Application of the Continuing Violations Doctrine to Environmental Law

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CONTENTS
Introduction .................................................... 724
I. Background: Why Continuing Violations Matter in Environmental Law .................................. 727
   A. The Gwaltney Requirement of a Continuing Violation of Citizen Suits ......................... 727
   B. Statutes of Limitations ................................ 729
   C. Penalty Calculations ................................ 730
II. Case Law .................................................. 731
   A. Multiple Violative Acts on Nonconsecutive Days ......................................................... 732
   B. Failure to Act—Curable .................... 734
      1. Procedural Violations ............................... 735
      2. Substantive Violations ............................ 737
         a. Allowing Illegal Fill to Remain in Wetlands ......................................................... 737
         b. Illegal Storage or Disposal of Waste in Violation of RCRA .................................... 739
   C. Failure to Act—Incurable ............................ 742
      1. Procedural Violations ............................... 742
      2. Substantive Violations ............................ 744
III. The Continuing Violations Doctrine in Other Areas of Law and the Implications for Environmental Law ...... 745
   A. Employment Discrimination Law and Continuing Violations ........................................... 745
   B. Continuing Violations for a Criminal Omission: Toussie v. United States ....................... 749
   C. Antitrust Law and Continuing Violations ................................................................. 752

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IV. Policy Justifications for Applying the Continuing Violations Doctrine ........................................ 755
   A. Statutes of Limitations and Continuing Violations ......................................................... 755
      1. The Functions of Statutes of Limitations .......................................................... 755
      2. Reasons to Relax Statutes of Limitations .......................................................... 756
         a. Inherently Unknowable Harms ................................................................. 757
         b. Fraudulent Concealment ........................................................................... 758
         c. Gradually Developing Harms ....................................................................... 759
         d. Difficulty of Discovery as the Common Theme in Relaxing Statutes of Limitations ................................................................. 759
         e. Applying the Continuing Violations Doctrine to Extend the Statute of Limitations for Serious Procedural Violations ................................................................. 760
   B. Citizen Suits and Continuing Violations ............................................................... 762
      1. The Purpose of Citizen Suit Provisions .................................................................. 763
      2. The Role of Citizen Suits .................................................................................. 764
      3. Lower Courts’ Application of the Continuing Violations Doctrine in the Citizen Suit Context ............................................................................................................ 764
   C. Penalties and Continuing Violations ........................................................................ 767
      1. Setting Monetary Penalties .................................................................................. 767
      2. EPA’s Civil Penalty Policy and Statutory Guidelines ........................................... 768
      3. Application of the Continuing Violations Doctrine to Penalty Calculations .................. 769
      4. Criticisms of the Continuing Violations Doctrine in Penalty Calculations .................. 770
   V. A Proposed Paradigm for Analyzing the Continuing Violations Issue ...................... 772
      A. Need for the Proposal ......................................................................................... 772
      B. The Proposal ....................................................................................................... 773
      C. The Proposal Applied ......................................................................................... 775

CONCLUSION

A continuing violation of a law consists of either a series of illegal acts united by a common mechanism or a continuing course of illegal conduct. The continuing violations doctrine has been employed in a number of areas of the law to toll or extend an applicable statute of limitations or to tailor penalties to the seriousness of a particular violation of the law. In environmental law, the doctrine also has been employed as a jurisdictional test to determine whether a citizen suit
may go forward. This Comment explores the circumstances in which
courts have applied the continuing violations doctrine under federal
environmental statutes and concludes that such application should be
sensitive to the particular context in which the continuing violations
issue arises.

Application of the continuing violations doctrine can enable
courts to achieve more equitable results, as demonstrated by the fol-
lowing scenarios. In the first, Corporation A, without acquiring the
necessary permits, secretly dumps several large truckloads of highly
toxic waste into a landfill on a single day. The waste leaches into the
soil and may ultimately contaminate adjoining properties as well as
important groundwater supplies. In the second, Corporation B, a lo-
cal apple cider maker who discharges moderate amounts of effluent
into a nearby creek, obtains the requisite permits and dutifully sub-
mits daily reports of its discharges to the Environmental Protection
Agency (EPA). The reports reveal, unfortunately, that Corporation B
has exceeded its permitted discharge levels by a small, but non-threat-
ening, amount on a few occasions.

All other factors being equal, one might expect that Corporation
A is more likely to be punished and, even if both corporations are
punished, to receive a more severe punishment, given the seriousness
of the potential harm and the blameworthiness of the actor in each
case. Yet, unlike Corporation B, whose violations are completely
transparent to the EPA, Corporation A may escape legal sanction un-
less the waste can be traced back to it. Even if Corporation A is
found to be responsible, it may escape punishment if its conduct is
discovered after the running of the statute of limitations. Further-
more, because environmental statutes often set maximum penalties
according to the number of days that an individual was in violation of
a provision, Corporation A may receive lesser penalties than Corpora-
tion B, even if its conduct is discovered promptly.

Such inequitable outcomes might be ameliorated, however, if
Corporation A's conduct is viewed as a continuing violation rather
than a single, discrete act. Deeming Corporation A to be "in viola-
tion" of the law for the entire time that its illegally-dumped waste
remains unremediated would toll the statute of limitations and enable
courts to hold Corporation A liable for every day that the waste is not
remediated. Through the doctrine of continuing violations, courts
have in fact attempted to address such inequities by applying the doc-
trine broadly in environmental cases.
As part I of this Comment explains, the doctrine of continuing violations\(^1\) is important in the field of environmental law for at least three reasons: first, for determining whether a citizen suit can be filed; second, for determining whether and for what period a cause of action can be maintained in light of the relevant statute of limitations; and third, for calculating the fine or other penalty appropriate for conduct that violates the law.

Part II of this Comment reviews the case law dealing with continuing violations in these three legal contexts, focusing on cases arising under the Clean Water Act,\(^2\) the Resource Conservation and Recovery Act (RCRA),\(^3\) and the Clean Air Act.\(^4\) Part III then compares the application of the continuing violations doctrine in federal environmental actions with the application of the doctrine in other areas of the law. Observing that courts appear to have construed the doctrine more broadly in the environmental field than in other areas, part IV argues that such an application is generally justified by the contexts in which the continuing violations issue arises.

Although the question of whether the continuing violations doctrine should be applied is largely one of statutory interpretation and congressional intent,\(^5\) these factors are often unclear. This Comment, applying a blend of legal realism and public policy, posits that sound policy considerations can and should provide useful guidance to courts in such instances. Concluding that the differing policy considerations in the three contexts in which the continuing violations issue arises require that a somewhat different analysis be conducted in each case, part V proposes a paradigm that allows courts to approach the issue in a context-sensitive manner. Under this paradigm, courts should examine each alleged violation and determine whether the nature of the violation implicates a policy concern that would be addressed by application of the continuing violations doctrine in the particular context.

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1. Some cases also refer to "continuing violations" as "ongoing violations." For the purposes of this Comment, these two terms are considered to be interchangeable.
5. See, e.g., Toussie v. United States, 397 U.S. 112, 115 (1970) (holding that whether the continuing offenses doctrine should apply is a question of statutory language and congressional intent), discussed infra part III.B.
I

BACKGROUND: WHY CONTINUING VIOLATIONS MATTER IN ENVIRONMENTAL LAW

A. The Gwaltney Requirement of a Continuing Violation in Citizen Suits

Most federal environmental statutes contain provisions authorizing citizen suits for injunctive relief and/or civil penalties,\(^6\) which are paid to the U.S. Treasury.\(^7\) Many such provisions permit actions against persons "alleged to be in violation" of a pollution standard, permit, etc.\(^8\) In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,\(^9\) the Supreme Court construed this language in the context of the Clean Water Act to require citizen-plaintiffs to allege either a "continuous or intermittent violation."\(^{10}\) The Court noted that although the federal government can impose penalties for wholly past violations, Congress intended that citizen suits serve only a "supplementary role"\(^{11}\) designed to protect the "primarily forward-looking" interests of citizen plaintiffs.\(^{12}\)

A number of commentators have criticized the *Gwaltney* decision for severely constraining federal courts' jurisdiction to hear citizen suits.

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\(^{11}\) *Gwaltney*, 484 U.S. at 57.

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\(^{12}\) *Id.* at 59.
Nevertheless, the *Gwaltney* analysis of the “in violation” language has been extended to other federal environmental statutes. Because private enforcement of environmental laws through citizen suits had become an important adjunct to governmental enforcement efforts prior to *Gwaltney*, the *Gwaltney* decision appeared to erect a major barrier to effective environmental protection.

In the nearly nine years since *Gwaltney*, however, the number of citizen suits has not diminished. Lower courts have interpreted the “continuous or intermittent violation” standard broadly, including a Fourth Circuit creation of a disjunctive “prong test” stating that this standard could be met either by proving actual violations after a suit is filed or by proving a reasonable likelihood that violations will recur. Due in large part to such rulings, citizen suits continue to play an important role in ensuring compliance with environmental laws. This role has become even more important over time because of political and fiscal pressures to reduce official enforcement activity at both the federal and state levels.


16. Smith, supra note 13, at 3.


19. Over the last several years, the EPA has actively tried to support citizen suits as an important enforcement supplement. Hodas, supra note 17, at 1620. With respect to federal environmental statutes, citizen suits now account annually for almost five times the number of judicial actions as the federal government. Id. at 1609.

20. Id. at 1619-20.
B. Statutes of Limitations

In addition to delimiting the scope of jurisdiction in citizen suit cases, the continuing violations doctrine sometimes resolves another jurisdictional issue: whether an action has been brought before the statute of limitations has expired. An especially high number of cases may be barred by relevant statutes of limitations in the environmental field because environmental harms tend to be latent or especially difficult to discover.21 In such cases, the continuing violations doctrine may sometimes offer a means of subjecting the violator to legal sanction. Specifically, unlawful conduct that commenced long ago may be subject to suit under one of two continuing violations theories: either (1) the conduct gives rise to a continually violative condition that may be sanctioned until or unless it is corrected; or (2) a separate cause of action accrues for each day that the conduct and its effects persist.22 Under the first theory, the defendant may be held liable for the entire violative period, even for that part lying outside of the statutory period; under the second theory, the defendant may be held liable only for the violation within the statutory period.

Because the Gwaltney decision generally requires a present continuing or intermittent violation in order to maintain a citizen suit, the statute of limitations question rarely raises a barrier to citizen enforcement actions.23 However, the statute of limitations question is crucial with respect to government enforcement actions. Given the government's limited resources and the political sensitivity with which enforcement actions must frequently be handled, violations are unlikely to be pursued as soon as they arise, creating the need for an expansive continuing violations doctrine. This need became even more pressing as a result of the D.C. Circuit's decision in 3M v. Browner.24 The 3M court held that 28 U.S.C. § 2462, the general five-year statute of limitations for government actions for the enforcement of civil penalties, applies to administrative, as well as judicial, proceedings.25 The 3M

23. Traditionally, there has been no general statute of limitations governing private actions based on federal law. M. Patrick McDowell, Note, Limitation Periods for Federal Causes of Action After the Judicial Improvements Act of 1990, 44 VAND. L. REV. 1355 (1991). Where a federal statute did not specify a limitations period, courts most often borrowed one from the forum state's statute of limitations governing analogous state law claims. Id. at 1359. The Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1658, established a general four-year statute of limitations for all civil actions based on federal statutes enacted after December 1, 1990. Id. at 1358.
24. 17 F.3d 1453 (D.C. Cir. 1994).
25. Id. at 1456-58. The statute reads:
court also ruled that the statute of limitations begins to run from the date of violation, not from the date of discovery of the violation. The EPA has sought to minimize the impact of 3M by interpreting its holding as applying only to discrete, one-time events, and not to continuing violations; this interpretation only increases the pressure to find continuing violations in government enforcement actions.

C. Penalty Calculations

Finally, whether or not a continuing violation exists will often be crucial in calculating the penalties to which a violator is subject. Environmental statutes generally define the maximum available penalty for a violation in per-day amounts. Thus, an administrative or judicial determination that a continuing violation, as opposed to a discrete one-day violation, is present may subject a defendant to millions, rather than thousands, of dollars in penalties. Adjudicating bodies do have and often exercise the discretion to set penalties far below the statutory maximum, taking into consideration such factors as the nature and severity of the harm, the culpability of the defendants, the economic benefit of noncompliance, and the ability of the defendants to pay. Nevertheless, the possibility and threat of larger fines because of continuing violations must certainly affect settlement negotia-

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

26. 3M, 17 F.3d at 1462.
28. The holding of 3M may nevertheless be relevant in such cases to the extent that it limits (to five years) the period for which a violator may be held liable for a continuing violation. See, e.g., In re Harmon Electronics, Inc., 1994 RCRA LEXIS 31, at *41-*42, and other administrative proceedings cited therein.
29. See, e.g., 42 U.S.C. § 6928(g) (1994) (RCRA civil penalty provision stating that "[e]ach day of such violation shall, for purposes of this subsection, constitute a separate violation"); 33 U.S.C. § 1319(c), (d), (g) (1994) (Clean Water Act criminal, civil, and administrative penalties).
tions and compliance behavior. When applied to penalty calculations, the continuing violations doctrine can promote settlement and compliance by giving regulated parties a continuing incentive to conform their conduct to the law.

II
CASE LAW

The most obvious case of a continuing violation is that in which a party commits some illegal act day after day. For example, a party may exceed its permit limits for releasing a hazardous substance during every day that it operates a facility. That party could be charged either with a number of daily violations or with a single continuing violation lasting a number of days. While the form of pleading may appear to be irrelevant in determining the maximum fine to which a party is subject, whether a charge alleges multiple violations or a single continuing violation may be crucial in determining whether a court has jurisdiction at all. Under the Gwaltney rule, plaintiffs in citizen suits generally must allege a continuous or intermittent violation. And in government enforcement actions, the allegation of a continuing violation may subject a party to liability for days of violation that occurred prior to the limitations period.

The case of the daily permit exceedance does not pose a serious question as to whether a continuing violation exists. But there are a number of cases where courts have had to rule on the issue of continuing violations and where the continuity of the violation is less obvious. For purposes of discussion, I divide these cases into the following categories: (1) cases in which a party has been in violation of a statute on several occasions, but on nonconsecutive days; (2) cases where a party has violated a statute by failing to perform a duty required by statute or permit and where such violation is curable; and (3) cases where a party has violated a statute by failing to perform a duty required by statute or permit and where such violation is incurable. Cases in the first category focus on the fact-dependent inquiry of how separate violative acts or occurrences are related. Cases in the second and third categories focus on omissions rather than acts. Although the distinction between "curable" and "incurable" violations in the latter two categories is hardly obvious or non-controversial, the term "curable" refers either to substantive harms that can be mitigated or eliminated by subsequent compliance with the law, or to procedural harms where compliance would at least allow external monitoring of future activities.
A. Multiple Violative Acts on Nonconsecutive Days

The first category consists of cases in which a party has been in violation of a statute on several occasions, but on nonconsecutive days. For example, a permittee may exceed its allowed levels of releases on several different days, but those permit exceedances occur over several months. The key issue in such cases is whether the violative occasions are sufficiently related or close in time to be considered "continuing." For example, in the Gwaltney case on remand from the Supreme Court, the district court found that the citizen plaintiff had proven continuing violations even though the last reported violation had occurred one month before the plaintiff had filed suit.\footnote{Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 1080 (E.D. Va. 1988), aff'd in part and rev'd in part, 890 F.2d 690 (4th Cir. 1989).} The Fourth Circuit subsequently upheld the district court's ruling, explaining that the defendant's discharge monitoring reports (DMR), which indicated violations for nearly every month for three years, satisfied the jurisdictional requirement that there be a "reasonable likelihood that the past polluter would continue to pollute in the future."\footnote{Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 693-95 (4th Cir. 1989).} The Fourth Circuit thereby established that the Gwaltney requirement could be satisfied in two different ways: either by proving actual violations after the date of filing suit; or by proving a reasonable likelihood that intermittent or sporadic violations will recur.\footnote{Id. at 694.}

Large time gaps between exceedances, however, will defeat a claim of continuity. In Allen County Citizens for the Env't. v. BP Oil Co.,\footnote{762 F. Supp. 733 (N.D. Ohio 1991).} which also involved a citizen suit under the Clean Water Act, the court ruled that a forty-one-month gap between a set of exceedances in ammonia reported prior to the complaint and an exceedance reported after filing of the complaint made the latter exceedance an isolated incident rather than a continuing violation.\footnote{Id. at 744.} Allen County also illustrates how a court will often examine the underlying causes of single exceedances to determine whether those exceedances are sufficiently related to support a finding of continuing violations. In holding that three reported phosphorus exceedances that occurred more than one year apart were insufficient to indicate a reasonable likelihood of continuing violations, the court noted that the three exceedances resulted from completely unrelated causes.\footnote{Id. at 746.} Yet with respect to another pollutant, biochemical oxygen demand, the court held that multiple exceedances arising from a single cause

\footnote{Id. at 694.}

\footnote{762 F. Supp. 733 (N.D. Ohio 1991).}

\footnote{Id. at 744.}

\footnote{Id. at 746.}
CONTINUING VIOLATIONS DOCTRINE

may nevertheless fail to qualify as a continuing violation if that cause is a single operational upset.\textsuperscript{37}

The nature of the regulatory scheme may also affect a court's continuity analysis. In \textit{United States v. SCM Corp.},\textsuperscript{38} a Clean Air Act case, the EPA argued before the district court that test results showing violations of Maryland's State Implementation Plan at various intervals of time over a period of years were sufficient to demonstrate continuing violations.\textsuperscript{39} The court rejected this argument and held the defendant liable for violations only on those days for which proof of specific violations existed.\textsuperscript{40} \textit{SCM} was decided just prior to the Supreme Court's decision in \textit{Gwaltney} and involved the determination of penalties, not the determination of jurisdiction to hear a citizen suit. The EPA nevertheless cited the Fourth Circuit's decision in \textit{Gwaltney} for the proposition that intermittent daily violations could be used to demonstrate continuing violations.\textsuperscript{41} The \textit{SCM} court, however, distinguished \textit{Gwaltney} on the grounds that that case involved a permit holder that was legally required to monitor and to regularly report its emissions. As the court explained, "[i]t is the monitoring and reporting requirements of the Clean Water Act that justified the shift of the burden of proof and the presumptions employed in \textit{Gwaltney}.\textsuperscript{42}" While the EPA and the state environmental agency could have required SCM to monitor and report its emissions, they had not done so. Thus, continuing violations could not be presumed from intermittent violations, and the EPA retained the burden of establishing each violation on an individual basis.\textsuperscript{43}

\textit{Gwaltney}, \textit{Allen County}, and \textit{SCM} together hold that a plaintiff need not demonstrate violations on consecutive days in order to prove a continuing violation. However, nonconsecutive violations must arise from the same general underlying cause and must be fairly close in time, particularly where the regulatory scheme does not require regular monitoring and reporting.

\textsuperscript{37} Id. at 744-45. The court followed the Fourth Circuit's reading of the Clean Water Act's legislative history in \textit{Gwaltney} to find that Congress intended that a single operational upset that leads to simultaneous violations should be treated as a single violation. Id. at 745.

\textsuperscript{38} 667 F. Supp. 1110 (D. Md. 1987).

\textsuperscript{39} Id. at 1123.

\textsuperscript{40} Id. at 1125.

\textsuperscript{41} Id. at 1124.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 1124-25. Congress subsequently addressed this very issue in the 1990 Clean Air Act Amendments when it shifted the burden of proving continuing compliance to sources that have committed violations. See 42 U.S.C. § 7413(e)(2) (1994).
B. Failure to Act—Curable

The second category of violations consists of cases where a party has violated a statute by failing to perform a duty required by statute or permit and where such violation is curable. This category includes, for example, a facility operator who fails to obtain a legally required permit. Note that one cannot distinguish this category from the first category merely by asking whether a party has committed acts of commission or a single act of omission. The distinction between commissions and omissions is not particularly instructive, for one can often characterize a failure to perform a legal duty as a series of violative acts. For example, a facility operator who fails to obtain a necessary permit can also be said to violate the statute on a daily basis by operating without a permit. What does distinguish this category of cases from the first category (Multiple Violative Acts on Nonconsecutive Days) is that the inquiry does not focus on the temporal or causal relationship between distinct acts (or omissions). Rather, the issue in these cases is whether the nature of a single act or omission or of the effects of a single act or omission is such that a violator should be held liable for a continuing violation. The fact that a violation can be cured or that the harm arising out of the violation can be mitigated by an affirmative act argues in favor of applying the continuing violations doctrine, but courts have not held curability to be determinative of whether a continuing violation exists.44

This second category of cases can be broken down into two subcategories: those cases involving procedural violations, and those cases involving substantive violations. The distinction between procedural and substantive violations is instructive because of the central role that self-reporting occupies in many environmental regulatory schemes.45 Procedural violations—for example, the failure to file discharge monitoring reports—are problematic because they undermine the regulatory system and prevent regulators from determining whether substantive violations are occurring.

The distinction between procedural and substantive violations, however, like the distinction between acts of commission and omission, is somewhat artificial. The interrelatedness of procedural and substantive violations can be seen in Carr v. Alta Verde Industries, Inc.,46 where the Fifth Circuit held that the failure of a cattle feedlot to obtain a National Pollution Discharge Elimination System (NPDES) permit was a continuing violation of the Clean Water Act.47

44. See, e.g., United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995), discussed infra part II.B.1.
45. See discussion infra part IV.A.2.e.
46. 931 F.2d 1055 (5th Cir. 1991).
47. Id. at 1063.
Because wastewater from the feedlot operation had flowed into a creek after heavy rains, the feedlot fell within the Act's definition of a point source. As such, the feedlot had committed a substantive violation by virtue of the discharge, and a procedural violation for failure to obtain a NPDES permit. Because the feedlot still had no permit after the date that the suit had been filed (a procedural violation), the Fifth Circuit held that the plaintiffs had satisfied the first prong of the Fourth Circuit's Gwaltney test for proving a continuing violation ("violations that continue on or after the date the complaint was filed"). The Fifth Circuit added that the plaintiffs also satisfied the second prong of that test ("likelihood of recurrence in intermittent or sporadic violations") because of the possibility of future discharges by the feedlot (substantive violations).

For the purposes of this Comment, the failure to obtain a permit is treated as a substantive violation, and procedural violations are defined as the failure to satisfy monitoring, reporting, or recordkeeping requirements. The distinction may be helpful in determining whether courts are applying the continuing violations doctrine differently to different types of cases.

1. Procedural Violations

Courts have reached different outcomes regarding the existence of a continuing violation where a party fails to provide notices required by law. In Lutz v. Chromatex, Inc., a district court ruled that the failure to notify the proper authorities of toxic substances release would be a continuing violation for jurisdictional purposes under both CERCLA section 103(a) and RCRA section A if such a failure

48. Id. at 1059-60.
49. Citing Justice Scalia's concurrence in Gwaltney, the Fifth Circuit noted that the "to be in violation" requirement was to be read broadly to include a violative state rather than merely a violative act. Id. at 1062-63. See infra note 69 for further discussion of Justice Scalia's concurrence.
50. See supra text accompanying note 33. As noted above, the two-prong Gwaltney test for determining the presence of a continuing violation is a disjunctive test; nevertheless, the Alta Verde court held that the plaintiffs had satisfied both prongs of the test. Alta Verde, 931 F.2d at 1063.
51. Alta Verde, 931 F.2d at 1063.
52. Id.
54. The statute provides that "[a]ny person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance . . . immediately notify the National Response Center established under the Clean Water Act of such release." 42 U.S.C. § 9603(a) (1994) (citation omitted).
55. Section A authorizes citizen suits "against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order . . . ." 42 U.S.C. § 6972(a)(1)(A) (1994). See also infra note 80 (explaining the two types of citizen suits available under RCRA).
continued until the time the complaint was filed. In contrast, another district court ruled, in *City of Toledo v. Beazer Materials & Services, Inc.*, that the failure to notify the EPA of past releases of hazardous substances, as required by CERCLA Section 103(c), was not a continuing violation. The *Beazer* court, citing the stated purpose of Section 103(c) to develop an inventory of hazardous waste sites, concluded that the reporting requirement of Section 103(c), unlike that of Section 103(a), was a single rather than an ongoing requirement. Similarly, in *United States v. Trident Seafoods Corp.*, the Ninth Circuit held that, for the purposes of calculating a fine, a renovator's failure to notify the EPA of its intent to remove asbestos was only a single violation under the Clean Air Act rather than a continuing violation. The district court in *Trident Seafoods* had held to the contrary and found a continuing violation; it reasoned that the purpose of notification was to enable the enforcement agency to monitor asbestos removal and to assure effective compliance with work rules, and that late notification, if prior to completion of the work, could still enable some monitoring. The court of appeals, while acknowledging the soundness of the district court's policy reasoning, nevertheless held that it would be unfair to subject the defendant to a continuing violation penalty where neither the statute nor pertinent regulations clearly spelled out that possibility. In other words, the court of appeals did not hold that application of the continuing violations doctrine was categorically improper or unauthorized; rather, it held that an agency that wished to have the doctrine applied must give regulated parties clear warning of that possibility.

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58. CERCLA Section 103(c) provides in part:
   
   Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility.

60. Id.
61. 60 F.3d 556 (9th Cir. 1995).
62. Id. at 558-59.
63. Id. at 559.
64. Id.
2. Substantive Violations

Continuing violations have been found with relative consistency for substantive violations of the law where the harm caused by the initial violative act can be mitigated or eliminated by subsequent compliance with the law.

a. Allowing Illegal Fill to Remain in Wetlands

A number of courts have held that allowing a pollutant to remain in wetlands is a continuing violation of the Clean Water Act, which prohibits the discharge of dredged material into wetlands without a permit issued pursuant to Section 404 of the Act. A day of violation has been interpreted to include not only a day in which a defendant is actually using a bulldozer or backhoe in a wetland area, but also each day that illegal fill material is allowed to remain therein. In North Carolina Wildlife Federation v. Woodbury, a district court explained that the failure to take remedial measures to remove illegally discharged material from wetlands is a continuing violation for the purpose of determining citizen suit jurisdiction because the injury arises not from the act itself of discharging dredge wastes, but from the lasting environmental degradation due to the discharge. The Woodbury court cited Justice Scalia's concurrence in Gwaltney for the proposi-

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66. Id. § 1344. Section 404(a) of the Clean Water Act authorizes the Secretary of the Army to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Id. § 1344(a).
69. Justice Scalia wrote a separate concurring opinion in Gwaltney to attack the majority's holding that a plaintiff's good faith allegation of a continuing violation would be sufficient to establish jurisdiction. Arguing that this holding "create[d] a peculiar new form of subject-matter jurisdiction," Scalia opined that the issue to be faced by the court of appeals on remand was whether the defendant was in fact in violation on the date the suit was brought. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 67 (1987) (Scalia, J., concurring). He went on to explain that the phrase "to be in violation" suggests a state rather than an act—the opposite of a state of compliance, and that "[w]hen a company has violated an effluent standard or limitation, it remains . . . 'in violation' of
tion that a company remains in violation of an effluent standard or limitation "so long as it has not put in place remedial measures that clearly eliminate the cause of the violation."  

The Woodbury court then explained that its holding would not eviscerate the holding of Gwaltney because only violations having persistent effects that are amenable to correction would constitute continuing violations until remedied. In other words, Gwaltney would continue to bar citizen suits for past discharges not susceptible to remedial efforts because of natural dissipation or dispersion. Finally, the Woodbury court noted that its construction of Gwaltney was sound public policy, since the failure to define the continuing presence of illegally discharged material as a continuing violation would create powerful incentives for violators to conceal their activities from public and private scrutiny.

Another case involving the illegal filling of wetlands illustrates the possibility of characterizing such a violation as both a procedural violation and a substantive violation. In United States v. Ciampitti, a developer had filled in wetlands without a Section 404 permit and was ordered by the court to remove the fill material. The court stayed that order, however, pending submission of an application for a fill permit, which was subsequently denied. After the permit denial, the defendant did not remove the fill despite the court’s removal order. The defendant’s initial conduct prior to the denial of the permit and prior to the court’s order could have been characterized as both a procedural and a substantive violation: procedurally, the defendant failed to obtain a permit; and substantively, the defendant illegally filled in wetlands and allowed the fill to remain. Once the permit was denied, however, the defendant’s conduct could only be characterized as a substantive violation, since no other procedure could legalize the defendant’s conduct. The court focused on the substantive nature of the violations in penalizing the defendant and assessed fines for each day that the defendant had allowed illegal fill material to remain after the fill permit was denied. This distinction suggests that courts may have a tendency to assume that substantive violations are more serious than procedural ones. To the extent that this tendency reflects a

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71. Id.
72. Id.
73. Id.
75. Id. at 686-87.
76. Id.
77. Id. at 700. The court also assessed penalties for fifteen separate days for which the United States had proved acts of filling wetlands without a permit. Id.
simplistic perception of procedural violations as mere "paperwork" violations rather than serious violations that undermine the environmental regulatory structure, a more uniform application of the continuing violations doctrine to substantive and procedural violations may be warranted.78

b. Illegal Storage or Disposal of Waste in Violation of RCRA

Courts have applied an analysis similar to that found in filled-wetlands cases in holding that the continuing presence of illegally-dumped waste is a continuing violation under RCRA. In Fallowfield Dev't Corp. v. Strunk,79 a district court found a continuing violation from the ongoing presence of illegally-dumped hazardous waste for the purpose of determining jurisdiction to file a RCRA Section A citizen suit.80 The court first carefully distinguished between the harm that results from a violation of RCRA and the harm that results from a typical discharge violation of the Clean Water Act or a typical emissions violation of the Clean Air Act. Characterizing the latter type of harm as "effectively irreversible" and "evanescent," the court argued that little would be gained by allowing a citizen suit in those cases because the damage had already been done.81

This conclusion tracks the Supreme Court's analysis in Gwaltney, which focused on the "forward-looking interests" of plaintiffs in citizen suits. Also, like the Supreme Court in Gwaltney, the Fallowfield court's analysis similarly overlooks the "forward-looking" deterrent value of citizen suits against past violators. Dischargers' incentives to comply with the law are reduced when citizens are only able to sue recalcitrant violators whose violations continue through the date that citizens file their complaints.82 In any case, the Fallowfield court contrasted the evanescent harm from discharge and emissions violations with the harms resulting from the improper disposal of hazardous waste, arguing that only the latter violation typically remains remediable because the waste remains on or adjacent to the initially contaminated property.83

78. For more discussion of this point, see infra part IV.A.2.e.
80. RCRA Section 7002 authorizes two types of citizen suits: those "against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . ."; and those "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . ." 42 U.S.C. § 6972(a)(1) (1994) (emphasis added). The former are frequently termed as "Section A" claims, and the latter as "Section B" claims.
82. Smith, supra note 13, at 57-58.
83. 1990 WL 52745 at *10.
The persuasiveness of the court's emphasis on remediability depends on the viewer's perspective. From an economic standpoint, for example, the focus of the inquiry should be on internalizing the cost of a harm, whether or not that harm is remediable. Accordingly, the continuing violations doctrine should be applied to internalize the cost of harms that accrue over time. On the other hand, the Fallowfield court's focus on remediability does have some intuitive appeal. This appeal reflects an approach to environmental protection that concentrates on preventing harm rather than on achieving the most economically efficient outcome.

The Fallowfield court added that the typical manner of violation also distinguishes RCRA cases from other cases. Violations of RCRA, the court said, "are often singular events," not daily violations. Thus, application of the doctrine of continuing violations in the RCRA context is necessary to avoid the wholesale elimination of Section A citizen suits. Therefore, rather than engage in a full-fledged analysis of the continuing violations doctrine, the court rested its holding on the need to carry out Congress' intent that citizen suits be an effective adjunct to government enforcement.

Citing both Woodbury and Fallowfield, another court held in Gache v. Town of Harrison that the illegal disposal of wastes constitutes a continuing violation as long as (1) no proper disposal procedures are put into effect; or (2) the waste has not been cleaned up and the environmental effects remain remediable. The court reasoned that a continuing violation existed because the environmental harms stemmed from the contamination of soil and water as waste materials seeped into the ground, and not from the act of dumping the waste.

Continuing violations have also been found in other cases involving substantive violations of RCRA. In Acme Printing Ink Co. v. Menard, Inc., the court held that the continuous leaking of hazardous substances from a former landfill, because it falls under RCRA's

85. 1990 WL 52745 at *10.
87. Id. at 1042.
88. Id. at 1041. The court further noted that the plain interpretation of RCRA also supported the conclusion that improperly discharged wastes that continue to exist unremediated represent a continuing violation, since part of the statute [42 U.S.C. § 6972(a)(2)] explicitly stated that citizen suits "shall be brought in the district court for the district in which the alleged violation occurred . . . ." 813 F. Supp. at 1041. The Gache court's analysis of this provision, as well as its overall analysis of the continuing violations issue, was extensively cited and followed in City of Toledo v. Beazer Materials & Services, Inc., 833 F. Supp. 646, 655-56 (N.D. Ohio 1993).
CONTINUING VIOLATIONS DOCTRINE

broad definition of "disposal," constitutes a continuing violation for the purpose of establishing citizen suit jurisdiction. In Goodwill Industries v. Valspar Corp., the failure of a RCRA interim permit holder to close a hazardous waste site was held to be a continuing violation. The court found that the violation continued even after the permit holder transferred title to the site so long as the permit holder did not take corrective action to remedy the environmental hazards at the site.

Finally, the failure to obtain a required permit led to the finding of a continuing violation in a RCRA criminal prosecution in United States v. White. The defendants in White allegedly stored hazardous waste without the required RCRA permit from 1982 until at least 1987. In seeking to dismiss a government indictment brought in 1990, the defendants argued that the five-year statute of limitations for federal criminal offenses had already expired because the illegal storage began in 1982. The defendants also argued that even if the illegal storage from 1985 onwards could be prosecuted, the storage prior to 1985 could not because that portion of the offense occurred outside the limitations period. The court rejected both arguments and held that the defendants' conduct was of such a nature that it constituted a single continuing offense. Although the court did not explain its conclusion more thoroughly, it apparently reasoned that the statute of limitations began to run only at the cessation of the single continuing offense in 1987.

In sum, courts have routinely found continuing violations for substantive violations of environmental statutes where the harms caused by the violations are deemed remediable, even where the affirmative act that initiates the violation lasts no longer than a day. By contrast, courts are divided over the applicability of the continuing violations

90. Id. at 1512. The interpretation of "disposal" to include continuous leaking has been adopted by other courts in the context of both CERCLA and RCRA. See, e.g., United States v. Waste Indus., Inc., 734 F.2d 159, 164-65 (4th Cir. 1984) (RCRA); NURAD, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845-46 (4th Cir. 1992) (CERCLA).
92. The defendants had applied for the permit required of owners or operators of hazardous waste facilities, and their facility was granted interim status. The court titled the defendants as interim "permittees" and treated them, for purposes of analysis, as regular permittees because they had continuing obligations similar to those imposed upon RCRA permit holders. Id. at *4-*5.
93. Id. at *5.
95. Id. at 877.
98. Id. at 887.
99. Id.
doctrine for procedural violations, even where the subsequent satisfaction of procedural requirements would remedy or at least ameliorate the resultant harm.

C. Failure to Act—Incurable

The third category of violations consists of cases in which a party has violated a statute by an affirmative act or by failing to perform a duty required by statute or permit, where subsequent action by the violator will not eliminate or reduce the harm arising out of the initial act or failure. That courts have been willing to find continuing violations within this category indicates that remediability of harm may not be the only factor in determining when and how to apply the continuing violations doctrine.

1. Procedural Violations

As the following cases illustrate, the failure to maintain records required by law or permit has been held to be a continuing violation in a number of cases, notwithstanding the fact that defendants may never be able to remedy the violation because underlying data for the period in question was never collected. In Sierra Club v. Simkins Industries, Inc., the defendant failed to take monthly samples of its discharge and to file quarterly reports as required under its NPDES permit from August 1981 to March 1984. The plaintiff did not file a citizen suit until October 1984. The court nevertheless held that the Gwaltney requirement of a continuing violation was satisfied on two grounds. First, the court pointed out that the defendant had not filed a complete DMR until January 1985; thus, the plaintiff had alleged a continuing series of reporting violations sufficient to satisfy Gwaltney. Second, and more interestingly, the court also held that the defendant was in continuing violation of its permit requirement that it retain records of its sampling. The court acknowledged that the defendant’s failure to sample occurred solely before the suit was filed, but concluded that the defendant could not “defend against its failure to file complete DMRs or retain records by noting that the underlying

100. 847 F.2d 1109 (4th Cir. 1988).
101. Id. at 1110.
102. Id. at 1112.
104. 847 F.2d at 1114. This first line of reasoning essentially conceived of the defendant’s conduct as a continuing violation of the “multiple violative acts on nonconsecutive days” type, as discussed in part II.A. of this Comment.
105. Id. at 1114-15.
data was never collected in the first instance." The court explicitly recognized the seriousness of Simkins' violations, even though they were procedural rather than substantive:

As a result of these violations, information on any harmful level of pollutants in the area of Simkins' plant during this time period is forever lost to environmental planners and policymakers and those who might undertake to remedy the effects of any pollution. . . . Unless a permit holder monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels.

The Simkins analysis was applied in Sierra Club v. Nueva Engineering, Inc. to find a continuing violation of a records retention requirement even where an NPDES permittee had ceased operation. Acknowledging that the defendant's cessation of operations meant that there was no continuing violation as to effluent discharge, the court in Nueva nevertheless held that the failure to file discharge monitoring reports constituted a continuing violation of the records retention requirement up to the day of the court's judgment.

In Arkansas Wildlife Federation v. Bekaert Corp., however, no continuing violation was found for incorrectly reporting an effluent discharge on a DMR and subsequently failing to file a corrected DMR. Simkins was distinguished on the ground that the defendant in that case sought to escape liability by completely failing to maintain the underlying data. While the outcome in Bekaert makes some sense because the reporting violation in Bekaert was less severe than that in Simkins, the court failed to explain why the remediability of the violation in Bekaert should not lead to the conclusion that the violation was continuing. In fact, the logic of the two cases appears reversed: Simkins involved an incurable violation, while Bekaert involved a curable one; yet the violation was held to be continuing in Simkins, but not in Bekaert. Perhaps the best available explanation is that the continuing violations doctrine was used by the Simkins court to express its concern that serious procedural violations tend to undermine the entire regulatory system.

106. Id. at 1115.
107. Id. at 1113-15.
109. Id. at 20,007. This holding applied to the two distinct purposes of satisfying Gwaltney and of calculating the appropriate penalty. Id.
111. Id. at 781.
2. Substantive Violations

The analysis in *Fallowfield* suggested that the continuing violations doctrine would not be applicable for violations of Clean Water Act and Clean Air Act discharge or emission permits because the harm in such cases is generally not remediable. Yet, at least in the context of calculating fines, courts have applied the continuing violations doctrine where the statutory language provides some support.

Courts have widely held that the violation of a monthly average discharge limit can subject a permittee to a fine calculated according to the number of days in that month. In reaching this conclusion, courts have apparently employed the logic of continuing violations, although they do not cite the doctrine by name. Rather, courts have generally relied on statutory language; the Fourth Circuit, for example, noted that the relevant provision of the Clean Water Act provides for penalties per day of violation, not penalties per violation. The Fourth Circuit went on to explain that this approach gives district courts the flexibility needed to assess penalties suitable to each case, and that the approach is not unfair to defendants because it only sets a maximum penalty. Courts may exercise significant discretion in determining appropriate penalties, and they may take into account a number of factors, including the reasons for a monthly violation. Assessing a penalty based on the number of days that a facility was in operation is merely one tool that the courts can use to tailor that penalty to the environmental harm caused by the pollution.

112. *See supra* notes 79-83 and accompanying text.


114. *Gwaltney*, 791 F.2d at 314 (citing 33 U.S.C. §1319(d)).

115. *Id.* at 315.


117. *Texaco Ref. & Mktg.*, 2 F.3d at 507-08.
III
THE CONTINUING VIOLATIONS DOCTRINE IN OTHER AREAS OF LAW AND THE IMPLICATIONS FOR ENVIRONMENTAL LAW

This section examines the development of the continuing violations doctrine in other areas of the law with an eye towards comparing the scope of the doctrine in these areas with the application of the doctrine in environmental law. This comparison reveals that courts have generally applied and interpreted the doctrine more broadly in environmental cases than in other areas of the law. This broader interpretation, however, is justified by a number of factors that tend to characterize environmental violations, including the absence of readily detectable harm from some violations, the difficulty of discovering harms that do result, and the presence of continuing harm in many cases even after a prohibited act has ceased. The comparison also suggests possible building blocks for a more coherent theory of continuing violations in environmental law. The different circumstances in which the continuing violations doctrine is applied, both in the field of environmental law as well as in other areas, suggest the need for a context-sensitive application of the doctrine.

A. Employment Discrimination Law and Continuing Violations

The continuing violations doctrine has recently received perhaps the most attention in the field of employment discrimination law. Despite this attention, the doctrine, in the words of one commentator, "remains both an inconsistent and confusing doctrine." 118

Title VII of the 1964 Civil Rights Act generally forbids employment discrimination on the basis of race, color, religion, sex, and national origin. 119 The statute is used to attack discriminatory acts aimed at individuals, as well as discriminatory policies aimed at entire groups of individuals. Since charges of discrimination must generally be filed within 180 days of an alleged illegal employment practice, 120 determining when a violation of Title VII occurs is crucial. Yet this task is sometimes discouragingly difficult because some actionable employment practices are not discrete "incidents" that occur at a particular point in time. For example, where there is an underlying and pervasive policy of discrimination, an employee subject to that policy may never suffer the "direct injury" sometimes required by courts to

120. Id. § 2000e-5(e)(1).
pursue a claim, if the employee is deterred or discouraged from applying for particular positions or benefits in the first place.\footnote{121}{Thelma A. Crivens, The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing, 41 VAND. L. REV. 1171, 1193 (1988).}

The continuing violations doctrine has been developed to accommodate exceptional circumstances in which discriminatory acts alleged by a plaintiff would not otherwise fall within the relevant limitations period.\footnote{122}{Ramona L. Paetzold & Anne M. O'Leary-Kelly, Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?, 31 AM. BUS. L.J. 365, 366 (1993).} As one court has observed, the theory has been used in at least four different circumstances: (1) situations in which a court, faced with different events occurring at different times, must decide which event triggered the running of the statute; (2) situations in which a court must decide whether an event within the statutory period is a violation in continuance of events outside of the statutory period so as to render all events actionable; (3) situations in which a court must decide whether a party has standing to challenge a continuous system, rather than a specific instance, of discrimination; and (4) situations in which a court must decide the substantive question of whether a present practice that perpetuates the effects of past discrimination is actionable.\footnote{123}{Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 585-86 (D. Minn. 1978).}

These prototypical situations are at least somewhat analogous to those found in environmental contexts. For example, a court may have to decide in environmental cases: (1) whether the statute of limitations is triggered by a violative act itself or by the discovery of the violation; (2) whether a violation within the statutory period is a continuance of events outside of the statutory period so as to render all events actionable; (3) whether, under \textit{Gwaltney}, a plaintiff has asserted a claim that gives rise to a remedy that will address the "forward-looking" interests of citizen plaintiffs; and (4) whether the present effects of past pollutive acts are actionable.

Although courts have applied the continuing violations doctrine inconsistently in employment discrimination cases, one common theme has emerged from the Supreme Court's jurisprudence in the area: a present continuing violation of federal law is actionable, whereas the continuing effect or impact of a past violation is not.\footnote{124}{Reid, supra note 118, at 1336.} This basic premise was reaffirmed in \textit{Bazemore v. Friday}, where the Court held that the maintenance of a pay disparity between similarly situated blacks and whites constituted a continuing violation of Title VII.\footnote{125}{478 U.S. 385 (1986).} Although the discriminatory salary structure had been insti-
tuted before the enactment of Title VII, the employer was continuing to violate Title VII by maintaining that salary structure. However, the Court's unwillingness to find a continuing violation where there are only present effects of past violations can be seen in United Air Lines, Inc. v. Evans. In Evans, the Court refused to apply the continuing violation theory to a female flight attendant who had been dismissed because of United's "no-marriage" rule, was rehired as a new employee, and sought seniority credit for her first period of employment. The Court held that the company policy of denying seniority credit for persons rehired as new employees was not actionable because it was a neutral policy that only gave effect to past discrimination.

That continuing violations are actionable, whereas continuing effects of past violations are not, sounds like a simple rule. But this "rule" begs the question of what constitutes a continuing violation in employment discrimination cases. One commentator has suggested the following alternative formulation: the occurrence of discrimination before the limitations period does not bar suit if the plaintiff can identify a present violation, either by establishing a link between prior conduct and more recent conduct, or by showing that a policy or practice is truly continuing.

To the extent that this formulation accurately reflects existing law, one can contrast it with the wider scope generally given to the continuing violations doctrine in environmental cases. The reason for this discrepancy may be the greater difficulty of discovering environmental violations than of discovering employment discrimination violations. In the former cases, there may often be no direct and obvious "victim" of a violation to serve as a potential plaintiff, whereas in the latter cases, there is usually at least one potential plaintiff who suffers the direct and immediate impact of a continuing violation. Thus, there may be more of a perceived need for the continuing violations doctrine in the environmental context.

In both environmental and employment discrimination cases, a showing of continuing violative activity is actionable. However, as the Fourth Circuit held in Gwaltney on remand, the mere likelihood of the recurrence of environmental violations is also sufficient to satisfy the continuing violations requirement, at least in the citizen suit con-

126. Id. at 396 & n.6.
128. Id. at 558. As the Court explained, the employer was entitled to treat the past act of forcing the employee to resign as lawful after the employee had failed to challenge that action in a timely manner. Id.
Furthermore, as reflected by numerous cases discussed in Part II of this Comment, courts generally do not require a continuing policy or practice before they will find an environmental continuing violation. In cases involving multiple violative acts on nonconsecutive days, courts do sometimes require that the violations arise out of the same or related causes. However, courts also have found continuing violations in numerous cases involving a single act or omission with continuing consequences. For example, the failure to notify authorities of the release of toxic substances is a continuing violation of CERCLA and RCRA even though the violation involves the failure to perform a single act. And in direct contrast to the Evans rule, which disallows claims based solely on the present effects of past violations, courts will often find a continuing violation in environmental cases even under circumstances that could easily be characterized as the continuing effects of a past violative act. This is illustrated by cases involving the filling of wetlands without a permit in violation of the Clean Water Act and the disposal and storage of hazardous waste without a permit in violation of RCRA.

However, at least one court has cited Evans in an environmental context for the proposition that a continuing impact traceable to past violations does not alone render the violation continuing. In Telluride, a district court held that the continued presence of illegal fill in wetlands did not give rise to a continuing violation for statute of limitations purposes. Telluride involved a government enforcement action, and the issue was whether the continuing violations doctrine could be applied to reach conduct beyond the limitations period. Applying Evans, the court stated that since the government was seeking injunctive relief and civil penalties against the defendant for illegally discharging pollutants, no continuing violation existed because the defendant was no longer discharging. In response to the government’s argument that Congress’ intent in enacting the Clean Water Act was to treat the unremediated illegal filling of wetlands as a continuing violation, the court simply pointed to 28 U.S.C. § 2462, the general statute of limitations provision concerning government en-

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130. See supra note 33 and accompanying text.
131. See supra part II.A.
133. See supra part II.B.2.a.
134. See supra part II.B.2.b.
136. Id.
137. Id. at 405-06.
138. Id. at 408.
ENFORCEMENT, and argued that it would be rendered meaningless under the government's interpretation.\textsuperscript{139}

As a matter of statutory interpretation, this analysis is incomplete, if not incorrect. Section 2462 is a general provision that applies to all governmental enforcement proceedings, not just environmental ones, and has existed in relatively the same form for over a century and a half.\textsuperscript{140} To argue that congressional intent regarding the nature of specific violations of the Clean Water Act can be discerned by looking to section 2462 requires a large leap in logic. If Congress truly intended the unremediated filling of wetlands to constitute a continuing violation, the specific and more recent expression of legislative intent should control over a far more general statute of limitations provision. In any case, the uniqueness of the position asserted by the \textit{Telluride} opinion highlights the greater scope that courts have generally given to the continuing violations doctrine in environmental cases. The majority of courts confronted with the issue of illegal fill in wetlands have not hesitated to apply the continuing violations doctrine, even though the continuing presence of fill could arguably be characterized as the continuing effects of past violations.

\textbf{B. Continuing Violations for a Criminal Omission: Toussie v. United States}

One of the Supreme Court's more extensive discussions of the continuing violations doctrine can be found in \textit{Toussie v. United States}, in which the Court reversed the defendant's conviction for failing to register for the draft on the grounds that the limitations period had already run.\textsuperscript{141} The statute in question, as implemented by presidential proclamation, provided that persons were to register on their eighteenth birthday, or within five days thereafter. Nearly eight years after his eighteenth birthday, the defendant was indicted for failing to register, despite a five-year statute of limitations.\textsuperscript{142} The Government argued that the statute imposed a continuing duty to register until age twenty-six and that its prosecution was therefore timely. In rejecting this argument, the Court pointed to the policy reasons behind a statute of limitations: to protect individuals against prosecution after the facts have faded away; to minimize the danger of punishment for acts in the distant past; and to encourage government officials promptly to investigate suspected illegal activity.\textsuperscript{143} Noting that these justifications

\textsuperscript{139} \textit{Id.}


\textsuperscript{141} 397 U.S. 112, 113 (1970).

\textsuperscript{142} \textit{Id.} at 113-14.

\textsuperscript{143} \textit{Id.} at 114-15.
are particularly compelling in criminal contexts, the Court stated that the doctrine of continuing offenses should not be applied unless (1) the explicit language of the substantive criminal statute compels such a conclusion, or (2) the nature of the crime involved is such that Congress must have intended that it be treated as continuing.\textsuperscript{144}

It is this second possibility that is most interesting, for it raises the issue of what violations should be deemed continuing, aside from clearly expressed legislative intent. As an example of such an offense, the Court pointed to criminal conspiracies, which continue as long as the conspirators engage in overt acts in furtherance of their plot.\textsuperscript{145} Whether the continuing violations doctrine should be applied where there is no unifying agreement (as may be found in a conspiracy) was not addressed in \textit{Toussie}.

A unifying agreement has not been required in environmental cases where the continuing violations doctrine has been applied, even where the \textit{Toussie} rule has been followed. For example, in \textit{United States v. White},\textsuperscript{146} a district court held that the storage of hazardous waste without a permit was a continuing offense. After quoting the \textit{Toussie} admonition that courts should not find continuing offenses unless explicitly authorized or apparent from the nature of the crime, the court simply declared that "[t]here is little doubt that the nature of the crime involved here . . . demonstrates that it is a continuing offense."\textsuperscript{147} While the court's explanation was somewhat sparse, it was a reasonable interpretation of the statutory language. The defendant in \textit{White} was charged with violating subsections (d)(2)(A) and (e) of section 3008 of RCRA, which provides for, inter alia, criminal penalties for anyone who "knowingly treats, stores, or disposes of any hazardous waste . . . without a permit . . . ."\textsuperscript{148} Thus, the very state of storage was prohibited by the statute, and not the mere act of disposal.

A number of environmental defendants in addition to White have argued that the analysis in \textit{Toussie} should apply in their cases, but with limited success. For example, in \textit{In re Harmon Electronics, Inc.}, an administrative proceeding, the administrative law judge (ALJ) rejected the defendant's argument that \textit{Toussie} should bar a civil prosecution for the operation of a hazardous waste landfill without a permit.\textsuperscript{149} The ALJ distinguished \textit{Toussie} on a number of grounds: first, \textit{Toussie} involved a criminal statute, which was construed in favor

\begin{footnotesize}
\begin{enumerate}
\item[144.] \textit{Id.} at 115.
\item[145.] \textit{Id.} at 122.
\item[147.] 766 F. Supp. at 887.
\end{enumerate}
\end{footnotesize}
of the defendant under the rule of lenity; second, the violation in \textit{Toussie} involved a single act of failing to register, whereas the violation in \textit{In re Harmon} "was not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA by treating, storing[,] and disposing of hazardous waste without a permit"; and third, the statute and legislative history of RCRA, unlike that in \textit{Toussie}, indicated a congressional intent to make failure to comply a continuing violation.\footnote{150} In particular, the ALJ noted the fact that improperly disposed hazardous waste remains on the property, "insidiously affecting the soil and groundwater aquifers."\footnote{151}

The ALJ in \textit{In re Lazarus, Inc.} similarly cited the prevention of future harm as a justification for finding a continuing violation.\footnote{152} \textit{In re Lazarus} involved a penalty proceeding under the Toxic Substances Control Act (TSCA)\footnote{153} for failing to register PCB transformers with fire response personnel, among other alleged violations. The ALJ held that this failure was a continuing violation because as long as the transformers were not registered, the danger existed that there would be serious injury both to the environment and to response personnel if the PCB transformers were exposed to fire.\footnote{154} This was contrasted with \textit{Toussie}, where nothing inherent in the act of registration itself made failing to register for the draft a continuing crime.\footnote{155}

The ALJ in \textit{In re Lazarus} also went on to find, however, that the defendant's failure to conduct quarterly inspections of its transformers and to keep records of these inspections were not continuing violations.\footnote{156} The ALJ stated that such violations were by nature complete upon termination of the quarterly period when the inspections were due, and that the EPA could not circumvent the statute of limitations by alleging a continuing failure to maintain records of past inspections that were never conducted in the first place.\footnote{157} Although the ALJ did not explain why this was so, he presumably would have reasoned that the requirement of quarterly inspections gave rise to a new, discrete duty each quarter; thus, the recurring failure to inspect in each quarter constituted discrete, but not continuing, violations. Subsequent inspection, like the act of registering transformers with fire response

\footnote{150} Id. at *30-*41.  
\footnote{151} Id. at *33 (quoting Fallowfield Development Corp. v. Strunk, CIV. A. No. 89-8644, 1990 WL 52745, at *29 (E.D. Pa. Apr. 23, 1990)).  
\footnote{152} EPA Docket No. TSCA-V-C-32-93, 1995 TSCA LEXIS 11 (May 25, 1995).  
\footnote{154} Id. at *18. The ALJ also held that the failure to clean up spilled PCBs was a continuing violation because the chemicals remain improperly disposed until they were cleaned up. \textit{Id.} at *39-*40.  
\footnote{155} Id. at *18.  
\footnote{156} Id. at *28-*29.  
\footnote{157} Id. at *29. Contrast this with the result in Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988), discussed \textit{supra} part II.C.1.
personnel, would tend to cure harms arising from a past failure to inspect, but the continuing violations doctrine would be unnecessary with respect to the inspection requirement because the defendant was always under a present duty to inspect. It should be noted that the application of the continuing violations doctrine with respect to the registration requirement pertained only to the issue of whether the statute of limitations barred an enforcement action at all; the ALJ did not decide whether the penalty should be based on the entire period of violation, 1985-92, or only on the portion of the violation within the five-year statutory period, 1987-92.

While the outcome in *Toussie* suggested that continuing violations would only be found in limited instances, the rule set out by the Court in that case has allowed courts and ALJs to distinguish *Toussie* in environmental cases by pointing to various factors: (1) the continuing nature of harm from a violation; (2) legislative history; and (3) the civil nature of most environmental proceedings. The violation in *Toussie* itself, like most employment discrimination violations, was more readily discernible than most environmental violations. Given the existence of a comprehensive system of social security numbers, the government had no excuse for not prosecuting Toussie at an earlier time.

**C. Antitrust Law and Continuing Violations**

The continuing violations doctrine also appears in antitrust actions. This section briefly discusses the scope of the doctrine in this area and observes that courts have applied the doctrine less broadly here than in environmental cases.

Antitrust causes of action are generally governed by a four-year statute of limitations.\textsuperscript{158} A cause of action accrues and the statute begins to run when a defendant first commits an act that injures a plaintiff's business.\textsuperscript{159} Therefore, when an antitrust claim is asserted in a contractual context, the plaintiff's cause of action generally accrues upon the date of the contract's execution. However, where the defendant commits, pursuant to a contract, a series of affirmative acts that harm the plaintiff, such conduct constitutes a continuing violation of antitrust laws upon which a plaintiff may continually sue.\textsuperscript{160} Thus, the receipt of rental payments during a limitations period pursuant to a lease executed prior to the limitations period has been held by some


courts to be a continuing violation, and not merely the subsequent harmful effect of a single violation occurring outside the statutory period.\textsuperscript{161} While other courts have taken a narrower view of what conduct is sufficiently substantive to constitute an affirmative act that is actionable,\textsuperscript{162} there seems to be little disagreement that a continuing violation requires at least some sort of affirmative act by the defendant that injures the plaintiff.\textsuperscript{163} Continuing and accumulating harm to the plaintiff is not, per se, grounds for recovery.\textsuperscript{164}

One can compare this rule with the rule regarding violations of certain FTC orders, where subsequent affirmative acts are not required in order to establish a continuing violation. In \textit{United States v. ITT Continental Baking Co.}, the Supreme Court held that the defendant's holding of a company, acquired in violation of an FTC consent order, constituted a continuing violation.\textsuperscript{165} In construing a statute regarding the "continuing failure or neglect to obey" an FTC order,\textsuperscript{166} the Court held that a violation is "continuing" only where: (1) both the detrimental effect to the public and the violator's realized gains continue and increase over a period of time; and (2) the violator possesses the ability to eliminate the effects of the violation if it so desires.\textsuperscript{167} The Court reasoned that the presence of such characteristics ensured that daily penalties for violations that had those characteristics would have a greater deterrent effect than a single penalty.\textsuperscript{168}

\textsuperscript{161} \textit{See} Hanover Shoe, 392 U.S. at 502 n.15.
\textsuperscript{162} \textit{See} Brina, \textit{supra} note 160, at 1072 n.59 (discussing cases that narrowed the holding of Hanover Shoe).
\textsuperscript{163} \textit{See} id. at 1072-74 & nn. 59-63; PHILIP E. AREEDA & HERBERT HOVENKAMP, 2 \textit{ANTITRUST LAW} ¶ 338b (rev. ed. 1995) ("In the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.").
\textsuperscript{164} Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1035 (5th Cir. 1977), \textit{cert. denied}, 434 U.S. 859 (1977).
\textsuperscript{165} 420 U.S. 223, 225-26 (1975). The consent order prohibited the defendant from acquiring any ownership in another business engaged in the production and sale of bread without the permission of the FTC. \textit{Id.} at 227-28. The defendant acquired assets in other companies in violation of this order, and the issue was whether the continued holding of these assets constituted a violation apart from the act of acquisition. \textit{Id.} at 225.
\textsuperscript{166} The relevant statutes were 15 U.S.C. Sections 21(l) and 45(l). Section 21(l) provides in part (and Section 45(l) provides similarly):

\begin{quote}
Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission, board, or Secretary each day of continuance of such failure or neglect shall be deemed a separate offense.
\end{quote}

\textsuperscript{167} \textit{ITT Continental Baking}, 420 U.S. at 231. The Court extracted these principles from a number of examples of "continuing violations" found in the legislative history: continuing conspiracies to fix prices or control production; maintenance of a billboard in defiance of an order prohibiting false advertising; failure to dissolve an unlawful merger; and failure to eliminate an interlocking directorate. \textit{Id.}
\textsuperscript{168} \textit{Id.}
The *ITT Continental Baking* standard for applying the continuing violations doctrine, unlike the *Evans* rule in employment discrimination cases, sometimes allows plaintiffs to recover for the present effects of a past violation. Nevertheless, this standard is still more stringent than the continuing violation standard found in many environmental cases.

Although the Supreme Court spelled out a two-prong test in *ITT Continental Baking*, the test actually seems to require three distinct elements: (1) continuing and increasing detrimental effect to the public; (2) continuing and increasing gains to the violator; and (3) curability. The first and second elements are presumably collapsed into a single prong because of the nature of antitrust violations: harms to others are often linked with gains to the violator. Unlike antitrust violations, environmental violations that result in continuing harm to others do not necessarily confer a corresponding continuing benefit on the perpetrator. A developer who illegally fills wetlands while constructing houses no longer benefits once the lots are sold, even though marine life may continue to suffer. Neither does a “midnight dumper” who has disposed waste illegally reap a continuing benefit when that waste migrates into the groundwater.169

The ALJ in *In re Lazarus*170 glossed over this distinction when he analogized the TSCA provision requiring the registration of PCB transformers to the statute discussed in *ITT Continental Baking*. The ALJ focused on the deterrent purpose of the statutes, and noted that in both cases the detrimental effects of the violation were continuing and could be terminated or minimized by the violator.171 The ALJ did not mention, however, whether the TSCA violator realized continuing and increasing gains as a result of its failure to act. In fact, the issue of gain to the violator may be viewed as largely irrelevant in environmental cases involving the present effects of past violative acts, and with good reason. Although benefit to the violator is obviously relevant from a deterrence perspective, this benefit generally accrues with the commission of the environmentally violative act, and it makes little sense to measure the benefit that accrues after the act. Thus, the

169. In certain cases, such environmental violations may confer continuing benefits on the perpetrator, at least at the margins. Just as antitrust violations can lead to lasting advantages for violators, noncompliance with environmental laws may enable corporations to gain market share. Charles Garlow & Jay Ryan, *A Brief Argument for the Inclusion of an Assessment of Increased Market Share in the Determination of Civil Penalty Liability for Environmental Violations: Letting Corporations Share the Regulatory Burden of Policing Their Markets*, 22 B.C. ENVTL. AFF. L. REV. 27, 27-28 (1994). Nevertheless, for the purposes of this Comment, such gains are assumed to be de minimis.


171. 1995 TSCA LEXIS 11 at *19-*20.
continuing violations doctrine is most applicable in environmental cases to ensure that continuing harmful effects are remedied and considered in penalty calculations.

IV
POLICY JUSTIFICATIONS FOR APPLYING THE CONTINUING VIOLATIONS DOCTRINE

The comparisons made in part III illustrate the generally wide application of the continuing violations doctrine in environmental cases and offer possible standards that courts might find useful in analyzing such cases. This part steps back from the case law and doctrinal issues, and examines the policy concerns behind the application of the continuing violations doctrine.

As part I explains, the continuing violations issue arises in three different contexts: statute of limitations cases, where the plaintiff seeks to enjoin or punish the continuation or the consequences of unlawful conduct initiated prior to the limitations period; citizen suit actions, where the plaintiff must allege a continuing or intermittent violation in order to establish jurisdiction; and fine calculations, where the finding of a continuing violation can greatly magnify the penalty assessed. Where more than one of these contexts is present in a given suit, courts sometimes assume that the continuing violations analysis is the same regardless of context. Certainly, the doctrine does serve the common function in all these contexts of securing greater compliance with environmental laws. And compliance is obviously essential to the success of environmental regulatory programs. Yet as the discussion below reveals, each of the three contexts requires separate analysis because each ultimately involves somewhat different policy concerns.

A. Statutes of Limitations and Continuing Violations

1. The Functions of Statutes of Limitations

Statutes of limitations are generally said to serve three primary functions: (1) to ensure fairness to defendants; (2) to promote judicial efficiency; and (3) to promote social stability. Statutes of limitations promote fairness to defendants by encouraging litigation to occur, if at all, before evidence is lost, memories are faded, and witnesses have disappeared. In criminal cases, where such concerns

172. See infra part V.A.
173. Hodas, supra note 17, at 1603.
174. See Developments, supra note 21, at 1185-86.
175. Id. at 1185. As the Supreme Court has stated, "[E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . the
are especially great, statutes of limitations also represent a social determination that it is less fair and useful for defendants to be punished for illegal acts committed long ago.\textsuperscript{176} Statutes of limitations promote judicial efficiency by relieving the courts of the burden of adjudicating relatively inconsequential or tenuous claims and by producing more accurate outcomes based on more reliable evidence.\textsuperscript{177} And statutes of limitations promote social stability by guarding against dilatory adjudication that will often disrupt settled expectations.\textsuperscript{178}

The fact that many environmental defendants are corporations may give the above-cited justifications additional weight. For example, the increased difficulty of defending a claim as time passes may be an especially troubling problem for corporate defendants.\textsuperscript{179} Not only do memories become faded and documents unavailable, but employees who handled particular compliance issues may no longer be with the company and may be difficult to locate.\textsuperscript{180} The fact that corporations are far more likely to keep and retain records in the first place, however, may make corporations less vulnerable in some cases, although witnesses may not be available to explain apparent inconsistencies in other cases.\textsuperscript{181} Nonetheless, it should not be overlooked that such evidentiary difficulties affect plaintiffs as well. Finally, the social stability argument may apply most strongly in the corporate context, because third parties may be reluctant to deal with companies that face the uncertainty of unsettled claims.\textsuperscript{182}

2. Reasons to Relax Statutes of Limitations

Application of the continuing violations doctrine, by effectively tolling or extending the statute of limitations,\textsuperscript{183} can undermine all of the functions of a limitations period. The question, then, is under what circumstances are countervailing concerns of equity and public policy sufficient to outweigh the considerations in favor of a strict limitations period. Courts have recognized a number of situations in which it is proper to allow the statute of limitations to run during a period of continuing violations.

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\textsuperscript{176} Developments, supra note 21, at 1186.
\textsuperscript{177} Id. at 1185.
\textsuperscript{178} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 1048-49.
\textsuperscript{182} Id. at 1050.
\textsuperscript{183} The relevant statute of limitations normally begins to run when a plaintiff's cause of action accrues. Generally, the point of accrual is either: (1) when the defendant's conduct is completed, if the cause of action can be maintained regardless of the resultant damage; or (2) when the harm occurs, if the cause of action requires harm as one of its essential elements. Developments, supra note 21, at 1200-01.
which statutes of limitations should not be strictly applied: inherently unknowable harms; fraudulent concealment; and gradually developing harms.

a. Inherently Unknowable Harms

"Inherently unknowable" harms are those harms so difficult to discover that a plaintiff is generally unlikely to learn of the harm before the limitations period expires.\(^{184}\) A typical common law example is that of underground trespass,\(^{185}\) such as the leaking of an underground storage tank or the spread of saltwater disposed via underground injection from oil and gas operations. As a rationale for tolling the statute of limitations, difficulty of discovery is stronger with respect to some environmental statutes than others. For example, major violations of the Clean Air Act and Clean Water Act can often be readily detected by the EPA, state environmental agencies, and/or citizen groups because of mandatory monitoring requirements and because unpermitted releases into the air and water can usually be traced back to the violator.\(^{186}\) By contrast, violations of RCRA may not be immediately discovered because disposal sites may be operated for many years without noticeable contamination.\(^{187}\)

One way that courts address the problem of "inherently unknowable" harms is by applying the discovery rule. Under this rule, the limitations period begins to run only when the plaintiff discovers or should have discovered the facts that will support the cause of action.\(^{188}\) In cases involving latent injuries or injuries that are difficult to detect, it is the discovery (or the discoverability) of the injury itself that triggers the statute.\(^{189}\)

Courts have been reluctant to apply the discovery rule to cases not involving latent injuries. In the 3M case,\(^{190}\) for example, the EPA attempted to argue that the discovery rule should apply to the failure to file premanufacture notices before importing a new chemical, as required by the Toxic Substances Control Act.\(^{191}\) The D.C. Circuit

\(^{184}\) Id. at 1203.
\(^{185}\) Id. at 1204.
\(^{186}\) Shanley, supra note 22, at 293.
\(^{187}\) Id. A number of state courts have recognized the greater "unknowability" of certain forms of contamination. For example, where the underground flow of pollutants has caused permanent injury, courts have generally held that the limitations period begins to run when the injury becomes apparent or when the plaintiff should have discovered the contamination by exercising reasonable diligence. William B. Johnson, Annotation, Application of Statute of Limitations in Private Tort Actions Based on Injury to Persons or Property Caused by Underground Flow of Contaminants, 11 A.L.R. 5th 438, 449 (1993).
\(^{188}\) Shanley, supra note 22, at 329.
\(^{189}\) See 3M v. Browner, 17 F.3d 1453, 1460 (D.C. Cir. 1994).
\(^{190}\) Id. See supra notes 24-28 and accompanying text.
\(^{191}\) 3M, 17 F.3d at 1454-55, 1460.
rejected the EPA's argument and explained that the discovery rule was intended to deal only with the problem of difficult-to-discover injuries, not with the problem of difficult-to-discover violations.\(^\text{192}\)

What this seemingly straightforward distinction fails to address, however, is the nature of the injury in many environmental cases. For example, in the case of many procedural violations, the violation and the injury are inseparable; procedural violations (e.g., failure to file a required DMR, or failure to notify the EPA of asbestos removal) may not cause any individual substantive injury (e.g., the effluent may be within permitted levels, or the asbestos removal may be done safely). Nevertheless, procedural violations are subject to penalty because compliance with procedure is the fundament of the entire regulatory system.\(^\text{193}\) If substantive injury occurs in connection with a procedural violation (e.g., the effluent contains excessive levels of regulated substances, or workers are exposed to dangerous levels of asbestos), such injury is clearly an independent basis for liability. Yet the procedural violation has in any case taken place and the violator should not be able to escape enforcement merely because obvious substantive harm did not result. While a "procedural" violation or injury may be readily discoverable in some cases (e.g., failure to file a required DMR), it will be far less so in other cases (e.g., failure to notify the EPA of asbestos removal).

Given courts' reluctance to apply the discovery rule outside the context of difficult-to-discover injuries, the continuing violations doctrine may have to serve as its functional equivalent for difficult-to-discover violations. Application of the continuing violations doctrine in such cases addresses the same fundamental problem as the discovery rule: ensuring fairness to plaintiffs who will not easily become aware of an available cause of action.

\textit{b. Fraudulent Concealment}

Another means for courts to relax a statute of limitations is through the doctrine of fraudulent concealment. Fraudulent concealment occurs when the defendant has prevented the plaintiff from obtaining knowledge of his or her cause of action through fraudulent or intentional means.\(^\text{194}\) In such cases, the statute of limitations is tolled until the plaintiff knows or should have known of the facts giving rise to the cause of action.\(^\text{195}\) Because passive silence by a defendant generally will not trigger application of the fraudulent concealment doc-

\begin{itemize}
  \item [192.] Id. at 1460.
  \item [193.] See infra part IV.A.2.e. for a more detailed discussion of the importance of self-monitoring and self-reporting.
  \item [194.] Shanley, supra note 22, at 329.
  \item [195.] Id.
\end{itemize}
trine (unless the defendant is in a continuing fiduciary relationship with the plaintiff or the fraud itself is secret in nature), the doctrine is likely to be available only in limited situations. Relatively few violations are likely to involve active concealment, as reflected by the fact that most violations require only a minimal intent element and the fact that actual knowledge of wrongdoing is significant almost solely for determining whether criminal charges are filed.

c. Gradually Developing Harms

A single wrongful act or the repetition or continuance of wrongful acts may give rise to gradually developing harms, which courts sometimes find justify the tolling of statutes of limitations. Pollution has been cited as a prime example. It is recognized that when future harm is unclear or gradually developing, the limitations period should not run until the damages become recoverably certain or until substantial harm is first manifested. As in the case of inherently unknowable harms or fraudulent concealment, it is only at some point after the initial violative conduct that a plaintiff is legally deemed to be aware of the cause of action. Furthermore, where wrongful conduct is repeated, a plaintiff initially disinclined to sue will have a greater incentive to sue as time passes. It would seem unfair (and inefficient) to require the plaintiff to sue separately for each repetition.

d. Difficulty of Discovery as the Common Theme in Relaxing Statutes of Limitations

The above policy justifications for tolling statutes of limitations were initially applied to common law tort actions such as nuisance and trespass, and they presume a bipolar model of adjudication with a clearly defined plaintiff and defendant. In this bipolar model, it is generally assumed that a plaintiff will suffer a concrete injury and that the injury will alert the plaintiff to the running of the limitations period. In cases where the injury may not be so obvious, the discovery rule, the doctrine of fraudulent concealment, and other doctrines are applied to toll the statute of limitations, and it is the plaintiff’s discovery of the harm, whether actual or constructive, that ultimately triggers the statute.

196. 51 AM. JUR. 2D Limitations of Actions § 149 (1970).
198. Developments, supra note 21, at 1207.
199. Id. at 1206-07.
The problem of inconspicuous injuries or of harms that are difficult to discover is especially common where statutorily created federal environmental actions are concerned. These actions are designed to vindicate public, rather than private, rights and the plaintiff is usually the government or a citizen-plaintiff who represents groups of citizens, if not society as a whole. Violation of a federal environmental statute may lead to no discoverable harm at all, and even when the harm is discoverable, it may be diffuse and not readily traced to its origin. In contrast to the bipolar model, there may not be a single, well-defined plaintiff who has sufficient incentive to raise a claim. To the extent that harms from such violations are especially unknowable, enforcement of the law must focus on the violations themselves. And to the extent that these violations are difficult to discover, some means of tolling the statute of limitations, such as the continuing violations doctrine, should be applied.

e. Applying the Continuing Violations Doctrine to Extend the Statute of Limitations for Serious Procedural Violations

Application of the continuing violations doctrine is especially appropriate to address procedural violations that have the potential to undermine the entire regulatory system. Such procedural violations may sometimes be overlooked in the context of numerous substantive violations, but they can be particularly problematic because they hinder the capabilities of the EPA and the public at large to monitor and discover substantive violations at all. Courts' tendency to view procedural violations as less serious than substantive violations was exemplified by the court in *United States v. Ciampitti*, where the court assessed fines for substantive but not for concurrent procedural violations.200

While it has been suggested that the EPA's heavy reliance on self-monitoring is a symptom of systematic enforcement failure,201 self-monitoring is likely to play an even more important role in future environmental regulation. The constraint of limited government resources is unlikely to be relaxed,202 and environmental agencies' workload will dramatically increase as large numbers of smaller, previously unregulated facilities become subject to regulation.203 Simply put, federal and state enforcement officials will not be able to inspect

201. See Hodas, *supra* note 17, at 1604-05 (discussing private studies critical of federal environmental enforcement).
202. Id. at 1604.
203. LeRoy C. Paddock, *Environmental Enforcement at the Turn of the Century*, 21 ENVTL. L. 1509, 1509, 1515-16 (1991) (discussing the recognition that serious harm can result from small releases, either individually or cumulatively).
and initiate enforcement proceedings against the hundreds of thousands of regulated entities.\textsuperscript{204} Environmental regulation will have to leverage limited enforcement resources into a significant enforcement presence.\textsuperscript{205}

As a central part of this transformation to a system that relies even more heavily on corporate self-regulation, procedural violations must be treated seriously under the law. Some courts are beginning to recognize the seriousness of procedural violations in the regulatory structure, as exemplified by the court in \textit{Sierra Club v. Simkins Industries, Inc.}\textsuperscript{206} Such courts recognize that self-monitoring and self-reporting requirements increasingly serve as the foundation for the entire regulatory system and, if complied with, enable regulators to enforce the law cheaply and efficiently.\textsuperscript{207} In fact, the best way to protect the environment is for facilities themselves to detect and remediate environmental problems as early as possible so that harmful discharges do not occur.\textsuperscript{208} Self-reporting requirements are also the key to citizen enforcement because they provide citizens with easy access to compliance data.\textsuperscript{209} Finally, complete and accurate self-reporting is vital to regulatory policy not just because it secures greater compliance, but also because it enables the government to monitor potentially harmful trends and to adjust its future course of action accordingly.\textsuperscript{210} Violations of monitoring and reporting requirements should be viewed not as trivial "paperwork" violations, but rather as serious violations.

One commentator has summed up this transformation from a command-and-control system to a more self-regulatory system by noting that environmental regulation will have to become "much like a tax auditing system."\textsuperscript{211} A successful environmental regulatory system will share with the income tax system at least one important feature: the low-cost detection of regulatory violations through vigorous policing of the integrity of the reporting system.\textsuperscript{212} Under the present

\textsuperscript{204} \textit{Id.} at 1520.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} 847 F.2d 1109 (4th Cir. 1988). See also discussion \textit{supra} part II.C.1.
\textsuperscript{208} \textit{Id.} at 10,466.
\textsuperscript{209} See Paddock, \textit{supra} note 203, at 1523-24. One of the main reasons why citizen suits have been used most extensively and effectively in conjunction with the Clean Water Act is that the Act provides a ready means of identifying violations through review of discharge monitoring reports. \textit{Id.} at 1523.
\textsuperscript{210} \textit{Simkins}, 847 F.2d at 1115 n.9.
\textsuperscript{211} Paddock, \textit{supra} note 203, at 1520.
tax system, a three-year limitations period applies to Government assessments for underpayment if the taxpayer has filed an honest federal income tax return. However, a six-year limitations period applies if the return omits properly includable income in excess of twenty-five percent of reported gross income, and there is no limitations period at all if the taxpayer fails to file a return or files a fraudulent return. The purpose of eliminating the limitations period in such cases is to overcome the special disadvantage placed upon the Government in assessing the proper tax. Sources that discharge without a permit or that fail to file accurate reports similarly burden the Government’s role of promoting environmental quality.

Just as the statute of limitations is suspended when a taxpayer fails to file a return, the limitations period should be extended for serious procedural violations of environmental statutes by using the continuing violations doctrine. One can identify which procedural violations of environmental laws are sufficiently serious to warrant such treatment by again analogizing to the tax reporting system. Filing knowingly false or fraudulent reports and failing to file a report would be obvious examples. Discharging or disposing without a required permit, which can be viewed as either a procedural or a substantive violation, is functionally equivalent to the failure to file a return because of such activities’ tendency to undermine a given regulatory scheme (aside from the substantive harm that they cause).

B. Citizen Suits and Continuing Violations

As discussed above, the Supreme Court’s decision in Gwaltney made a continuing or intermittent violation an absolute prerequisite for maintaining a citizen suit under the Clean Water Act. Gwaltney, and subsequent lower court decisions that extended the holding of Gwaltney to other federal environmental statutes, 219

214. Id. § 6501(e)(1)(A).
215. Id. § 6501(c)(1), (3).
216. Klemp v. Commissioner, 77 T.C. 201, 205 (1981). The rationale for eliminating the limitations period does not seem to be based solely on the difficulty of discovering the violation per se; the IRS can rather easily identify who has failed to file a return by comparing returns received with past returns, with social security numbers, or with W-4 forms. The failure to file any return means that the IRS must overcome an extra burden of gathering evidence to determine the proper tax, and it also threatens to undermine the entire tax filing and reporting system.
217. That persons who falsify or fabricate data or who operate without a required permit already are considered to be among the most serious offenders is reflected by the fact that such persons have historically been especially subject to criminal prosecution. Cooney et al., supra note 207, at 10,465-66 (1995).
218. See supra part II.B.
219. See supra part I.A.
220. See supra note 14 and accompanying text.
threatened to undermine the viability of citizen suits, which had become an important component of the environmental regulatory scheme.

1. The Purpose of Citizen Suit Provisions

Citizen suit provisions were developed as an answer to the government's failure to enforce environmental statutes, whether caused by lack of will or lack of resources.221 Citizen suits were intended by Congress to act both as a spur and as a supplement to government enforcement actions.222 Although a citizen contemplating suit must provide advance notice to the alleged violator and to federal and/or state environmental agencies,223 such notice is not intended to cut off the right of action against violations that are not continuous.224 Nor is the purpose of such notice to allow violators to escape liability by complying within the notice period,225 as the Supreme Court assumed in Gwaltney.226 Rather, as suggested by provisions barring a citizen suit only if the government initiates an enforcement action within the notice period (or if the government is diligently pursuing an enforcement action),227 the notice requirement is only intended to allow government authorities the first opportunity to prosecute an action.228 As a number of commentators have argued, it should make no difference to the violator whether the court exacts a civil penalty as the result of a citizen suit or as a consequence of government enforcement action.229 Nevertheless, the Supreme Court in Gwaltney, after declaring that it was "plain that the interest of the citizen-plaintiff is primarily


226. 484 U.S. at 60.


229. E.g., Smith, supra note 13, at 19. Similarly, the Senate Report regarding the citizen suit provision of the Clean Water Act stated that the same standards for enforcement should apply whether an action was brought administratively or through a citizen suit. S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3746.
forward-looking[.]." 230 made the liability of a possible violator depend in many cases on the identity of the would-be enforcer.

2. The Role of Citizen Suits

Citizen suits have been fairly effective in achieving Congress' intent of spurring government action. 231 Nevertheless, this spurring effect peaked in the late 1980s and has since fallen, due to lack of funding and political pressures, particularly with regard to state enforcement programs. 232 Citizen suit judicial enforcement has compensated for some of this decrease; for example, citizen suits now nearly equal government enforcement efforts under the Clean Water Act. 233 Citizen suits will continue to be a vital means of ensuring compliance with existing environmental laws as long as the political will and government resources for environmental enforcement are limited. 234 Citizens can more carefully monitor lower profile polluters and are often in a better position to discover unpermitted discharges. 235 And, as the experience of the 1980s demonstrated, citizen suits may sometimes be the only means of enforcing environmental laws when political priorities focus elsewhere. 236 Because citizens are outsiders to the permitting process and to the regulatory scheme, they are not subject to the same risks of agency capture and political pressure. 237

3. Lower Courts' Application of the Continuing Violations Doctrine in the Citizen Suit Context

Notwithstanding the Gwaltney decision and its predicted effects, citizen suits have remained an important part of the enforcement landscape. A major reason why Gwaltney has been less damaging than originally expected is lower courts' broad interpretation of the continuing violations doctrine. 238

230. 484 U.S. at 59.
231. Hodas, supra note 17, at 1608-09.
232. Id.
233. Id. at 1620.
234. See id. at 1619-20.
235. Id. at 1654.
236. See Smith, supra note 13, at 45-56 (summarizing failure of EPA to enforce Clean Water Act during Reagan Administration).
237. Hodas, supra note 17, at 1652-53.
238. The restrictive impact of Gwaltney has also been reduced by such holdings as: (1) whether a violation is continuing is measured at the time a suit is filed, not at the time of trial; see, e.g., Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 693-94 (4th Cir. 1989); Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1135-36 (11th Cir. 1990); Atlantic States Legal Found., Inc. v. Pan American Tanning Corp., 993 F.2d 1017, 1021 (2d Cir. 1993); Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc., 2 F.3d 493, 503 (3d Cir. 1993); and (2) proof of one or more violations after a complaint is filed is conclusive proof of a continuing violation; see, e.g.,
Upon remand of Gwaltney from the Supreme Court, the Fourth Circuit held that a continuing violation could be proved "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations."239 Under the first prong of this test, other courts have concluded that the failure to take remedial measures where harm is remediable is a continuing violation for the purposes of citizen suit jurisdiction.240 This concern with remediability follows directly from the Supreme Court’s conclusion that the “interest of the citizen-plaintiff is primarily forward-looking.”241

With respect to the second prong, the Fourth Circuit emphasized in Gwaltney that intermittent or sporadic violations do not cease to be ongoing “until the date when there is no real likelihood of repetition.”242 Thus, in Carr v. Alta Verde Industries, Inc.,243 the fact that there was only a reasonable likelihood of intermittent or sporadic unpermitted discharges from a cattle feedlot was nevertheless sufficient to demonstrate an ongoing violation.244 The standard described by the Fourth Circuit does not necessarily require continuous unlawful activity; as a district court ruled in Hudson River Fishermen’s Ass’n v. County of Westchester, the possibility that a violator’s remedy to a violation will not be effective or can be easily bypassed may be enough to establish a continuing violation.245 In Hudson River, the defendant had installed a cap to stop unpermitted discharge from a pipe.246 Nevertheless, the court held that the plaintiff had demonstrated an “ongoing violation” sufficient to establish jurisdiction by presenting evidence that the cap leaked and could be removed.247

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242. Id. at 172.
244. Id. at 1063.
246. Id.
247. Id.
In contrast to the statute of limitations context, where there are significant policy reasons to limit the application of the continuing violations doctrine, the policy reasons behind citizen suits favor a broad interpretation of the continuing violations doctrine. Citizen suits, unlike enforcement actions brought after limitations periods have passed, do not risk unfairness to the defendant, inaccurate outcomes because of unreliable evidence, or disruption of settled expectations. The lower courts' broad interpretation of the continuing violations doctrine is sound policy because it promotes greater citizen participation and more effective environmental compliance. Their broad interpretation is both faithful to the Supreme Court's concern with vindicating the forward-looking interests of citizen-plaintiffs and consistent with the language of Gwaltney. The Supreme Court's interpretation of the “in violation” language as requiring a “state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future” seems to invite the lower courts' expansive reading of the doctrine.

Interpreting the requirement of a continuing violation broadly also minimizes interference with the government's enforcement discretion. One potential effect of a strict reading of the Gwaltney rule is to force private individuals to give notice of intent to sue immediately after a particular incident of non-compliance occurs. The lower courts' broader reading of Gwaltney allows citizens to wait and see whether administrative enforcement will be adequate.

Finally, the rationale for extending the statute of limitations for serious procedural violations also argues for an expansive interpretation of the continuing violations doctrine with respect to the same violations in determining citizen suit jurisdiction under Gwaltney. Private citizens, unlike the EPA, do not have access to regulated entities' facilities and generally do not have the power to conduct inspections, check records, or request additional information. The integrity of the self-reporting system is therefore especially important to citizen suit actions, and violators should not be able to defeat jurisdiction through violations that directly undermine that system. Thus, a citizen should be able to sue an entity that filed a knowingly false report, even if that report was filed several years ago, as long as that report has not been corrected; such a violation is "continuing" because the entity should be subject to a continuing duty to file correct

248. 484 U.S. at 57 (emphasis added).
250. See Holderer, supra note 179, at 1053 (arguing that analysis holding that the statute of limitations for Clean Water Act citizen suits runs only upon filing of discharge monitoring reports should not be applied to EPA actions).
reports (and to correct past errors). Similarly, a citizen should also be able to sue an entity that committed an unpermitted discharge, even if that discharge was an isolated incident that occurred several years ago, until that discharge is reported to the EPA (provided that the discharge would have qualified as a "continuous or intermittent violation" at the time of discharge) or until the statute of limitations runs on an enforcement action brought by the government.

C. Penalties and Continuing Violations

A considered application of the continuing violations doctrine to the setting of monetary penalties can help to advance the purposes of those penalties.

1. Setting Monetary Penalties

Criminal and civil monetary penalties are a central tool in the enforcement of environmental laws. Effective enforcement is based on the theory of deterrence, which operates on three levels: deterring the regulated community from violating the law in the first place; deterring specific violators from further violations; and deterring the public from violating other laws. The ability to deter pollution relies on the premise that it should be more cost-effective for a potential polluter to comply with environmental regulations than to pay fines for noncompliance.

Effective deterrence thus requires four elements: (1) significant likelihood that a violation will be detected; (2) swift and sure enforcement response; (3) appropriately severe sanctions; and (4) that each of these factors will be perceived as real.

The continuing violations doctrine, when applied in the context of penalty setting, pertains primarily to the third element: whether sanctions are appropriately severe. Determining how to set sanctions, however, is no simple task; policymakers differ on the fundamental question of whether sanctions should be based on the gain to the offender or on the harm to others. The Supreme Court suggested in United States v. ITT Continental Baking that both factors are some-
times relevant in the penalty setting context.\textsuperscript{257} For offenses that society wishes to "unconditionally" deter,\textsuperscript{258} such as rape or murder, there is no socially acceptable level of activity; the gain to the offender is irrelevant in assessing liability.\textsuperscript{259} But in order to set the appropriate deterrent, society must focus primarily on the offender's gain: the penalty must be set beyond the total subjective gain to the violator. For offenses that are by-products of activities that society does not wish to prohibit entirely ("conditionally deterred activities"), however, such as breach of contract, both the gain to the offender and the harm to the victim are relevant in setting the penalty. In this case, society only seeks to deter a breach of contract where the harm to the victim of the breach is greater than the gain to the offender, and it achieves that end by requiring the offender to pay for the harm.\textsuperscript{260} According to the optimal penalty theory, the sanction set should be equal to the net social cost of the violation divided by the probability of detection.\textsuperscript{261}

2. EPA's Civil Penalty Policy and Statutory Guidelines

EPA's civil penalty policy assesses penalties according to two primary considerations that correspond roughly with the gain to the offender and the harm to the victim. Civil penalties generally contain both a "benefit component" and a "gravity component."\textsuperscript{262} The benefit component supposedly reflects the amount needed to specifically deter the violator, assuming that the violator expects to be penalized for each such infraction, and should remove any significant economic benefits resulting from failure to comply with the law.\textsuperscript{263} The gravity component includes actual or possible harm, as well as other factors.\textsuperscript{264} Actual or possible harm is determined according to the amount and toxicity of the pollutant, the sensitivity of the environ-

\begin{itemize}
\item \textsuperscript{257} 420 U.S. 223, 231 (1975). See supra notes 165-69 and accompanying text.
\item \textsuperscript{258} The distinction between "conditionally" and "unconditionally" deterred activities is borrowed from Judge Richard A. Posner. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 357-58 (3d ed. 1986).
\item \textsuperscript{259} Cohen, supra note 84, at 1061-62.
\item \textsuperscript{260} See id. at 1062.
\item \textsuperscript{261} Id. at 1063. See generally Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968).
\item \textsuperscript{264} Framework, supra note 262, at 35,074. The EPA uses the gravity component to advance the interests of deterrence and fairness, because both interests require that the total penalty include an amount greater than the benefit component to make the violator economically worse off than if it had obeyed the law. Policy, supra note 263, at 35,083.
\end{itemize}
ment, the size of the violator, and the length of time of the violation.\textsuperscript{265}

The fact that EPA's civil penalty policy focuses on both gain and harm reflects two of the policy's main purposes: (1) to deter environmental violations from occurring at all;\textsuperscript{266} and (2) to resolve environmental problems that threaten natural resources and public health.\textsuperscript{267} Unfortunately, EPA enforcement actions often result in penalties that relate little to the economic benefit of the violation and that are so low that the violators economically benefit from the violations.\textsuperscript{268} Benefit recovery performance in the states is even worse than the EPA's.\textsuperscript{269} A thoughtful application of the continuing violations doctrine can lead to more effective accomplishment of this nation's environmental policy goals.

EPA's penalty policy has influenced courts both directly and indirectly. Congress apparently took note of the factors listed in the policy when drafting a 1987 amendment to the Clean Water Act that requires courts to take account of certain specified factors when determining civil penalty awards.\textsuperscript{270} A similar amendment expanded the penalty assessment criteria under Section 113 of the Clean Air Act in 1990.\textsuperscript{271} Furthermore, courts have sometimes relied on EPA's penalty policy to determine appropriate penalties both before and after the enactment of these amendments.\textsuperscript{272}

3. Application of the Continuing Violations Doctrine to Penalty Calculations

In order to achieve a proper level of deterrence, the continuing violations doctrine should be applied as long as a violator continues to reap economic benefits from a violative act or omission. For example, operation of a facility without a required permit saves a violator the cost of compliance and results in an economic advantage over law-abiding competitors.\textsuperscript{273} Even the ability merely to delay expenditures

\textsuperscript{265} Framework, supra note 262, at 35,074.
\textsuperscript{266} Policy, supra note 263, at 35,083.
\textsuperscript{267} Id. at 35,084. The other main goal of the policy, fair and equitable treatment of the regulated community, is promoted through removal of unfair economic advantage gained by violators and by consistent application of the penalty policy. Id.
\textsuperscript{268} Hodas, supra note 17, at 1609-10.
\textsuperscript{269} Id. at 1610.
\textsuperscript{272} Tyson Foods, 897 F.2d at 1142 n.23.
\textsuperscript{273} See Framework, supra note 262, at 35,076 (discussing benefits accrued to violators from avoided costs).
necessary to achieve compliance results in economic advantage, as long as the violator is subject to a continuing duty to comply. Consistent application of the continuing violations doctrine in these cases helps to address criticisms that the EPA frequently fails to assess penalties that correspond to the economic benefits of each violation.

Furthermore, in order to achieve the second goal of EPA's penalty policy, the resolution of environmental problems, the continuing violations doctrine should also be applied where the threat to natural resources and/or public health is a function of the length of the violation. For example, in the filled wetlands cases, the harm to the environment corresponds with the length of time that fill material remains in wetlands. Filled wetlands can no longer perform such ecological functions as filtering pollutants, providing wildlife habitat, or storing flood waters. Application of the continuing violations doctrine in cases of such continuing harm gives violators the incentive to correct past violative acts and promotes fairness by internalizing the social costs of violations.

4. Criticisms of the Continuing Violations Doctrine in Penalty Calculations

Critics of the widespread application of the continuing violations doctrine in calculating fines argue that the doctrine creates bad incentives; however, these criticisms are generally unsubstantiated.

First, such critics argue that the continuing violations doctrine, by subjecting an alleged violator to accumulating fines for each day of violation, provides an incentive for the EPA to delay notification and prosecution. The continuing violations doctrine, however, merely

274. Id. at 35,075. The EPA's examples of violations that result in savings from deferred costs include: failure to install equipment needed to meet discharge or emission control standards; testing violations where the testing still must be done to demonstrate achieved compliance; and improper disposal, where proper disposal is still required to achieve compliance. Id.


277. See, e.g., Holderer, supra note 179, at 1047 (1993). Holderer cites In re CWM Chemical Services, No. II TSCA-PCB-91-0213 (Nov. 6, 1991), rev'd, TSCA Appeal No. 91-6, 1992 WL 90321 (Mar. 23, 1992), as an example of potential injustice. In CWM, the defendant alleged that the EPA waited nearly ten years before filing an administrative complaint for ongoing improper disposal of sludge. During those ten years, the EPA allegedly knew of the sludge's dangerous composition, whereas CWM did not. While the EPA's alleged failure to notify and to prosecute at an earlier date, if true, probably did result in greater contamination than would otherwise have occurred, this does not necessarily justify "punishing" the EPA by making the continuing violations doctrine unavailable. First of all, EPA's delay is probably more plausibly explained by political constraints than by a malicious intent to rack up large penalties. Second, and more importantly, compliance with the
CONTINUING VIOLATIONS DOCTRINE

counters any tendency by violators to drag their feet on clean-up efforts. And in any case, the fact that collected penalties are paid into the general treasury lessens any incentive on the part of the EPA to delay enforcement. Furthermore, performance incentives often run to the contrary; for example, EPA standards for assessing state administration of the CWA emphasize the number of cases resolved, rather than the total penalties collected. Finally, and perhaps more importantly, prompt and meaningful enforcement action by government agencies is often driven by citizen suits demanding such action.

Second, application of the continuing violations doctrine to penalty calculations is said to result in economic inefficiency because regulated entities are overdeterred from carrying out socially useful activities with negative side effects. In other words, the continuing violations doctrine, particularly when applied in the context of continuing harms, may cause firms to avoid socially useful activities or to spend an economically inefficient amount of resources on safeguards. This concern seems unwarranted, both empirically and theoretically. Empirically, the lack of resources at the EPA provides companies with a comfort level that allows them to risk noncompliance with environmental regulations; in other words, most companies face a situation of underdeterrence rather than overdeterrence. Theoretically, the inefficiency argument is misdirected. In the process of devising statutory and regulatory standards, Congress and the EPA have already made a judgment as to the proper level of regulation and the amount of weight to be given to efficiency concerns; whether or

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law is the obligation of the regulated party, not the EPA; in other words, *ignorantia legis neminem excusat.*

279. See supra note 7 and accompanying text.
280. Hodas, supra note 17, at 1611-12.
281. Id. at 1621.
282. See Cohen, supra note 84, at 1105 (arguing that in the criminal context, fines for environmental violations should be based primarily on harm rather than gain because such violations, which arise from socially beneficial activities, should only be conditionally deterred).
283. Id.
284. Garlow & Ryan, supra note 169, at 37-38. Garlow and Ryan go on to argue that the EPA penalty policy's failure to account for market share gains made during periods of noncompliance also results in underdeterrence. Id. at 38.
285. See, e.g., Clifford Russell, *Monitoring and Enforcement, in Public Policies for Environmental Protection* 243, 243 (Paul Portney ed., 1990) (concluding that insufficient monitoring and enforcement have encouraged widespread violation of environmental regulations); Hodas, supra note 17, at 1606 (citing EPA Inspector General findings that EPA penalty policy is frequently ignored and penalties are often set too low to recover economic benefit of noncompliance).
not standards should be set at a more “efficient” level is no longer up for debate at the enforcement stage.286

V

A PROPOSED PARADIGM FOR ANALYZING THE CONTINUING VIOLATIONS ISSUE

A. Need for The Proposal

Courts are not always sensitive to the distinctions between the differing contexts in which the continuing violations doctrine arises. For example, in Sasser v. Administrator,287 the Fourth Circuit was faced with the issue of whether allowing a pollutant to remain in wetlands was a continuing violation for the purpose of retroactively applying an amendment to the Clean Water Act that had been passed after the defendant had originally discharged the pollutant into the wetlands.288 Citing United States v. Ciampitti289 and United States v. Cumberland Farms,290 the court, without further analysis, simply concluded that the defendant’s violation was continuing.291 In both of the cited cases, however, courts had determined that each day a pollutant remains in wetlands without a permit constitutes an additional day of violation for the purpose of calculating penalties.292 The point of raising this distinction is not to argue that the Sasser court should have reached a different outcome, but that the court should have explained more carefully why the same continuing violations analysis should apply.293

This section proposes a general paradigm for analyzing how the continuing violations doctrine should be applied in the three major environmental contexts in which the issue arises: statute of limitations determinations; citizen suit actions; and fine calculations. Because, as

286. See Hodas, supra note 17, at 1623 (discussing Congress’ decision, as embodied in the 1972 Clean Water Act, to require the EPA to consider economic efficiency of effluent limitations on an industry-wide basis when regulations are promulgated).
287. 990 F.2d 127 (4th Cir. 1993).
288. Id. at 129. The amendment authorized the EPA Administrator to assess civil penalties through administrative proceedings. Prior to the amendment, EPA could recover civil penalties only through a district court action. See id.
291. Sasser, 990 F.2d at 129.
293. One can contrast the Sasser court’s lack of analysis with the analysis found in North Carolina Wildlife Fed’n v. Woodbury, No. 87-584-CIV-5, [1989 Litigation] 19 Envtl. L. Rep. (Envtl. L. Inst.) 21,308 (E.D.N.C. Apr. 25, 1989). The Woodbury court, after citing Tull v. United States, 481 U.S. 412 (1987), and Ciampitti for the proposition that the failure to remove improperly discharged material from wetlands was a continuing violation, explained that its finding was based on the fact that the injury giving rise to citizen standing was not the physical act of discharge itself, but the consequences of the discharge in terms of lasting environmental degradation. Id. at 21,309.
part IV suggested, the continuing violations doctrine is used to ad-
dress differing policy concerns in each context, the proposed paradigm
is designed to be sensitive to these differing concerns.

B. The Proposal

Under the proposed paradigm, courts should examine each al-
leged violation and determine whether the nature of the violation im-
plies a policy concern that would be addressed by the continuing
violations doctrine in the particular context. Obviously, courts' analy-
ses should not be driven merely by policy concerns, but primarily by
the intent of Congress. However, to the extent that congressional in-
tent may be unclear, policy concerns may provide useful guidance.
For example, the fact that many environmental statutes define maxi-
imum assessable penalties in terms of per-day amounts²⁹⁴ is one indica-
tion that courts have some discretion to apply the continuing
violations doctrine in a wide range of situations. Consideration of pol-
icy concerns can guide how that discretion should be exercised.

Specifically, in the penalty calculation context, courts should ap-
ply the continuing violations doctrine: (1) to violations that result in
continuing benefit to the violator over time; and (2) to violations that
result in continuing harm to others or to the environment and are cur-
able. As mentioned above, many environmental statutes define maxi-
mum assessable penalties in terms of per-day amounts, which suggests
that Congress intended that the continuing violations doctrine be ap-
plied in appropriate circumstances. As reflected by the categories to
which the continuing violations doctrine is proposed to be applied for
the purposes of penalty calculation, the appropriate circumstances
should be defined by the reasons that underlie penalty policies. Ap-
lication of the doctrine to violations that result in continuing benefit
to the violator over time advances the deterrent purpose of penalties
by enabling them to be tailored to the economic benefit gained by the
violator.²⁹⁵ Application of the doctrine to violations that result in con-
tining harm to others or to the environment and that are curable
advances the other major purpose of assessing penalties: the actual
resolution of environmental problems resulting from violative con-
duct.²⁹⁶ Even though penalties paid by violators usually go into the
general treasury,²⁹⁷ structuring the penalties in this way creates an in-
centive for violators to cure harmful conditions.

In the statute of limitations context, courts should apply the con-
tinuing violations doctrine: (1) to serious procedural violations; and

²⁹⁴. See supra note 29 and accompanying text.
²⁹⁵. See supra part IV.C.2.
²⁹⁶. Id.
²⁹⁷. See supra note 7 and accompanying text.
(2) to violations that Congress has deemed to be continuing or that are of such a nature that Congress must have intended that they be treated as continuing. Application of the doctrine to the first category, serious procedural violations, addresses the inherent difficulty of discovering such violations and the tendency of such violations to obscure underlying substantive violations. Application of the doctrine to the second category, violations that Congress has deemed to be continuing or that are of such a nature that Congress must have intended that they be treated as continuing, prevents individuals from escaping liability for violative conduct, such as the illegal storage of hazardous waste, simply because that conduct has been ongoing for a long time.

This second category seeks to effect congressional intent and is borrowed directly from *Toussie v. United States*, which addressed the question of continuing violations in a statute of limitations context. Evidence of congressional intent regarding the application of the continuing violations doctrine in the statute of limitations context, when compared to the penalty calculation context, is sparse; Congress has generally not enacted statutes of limitations for specific environmental statutes. However, one can often infer such intent from the statutory structure or overall regulatory scheme. For example, RCRA's prohibition on both the disposal and storage of hazardous waste without a permit, along with Congress' overall intent to address the long-term and permanent disposal of hazardous waste, indicates that the initial act of disposal and the subsequent act of storage should be considered together as a continuing course of conduct. Thus, the statute of limitations should not begin to run until all illegal conduct completely ceases.

Notwithstanding application of the continuing violations doctrine in the above-described contexts, the statute of limitations should begin to run if reports documenting the violation are filed with the EPA or another appropriate regulatory agency. This modification to the general rule will protect the fairness and judicial efficiency interests behind statutes of limitations and will give violators an incentive to admit their violations and to try to rectify them.

298. *See supra* part IV.A.2.e.
299. *See supra* part I.B.
300. 397 U.S. 112 (1970). *See discussion supra* part III.B.
In the citizen suit context, courts should apply the continuing violations doctrine most broadly in order to effect the “primarily forward-looking”\textsuperscript{304} interests of citizen plaintiffs and to ensure that citizen suits continue to play their intended role in stimulating enforcement. A broad application of the doctrine is justified not only as a means of overcoming the barrier erected by \textit{Gwaltney}, but also by the fact that \textit{Gwaltney} itself only requires a “continuous or intermittent violation.”\textsuperscript{305}

Courts should therefore apply the continuing violations doctrine in the citizen suit context: (1) to violations that result in continuing harm to others or to the environment where that harm continues into the present and is subject to cure; (2) to serious procedural violations; and (3) to violations where there is a reasonable likelihood of recurrence. Application of the continuing violations doctrine in the first two instances will merely enable citizen suits to serve their intended role in securing effective enforcement by allowing citizens to challenge a wide range of violations that are already subject to government enforcement.\textsuperscript{306} Yet such an application does not violate the spirit of \textit{Gwaltney} because citizens do have a forward-looking interest in each instance: citizens clearly have an interest in preventing future harm arising from a violation, even where the violator’s active conduct occurred in the past. Citizens also have a strong interest in the integrity of environmental monitoring and reporting systems, and in the possible substantive violations that might have been revealed and made subject to suit if a violator had complied with procedural requirements. Application of the continuing violations doctrine to the third category, cases where there is a reasonable likelihood that a past polluter will continue to pollute in the future, merely effects the Supreme Court’s \textit{Gwaltney} interpretation of the “in violation” language found in the citizen suit provision.\textsuperscript{307} Finally, although application of the doctrine to violations that result in increasing benefit to the violator over time would also advance Congress’ intent for citizen suits to stimulate government enforcement, such an application would arguably violate \textit{Gwaltney} absent the presence of some other factor that more directly affects the forward-looking interests of citizen plaintiffs.

\textbf{C. The Proposal Applied}

This section briefly reconsiders the introductory hypothetical of Corporation A and Corporation B in light of the above analysis. This

\begin{itemize}
  \item \textsuperscript{304} \textit{Gwaltney}, 484 U.S. at 59.
  \item \textsuperscript{305} \textit{Id.} at 57 (emphasis added).
  \item \textsuperscript{306} \textit{See supra} part IV.B.
  \item \textsuperscript{307} \textit{Gwaltney}, 484 U.S. at 57.
\end{itemize}
section then discusses several other hypothetical situations, modeled after some of the cases discussed in Part II, in order to illustrate more fully the operation of the proposed paradigm. In each of these latter hypotheticals, it is assumed that the present year is 1996 and that a five-year statute of limitations applies.

The story of Corporations A and B illustrates the potential utility of the continuing violations doctrine in smoothing out inequities and in achieving a more effective environmental regulatory system. Applying the proposed paradigm to Corporation A would toll the statute of limitations for as long as the RCRA definition of disposal or storage continued to be met. Furthermore, the total penalty can be tailored to the harm caused by A's conduct because the continuing harm over time would subject A to per-day fines. Finally, the continuing harm over time would also justify a citizen suit to protect the forward-looking interests of the general public.

In contrast, Corporation B's conduct, if it occurred before the limitations period, would no longer be subject to suit because reports were filed with the EPA. Furthermore, the continuing violations doctrine may or may not be applied in the penalty calculation, depending on whether B's exceedances were sufficiently close in time and cause. Finally, B may not be subject to a citizen suit if there is no reasonable likelihood that its violations will recur.

The following hypotheticals further illustrate the operation of the proposed paradigm, particularly with respect to the differing analyses in the three contexts of statutes of limitations, penalty calculations, and citizen suits.

C, a developer, fills in a wetland in 1990 without a Section 404 permit, thereby violating the Clean Water Act. C confesses its violation to the EPA in 1994, but the wetland remains filled as of 1996. The statute of limitations began to run in 1994; although the violation is of such a nature that Congress must have deemed it to be continuing,\textsuperscript{308} the statutory period begins to run upon notification of the EPA. C is subject to a fine for the entire six-year period, however, because the violation has resulted in continuing harm to the environment over time.\textsuperscript{309} A citizen suit can be maintained because the harm from the presence of the illegal fill continues into the present.

\textsuperscript{308} Although the Clean Water Act does not explicitly require the restoration of illegally filled wetlands, courts have inferred the power to order restoration from the EPA's statutory authority to seek a permanent or temporary injunction to remedy CWA violations. John W. Kilborn, \textit{Purchaser Liability for the Restoration of Illegally Filled Wetlands Under Section 404 of the Clean Water Act}, 18 B.C. ENVT'L. AFF. L. REV. 319, 335 (1991). Underlying this inference is the assumption that the continued presence of illegal fill in a wetland is a continuing violation.

\textsuperscript{309} See supra part II.B.2.a.
D is required to file monthly discharge monitoring reports (DMRs), but fails to file a DMR in July, 1990, because it failed to collect the underlying data. Because the failure to file a DMR is a serious procedural violation, the continuing violations doctrine should be applied to toll the statute of limitations; also, a citizen suit may be brought. The continuing violations doctrine is not applied to the fine calculation, however, because there is no increasing benefit to D and no increasing harm to others as time passes. D can only be fined for that month of violation.

Under the terms of its NPDES discharge permit, E's discharge of nitrogen is limited by a daily maximum. E's discharge of nitrogen exceeds the daily maximum on one day in 1994 because of a computer error that has since been corrected. A government enforcement action is timely because the five-year limitations period has not expired, and the continuing violations doctrine is not applied. E may be fined for only one day of violation because there was no increasing benefit to the violator over time (i.e., all the benefit accrued to E on that day) and because there was no increasing harm to others over time that is subject to cure (since the nitrogen has diffused into the environment). Finally, a citizen suit action against E is barred because there is no reasonable likelihood of recurrence.

CONCLUSION

The continuing violations issue appears with particular frequency in environmental cases because of the absence of readily detectable harm from some violations, the difficulty of discovering harms that do result, and the presence of continuing harm in many cases even after a prohibited act has ceased. The frequency with which the issue arises suggests the need for a comprehensive approach that applies the doctrine in a systematic way.

Crafting a universally applicable rule for applying the continuing violations doctrine may not be possible, however, because the task requires an integration of statutory interpretation, public policymaking, and balancing of equity concerns, all of which are highly context-dependent inquiries. Rather than proposing a specific rule to apply to every situation, this Comment takes a more framework-oriented approach that is intended to provide a starting point for courts in their analysis of the issue. By applying the proposed paradigm, courts hopefully will decide the continuing violations issue in a manner that is sensitive to the particular context in which the issue arises.