, 1986, the date of discharge, and not, as Hamilton maintained, in May 1987 when Hamilton first became aware that younger executives were paid significantly higher salaries than he was paid.143

The United States Court of Appeals for the Fourth Circuit held that proper construction of the statute of limitations in this case required application of the discovery rule.144 The court held that the statutory period should not begin to run until a “reasonable plaintiff should have known facts that would support a charge of discrimination.”145 Maintaining that the rule is reasonable in requiring the complainant to be “reasonably prudent in exercising potential opportunities to discover putative discrimination,” the Fourth Circuit held that Hamilton had filed his discrimination claim in a timely manner.146 The court reasoned that, because Hamilton’s ADEA complaint was filed within the 180-day statutory period, and because he only became aware of the pay discrimination through pre-trial discovery of his original claim, the claim was not time-barred.147 According to the court, “Hamilton was not sitting idly by, allowing his claims to grow stale. In fact, he became aware of the pay discrimination when he did only because he acted expeditiously to protect his discriminatory discharge claim.”148 Thus, the court recognized the discovery rule as a reasonable means with which to prevent accrual of the statutory period, provided the plaintiff can show that expecting earlier discovery of the injury was unreasonable.149

140 Hamilton, 895 F.2d at 161.
141 29 U.S.C. § 626(d). Section 626(d) states, in relevant part: “[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—(1) within 180 days after the alleged unlawful practice occurred . . . .” Id.
142 Hamilton, 895 F.2d at 162–63.
143 Id. at 163.
144 Id. at 163–64.
145 Id. at 164 (quoting Equal Employment Opportunity Comm’n v. O’Grady, 857 F.2d 383, 393–94 (7th Cir. 1988)).
146 Id. at 164–65
147 Hamilton, 895 F.2d at 164–65.
148 Id. at 165.
149 See id. at 164–65.
In short, unless the defendant can show that the plaintiff had reasonable notice or opportunity to discover the violation, the statute of limitations will be tolled by the discovery rule. In *Hamilton*, the court found that the plaintiff neither received any notice nor had the opportunity to reasonably discover the notice until the discovery phase of the trial, and thus the statute of limitations did not begin to run until that time.

In contrast, however, in *Tolle v. Carroll Touch, Inc.*, the United States Court of Appeals for the Seventh Circuit, based on the facts of the case, found that the plaintiff had received sufficient notice such that the discovery rule did not toll the statute of limitations. *Tolle* involved an employee bringing suit against her former employer for Employment Retirement Income Security Act (ERISA) benefits. On January 9, 1984, Carroll Touch, Inc. (CTI) executives informed Tolle and fellow employees that the company was taking specific measures to relocate from Illinois to Texas. Shortly thereafter, on September 19, 1984, CTI informed Tolle that she would be terminated on October 19, 1984. On September 24, 1984, Tolle received a written memorandum confirming her termination.

After she received notice and prior to her termination, Tolle attempted to obtain medical leave for her heart condition. She was unable to obtain medical leave, however, because no doctor would certify her as being “disabled.” As a result, CTI was able to terminate Tolle and avoid providing employee benefits under section 510 of ERISA. Tolle filed her complaint on September 29, 1989, and filed

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150 See id. at 164.
151 Id. at 164–65.
154 Tolle, 977 F.2d at 1129.
155 Id. at 1132.
156 Id.
157 Id.
158 Id. Connie Tolle began working for Carroll Touch, Inc. (CTI) in 1978. At the time she was hired, Tolle informed CTI she had heart murmurs but the condition did not cause her problems. Id. at 1131. From 1980 to 1984 Tolle underwent examinations and subsequent treatment for her heart condition. Id. at 1131–32.
159 Tolle, 977 F.2d at 1132.
160 29 U.S.C. § 1140. Section 1140 “is aimed at preventing persons and entities from taking various actions for the purpose of interfering with the participant’s ability to collect benefits to which the participant would otherwise be entitled or from taking actions to prevent such a participant from collecting benefits to which he or she may become entitled.” Tolle, 977 F.2d at 1139.
161 See Tolle, 977 F.2d at 1140.
an amended complaint on October 31, 1989. CTI claimed that Tolle's ERISA claim was time-barred because she filed the complaint more than five years after her notification of discharge on September 24, 1984. Thus, CTI claimed that the statutory period had expired five days prior to the filing of Tolle's first complaint.

Employing the discovery rule, the Seventh Circuit found that the decision to terminate and the "participant's discovery" of the decision dictated accrual. In other words, the statutory period began to run once CTI communicated its decision to Tolle. Thus, the court held that the statutory period began on September 19, 1984, or at least no later than September 24, 1984, when Tolle received written confirmation, thereby time-barring Tolle's ERISA claim. The court reasoned that the September 24, 1984 letter "stated in unequivocal terms that [Tolle] would be terminated on October 19, 1984." As a result, this letter, "which left no room for contingencies," provided Tolle with sufficient notice such that the discovery rule was satisfied no later than September 24, 1984, when CTI made and clearly communicated its decision to terminate.

In short, both Hamilton v. 1st Source Bank and Tolle v. Carroll Touch, Inc. hold that the discovery rule is a reasonable theory with which to toll the relevant statute of limitations. Although the courts reach different results due to different facts, both courts nonetheless imply that some piece of documentation, some form of direct notice, is required to satisfy the discovery rule. Moreover, implicit in the discovery rule cases is that the rule does not undercut the policies behind statutes of limitations, including fairness to the defendant to be free of old claims. Courts' acceptance of this line of reasoning has

162 Id. at 1132.
163 Id. at 1138. The Seventh Circuit held that because Tolle alleged that CTI violated § 510 when it terminated her so as to avoid paying her employee benefits to which she was entitled, the relevant date for accrual of the five-year statutory period under ERISA was the date of Tolle's termination. Id. at 1139-40. The question remained, however, whether the relevant date for accrual was the date of actual termination—October 19, 1984—or the date the termination was decided upon and communicated to Tolle—September 24, 1984. Id. at 1140.
164 See id. at 1138.
165 Id. at 1140-41.
166 Tolle, 977 F.2d at 1141.
167 Id.
168 Id.
169 Id.
170 Hamilton v. 1st Source Bank, 895 F.2d 159, 163-65 (4th Cir. 1990); Tolle, 977 F.2d at 1139.
171 See Tolle, 977 F.2d at 1141; Hamilton, 895 F.2d at 164-65.
172 See Tolle, 977 F.2d at 1138-41; Developments, supra note 14, at 1,200.
resulted in application of the discovery rule, not only in the context of ERISA or age discrimination claims, but in the CWA context as well.

B. CWA Violations

Although the discovery rule arises in a different context, it nonetheless similarly is employed and justified in CWA enforcement actions falling under the five-year limitations period of § 2462. Generally, courts hold that the statute of limitations does not accrue for CWA violations until the plaintiff knows of the violation or "through the use of reasonable diligence should have discovered" the violation. Many courts reason that the discovery rule not only preserves some of the benefits and purposes of statutes of limitations, as the government cannot delay bringing actions against violators, but also prevents the public from being "harmed by an inability to prosecute claims for violations that could not reasonably have been discovered." A rule that prevents the statute from running until the government has had a reasonable chance to become aware that the alleged violation has occurred—often through some form of written notice—preserves the purposes behind the CWA.

One case that followed this reasoning was Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., a citizen suit filed by Atlantic States on July 30, 1984, alleging several violations of the CWA by the defendant. Defendant Al Tech had an EPA permit allowing it to discharge pollutants into the Kromma Kill, a small creek flowing into the Hudson River. Atlantic States contended that Al Tech had discharged pollutants between July 1977 and May 1983 at levels exceeding the terms and standards of the permit under which it was operating. Although Al Tech itself was aware of occasionally

174 Windward, 821 F. Supp. at 695; accord ALCOA, 824 F. Supp. at 646.
175 Windward, 821 F. Supp. at 695; accord ALCOA, 824 F. Supp. at 646.
178 Atlantic States, 635 F. Supp. at 286. Al Tech operated a steel products manufacturing facility. Id.
179 Id.
180 Id.
exceeding the permit standards, Atlantic States did not become aware of the alleged violations until reviewing reports that Al Tech submitted to the EPA.\textsuperscript{181}

In its motion for summary judgment, Al Tech argued that Atlantic States was barred from litigating its pre-July 1979 claims due to the five-year statute of limitations applicable to CWA civil penalty cases.\textsuperscript{182} The United States District Court for the Northern District of New York agreed with Al Tech that § 2462 was the applicable statute of limitations for CWA violations.\textsuperscript{183} The court did not agree, however, that Atlantic States's claims prior to July 1979 were time-barred.\textsuperscript{184}

Implicitly employing the discovery rule, the \textit{Atlantic States} court held that the statute of limitations did not accrue when the violations actually occurred, but rather when the reports filed by Al Tech with the EPA revealed the CWA violations.\textsuperscript{185} The court reasoned that, but for the reports, the public never would have been aware that the alleged violations had occurred.\textsuperscript{186} The court stated that "[i]t would have been practically impossible for [Atlantic States] to have discovered the alleged violations of [Al Tech] on its own."\textsuperscript{187} Moreover, the court held that if the statutory period were to begin to run when the violations actually occurred and not when they were discovered or could have been discovered, the remedial benefits of the CWA would be impeded or foreclosed.\textsuperscript{188} In short, the \textit{Atlantic States} court implied that to satisfy the discovery rule, some sort of notice is required.\textsuperscript{189}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id. at 287.}
\item \textsuperscript{183} \textit{Atlantic States,} 635 F. Supp. at 287.
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} See \textit{id. at} 287--88. In a case similar to \textit{Atlantic States, United States v. Hobbs}, the United States District Court for the Eastern District of Virginia held that the five-year statutory period for purposes of a CWA violation does not accrue until reports that document violations are filed with the EPA and not when the violations actually occur. The court reasoned that such a holding was the only manner in which to preserve both effective enforcement of the statute and of its remedial benefits. \textit{United States v. Hobbs,} 736 F. Supp. 1406, 1409--10 (E.D. Va. 1990). The court found that, although the EPA may have been alerted to the possible unpermitted discharges committed by the defendants during the years 1980--88, the statutory period did not begin to run until a biologist with the United States Fish and Wildlife Service filed a report with the EPA on December 12, 1988 recommending the ACOE issue a cease and desist order. \textit{Id. at} 1410. Thus, although the government did not file its claims until June 1989, it was not barred from litigating its claims of CWA violations as far back as 1980. \textit{See id.} The court reasoned that the government's cause of action accrued on the date of the filing of the report and not earlier because the report was the "first piece of information to formally detail and document the results of any field studies conducted on defendants' property." \textit{Id.}
\item \textsuperscript{186} \textit{Atlantic States,} 635 F. Supp. at 287.
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id. at} 288.
\item \textsuperscript{189} See \textit{id. at} 287--88.
\end{enumerate}
\end{footnotesize}
The United States District Court for the Northern District of Georgia reached a similar result in *United States v. Windward Properties, Inc.*, where the United States brought a civil enforcement action against Windward Properties, Inc. (Windward) for five alleged violations of the CWA. The government alleged that Windward had discharged dredged or fill material into three streams and their adjacent wetlands at Windward’s real estate development in violation of sections 301 and 404 of the CWA. Specifically, the government alleged that Windward committed these violations between 1979 and 1982 during construction of a dam.

In moving for summary judgment, Windward argued that the government’s action was barred, not only by the doctrine of laches, but also by the applicable statute of limitations, § 2462. Windward argued that the statutory period began no later than March 1982, the last period of alleged violation. On the other hand, the government contended that the statute of limitations did not accrue until the government discovered Windward’s unlawful activities. Thus, the government argued, its cause of action filed February 14, 1991, was timely.

The court, citing *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, *United States v. Hobbs*, and *NCWF*, held that the discovery rule applied to this statute of limitations issue, and listed several policy arguments in favor of employing the objective rule in civil enforcement actions for wetlands violations. The court found that implementation of the discovery rule, rather than a strict interpretation of § 2462, was proper. The court reasoned that the discovery rule would ensure that the purposes behind the CWA, as listed in sections 101(a) and 101(a)(2) of the CWA, would not be

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191 *Id.*
192 *Id.*
193 *Id.; see 28 U.S.C. § 2462.*
195 *Id.* at 693.
196 *Id.*
199 29 Env’t Rep. Cas. (BNA) 1941 (E.D.N.C. 1989). The NCWF court extended, in dicta, the *Atlantic States* rationale to dredge/fill violations, reasoning that the discovery rule “recognizes that it is virtually impossible for the public to discover violations until reports have been filed [sic] with the EPA.” *Id.* at 1944.
201 *Id.* at 694; *see 28 U.S.C. § 2462.*
202 33 U.S.C. §§ 1251(a)(1)–(2). The sections state respectively, in relevant part: “[t]he objec-
thwarted, including the purpose of protecting the many functions, values, and benefits wetlands bestow on both society and the environment.203

Moreover, the court maintained that the discovery rule was necessary for statute of limitations purposes because most fill violations are neither obvious nor easily detectable.204 Unlike other CWA violations where the government is on notice of discharges because of required permitting and reporting processes, most section 404 violations are not easily detectable because most violations occur without a permit or a report filed by the violator.205 Furthermore, once the fill has been discharged, some filled wetlands resemble uplands, and easily are overlooked.206 Thus, to ensure that the government has an opportunity to prevent the purposes of the CWA from being frustrated, the court found the discovery rule reasonable.207

Finally, the court noted that the discovery rule should apply to section 404 violations because the rule adequately balances the competing interests of the government and the private defendant regarding statutes of limitations issues.208 "Under [the discovery] rule, many of the policy benefits of statutes of limitations are preserved as the Government cannot unreasonably delay in bringing an action, while the public is not harmed by an inability to prosecute claims for violations that could not reasonably have been discovered."209

Applying its findings to the facts at hand, the Windward court, in denying summary judgment, found that a genuine issue of material fact existed.210 The court ruled that, although Windward might convince the court that the government should have known of the alleged violation by showing a group of facts suggesting the government did in fact know of the violation, those same facts were not "sufficient" for the court to say, as a matter of law, that the government reason-
ably should have known of the violation at issue prior to February 14, 1986.\textsuperscript{211}

A third case that followed the discovery rule, albeit involving a different CWA violation, is \textit{United States v. Aluminum Company of America}, a case in which the government sought civil penalties against the Aluminum Company of America (ALCOA) for 174 alleged violations of the CWA beginning in August of 1987.\textsuperscript{212} The government claimed to have become first aware of the CWA violations when ALCOA filed its Discharge Monitoring Reports (DMRs) with the EPA on September 29, 1987.\textsuperscript{213} The government filed its complaint on September 22, 1992.\textsuperscript{214}

ALCOA, in its motion for summary judgment, asserted that the claim accrued on the date of the actual violations, and thus the August 1987 violations were time-barred by the five-year statute of limitations.\textsuperscript{215} The government, on the other hand, maintained that the August 1987 violations were not time-barred because the statutory period began to run on the date the EPA received the DMRs from ALCOA—September 29, 1987.\textsuperscript{216} Citing the factually similar case of \textit{Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.},\textsuperscript{217} the United States District Court for the Eastern District of Texas, in \textit{ALCOA}, ruled for the government, holding that

\textsuperscript{211} \textit{Id}. The facts Windward alleged with regard to sufficient notice included a high degree of publicity surrounding construction of the lake and dam, the government's possession of aerial photographs of the site, and the existence of public records, including dam and construction permits. \textit{Id}.

\textsuperscript{212} \textit{United States v. Aluminum Co. of Am.}, 824 F. Supp. 640, 646 (E.D. Tex. 1993). Although ALCOA had applied for and received a renewal for its NPDES permit, the government alleged ALCOA violated the CWA by discharging chemicals into a nearby ditch. \textit{Id}. at 642-43. That discharge, which occurred during dismantling of the plant, was in excess of the standards established in the permit. \textit{Id}.

\textsuperscript{213} \textit{See id}. at 643, 646-47.

\textsuperscript{214} \textit{Id}. at 644.

\textsuperscript{215} \textit{Id}. The date the statute of limitations began to run was a major issue because 129 of the alleged violations occurred in August 1987 but were not reported until September 1987. Thus, the date the court decided the statute of limitations accrued was of tremendous importance to both parties, as it would determine the defendant's potential level of liability. \textit{See id}.

\textsuperscript{216} \textit{Id}.

\textsuperscript{217} 913 F.2d 64 (3d Cir. 1990). Powell Duffryn was charged with violating the limitations of its NPDES permit a total of 386 times over a period of six years. \textit{Id}. at 68. The United States Court of Appeals for the Third Circuit held the statute of limitations did not begin to run at the time of discharge but when the defendant filed its DMRs, reasoning plaintiffs could never have reasonably been "deemed" to have known about the violations, since Powell Duffryn itself had the responsibility to monitor the effluent. \textit{Id}. at 75.
the statute of limitations did not begin to run for purposes of the discovery rule until ALCOA had filed the DMRs.\textsuperscript{218}

The court rejected ALCOA’s call to expand the discovery rule to encompass all evidence that the EPA knew or, through the use of reasonable diligence, should have known of the violation.\textsuperscript{219} The court implicitly held that the statutory period only can accrue at the time the appropriate agency discovers the violation, namely, when the agency receives the statutorily mandated report.\textsuperscript{220} The court stated “[t]o hold otherwise . . . would encourage the manufacturer to violate the reporting requirement and hide evidence . . . until the five-year limitations period had run.”\textsuperscript{221} Noting that statutes of limitations asserted as a defense against the government warrant a strict construction in favor of the government, the court found that ALCOA’s correspondence with the EPA did not suffice as notice sufficient to satisfy the discovery rule.\textsuperscript{222}

The court further reasoned that claiming that the EPA could have discovered the violation did not “correspond with reality,” despite the fact that the EPA had the right to inspect and could have inspected the facility to test ALCOA’s effluent discharge.\textsuperscript{223} The EPA simply did not possess the resources with which to monitor and inspect sites for potential violations.\textsuperscript{224} As the court noted, Congress recognized the EPA’s limited resources when it drafted the CWA to require the permittee to monitor and submit reports for its own effluent discharge.\textsuperscript{225} “To allow the permittee to benefit from the EPA’s failure to inspect and immediately discover violations would frustrate the purposes of the CWA.”\textsuperscript{226}

Thus, although ALCOA speaks of the discovery rule from a different CWA context than Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.\textsuperscript{227} or United States v. Windward Properties, Inc.,\textsuperscript{228} the end result is strikingly similar. The difficulties that both

\textsuperscript{218} ALCOA, 824 F. Supp. at 646.
\textsuperscript{219} See id.
\textsuperscript{220} See id. at 645–46.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 646.
\textsuperscript{223} ALCOA, 824 F. Supp. at 647.
\textsuperscript{224} See id. Region VI, the EPA region where the case originated, received 14,270 DMRs each month, and with its limited resources could only inspect roughly 900 facilities per year out of nearly 5,600 permits. Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} 635 F. Supp. 284 (N.D.N.Y. 1986).
\textsuperscript{228} 821 F. Supp. 690 (N.D. Ga. 1993).
the government and public interest citizen groups face in discovering CWA violations mandates an interpretation of the discovery rule that requires a showing of some form of notice before the five-year statutory period under § 2462 can accrue.229 Courts implicitly maintain that a notice requirement is consistent with the purpose and text of the discovery rule.230 The statutory period cannot begin to run unless the plaintiff knew of or discovered, or should have known of or reasonably discovered, the alleged injury or violation.231 Without an implied notice requirement, defendants too easily may impede the government’s ability to protect wetlands.232

Fortunately for the government and for other plaintiffs, the continuing violation theory is also an effective means of tolling the statute of limitations in some cases.233 The theory, which holds that for every day a pollutant or discharge of dredged or fill material remains in wetlands constitutes a continuing violation, is an excellent alternative in the event an action is time-barred by the discovery rule.234

V. United States v. Telluride Co.

Although the discovery rule never was raised in United States v. Telluride Co., the continuing violation theory was the central issue between the contending parties.235 In Telluride, the United States, through the EPA, brought a civil enforcement action pursuant to section 309 of the CWA236 seeking injunctive relief and civil penalties against the Telluride Company, Mountain Village Company, Inc., and Telluride Ski Area, Inc. [hereinafter collectively referred to as TELCO].237 The United States alleged that TELCO, the developers of the Telluride ski resort in Telluride, Colorado, had violated the CWA at a land development property owned by TELCO.238 Specifically, the government stated that TELCO had discharged dredged or fill mate-

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230 See ALCOA, 824 F. Supp. at 646; Windward, 821 F. Supp. at 695.
231 See ALCOA, 824 F. Supp. at 646; Windward, 821 F. Supp. at 695.
233 See supra notes 80–87 and accompanying text.
234 See supra notes 80–87 and accompanying text.
235 United States v. Telluride Co., 884 F. Supp. 404, 406–08 (D. Colo. 1995). In Telluride, the EPA did not raise the issue of tolling under the discovery rule.
237 Telluride, 884 F. Supp. at 405.
238 Id.
rials without a permit into wetlands on the property in violation of sections 301 and 404 of the CWA. The government alleged that TELCO filled or caused to be filled over sixty acres of wetlands during a thirteen-year span from 1981 to 1994.

In September 1990, the EPA, in a meeting with TELCO’s attorneys, brought forth its allegations of illegal fill activities. The meeting resulted in a negotiated consent decree between the United States and TELCO in 1993. The United States filed its original complaint, along with a proposed consent decree, on October 15, 1993. After the United States District Court for the District of Colorado rejected the proposed consent decree, the United States amended its complaint and filed a revised amended complaint on October 7, 1994.

After answering the amended complaint, TELCO filed a motion for partial summary judgment on statute of limitations grounds. TELCO asserted, pursuant to § 2462, that all claims based on the discharge of dredged or fill materials into wetlands that occurred before October 15, 1988 were time-barred. TELCO argued that the five-year statutory period began on the date the violation occurred and thus, given the filing date of October 15, 1993, all claims of violations prior to October 15, 1988 were precluded. Citing 3M Co. v. Browner, TELCO posited that the EPA had surrendered the opportunity to assess penalties against TELCO for any violations allegedly committed more than five years before the EPA filed its original complaint. According to TELCO, the government’s claims accrued at the time TELCO committed the alleged violations.

240 Telluride, 884 F. Supp. at 405.
241 Id.
242 Id.
243 Id.
244 Id.
245 Telluride, 884 F. Supp. at 405.
246 Id.
247 Id. at 405–06.
248 Id.; see 28 U.S.C. § 2462.
249 17 F.3d 1453 (D.C. Cir. 1994). See infra note 251 for a full discussion of the 3M Co. decision.
250 See Telluride, 884 F. Supp. at 406.
251 Id. In the case cited by TELCO, 3M Co. v. Browner, 3M had filed a petition for review of the EPA’s assessment of civil penalties for violations of the Toxic Substance Control Act (ToSCA). 3M Co., 17 F.3d at 1454; see 15 U.S.C. §§ 2601–92 (1994). The EPA alleged 3M “unwittingly” had committed several ToSCA violations between August 1980 and July 1986. See 3M Co., 17 F.3d at 1454. 3M had possessed and worked with two imported chemicals that were not on the EPA’s inventory list of existing chemicals. Id. Section 5 of ToSCA requires the importer or manufacturer of a chemical to file the requisite notice and customs certificates 90
In opposition to TELCO, the United States argued that because a continuing violation existed, the statute of limitations had not yet begun to run. As a result, the United States argued it still could litigate all alleged violations committed by TELCO during the thirteen-year period. Relying on *Sasser v. Administrator, EPA* and *NCWF,* the EPA maintained that so long as the illegal, unpermitted fill remained and was not physically removed, the adverse effects of the discharged materials into waters of the United States constituted a continuing violation, and thus the five-year statute of limitations was tolled.

The *Telluride* court concluded that the unlawful discharge of pollutants pursuant to section 301 of the CWA, for purposes of § 2462, did not constitute a continuing violation. Relying heavily on *3M Co. v. Browner,* the court further held that the five-year statute of limitations before importing the chemical. ToSCA, 15 U.S.C. § 2604(a)(1). The EPA subsequently filed an administrative complaint against 3M, seeking $1.3 million in civil penalties for 3M's failure to file Premanufacturer Notices as well as 3M's submission of inaccurate Customs Certificates for the two chemicals. *3M Co.,* 17 F.3d at 1455. 3M asserted a statute of limitations defense arguing that, consistent with § 2462, the statute of limitations for ToSCA civil enforcement actions, all EPA claims for violations before September 1983 were barred. *Id.* The United States Court of Appeals for the District of Columbia Circuit held that the running of the limitations period is measured from the date of the underlying violation. *Id.* at 1462. Thus, the EPA was precluded from prosecuting claims against 3M for alleged violations committed more than five years before the EPA filed its original administrative complaint. *See id.*

252 *Telluride,* 884 F. Supp. at 406.

253 *See id.*

254 990 F.2d 127 (4th Cir. 1993).


256 *See Telluride,* 884 F. Supp. at 406–07. In *Sasser* the defendant was charged with discharging pollutants without a permit into freshwater wetlands along his property in South Carolina in violation of § 301, 33 U.S.C. § 1311, of the CWA. *Sasser,* 990 F.2d at 128. An administrative law judge imposed a $125,000 fine against Sasser. *Id.* at 129.

In his defense, Sasser argued that the EPA lacked jurisdiction to assess civil penalties and that the only method of recovery for the EPA was through federal district court. *Id.* Dismissing Sasser's argument of lack of subject matter jurisdiction, the United States Court of Appeals for the Fourth Circuit held that Sasser's violation of the CWA was a continuing one. *Id.* The court stated that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Id.*

Similarly, in *NCWF,* the United States District Court for the Eastern District of North Carolina found that a continuing violation of § 301 of the CWA existed regardless of the six years that separated the last date of unpermitted discharge of dredged or fill material from the date of the filing of the complaint. *NCWF,* 29 Env't Rep. Cas. (BNA) at 1942–43. The court held that "when a company has violated an effluent standard or limitation, it remains ... 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Id.* at 1943 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 69 (1987) (Scalia, J., concurring)).

tations began to run at the time of the discharge, and thus the government could not assert any claims for alleged violations that occurred prior to October 15, 1988. The court’s holding implicitly echoed the reasoning of 3M Co.—that measuring the limitations period from the date of the actual violation would be consistent with the purposes of statutes of limitations. The court supported its finding first by distinguishing the cases that the government relied on in support of the continuing violation theory. The court maintained that the two primary cases the government cited, Sasser v. Administrator, EPA and NCWF, did not address the issue of the continuing violation theory in the statute of limitations context. Rather, the Sasser court, according to the Telluride court, “was not concerned with whether the violation was continuing so as to bar the commencement of the statute of limitations . . . . The issue was not whether the EPA had belatedly prosecuted a stale claim but whether the EPA was authorized to prosecute such a claim at all.” The Telluride court stated that the NCWF court was concerned only with the continuing violation theory for subject matter jurisdiction purposes, and not with respect to the statute of limitations itself.

In direct contrast to the government’s argument, the court held that for purposes of § 2462, the plain language of the CWA did not create a continuing violation. Thus, the court struck down the government’s argument asserting a continuing violation for the unpermitted fill. The court agreed with TELCO’s argument that the express language of sections 301 and 502(16) of the CWA did not create continuing violations but instead made the act of discharging a violation. Once the act of discharging is complete, the violation is

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258 Telluride, 884 F. Supp. at 408. In 3M Co. v. Browner, a ToSCA enforcement case, the court held that the phrase “first accrued” meant the time at which the cause of action first existed, and not when the violation was first discovered. 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C. Cir. 1994).

259 See Telluride, 884 F. Supp. at 408; see also 3M Co., 17 F.3d at 1460–61.


263 Id.

264 Id. at 407.


266 Telluride, 884 F. Supp. at 407–08.


268 Telluride, 884 F. Supp. at 407.
complete and the statutory period accrues.\textsuperscript{270} In its holding, the \textit{Telluride} court cited \textit{3M Co.}, which stated “[b]ecause liability for the penalty attaches at the moment of the violation, one would expect [the date of the act of discharging] to be the time when the claim for the penalty ‘first accrued.’”\textsuperscript{271} According to the \textit{Telluride} court, nothing in the plain language of the statute, the legislative history, or the purposes of the CWA, “compel[led] one to depart from established principles of statutory construction so as to read a ‘continuing violation’ into the Act.”\textsuperscript{272}

In addition to finding that the statutory period accrued at the time of discharge, the court held that, even if the continuing violation theory were applicable, TELCO had committed no continuing violation.\textsuperscript{273} The court reasoned that “mere ongoing impact” from past violations did not suffice to extend the period in which a plaintiff can file an action.\textsuperscript{274} In support of its position, the \textit{Telluride} court cited the United States Court of Appeals for the Ninth Circuit case of \textit{Ward v. Caulk},\textsuperscript{275} which stated that “a continuing violation is occasioned by continual unlawful acts, not by ill effects from an unlawful violation.”\textsuperscript{276} The \textit{Telluride} court thereby implied that the existence of illegally discharged dredged or fill materials in wetlands constituted ill effects but did not, in and of itself, constitute an unlawful act.\textsuperscript{277} As a result, the court concluded that because TELCO was not discharging fill into wetlands, neither a current violation nor a continuing violation existed for statutes of limitations purposes. The court stated that “[t]he fact that a continuing impact exists from TELCO’s past violations does not render the violation continuing.”\textsuperscript{278} In short, the \textit{Telluride} court held that for CWA violations, no continuing violation exists and thus the five-year statutory period under § 2462 accrued at the time of discharge.\textsuperscript{279} As a result, the government only could pursue alleged violations that occurred on or after October 15, 1988.\textsuperscript{280}

\textsuperscript{270} See id.
\textsuperscript{271} Id. at 408 (quoting \textit{3M Co. v. Browner}, 17 F.3d 1453, 1460–61 (D.C. Cir. 1994)).
\textsuperscript{272} Id. at 407.
\textsuperscript{273} See id. at 408.
\textsuperscript{274} \textit{Telluride}, 884 F. Supp. at 407, 408.
\textsuperscript{275} 650 F.2d 1144 (9th Cir. 1981).
\textsuperscript{276} \textit{Telluride}, 884 F. Supp. at 407; see \textit{Ward}, 650 F.2d at 1147.
\textsuperscript{277} See \textit{Telluride}, 884 F. Supp. at 407.
\textsuperscript{278} Id. at 408.
\textsuperscript{279} See id.
\textsuperscript{280} See id.
VI. The Telluride Court Erred in Failing to Adopt Either the Continuing Violation Theory or the Discovery Rule

Whether the continuing violation theory or the discovery rule is the preferred choice for the tolling of federal statutes of limitations, the United States v. Telluride Co. court was incorrect in holding that the five-year statutory period for CWA violations began to run at the time the act of discharge occurred. The court erred because it failed to recognize that a significant period of time often elapses between the moment a defendant commits a wrong and the time a plaintiff discovers or becomes aware of the injury.281 A wrongful tort or statutory violation does not necessarily give rise to an immediate injury or harm for which a plaintiff will be aware of the source or cause of an injury.282 Thus, the time the statutory period accrues can be of tremendous concern to both an injured party and a tortfeasor, as it will determine not only whether or not a plaintiff has slept on his or her rights but also whether a defendant is liable for any "ancient obligations."283

Specifically, significant periods of time can elapse between a violation of federal law and when the government becomes aware of the violation and its injurious effects.284 Thus, to adhere to a rule that the statute of limitations accrues on the date of violation, when discovery of the violation could be much later, is facially unfair to the complaining party.

Such a rule would be unfair in that it conflicts with the purposes of the CWA—to protect the chemical, physical, and biological integrity of the nation's waters—by preventing the government and civil environmental groups from attaching deterrence value to the enforcement sections therein. Moreover, a rule like that adhered to in Telluride not only potentially prevents the government from litigating claims it has not even "slept on"—it may in fact force the government to rush into filing claims—but also subtly encourages fraud and concealment on the part of landowners and developers. Realizing that the statutory period will begin to run on the day of violation and not when the government has a reasonable opportunity to discover the violation will motivate violators not only to conceal their violations from the

281 Developments, supra note 14, at 1,200.
282 Id.
283 Id. at 1,185, 1,200.
284 See supra section IV.
government and their neighbors, but also to bypass or ignore the entire permitting and regulatory process promulgated under the CWA. The rule established in Telluride will provide a violator with incentive to make unpermitted discharges of pollutants or dredged or fill materials into waters of the United States secretly or covertly, and to continue to keep those violations a secret beyond the five-year statute of limitations, thereby completely frustrating effective enforcement of the CWA.

In short, the Telluride decision conflicts with the well-known notion that misrepresentation or misleading conduct often constitutes “constructive fraud” so as to grant the government a concealment exception to the running of the statute of limitations. Permitting the Telluride decision to remain good law not only frustrates effective enforcement of the CWA but also contradicts well-established principles of deterrence.

Both the Telluride court and the United States government erred in their respective interpretations of the continuing violation theory in Telluride. In Telluride, the court held that the unlawful discharge of pollutants under section 301 did not constitute a continuing violation so as to extend the period in which the government could file an action. Similarly, the EPA argued that the discharge of dredged or fill materials into wetlands constituted a continuing violation so long as the adverse effects of the illegal, unremoved fill continue. Both the judge and the government, in asserting their respective interpretations of the continuing violation theory, however, incorrectly cited the NCWF decision. NCWF implicitly stood for the proposition that the presence alone of illegal fill in wetlands constituted a CWA violation, irrespective of adverse effects.

Under NCWF, every day illegal, unpermitted fill remains in wetlands constitutes a CWA violation in and of itself, distinct from the physical act of discharging. Not only is an unpermitted discharge of illegal fill a violation of the CWA, but the fact that the alleged violator chooses to let the illegal fill remain, constitutes a second CWA violation, irrespective of any harmful or ill effects or impacts resulting

285 See supra notes 40–43 and accompanying text.
288 See id. at 406.
290 See supra notes 88–100 and accompanying text.
291 NCWF, 29 Env’t Rep. Cas. (BNA) at 1943.
from the discharge.292 Thus, so long as illegal fill remains in wetlands and physically is not removed, this second violation of the CWA is a continuing one. This approach satisfies the requirement of United States v. Telluride Co. that an actual violation of federal law presently exist, not merely the presence of continuing ill effects of a past act of violation.293 Although the first CWA violation may be both completed and inactionable after the five-year statutory period, the second violation remains a continuing violation until the fill physically is removed. Thus the statute of limitations does not accrue for purposes of the second violation as the violation is of a continuing nature.

Finally, one must consider employment of the continuing violation theory in section 404 cases from the perspectives of efficiency and consistency. The ACOE, in its role as defender of the environment, enforces section 10 of the Rivers and Harbors Act of 1899294 via the “continuing offense” or continuing violation theory.295 For reasons of uniformity, consistency, and efficiency, extending the continuing violation theory to section 404 violations appears logical. The continuing violation theory recently was extended to section 404 violations by the United States District Court for the Middle District of Florida in United States v. Reaves.296 Because the ACOE already follows the continuing violation theory for one set of its enforcement matters, it only would be rational to enable the ACOE to employ the same standard for statutes of limitations purposes for other enforcement matters, including those brought under section 404. The Reaves opinion implicitly confirms extension of the continuing violation theory to section 404 cases as a practical and necessary decision.297

The Reaves case, moreover, provides support for another argument, albeit unintentionally, that supports extending the continuing violation theory to section 404 cases. The ACOE and the EPA will and do bring enforcement actions alleging both section 10 and section 404 violations. Permitting a rule like that espoused in United States v. Telluride Co. would be inefficient and confusing because, as in

292 See id.
293 See United States v. Telluride Co., 884 F. Supp. 404, 407–08 (D. Colo. 1995) (citing McDougal v. County of Imperial, 942 F.2d 668, 674–75 (9th Cir. 1991) and Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)). Both cases cited in Telluride stand for the proposition that “mere ongoing impact from past violations does not extend the period in which a plaintiff must file an action.” Id. at 407.
295 See supra notes 103–22 and accompanying text.
296 See supra notes 108–22 and accompanying text.
297 See supra notes 108–22 and accompanying text.
Reaves-like cases, the section 10 and section 404 violations can be linked inextricably to the same activity and factually indistinguishable from one another. To establish a rule contrary to the continuing violation theory may cause great inefficiency and confusion for both courts and litigating parties in resolving cases where section 10 and section 404 violations coexist, because the respective statute of limitations issues will have to be bifurcated and argued separately, rather than dispersed with in one motion or brief. Thus, to provide the ACOE and the EPA with the continuing violation theory in one statutory enforcement context but not the other is illogical, particularly since both the CWA and the Rivers and Harbors Act have a common design or purpose: to protect and preserve the navigable waters of the United States.

In short, because courts have recognized the continuing violation theory for section 10 enforcement cases, so too should courts, for reasons of efficiency and consistency, recognize the continuing violation theory for section 404 violations. If the continuing violation theory or an implicit reading of it are rejected, the discovery rule, although not asserted in Telluride, should nonetheless be available to the federal government for section 404 CWA enforcement actions because of its near universal adoption by courts in other statutes of limitations contexts.

Private and public plaintiffs alike have applied the discovery rule, and courts have recognized it in a wide variety of statutes of limitations cases pertaining to a plethora of federal statutes. Moreover, some federal courts have accepted the discovery rule as a valid theory with which to interpret the accrual of the § 2462 statute of limitations for CWA enforcement actions. The discovery rule was applied in United States v. Windward Properties, Inc., a CWA enforcement action that included section 404 violations for the unpermitted fill of wetlands.

In short, because of its near universal application in federal statute of limitations matters, including other CWA violations, extending the discovery rule to section 404 violations seems logical. For reasons of uniformity, predictability, and certainty among federal courts, the discovery rule should be a valid doctrine for section 404 cases. Specifically, the discovery rule is a necessary doctrine for section 404

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298 See supra notes 130–33 and accompanying text.
299 See supra section IV.B.
300 See supra notes 190–211 and accompanying text.
violations for the reasons alluded to in Windward\textsuperscript{301} and United States \textit{v. Aluminum Company of America}.\textsuperscript{302}

The federal government is responsible for enforcing federal laws with limited resources over large geographical areas.\textsuperscript{303} As a result, the discovery of many section 404 wetlands violations, like other CWA violations, can be extremely difficult.\textsuperscript{304} Most violations are difficult to detect because after fill operations, former wetlands often resemble uplands, thereby making a violation virtually invisible to the naked eye.\textsuperscript{305} In addition, violations are difficult to detect because, unlike other CWA violations where the violators themselves file a report, the government is not put on notice of potential violations in section 404 matters.\textsuperscript{306} The government lacks the personnel and economic resources with which to police and enforce the CWA at a more favorable level.\textsuperscript{307} As indicated in United States \textit{v. Aluminum Company of America}, federal agencies often are deluged with more responsibility and a greater duty to enforce than is feasible.\textsuperscript{308} Too much of the timing of a CWA enforcement action is beyond the government's control.\textsuperscript{309} Thus, not to provide the federal government with the ability to assert in court that it simply did not possess the means to reasonably discover the alleged violation would thwart effective enforcement of the CWA.\textsuperscript{310}

In short, courts should require a party to present some form of reasonable notice to satisfy the elements of the discovery rule. For the five-year statutory period under § 2462 to accrue, some form of notice must be provided to, or be reasonably attainable by, the federal environmental agency. Considering the difficulty the federal government has in discovering alleged violations, some reasonable notice requirement, albeit a report from another federal agency or a letter from a local conservation commission, would place the contending parties on a more level playing field.

The objective nature of the discovery rule, specifically a notice requirement, lends itself to section 404 enforcement actions. If the

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\item \textsuperscript{301}821 F. Supp. 690 (N.D. Ga. 1993).
\item \textsuperscript{302}824 F. Supp. 640 (E.D. Tex. 1993).
\item \textsuperscript{303}Id. at 647.
\item \textsuperscript{304}Windward, 821 F. Supp. at 695.
\item \textsuperscript{305}Id.
\item \textsuperscript{306}Id.
\item \textsuperscript{307}Id.
\item \textsuperscript{308}ALCOA, 824 F. Supp. at 647.
\item \textsuperscript{309}See United States \textit{v. Meyer}, 808 F.2d 912, 919 (1st Cir. 1987).
\item \textsuperscript{310}See ALCOA, 824 F. Supp. at 647.
\end{itemize}
\end{footnotesize}
government should have reasonably discovered a violation sooner, then the statutory period would begin to run sooner. The purpose of statutes of limitations still would be upheld by the discovery rule if it included this requirement. "[T]he Government can not unreasonably delay in bringing an action, while the public is not harmed by an inability to prosecute claims for violations that could not reasonably have been discovered."

It is possible that the government in United States v. Telluride Co. did not assert the discovery rule to combat the accrual of the statutory period because the facts were unfavorable. Perhaps the government did not dispute the facts nor assert the discovery rule because it realized it should have, through the use of reasonable diligence, discovered the sixty-acre violation of the CWA. If this is the case, the objectivity of the discovery rule, in light of the purposes of statutes of limitations, would hold: if the government has slept on its rights, it should lose the opportunity to litigate a stale claim.

**VII. Conclusion**

In short, the Telluride case reminds the legal community that statutes of limitations, when not accorded much weight or respect by a plaintiff, can carry significant legal, economic, and environmental consequences. Thus, the need for a legitimate device with which to toll the statutory period for CWA violations is obvious. The government and environmental public interest groups must possess the ability to reasonably discover the undiscoverable if either is to succeed in protecting America's environment. The answer to this problem lies in either the continuing violation theory or the discovery rule. Application of either the continuing violation theory or the discovery rule to toll the § 2462 five-year statutory period for CWA violations will enable the government not only to protect the biological, physical, and chemical integrity of the nation's waters by prosecuting violations that could not have been reasonably discovered earlier, but also will ensure that the future of America's wetlands will be more secure. The United States v. Reaves and United States v. Windward Properties, Inc. decisions, respectively adopting each of the above-mentioned doctrines, are steps in the right direction.

311 See Windward, 821 F. Supp. at 695.
312 Id.