UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Robert J. Heser and Andrew Heser[1]	)	**Docket No. CWA-05-2006-0002**
	)	**NP275083W01**
Respondents	)	

ORDER OF DISMISSAL

The Complaint in this matter, which was filed on May 1, 2006, alleges that in August and September 1999, the Respondents discharged dredged and/or fill material into navigable waters in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), ("CWA"or "Act") without having a permit issued under Section 404 of that Act. The single count asserts that the Respondents, who are farmers, and the owners of the land which is the subject of this action and located in Marion County, Illinois, used "a scraper, paddlewheel and bulldozers, [resulting in the] discharge[] [of] approximately 3,000 cubic yards of dredged spoil and organic debris into approximately 13,195 square feet of Martin Branch [variously described as ditch, creek, stream and natural channel],[2] its tributaries and approximately 2.1 acres of adjacent forested wetlands. . . ." Compl. ¶ 12. The Hesers' property includes that portion of

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[1]Respondents Robert and Andrew Heser correctly point out that there is no legal entity known as "Heser Farms," and that EPA produced no evidence that there is such an entity. Accordingly, references to "Respondents" applies only to Andrew and Robert Heser and the caption has been modified by the Court to reflect this.

[2]At the hearing, Martin Branch was described as a intermittent stream that has been channelized and which moves through a forested riparian corridor. Tr. March 28, 2007 at pgs. 29, 51, 55, 60, 86, 93, 95 and Tr. April 30, 2007 at pgs. 47-49, 75, 80 and CX 7.

Martin Branch which runs through their farm land. For this alleged violation, EPA seeks a civil penalty of $120,000.00. No remedial or injunctive relief is sought by EPA.

The only issue for resolution at this time is the Respondents' affirmative defense that the Complaint was not timely filed and accordingly that the action is barred by the applicable statute of limitations.[3] For the reasons which follow, the Court determines that the statute of limitations expired before EPA filed its Complaint and therefore the matter must be DISMISSED.

Background.

For the limited purpose of determining the appropriate period of time to apply the statute of limitations, the following facts may be considered as not in dispute. In late August and early September 1999, the Respondents engaged in the work of the nature as described above on their property located in Marion County, Illinois.[4] While this work was ongoing, an estranged relative of the Respondents, their uncle, William E. Heser, made a telephone call to the United States Army Corps of Engineers ("Corps") about this activity. The telephone call to the Corps was made on September 1, 1999, reporting the work activity of the Respondents to the Corps. (EPA Ex. 8, CX 000042). The "Initial Regulatory Complaint Report," bearing the September 1, 1999 date, reflects that the "authorities for requesting this information are . . . [among others] Section 404 [of the] Clean Water Act. *Id.* That report reflects details about the alleged violation.

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[3]Respondents asserted the statute of limitations defense in their May 31, 2006 Answer.

[4]The Complaint describes the location of the site as the "southeast quarter of the southwest quarter of the northwest quarter of Section 11, Township 1 North, Range 2 East, Racoon Township, Marion County, State of Illinois." First Amended Administrative Complaint at ¶12.

The Corps then sent a Complaint form to William Heser.[5] Thereafter, on September 4, 1999, William E. Heser's sons videotaped the subject activity and forwarded it to the Corps.[6] Tr. March 28, 2007 at 171. Subsequently, in a certified statement submitted by William E. Heser on September 13, 1999, he referred to his personal observation of the Respondents' activity and included the video tape with that regulatory complaint. *Id.*, Tr. March 29, 2007 at 125, 165, CX 8 at pages 42 - 45. Following those events, on January 12, 2000, the Corps notified the Respondents that it was alleging the subject violation. Bearing in mind that EPA's Complaint was filed on May 1, 2006, and assuming, as discussed below, that the statute of limitations is five years, it would seem that, absent some justifiable reason, EPA would have to have filed its complaint by September 2004, and not when it was actually filed, some 19 (nineteen) months later, on May 1, 2006. This observation is not undone by the fact that the Respondents and EPA executed two tolling agreements. The first tolled any statute of limitations from January 10, 2005 through November 1, 2005, while the second tolling agreement extended that initial tolling period through May 1, 2006. Of course the last date listed for the second tolling agreement, May 1, 2006, represents the date EPA's Complaint was actually filed. The problem is that neither tolling agreement captured the period from September 14, 2004 through January 9, 2005.

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[5]The Corps' Mr. Lenz admitted that his office received the complaint about the Hesers' activity at Martin Branch "back in 1999" and that he was present for "the site visit that was done shortly after that." Tr. March 26, 2007 at 44, 95, CX 42. The Corps "received a video with the complaint and the pictures with the complaint. *Id.* at 102, 105. Lenz admitted that the Corps "received it all in one package . . . the complaint, the pictures and the video . . . [and that it] "likes to have it in that fashion" because they have to make determination "on whether there's been a violation." *Id.* at 105.

[6]The video tape, filmed by sons of William Heser, was shown at the hearing.

The Statute of Limitations Provision.

As Respondents note, and EPA agrees, the applicable five year statute of limitations provision is found at 28 U.S.C. § 2462. That section, in the absence of a specific provision, is generally applicable to civil fines and penalties and speaks in terms of an action, suit or proceeding for enforcement of any civil fine or penalty being "commenced within five years from the date when the claim *first accrued*."[7] (emphasis added). *3M Co. v. Browner*, 17 F.3d 1453, *1455. (C.A.D.C. 1994)("*3M*"). As stated, neither side disputes that this statute of limitations provision is the appropriate provision to apply here and numerous court decisions make it clear that this is correct.[8] Accordingly, there is no serious question that this provision is applicable to this matter. Rather, the differences between the parties involve the proper construction of the provision.

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[7]The Section provides: "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 mad thereon ." 28 U.S.C § 2462.

[8]Examples, among many, of cases applying Section 2462 to Clean Water Act cases include: *United States v. Windward Properties, Inc.*, 821 F. Supp. 690 (N.D. Georgia, Atlanta Division 1993) and *Reichelt v. United States Army Corps of Engineers*, 969 F.Supp. 519 (N.D. Ind. 1996). The Court is unaware of any decision holding that this section is not applicable to proceedings under these provisions of the Clean Water Act.

Respondents' Contentions.

Respondents assert that the statute began to run as of early September 1999, at which time the work and associated discharges at the site had been completed.[9] Respondents observe that the only discharges pled by the government relate to the Hesers' activities in August and September 1999.[10] *Id.* at 3. The testimony at hearing supports the finding that the alleged violation was a discrete event and a completed act, as opposed to continuing conduct. At the hearing, Ms. Wendy Melgin, EPA's own expert witness on hydrology, hydro-geology and wetlands ecology, testified under questioning by EPA counsel, as to why EPA conducted no sampling of the water downstream from the alleged violation site. In this regard Ms. Melgin stated: "Right, *the violation is over with* . . . ." Tr. May 3, 2007, at 78 (emphasis added). Respondents' Counsel revisited this point, asking the witness if the reason EPA decided not to test the water at the site was "because the violation was over with, is that correct?" The witness responded, "That's one of the reasons." Tr. May 3, 2007 at 177. Later, EPA's counsel returned to the question of whether the activity that led to the alleged violation was completed and Ms. Melgin again testified, "I mean from (*sic*) the filling activity was complete." Tr. May 3, 2007 at

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[9]Respondents cite to *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), ("*3M*"), for the proposition that the statute runs from the date of the violation, and not from the date the government discovers the violation. Respondents also note that, as in this case, in *3M* the government sought a civil penalty only and did not seek equitable or remedial relief. R's Br. at 5. Respondents note further that in *Trawinski v. United Technologies, Carrier Corp.*, 313 F.3d 1295, (11th Cir. 2002), a Toxic Substances Control Act ("TSCA") case, that court stated that the "statute of limitations begins with the violation itself - it is upon violation, *and not upon discovery of harm*, that the claim is complete and the clock is ticking." *Id.* at 1298 (emphasis added). These cases are discussed *infra.*

[10]This is an important observation, as it is true EPA presented *no* evidence that the discharges are "continuing." Indeed, despite the resources available to the Agency, and extensively applied for the purpose of proceeding against the Hesers, EPA did not utilize its resources to show any continuing impact on downstream waters. Thus, no testing of the quality of water flow adjacent to the disturbed area has ever been conducted, let alone any evidence that, further downstream, Lake Centralia, was impacted by *the Hesers'* activities.

228. Ms. Melgin did testify that the impact from the alleged violation continues but, despite EPA counsel's attempts to have her revise her answers,[11] she was quite clear that the activity which led to the government's involvement had concluded. Tr. May 3, 2007 at 86. As noted, if September 13, 1999 is the appropriate time to measure the start of the running of the statute, the statute of limitations would have expired *no later than* mid-September, 2004, and the onset of the tolling agreements, would have started too late, as they did not become operative until January 10, 2005, a shortfall of about 4 (four) months.[12]

Although Respondents reject, as an alternative basis of computing the onset date, starting the running of the statute of limitations with the date of the alleged violation's "discovery," they contend that such a measure does not aid EPA in any event. Under that standard, defining "discovery"as the date the government actually discovers the violation or, through reasonable diligence, should have discovered it, Respondents contend the statute still expired prior to filing of the Complaint. This is because, under the discovery approach, the government was put on notice of the Respondents' activity by September 1, 1999 and it received additional, very

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[11]Shortly after returning from a break in the proceedings, Counsel for EPA revisited Ms. Melgin's unfortunate, but repeated, testimony that "the violation was over with." EPA Counsel, referring to Ms. Melgin's statement that there was no water sampling because the violation was over with, stated: "And I just wanted to clarify for the record your meaning or what you mean by violation. And I just - - I know you are not a lawyer, so *I just wanted to get the record clear that you don't mean violation.*" At that point the Court stepped in, "No, you are going to testify for her or tell her what she doesn't mean?" Although EPA Counsel responded, "I am asking her," the Court would not allow the mischaracterization to stand, stating: "No, you are not. You are doing more than that. You were telling her. 'You don't mean, do you,' and then you were going to fill in the blank. She said twice the violation was over with . . . don't put words in her mouth." Tr. May 3, 2007 at 227. It was not surprising that when EPA Counsel then asked again what the witness meant by her statement that the violation was over with, the witness finally responded, "I mean the filling activity was complete." Tr. May 3, 2007 at 228.

[12]*United States of America v. General Iron Industries*, 2005 WL 956970, (N.D.Ill 2005), is distinguishable from the case at hand simply because the Respondents are *not* seeking to avoid the operation of the two tolling agreements. In *General Iron* the respondent *was* trying to avoid the terms of the tolling agreements. In contrast, here, from the start it has been the Respondents' position that the tolling agreements came into effect too late to help EPA. As discussed, the Court agrees.

graphic, documentary evidence, consisting of videotaping of the site, not long thereafter, around September 13, 1999. Thus, Respondents contend that the government knew or reasonably should have known of the Hesers' activity and purported violations by September 13, 1999. Applying that date, and a "discovery" of the conduct test, Respondents assert that the government had until September 12, 2004 to file its complaint.

Addressing EPA's contentions regarding the issue at hand, Respondents note that EPA asserts that the statute of limitations only begins to run upon either the issuance of a permit[13] for the subject activity or the removal of the dredged or fill material. Respondents note that such an approach, making remediation the date for triggering the start of the statute of limitations, has nothing to do with the purpose of such statutes. Respondents additionally note the irony involved, as the Complaint does not seek any remediation, only a civil penalty. This, it contends, is significant because the government does not seek equitable relief. Rather as only a monetary penalty is sought by EPA, the statute of limitations must run from the date of the alleged violative activity.

Respondents contend that EPA's argument that the CWA contemplates continuing violations is also unpersuasive. Beyond the government's acknowledgment that the CWA nowhere explicitly provides that such violations are continuing, Respondents also maintain that neither the decision in *Harmon Electronics*, 7 E.A.D. 1, 18 (EAB 1997), *rev'd on other grounds*, 19 F.Supp. 2d 988 (W.D. Mo. 1988), ("*Harmon*"), nor the CWA's reference to penalties on a "per day" of violation basis, support EPA's continuing violation argument. Respondents also point out that in *Harmon*, the dumping practice was described as a "prolonged course of

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[13]Yet, as Respondents note, the government has announced that it would never issue an 'after-the-fact' permit in this case. Respondent's Reply at 6, citing Tr. May 3, 2007 at 101-106.

conduct," that was involved and, unlike the allegations regarding the Hesers here, that practice was continuing in *Harmon*, with the most recent dumping event occurring within five years of the suit's filing. In contrast, the Hesers' alleged violative activity had ceased in September 1999, when their work had been completed. As for the "per day of violation" provision, Respondents point out that such a provision has no inherent linkage with a statute of limitations.[14] Respondents' Reply at 10-11. The Court agrees with these observations.

Respondents also assert that EPA's reference to the CWA's definition of "discharge of fill material" is not of assistance to the government's continuing violation theory because that definition refers to the *addition* of dredged material.[15] As the evidence in this case establishes that the Hesers engaged in activity at the site only during August and September 1999, and not thereafter, the record offers no support to show there was any *addition* of material after September 1999. Similarly, the government's claim that filling wetlands can, by the nature of such activity, be considered to be a 'continuing' violation, is nothing more than an unsupported assertion. While Respondents acknowledge that, hypothetically, damage could continue past the date of a discharge, that reasoning conflates the distinct concepts of a *continuing violation* with *continuing damage*, and Respondents point out that the adoption of such an approach would make the statute of limitations meaningless.[16] Respondents' Reply at 12.

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[14]Nor, Respondents contend, can the government's notion that the requirement for a CWA permit translate into a basis to establish a continuing violation because, with regard to the Hesers, the government is only seeking a civil penalty and has made it clear that it would not grant such a permit in any event.

[15]The CWA provides that the "term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any *addition* of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362 (12). "Pollutant" is defined to include "dredged spoil, solid waste, . . . rock, sand, cellar dirt, . . . discharged into water. . . . ." 33 U.S.C. § 1362(6) (emphasis added).

[16]Respondents observe that the decision in *U.S. v. Telluride*, 884 F.Supp. 404 (D.Colo. 1995) ("*Telluride*"), makes this distinction. Further, Respondents note that the government's bare contention

Respondents also address the government's contention that a continuing violation is established by the Heser's ongoing farm activity, which "necessarily results in the discharge of additional fill material at the site."[17] Respondents' Reply at 13, quoting EPA's Brief at 16. Respondents note that the Complaint, even as amended, does not make such a claim. The Court has reviewed the First Amended Administrative Complaint again and finds that in fact it does not make any claim that there is a discharge of additional fill at the site. Rather, the facts alleged by the government are that, during August and September 1999, the Respondents used various machinery on their property which resulted in the discharge of material into Martin Branch and associated wetlands.

Still another theory advanced by the government to support its continuing violation claim, is that wetland fills are inherently undiscoverable. In response, Respondents point out that, as the record in this case demonstrates, county soil and water officials conduct extensive field work in rural areas and that aerial photography is a part of this. Apart from its continuing violation

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that *Telluride* was "incorrectly decided" does not offer a rationale to support that view. Respondents' Reply at 12-13.

[17]Respondents describe such diffuse sources of pollution from agricultural fields as an attempt by the government to reassert its "non-point source" pollution claim. Yet EPA conceded at the hearing that non-point source pollution is not regulated. The Court also notes that there is no claim that the Respondents are prohibited from farming the land in issue, only that the alleged filling activity violated the CWA. Consequently, there is no evidentiary basis to conclude that such a diffuse pollution source would not have existed had no work been done at the site if the Hesers had simply conducted farming there. Restated, farming activity if the site had been unaltered would have produced agricultural runoff in any event or, at a minimum, there is no evidentiary basis to reach the conclusion that this would not have occurred. Similarly, the government is, so to speak, "far afield" with its claim that the Hesers' row-cropping continually adds fill material to Martin Branch because, as just mentioned, there is no evidence that, if the activity had not occurred, simply farming the land would not have produced fill. Also not to be ignored is that the record does not contain evidence that the row cropping continuously disrupts the site, resuspending fill or farm chemicals into Martin Branch. The related argument offered by EPA that "surface drains" from the Hesers' land create point source discharges that constitute continuing violations fails for the same reason. This conclusion is also buttressed by the fact that EPA did not claim such surface drainage as a basis for point source pollution, nor could it.

theory, EPA advances an alternative argument that the statute of limitations should not be deemed to start until the government "discovers" the violation. Respondents distinguish cases cited by EPA, *Reichelt v. United States Army Corps of Engineers*, 969 F. Supp 519 (N.D. Ind. 1996) and *United States v. Hobbs*, 736 F.Supp 1406 (E.D. Va. 1990), because the time between the date of discovery of a violation and the related investigation was negligible, involving a few days in each instance, not years as in this matter.

EPA's Contentions.[18]

By EPA's own recounting of the facts, on September 4, 1999, the owner of property adjoining the Respondents' farmland, Daniel Heser, cousin of the Respondents, videotaped the area in issue. This graphic evidence was included with the September 13, 1999 complaint, filed by the Respondents' uncle, with the United States Army Corps of Engineers. Thus, there is no dispute that, as of September 13, 1999, the federal government had actual notice of the alleged violative activity at the site.[19]

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[18]The Court also read and considered EPA's Reply Brief, much of which reargued the points made in its initial brief. For example, EPA added to its initial brief's argument that the CWA contemplates continuing violations by talking about preconstruction permits under the Clean Air Act in *United States v. Duke Energy Corporation*, 278 F.Supp. 2d 619 (2003), and farm road exemptions under the CWA. With the latter, EPA argues that Section 404 permit requirements provide for ongoing requirements for such roads and from there proceeds to try to draw a link to actions controlling material after discharge. Apparently these were offered to support its earlier contention that the statute of limitations does not start to run until the fill is removed. EPA Reply at 12-16. The *Duke* case ended up being decided by the Supreme Court, a fact which EPA neglects to mention, but that decision has nothing to do with, nor is it instructive to, the case at hand. While one could generously call these arguments "imaginative," they have no value to the resolution of this matter.

[19]Although included in EPA's Brief, the Court considers that, except for the date the Complaint was actually filed and the dates of the tolling agreements, all dates referred to by EPA which are subsequent to the date of the alleged activity of the Respondents only serve to underscore why the statute of limitations should not be extended. Thus, EPA's inclusion of various other dates, recounting the leisurely pace the government took before actually filing the complaint, some five years, seven months and two weeks later, only serves to distract attention from the critical date of September 13, 1999, when the statute of limitations clock started running. Thus, that the Corps first strolled out to the site five months later, on February 15, 2000, for a "look see" and then "promptly" referred the matter concerning alleged "flagrant violators," to EPA some *two* years, *two* months and *two* weeks, later, on May 1, 2002, is only an

Although EPA agrees that the general statute of limitations provision at 28 U.S.C. § 2462 applies, it offers arguments to avoid its operation. As noted, one such offering is that the statute of limitations is tolled indefinitely and does not begin running until the fill is permitted or removed. EPA's other argument is that the statute starts running when it is "discovered by the *Complainant*." EPA Br. at 8.

In support of its theory that the statute does not run until the fill is removed (or if the government issues an after-the-fact permit), EPA looks to language from the EAB's statement in a Resource Conservation and Recovery Act ("RCRA") decision, *Harmon Electronics*, 7 E.A.D. 1, 18 (EAB 1997), *rev'd on other grounds*, 19 F.Supp. 2d 988 (W.D. Mo. 1988). There, the EAB stated that a continuing violation can be defined as "a series of illegal acts united by a common mechanism or a continuing course of illegal conduct." *Id.* at 8. EPA translates this statement to mean that the violation continues until the fill is removed or its presence permitted after the fact. Thus, EPA appears to concede that there is no "series of illegal acts" here, but that there is a "continuing course of illegal conduct" by virtue of the fill's continued presence. That fill, EPA submits, presents the "continuing wrong" and the wrong continues until the addition, i.e. the fill, is removed. EPA suggest several theories to support its claim that the course of illegal conduct continues. First, it states that as the statute of limitations provision was enacted long before the CWA, it was not drafted with that Act in mind. Next, it reminds that the CWA, as a remedial statute, must be interpreted broadly. EPA then asserts that the CWA's language "clearly contemplates" continuing violations and that the continued presence of illegal fill "surely [is] the

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embarrassing admission which underscores the point that the federal government had notice of the alleged violative activity at least by September 13, 1999. EPA, matching the pace of the Corps, made its first visit to the site one year, four months and two and a half weeks later, on September 19, 2003. EPA's report ensued on December 23, 2003, and over a year later, on January 7, 2005, EPA issued an order directing restoration of the site.

type of violation that Congress would want in [the continuing violations] category."[20] As noted earlier, EPA finds evidence of Congressional intent for continuing violations by the fact that the CWA talks in terms of penalties for each day that a violation continues. 33 U.S.C. §1319(g)(2)(b). EPA also contends that the "very nature" of violations involving the discharge of fill means Congress must have intended that they be considered as continuing.[21] Last, in the face of unsupportive facts here, EPA nevertheless maintains that such environmental violations as here are "inherently difficult if not impossible" to discover. *Id.* at 9.

Although EPA acknowledges that the decision in *U.S. v. Telluride*, 884 F.Supp. 404 (D.Colo. 1995), rejects its continuing violation arguments, it maintains that *Telluride* was simply wrongly decided. EPA asserts that the *Telluride* court erred because interpreting other statutes of limitations is an approach of extremely minimal value and also because the Hesers' actions arise in the context of a civil, not a criminal, proceeding. EPA further contends that the decision in *Telluride* incorrectly relies upon *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), because *3M* did not decide "whether the continuing violation theory could be applied with respect to the statute of limitations in 28 U.S.C. § 2462," but only whether the statute of limitations begins to run when the claim accrues. EPA Br. at 14.

As referred to, EPA also contends that the Respondents' row cropping is an "activity which continually disrupts the Site and resuspends fill material on it." *Id.* at 16. It maintains that

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[20]In support of its contention that unremoved fill presents a continuing violation, among other cases, EPA cites to *United States v. Reaves,* 923 F.Supp. 1530 (M.D. Fla. 1996), *Fisher Sand and Gravel*, 1999 U.S. Dist. LEXIS 8443 (D. Wyo. May 20, 1999) and *In re Britton Construction Co.*, Docket No. CWA III 096 (ALJ Pearlstein May 21, 1997), *aff'd*, 8 E.A.D. 261 (EAB 1999).

[21]A bootstrapping argument, EPA also points to the Corps' requirement for the issuance of a permit, whenever issued, and any restoration/mitigation requirements which may be imposed in connection with such a permit.

farming the site where the wetlands formerly were "necessarily results in the discharge of additional unpermitted fill material at the Site."[22] *Id.* Neither of these arguments, which have been previously exposed as empty, merit further discussion.[23]

The fact that the record indisputably shows that in this instance the federal government became aware of the alleged violative activity *while it was being conducted*, does not cause EPA to shy away from the argument that "[w]etland [f]ills are inherently undiscoverable." *Id.* at 17. Thus, even here, where the government actually knew about the Respondents' activity from the outset, the government makes this claim without blinking.

As an associated argument to its "inherently undiscoverable"claim, EPA contends that the statute of limitations should not be deemed to begin running until the violation is "discovered." To avoid the common sense conclusion that the "discovery" in this case occurred at the time the activity began, EPA gives the term "discovery" an unusual meaning, asserting that it means "the date that the relevant agency's investigation report documenting the violation *is finished.*"[24] *Id.* at 19. (emphasis added). Although it acknowledges that the *3M Co. v. Browner* decision was critical of EPA's "open-ended" notion of discovery, EPA, putting aside the facts, distinguishes *3M* on the basis that Clean Water Act cases are different, because such violations go on undetected and there is no ability for the government to improve its ability to discover such

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[22]As also noted earlier,this claim, which is an assumption based on speculation, not evidence, is unsupported by the record. Nor does EPA even attempt to point to any arguable record support for this claim.

[23]See *infra* at pages 7-9, including n. 17.

[24]EPA acknowledges that *United States v. Windward*, 821 F. Supp. 690, 694 applied an "objective" discovery standard, that is, it applied the common sense conclusion that the government "discovers" a violation when it learns of the potentially violative activity.

violations. *Id.* at 20, citing *United States v. Material Services Corp.* No. 95C 3550 (N.D. Ill. September 30, 1996), 1996 U.S. Dist. LEXIS 14471, 1996 WL 563462,

Ignoring the inconvenient facts, EPA applies a scattershot approach, offering various dates as the time of 'discovery,' none of which apply the date of the federal government's actual knowledge of the activity. One of these creative dates is when EPA received the Corps of Engineers' enforcement referral, on May 1, 2002, some two years and eight months after the Corps had actual knowledge of the Respondents' activity. Another is to measure discovery by the time EPA needed for the development of evidence to support its case. Under this formulation, EPA contends that the statute of limitations clock should not start running until the Corps' "subsurface soil sampling information" had been gathered, on February 15, 2000. Using that date, EPA then argues that the tolling agreements, which started on January 12, 2005, mean that the statute of limitations was extended at a time some four weeks before the original time period of February 14, 2005, would have run out. Under this creative math, EPA calculates that from February 15, 2000, through February 14, 2005 would be the applicable period, but that the tolling agreements then extended the period through May 1, 2006, the date the Complaint was finally filed.

Discussion.

For the reasons which follow, the Court finds that the statute of limitations period begins to run from the date the violation occurs. Secondarily, even if a "discovery of violation" standard were grafted onto the statute of limitations period, in this case, the result would be the same, as the date of violation and the date of discovery were virtually the same. Last, the continuing violation theory, without an evidentiary basis of support, such as by showing later additions of dredge or fill or by measuring material downstream contamination from such dredge or fill,

is nothing more than speculation. Finding a continuing violation based on such surmise, amounts to effectively legislating the statute of limitations out of the Clean Water Act, even though Congress did not do so and even though 28 U.S.C. § 2462 provides a five-year statute of limitations in such situations.

A. Purposes of statutes of limitations.

As noted by the Supreme Court in *United States v. Kubrick*, 444 U.S. 111 (1979), "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" The court noted that such statutes "afford[] plaintiffs *what the legislature* deems a reasonable time to present their claims, [and also] protect defendants *and the courts* from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, *or otherwise*." *Id.* at *118. (emphasis added). In instances involving CWA violations of this nature, the consensus is that 28 U.S.C. § 2462 applies. Accordingly, the legislature has decided that the reasonable time to present such claims is five years. Although *Kubrick* involved a claim under the Federal Tort Claims Act, and the applicable statute of limitations period was only two years, the Supreme Court still spoke to the meaning of the term "accrues," the same term involved in the *Hesers*' matter. The court had to determine whether "accrues" applies to "when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting injury may constitute medical malpractice." *Id.* at *113. In a situation directly analogous to the *Hesers* matter, the court emphasized that the plaintiff was aware of his injury

and thus had the "factual predicate for a claim." As in this case, in *Kubrick* the plaintiff had knowledge of the critical facts that there was an injury and who had inflicted it. Those facts were distinguished from the determination of whether there was a good cause of action. *Id.* at 123. Knowing of the injury, it was then up to the plaintiff to seek advice from the medical and legal community, just as in this case, it was up to the Corps and EPA to make their determinations and to act by filing a complaint within the allotted time. Otherwise, the court observed, postponing the accrual of the claim would undermine the purpose of the statute of limitations to require "reasonably diligent" presentation of the claim. *Id.* While it is true, as the Supreme Court acknowledged, that "statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims . . . that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." *Id.* at *125.

Although involving a criminal proceeding, *Toussie v. United States*, 397 U.S. 112 (1970) is also instructive. There, the issue was whether the statute requiring males between18 and 26 to register for the draft imposed a continuing duty to register, a result which would effectively extend the applicable five-year statute of limitations to prosecute for failing to register. The court noted that a salutary purpose of statutes of limitations is to "encourag[e] law enforcement officials promptly to investigate suspected [wrongdoing], noting that "continuing offenses should be applied in only limited circumstances" as there is an obvious "tension between the purpose of a statute of limitations and the continuing offense doctrine," . . . [as] the latter, for all practical purposes, extends the statute beyond its stated term." *Id.* at *115. Although the Supreme Court did not assert that a offense could never be construed as continuing, it stated that "such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion." *Id.* It is noted that, while this is a civil proceeding, the CWA has no explicit

language compelling the conclusion that a continuing offense was intended, and accordingly the tension between the statute of limitations and the continuing offense doctrine is intact.[25]

B. The statute of limitations begins to run from the time of the violation's occurrence.

The core facts applicable to the present issue are not complex and they should be kept in mind in analyzing this matter.[26] The federal government had actual knowledge of the Respondents' actions at Martin Branch by September 13, 1999. There is no evidence that there were any new, discrete, additions or activity at the wetland/creek site after September 13, 1999. That is, *the record* is bereft of any *facts* to show there were subsequent additions of dredge or fill to Martin Branch after September 13, 1999. Consistent with the previous discussion regarding

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[25]At least in the context of a criminal offense, the Supreme Court went so far as to state that even where a regulation speaks in terms of a continuing offense, such an administrative decision would not carry the day "unless the statute itself, apart from the regulation, justifies that conclusion." *Toussie* at *121. Even the three justices who dissented agreed that, at least in the criminal context, the continuing offense concept should be approached "with 'a presumption against a finding that an offense is a continuing one.'" *Id.* at *135.

[26]The Court must take note of the Respondents' objection to EPA's inclusion in its Initial Brief of matters that are irrelevant to the statute of limitations issue. Respondents describe those references as "unwarranted, unnecessary and irrelevant to the . . . statute of limitations issue." Respondents' Reply at 2. The Court, prior to reading the Respondents' objection about this, made the same observation upon reading EPA's Initial Brief. Thus, the Court agrees that EPA spent considerable time on the merits of the underlying claim and "unfairly cast Respondents as rogues and profiteers at the expense of the government." A few examples from EPA's Initial Brief make this clear. Early on in its Brief EPA refers to *prior* activities involving the Respondents actions on *other* agricultural land and at a *different* point in time, asserting that the Hesers were denied farm subsidies because of allegations of unpermitted wetlands conversion on farmland. Such comments have nothing to do with this case, and this is especially so with regard to the statute of limitations issue and can only have been inserted for improper purposes. Further, regarding the land in issue in this proceeding, EPA interjects that, during a February 2000 visit from the Corps of Engineers, Respondents were "generally uncooperative concerning the allegations and that in the Corps' subsequent referral of the matter, the Hesers were "identified as 'flagrant violators' based on their prior knowledge of [the permit] requirements." Obviously, neither of these inclusions have any bearing on the issue of the statute of limitations issue, the only issue at hand. Yet, EPA describes these claims as facts "relevant" to the Respondent's (sic) proffered defense." EPA Brief at 3. Such improper comments could be viewed as unprofessional or, at best, revealing of a confused legal analysis of the issue. It goes without saying that these extraneous comments do not play a role in the Court's analysis of the issue before it.

the purposes of statutes of limitations and, as the federal government was armed with actual knowledge of the activity in issue, the statute of limitations clock began running at that time, as that was the last date that the Hesers added dredge or fill material into Martin Branch and associated wetlands.

The decision of the United States Court of Appeals, District of Columbia Circuit, in *3M* is most instructive. While a Toxic Substances Control Act ("TSCA") case, the Court of Appeals held that the proceeding "accrued," for statute of limitations purposes, on the date that the company committed the violations, not when EPA could reasonably have been expected to detect the violations. There are several noteworthy observations regarding the *3M* decision that are pertinent here. After explaining why 28 U.S.C. § 2462 applied to the proceeding, the court rejected the maxim that statutes of limitations ought to be "strictly construed in favor of the government," and looked instead to the older maxim that "[i]n a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to pecuniary forfeiture." *Id.* at *1457, quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.). The court then turned to "the meaning of § 2462's phrase 'unless commenced within five years from the date when the claim first accrued,'" noting that a "claim normally accrues when the factual and legal prerequisites for filing suit are in place." *Id.* at *1460. It acknowledged that, at times, such a determination may be more involved, as in instances when the date of the wrong is distinct from the maturation of the harm, and that, for "latent injuries or injuries difficult to detect, courts have developed the 'discovery rule.'" However, the court distinguished those instances where the harm does not become apparent from EPA's advocacy that "accrual" should refer, not to latent harms that only surface later, but that the term be expanded to mean that accrual begins upon "discovery of the

violation." The court clearly rejected EPA's interpretation. It noted that the statute of limitations provision "is aimed exclusively at restricting the time within which actions may be brought to recover fines, penalties and forfeitures." Of note to EPA's alternative contention that such wetland fillings are "continuing violations," the court pointed out that *proving the violation* is distinct from *the resulting injuries or damages*. Thus, it concluded, accrual would normally be at the moment of violation.[27] Moreover, the court made it clear that its interpretation, rejecting EPA's "discovery of the wrong" contention, was an application of the statute of limitations, not simply to TSCA cases, " but to the *entire* federal government in *all* civil penalty cases, unless Congress specifically provides otherwise."[28] Of great significance to the CWA matter here, the D.C. Circuit expressly rejected the notion that its interpretation of the very same statute of limitations provision "ought to be influenced by EPA's particular difficulties in enforcing TSCA." *Id.* at *1461.[29] The court noted that there can be a number of factors that can make it difficult for an agency to detect statutory violations, including the "nature of the statute" involved, but it could not fathom why Congress would want the running of the statute to depend on such factors, and that such problems were a more appropriate subject for congressional

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[27]The D.C. Circuit also took note that the Supreme Court has rejected a "discovery of violation" rule in other enforcement contexts, stating that it is the "breach of duty, not its discovery, that normally is controlling" and that an interpretation resting on discovery is "contrary to the purposes of statutes of limitations." While these cases involved child labor law violations and a Federal Tort Claims Act claim, one should bear in mind that the D.C. Circuit was citing those cases as instructive *in the EPA TSCA* case that was before it. There is no basis to conclude that the court would somehow invent another measure for the statute of limitations simply because another federal environmental statute was involved. In fact, as noted above, the court expressly stated the opposite.

[28]As noted, EPA does not contend that Congress has specifically stated otherwise for CWA cases. That is, EPA has not asserted that Congress included a "discovery of the wrong" basis for CWA statute of limitations purposes.

[29]As with *3M*, there is no suggestion in this case that the *Hesers'* activities were fraudulently concealed or inherently undiscoverable.

oversight, than for the courts' involvement. *Id.* Instead, the D.C. Circuit emphasized that, rather than expanding the courts' role to legislative determinations, the court must focus on the sound reasons for having a statute of limitations in the first place. Thus, the D.C. Circuit stated without qualification, "nothing in the language of § 2462 *even arguably* makes the running of the statute of limitations period turn on the degree of difficulty an agency experiences in detecting violations."[30] *Id.* (emphasis added).

National Parks and Conservation Ass'n Inc v. TVA, 502 F.3d 1316 (11th Cir. 2007), a Clean Air Act case, also addressed the same statute of limitations provision involved in this litigation. There, the suit was brought more than five years after work had been completed on a boiler at an electricity generating facility. Citing *3M*, the Eleventh Circuit held that a claim first accrues on the date a violation first occurs. While clearly the work had been completed far more than five years before the suit was filed, the focus was upon the theories advanced to support the plaintiffs' assertion that the violation had been continuing. As did the court in *3M,* the 11th Circuit emphasized the importance of distinguishing between "the 'present consequences of a one-time violation,' which do not extend the [statute of] limitations period, and 'a continuation of a violation into the present,' which does." *National Parks* at 1322. Thus, the court noted that a violation's "current ill effect of its past failure . . . is not sufficient to bring . . . [the plaintiffs'] claims within the five-year statute of limitations . . . ." *Id.* at 1326.[31]

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[30]In *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, (W.D. Wis., 2001), the federal district court found that the reasons noted in the *3M* decision applied with equal force to the case before it. Thus absent showing that Murphy Oil made "affirmative efforts to prevent [the government] from discovering the information . . . necessary to discover [the] alleged violations . . ." the court rejected the argument that Section 2462 is impacted by the degree of difficulty an agency faces in detecting violations. *Id.* at 1085.

[31]Although EPA has not sought equitable remedies against the Hesers, it is worth noting that the court in *National Parks* observed that while 28 U.S.C. § 2462 applies only to legal claims, the concurrent remedy doctrine operates to bar equitable remedies where legal and equitable claims coexist and the statute of limitations bars the concurrent legal remedy. Concurrent refers to the situation where "an action at law or

United States v. The Telluride Company, 884 F. Supp. 404 (D. Colo. 1995)(*Telluride*), rev'd on other grounds, 146 F.3d 1241 (10th Cir. 1998), adds significant analysis to the issue before this Court. Succinctly, the district court spoke to the critical relevant cases on the issue of "continuing violations," including *3M*, *United States v. Payne*,[32] 978 F.2d 1177, (10th Cir. 1992), and *Toussie v. United States*,[33] 397 U.S. 112 (1970).[34]

The *Telluride* court noted that there was no *present* discharge of pollutants involved, and that, intellectually, the concept of a *continuing discharge* must be distinguished from a *continuing impact*.[35] While the government contended that the Congressional purpose behind the CWA to

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equity could be brought on the same facts." *Id.* at *1327.

[32]The *Telluride* court observed that *Payne* looked to the plain language of the statute and the nature of the criminal statutory provision and concluded that neither supported the government's contention that the violation (false representations regarding social security numbers) was a continuing offense.

[33]Regarding *Toussie*, as discussed *supra*, a case involving failure to register for the draft, the *Telluride* court noted that the Supreme Court looked to the same factors as the Tenth Circuit did in *Payne*, that is, the nature of the crime and the statutory language, and thereupon reached the conclusion that failing to register was not a continuing offense. While the government argued in *Telluride* that the Supreme Court has considered continuing violation claims in civil cases, citing *United States v. Evans*, 431 U.S. 553, (1977), the *Telluride* court observed that under *Evans* "continuing impact from past violations is not actionable," noting that the Supreme Court held that "the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *Telluride* at *408 quoting *Evans* at 558.

[34]The *Telluride* court also distinguished dicta in *North Carolina Wildlife Federation v. Woodbury*,1989 WL 106517 (E.D. N.C. 1989)("*NCWF*") and *Sasser v. Administrator*, 990 F.2d 127, (4th Cir. 1993), both of which accepted the contention that as long as fill remains in a wetland the violation continues, because neither case dealt with the issue of a continuing violation in the context of a statute of limitations question. *Telluride*, as set forth *supra*, then explains why such violations are not "continuing violations" under the CWA.

[35]Others have recognized the flaws in EPA's "continuing violation" claim. For example it has been observed that, as the CWA does not expressly or impliedly contain a continuing violation doctrine, that doctrine's application can only arise through judicial fiat. However, the soundness of such judicial determination is called into question because Section 301(a) of that Act, by its plain language, referring to the "discharge of any pollutant," contemplates an "actual, discrete release of a pollutant." Such language contradicts the notion that a discharge occurs every day that illegal fill remains. David S. Foster, *The Continuing Violations Doctrine and the Clean Water Act: Untenable Solutions and a Need for Reform*, 32 Envtl. L. 717 (2002). The author further notes that *Telluride* picked up on this plain language problem by holding that one must show that a discharge occurred every day after the material was dumped into the

restore and maintain the Nation's waters *must* mean that illegally filling a wetland and not taking corrective action on such illegal filling is a continuing violation, the *Telluride* court accepted as a general statement that the damage caused by filling wetlands would continue long after the actual discharge, but it also observed that to accept the government's position would "rob . . . the statute of limitations provision of any meaning in the CWA context." *Id.* at *408. As this Court has separately noted, the *Telluride* court paid attention to the significance of the D.C. Circuit's decision in *3M.* Accordingly, the court in *Telluride* concluded that the five year statute of limitations begins to run at the time of the discharge.[36]

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wetland. Thus, without showing *present* discharging of pollutants, the author maintains that no continuing violation can be established. So too, the *Telluride* court noted that it is important to distinguish the discharge itself from *the effects of the discharge.* While a discharge and its effects are related, they are not synonymous. Although segregating the act of a discharge from the effects of a discharge has been criticized as inconsistent with the overriding purpose of the CWA, the author submits that such a salutary objective is not enough to overcome the absence of any legislative history or express language in the Act to support it and in the face of the statutory language leading to the conclusion that a discrete, physical act, the discharge of a pollutant, is being addressed. That conclusion, supported by the reasoning in *Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U. S. 49 (1987), is that a violation requires a discharge and that penalties are available only for a violation. The author's point is the language of 301(a) is at odds with a continuing violation argument because of its definition of a discharge. Also, to the argument that the statute should not begin to run until EPA discovers the violations, the *3M v. Browner* decision, 17 F. 3d 1453 (D.C. Cir. 1994), although a TSCA decision, supports the argument that the claim accrues on the date the transgression occurs, not the date it is discovered. Ultimately, the author concludes that neither the text of the CWA nor the Supreme Court's interpretation of section 311(a) support a continuing violations theory, nor a basis to avoid the statute of limitations. As these authoritative sources do not provide support for a discovery of violation theory to be applied to extend the statute of limitations, or to apply a continuing violation theory, ultimately the author recognized that the solution must lie with an amendment to the CWA if there is to be recovery beyond five years from the date of the last discrete violative activity.

[36]Although equitable tolling of the statute of limitations and injunctive relief were discussed in *Telluride*, and found inapplicable, neither subject is involved in this litigation. It is also noted that, inferentially, the Environmental Appeals Board ("EAB") seemed to recognize in *Harmon Electronics* that the distinction made by the court in *Telluride* between the prohibited conduct, i.e. the dredging and filling, and the consequences of such conduct, but that only the prohibited conduct was involved in *Harmon. In re Harmon Electronics,* RCRA Appeal No. 94-4, 7 E.A.D. 1, 1997 WL 133778, (E.P.A.), March 24, 1997, at n.36.

C. Applying a "date of discovery" test to start the running of the statute of limitations yields the same result.

Apart from its continuing violation theory, EPA advances an alternative argument that the statute of limitations should not be deemed to start until the government "discovers" the violation. This theory is rejected for several reasons. Chief among the reasons is that any honest description of the term "discovered," as applied here, leads to the finding that the federal government discovered the violation, that is, it had actual knowledge of the Hesers' activity at Martin Branch, no later than by mid-September 1999. Thus the date of the Hesers' activity and the date of the federal government's discovery of that activity are the same.[37]

Because this alternative theory also runs into trouble with the undisputed facts in this case, EPA pretends that "discovery" occurs when "the relevant agency's investigation report documenting the violation *is finished*," or, conveniently, when *EPA* receives its referral of the matter from the Corps of Engineers, and/or the necessary subsurface soil sampling information. It will not come as a surprise that these non-intuitive "discovery" dates would operate to make the statute of limitations start much later than the date the federal government actually became aware of the activity.

Reichelt v. United States Army Corps of Engineers, 969 F.Supp. 519 (N.D. Ind. 1996), cited by EPA, is another case in which the issue was whether the statute of limitations had expired. There, the federal district court, applying the same statute of limitations provision, 28 U.S.C. § 2462, construed the meaning of that provision's use of the phrase 'when the claim *first accrued*.' That court, acknowledging that the Seventh Circuit has held that accrual applies to the

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[37]As the government's filing of the Complaint in this case was late by months, not days, it is unnecessary to have exactitude as to the particular day in September 1999 it discovered the Hesers' activity. Suffice it to say that it acquired knowledge of the activity by September 13, 1999 or shortly thereafter.

date when a violation is discovered, went on to conclude that while the Corps knew of a possible violation earlier, it was not until 17 days later, that it completed its investigation and review and made its report, that it determined that there was a violation, moving the inquiry from a "suspected" violation status to an "actual" violation status.[38] Thus, the court rejected as a measure for the onset of the statute of limitations, the date when the violation actually occurred, in favor of a discovery rule.[39] As Respondents point out here, the key is that even under a discovery approach, the government knew of the violation by September 13, 1999. Respondents contend that to transform a short period of time for the government to investigate the circumstances into an open-ended, years-long process, would be at odds with any reasonable discovery rule principle, and there is no basis for one to conclude that the court in *Reichelt* would have gone along with any prolonged period between the date of discovery and the time of government's investigatory conclusion, as to do otherwise would be a de facto open-ended extension of the statute of limitations. Respondents similarly distinguish *United States v. Hobbs*, 736 F.Supp 1406 (E.D. Va. 1990), because the time between the date of discovery of a violation and the related investigation was negligible, involving a few days in each instance, not years as in this matter.

EPA quibbles with the Respondents' description of EPA Ex. 8, page 42, as the Corps of Engineers "Complaint form," making much ado that it "really . . . [is the Corps'] "*Initial Regulatory* Complaint Form." EPA Reply at 1. (emphasis added). Granted, EPA's description of

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[38]An interesting side note is that the court in *Reichelt*, looking to a memorandum of understanding between EPA and the Corps, found that the Corps is the lead enforcement agency for unpermitted discharge violations.

[39]Among others, the decision in *United States Pub. Interest Research Group v. Atl. Salmon of Me.*, LLC, 257 F. Supp. 2d 407, 426 (D. Me. 2003), notes that some courts have applied a discovery rule in determining when accrual occurs, while other courts have held that a claim accrues at the time of violation. Thus there are divergent views on this issue.

the complaint form is more complete, but it ignores the more important, substantive, fact about the document. Namely, it shows the Corps learned about the subject activity as of September 1, 1999. Similarly, EPA applies a pinched reading of the testimony of the Corps' Ward Lenz, by claiming that, although to be sure Mr. Lenz was in fact describing the "general, processing procedures [when it receives] Initial Complaint forms," that doesn't tell the whole story, as Lenz then continued to explain that "a Site inspection and analysis of soil samples from the site were necessary to determine the existence of regulated wetlands and therefore a violation... ."[40] Reply at 1-2. Once again, such an analysis fails to distinguish the date when the government had knowledge of the subject activity from the date that it concluded that it was violative activity. Under EPA's theory, if it took a decade for the Corps to make its determination, the statute of limitations would not begin to run until ten years had elapsed, an obviously absurd result. However, the point of the example is to illustrate that, at most, it is the date the government becomes aware of the alleged violative activity, not the date that the government ultimately figures out whether the activity is a violation, that must control for statute of limitations purposes.

Viewed from the perspective that a discovery standard should be applied in determining when a claim accrued, *United States v. Windward Properties, Inc.*, 821 F. Supp. 690 (N.D. Ga.

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[40]A consistent theme for its argument, EPA also distinguishes the Respondents' characterization that the government notified the Respondents of a violation on January 12, 2000, asserting that was only a notification of an "apparent" violation. In support of this view, that the statute of limitations clock does not start running until the government makes a final determination that there has been a violation, EPA adds that other site inspections and information requests ensued after January 12, 2000. EPA Reply at 2. These arguments reflect EPA's view that the government's actual knowledge of suspect activity counts for nothing and, at least under this theory, it need not be concerned about any statute of limitations issue until it arrives at such a final determination. Of course, under EPA's theory, a statute of limitations which started running when a final determination was made would not be a worry either, even if more than five years then elapsed without a complaint being filed, because EPA would then retreat to its alternate position that the violation continues in any event until the fill or dredged material is removed. Accordingly, any affirmation of EPA's view of the statute of limitations must be honest enough to admit that, in truth, there is no functioning statute of limitations, where a violation of Section 301(a) of the Clean Water Act is alleged.

1993), a case in which the government sought injunctive relief and civil penalties for the unpermitted discharge of dredged or fill materials into streams, adds to the analysis. As here, the parties agreed that 28 U.S.C. § 2462, was the operative provision regarding the statute of limitations. The government asserted that the claim did not *accrue* until Windward's activities were discovered but it also contended that the actions constituted continuing violations and, last, that the statute of limitations does not apply to its request for injunctive relief.[41]

The *Windward* court noted that many courts have applied a discovery rule, using the time that the plaintiff knew, or reasonably should have know, of the violation. The court recognized that there are valid policy concerns which support the application of a discovery rule, stating that strictly applying a rule that the claim accrues at the time of the violation could thwart the purpose of the CWA because there can be violations which are difficult if not impossible to detect immediately.[42] *Id.* at *694. However, in rejecting the defendant's argument that such a discovery rule should not extend to dredge/fill violations, the court stated that *the discovery rule takes into account whether the government should have learned of the violation earlier*, adding that in those situations "*the limitations period will begin running sooner.*" *Id.* at 695. (emphasis added). Thus, the court struck a balance, rejecting the government's claim that the discovery rule should not apply until the government actually discovers the violation, and adopting instead a rule that

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[41]Though EPA has not sought equitable relief against the Hesers, it is noteworthy that *Windward* rejected the government's contention that the statute of limitations provision was inapplicable to its claim for injunctive relief. The court pointed out that it is settled law that equitable remedies will be unavailable when it is determined that the statute of limitations bars legal relief. Accordingly, upon listing an extensive list of authorities for that proposition, the court held that Section 2462 limits the government's legal *and* equitable requests for relief. *Windward* at *693. *cf. U.S. v. Banks*, 115 F.3d 916 (11th Cir. 1997).

[42]The court observed that such a discovery rule was recognized in *North Carolina Wildlife Fed'n v. Woodbury*. 1989 WL 106517 (E.D.N.C. 1989) and in *United States v. Hobbs*, 736 F.Supp. 1406 (E.D. Va. 1990).

the statute begins to run when the government knows of the violation or "through the use of reasonable diligence should have discovered" it. Using this approach takes account of the government's obligation to not "unreasonably delay in bringing an action, while [also factoring that] the public is not harmed by an inability to prosecute claims for violations that could not reasonably have been discovered." *Id.* The court then applied the test to the facts it faced to determine if the government "actually knew or reasonably should have known that Defendant was violating the CWA more than five years prior to bringing [that] action." *Id.* Ultimately the court concluded that while it was possible that the defendant would be able to show at trial that the government knew or reasonably should have known of the CWA violation, summary judgment was denied because there were genuine issues of material fact to be resolved. However, in this matter, the facts supporting the Hesers' position are more compelling[43] and not subject to any such issues of material fact, as it is clear that the government had actual knowledge of the alleged violative activity by September 13, 1999.

United States v. Material Service Corporation, No. 95C 3550 (N.D. Ill. September 30, 1996), 1996 WL 563462 (N.D. Ill, 1996), 1996 U.S. Dist. LEXIS 14471, a decision not reported in F. Supp., also involved allegations of wetlands dredge and fill activities. The court addressed the question of whether the discovery rule applies to CWA cases, holding that having the statute of limitations begin to run when the violation occurs would be contrary to the remedial benefits of

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[43]In *Windward* there were more inferences to be drawn. For example, defendant showed that, among other facts, the Corps had been contacted regarding the construction of the dam, that there was much publicity attending the development of the lake, and that the government had aerial photographs of the lake. However, the court was unable to conclude, at least for summary judgment purposes, that the government reasonably should have known of the violation by the date in issue. In contrast, the Hesers situation is markedly different. No application of when the government reasonably should have known is needed, as the facts show the government had actual knowledge of the Respondent's activity by September 13, 1999.

the CWA. Citing the decision in *Windward*, the court agreed that the statute should begin to run "when the plaintiff discovers the violation *or through reasonable diligence should have discovered the violation.*" *Id.* at *3 (emphasis added). Thus, even applying a *reasonable diligence* standard, the government's discovery theory would fail as it applies to the Hesers.[44]

So too, in *United States v. Hobbs*, 736 F. Supp. 1406, (E.D. Va, 1990), the court addressed statute of limitations issues, where the government sought injunctive relief and civil penalties for claims that the defendants had placed fill materials into waters of the United States without having a permit, arriving at the same conclusion that *Windward* would later reach. As pertinent here, the court in *Hobbs*, another court that has determined that 28 U.S.C. § 2462, is the applicable statute of limitations to be applied in CWA cases, spoke to the term "accrual" as used within that section. While the court rejected construing that term to start the limitations period running when violations actually occurred, its alternative was to have it start *"when they are discovered . . . ."* *Id.* at *1410. (emphasis added). The point, as it applies to the Hesers, is that the actual occurrence and the date of discovery[45] merge here; that is they are effectively the same date.

Despite these cases applying a discovery rule, it is not uniformly applied. For example, in

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[44]That court also interpreted the decision in *3M*, finding that it did not determine that the discovery rule was inapplicable for CWA cases. Rather, the court expressed that the *3M* decision only declined to apply the discovery rule to TSCA cases. For the reasons previously expressed, the Court does not believe that such a narrow reading can be squared with the broad language employed by the court in *3M*.

[45] The *Hobbs* court referred to a report from the U.S. Fish and Wildlife Service, regarding the defendants' property, being submitted to an EPA Region as the *first time* EPA was formally alerted to "possible violations." That approach , it is submitted, blurs report *results* with the time when actual knowledge of the potential violation is discovered. Again, confusing the date when *conclusions* are reached about activities with the date the government becomes *aware* of the potentially violative activity, is an invitation to allow an open-ended period to occur before the statute of limitations starts running. The effect of such an approach is to delay and therefore extend that period, an unwarranted result which allows government to neglect its duties to act in a timely manner, and therefore runs contrary to the purpose of statutes of limitations.

Trawinski v. United Technologies, 313 F.3d 1295 (11th Cir. 2002), the court held that the statute of limitations began to run immediately upon occurrence of an alleged violation of the Energy Policy and Conservation Act and was not extended by the discovery rule. As in this case, the court in *Trawinski* applied 28 U.S.C. § 2462, as the statute of limitations. Rejecting application of a discovery rule, the court, citing *3M*, looked to the time when the "facts and circumstances" were within the knowledge of the plaintiffs, and held that the statute begins to run with the violation itself, not its discovery, and accordingly that the statute of limitations starts to run at the time of violation.

Last, the government has advanced in support of its continuing violation theory, that wetland fills are "inherently undiscoverable." The Court notes that the facts of this case cannot be disregarded. Given the facts involved, this claim is a bit cheeky for EPA to assert here. The alleged violative activities involving wetlands and Martin Branch *were discovered* by the government virtually *at the time of the alleged violative activity.* Thus, EPA's argument that wetland violations are inherently undiscoverable is misplaced in this instance.[46] Further, in direct response to the "inherently undiscoverable" assertion, Respondents point out that, as the

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[46]A misapplied case cited by EPA in its Reply Brief, *BP America Production Co. v. Burton*, 127 S.Ct. 638 (2006), held that the applicable six-year statute of limitations for government contract actions, 28 U.S.C. § 2415(a), was not applicable to administrative payment orders as that statute applied only to court actions. There, the court noted that §2415(a) actions begin with the filing of a complaint to enforce a contract, with the key terms being action and complaint. It is true that the court distinguished filing a suit in court from initiating an administrative proceeding but it also noted that the language of the provision specifically refers to its operation being effective within one year after a final decision has been made in the administrative proceeding. The court specifically recognized that the statute separated the two proceedings. Further, the court distinguished its holding from those administrative proceedings which include modifiers, such as "administrative action," "civil or administrative action," or "administrative enforcement actions," as opposed to what it was confronted with in *BP America*, where the statute of limitation only refers to "action." Manifestly, the language employed by 28 U.S.C. § 2462, referring to "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," is not so limited and the proceeding against the Hesers itself is also not so limited. Accordingly, *BP America* is without precedential value in this case.

record in this case demonstrates, county soil and water officials conduct extensive field work in rural areas and that aerial photography is a part of this. The record, as evidenced by the wealth of mapping exhibits EPA introduced at the hearing, certainly supports the Respondents's observations about the many resources available to, and utilized by, the government to monitor land use activity. However, the government's actual knowledge about the Hesers' activity means that it is unnecessary to address the "inherently undiscoverable" theory further.

Conclusion.

Although the *3M* decision applied the statute of limitations provision to a TSCA case, there is nothing in the court's reasoning, nor its determinations about Section 2462 which would limit its rationale to TSCA matters alone. Rather, the court was speaking to Section 2462's application to civil penalties generally and the Court finds the *3M* analysis apt here.

Alternatively, apart from the reasoning in *3M*, even if a "date of discovery" test were applied here, it is the government's *actual knowledge* of the subject activity that sets this case apart from other situations where one could at least make arguments for a later date to start the running of the statute of limitations such as when the activity occurs but it is unknown to the government. The point is that, at a minimum, in those situations where the government has actual knowledge of potentially violative activity, it has a duty to act within the time frame afforded by the statute of limitations. It is important to bear in mind that once the government has actual knowledge of the suspect activity, it has a significant period of time to conduct whatever investigations it deems necessary and then, if warranted, to file its complaint.

Five years, is not an insubstantial period of time.[47] It is certainly sufficient time for the government to meet its obligation to investigate and bring any action or, absent such activity over a span of five years, to be prohibited from taking action subsequent to the expiration of that lengthy period of time. This conclusion is consistent with the principle underlying statutes of limitations generally – that in most instances government has an obligation to act within a discrete period of time or its right to take action lapses. Such a conclusion is also in harmony with a related principle behind statutes of limitations – that the citizenry should, at some point, be able to know that a potential controversy with government becomes invalid to assert.

As the previous discussion makes clear, there is no evidence that there were any new, discrete, additions or activity occurred at the wetland/creek site after September 13, 1999. It is not sufficient in a legal proceeding to simply "declare" that farming activity near the site in question would necessarily have resulted in new additions. In terms of comparing post-alteration effects, Ms. Melgin agreed that EPA would not have any concept of the amount of agricultural runoff that existed prior to the alteration. Tr. May 3, 2007 at 220. She also had no idea of how close the crop land was to Martin Branch prior to the alleged alteration. Tr. May 3, 2007 at 221. Certainly there is no basis to take judicial notice of such a "claimed fact." Similarly, the government may not simply "declare" that there *must* be a continuing impact on the waters by virtue of the original disturbance. EPA has never performed a watershed assessment of Martin Branch. Tr. May 3, 2007 at 186. With its financial resources the government, at least potentially,

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[47]It should also be noted that the filing of a complaint does not foreclose further discovery by the government. Rather the five year requirement necessitates that before that time expires, the government has to have made its determination whether the conduct was in violation of the CWA or not. On any appeal of this decision, should a 'date of discovery' rule be applied, and assuming that such a rule was reality-based and therefore not tied to a contorted definition of 'discovery,' such as EPA has advocated here, then, at least in theory, the applicable period could be longer than the five years from the last date of a discharge. However, in this case, as noted, such longer periods are not available because the date of discovery of the violation and the date of last discharge are the same.

could have endeavored to show that the Respondents' activity continued to cause pollutants to move downstream from the site and by expert analysis could have opined about the effluents emanating from the stream prior to the activity.[48] Accordingly given the absence of information regarding any impact on waters immediately downstream from the cited activity, *a fortiori*, the government may not declare that the Hesers' activity *must* have had some adverse impact even further downstream on receiving waters, and this analysis should not be clouded by the fact that a receiving water, Lake Centralia has pollution-related problems. This is a legal proceeding, not cocktail party chatter, and while in the latter setting people so inclined might agree that the Hesers' activity simply must be contributing to the Lake's problems, the law does not entertain such speculation as a substitute for proof.

It is also revealing that EPA sought agreements from the Respondents tolling the period for the running of the statute of limitations. Certainly, if EPA truly believed that such violations continue on *ad infinitum*, or that they were unnecessary here, they would never have sought tolling agreements. One does not seek tolling agreements where none are needed. Rather, those acts exposed the government's concern that the statute of limitations was about to expire. The real problem for the government in this instance is that it made a miscalculation as to the onset date for measuring the five year period. While the miscalculation was unfortunate, such errors are not grounds for extending the statute of limitations.

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[48]This is not far-fetched. For example, the government could have measured deposits flowing in the stream just upstream from the cited activity and compared those results with deposits immediately downstream from the Hesers' activity. Certainly they had access to such upstream property, as the estranged relative who informed the government of the Hesers' activity is the owner the adjacent upstream land.

The Court concludes that, under either a date of last discharge or a date of discovery test, the statute of limitations expired before the Complaint was filed, and the tolling agreements, reflecting a miscalculation on EPA's part, are consequently are of no avail here.

The Court takes the view that any other construction must be called for what it would be, an attempt by a judicial body to engage in the odious practice of legislating, by effectively removing the statute of limitations from CWA cases. That may be an admirable goal, carried out in pursuit of the protecting our water resources, but the question is whether such legislative objectives should be completed by courts instead of Congress. While it might be better for the environment to have a construction that would have the effect of indefinitely extending the statute of limitation's running, this is a matter best left for the legislature, not this Court. Certainly, the D.C. Circuit certainly recognized this in *3M*, noting that it had a "limited role . . . in [that] case . . . [namely] interpreting a statute, *not creating some federal common law*." *3M* at *1461. (emphasis added).

Accordingly, on the basis of the foregoing reasons, and upon rejecting EPA's various theories to avoid operation of the statute of limitations, this matter is hereby DISMISSED.

SO ORDERED.

William B. Moran

William B. Moran
United States Administrative Law Judge

December 19, 2007
Washington, D.C.

In the Matter of Robert J. Heser, Heser Farms and Andrew Heser, Respondents
Docket No. CWA-05-2006-0002

I hereby certify that the following, Order of Dismissal, dated, December 19, 2007 was sent in the following manner to the addressees listed below.

Knolyn R. Jones
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Dated: December 19, 2007

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