

violation is October 8, 2002,¹⁰ as admitted by Respondent, and Respondent's violation was continuing, as pleaded by EPA.

B. EPA Timely Filed the Complaint Under the Statute of Limitations Within Five Years of the Date EPA's TSCA Section 8(e) Claim First Accrued.

The United States Court of Appeals for the District of Columbia Circuit has held that the general federal five-year statute of limitations applies specifically to administrative claims filed for enforcement of civil penalties pursuant to TSCA.¹¹ 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). The general five-year federal statute of limitations states:

Except as otherwise provided by an 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 of *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.

28 U.S.C. § 2462 (emphasis added). Consequently, under the general federal five-year statute of limitations, the government is barred from maintaining an action to enforce a civil penalty unless the action is commenced within five years of "the date when the claim first accrued." Id. The general rule of accrual for determining when a claim accrues establishes that the claim normally accrues when the factual and legal prerequisites for filing suit are in place (e.g., when the illegal act is committed);¹² however, this general rule of accrual is subject to certain exceptions, including a special rule of accrual for continuing violations.

¹⁰ EPA TSCA guidance at the time of Respondent's alleged violations provided fifteen business days to submit TSCA section 8(e)-reportable information to the Administrator. TSCA Section 8(e); Notice of Clarification and Solicitation of Public Comment, 58 Fed. Reg. 37,735 (July 13, 1993). Current EPA guidance allows for thirty calendar days. See TSCA Section 8(e); Notification of Substantial Risk; Policy Clarification and Reporting Guidance, 68 Fed. Reg. 33,129 (June 3, 2003).

¹¹ Complainant agrees with Respondent that TSCA does not contain its own statute of limitations for filing a claim and that 28 U.S.C. § 2462 is the applicable statute of limitations for a claim under section 8(e) of TSCA. However, in its Memorandum, Respondent erroneously describes the statute of limitations at 28 U.S.C. § 2462 as "EPA's five-year general statute of limitations." Resp't Memorandum at 2. This description is not wholly accurate. The statute of limitations at 28 U.S.C. § 2462 is the general federal statute of limitations which applies to a claim in the absence of a specific statute of limitations in a federal statute such as TSCA.

¹² "A claim normally accrues when the factual and legal prerequisites for filing suit are in place." 3M Co. v. Browner, 17 F.3d at 1460 (citing United States v. Lindsay, 346 U.S. 568, 569 (1954); Oppenheim v. Campbell, 571 F.2d 660, 662 (D.C. Cir. 1978)).

The doctrine of continuing violations is one of the recognized exceptions to the general rule of accrual. This special rule of accrual provides that a new claim accrues each day of the violation. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502 n.15 (1968); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). In applying the continuing violations doctrine, the EAB has repeatedly held that, for purposes of an Agency civil penalty action subject to the general federal five-year statute of limitations, a continuing violation first accrues not when the violation first occurs but when the illegal course of conduct is complete. See generally Harmon, 7 E.A.D. 1; Lazarus, 7 E.A.D. 318; Newell, 8 E.A.D. 598; In re Norman C. Mayes, RCRA Appeal No. 04-01, 12 E.A.D. 54 (EAB 2005).

1. The Environmental Appeals Board has adopted a test for determining whether a particular violation is a continuing violation.

The EAB has adopted a two-prong test to determine whether a particular violation is a continuing one for statute of limitations purposes. The Board first looks to the general language of the statute and the legislative history to determine whether the statute, or regulatory scheme, was “expected to give rise to continuing violations.” Harmon, 7 E.A.D. at 22–23. The EAB next turns to the specific violations alleged in the complaint to determine whether they are continuing in nature in light of the statutory language and applicable implementing regulations. Id. The touchstone of the Board’s examination of “whether a particular violation is a continuing one for the purpose of applying the statute of limitations must depend primarily on the nature of the violation itself.” In the Matter of Frontier Stone, Inc., CAA Docket No. II-0095-0105, 4 (March 1997); see generally Harmon, 7 E.A.D. 1; Lazarus, 7 E.A.D. 318; Newell, 8 E.A.D. 598; Mayes, 12 E.A.D. 54.

The EAB adopted its test to determine whether a particular violation is a continuing one in Harmon, a case involving four Resource Conservation and Recovery Act (RCRA) violations. In applying the first prong of the test, the EAB focused on language contained in the statutory

penalty provisions of RCRA to find that the Act “clearly contemplates the *possibility* of continuing violations.”¹³ Harmon, 7 E.A.D. at 22. After determining RCRA generally contemplated continuing violations,¹⁴ the EAB scrutinized the specific violations at issue under the second prong of the test. The Board found all four violations to be continuing in nature.¹⁵ Upon meeting both prongs of the test, the EAB held that the violations were continuing and the “illegal conduct continued into the limitations period preceding the filing of the complaint” Id. at 39. Thus, the Agency’s action in Harmon was not time-barred because the claim was filed within five years of the last day of the violation, even though the violation *began more than 10 years* before the claim was filed.

a. Under the Harmon test, TSCA and its legislative history demonstrate that Congress intended for continuing violations under TSCA.

With respect to applying the first prong of the Harmon test to the instant case, the EAB has clearly held that Congress intended for continuing violations under TSCA. The Board’s holdings are based on the TSCA penalty provisions that are the same ones that apply in this case, and which allow for penalties for each day a violation continues.¹⁶ Lazarus, 7 E.A.D. at 368

¹³ The EAB took special note of RCRA section 3008(g), which states: “[a]ny person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. *Each day of such violation* shall, for purposes of this subsection, constitute a separate violation.” Harmon, 7 E.A.D. at 22 (citing 42 U.S.C. § 6928(g)). The EAB also focused its attention on RCRA section 3008(a)(3), which provides “[a]ny penalty assessed in the order shall not exceed \$25,000 *per day of noncompliance* for each violation of a requirement in this subchapter.” Id. (citing 42 U.S.C. § 6928(a)(3)). In both instances, the Board concluded that Congress intended for continuing violations by “expressly contemplating daily penalties for a violation.” Id. at 23.

¹⁴ The EAB also reviewed the legislative history of RCRA, finding that the “RCRA regulatory scheme was expected to give rise to continuing violations.” Harmon, 7 E.A.D. at 23.

¹⁵ The four violations at issue in Harmon were: (1) failure to have a permit; (2) failure to have a groundwater monitoring program in place; (3) failure to obtain, establish or maintain financial assurance for facility closure and post-closure; and (4) engaging in disposal of hazardous waste activities without having notified the Administrator of such activities. Harmon, 7 E.A.D. at 1.

¹⁶ In Lazarus, the EAB focused on TSCA’s general penalty provision, which also applies to section 8(e) violations and is found at section 16(a)(1), which states, “[a]ny person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. *Each day of such violation* shall, for purposes of this subsection, constitute a separate violation.” 15 U.S.C. § 2615(a)(1) (emphasis added). The Board read TSCA’s general penalty provision as providing “evidence that Congress contemplated the possibility of continuing violations in TSCA.” Lazarus, 7 E.A.D. at 368.