IN RE HARMON ELECTRONICS, INC.

RCRA (3008) Appeal No. 94-4

FINAL ORDER

Decided March 24, 1997

Syllabus

Harmon Electronics, Inc. appeals from an Initial Decision assessing a civil penalty of $586,716 for various violations of the requirements of Missouri's authorized program under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992(k). The complainant is U.S. EPA Region VII. The violations alleged in the Region's complaint relate to Harmon's unpermitted disposal of hazardous waste at Harmon's facility in Grain Valley, Missouri. Between 1973 and 1987 Harmon's employees disposed of various organic solvents by pouring them out the back door of the facility. This disposal practice came to the attention of Harmon's management sometime in November of 1987, during a safety walk-through of the facility. Harmon's management then ordered an immediate halt to the disposal practice. Over the next six months consultants hired by Harmon investigated the extent of the contamination at the site and found that the soils at the site had been contaminated with freon, TCA, toluene, methyl chloride, and xylene. Harmon reported the disposal practice to the Missouri Department of Natural Resources ("MDNR") on June 27, 1988.

Following its own inspection of the site, MDNR informed Harmon that the site had been classified as a hazardous waste land disposal facility and that Harmon was therefore subject to the regulatory requirements governing land disposal facilities. Thereafter, despite several letters from the Region indicating that it considered these violations to be a high priority matter and urging MDNR to initiate enforcement proceedings seeking both compliance and the assessment of monetary penalties, MDNR entered into a consent decree with Harmon forgoing the pursuit of any monetary penalties. This decree was approved by the State court in March 1993. EPA was not a party to the consent decree.

On September 30, 1991, the Region filed a four-count administrative complaint alleging the following violations: (1) operation of a hazardous waste landfill without a permit or interim status, in violation of section 3005 of RCRA, 42 U.S.C. § 6925, and 40 C.F.R. part 270 (Count I); (2) failure to have a ground-water monitoring program for a hazardous waste landfill, in violation of 40 C.F.R. part 265, subpart F (Count II); (3) failure to establish and maintain financial assurance for closure and post-closure and liability coverage for sudden and non-sudden accidental occurrences at a landfill, in violation of 40 C.F.R. part 265, subpart H (Count III); and (4) failure to provide timely notification and/or register as a hazardous waste generator, in violation of section 3010(a) of RCRA, 42 U.S.C. § 6930(a) (Count IV). The Region proposed a penalty of $2,343,706 for these violations.

By accelerated decisions, the Presiding Officer found Harmon liable for all the alleged violations. The Presiding Officer then conducted a hearing on the issue of the appropriateness of the proposed penalty. In an Initial Decision dated December 12, 1994, the Presiding Officer

assessed a penalty of $586,716. In so doing, the Presiding Officer substantially reduced the Region's proposed multi-day penalties for all four counts of the complaint to reflect Harmon's self-reporting and cooperation with MDNR in the investigation and remediation of the site. Although the Region had already taken Harmon's self-reporting and cooperation into consideration in recommending an appropriate penalty amount, the Presiding Officer made further reductions. He also limited the penalties assessed to the five-year period preceding the filing of the complaint.

On appeal, Harmon raises the following issues: (1) whether the Region's enforcement action against Harmon is precluded by the language of RCRA and by principles of res judicata, because the State of Missouri had already taken action with respect to the same violations; (2) whether the Region's action against Harmon is barred by the general five-year statute of limitations at 28 U.S.C. § 2462 because all of the alleged violations were instantaneous and complete in 1980-82; (3) whether, in light of the Agency's self-policing policy (60 Fed. Reg. 66,706 (Dec. 22, 1995)), the gravity component of the penalty assessed against Harmon should be eliminated in its entirety, given that Harmon discovered and voluntarily reported its own violations and worked cooperatively with the State of Missouri to remedy the violations; (4) whether Harmon is liable for failing to obtain liability insurance after it ceased its hazardous waste management operations in 1987, and if it is liable, whether a penalty is appropriate; (5) whether the Presiding Officer's penalty assessment for Harmon's violation of the financial responsibility requirements, including an upward adjustment for bad faith, is appropriate; (6) whether, for purposes of determining an appropriate penalty, the Region failed to meet its burden of proof on the seriousness of the alleged violations.

Held: 1. The Region's enforcement action is not precluded either by the language of RCRA or by principles of res judicata. With regard to the language of RCRA, Harmon's assertion that EPA is prohibited from bringing an enforcement action in an authorized State where the State has already taken some action (a practice known as "overfiling") is rejected. It is well settled that RCRA provides the Agency with overfiling authority and Harmon has not offered any persuasive reasons to reopen this well-established reading of the statute. Further, Harmon's argument that the Region's action is barred by the doctrine of res judicata is rejected because the Region was not a party to the State's action nor was the Region in privity with the State.

2. Harmon's assertion that the violations at issue in this case were instantaneous and complete when they first occurred in 1980-82 is rejected. Rather, the violations were continuing in nature and the illegal conduct continued into the limitations period. Although RCRA does not explicitly state that violations of the Act are continuing, a review of the Act and its legislative history reveal that RCRA clearly contemplates the possibility of continuing violations. In addition, a review of the specific requirements that Harmon was charged with violating makes clear that Congress intended these requirements to impose continuing obligations. Thus, because Harmon's violations were continuing in nature and the illegal conduct continued into the limitations period, none of the Region's claims is barred by the applicable five-year statute of limitations at 28 U.S.C. § 2462.

3. The Agency's self-policing, self-reporting policy is intended as guidance in the settlement context and was not intended for use in the adjudicatory context. Allowing application of the policy in this vigorously contested adjudication would undermine the policy's settlement-encouraging features. The Presiding Officer adequately gave consideration to Harmon's disclosure of its RCRA violations by reducing Harmon's multi-day penalties by 66% and by increasing the Region's proposed reductions for good faith. The nature of the violations at issue in this case involve critically important requirements going to the heart of the RCRA program. It is inappropriate to grant any downward adjustments beyond that which the Presiding Officer has already awarded.

4. Harmon's assertion that it is not liable for failure to establish liability coverage after it ceased operations in 1987 is contrary to express language of the regulations at 40 C.F.R. § 265.147(e) and the Board's decision in *In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 319-320 (EAB 1994), and is therefore rejected.

5. The Presiding Officer's penalty determination has ample support in the record on appeal and the penalty is therefore affirmed.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Before us is an appeal of an administrative enforcement action brought pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992(k). Respondent Harmon Electronics, Inc. ("Harmon") has appealed an Initial Decision issued by Administrative Law Judge Frank W. Vanderheyden ("Presiding Officer") assessing a civil penalty against Harmon for various violations of the requirements of Missouri's authorized RCRA program.[1] In its appeal, Harmon raises the following issues: (1) whether the Region's enforcement action against Harmon is precluded by the language of RCRA and by principles of res judicata, because the State of Missouri has already taken action with respect to the same violations; (2) whether the Region's action against Harmon is barred by the general statute of limitations at 28 U.S.C. § 2462[2] because all of the violations charged in the First Amended Complaint first accrued more than five years before the Region commenced its action against Harmon; (3) whether, in light of the Agency's self-policing policy,[3] the gravity component of the penalty assessed against Harmon should be eliminated, given that Harmon discovered and voluntarily reported its own violations and worked cooperatively with the State of Missouri to remedy the violations; (4) whether Harmon is liable for failing to obtain liability insurance after it ceased its hazardous waste management operations in 1987, and, if Harmon is liable, whether a penalty is appropriate; (5) whether the Presiding Officer's penalty assessment for Harmon's violation of the financial responsibility requirements, including an upward adjustment for bad faith, is appropriate; and (6) whether the Region failed to meet its burden of proof on the serious-

[1] The State of Missouri has received authorization from EPA to administer a hazardous waste management program in lieu of the federal program, pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b), and 40 C.F.R. part 271, subpart A.

[2] For the text of 28 U.S.C. § 2462, see *infra* note 21. *See also 3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (holding that the general statute of limitations at 28 U.S.C. § 2462 is applicable to an administrative enforcement action for the assessment of a penalty, unless Congress has specifically provided for a different limitations period for the type of administrative action at issue).

[3] 60 Fed. Reg. 66706 (Dec. 22, 1995)(*Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*).

ness of the violations alleged in all the counts of the Region's First Amended Complaint.

For the reasons set forth below, Harmon's appeal is dismissed.

I. *BACKGROUND*

Harmon operates a facility in Grain Valley, Missouri ("the facility") where it assembles signal equipment for the railroad industry. From 1973, when Harmon began operating the facility, until November of 1987, Harmon's employees used organic solvents (specifically, 1,1,1-trichloroethane ("TCA"), freon, trichloroethylene ("TCE"), toluene, xylene and methylene chloride) to clean flux from the equipment being assembled. These solvents, when discarded, are classified as hazardous wastes under RCRA. Every one to three weeks, one of Harmon's maintenance workers would dispose of the unused solvents by throwing them out the back door of the facility onto the ground.

This disposal practice came to the attention of Harmon's management sometime in November of 1987, when Harmon's personnel manager was performing a routine Occupational Safety and Health Act ("OSHA") safety walk-through of the facility. Oral Argument Transcript at 7. Harmon's management ordered an immediate halt to the disposal practice, and in December of 1987, Harmon changed its assembly process so that it could use a nonhazardous cleaning material, rather than solvents. *Id*. at 8; Initial Decision at 6-7. As a consequence, Harmon ceased generating hazardous waste.

Soon after learning of the disposal practice, Harmon's management initiated an investigation of the disposal site, and over the next six months, hired several consultants to investigate the effects of the disposal practice. From these investigations, Harmon learned that there was contamination at the immediate disposal area. Initial Decision at 8. In May of 1988, one of those consultants, International Technology Corporation ("IT"), analyzed the previously collected data, and issued what is called the "Phase I Report." This report indicates that the soil at the site was contaminated with freon, TCA, toluene, methyl chloride, and xylene. *Id*. at 8-9.

On June 27, 1988, representatives of the Missouri Department of Natural Resources ("MDNR") met with representatives of Harmon and IT at Harmon's request. During this meeting, Harmon's representatives disclosed Harmon's practice of disposing of unused solvents out the back door of the facility. They also provided MDNR with a copy of the

Phase I Report. Subsequently, on August 1, 1988, a compliance inspection of Harmon's facility was conducted. As a result of this inspection, on August 9, 1988, MDNR sent a Notice of Violation ("NOV") to Harmon. It also sent a letter explaining that:

> The violations cited pertain to the improper disposal of hazardous waste onto the ground, the hazardous waste storage area, and the failure to comply with all standards applicable to generators of hazardous waste.

Letter from MDNR to Harmon (August 9, 1988), Respondent's Exhibit 11.

On November 1, 1989, MDNR sent Harmon a letter stating that Harmon's disposal site "is a hazardous waste land disposal facility, as defined in the state and federal hazardous waste laws and regulations." Letter from MDNR to Harmon (November 1, 1989), Respondent's Exhibit 33. In the letter, MDNR informed Harmon that, as a hazardous waste land disposal facility, Harmon was subject to the requirements of 40 C.F.R. part 265, which are incorporated by reference into Missouri's RCRA program, including "requirements and standards for land disposal facilities, groundwater monitoring, closure and post-closure, financial assurances, and general facility standards." *Id*. MDNR explained that its standard procedure was to issue an administrative order requiring a facility to comply with applicable standards. However, because of Harmon's voluntary disclosure and its cooperation in completing work to characterize the site, MDNR proposed that Harmon enter into a consent decree with MDNR, which would allow for more flexibility than an administrative order. *Id*.

On February 27, 1990, Harmon submitted a legal memorandum to MDNR, conceding that MDNR had legal authority to classify its facility as a hazardous waste land disposal facility under RCRA, but arguing that MDNR, as a matter of discretion, should forgo such a classification as a way of rewarding Harmon for voluntarily reporting its violations and encouraging other facilities to self-report. Respondent's Exhibit 37. By letter dated May 16, 1990, however, MDNR rejected Harmon's arguments, noting that it was already rewarding Harmon for its voluntary disclosure by forgoing pursuit of monetary penalties and by offering Harmon the opportunity to enter into a consent decree. Letter from MDNR to Harmon (May 16, 1990), Respondent's Exhibit 40. The letter also stated that Harmon must come into compliance with RCRA and other laws and regulations governing hazardous waste disposal within 60 days. *Id*.

By letter dated May 29, 1990, U.S. EPA Region VII, which has an oversight role in State RCRA programs,[4] informed MDNR that the EPA considered Harmon a high priority class I violator under EPA's RCRA Enforcement Response Policy, and that it expected MDNR to expedite its enforcement of Harmon's violations, including the assessment of monetary penalties. The letter concluded that if MDNR did not initiate an enforcement action within 30 days, the Region would consider initiating its own enforcement action against Harmon. See Letter from EPA to MDNR (May 29, 1990), Complainant's Exhibit 3.[5] On October 15, 1990, the Region sent another letter to MDNR, this time stating that if MDNR did not initiate an enforcement action within 30 days, the Region would take its own action. Letter from EPA to MDNR (October 15, 1990), Complainant's Exhibit 3.

Finally, on September 30, 1991, the Region did bring the instant action against Harmon, filing an administrative complaint consisting of four counts and alleging the following violations: (1) operation of a hazardous waste landfill without a permit or interim status, in violation of section 3005 of RCRA, 42 U.S.C. § 6925, and 40 C.F.R. part 270 (Count I); (2) failure to have a groundwater monitoring program for a hazardous waste landfill, in violation of 40 C.F.R. part 265, subpart F (Count II); (3) failure to establish and maintain financial assurance for closure and post-closure and liability coverage for sudden and nonsudden accidental occurrences at a landfill, in violation of 40 C.F.R. part 265, subpart H (Count III); and (4) failure to provide timely noti-

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[4] EPA's oversight role is discussed *infra* at part II, section A of this opinion.

[5] The letter reads in pertinent part as follows:

> We consider [Harmon's RCRA violations] to be High Priority Class I Violations in accordance with criteria specified in the National Enforcement Response Policy. Our staffs agree this is the proper classification for this facility.
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> The time frames provided in the Enforcement Response Policy for timely enforcement action have elapsed. More than 195 days have passed since the violations were originally noted. The EPA expects that MDNR will fully expedite the formal enforcement and attainment of penalties for this facility. EPA is aware the State of Missouri does not have administrative penalty authority. We understand penalties are obtained either in settlement agreements or through a judicial filing by the Office of the Attorney General. If MDNR fails to take formal enforcement action within thirty (30) days of receipt of this letter, which shall also include the filing for or attainment of monetary penalties, then EPA may initiate an enforcement action against this facility.

fication and/or register as a hazardous waste generator, in violation of section 3010(a) of RCRA, 42 U.S.C. § 6930(a) (Count IV).

After the Region had filed its complaint, a Missouri Circuit Court judge entered a consent decree, dated March 5, 1993, approving a settlement agreement between Harmon and the State of Missouri. The Consent Decree provides in part as follows:

> WHEREAS, Harmon specifically denies the allegations of fact and conclusions of law contained in plaintiff's petition; and
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> WHEREAS, Harmon, without adjudicating or admitting any issue of fact or law herein, agrees with plaintiff to the entry of this Consent Decree in settlement of the petition.
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> In addition, the provisions of this Consent Decree shall apply to all persons, firms, corporations and other entities who are or will be acting in concert and in privity with, or on behalf of, the parties to this Decree or their servants, employees, successors and assigns.

Respondent's Exhibit 82 (emphasis added). EPA was not a party to either the settlement agreement or the consent decree.

After the consent decree between Harmon and the State of Missouri was entered, the Region filed two motions in its enforcement action against Harmon, which it had initiated in 1991. One motion sought a partial accelerated decision ("PAD") as to liability for all counts, and the other asked the Presiding Officer to strike the affirmative defenses raised in Harmon's answer. On August 17, 1993, the Presiding Officer issued an order granting the Region's PAD motion with respect to Counts I, II, and IV. As for Count III, the Presiding Officer granted the Region's motion with respect to financial assurance for closure and post-closure, but ruled that the complaint had not adequately alleged a failure to obtain liability coverage for sudden and non-sudden accidental occurrences. In addition, the Presiding Officer granted the Region's motion to strike certain affirmative defenses. With the Presiding Officer's approval, the Region then filed the First Amended Complaint, dated October 29, 1993, to cure the pleading deficiency in Count III and to adjust the proposed penalty amount to reflect changes in the method of calculating the economic

benefit of noncompliance. The Presiding Officer later granted the Region's renewed motion for a partial accelerated decision with respect to the revised Count III, relating to the failure to obtain coverage for sudden and non-sudden accidental occurrences.

Having thus disposed of all liability issues, the Presiding Officer conducted an evidentiary hearing on January 12-14, 1994, solely on the issue of the appropriateness of the proposed penalty. At the conclusion of the hearing, the Presiding Officer issued an Initial Decision, in which he rejected the proposed penalty of $2,343,706 and assessed a much lower penalty of $586,716. The Presiding Officer reduced the multi-day penalties for all four counts of the First Amended Complaint to reflect Harmon's self-reporting and cooperation with MDNR in the investigation and remediation of the site. Initial Decision at 41-42, 51, 54-55, 59.

Harmon then filed this appeal in a timely fashion. Opening Brief of Appellant Harmon Electronics ("Harmon's Brief"). The Region filed a reply brief (Reply Brief of the United States Environmental Protection Agency ("Region's Reply")), and Harmon filed a response to the Region's reply brief (Appellant Harmon's Response to USEPA's Reply Brief ("Harmon's Response")). The Board also received an amicus brief on the overfiling issue filed jointly by Bridgestone/Firestone, Inc. and Laidlaw Environmental Services, Inc. On May 1, 1996, the Board held oral argument on the issues relating to overfiling, self-reporting, and the statute of limitations.[6]

II. *DISCUSSION*

A. *The Overfiling Issue*

On appeal, Harmon challenges the Region's authority "to assess penalties and issue a compliance order when the State of Missouri has issued a consent decree concerning the same RCRA violations and determined not to assess penalties because of Harmon's voluntary disclosure." Harmon's Brief at 5. In support of its challenge, Harmon

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[6] When it first scheduled oral argument, the Board consolidated this appeal for purposes of oral argument with the interlocutory appeal in *In re The Beaumont Co.*, Docket No. RCRA-III-238 (ALJ, Oct. 20, 1994) (Interlocutory Order) because the *Beaumont* appeal also involved overfiling issues. Before the oral argument was held, however, respondent The Beaumont Company moved from its last known address, failing to notify the Board of its new address. The Board was unable to notify The Beaumont Company that the oral argument had been rescheduled. Accordingly, the Board separated the two cases, and canceled the oral argument in the *Beaumont* case. *See* Order Rescheduling Oral Argument (April 1, 1996).

makes two separate arguments, one based on the language of RCRA and one based on principles of res judicata. The argument based on the language of RCRA is as follows:

> [I]n bringing this action, EPA disregards the plain language of RCRA § 3006, which provides that authorized State programs operate "in lieu of" the federal program and that any action taken by a State under its authorized hazardous waste program "shall have the same force and effect" as actions taken by EPA. RCRA § 3006(b) and (d). Consequently, when an authorized state has taken action to enforce its hazardous waste laws, as MDNR took against Harmon, § 3006 requires EPA to give "force and effect" to such action. EPA's action against Harmon and the Initial Decision violate the plain language of § 3006 by giving Missouri's actions no force or effect.
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> Thus, when reading § 3006 together with § 3008, EPA may not overfile when the state has taken actions to enforce its hazardous waste program which must be given full force and effect. EPA may overfile when the state had taken no enforcement actions. If EPA believes the state's enforcement actions are inadequate, then EPA must withdraw authorization pursuant to § 3006(b) and (e).

Harmon's Brief at 43-45. We need not dwell for long on this statutory argument. It is well settled that, even when the authorized State has taken action, RCRA nevertheless authorizes the Agency to take its own action.[7]

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[7] This issue received in-depth consideration by EPA as early as 1986, when EPA's General Counsel rendered a legal opinion that addressed the same arguments that Harmon is raising now and concluded that RCRA authorizes the Agency to bring an action in an authorized State even if the State has already prosecuted the same respondent for the same violations. Memorandum entitled: "Effect on EPA Enforcement of Enforcement Action Taken By State With Approved RCRA Program" from Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator (May 9, 1986) ("Blake Memorandum"). Since that time, numerous Agency decisions have affirmed this position. *See, e.g., In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (EAB 1994) ("Nevertheless, under the statute, even if the State brings an enforcement action for violations of the State's program, the Agency retains authority to bring its own enforcement action for such violations."); *In re Southern Timber Prod., Inc.*, 3 E.A.D. 371, 378 (JO 1990) ("The Agency has long interpreted RCRA as authorizing a federal

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Harmon has not offered any persuasive reasons to reopen this well-established reading of the statute, and we decline to do so.[8]

We turn therefore to Harmon's second argument, which is based on principles of res judicata. Harmon contends that the Region's enforcement action is precluded by principles of res judicata because "MDNR's enforcement actions against Harmon included a Missouri Consent Decree which was signed by the Honorable David W. Shinn, Jackson County, Missouri Circuit Court Judge, on March 5, 1993." Harmon's Brief at 45-46. Harmon argues further that:

> In the context of this case, the full faith and credit statute, 28 U.S.C. § 1738, requires that federal courts give "the same preclusive effect to a prior state court judgment that the state court would give to the judgment." *United States v. Bliss*, 1988 WL 169817 (E.D. Mo. Sept. 27, 1988). Therefore, a federal court must apply Missouri law regarding res judicata. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984). It stands to reason that in this action, the Board must also follow Missouri law concerning res judicata. *See In the Matter of Beaumont*, 1994 WL 711200, RCRA Docket No. III-238, (Oct. 20, 1994)(ALJ applying West Virginia law to res judicata analysis).

Harmon's Brief at 45 n.13.

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enforcement action in an authorized State even where the State has 'acted' in some limited fashion. * * * [N]othing in the statute precludes federal enforcement to secure an adequate penalty."); *In re Martin Electronics*, 2 E.A.D. 381, 385 (CJO 1987) ("[E]ven if a State's enforcement action is adequate, such State action provides no legal basis for prohibiting EPA from seeking penalties for the same RCRA violation. EPA's decision to defer to prior State action is a matter of enforcement discretion and policy."). In addition, the regulations implementing RCRA clearly contemplate federal enforcement when the parallel action of an authorized State results in an inadequate penalty. *See* 40 C.F.R. § 271.16(c) ("Note: To the extent the State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties."). Finally, the Agency's authority to bring an action, even after State action for the same violation, has also been upheld at the judicial level. *See, e.g., EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

[8] It should be noted that, while EPA has statutory authority to overfile, "it is entirely appropriate and consistent with RCRA for EPA, as a matter of discretion, to avoid taking civil enforcement action if a state has taken timely and appropriate enforcement action." Blake Memorandum at 11.

In response to Harmon's challenge, the Region contends that the principles of res judicata apply only to claims that have been adjudicated.[9] The Region asserts that the Missouri case law relied on by Harmon does not recognize the Missouri-Harmon consent decree as an adjudication to which res judicata would apply. By its own terms, the Region contends, the consent decree resolves no issues of fact or law. Region's Reply Brief at 58. The Region also contends that the doctrine of res judicata only applies to persons who were parties to the former adjudication or to their privies. The Region argues that EPA is neither a party to the consent decree nor in privity with the State of Missouri. *Id*. at 59.[10]

After careful consideration of the arguments of the parties, we conclude that the Region is not precluded by principles of res judicata from bringing this enforcement action. The full faith and credit statute at 28 U.S.C. § 1738 requires the Board to give the same preclusive effect to the consent decree that the courts of Missouri would give it. To determine what the courts of Missouri would do, we must consult the Missouri case law on res judicata. Based on our review of the case law, we conclude that Missouri courts would not give any preclusive effect to the consent decree in this case because the Region was not in privity with the State of Missouri with respect to the consent decree.

Missouri law provides that "[r]es judicata prevents a party or privy from relitigating facts or questions in issue in a former action between the same parties which has been settled by judgment on the merits." *Clements v. Pittman*, 765 S.W.2d 589, 591 (Mo. 1989). Res judicata

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[9] The Region is joined in this position by EPA's Office of General Counsel and Office of Enforcement and Compliance Assurance.

[10] In its reply brief, the Region suggests that the consent decree cannot have any preclusive effect on the Region's action because the Region's action was commenced before the consent decree was entered. In support of this argument, the Region states that "the body of case law on this issue deals only with actions filed *subsequent* to a prior adjudication." Region's Reply Brief at 54. Harmon responds that:

> Under the Restatement (Second) of Judgments § 14, it is clear that, for purposes of res judicata, "the effective date of a final judgment is the *date of its rendition*, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect."

Harmon's Response to Region's Reply Brief at 21. The Region has not cited, and we have not found, any authority to suggest that the Restatement provision quoted above is not an accurate statement of the law. Accordingly, the Region's argument is rejected.

applies to a non-party only if the non-party is in privity with a party. *Id*. "Privity connotes those who are so connected with the party to the judgment as to have an identity of interest that the party to the judgment represented the same legal right." *Id*. Privity, however, "is not established from the mere fact that persons may happen to be interested in the same question, or in proving or disproving the same state of facts." *American Polled Hereford Ass'n v. City of Kansas City*, 626 S.W.2d 237, 241 (Mo. 1982).

In its appeal brief, Harmon bases its claim of privity on the State authorization relationship between the Agency and the State of Missouri. Harmon contends that State authorization, in and of itself, creates a relationship of privity for purposes of res judicata.

> It is undoubtedly clear under the RCRA statutory framework, that the State of Missouri, when administering its hazardous waste program pursuant to authority granted to it by EPA under RCRA § 3006, acts as EPA's agent and representative and, consequently, the parties are in privity. *See Beaumont*, p. 11 (by virtue of RCRA § 3006(d), the authorized state was EPA's representative as a matter of law in the prior state proceeding).
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> Under RCRA § 3006(b), EPA and Missouri, as an authorized state, have identical interests in enforcing the RCRA regulations as incorporated by reference in Missouri. For a state to receive authorization under RCRA § 3006(b), it must demonstrate that the state program is equivalent to the federal program and that the state program will provide adequate enforcement of hazardous waste regulations. By virtue of the authorization provisions of RCRA, both EPA and Missouri have the same interest in enforcing compliance with the state hazardous waste program.

Harmon's Response to Region's Reply Brief at 19.[11]

The Region counters that, for a number of reasons, State authorization alone does not ensure that the Agency's interests will be identical to those of the authorized State. First, the Region points out that EPA has an interest in national uniformity in the enforcement of RCRA

[11] The case mentioned in the quotation is *In re The Beaumont Co.*, Docket No. RCRA-III-238 (ALJ, Oct. 20, 1994) (Interlocutory Order).

requirements. *National Criteria for a Quality Hazardous Waste Management Program*, OSWER No. 9545.00-1 (revised June 1986) at 29. This concern is reflected in the imposition of national minimum standards for hazardous waste management in RCRA and in the requirement that a State adopt "equivalent" state standards as a prerequisite for authorization.[12] The Region points out that some States might not share the Agency's concern for nationwide uniformity and in fact might be far less interested in enforcing strict, nationally-consistent hazardous waste management standards than in encouraging regulated industries to remain in or relocate to the State, thereby preserving or bolstering the State's economy.

The Region also contends that EPA has an interest in deterring non-compliance through the assessment of penalties in a manner consistent with EPA's 1990 *RCRA Civil Penalty Policy*. Under that policy, some types of violations call for $20,000-25,000 per day of violation. The Region points out, however, that in significant, high priority cases a State may not share EPA's interest in imposing penalties at or approaching this level, and in some cases, a State may not even have the authority to assess such penalties, since it is possible for a State to obtain authorization under RCRA § 3006 with a maximum civil penalty authority of only $10,000 per day per violation. 40 C.F.R. § 271.16 (a)(3)(i).

The Region also points out that EPA may have national enforcement priorities that differ from those of an authorized State, and that even when EPA and an authorized State have common enforcement interests, economic and resource considerations may make it difficult or impossible for an authorized State to represent EPA's interests adequately or as well as EPA would represent such interests in its own enforcement action.[13]

Based on the Region's arguments, we are persuaded that State authorization alone does not ensure an identity of interests between the Agency and the State for purposes of establishing privity. Although the Agency and an authorized State are charged with enforcing the same regulatory scheme, and often share common interests, to assume that the Agency and the State government will always have identical

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[12] In this regard, a determination that a State has adopted adequate standards for purposes of obtaining authorization does not obviate the need for the Agency to assure that these standards are also adequately implemented.

[13] The arguments outlined in the text *supra* are incorporated into the Region's *Harmon* brief as Attachment A. Region's Reply at 52.

interests and concerns in the enforcement of individual matters within that regulatory scheme would ignore political barriers and fiscal realities. For example, there are instances where compliance problems within a State may go unaddressed or be inadequately addressed for resource or other reasons. There may also be cases where environmental violations within a State pose problems in other States, or across the nation as a whole (*e.g.*, where a single company has violated federal environmental laws in many States). Thus, the interests of a State will often differ from those of the Agency. Because many enforcement decisions are a matter of discretion, it is important that the possibility of EPA enforcement be available as a backstop to ensure that wrongdoing is properly addressed and to fully vindicate federal interests.[14] Further, the reservation of overfiling authority to EPA where a State has not taken adequate action would be rendered meaningless if res judicata automatically (by virtue of State authorization alone) operated to preclude EPA action. We conclude, therefore, that State authorization alone cannot ensure an identity of interests between the Agency and the authorized State, even where the State has taken some action against the same respondent.

That conclusion, however, does not end our inquiry. It remains to be determined whether, in the particular circumstances of this case, an identity of interests existed between the Region and the State of Missouri with respect to the consent decree.[15]

At oral argument, Harmon emphasized that the Region did not have significant involvement in the State's dealings with Harmon.[16] The implication Harmon wishes us to draw from this argument is that,

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[14] We note that our conclusion in this regard only addresses the narrow issue of whether State authorization, by itself, precludes EPA from overfiling. In concluding that it does not, we do not mean to imply that it is necessary or appropriate for EPA to exercise its overfiling authority in all cases where the State has not sought precisely the same relief as EPA would have. On the contrary, this is a policy determination that must be made on a case-by-case basis. *See supra* note 8.

[15] We note that during oral argument, the Agency conceded that there are circumstances under which Agency action could be barred by principles of res judicata. Oral Argument Transcript at 51 ("Were EPA controlling the state action in some way, yes, I think the particular facts would have to be looked at.").

[16] Oral Argument Transcript at 10, 12-13, 27 ("EPA, in fact, worked through MDNR."), 27-28 ("Harmon worked directly with MDNR and was never aware of EPA's oversight except in a couple of meetings where maybe EPA would come and join."), 28 ("But, clearly, they [at EPA] were leaving, and to this day leave, the State of Missouri totally in control of the actual technical activities and remediation at this site."), 28 ("We have not seen or heard of them on any issues which we may or may have not agreed or disagreed with MDNR."), 29.

if the Region had believed that its interests were not being represented by the State, it would have intervened to a much greater extent than it did. The Region's lack of involvement, Harmon believes, suggests that it was satisfied with the State's handling of the case.

This argument, however, ignores the Region's repeated communications to MDNR concerning the assessment of penalties against Harmon. For example, on May 29, 1990, the Region sent a letter to MDNR, stating that the Region considered Harmon a high priority class I violator under EPA's RCRA Enforcement Response Policy. The letter further stated that the Region expected MDNR to expedite its enforcement of the violations including the assessment of monetary penalties. The letter concluded that if MDNR did not initiate an enforcement action within 30 days, seeking both compliance and the assessment of a penalty, the Region might initiate its own enforcement action against Harmon.[17] The Region sent another letter to MDNR on October 15, 1990, this time stating that if MDNR did not initiate an enforcement action within 30 days, the Region *would* take its own action.[18] Despite these communications from the Region, the State of Missouri signed the consent decree, which does not require Harmon to pay any penalties.[19]

Thus, before the entry of the consent decree, the Region unequivocally expressed its interest in having substantial penalties assessed against Harmon (later proposing a penalty in excess of $2.3 million). The State, on the other hand, expressed its interest in rewarding Harmon for what the State viewed as Harmon's self-reporting of the violations charged in this action by settling the matter without penalties. Given this clash of interests over the propriety and amount of penalties, we conclude that no identity of interests existed between the Region and the State of Missouri with respect to the entry of the consent decree. In other words, the particular circumstances of this case do not establish a relationship of privity between the Region and the State.

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[17] *See supra* note 5 (Letter from EPA to MDNR (May 29, 1990), Complainant's Exhibit 3).

[18] *See* Letter from EPA to MDNR (Oct. 15, 1990), Complainant's Exhibit 3.

[19] Given that the State chose to disregard the Region's wishes, it certainly cannot be said that the State was acting as an agent for EPA or a representative of EPA. *Cf. United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1002-04 (9th Cir. 1980)(holding that EPA was in privity with State agency charged with administering Washington State's approved NPDES program, where EPA had prompted the State agency to bring an enforcement action in State court and where the State agency vigorously asserted EPA's position in the State proceedings).

Moreover, even absent the clear expression by EPA of the divergence of interests in this case, we would not be persuaded by Harmon's argument that a lack of EPA presence connotes privity. This conclusion is consistent with the decision of the Agency's Chief Judicial Officer in a similar case, *In re Martin Electronics, Inc.*, 2 E.A.D. 381, 385-86 (CJO 1987). In that decision, the Chief Judicial Officer rejected an argument based on principles of res judicata because privity had not been established:

> Furthermore, for *res judicata* or collateral estoppel to apply, the estopped party must have been a party or in privity with a party to the prior adjudication. In this case EPA was not in privity with the State agency. The record shows that EPA involvement with the state consent order was minimal and only concerned the appropriate number of groundwater monitoring wells required by Florida law. EPA's approval of the consent order was not required and EPA did not approve the agreement. EPA's interests in national consistency in enforcement actions differed from the State's interest which led to settlement with no penalties. Certainly it cannot be said that the State was acting as an agent for EPA or a representative of EPA. *Cf. U.S. v. ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980).

Id. at 386, n.8.

In sum, the Board is of the view that EPA was not in privity with Missouri when that State took action against Harmon, either by virtue of State authorization alone or by virtue of the particular circumstances of this case. EPA is not bound under the doctrine of res judicata by the results of that State's actions and is therefore not precluded from bringing the challenged action.[20]

B. *The Statute of Limitations*

As previously stated, after an evidentiary hearing on the issue of an appropriate penalty, the Presiding Officer assessed a penalty of $586,716. In so doing, the Presiding Officer held that the violations at issue in this case were continuing ones. Initial Decision at 30-31.

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[20] Because we conclude that there is an absence of privity between EPA and the State, we need not reach the issue of whether Missouri law recognizes the Missouri-Harmon consent decree as an adjudication to which res judicata would apply.

Nevertheless, the Presiding Officer stated that the general five-year statute of limitations at 28 U.S.C. § 2462[21] is "germane to the assessment of penalties in this proceeding," and he only assessed penalties for violations occurring within five years from the date the initial complaint was filed, September 30, 1991.[22] Initial Decision at 31.

The statute of limitations requires that an action such as this one be commenced within five years from the date the claims raised in the action "first accrued." 28 U.S.C. § 2462. Harmon argues that the violations it is charged with committing "first accrued" for purposes of 28 U.S.C. § 2462 between 1980-82, when Harmon first became subject to RCRA's permitting and other requirements but neglected to file the required notifications necessary to obtain interim status and a permit or to comply with Act's groundwater monitoring or financial assurance requirements. Because EPA did not institute the instant enforcement action until more than five years after Harmon first became subject to RCRA's permitting and other requirements, Harmon argues that the action must now be dismissed in its entirety as untimely.

Harmon does not dispute the fact that the elements establishing the violations in 1980-82 were equally present in 1987.[23] In other words, there is no dispute in the record that Harmon was the owner

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[21] 28 U.S.C. § 2462 provides as follows:

> 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.

After the evidentiary hearing in this case, the United States Court of Appeals for the District of Columbia issued a decision in *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994), holding that the five-year statute of limitations at 28 U.S.C. § 2462 is applicable to an administrative enforcement action for the assessment of a penalty, unless Congress has specifically provided for a different limitations period for the type of administrative action at issue.

[22] In this case, the Presiding Officer limited the assessment of penalties to the five-year period preceding the filing of the initial complaint in 1991. Initial Decision at 32. The Presiding Officer appears to assume that the statute of limitations precluded him from doing otherwise. The Region did not appeal from this determination. Therefore, in ruling on whether a cause of action for each of the violations alleged in this case is time barred, we do not need to decide whether a penalty could have been assessed for the entire period of violation, including that period more than five years prior to the filing of the initial complaint.

[23] The statutory and regulatory provisions at issue for each of the alleged violations are discussed *infra* in the text.

and operator of an active hazardous waste management facility in 1980-82, and that Harmon was still the owner and operator of the same active facility in 1987. In fact, the record demonstrates that these elements existed continuously throughout the entire 1980-87 period and that at no time during that period did Harmon ever have interim status or a permit for the facility.

Harmon argues that all four counts of the First Amended Complaint are nevertheless barred under the statute of limitations because each alleged violation was "complete and instantaneous," and therefore had accrued, the moment Harmon first became subject to the applicable requirements. As explained by Harmon:

> In this case, the failure to submit a hazardous waste notification (Count IV) and permit application (Count I) are violations which were complete and instantaneous in November of 1980, when they were due under EPA's regulations. The groundwater and financial regulations promulgated by 1982 (Counts II and III) are part of the permit and/or interim status requirements and, likewise, violations of these requirements were instantaneous and complete at the moment they were required. Thus, after 1982 at the latest, there was no RCRA violation which is the subject of EPA's penalty claim that had not already been completed.

Harmon's Brief at 33-34.[24] According to Harmon, the violations were not "continuing violations." *Id*. at 31. See Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 Ecology L.Q. 723, 724 (1996) (defining a continuing violation as "a series of illegal acts united by a common mechanism or a continuing course of illegal conduct"). Therefore, since the Region's complaint was filed in

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[24] The effective date of the applicable regulations are detailed in the Initial Decision as follows:

> For counts I and IV - the regulations became effective on November 19, 1980. Section 3005(e) of RCRA, 42 U.S.C. § 6925(e) and 40 C.F.R. § 270.70; for count II - the regulations became effective on May 19, 1981. 45 Fed. Reg. 33,232 (May 19, 1980); for count III - the regulations became effective for financial assurance for closure and post-closure care on July 6, 1982, and for sudden and non-sudden accidental occurrence coverage on July 15, 1982. 47 Fed. Reg. 15,032 (Apr. 7, 1982) and 47 Fed. Reg. 16,544 (Apr. 16, 1982).

Initial Decision at 21 n.5.

1991, more than five years after the alleged violations originally occurred, Harmon argues that the four counts of the complaint are barred by the statute of limitations.

A review of the general subject of statutes of limitations discloses that the question of when an action accrues is subject to numerous different rules, interpretations, and exceptions. *See generally*, *Developments in the Law — Statutes of Limitations*, 63 Harv. L. Rev. 1117 (1950). Not unexpectedly, there are conflicting court decisions over the resolution of seemingly identical issues. *Compare, e.g.*, *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985) (holding that the 5-year statute of limitations in 28 U.S.C. § 2462 runs from the date of the violation, rather than from the date of the administrative assessment of the sanction) *with United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987) (date penalty is subsequently imposed, rather than date violation occurs, triggers the 5-year statute of limitations of 28 U.S.C. § 2462). Moreover, in searching for applicable precedents, caution must be exercised because "[c]ases dealing with other limitations statutes are of extremely limited value; as stated by the Supreme Court in *Crown Coat Front Co. v. United States*, 386 U.S. 503, 87 S. Ct. 1177, 18 L. Ed. 2d 256 (1967)." *Core Laboratories, Inc.*, 759 F.2d at 481. With the foregoing caveats in mind, we proceed to examine the case law for relevant insights and precedents in construing 28 U.S.C. § 2462 as it pertains to the RCRA violations alleged in the First Amended Complaint.

Under this statute of limitations, the government is barred from maintaining an action to enforce a civil penalty or fine, *inter alia*, unless the action is commenced within five years of "the date when the claim first accrued." 28 U.S.C. § 2462. Stated in its simplest terms, "[a] cause of action 'accrues' when a suit may be maintained thereon." *Black's Law Dictionary* 21 (6th Ed. 1990). "A claim normally accrues when the factual and legal prerequisites for filing suit are in place." *3M Co. v. Browner*, 17 F.3d 1453, 1459 (D.C. Cir. 1994) (case of an alleged violation of a regulatory requirement under the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601, *et seq.*) (*citing United States v. Lindsay*, 346 U.S. 568, 569 (1954); *Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978)). Thus, in the case of an automobile collision resulting in personal injury, the cause of action for negligence accrues on the day of the collision, which coincides with the day on which the injury is sustained. *Black's Law Dictionary* 21 (6th Ed. 1990) (a cause of action "accrues," "on date that damage is sustained and not date when causes are set in motion which ultimately produce injury."). In other cases, the injury may not become apparent immediately, as when a worker is exposed to hazardous chemicals

that have a long latency period before producing an injury, such as an illness like cancer. In those cases, it has been held that the cause of action accrues when the injury either is, or should have been, discovered. *See generally,* Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 Harv. L. Rev. 1683 (1983). A special rule is also applicable in cases where the wrongful conduct is of the type that is capable of continuing for a period of time, such as the possession of illicit drugs. *See United States v. Blizzard*, 27 F.3d 100, 102 (4th Cir. 1994) ("The government may prosecute a person who continues to possess unlawful drugs irrespective of the date he first possessed them."). In those cases, the violation accrues on the last day conduct constituting an element of the violation takes place. In other words, the violation does not begin to accrue for statute of limitations purposes until the accused no longer possesses the illegal drugs.[25] The parties in the instant proceeding have argued at length over whether this case is controlled by the doctrine of continuing violations and, if so, how to properly apply the doctrine to the facts and circumstances presented here. We now turn to that subject.

A continuing violation accrues when the course of illegal conduct is complete, not when an action to enforce the violation can first be maintained. *See United States v. Rivera-Ventura,* 72 F.3d 277, 281 (2d Cir. 1995) ("A 'continuing offense' is, in general, one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course. * * * Though some conduct, even before it is concluded, may fit the statutory definition of a crime, thereby permitting institution of a prosecution before the offense is complete * * * the limitations period for a continuing offense does not begin until the offense is complete * * *.") (citations omitted); *United States v. Collins*, 1991 U.S. App. LEXIS 3575, at *47 (6th Cir. Feb. 26, 1991) ("When the period specified in a continuing offense spans the statute of limitations period, * * * the crime is not barred by the statute of limitations as long as the proscribed course of conduct continues into the

[25] The continuing violations doctrine has been applied not only in the statute of limitations context but also to determine whether a citizen's suit satisfies the jurisdictional requirements of the Clean Water Act, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), and to calculate the amount of penalties that may be imposed for violations that span a period of time. *See generally* Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 Ecology L.Q. 723 (1996). The utility of these cases in the statute of limitations context has been questioned. *See United States v. Telluride Co.*, 884 F. Supp. 404, 407 (D. Colo. 1995) (observing that none of the cases cited by the government in support of its continuing violation contention addressed the doctrine in the context of the statute of limitations).

limitations period."); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 597 (9th Cir.) ("'Continuing wrongs,' however, are repeated instances or continuing acts of the same nature * * *."), *cert. denied*, 498 U.S. 824 (1990); *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) ("[A] statute of limitation does not begin to run on a continuing wrong till the wrong is over and done with * * *."); *Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp. 253, 256 (N.D. Ind. 1993) ("The continuing claim doctrine prevents the statute of limitations from protecting an offender in an ongoing wrong, and avoids claims that would be barred because they began before the statutory period."). Several courts have held that the continuing violations doctrine applies to civil penalty cases subject to the general five-year statute of limitations in 28 U.S.C. § 2462. *See, e.g., Sasser v. EPA*, 990 F.2d 127 (4th Cir. 1993) (holding that the administrative complaint properly charged a continuing violation under the Clean Water Act); *United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996) (holding that unpermitted discharge of fill material is a continuing violation that tolls the five-year statute of limitations under 28 U.S.C. § 2462 for purposes of assessing civil penalties).[26]

Given that a continuing violation tolls the running of the five-year limitation period in 28 U.S.C. § 2462, it is readily apparent that the date when a violation "first accrues" is not to be confused with the date when a violation "first occurs." Because of the tolling effect, a claim for civil penalties in a case to which the continuing violations doctrine applies may be maintained at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed. Harmon is guilty of either not understanding or obfuscating the distinction between these dates, for it cites *3M* for the proposition that accrues "means the point in time at which a cause of action *first exists* * * *." Harmon's Brief at 28 (emphasis added).[27] If this proposition were true for all situations (which plainly is not the case) then there would be a clear inconsistency in the case law between cases applying the doctrine of continuing violations and those applying the

[26] Dicta in *3M* suggests that the continuing violations doctrine would not apply to the Toxic Substances Control Act violations at issue therein. 17 F.3d at 1455 n.2 (expressing "considerable doubt" regarding the applicability of the continuing violations doctrine). The *3M* Court did not decide that issue. Although the Supreme Court case on which this dicta relies (*Toussie v. United States*, 397 U.S. 112 (1970)) did not involve 28 U.S.C. § 2462, it is nevertheless discussed later in this decision.

[27] As discussed more fully *infra* n. 34, Harmon's "first occurs" or "first exists" argument, if accepted, would convert a statute of limitations intended to prevent stale claims into a shield against penalties resulting from unlawful conduct that occurred well within the five-year limitations period.

rule of accrual in *3M*. In point of fact, however, there is no inconsistency; the continuing violations doctrine is simply a recognized *exception* to the general rule. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 (9th Cir. 1984) (a continuing violation is an "exception" to the general rule of accrual).[28]

Having shown that the date when a violation first accrues under the general five-year statute of limitations is not to be confused with the date when the violation first occurs, we next turn to a consideration of whether RCRA itself contemplates the existence of continuing violations and whether the specific violations alleged are continuing in nature.[29]

Although RCRA does not contain any explicit language stating that violations under the Act are continuing, it does contain language that clearly contemplates the *possibility* of continuing violations. This language appears in two separate enforcement provisions, both found within § 3008 of RCRA:

> Any 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.

RCRA § 3008(g), 42 U.S.C. § 6928(g) (emphasis added), and:

> Any penalty assessed in the order shall not exceed $25,000 *per day of noncompliance* for each violation of a requirement of this subchapter.

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (emphasis added). As a matter of statutory interpretation, it seems inescapable that these provisions are intended to encompass violations that either continue without interruption from one day to the next or are repeated on a regular or inter-

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[28] In the present case, when the ALJ ruled that the four counts of the complaint alleged continuing violations, he plainly did not rule that the general rule of accrual did not exist; rather, he merely applied a well-recognized exception to the general rule, finding that EPA's case did in fact fit within this particular exception.

[29] Because 28 U.S.C. § 2462 is a general statute of limitations, applicable to numerous individual regulatory statutes, it is necessary to examine RCRA to determine whether a violation of that statute is continuing and thus capable of tolling the general statute of limitations.

mittent basis. In either event, the important point for our purposes is that the language of these two provisions, by expressly contemplating daily penalties for a violation of the Act, clearly assumes the possibility of continuing violations.

A review of RCRA's legislative history also indicates that such violations were contemplated by the Act; it suggests that the RCRA regulatory scheme was expected to give rise to continuing violations. As first enacted in 1976, section 3008(a) of RCRA required the Administrator to provide notice to violators of any violation. If, after such notice, the violation *continued* for more than 30 days, the Administrator was authorized to issue an order requiring compliance within a specified time period. Pursuant to section 3008(a)(3), a penalty would be imposed only if the offender failed to take corrective action within the time referenced in the order. In 1980, section 3008(a) was amended to authorize the Administrator to issue compliance orders immediately, instead of waiting for 30 days. A Senate Report explains the amendment as being "aimed at stopping so-called 'midnight dumping' which may not continue at any location for more than 30 days, and to seek penalties for single occurrences, rather than just *continuing offenses*." S. Rep. No. 172, 96th Cong., 2nd Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5022. By thus contrasting the special case of midnight dumping with that of "continuing offenses," the report tacitly assumes that continuing offenses represent the type of offense normally encountered under RCRA. At the very minimum, this report strongly implies that at least some RCRA violations must be considered continuing ones. Thus, the legislative history of RCRA, as well as the language of the statute, supports the conclusion that Congress clearly contemplated the possibility of continuing violations under RCRA. We now turn to an analysis of the specific violations alleged in the First Amended Complaint.

1. *First Amended Complaint*

a. *Count I: Operating Without a Permit*

Count I of the First Amended Complaint alleges that Harmon operated a hazardous waste disposal facility without first achieving interim status or obtaining a permit,[30] in violation of section 3005(a) of RCRA, 42 U.S.C. § 6925. Section 3005(a) provides that:

[30] To obtain an operating permit, a hazardous waste management facility must file a permit application consisting of part A and part B. Part A is a short form containing certain basic information about the facility, such as the facility name, location, nature of business, regulated

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> Not later than eighteen months after [the date of the enactment of this section], the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to *have* a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section [3010] of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

RCRA § 3005(a) (emphasis added). Section 3005 thus calls for the promulgation of regulations that require, *inter alia*, certain persons "to have a permit." Section 270.1(c) of the regulations implements this particular requirement by providing, in pertinent part, as follows:

> Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit.

40 C.F.R. § 270.1(c). The word "have," like the word "possess," contemplates a continuing course of conduct rather than a discrete act. *See Blizzard*, 27 F.3d at 102 ("'[P]ossession is by nature a continuing offense.'") (*quoting Jordan v. Virginia*, 653 F.2d 870, 875 (4th Cir. 1980)). By using the word "have," Congress clearly indicated that the permit obligation is continuing in nature. As a result, any person who owns or operates an existing facility is under a continuing obligation to "have" a permit, and the obligation clearly includes the period of time during which the person is the owner or operator of the facility and the facility is used for the treatment, storage, or disposal of haz-

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activities, and a topographic map of the facility site. 40 C.F.R. § 270.13. Part B requires substantially more comprehensive and detailed information that demonstrates compliance with the applicable technical standards for hazardous waste management facilities. 40 C.F.R. § 270.14. New facilities must submit part A and part B at the same time. 40 C.F.R. § 270.10(f)(1). An existing hazardous waste management facility (*i.e.*, one that was in existence on November 19, 1980), however, needed only notify EPA of its hazardous waste management activity and file part A to obtain "interim status" and continue operations. 40 C.F.R. §§ 270.10(e) & 270.70(a). Existing facilities that have already filed part A to gain interim status, must submit part B in accordance with any applicable statutory deadline or earlier if requested by EPA or an authorized State. 40 C.F.R. § 270.10(a) ("Persons currently authorized with interim status shall apply for permits when required by the Director.").

ardous waste. In addition, section 3005(a) states that "upon and after" the date the permitting regulations become effective, disposal of hazardous waste is prohibited "except in accordance with such a permit." This further indicates that Congress intended the obligation to have a permit to be a continuing one. We therefore reject Harmon's assertion that the violations were complete and instantaneous in November of 1980.

In support of its assertion that the violation is barred by the five-year statute of limitations, Harmon relies on several criminal cases relating to continuing violations.[31] We do not view these cases as controlling for two reasons. First, as noted above, cases interpreting other limitations statutes are of extremely limited value. *Core Laboratories, Inc.*, 759 F.2d at 481-82. And second, in the criminal context, statutory interpretation is governed by the rule of lenity.[32] By definition, this rule is inapplicable in the civil context. Moreover, even if we were to rely for guidance on the criminal cases cited by Harmon, we would still conclude that the violations at issue in this case were continuing ones. We arrive at this result by applying the general principles of these cases to the specifics of this case, but only after taking into account the distinctions just noted. For example, instead of applying the rule of lenity, we apply the rules of interpretation applicable to civil cases involving a remedial statute such as RCRA.

The latter approach was followed in *United States v. Aluminum Co. of America*, 824 F. Supp. 640, 647 (E.D. Tex. 1993), which is among the more recent cases to construe the meaning of "accrue" in 28 U.S.C. § 2462 in the context of an environmental controversy. There the court looked to the purposes and legislative history of the underlying environmental statute, in that case, the Clean Water Act, in determining when a claim first accrues. The specific issue before the Court was whether a claim accrues upon the actual occurrence of the violation (*i.e.*, exceeding a pollutant discharge limitation in a permit) or upon subsequent reporting of the violation in a Discharge Monitoring Report (DMR). As the Court explained:

> Determining when a claim first accrues is a complex task. The language of a statute of limitations must be

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[31] *See* Harmon's Brief at 31-42, citing, among other cases, *Toussie v. United States*, 397 U.S. 112 (1970), and *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989).

[32] The "rule of lenity" is a principle of statutory construction which provides that criminal statutes must be strictly construed, and any ambiguity resolved in favor of lenity. *See Tanner v. United States*, 483 U.S. 107, 131 (1987).

> "interpreted in the light of the general purposes of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *United States v. Core Laboratories, Inc.* 759 F. 2d 480, 481-82 (5th Cir. 1985) (citing *Reading Co. v. Koons*, 271 U.S. 58, 70 L. Ed. 835, 46 S. Ct. 405 (1926)).
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> The United States Court of Appeals for the First Circuit has not explicitly addressed the issue of whether a claim for civil penalties accrues upon the actual occurrence of the violation of a provision of an environmental statute such as the CWA, or upon subsequent report of that violation. However, several other courts have considered the purposes and legislative history of such acts, and have held that such a claim accrues when the appropriate agency receives the statutorily mandated report.

Aluminum Co., 824 F. Supp. at 644-45 (footnote omitted). The Court held that the statute of limitations accrues upon the filing of the DMR, not when the violation occurred, noting that "[t]he CWA is entitled to a broad construction to implement its purpose." *Id*. at 645. It cited, *inter alia*, *United States v. Sellers*, 926 F.2d 410, 416 n.2 (5th Cir. 1991) (holding that the criminal penalty provision of the Resource Conservation and Recovery Act is entitled to liberal construction to effectuate the purposes of the Act, *i.e.*, to protect the public health). *Id*.; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (finding violations to be continuing based on the broad remedial intent of the Fair Housing Act of 1968); *Conners v. Hallmark & Son Coal Co.*, 935 F.2d 336, 343 (D.C. Cir. 1991) (interpreting statute of limitations in light of Congress' intent to provide broad remedies under ERISA). With this background in mind, we turn now to the chief case cited by Harmon in support of its contention that the violations are not continuing violations, *Toussie v. United States*, 397 U.S. 112, 115 (1970).

Toussie is a criminal prosecution in which the Supreme Court articulated a two-pronged test for determining whether a particular criminal statute contemplates a continuing offense. Under the test, a statute should be interpreted as describing a continuing offense only if one of the following is true: (1) "[T]he explicit language of the substantive criminal statute compels such a conclusion, or [(2)] [T]he nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id*. Harmon relies on *Toussie* in support of its assertion that the violations alleged in the pre-

sent case are not continuing ones. In *Toussie*, Defendant Toussie was required to register for the draft between June 23, 1958 (his 18th birthday) and June 28, 1958, in accordance with a Presidential proclamation issued pursuant to section 3 of the Universal Military Training and Service Act ("Draft Act"). Prosecutions under the Draft Act were subject to a five-year statute of limitations. Toussie was indicted in May 1967 and convicted for failing to register. Toussie maintained that the statute of limitations had started to run in 1958 and that, accordingly, the government's action in 1967 was barred by the statute of limitations. The government, on the other hand, argued that the duty to register had continued until Toussie was age 26 and that the offense had continued for as long as the duty to register had continued.

The Court began its analysis by noting the tension between the continuing offense doctrine and the goals of a statute of limitations:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. * * * [T]he doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." 410 F.2d at 1158.

Id. at 114-115 (citations omitted). The Court then articulated the two-pronged test discussed above.

Applying this test to the Draft Act, the Court first concluded that "there is no language in this Act that clearly contemplates a prolonged course of conduct." *Id*. at 120. The Court noted that a regulation had been promulgated to implement the registration requirement and that this regulation contained explicit language referring to registration as a continuing duty. The Court concluded, however, that for purposes of determining whether a criminal offense should be treated as continuing, it is the statute that matters, not an implementing regulation. *Id*. at 120-21. The Court concluded that the statute was "somewhat

ambiguous" on the limitations question and that, because it was a criminal statute, the ambiguity should be resolved against finding a continuing offense. *Id*. at 122-23. The Court then applied the second prong of the test, *i.e*., whether the "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." The Court concluded that "there is also nothing inherent in the act of registration itself which makes failure to do so a continuing crime." *Id*. at 122. In arriving at this conclusion, the Court noted that under the Act:

> A man must register at a particular time and his failure to do so at that time is a single offense.
>
> [F]rom the registrant's viewpoint the obligation arises at a specific time. In Toussie's case it arose when he turned 18. He was allowed a five-day period in which to fulfill the duty, but when he did not do so he then and there committed the crime of failing to register.

Id. at 119. Harmon argues that the statute at issue in *Toussie* is analogous to this case. We disagree.

The Supreme Court's decision in *Toussie* was based, *inter alia*, on its conclusion that the Draft Act required a person to register within a particular time frame. The Supreme Court also found that, although the regulation implementing the Draft Act clearly imposed a continuing obligation to register, nothing in the *statute* suggested that the obligation to register continued beyond the deadline for registering. *Id*. at 120-121. In contrast, in the present case, as discussed above, the violation alleged in Count I of the First Amended Complaint is clearly a continuing one. That is, the applicable statutory provisions and regulations both require that the owners or operators of a hazardous waste treatment, storage, or disposal facility *have* a permit in their possession *on and after* the date they engage in the treatment, storage, or disposal of hazardous waste. In addition, RCRA § 3008 explicitly provides for the assessment of multi-day penalties. The clear import of this language compels the conclusion that Congress intended the permitting violation alleged in Count I of the First Amended Complaint to be continuing in nature. However, because RCRA does not "explicitly" state that such a violation is continuing, we cannot say with a high degree of certainty that it would satisfy the first prong of the *Toussie* test.[33]

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[33] In *Toussie* the Court held that the continuing offense doctrine "should be applied only in limited circumstances * * * [in which] the *explicit language* of the substantive criminal statute

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However, we need not decide if the first prong of the *Toussie* test is satisfied. Even if the violation alleged in Count I does not satisfy the first prong of the test, it fully satisfies the second. Specifically, the nature of the violation is such that Congress must have intended it to be treated as a continuing one. As discussed above, the language of RCRA and its implementing regulations support the conclusion that the permitting requirements are intended to impose continuing obligations on owners and operators in order to protect human health and the environment. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 114 S.Ct. 1588, 1590 (1994) ("RCRA is a comprehensive statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934."); *United States v. Sellers*, 926 F.2d at 416 n.2 (stating that RCRA regulates the treatment, storage, and disposal of hazardous waste from its creation to its permanent disposal). The permitting requirements allow EPA and the States to identify facilities that are subject to regulation, to inspect them, to design permit terms for the specific environmental conditions at the facility, and to order necessary remedial action to prevent harm to public health and the environment. If the owners and operators of these facilities do not obtain required permits, the purposes of RCRA are thwarted. The seriousness of any failure to have a permit is underscored by the Act's civil penalty provisions, which, as discussed earlier, provide for the imposition of penalties on a daily basis for each day a violation occurs. It seems certain that this scheme is intended to impose continuing obligations on the persons who are subject to the permitting requirements. It therefore follows that those persons should not escape the Act's pecuniary sanctions merely because they have continued to violate the law for a considerable period of time.[34] *See Crown Coat Front Co.*, 386 U.S. at 517 (the

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compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115 (emphasis added). In *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989), the court took the "explicit language" requirement very literally by ruling that the statute in that case failed the first prong of the *Toussie* test because it nowhere used the words "continuing offense" or comparable words.

[34] To accept Harmon's argument leads to a fundamentally absurd result, seemingly contrary to the Act's purposes. Harmon is saying, in so many words, that after the five-year limitations period has run, it can not be subjected to civil penalties for failing to obtain a permit, even if it continues to operate the facility up to — and possibly past — the moment an enforcement action is filed against it. In other words, according to Harmon's reasoning, if it were to continue operating its hazardous waste management facility, it would be immune from the type of pecuniary sanctions that all other owners and operators of hazardous waste management facilities would incur for owning or operating an existing facility without a permit.

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inquiry into when a cause of action first accrues is answered on a case-by-case basis "'in light of the general purposes of the [underlying] statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of time within which an action must be brought.'") (*quoting Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). Thus, even if we were to rely for guidance on the test articulated in *Toussie*, we would conclude that the violations at issue in this case are continuing in nature. *See United States v. White*, 766 F. Supp. 873, 887 (E.D. Wash. 1991) (denying motion to dismiss criminal indictment under § 3008 of RCRA based on five-year criminal statute of limitations because the nature of the crime (storing hazardous waste without a permit) demonstrates it is a continuing offense).

We also reject Harmon's reliance on *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989), which involved criminal offenses at a nuclear power plant subject to the following provision of the Atomic Energy Act:

> It shall be unlawful * * * for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, *possess, use*, import, or export any utilization or production facility except under and in accordance with a license issued by the [Nuclear Regulatory Commission] * * *.

Id. at 1095 (alterations in original) (emphasis added) (*quoting* 42 U.S.C. § 2131). The power plant was operating under a permit issued by the Nuclear Regulatory Commission ("NRC"), which required the power plant to comply with certain regulations, which in turn required the power plant to submit by a particular date certain plans and schedules for making plant modifications and to implement those modifications in accordance with a prescribed time schedule. The power plant, however, failed to submit the required plans and schedules or to implement the required modifications. By failing to comply with the regulations, the power plant failed to comply with its permit, and therefore failed to operate "in accordance with a license issued by the [NRC]," within the meaning of the statute quoted above. Indictments followed.

Thus, even though Harmon was clearly an owner and operator of a hazardous waste management facility in 1987 (less than five years before the complaint was filed), it nonetheless cannot be held accountable for its failure to have a permit because the action "first accrued" against it in 1980-82. According to Harmon's logic, it would be free to repeat its violations of the permitting requirements of RCRA indefinitely, safely beyond the reach of the law's pecuniary sanctions.

The government argued that these violations were continuing offenses for purposes of the statute of limitations, reasoning that the phrase "possess and use" in the statute suggested a continuing course of conduct. It also contended that the Congressional concern about the safety of nuclear power plants, as reflected in the Atomic Energy Act, demanded that violations of the Act be treated as continuing offenses for purposes of the statute of limitations. The Court rejected both arguments. The Court cited the test articulated in *Toussie*, first concluding that the "explicit language" of the statute did not suggest a continuing offense because the statute nowhere used the word "continuing offense" or comparable words. The Court also applied the second prong of *Toussie* by considering whether the "nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." In that respect, the Court looked to the language of the underlying regulation to discern the nature of the crime involved and concluded that because the regulation merely called for specific conduct to be performed by a date certain (submission of certain reports and making plant modifications) there was nothing inherent in the failure to carry out these acts which demanded that they be construed as continuing crimes.

Complainant has suggested that perhaps the Court in *Del Percio* might decide a RCRA case differently. EPA Reply Brief at 38. Complainant points to the Court's unpublished opinion in *United States v. Production Plated Plastics*, No. 91-1728, 1992 U.S. App. LEXIS 3339 (6th Cir. Feb, 20, 1992), a civil case, in which the defendants were charged with violations of § 3005 of RCRA. The claims included the illegal discharge of hazardous waste without a RCRA permit or interim status. The Court held that "[t]he continued use of the facility after November 1985, and the failure to implement the state-approved closure plans imposes a continuing health hazard and thwarts the express purpose of RCRA." *Production Plated Plastics*, 1992 U.S. App. LEXIS 3339, at *2. There is no way of knowing, of course, if the Sixth Circuit would in fact decide a RCRA case differently but the Complainant's point is well-taken. Moreover, we think that the criminal nature of the offense in *Del Percio* and, more importantly, the fact that the offenses arise under a different statute are factors that should distinguish it from the instant case. These factors may have strongly influenced the Court to rule against the government. For example, in applying the second prong of the *Toussie* test, the *Del Percio* Court was heavily influenced by the fact that the particular regulation giving rise to the criminal offenses lacked any inherently continuing features. The Court noted that "[t]hese regulations provide the substantive bases for the charged offenses and define the 'nature' of those offenses." *Del Percio*, 870 F.2d at 1097. As noted previously, the regulations required

the defendants to submit certain plans and schedules by a particular date and to implement those plans according to a specific time schedule. Based on the regulations, the Court held that the nature of the offenses were not continuing "despite the presence of the 'possession and use' language in the [statute]." *Id*. The regulations at issue in the case before us, as discussed further below, are, in contrast, fully consistent with the continuing nature of the violations alleged in the First Amended Complaint. Therefore, for the foregoing reasons, we do not consider *Del Percio* as reason to conclude otherwise.

In contrast, in the present case we conclude that Congress intended the violation of RCRA's permitting requirements to be a continuing violation. As discussed above, both RCRA and its implementing regulations require owners and operators of hazardous waste facilities to "have" a permit during the active life of the facility, including the applicable closure period.[35] This clearly includes the period during which the facility is used for the treatment, storage, or disposal of hazardous waste. Unlike the obligations at issue in *Del Percio* and *Toussie*, which are complete upon the occurrence of the date specified, the obligation under § 3005(a) of RCRA to have a permit cannot be considered complete where the facility continues to be used for the treatment, storage, or disposal of hazardous waste; in short, the obligation is continuing. This is underscored in RCRA by the additional language that "upon and after" the date permitting regulations become effective the disposal of hazardous waste is prohibited except in accordance with a permit. Given the language of RCRA, as well as the legislative history discussed above, it is clear that Congress intended the permitting requirement to be continuing in nature. Thus, we conclude that the violations alleged in Count I of the First Amended Complaint consist of the failure to meet a continuing obligation.[36]

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[35] The permitting obligation also includes, for certain facilities, the obligation to have a post-closure permit. 40 C.F.R. § 270.1(c); RCRA § 3005.

[36] We also reject Harmon's reliance on *United States v. Telluride Co.*, 884 F. Supp. 404 (D. Colo. 1995), which addressed the Clean Water Act's prohibition on discharges into waters of the United States. In *Telluride*, the government argued that the discharge of dredged or fill materials into waters of the United States is a "continuing violation" as long as the adverse effects of the fill continue. The government therefore argued that the statute of limitations will not begin to run until the fill is physically removed. The Court recognized that "[i]t is undisputed the damage caused by filling wetlands continues long beyond the actual discharge." *Id*. at 408. The Court reasoned, however, that although the adverse effects of the discharge had

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b. *Count II: Groundwater Monitoring*

Count II alleges Harmon's failure to have a groundwater monitoring program for its hazardous waste landfill, in violation of regulations set forth at 40 C.F.R. part 265, subpart F. As discussed *infra*, the First Amended Complaint alleged that prior to 1989 Harmon did not have any ground water monitoring system in place. Based on our analysis of both the statutory and regulatory provisions governing the ground water monitoring requirements, we conclude that the violation alleged in Count II arises from the failure to meet a continuing obligation.

Several provisions of RCRA § 3004 require the Administrator to promulgate and implement ground water monitoring requirements for landfills and surface impoundments as well as other regulated units. *See, e.g.*, RCRA §§ 3004(a), (o), and (p); *see also* §§ 3005(e)(2)(B), 3005(i), and 3015(b). Although these provisions do not explicitly state that the obligation to comply with ground water monitoring requirements is ongoing, the nature of the requirements is such that Congress must assuredly have contemplated continuing obligations. As early as 1976, Congress recognized ground water contamination from hazardous wastes as "perhaps the most pernicious effect" of unregulated waste disposal. H.R. Rep. No. 94-1461, 94th Cong., 2d Sess. 89, reprinted in 1976 U.S.C.C.A.N. 6238, 6325. Many provisions of RCRA, including several new amendments added in 1984, reflect Congress' continuing concern about ground water monitoring. For example, in 1984 Congress added RCRA § 3005(e)(2)(B), providing that interim status to operate would terminate for an affected facility unless the facility certified by a specified date that it "is in compliance with all applicable groundwater monitoring and financial responsibility requirements." As noted by EPA in codifying these amendments into its regulations, "Congress asserted that since EPA's ground-water monitoring requirements have been in effect since November 1981, there is no excuse for noncompliance at this late date. 129 Cong. Rec. H8142 (October 6, 1983)." 50 Fed. Reg. 28,702, 28,724 (July 15, 1985) (EPA's Final Codification rule for the 1984 Amendments to RCRA). Given these provisions and legislative history, as well as the nature of the underlying requirements (discussed *infra*), it is simply unimaginable that the Congress would have viewed the ground water moni-

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continued into the limitations period, the conduct that is actually prohibited by the statute (*i.e.*, the dredging and filling) had not continued. The *Telluride* decision has no applicability here. In Count I in this case, Harmon is being held responsible for its violative conduct, not the effects or consequences of that conduct.

toring violation Harmon is charged with as anything other than a continuing violation.

Further, the ordinary meaning of the word "monitoring" connotes an ongoing activity.[37] This is especially so when the focus of the monitoring activity is ground water contamination, which is the principal point of reference for RCRA's monitoring requirements. Land disposal is a disfavored method of waste disposal in the RCRA scheme,[38] because of the contamination threat it poses for ground water. Because the threat from a land disposal facility is ongoing, the need to monitor the groundwater for contamination also is ongoing. Given this continuing need for groundwater monitoring, it is reasonable to assume that Congress contemplated an ongoing obligation to monitor the groundwater.

This conclusion is supported by the language of the regulations implementing the ground water monitoring requirements. For example, the regulations state, in part, that properly installed monitoring wells must,

> [I]mmediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the upper most aquifer.

40 C.F.R. § 265.91(a)(2). It is difficult to imagine how a monitoring activity could "immediately" detect this type of movement unless the monitoring is conducted on an ongoing basis.[39] *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1222 (N.D. Ind. 1989) ("The purpose of a hazardous waste landfill's ground water

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[37] A "monitor" is defined as, "an instrument used to measure continuously or at intervals a condition that must be kept within prescribed limits." McGraw-Hill, Dictionary of Scientific and Technical Terms (1976). "Monitoring" obviously encompasses the act of using a monitor to perform the measurements.

[38] In imposing restrictions on such disposal, Congress stated that, with respect to environmental health:

> [R]eliance on land disposal should be minimized or eliminated, and land disposal, * * * should be the least favored method for managing hazardous wastes; * * *.

RCRA § 1002(b)(7), 42 U.S.C. § 6901(b)(7).

[39] *See also* 40 C.F.R. § 265.92(c) and (d) (establishing monitoring frequencies); 40 C.F.R. § 265.94 (schedule for reporting results of monitoring system).

monitoring system is to detect immediately the migration of hazardous waste or hazardous waste constituents from the waste management area into the environment so that any necessary corrective or remedial action can be taken."), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). Further, under 40 C.F.R. § 265.90:

> [T]he owner or operator [of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste] must install, operate, *and maintain* a ground-water monitoring system which meets the requirements of § 265.91, and must comply with §§ 265.92 through 265.94. *This groundwater monitoring program must be carried out during the active life of the facility, and for disposal facilities, during the post-closure care period as well.*

40 C.F.R. § 265.90(b) (emphasis added). This language clearly indicates that the ground water monitoring requirements continue throughout the life of the facility, and longer for disposal facilities. Thus, based on the language of RCRA and its implementing regulations, we conclude that a person who owns or operates a hazardous waste facility is under a continuing obligation to have a ground water monitoring system in place that complies with the requirements of the applicable regulations. *See United States v. Conservation Chemical Co. of Illinois*, 660 F. Supp. 1236, 1242 (N.D. Ind. 1987) ("the present storage of hazardous waste at the [RCRA treatment, storage, and disposal facility] constitutes *continuing violations* of RCRA's groundwater monitoring, financial responsibility and site security regulations * * *.") (emphasis added).

Harmon's reliance on *Toussie* and other criminal cases in support of its assertion that the violations were complete and instantaneous in 1980-82, is no more persuasive here than it was with regard to the violations alleged in Count I. As discussed above, *Toussie* and the cases relied on by Harmon dealt with obligations that had to be fulfilled within a certain time frame, and the obligations did not continue beyond that time frame. By contrast, the obligation to have a ground water monitoring program in place is a continuing one and is therefore distinguishable from the obligations in the cases relied on by Harmon.

c. *Count III: Financial Responsibility*

Count III alleges Harmon's failure to obtain, establish, or maintain financial assurance for closure and post-closure at its facility, and its failure to obtain and maintain insurance coverage for sudden and

non-sudden accidental occurrences. As was true for the ground water monitoring requirements, both the language of RCRA and the nature of the requirements are such that Congress surely contemplated continuing obligations. The failure to comply with these obligations, therefore, resulted in continuing violations.

The statutory provision dealing with financial responsibility is section 3004 of RCRA. This section expressly requires the Administrator to promulgate regulations requiring financial responsibility. RCRA § 3004(a)(6), 42 U.S.C. § 6924(a)(6) (requiring the Administrator to promulgate performance standards and stating that such standards shall "includ[e] financial responsibility."). Subsection (t)(1) of section 3004 lists the financial mechanisms by which a person may comply with the financial responsibility requirements, as follows:

> Financial responsibility required by subsection (a) of this section may be *established* in accordance with regulations promulgated by the Administrator by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer.

Each of the specified means in section 3004(t) for establishing financial responsibility contemplates an ongoing contractual relationship or ability to assure the availability of funds. *See also* RCRA § 3005(e)(2)(B) (requiring that a facility certify compliance with financial assurance requirements as a condition of retaining interim status). Congress must have intended that they be treated as continuing obligations, for the need for financial responsibility continues throughout the life of the facility and any applicable post-closure period. Indeed, these provisions were designed to assure that monies would be available for closure and post-closure whether or not the owner or operator were available or solvent. 50 Fed. Reg. 28,702, 28,734 (July 15, 1985).

The ongoing nature of the financial responsibility requirements is also supported by the language of 40 C.F.R. part 265. *See* 40 C.F.R. § 265.143 ("By the effective date of these regulations, an owner or operator of each facility must *establish* financial assurance *for closure of the facility*.")(emphasis added); 40 C.F.R. § 265.143(h) ("Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Regional Administrator has reason to

believe that final closure has not been in accordance with the approved closure plan."); 40 C.F.R. § 265.147(e) ("Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the Regional Administrator has reason to believe that closure has not been in accordance with the approved closure plan."). We conclude, therefore, that the financial responsibility requirements contemplated in RCRA are continuing obligations.

As with the violations alleged in counts I and II of the First Amended Complaint, the violation of RCRA's financial responsibility requirements alleged in count III is distinguishable from the violations at issue in *Toussie* and the other cases relied on by Harmon in that the violations in those cases involved obligations that had to be fulfilled within a certain time frame. Here, however, the obligation to comply with the applicable financial responsibility and insurance requirements is a continuing one. *See, e.g., United States v. Ekco Housewares, Inc.*, 853 F. Supp. 975, 988 (N.D. Ohio, 1994) ("The obligation to maintain liability coverage remains * * * until the hazardous waste management unit is 'closed' pursuant to applicable regulation and an approved plan."), *rev'd, in part, on other grounds*, 62 F.3d 806 (6th Cir. 1995).

d. *Count IV: Notification Under RCRA § 3010*

Count IV alleges a violation of Section 3010 of RCRA, 42 U.S.C. § 6930, which provides in pertinent part as follows:

> (a) Preliminary Notification
>
> Not later than ninety days after promulgation of regulations under section [3001] of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section [3006] of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person.

* * * * * * *

> No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

The first sentence of section 3010(a) requires notification of specified hazardous waste activities "[n]ot later than ninety days after promulgation of regulations" that make such hazardous wastes subject to RCRA regulation. At first glance, this notification requirement resembles the draft registration requirement at issue in *Toussie* in that it requires action within a particular time frame and does not expressly provide that the obligation to take such action continues beyond that time frame. If section 3010 only contained the 90-day notification requirement, Harmon's reliance on *Toussie* and similar cases might well be persuasive. Section 3010, however, also contains a prohibition. Specifically, it states that, absent such notification, hazardous waste may not be "transported, treated, stored, or disposed of."[40] This prohibition distinguishes section 3010 from the draft registration requirement at issue in *Toussie*. By prohibiting the act of disposal without having complied with the notification provision, section 3010 describes two separate requirements, the violation of which could result in two different but often interrelated violations, one consisting solely of a failure to file a notification within 90 days and the other consisting of hazardous waste activities that violate the prohibition. At least with respect to the latter violation, Harmon continued to violate the prohibition until at least November 1987 by repeatedly disposing of hazardous waste without having filed the required notification. No such notification was filed until 1988. This continuous course of prohibited conduct is a continuing violation. *See United States v. Indiana Wood Treating Corp.*, 686 F. Supp. 218, 222 (S.D. Ind. 1988) (stating that the failure to comply with RCRA's notification requirement violated RCRA § 3010 "on and after August 18, 1980."); *see also United States v. Blizzard*, 27 F.3d 100 (4th Cir. 1994) (knowingly concealing and retaining stolen government property is a continuing offense).

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[40] Although use of the passive voice can create confusion regarding the persons who are subject to a requirement or prohibition, *see In re City of Detroit Public Lighting Dept.*, 3 E.A.D. 514, 522 (Adm'r 1991), it is clear from the context of section 3010 that the prohibition on transportation, treatment, storage, or disposal refers to persons who fail to comply with the notification requirement.

e. *The Illegal Conduct Continued into the Limitations Period*

As discussed above, RCRA and its implementing regulations provide that the obligations to have a permit, to have a groundwater monitoring system in place, and to maintain financial responsibility are continuing obligations. The failure to fulfill those obligations, therefore, results in continuing violations. In addition, RCRA imposes a prohibition on hazardous waste disposal activities where notification under § 3010(a) has not been given. Continuously engaging in the disposal of hazardous waste when notification has not been given, therefore, results in a continuing violation.[41] For the following reasons, we also conclude that Harmon's illegal conduct continued into the limitations period preceding the filing of the complaint in this action.

Harmon actively disposed of hazardous waste onto the ground behind its building from the time the applicable RCRA requirements became effective until the end of 1987. This disposal took place approximately once every one to three weeks. Initial Decision at 6. By reason of these activities, Harmon was the owner and operator of a hazardous waste management facility. Even after Harmon had ceased its active disposal of hazardous waste at the end of 1987, it continued to be the owner of a hazardous waste management facility and retained that status at the time of the filing of the complaint. As an owner and operator of a hazardous waste disposal facility, Harmon was subject to: (1) the obligation to have a permit; (2) the obligation to have a groundwater monitoring system in place; and (3) the obligation to maintain financial responsibility. From the time those obligations became effective in 1980 and 1982, until the filing of the complaint, Harmon failed to comply with either the permit, financial responsibility requirements, or groundwater monitoring requirements.[42] As for count IV, by continuing to dispose of hazardous waste at least until November of 1987 without having filed the required notification,

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[41] We note that the violations in Counts I-III, in contrast to Count IV, consist mainly of failures to come into compliance, *e.g.*, failure to have a permit, failure to monitor for pollution, etc. The violations in those instances continued each day without interruption. Count IV, on the other hand, consists of acts of disposal that occurred roughly every one to three weeks as part of a continuing course of illegal conduct. Despite the differences between the two categories of illegal conduct, they both constitute continuing violations. *See* Lin, *supra*, at 724 ("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.").

[42] With respect to the ground water monitoring requirements, Harmon did not have any ground water monitoring system in place prior to 1989, and even after 1989 its system did not meet the regulatory requirements.

Harmon engaged in a continuous course of conduct whereby it continued to violate the prohibition in section 3010 at least until that date.[43]

2. *The Sufficiency of the First Amended Complaint*

We also reject Harmon's argument that the Region failed to *allege* continuing violations in its First Amended Complaint. In the discussion that follows, we consider the sufficiency of the complaint, concluding that the complaint was sufficient to allege violations that continued into the limitations period.

Count I: Count I appears under the heading: "OPERATION OF A HAZARDOUS WASTE LANDFILL WITHOUT A PERMIT OR INTERIM STATUS." First Amended Complaint at 5. It alleges in pertinent part that:

> 10. Respondent has not filed a Part A or Part B RCRA permit application for the disposal of hazardous waste pursuant to Section 3005 of RCRA, and therefore is not a RCRA permitted facility or a facility which may operate pursuant to interim status.
>
> 11. From the start of operations until approximately 1987, Respondent disposed of hazardous waste on the ground at the facility. The hazardous wastes disposed of on-site included 1,1,1-trichloroethane, freon, methylene chloride, toluene and xylene.
>
> 12. Respondent has operated a hazardous waste disposal facility without a RCRA permit and without having obtained interim status in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and 40 C.F.R. Part 270 * * *.

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[43] In reaching today's decision we do not suggest that all violations of RCRA are continuing ones for purposes of determining whether the applicable statute of limitations precludes maintenance of a cause of action. In this case, both the nature of the violations and the company's actions were such that the causes of action clearly were not time barred. Thus, this case presents no occasion to rule on the many other issues that might arise in the future. For example, there may be instances where the company discontinued the unlawful conduct of an otherwise continuing violation more than five years before the complaint was filed. In other instances, the particular violation in question may only be considered a one-time requirement. In other instances there may be intermittent compliance with continuing requirements. The resolution of these issues we leave for another day.

First Amended Complaint at 5. Count I also proposes a "$537,000 multi-day penalty." *Id*. at 6. The proposal of a multi-day penalty in Count I unequivocally indicates that Harmon is being charged with a continuing violation. Paragraph 11 of Count I alleges that Harmon engaged in the disposal of hazardous waste during the period between 1981 and "approximately 1987."[44] This paragraph is sufficient to allege that Harmon was an owner and operator of a hazardous waste disposal facility. Paragraph 10 alleges that, as of the filing of the complaint, Harmon had never had a permit (or interim status). These allegations and proposed penalty are sufficient to put Harmon on notice that it is being charged with a violation that continued into the limitations period.

Count II: Count II appears under the heading: "FAILURE TO HAVE A GROUNDWATER MONITORING PROGRAM FOR A HAZARDOUS WASTE LANDFILL." *Id*. at 6. It alleges in pertinent part that:

> 15. Regulations set forth in 40 C.F.R. Part 265, Subpart F, as incorporated by reference at 10 C.S.R. §25-7.265, provide in part that an owner or operator of a hazardous waste landfill is required to install *and operate* a groundwater monitoring system capable of determining the facility's impact on the quality of ground water in the uppermost aquifer underlying the facility. Any such groundwater monitoring system must include at least one well placed hydraulically up gradient from the limits of the facility.
>
> 16. Prior to 1989, Respondent had no groundwater monitoring system in place. In 1989, Respondent installed three monitoring wells at its Grain Valley facility. Respondent has never installed any wells up gradient from the limits of the facility.

[44] Out of context, the phrase "approximately 1987" could be reasonably interpreted as meaning late 1986, which would not necessarily bring Harmon's conduct within the limitations period beginning on September 30, 1986. In the context of the First Amended Complaint, however, it is clear that the phrase refers to late 1987. On page 4 of the First Amended Complaint, for instance, the following sentence appears: "The solvents were disposed of on the ground on-site at the Harmon Electronics Plant, in Grain Valley, Missouri (hereafter "Facility") from the beginning of operations in 1973 until approximately the end of 1987." A similar sentence appears in Count IV of the First Amended Complaint, as follows: "The Respondent generated hazardous waste from 1973 to approximately the end of 1987 but failed to register as a hazardous waste generator during that period."

Id. (emphasis added). Count II proposes a "$537,000 multi-day penalty." The proposed penalty in Count II is an unequivocal indication that a continuing offense is being alleged. *Id*. In addition, the paragraphs quoted above clearly allege that Harmon violated the groundwater monitoring requirements, and that this violation continued from 1982 until at least the date of the complaint. We therefore find Count II sufficient to put Harmon on notice that it is being charged with a continuing violation of the groundwater monitoring requirements and that this violation continued into the limitations period.

Count III: Count III appears under the heading: "FAILURE TO ESTABLISH FINANCIAL ASSURANCE FOR CLOSURE/POST CLOSURE AND FOR SUDDEN AND NON-SUDDEN ACCIDENTAL OCCURRENCE COVERAGE." *Id*. at 7. Count III alleges in pertinent part that:

> 19. 40 C.F.R. Part 265, Subpart H * * * requires in part that operators of hazardous waste landfills obtain, establish *and maintain* a financial assurance mechanism for closure and post-closure *and maintain* insurance coverage for sudden and non- sudden accidental occurrences.
>
> 20. Respondent has not obtained, established or maintained financial assurances for closure and post-closure at its facility, nor has Respondent obtained, established or maintained insurance coverage for sudden and non-sudden accidental occurrences.

Id. (emphasis added). Count III also proposes a "$537,000 multi-day penalty." *Id*. Finally, Count III proposes "an upward adjustment of $139,875 for willful *and continued* violation." *Id*. (emphasis added). The foregoing allegations and proposed penalty make clear that the Region is alleging a violation that continued right up to the day the First Amended Complaint was filed.

Count IV: Count IV appears under the heading: "FAILURE TO PROVIDE TIMELY NOTIFICATION AND/OR REGISTER AS A HAZARDOUS WASTE GENERATOR." *Id*. at 8. Count IV alleges in pertinent part as follows:

> 23. Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), requires in part that a generator of hazardous waste must notify EPA of such activity within ninety (90) days of the promulgation of regulations under Section 3001 of RCRA, 42 U.S.C. § 6921. Section 3010(a) of RCRA

> also provides that no hazardous waste subject to regulation may be transported, treated, stored, or disposed of unless the required notification has been given.
>
> * * * * * * *
>
> 25. The Respondent generated hazardous waste from 1973 to approximately the end of 1987 but failed to register as a hazardous waste generator.

Count IV also incorporates by reference the allegations at paragraph 11 which read as follows:

> 11. From the start of the operations until approximately 1987, Respondent disposed of hazardous waste on the ground at the facility. The hazardous wastes disposed of on-site included 1,1,1-trichloroethane, freon, methylene chloride, toluene and xylene.

Count IV also proposes a multi-day penalty of $232,700. The proposal of a multi-day penalty and the allegations relating to Harmon's continuing generation and disposal of hazardous waste until the end of 1987 make clear that a continuing violation is being alleged and that such violation continued into the limitations period.

3. *Conclusions Relating to the Statute of Limitations*

In view of the foregoing discussion, we reach the following conclusions with regard to Harmon's statute of limitations challenge: (1) The violations alleged in counts I, II, and III of the First Amended Complaint each arose from the failure to comply with a continuing obligation, and the violation alleged in count IV arose from a continuous course of prohibited conduct; (2) The violations alleged were continuing violations that continued into the limitations period; and (3) The First Amended Complaint adequately alleges that Harmon committed continuing violations and that such violations continued into the limitations period. We therefore reject Harmon's statute of limitations challenge.

C. *Self-Reporting*

Harmon discovered the violations charged in the First Amended Complaint during a routine OSHA walk-through investigation of its facility in November 1987. It then reported those violations to the MDNR on June 27, 1988. Harmon argues that the Agency should forgo

assessing penalties against Harmon as a way of rewarding Harmon for its good conduct. Harmon contends that by so rewarding it, the Agency will create an incentive for others to follow Harmon's example. Harmon's Brief at 22.

The Presiding Officer shared the belief that Harmon should be rewarded for discovering and voluntarily disclosing its violations. He therefore reduced by 66% the multi-day penalties sought by the Region in the First Amended Complaint. In addition, because he concluded that Harmon discovered and voluntarily disclosed the violations, the Presiding Officer increased the Region's recommended downward adjustment for good faith with respect to two of the counts in the First Amended Complaint.[45] Harmon argues, however, that the Presiding Officer erred by not completely eliminating the gravity-based penalties for its violations.

In support of its argument, Harmon points to EPA's policy statement on self-reporting of violations. This policy statement was issued in final form on December 22, 1995, under the title "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." 60 Fed. Reg. 66706 (Dec. 22, 1995). The new policy provides that:

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[45] With respect to Count I of the First Amended Complaint — alleging operation of a hazardous waste landfill without a permit or interim status — the Region had recommended a $3,000 multi-day penalty. The Presiding Officer reduced that figure to $1,000, noting that:

> Respondent has voluntarily stepped forward and admitted to its past illegal disposal activities. In doing so, respondent has expended considerable sums of monies in investigation and remediation efforts before and after the issuance of EPA's complaint. Additionally, respondent has prevented future disposal by eliminating its hazardous waste generation. By its voluntary disclosure, the public and the environment have benefitted by obtaining compliance where there otherwise would not be.

Initial Decision at 41. Moreover, the Region had recommended that the penalty amount for Count I be adjusted downward by 25% in part to reflect respondent's voluntary disclosure of past illegal hazardous waste disposal. The Presiding Officer, however, increased that percentage to 30%, in part to reflect Harmon's voluntary self-disclosure. Initial Decision at 44. The Presiding Officer also rewarded Harmon's voluntary self-reporting by reducing the multi-day penalties for Counts II and III from $3,000 to $1,000 and by reducing the multi-day penalty for Count IV from $1,300 to $400. In addition, the Presiding Officer adjusted the penalty for Count IV downward by 35%, instead of the 25% adjustment recommended by the Region, in part to reflect Harmon's self-disclosure of the violations.

> [W]here violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence.

60 Fed. Reg. 66706. The new policy lists nine conditions that a regulated entity must meet in order for the Agency to reduce, or forgo seeking, gravity-based penalties under the policy. If the entity meets all nine conditions, the Agency will not seek gravity-based civil penalties, and generally will not seek criminal prosecution. If the entity meets all of the conditions except the first — requiring the violation to have been discovered through an environmental audit or due diligence — the Agency will reduce its recommended gravity-based penalties by 75%. *Id*.

When the new policy was published in interim form for comment,[46] Harmon contended that it met the conditions in the policy for elimination of all gravity-based penalties. Harmon's Response at 6. Harmon now concedes that it does not meet all (or even all but the first) of the nine conditions set out in the final form of the new policy.[47] Nevertheless, Harmon still maintains that it satisfies the "spirit"

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[46] 60 Fed. Reg. 16875 (Apr. 3, 1995).

[47] Oral Argument Transcript at 71:

> Judge Reich:
> I would like to get a sense whether, in light of this policy, you think it would be appropriate for the Board to look at the policy, as written, and determine whether the policy, as written, applies or whether to just look at the policy, as written, as confirming the kind of underlying penalty considerations that relate to self-reporting and evaluate Harmon's conduct in that regard without trying to go literally line-by-line against the new policies to determine whether or not that would apply.
>
> Ms. Honneger:
> It is the latter approach. The record does not establish that every element of the nine conditions is met in this case, but we think that the record clearly shows that we met the spirit, the intent, the essence, the purpose for which this policy was put in place.

and "essence" of the new policy, if not all nine conditions set out in that policy.

The Region, on the other hand, correctly points out that the policy is specifically intended as guidance in a settlement context and was never meant for use in an adjudicatory context.[48] The Region also contends that:

> Harmon simply does not meet the conditions stated in the policy, most notably the requirements for expeditious correction of all violations, prompt disclosure of violations and the requirement that there be no repeat violations.

Oral Argument Transcript at 97.

After careful consideration of the arguments, we conclude that the Presiding Officer did not err by failing to eliminate all of the gravity-based penalties for Harmon's violations. We agree with Harmon that its disclosure of its RCRA violations is relevant to consider in the penalty context. We believe, however, that the Presiding Officer adequately rewarded such conduct by reducing Harmon's multi-penalties by 66% for all counts in the complaint, and increasing the Region's proposed penalty reductions for good faith. *See supra* n.45. The nature of the violations involve critically important requirements that go to the heart of the RCRA program. We are unwilling to grant any further downward adjustments beyond that which the Presiding Officer has already awarded.

Harmon's invocation of the "spirit" of the new self-policing, self-reporting policy, so as to credit it with even greater penalty reductions than the Presiding Officer has already allowed, is rejected. Harmon downplays one critically important aspect of the "spirit," as well as the terms, of the policy, which is to encourage settlements rather than allow a case to run its full course through expensive and time-

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[48] *See* 60 Fed. Reg. 66706, 66712 (Dec. 22, 1995) (Part II.G. "Applicability"):

> This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

consuming litigation. This important aspect of the policy would be undermined if the penalty reduction provisions of the policy were applied in full here. We have previously held that the settlement-encouraging features of a penalty policy are to be respected and should not be undermined by an adjudication that would allow full credit for mitigating conduct properly considered only within the context of a settlement. *In re Spang & Company*, 6 E.A.D. 226, 248 (EAB 1995) (a respondent's agreeing to perform supplemental environmental projects "represent[s] an essential part of the *quid pro quo* the Agency expects to receive for settling a case with a reduced penalty. This *quid pro quo* is obviously missing in this [vigorously contested enforcement] adjudication.").

D. *The Financial Responsibility Requirements*

Harmon raises three issues relating to Count III of the First Amended Complaint, which alleges violations of the financial responsibility requirements.

1. *Liability Insurance Coverage Requirement*

Harmon argues that it is not liable for the failure to establish and maintain liability coverage for sudden and non-sudden accidental occurrences. Harmon contends that the "purpose of this RCRA liability insurance coverage is to protect against accidents at *operating* facilities." Harmon's Brief at 49. Such a purpose, Harmon argues, "has no application to a facility like Harmon which has not generated hazardous waste in its assembly operations since late 1987." Harmon's Brief at 50.

We disagree. Section 265.147(e) provides that:

> *Period of coverage*. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the Regional Administrator has reason to believe that closure has not been in accordance with the approved closure plan.

Harmon's argument cannot be reconciled with this language, which specifically provides that liability insurance must be maintained until

closure is certified, an event which necessarily takes place after a facility has ceased operating. As we observed in *In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 319-320 (EAB 1994):

> Under paragraphs (a) and (b) of section 265.147, the owner/operator of an interim status hazardous waste management facility must maintain liability insurance coverage for bodily injury and property damage to third parties caused by both sudden and non-sudden accidents arising from facility operations. This obligation lasts until the owner/operator has submitted a certification of closure to the State.

Harmon argues that the *Gordon Redd* decision should be reconsidered, but offers no persuasive reason for doing so. Harmon's Brief at 50 n.14. Accordingly, we decline to revisit the holding in that decision. *See also United States v. Ekco Housewares, Inc.*, 853 F. Supp. at 988 ("The fact that Ekco had stopped actively discharging hazardous wastes to, but had not yet closed, the surface impoundment did not affect Ekco's obligation to have established the required [liability] coverage, nor did it eliminate the risks associated with the hazardous wastes contained in or emanating from the surface impoundment, the very risks that liability coverage is designed to protect against.").

2. *Penalty for Violations of Financial Requirements*

Harmon did not obtain financial assurance for closure until 1991 and never obtained sudden and non-sudden accidental coverage. Initial Decision at 54. The Presiding Officer found that Harmon had exhibited "willful indifference or selective blindness" in failing to comply with these financial responsibility requirements. Consequently, the $251,875 penalty assessed by the Presiding Officer for those violations included a 25% upward adjustment for bad faith.

Harmon argues that the penalty assessed by the Presiding Officer is inappropriate for a number of reasons. First, Harmon argues that the Presiding Officer's finding of "willful indifference or selective blindness" on the part of Harmon "fail[s] to consider that Harmon was engaged in a good faith legal challenge to the applicability of RCRA to an old disposal site." Harmon's Brief at 51. Harmon does not dispute that the requirements of RCRA apply to its facility. Indeed, Harmon conceded early on that its facility was a "hazardous waste land disposal facility" subject to the RCRA requirements. *See* Legal Memorandum entitled "Research on the Authority of the Missouri Department of Natural Resources Under Missouri Laws" submitted by Harmon's coun-

sel to MDNR, Respondent's Exhibit No. 37, at 22. Rather, Harmon argues that, because it voluntarily reported its own violations, the State should, as a matter of discretion, classify the site as "abandoned or uncontrolled" under the Missouri Abandoned or Uncontrolled Site Act, Mo. Rev. Stat. §§ 260.425-.480 (the State equivalent of the Comprehensive Environmental Response, Compensation, and Liability Act). *Id*. In other words, Harmon was challenging MDNR's exercise of its discretion, not MDNR's authority to enforce the RCRA requirements. This does not excuse non-compliance with the law.

Harmon also argues that it did not receive notice from MDNR of the financial assurance and liability requirements until September 1991 and that, upon receiving such notice, it took immediate action to fulfill these requirements, achieving compliance with the financial assurance requirements two months later, and immediately instructing its insurance broker to investigate the insurance market. Harmon's Brief at 53. We find this argument unpersuasive. The record supports the conclusion that Harmon either knew or should have known that it was subject to the financial responsibility requirements earlier than 1991. For one thing, Harmon was cited in 1988 for operation of a hazardous waste facility without a permit. In a Notice of Violation issued on August 9, 1988, Harmon was informed that Harmon was in violation of hazardous waste disposal requirements. Respondent's Exhibit 11. Among these standards are the financial responsibility requirements of part 265. Thus, the receipt of the 1988 Notice of Violation should have put Harmon on notice that it was subject to the financial responsibility requirements. *See* 40 C.F.R. § 265.1(b)(the requirements of part 265 apply "to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file part A of the permit application as required by 40 C.F.R. 270.10(e) and (g)."); 40 C.F.R. § 265.140 (applicability of financial requirements). Harmon received further notice in the form of a letter from MDNR, dated November 1, 1989, which explained that:

> As a hazardous waste land disposal facility, Harmon Electronics, Inc. must achieve compliance with the statutory and regulatory standards applicable to this type of facility and must monitor and close the site in accordance with these standards. These standards are found in the Missouri Hazardous Waste Management Law, the federal Resource Conservation and Recovery Act, and the Hazardous Waste Management Regulations found in 10 CSR 25-7.265, incorporating by reference sections of 40 CFR Part 265. These laws and regulations

> include requirements and standards for land disposal facilities, groundwater monitoring, closure and post-closure, *financial assurances*, and general facility standards.

Respondent's Exhibit 33 (emphasis added). In view of the foregoing, we are not impressed by the speed with which Harmon attempted to comply with the financial responsibility requirements upon receiving notice of their applicability in 1989.

Harmon also argues that:

> [T]he ALJ failed to consider Harmon's good faith efforts to comply with the financial requirements, to voluntarily disclose, to investigate and remediate the site, and to eliminate hazardous waste from its operations. The ALJ considered these factors in mitigating the penalty for all the other Counts and there is no logical reason to ignore Harmon's good faith for Count III.

Harmon's Brief at 54. This argument is without merit. The Presiding Officer reduced the proposed multi-day penalty for Count III by 66% because of Harmon's good faith in voluntarily disclosing its violations, investigating and remediating the site, and eliminating hazardous waste from its operations. Initial Decision at 41, 54-55. It is true that the Presiding Officer did not consider Harmon's good faith efforts to comply with the financial responsibility requirements per se. As discussed above, Harmon's efforts to achieve compliance did not begin until 1991, even though Harmon received notice of its obligation to comply with such requirements in 1988 and 1989. Under the circumstances, we are not persuaded that the Presiding Officer's 25% upward adjustment for bad faith was unreasonable or that Harmon deserves any further reduction in the penalty.

In sum, Harmon has not persuaded us that the Presiding Officer's penalty assessment for Count III is inappropriate.

3. *The Missouri Consent Decree*

Harmon argues that it not liable for its failure to obtain liability insurance coverage because it "is specifically excused by the State of Missouri from such performance as long as it continues to fulfill the requirements of the Consent Decree." Harmon's Appeal at 58. Harmon contends that: "In paragraph 6 [of the consent decree], the State agrees to forgo enforcement actions based upon the liability insurance

requirements as long as Harmon continues to make a semi-annual demonstration of its attempts to comply with the regulations at 40 C.F.R. § 265.147."

Harmon's argument is rejected. It is true that the State, in an exercise of its enforcement discretion, agreed to forgo enforcement actions, provided Harmon made an effort to comply with section 265.147; however, the consent decree did not relieve Harmon of its obligation to comply with section 265.147. Moreover, this exercise of enforcement discretion on the part of the State does not prevent the Region from taking its own enforcement action against Harmon. As the Board observed in a similar situation:

> [A] State's exercise of its enforcement discretion is certainly not binding on the Region. Indeed, EPA's statutory right to overfile is founded on the notion that EPA is entitled to bring enforcement actions in an authorized State whenever the State, in EPA's opinion, has not exercised its enforcement discretion properly.

In re Gordon Redd Lumber Co., 4 E.A.D. 301, 317-318 (EAB 1994). We conclude that the existence of the consent decree did not make it inappropriate for the Presiding Officer to order Harmon to obtain liability insurance coverage, as is required by the express terms of the regulations, and to assess a penalty against Harmon for its failure to obtain such coverage.

E. *The Seriousness of the Violations*

Section 3008(a)(3), 42 U.S.C. § 6928(a)(3), requires the Presiding Officer to take into account the seriousness of the violation when assessing a penalty. On appeal, Harmon argues that the Presiding Officer's assessment of the seriousness of Harmon's violations is not supported by a preponderance of the evidence. Harmon's Brief at 59. In particular, Harmon attacks the competence of Peter Sam, the EPA RCRA Compliance Officer who calculated the Region's proposed penalties. Harmon argues that Sam was "EPA's only witness on the seriousness of violations" (Harmon's Brief at 60), and that: "The ALJ relied upon the Compliance Officer's uneducated and uninformed opinions of the levels of contaminants and their toxicity—completely ignoring Harmon's toxicologist report of their low potential for adverse impact." Harmon's Brief at 62. Harmon contends, therefore, that the Presiding Officer's penalty assessment is based on an inaccurate characterization of the potential for harm posed by Harmon's violations.

The Region responds that Mr. Sam has a Bachelor of Science Degree in Chemistry and Biology and a Master's Degree in Environmental Sciences and Planning, and that this educational background qualifies him for a position as a RCRA Compliance Officer. Region's Reply Brief at 72. For the reasons set forth below, we conclude that the Presiding Officer did not err in his assessment of the seriousness of the violations.

Under EPA's 1990 Revised RCRA Civil Penalty Policy, the "seriousness" of the violation is reflected in the gravity-based component of the penalty. The gravity-based component of the penalty, in turn, is based on two factors: (1) the potential for harm posed by the violation; and (2) the extent of deviation from the statutory or regulatory requirement. Each of these factors is characterized as either major, moderate or minor, and these characterizations in part determine the recommended penalty amount.

The Presiding Officer found that each of the violations in Counts I, II, and III posed a major potential for harm and represented a major deviation from the statutory or regulatory requirement. With respect to Count IV of the First Amended Complaint, the Presiding Officer agreed with the Region that the violation posed a moderate potential for harm and represented a major deviation from the statutory or regulatory requirement. The Presiding Officer stated that Harmon "d[id] not dispute this classification. Therefore, it is accepted as reasonable." Initial Decision at 58-59. On appeal, the focus of Harmon's challenge is on the Presiding Officer's potential for harm characterizations. In determining the "potential for harm" posed by a violation, the Penalty Policy recommends consideration of the "the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents and the degree of such potential exposure." Penalty Policy at 13. The Penalty Policy also recommends consideration of whether the violation "undermines the statutory or regulatory purposes or procedures for implementing the RCRA program," on the assumption that harm to the RCRA program may indirectly lead to a risk of exposure.[49] If the Presiding Officer finds either that the violation poses a substantial risk of exposure or that it substantially under-

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[49] As the penalty policy explains:

> There are some requirements of the RCRA program which, if violated, may not be likely to give rise directly or immediately to a significant risk of contamination. Nonetheless, all regulatory requirements are fundamental to the continued

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mines the integrity of the RCRA program, the Penalty Policy recommends that the violation's potential for harm be characterized as major. Penalty Policy at 15. Hence, under the Penalty Policy, even if the risk of exposure is not substantial, the Presiding Officer may nevertheless characterize the violation as major if it substantially undermines the integrity of the RCRA program. *See In re Everwood Treatment Co., Inc. and Cary W. Thigpen*, 6 E.A.D. 589, 604 (EAB 1996).

As noted above, Harmon believes that the Presiding Officer overestimated the risk of exposure posed by the violations because he credited Mr. Sam's testimony and ignored Harmon's toxicological evidence. The Presiding Officer's potential for harm determinations, however, were not just based on the risk of exposure posed by the violations. They also rested on an independent basis, namely, the adverse effect of those violations on the integrity of the RCRA program. Because we agree with the Presiding Officer's assessment of this adverse effect on the RCRA program (for the reasons given below), we need not resolve the conflicting claims about Mr. Sam's expertise and the risk of exposure posed by the violations.

The Presiding Officer found that the violations charged in Counts I, II, and III would substantially undermine the integrity of the RCRA program. Initial Decision at 39-40, 50, 54. With respect to Count IV, by adopting the Region's classification of the potential for harm from the violation as "moderate" (*id*. at 58-59), the Presiding Officer agreed that the violation posed a significant risk of exposure to human health and the environment and/or may have had a significant adverse effect on the integrity of the RCRA program. *See* Penalty Policy at 15. These determinations are consistent with the recommendations of the Penalty Policy. The Penalty Policy lists examples of violations that "merit substantial penalties" because they "undermine" the statutory or regulatory purposes or procedures for implementing the RCRA program." *Id*. at 14-15. Among the violations listed are all of the violations charged in the First Amended Complaint. *Id*. at 15.

> integrity of the RCRA program. Violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program.

Penalty Policy at 14.

Harmon's operation of a RCRA facility without a permit or interim status was a particularly serious violation, for until 1988, such operation took place entirely outside the RCRA program. Such an operation cannot help but have an adverse effect on the RCRA program, even if the risk of actual exposure was not substantial, as Harmon argues. In previous cases, the Agency has found that similar operations presented a major potential for harm, even when risk of actual exposure was not substantial. *See Everwood Treatment Co., supra*; *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 418 (CJO 1987). For similar reasons, the failure to give notification under section 3010 is also a serious violation and a threat to the integrity of the program.

Harmon's failure to comply with the financial responsibility requirements also posed a serious threat to the RCRA program, for the goals of RCRA will not be fulfilled if the owner or operator of a facility does not have the financial wherewithal to achieve closure or to compensate persons who have been harmed by the facility. Similarly, Harmon's failure to comply with the groundwater monitoring requirements also posed a serious threat to the integrity of the RCRA program, since the success of the program hinges on its ability to obtain accurate information about the extent and character of any groundwater contamination. Finally, Harmon's disposal of hazardous waste between 1980 and at least the end of 1987 without having complied with the notification requirements in RCRA § 3010, posed a serious threat to the Agency's ability to properly monitor such disposal and thereby ensure the protection of human health and the environment. For all the foregoing reasons, we see no error in the Presiding Officer's conclusion that the violations charged in Counts I, II, and III presented a major potential for harm, or that the violation alleged in Count IV presented a moderate potential for harm.[50]

III. *CONCLUSION*

For all the foregoing reasons, we come to the following conclusions. With respect to the first issue discussed above, we hold that: (1) RCRA authorizes EPA to bring an action in an authorized State even if the State has taken action against the same respondent for the same violations; (2) State authorization in and of itself does *not* establish a relationship of privity between EPA and the authorized State, such that

[50] Harmon argues that any harm to the integrity of the RCRA program caused by its violations is "far outweighed by the potential for harm to EPA's interest in encouraging self-reporting and voluntary cleanups." Harmon's Brief at 64. We need not address this argument here, for it does not relate to the seriousness of the violation, and we have dealt with it elsewhere in the opinion.

under the doctrine of res judicata, EPA is bound by the results of a State enforcement action just as the State is bound; and (3) The particular dealings between the Region and the State of Missouri in this case did not establish a relationship of privity, such that EPA is bound by the consent decree just as the State of Missouri is bound. With respect to the other issues raised in this appeal, we hold that: (1) The Region's action against Harmon is not barred by the applicable statute of limitations; (2) The Presiding Officer's penalty assessment need not be reconsidered in light of the new policy on self-policing; (3) Even though Harmon ceased active hazardous waste management operations in 1987, it was required to maintain liability insurance coverage and its failure to do so violated the RCRA financial responsibility requirements; (4) The Presiding Officer's penalty assessment for Harmon's violation of the financial responsibility requirements, including an upward adjustment for bad faith, is appropriate; and (5) The Presiding Officer's determinations on the seriousness of the violations charged in the First Amended Complaint are supported by the preponderance of the evidence.[51]

For these reasons, the Initial Decision is affirmed and a penalty of $586,716 is assessed against respondent Harmon Electronics, Inc. Harmon shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed to by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748
Pittsburgh, PA 15251-6748

So ordered.

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[51] Under the heading "Relief Sought," Harmon has requested that the Board vacate the Presiding Officer's compliance order (Initial Decision at 67-69) as inconsistent with the Missouri Consent Decree and with the language of RCRA § 3006. Harmon's Brief at 66. At oral argument, counsel for the Region stated that except for acquiring adequate insurance coverage, "all the injunctive portions of the ALJ's [compliance] order had been met." Oral Argument Transcript at 112. In addition, with regard to the insurance requirement, counsel for the Region stated: "I believe, through discussions between our technical people and the people at MDNR, MDNR is in the process of sending a letter to Harmon informing it that it no longer needs it." *Id*. Thus, it appears as if Harmon's request in this regard is now moot. Even if this issue were not moot, however, we find nothing in either Harmon's brief or in the record on appeal that would support vacating the compliance order.