3/19/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	:	
District of Columbia (Lorton Prison Facility)	:	**Docket No. TSCA-III-439**
Respondent	:	

MEMORANDUM DECISION UPON ORDER GRANTING MOTION TO DISMISS

This matter arises under the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq., (hereafter "TSCA" or "the Act"), specifically section 16 of TSCA, 15 U.S.C. § 2615), and regulations issued pursuant to the Act.

The complaint charges respondent with eleven violations of 15 U.S.C. § 2614(1)(c),[1] [section 15(1)(c) of the Act], and the polychlorinated biphenyls (PCBs) "disposal and marking" regulations at 40 CFR Part 761. Respondent District of Columbia moved to

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[1] Section 15(1)(c) of the Act, 15 U.S.C. §2614(1)(c), provides in pertinent part:

> It shall be unlawful for any person to--
> (1) fail or refuse to comply with . . .
> (c) any rule promulgated or order issued under section 2604 or 2605 of this title ....

dismiss two counts and part of a third (counts IV, V, and VI)[2] on the ground that the acts complained of occurred more than five years before the date upon which the complaint was filed and are, consequently, barred by the general statute of limitations at 28 U.S.C. § 2462.

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 . . . .

In support of the motion, respondent argues [supplemental brief at 2-12] that:

(1) Section 2462 is a general statute of limitations and is applicable to any enforcement action not subject to another limitations period, and not specifically exempted from a limitations period;

(2) Although some statutes contain a statute of limitations, TSCA does not. No other limitations period applies to administrative actions under TSCA; neither are such actions exempted from a limitations period. Therefore, administrative enforcement actions under TSCA are subject to the general provisions of 28 U.S.C. § 2462.

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[2] The complaint groups counts V - VII into one section ("Counts V - VII"), consisting of paragraphs numbered 28-30. These paragraphs allege that respondent's failure to prepare and/or maintain PCB records and annual documents for the years 1983, 1984 and 1985 constitutes three separate violations of the Act and regulations. Presumably count V relates to the year 1983, count VI relates to 1984, and count VII relates to 1985, although the numbering system utilized in the complaint leaves something to be desired.

(3) Black's Law Dictionary[3] lists, as its first definition of the term "enforce," the following:

> (1) enforce . .. as to enforce a particular law . . . to compel obedience to.

(4) This action for civil penalties constitutes "enforcement" as that term is commonly understood, because a penalty or civil fine is the intended result. To suggest that this proceeding does not seek to enforce a civil fine or penalty, but is merely a proceeding to assess a civil penalty that respondent will be legally obligated to pay, minces words and goes against the clear meaning of section 2462, i.e. that actions which are intended to deprive a person of money, property, or some other interest ("pecuniary or otherwise") must be started within five years unless otherwise provided by statute.

(5) EPA's use of the terms "enforce" and "enforcement" in TSCA regulations makes clear its view that admininistrative actions (such as this one) to assess civil penalties do in fact constitute "enforcement" of a civil penalty. [Respondent's supplemental brief at 2]. For example, 40 CFR §761.135 states:

> . . . . compliance with this policy creates a presumption against both enforcement action for penalties and the need for further cleanup . . . EPA's exercise of enforcement discretion does not preclude enforcement action under other provisions of TSCA . . . [emphasis added].

(6) Section 2462 has been applied to enforcement actions under other statutes administered by EPA, namely the Clean Water Act and the Clean

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[3] Fourth Edition, West Publishing Company.

> Air Act.[4] These applications demonstrate that there is nothing inherent in "environmental" statutes to prevent application of section 2462 to this case.

Complainant did not respond, and the motion to dismiss has been granted (see Order Upon Motion to Dismiss, attached). Ordinarily, failure to respond to a motion indicates that there is no opposition, and the motion would be granted without opinion. However, since respondent has raised an issue respecting which the judges in this agency disagree, a more considered ruling is appropriate.

DISCUSSION

No federal district or appellate court has directly ruled upon the question of whether section 2462 can bar an administrative action for civil penalties. However, in 1987, the First Circuit in United States v. Meyer[5] observed, following the parties' concession[6] that section 2462 applied to administrative proceedings under the Export Administration Act[7] brought more than five years

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[4] National Wildlife Federation v. Consumers Power Company, 657 F. Supp. 989 (W.D. Mich. 1987); United States v. SCM Corp., 667 F. Supp. 1110 (D. Md. 1987). See also Public Interest Research Group of New Jersey, Inc., v. Powell Duffryn Terminals, Inc. 913 F. 2d 64 (3d Cir. 1990). See also various decisions by federal administrative law judges, discussed infra pp. 5-6.

[5] United States v. Meyer, 808 F.2d 912 (1st Cir. 1987).

[6] "Both parties concede that, as applied to the [Export Administration Act], this statute [i.e. 28 U.S.C. §2462] at least requires that any administrative action aimed at imposing a civil penalty must be brought within 5 years of the alleged violation." United States v. Meyer, 808 F.2d 912, 914.

[7] Id. The Export Administration act, like TSCA, does not contain a statute of limitations.

after the alleged violations were committed:

> Although the analytical underpinnings of this interpretation seem somewhat wobbly, the view is eminently reasonable as a matter of policy and is supported by two distinct pronouncements of subsequent legislative committees that chose to comment on the matter.[8]

> [C]onstruing §2462 to require the initiation of administrative proceedings within five years of the date of the alleged violation . . . abundantly satisfies any legitimate concerns for repose, fair notice, and preservation of evidence.[9]

In various decisions federal administrative law judges have disagreed as to the applicability of section 2462 to TSCA administrative proceedings. One decision holds that charges brought more than five years after the alleged violation occurred are barred;[10] other decisions have held that section 2462 does not apply.[11] With respect to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., which, like TSCA, does not contain a statute of limitations, two judges have taken the

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[8] The Senate report on the 1965 amendments to the Export Administration Act states that no statute of limitations is included because "it is intended that . . . section 2462 of title 28 shall govern." See infra, p.8.

[9] United States v. Meyer, at 922.

[10] In re Commonwealth Edison Company, No. TSCA-V-C-133 (Order on Motion to Dismiss, December 1, 1983).

[11] In re Tremco, Inc., No. TSCA-88-H-05 (Interlocutory Order, April 7, 1989); In re Rollins Environmental Service (N. J.), Inc., No. II-TSCA-PCB-88-0116 (Interlocutory Order Granting Motion for Partial Accelerated decision, July 13, 1989); In re Energy Systems Company (ENSCO), Inc., No. TSCA-VI-408C (Order Denying Respondent's and Complainant's Motions for Discovery and Striking Affirmative Defenses); In re University of Delaware, No. TSCA-III-452 (Order Granting in Part Motion to Amend Answer (August 1, 1990). In re 3M Company, No. TSCA-88-H-06 (Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision, August 7, 1989).

position that section 2462 would bar administrative proceedings not brought within five years, relying in part for this result upon an anomaly that would otherwise occur under RCRA, where EPA may bring certain cases before either federal administrative law judges or in federal district court.[12] A third judge has held that section 2462 does not apply to RCRA administrative proceedings.[13] Accordingly, three of the five EPA judges who considered the application of section 2462 in TSCA and RCRA administrative civil penalty proceedings determined that section 2462 applies to such proceedings.

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[12] Section 2462 was held to apply in In re Waterville Industries, Inc., No. RCRA-I-87-1086 (Order, June 23, 1988), and was held not to apply in In re J. V. Peters & Company, Inc., No. RCRA-V-W-81-R-75 (Initial Decision September 26, 1988). See also Adolph Coors Company and its Unincorporated Affiliates, RCRA-VIII-90-09, Order Denying Motions for Accelerated Decision and to Dismiss, March 1, 1991, where the presiding judge agreed that §2462 applies to administrative as well as judicial proceedings under Section 3008(a) of RCRA: "It would seem anomalous indeed to hold that a judicial proceeding under RCRA § 3008(a) was time barred by 28 U.S.C. §2462, while the government had an unlimited period of time to commence an administrative proceeding under the same section of RCRA." However, it was then determined that the statute began to run the same year the complaint was filed.

[13] In re J. V. Peters, Inc., RCRA Appeal No. 88-3 (Final Decision, August 7, 1990), at 8-9. The latter holding was appealed to the Administrator, and consequently the Judicial Officer concluded in the Final Decision, "[a]ssuming that §2462 applies to this proceeding . . . this action is not barred, because the Second Amended Complaint . . . 'relates back' to the First Amended Complaint." In a footnote, the decision observes that (1) there appears to be no federal district or circuit court decision that applies a statute of limitations to a RCRA civil enforcement action, but (2) several courts have applied section 2462 to the civil enforcement of other environmental statutes. Several cases are cited, including federal district court decisions which apply section 2462 to the Clean Water Act and the Clean Air Act. See also supra, note 4, p. 4.

Disagreement as to the applicability of section 2462 arises in part from the language of the statute itself. While the words "action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise" do not specifically include administrative proceedings to assess a civil penalty, neither do they exclude administrative proceedings.

The legislative history of the Export Administration Act is clear with respect to the applicability of section 2462 to administrative proceedings brought pursuant to that Act. However, not every court which has commented upon the question of applicability to administrative proceedings has been persuaded that even such clear history should necessarily be heeded. As was noted above, the court in Meyer viewed the Senate committee's comments on the Export Administration Act amendments as "distinct pronouncements,"[14] but later in the opinion characterized them as "legislative dictum," referring to them as merely the "opinion registered by the committee on how it believed section 2462 would be interpreted by the courts in the context of EAA enforcement actions."[15] An EPA administrative law judge concluded that "[n]othing in the legislative history . . . support[s] the conclusion that Congress explicitly intended section 2462 to apply

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[14] Id. at 915. The Meyer court, as has been pointed out, was not deciding whether section 2462 applied to Export Administration Act proceedings, since the parties had agreed that it did. The issue before the court was when section 2462 began to run.

[15] United States v. Meyer, at 914.

to administrative proceedings in general." (Emphasis supplied). In re 3M Company, supra n. 11, slip opinion at 26.

In 1948, section 2462 was amended to add the term "action," which extended (or clarified) the application of the limitations period to "actions" as well as "suits" and "proceedings." Since the 1948 amendment, at least three separate Congressional committees have stated that section 2462 in its present form does apply to administrative proceedings under the Export Administration Act. For example, the Senate Report of the 1965 amendments to 50 U.S.C. §2401-2420 (the Export Administration Act) states, at S. Rep. No. 363, at S. Rep. No. 363, 89th Cong., 1st Sess. 7 (1965), reprinted in 1965 U.S. Code Cong. and Adm. News, 1826, 1832 that:

> The bill [to amend 50 U.S.C. §§ 2401-2420] does not prescribe any period following an offense within which the civil penalty must be imposed. It is intended that the general 5-year limitation imposed by section 2462 of title 28 shall govern. Under that section the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings. [Emphasis supplied]

Substantially the same statement appeared in the corresponding House of Representatives Committee report. See H.R. Rep. No. 434, 89th Cong., 1st Sess. 5 (1965). Twenty years later, in 1985, the Conference Report of additional amendments to the Export Administration Act suggests anew the intention that the government agency in question "must bring its administrative case within 5 years from the date the violation occurred." H.R. Rep. No. 1890, 99th Cong., 1st Sess. (1985). These reports clearly reflect the

intentions of three different legislative committees that section 2462 should apply to certain administrative proceedings for the enforcement (i.e. imposition, assessment) of civil penalties.

Even through the legislative history does not refer to the applicability of section 2462 to administrative proceedings under other statutes, which is not unreasonable given that the statute under consideration was the Export Administration Act, they have significance for TSCA proceedings nonetheless. Such history leaves no doubt that three legislative committees concluded:

1. Section 2462 is not inapplicable to administrative proceedings merely by virtue of its location in Title 28 of the U. S. Code;[16]

2. The application of section 2462 to administrative civil penalty proceedings is not inappropriate for any other reason;

3. Export Administration Act proceedings, in which civil penalties are assessed, constitute "action[s], suit[s], or proceeding[s] for the enforcement of any civil . . . . penalty".

The Export Administration Act administrative proceedings are essentially the same as administrative enforcement proceedings under TSCA. Consequently, the legislative history of that Act and its amendments is singularly instructive for the matter at hand.

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[16] See In re Union Carbide Corp., Docket No. TSCA-85-H-02 (October 3, 1985); In re Frank Rose, Jr., supra, and In re Edward Wildt, supra, n. 12. The opinion in Union Carbide suggests that the mere fact that section 2462 is located in Title 28 of the United States Code may mean that it cannot apply to administrative enforcement proceedings. It is noted, however, that some portions of Title 28 deal with matters other than federal district and appellate courts. See 28 U.S.C. §2347(c), 2672, 2675.

It is important to note that, even if section 2462 does not apply to civil penalty proceedings, in cases where the violations alleged in the administrative complaint occurred five or more years prior to its issuance, the penalty assessed can not be collected in district court in some circuits.[17] A literal construction of the term "enforcement" in section 2462 to exclude proceedings in which a penalty is assessed should not be followed if it leads to unreasonable, extraordinary, unjust, or absurd consequences.[18] For this reason, coupled with the clear legislative history of the

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[17] This assumes, of course, that section 2462 would apply to the collection proceeding. See United States v. Core Laboratores, 759 F. 2d 480 (5th Cir. 1985), which held that section 2462 began to run from the date of the original violations complained of, not from the date of the administrative order which assessed the penalties. The Ninth Circuit has held that section 2462 starts to run from the date of the commission of the offense. See, for instance, In re Edward Wildt, Docket No. 213-100, U. S. Department of Commerce, 3 O.R.W. 352 (NOAA 1983), which was dismissed principally because any penalties assessed could not be collected in the Ninth Circuit. The Meyer court held that the statute begins to run at the time the penalty is assessed. 808 F. 2d at 916-918.

[18] "If giving a literal interpretation to the words will lead to such unreasonable, unjust or absurd consequences as to compel a conviction that they could not have been intended by the legislature . . . then the court should interpret the statute according to its real rather than its apparently literal meaning." In re Blalock, 31 F. 2d 612, 614 (N.D. Ga. 1929). "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." United States v. Meyer, 808 F. 2d at 919, quoting 2A Sands, Sutherland Statutory Construction §45.12 (4th ed. 1984). "The interpretation should be reasonable, and where the result of one interpretation is unreasonable, while the result of another interpretation is logical, the latter should prevail." Sierra Club v. Train, 557 F. 2d 485, 490 (5th Cir. 1977).

Export Administration Act and federal court statements as to the reasonableness of applying section 2462 to administrative penalty assessment proceedings, a narrow construction of the statute of limitations as precluding application to such administrative proceedings is unwarranted.

Turning to the immediate issue of civil penalty actions under TSCA, section 16 provides, in part, for assessment of penalties in an administrative proceeding as well as for collection of penalties in a federal district court:

> §2615 [TSCA §16]
> (a) Civil
> * * *
> (2)(A) A civil penalty for the violation of section 2614 of this title shall be assessed by the Administrator by an order made on the record after opportunity . . . for a hearing in accordance with section 554 of Title 5.
> * * *
> (4) If any person fails to pay an assessment of a civil penalty --
> (A) after the order making the assessment has become a final order . . .
> the Attorney General shall recover the amount assessed . . . in an action brought in any appropriate district court of the United States In such an action, the validity, amount, and appropriateness of such penalty shall be subject to review.

TSCA provides that the assessment of civil penalties for violations of TSCA shall be accomplished in an administrative order. If the person against whom the penalty was assessed does not pay voluntarily, a collection action in district court lies to compel such payment. It is this fact -- that it is the district court action which compels payment, whereas the administrative order, not self-executing, merely creates a legal obligation to pay

-- which has given rise to the notion that the administrative proceeding under TSCA does not "enforce," but merely "assesses" a penalty, and so cannot be a "proceeding for the enforcement of [a] ... penalty" as contemplated by section 2462.[19] This view would create a term of art of the word "enforcement," a result not supported by the definition, by common understanding, by usage in TSCA regulations (See 40 CFR §761.135), or by the legislative history of the Export Administration Act.

A restrictive interpretation of section 2462 as applied to TSCA results in an unjustifiably narrow definition of the term "enforcement" in relation to its object ("penalty") as stated in the statute. Such narrow definition focuses on the sense of "enforce" as to "compel," "urge" or "give force to" payment of a penalty. However, the accepted definition of "enforcement," such as that given in Black's Law Dictionary, at 275 (abridged 5th edition 1983), is "[t]he act of putting something such as a law into effect ...." Accordingly, a correct interpretation of "enforcement of [a] ... penalty" is, "putting a penalty into effect." The determination of the amount of penalty and the administrative order directing the respondent to pay that penalty clearly constitutes "putting a penalty into effect," i.e. a penalty is assessed which respondent is then legally obligated to pay. Collection proceedings, if any, in federal district court are purely mechanical. These procedures are similar to those followed by district courts with respect to violations of statutes in which

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[19] In re Tremco, supra, note 11.

there is no antecedent administrative penalty assessment: the amount of penalty is determined by the court and the court orders the violator to pay. Of course, an assessment of a penalty in district court is considered "enforcement of a penalty." It follows that when an EPA judge assesses a civil penalty and orders the violator to pay, such assessment should also be considered "enforcement of a penalty."

Matters in which a district court assesses penalties without prior administrative determinations, such as under section 309(b) of the Federal Water Pollution Control Act, (FWPCA) 33 U.S.C. §1319(b), Section 113(a) and (b) of the Clean Air Act (CAA), 42 U.S.C. §7413(a) and (b), and section 3008(a) of RCRA, 42 U.S.C. §6928(a)[20] undermine the reasoning set forth in United States v. Meyer, 808 F.2d 912, 914-915 (1st Cir. 1987) that

> a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced . . . .
>
> The use of the word "enforcement" in 28 U.S.C. §2462 is not without significance; the noun by definition ("com-pulsion ... forcible urging the compelling of the fulfillment," . . .) presupposes the existence of an actual penalty to be enforced.

While that reasoning may be applied to cases in which an antecedent administrative judgment is a statutory prerequisite to filing a civil action in district court, such as civil penalty cases brought

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[20] These statutes authorize EPA to proceed in certain actions either by administrative complaint (or order), or by filing a complaint in federal district court, See, section 309(a) of FWPCA, 33 U.S.C. §1319; section 113(a) of CAA, 42 U.S.C. §7413; and section 3008(a) of RCRA, 42 U.S.C., §6928(a).

under TSCA or the Export Administration Act, it does not make sense in cases in which there is no such statutory prerequisite. As has been noted, however, section 2462 was held to apply in cases where no administrative civil penalty assessment preceded the district court action, including citizen enforcement suits under the Clean Water Act.[21] Consequently, "enforcement of [a] . . . penalty" cannot be interpreted exclusively as compelling payment of a penalty already imposed; rather, it must be interpreted as also encompassing penalty assessment. If "enforcement of [a] . . . penalty" necessarily includes assessment of a penalty in those cases, then it cannot exclude assessment of a civil penalty under TSCA merely because the assessment and collection stages of TSCA proceedings occur separately in two different forums.

The question then becomes whether the section 2462 statute of limitations should bar certain charges in the complaint here. As succinctly stated many years ago, statutes of limitation generally

> . . . .promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

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[21] Sierra Club v. Chevron U.S.A., 834 F.2d 1517 (9th Cir. 1987); Chesapeake Bay Foundation, v. Bethlehem Steel Corp. 608 F. Supp 440 (D. MD 1985); United States v. SCM Corp., 667 F. Supp. 1110 (D. MD 1987); Sierra Club v. Simkins, 617 F. Supp. 1120 (D. E. MD 1985).

However, "[t]his policy of repose, designed to protect defendants, is frequently outweighed ... where the interests of justice require vindication of the plaintiff's rights". Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965).

Thus, there are instances where a statute of limitations does not bar an action. For instance, the policy is outweighed when the statute is in derogation of sovereignty. "The general rule is that statutes of limitations ordinarily do not run against the United States . . . [t]hus said section 2462 constitutes an exception to this general rule and is in derogation of an inherent attribute of sovereign immunity."[22] As such an exception, section 2462 is to be strictly construed.[23] Addressing statutes of limitations other than section 2462, courts have held, "the United States is not bound by any limitations period unless Congress explicitly directs otherwise,"[24] and "[s]tatutes of limitation sought to be applied to bar rights of the government must receive strict construction in favor of the government."[25] A strict construction of section 2462

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[22] United States v. Weaver, 207 F. 2d 796, 798 (5th Cir. 1953).

[23] United States v. Davio, 136 F. Supp. 423, 427 (E.D. Mich. 1955).

[24] United States v. City of Palm Beach Gardens, 635 F. 2d 337, 339 (5th Cir. 1981) (Six-year statute of limitations, 28 U.S.C. §2415(b), held not to apply in action under Hill-Burton Act).

[25] Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386, 391 (1984) (26 U.S.C. §6501(c)(1), providing that tax may be assessed at any time in the case of false or fraudulent returns held to apply, rather than 26 U.S.C. §6501(a), a three-year statute of limitations, where taxpayer filed false or fraudulent return but later files nonfraudulent amended return), quoting E.I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456 (1924).

may suggest that a civil penalty assessment proceeding under TSCA is not a "proceeding for the enforcement of [a] . . . penalty."

The standards which reflect the rule of strict construction of statutes in derogation of sovereignty must be considered along with the limitations on that rule. One of the limitations is the situation in which a statute "expressly includes the government," where "there is no room for the operation of this rule, and a statute of this nature, like any other, is entitled to receive a sensible and reasonable treatment."[26] While section 2462 does not include the term "federal government," it is "primarily, if not exclusively, designed for use in suits brought by the Government,"[27] and thus the rule of strict construction should not apply to it. Because the "stringency of the rule should be relaxed where the demands of a contrary policy include the government within the purpose and intent of a statute,"[28] at least the stringency of the rule of strict construction should be relaxed as applied to section 2462.

Moreover, application of the rule of strict construction to section 2462 to limit its application here appears to be contraindicated by two key federal court opinions. In H.P. Lambert v. Secretary of the Treasury, 354 F. 2d 819, 822 (1st Cir. 1965),

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[26] Sands, Sutherland Statutory Construction, §62.02 (Fourth Ed. 1986); Shaw v. Library of Congress, 747 F. 2d 1469 (C.A. D.C. 1984).

[27] Chesapeake Bay Foundation v. Bethlehem Steel Corp. 608 F. Supp. at 449.

[28] 3 Sands, Sutherland Statutory Construction §62.02, supra.

the First Circuit states that "the general policy of statutes of limitations is so deeply ingrained in our legal system that a period of limitation made generally applicable to such proceedings,[29] as is section 2462, is not to be avoided unless that purpose is made manifestly clear." The Fifth Circuit states in United States v. Core Laboratories, 759 F. 2d 480, 483 (5th Cir. 1985) that "[t]here are exceptions to this rule [the right to be free of stale claims, which comes in time to prevail over the right to prosecute them], . . . but where the Congress has meant to make such exceptions, it has clearly expressed that intent."[30] Congress has not expressed an intent to except administrative proceedings from the right to be free of stale claims as phrased in section 2462. To the contrary, as previously noted, Congress has expressed

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[29] A proceeding under 19 U.S.C. §1641(b), authorizing the Secretary of the Treasury to revoke customhouse brokers' licenses, was at issue. The court did not regard the words in §1641(b), "[t]he collector . . . may at any time . . . serve notice," [emphasis supplied] as a manifestly clear exception to the section 2462 statute of limitations, even though the underlined phrase "taken literally, might suggest there was no limit of time. . . ." Lambert at 822.

[30] The court considered it inappropriate to view section 2462 and the antiboycott provisions of the Export Administration Act as such exceptions, especially because the monetary penalties authorized by those provisions were not intended to deal with serious and flagrant violations. By analogy, civil penalties authorized by section 16(a) of TSCA are not intended to deal with imminent hazards or knowing or willful violations of TSCA; criminal penalties under section 16(b) of TSCA and district court actions under section 7 of TSCA for imminent hazards, would deal with such violations. The Fifth Circuit held that section 2462 began to run from the date of the alleged violation until the date the complaint was filed in district court, rather than from the date of the final administrative order assessing the penalty, which the court believed would in practice render the limitations period ineffectual. See supra, note 17.

an intent that section 2462 applies to administrative proceedings under the Export Administration Act (EAA). Supra, p. 8; United States v. Core Laboratories, Inc., 759 F. 2d at 482. Taking into account the standards set forth in Lambert and Core, as well as the consideration that section 2462 was intended to apply primarily to the government and thus is not, in the usual sense, in derogation of sovereignty,[31] there is little support for the application of the rule of strict construction to section 2462.

The statements in Weaver, supra n. 22, to the effect that section 2462 is in derogation of the rule of sovereign immunity, and in Davio, supra, n. 23, that it should thus be strictly construed, moreover, are neither persuasive nor supported by precedents. The authorities cited in Weaver, which is the sole authority cited in Davio, address the issue of whether a state statute of limitations, which applies generally to private litigants and not specifically to the government, bars claims brought by the federal government. See, Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 133 (1938) (". . . the implied immunity of the domestic sovereign, state or national, has been universally deemed to be an exception to local statutes of

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[31] 3 Sands, Sutherland Statutory Construction, §62.01 at 111, states the rule of strict construction of statutes in derogation of sovereignty, as follows: "Statutory provisions which are written in such general language that they are reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which exempts the government from their operation in the absence of particular indicia suppporting a contrary result in particular instances" However, "the rule has been most emphatically stated and regularly applied where it is asserted that a statute makes the government amenable to suit." Id. at 113.

limitations where the government, state or national, is not expressly included. . . .," dealing with the question of whether a foreign government is subject to the local statute of limitations as are private litigants); Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 351 (1939), ("state statutes of limitations have no applicability to suits by the Government . . . because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments"); United States v. Summerlin, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation. . .in enforcing its rights."); citing United States v. Nashville, 118 U.S. 120, 125-126 (1886)["(T)he United States, asserting its rights vested in it as a sovereign government, is not bound by any statute of limitation, unless Congress has clearly manifested its intention that it should be so bound," addressing the issue of whether the statute of limitations of Tennessee applies to the United States]. In summary, because Congress clearly manifested an intent that the United States be bound by section 2462 (see supra, p. 16, n. 27), the doctrine of sovereign immunity has been waived expressly and should not operate to restrict the application of section 2462 here.

The Palm Beach Gardens opinion, (supra p. 15, n. 24) is not inconsistent with this conclusion. In that case, the statute of limitations at issue, 28 U.S.C. § 2415(a) and (b), which expressly includes the United States, was not strictly construed. Neither were the statutes of limitations at issue in the relevant cases

cited in that opinion (See, United States v. Borin, 350 F. 2d 386 (5th Cir. 1954); United States v. 93 Court Corp., 350 F. 2d 386 (2nd Cir. 1965), cert. denied, 382 U.S. 984 (1966) (State statute of limitation does not bar enforcement by the United States of a right acquired by Reconstruction Finance Corporation, a government corporation.); Guaranty Trust, supra.

Badarracco v. Commissioner of Internal Revenue, supra p. 15, n. 25, on the other hand, mandates strict construction of statutes of limitations applied to bar rights of the government. It applies a rule of strict construction to a statute of limitation (26 U.S.C. § 6501) which applies exclusively to the federal government (the Internal Revenue Service). However, the authorities cited therein indicate both that the language in Badarracco should not be considered in a vacuum and that the opinion is not helpful in resolving the case at hand. The opinion quotes a rule of strict construction of statutes of limitations to be applied to tax collection cases, citing Lucia v. United States, 474 F. 2d 565, 570 (1973). Badarracco further cites E. I. Dupont de Nemours, supra, which concerns section 424 of the Transportation Act of 1920, a statute of limitations which applies to generally to private parties, i.e. carriers, including railroads. That opinion cites the exception to the doctrine of sovereign immunity: the United States is "subject to no time limitation, in the absence of Congressional enactment clearly imposing it." Id., 264 U.S. at 462. Badarracco also cites Lucas v. Pilliod Lumber Company, 281 U.S. 245, 249 (1930), another tax collection case, which states,

"[U]nder the established general rule a statute of limitations runs against the United States only when they assent and upon the conditions prescribed." The language quoted in Badarracco, supra, p. 15, therefore must be considered in light of the fact that it does not refer to section 2462, but rather to a statute of limitations specific to tax collection cases, and in light of the exception to the doctrine of sovereign immunity, i.e. where Congress has expressly waived it by manifesting its intent that the statute apply to the government. Considering Badarracco in that context, it is not inconsistent with the conclusion that the doctrine of sovereign immunity should not operate to restrict application of 2462 to judicial actions. But, even assuming arguendo that the rule of strict construction applies, it does not result in the exclusion of TSCA administrative proceedings from the scope of application of section 2462. "Strict construction of a statute" is defined as

> ....that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute as well as within its spirit or reason, resolving all reasonable doubts against applicability of statute to particular case" Black's Law Dictionary, (Abridged 5th ed. 1983) at 740-741.

Because section 2462 applies to district court actions which do not require antecedent administrative penalty assessments,[32] the assessment phase of proceedings is not per se an expansion of the scope of section 2462. The question is whether administrative

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[32] See supra. p. 14.

penalty assessments under TSCA section 16(a)(2)(A) are so distinct from other types of proceedings to which section 2462 applies that application of section 2462 to TSCA administrative proceedings would not be within the letter and spirit or reason of the statute.

To analyze this, if the respondent in a section 16(a)(2)(A) proceeding pays the assessed penalty voluntarily as ordered by the administrative law judge, then there is no significant difference from a district court proceeding in which a penalty is assessed. The administrative order effected enforcement of a penalty. Respondent was compelled, albeit without the coercive influence of the U. S. Marshal Service, to pay it.

In the other hand, whether or not the respondent pays the assessed penalty, the procedure is basically the same as that under the Export Administration Act [see, 50 U.S.C. §2410(f)]. Congress has expressed its intent that section 2462 apply to both stages of the proceedings under that Act (supra, pp. 8-9). While the Meyer court discussed the distinction of this type of "bifurcated" procedure under the Export Administration Act, that is, the situation where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a collection action in district court, it did so only in the context of determining the date when the limitations period began to run for purposes of applying section 2462 to the collection action. The fact that the right to recover in district court is dependent upon respondent's failure to pay pursuant to the administrative order was germane to determining that date. However, there is no indication in opinion

that such a fact was relevant for or considered in connection with any other purpose. Meyer, 808 F. 2d at 916-918. See also, United States v. Old Ben Coal Co., 676 F. 2d 259 (7th Cir. 1982).

The distinction of such "bifurcated" proceedings, such as those under section 16 of TSCA, thus seems untenable for purposes of determining whether they are "proceedings for the enforcement of [a] . . . penalty." "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). Consequently, there is no compelling reason to conclude that the structure of proceedings under TSCA justifies the exclusion of administrative proceedings under section 16(a)(2)(A) from the application of section 2462 even under a standard of strict construction.

Considerations of fairness and uniformity also support inclusion of TSCA administrative proceedings in the scope of § 2462. Effective enforcement is diminished by disparity in treatment of violators by the government. For instance, it would appear unreasonable to apply the statute of limitations to district court and citizen enforcement actions under RCRA §§ 3008(a) and 7002, 42 U.S.C. §§6938(a) and 6972, but not to administrative enforcement actions under RCRA § 3008(a). EPA could then avoid the limitations period merely by initiating administrative rather than district court proceedings. Similarly, uniformity in enforcing the Clean Water Act has been considered important. Applying section 2462 to citizen enforcement suits as well as government enforcement

actions "logically extends pre-Clean Water Act circuit decisions regarding the proper scope of section 2462 and promotes the important federal policy of uniformly and adequately enforcing the Clean Water Act." Sierra Club v. Chevron U.S.A. Inc., 834 F. 2d 1517, 1521 (9th Cir. 1987); see also, Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 448, 449 ("Proceedings initiated by the EPA would almost certainly be subject to a five year statute of limitations, 28 U.S.C. §2462, and the limitations period for citizen enforcement should not be shorter. . . . (I)t is important, then, that the statute of limitations for citizen suits be at least as long as that for administrative action.") By analogy, there should be uniformity in enforcement of TSCA; if section 2462 applies to district court collection actions under TSCA[33], or perhaps even to citizen civil actions brought under section 20 of TSCA, 15 U.S.C. §2619, then it should apply also to administrative proceedings under section 16(a)(2)(A) of TSCA.

As stated in United States v. N.O.C., Inc., slip op. at 17, "[a] statute of limitations must be applied to administrative matters in accordance with the 'general purposes of the statute and its other provisions, and with due regard to those practical ends which are served by any limitation of time, within which an action must be brought'," quoting, Crown Coat Front Co. v. United States, 386 U.S. 503,517 (1967), and Reading Co. v. Koons, 271 U.S. 58, 62 (1926). Accordingly, application of section 2462 must be considered in the context of the characteristics of regulation

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[33] United States v. N.O.C., Inc., supra.

under TSCA. A crucial aspect of TSCA regulation is the preparation and maintenance of accurate and complete records regarding toxic substances. Under most of the regulations duly promulgated under TSCA which involve recordkeeping, persons regulated under TSCA are required to maintain records for five years.[34] A five year statute of limitations would be consistent with these regulations, and would be especially appropriate considering that the regulated community is given notice by these regulations that records may be legitimately discarded after five years. It would thus be unfair to require a respondent in a TSCA enforcement action to attempt to piece together a defense to allegations of violations occurring

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[34] 40 CFR §720.78(a), (b)(3), and (c) - premanufacture notice (for reporting new chemical substances) documentation must be retained by manufacturers and importers for five years.

40 CFR §720.40 - Manufacturers, importers, and processors intending to engage in a new use of a chemical substance must retain new use notice documentation for five years.

40 CFR §761.180(a) Records on disposition of PCBs and PCB Items and annual documents "shall be maintained for at least five years after the facility ceases using or storing PCBs and PCB Items. . . ."

40 CFR §761.180(b) - Owner or operator of a PCB disposal or PCB storage facility shall retain documents (or information on PCBs and PCB Items handled at the facility) for at least five years after the facility is no longer used for storage or disposal of PCBs.

See also, 40 CFR §763.94(a), where records concerning asbestos must be retained by the local education agency for three years after the next required reinspection or for an equivalent period, for each homogenous area where all asbestos-containing building material has been removed.

over five years ago. Not only may records have been discarded, but facilities may have moved, management and employees may have been replaced, or companies may have changed policies and/or ownership. In contrast, EPA may very likely have complete inspection reports and documentation of alleged violations.

Finally, in response to any argument that a respondent may wrongfully conceal violations of TSCA and thus allow the five year limitation to expire, the equitable doctrine of fraudulent concealment which is read into every statute of limitations[35] could be applied to toll the statute in cases where the required elements of fraudulent concealment are present.[36]

In conclusion, while there are conflicts in administrative opinions, after consideration of all the arguments, the relevant case law, legislative history, and, not least, matters of common sense, consistency and simple fairness, it is held that the five year statute of limitations of 28 U.S.C. section 2462 does apply to this administrative proceeding brought pursuant to section 16(a)(2)(A) of TSCA.

Accordingly, counts IV and V, and such portions of count VI as allege violations which occurred five years or more before the

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[35] Holmberg v. Armbrecht, 327 U.S. 392, 396-397 (1946); In re Frank Rose Jr, supra, citing, United States v. Firestone Tire and Rubber, 518 F. Supp. 1021 (1981).

[36] The elements are set forth in Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F. 2d 389, 394 (6th Cir. 1975).

complaint was filed, have been dismissed as barred by 28 U.S.C. §2462. (See Order Upon Motion to Dismiss, attached).

J. F. Greene
Administrative Law Judge

Dated: August 30, 1991
Washington, D.C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ADMINISTRATIVE LAW JUDGES

MAIL CODE A-110

IN THE MATTER OF	:	
	:	
District of Columbia	:	Dkt. No. TSCA-III-439
Lorton Prison Facility	:	
Respondent	:	
	:	
	:	

ORDER UPON MOTION TO DISMISS

Respondent District of Columbia having moved to dismiss Counts IV, V and portions of Count VI, and complainant having filed no response, now, therefore , it is ORDERED that Counts IV and V, and such portions of Count VI as allege violations which occurred five years or more before the complaint herein was filed are dismissed without prejudice.

ORDER to follow.

Henry B. Frazier III

for J. F. Greene
Administrative Law Judge

Dated: March 19, 1991
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 19, 1991.

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Secretary

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CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order Granting Motion to Dismiss was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on

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