United States v. Navistar International Transportation Corp.: Seventh Circuit Bars Government's CERCLA Claim Based on Violation of the Statute of Limitations

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UNITED STATES v. NAVISTAR INTERNATIONAL TRANSPORTATION CORP.: SEVENTH CIRCUIT BARS GOVERNMENT'S CERCLA CLAIM BASED ON VIOLATION OF THE STATUTE OF LIMITATIONS

"What a difference a day makes . . . twenty-four little hours."

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in an effort to protect the public health and environment from the dangers associated with hazardous waste sites. Although the statute provided that those responsible for contaminating the environment would be held liable for the clean-up of hazardous waste, CERCLA also recognized the importance of prompt resolution of liability regarding


CERCLA provides for the identification of sites where hazardous substances have been released, or where such releases are likely to occur. See VALENTE & VALENTE, supra, at 195. Once identified, the government, or a private party which has assumed the responsibility, will clean-up the site. See id. Finally, if the government conducted the clean-up, the government may seek recovery of the cost it incurred during the clean-up from those who are responsible for the contamination. See id. If a private party undertook the clean-up, that party may then seek contribution or cost recovery from other potentially responsible parties. See id.
the clean-ups. Therefore, Congress incorporated statutes of limitations into the CERCLA framework to encourage the government to bring timely actions against potentially liable parties.

Courts have often had difficulty interpreting CERCLA's complex statutes of limitations. Specifically, courts have struggled with balancing the policy of ensuring expeditious resolution of claims with the desire to hold accountable those who caused the contamination. To aid in the task of interpreting CERCLA, courts have relied upon the rule of statutory construction under which statutes of limitations, when applied against the government, are to be construed strictly in the government's favor.


4. See Pub. L. No. 99-499, 100 Stat. 1613 (1986). The statutes of limitations were incorporated into CERCLA through SARA. See also Velsicol Chem. Corp. v. Enenco, Inc., 9 F.3d 524, 528 (6th Cir. 1993) (noting that prior to enactment of SARA, Congress intended government to be able to bring cost recovery actions at any time); United States v. Mottolo, 605 F. Supp. 898, 909-10 (D.N.H. 1985) (noting lack of time restrictions on government suits prior to amendments). For a more complete discussion of Congress's intent in adopting these amendments, see infra notes 24 and 72, and accompanying text.

5. See Recent Cases, Court Rejects CERCLA Cost Recovery Claim, 4 N.C. ENVTL. L. LETTER 3 (1998) ("CERCLA was cobbled together and hastily enacted during a lame-duck session of Congress. . . . Since 1981, federal judges, government lawyers, and private-sector legal advisors have strained to make sense of [CERCLA's provisions]. . . . The confusion generated by CERCLA extends to its statute of limitations."); see also Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 842 (6th Cir. 1994) (illustrating court's difficulty interpreting CERCLA's statute of limitations). The Kelley court concluded that the CERCLA statutes of limitations were ambiguous. See id. at 842. The Kelley court stated that "[o]bviously if the meaning of the statutory language was as clear as either party maintains, the two sides could not have arrived at such contrary interpretations of it." Id.

6. See Kelley, 17 F.3d at 842-43 (recognizing conflict between United States Supreme Court opinions favoring application of statutes of limitations with rule that courts strictly construe statutes in favor of government); United States v. United Nuclear Corp., 814 F. Supp. 1552, 1561-63 (D.N.M. 1992) (addressing conflict of policies and concluding court should construe statute of limitations in favor of government).

7. See Kelley, 17 F.3d at 842-44 (concluding district court properly relied upon statutory rule of construction); United States v. Akzo Nobel Coatings, Inc., 990 F. Supp. 897, 904 (E.D. Mich. 1998) ("The [CERCLA] statutes should be interpreted with the United States Supreme Court's frequent admonition to strictly construe statutes of limitation in favor of the Government where application of them might otherwise bar its rights."); United Nuclear, 814 F. Supp. at 1561 (stating "[c]ourts have interpreted the [CERCLA] statute of limitations liberally in favor of EPA"); United States v. Petersen Sand & Gravel, Inc., 824 F. Supp. 751, 755 (N.D. Ill. 1991) (stating "whenever a defendant seeks to apply a statute of limitation in order to bar a governmental action, the statute of limitation must be strictly construed in favor of the government") (citing Moltolo, 605 F. Supp. at 902); United States v. Moore, 698 F. Supp. 622, 625 (E.D. Va. 1988) (citing rule as "statutes of limitation sought to be applied to bar rights of the Government must be strictly construed in

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Recently, the Seventh Circuit, in *United States v. Navistar International Transportation Corp.*, \(^8\) confronted the issue of whether CERCLA’s statute of limitations barred the government’s cost recovery claim for an initial remedial action.\(^9\) The *Navistar* decision focused primarily on which of CERCLA’s statutes of limitations applied and what actions were sufficient to trigger the relevant statute.\(^10\) The Seventh Circuit, unlike the majority of courts, rejected the rule in favor of construing statutes of limitations to the advantage of the government, and held that the federal government missed the applicable statutory period by a single day.\(^11\)

This Note discusses the Seventh Circuit’s holding in relation to other judicial opinions addressing similar statute of limitations issues under CERCLA. Part II summarizes the law’s development in this area prior to the *Navistar* decision.\(^12\) Part III explains the facts giving rise to the *Navistar* case.\(^13\) Part IV describes the *Navistar* court’s reasoning in reaching its decision.\(^14\) Part V presents a critical analysis of the Seventh Circuit’s reasoning and decision.\(^15\) Finally, Part VI discusses the negative consequences which the holding may potentially have on future assignments of CERCLA liability.\(^16\)


9. *See Navistar*, 152 F.3d at 704. For a discussion of the facts leading up to the Seventh Circuit’s hearing of the *Navistar* case, *see infra* notes 83-101 and accompanying text. For a more complete discussion of the *Navistar* court’s decision and reasoning, *see infra* notes 102-35 and accompanying text. For a critical analysis of the *Navistar* court’s opinion and its potential impact on environmental law, *see infra* notes 136-63 and accompanying text.

10. *See id.* at 706-14. For a discussion of the *Navistar* court’s reasoning in determining which statute of limitations applied, *see infra* notes 107-22 and accompanying text. For a discussion of which actions the *Navistar* court held sufficient to trigger the statute of limitations, *see infra* notes 123-35 and accompanying text.

11. *See id.* at 714. For a discussion of the Seventh Circuit’s reasoning in rejecting the statutory rule of construction, *see infra* notes 103-06 and accompanying text.

12. For a summary of the relevant law prior to the *Navistar* opinion, *see infra* notes 17-82 and accompanying text.

13. For a discussion of the factual events giving rise to the *Navistar* case, *see infra* notes 83-101 and accompanying text.

14. For a narrative analysis of the *Navistar* court’s reasoning, *see infra* notes 102-35 and accompanying text.

15. For a critical analysis of the *Navistar* court’s reasoning, *see infra* notes 136-49 and accompanying text.

16. For a discussion of the impact which the *Navistar* opinion may have on this area of law, *see infra* notes 150-63 and accompanying text.
II. BACKGROUND

A. Statutes of Limitations

Statutes of limitations set forth a period of time during which claimants must bring particular legal actions.\(^{17}\) After the statutory period has elapsed, a claimant is precluded from bringing the action, regardless of its merit.\(^{18}\) Modern courts tend to favor statute of limitations defenses when asserted against private parties, construing the statutes liberally in the interest of giving them effect.\(^{19}\) This favorable view of limitation defenses, however, does not apply when employed against the federal government.\(^{20}\) The government is generally not subject to statutes of limitations absent congressional intent to the contrary.\(^{21}\) Even when Congress does

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17. See United States v. Kubrick, 444 U.S. 111, 117 (1979) (holding that statutes of limitations are legislative judgments announcing that justice requires adversaries be put on notice). Long before the first statutes of limitations were written, courts recognized the notion that a long lapse of time precludes a claimant from pursuing an action upon a right. See 51 Am. Jur. 2d Limitation of Actions § 1 (1970). Today, however, legislatures routinely incorporate express periods of limitations into their enactments. See id. § 9.

18. See id. § 27 (1970); see also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (holding court ruling upon statute of limitations grounds is ruling on merits). In Spendthrift Farm, the United States Supreme Court stated "[t]he rules of finality, both statutory and judge-made, treat dismissal on statute-of-limitations grounds . . . as a judgment on the merits." Id. at 228. See also Fed. R. Civ. P. 41(b) (stating any involuntary dismissal of claim, other than dismissal for lack of jurisdiction, improper venue or failure to join party, "operates as an adjudication upon the merits").


20. See generally 51 Am. Jur. 2d Limitation of Actions § 50 (1970) (stating that "the judicial attitude is in favor of statutes of limitation . . . since they are considered as statutes of repose and as affording security against stale claims. Consequently, except in the case of statutes of limitation against the government, the courts are inclined to construe limitation laws liberally.").

consent to being bound by a statute of limitations, courts will generally construe the statute in favor of the government.\textsuperscript{22}

B. CERCLA's Statutes of Limitations


A series of amendments to CERCLA, known as the Superfund Amendments and Reauthorization Act (SARA), was adopted by Congress in 1986.\textsuperscript{23} SARA added a number of statutes of limitations to CERCLA that control when the government or private persons must bring suit for the various types of actions available under the statute.\textsuperscript{24} Prior to the enactment of SARA, there were no time restrictions placed upon the government's authority to bring many types of CERCLA actions.\textsuperscript{25} This Note will address the statutes of

\textsuperscript{22} See Badaracco v. Commissioner, 464 U.S. 386, 391 (1984) (stating, "[t]his Court long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar the rights of the Government, must receive a strict construction in favor of the Government'") (quoting E.L. DuPont de Nemours & Co., 264 U.S. at 462); Independent Coal & Coke Co. v. United States, 274 U.S. 640, 650 (1927) (stating "[s]tatutes of limitation against the United States are to be narrowly construed") (citation omitted); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) (stating, "6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed'). Courts have applied this rule of construction in the context of environmental litigation, as well as other areas of law. \textit{See}, e.g., United States v. Telluride Co., 146 F.3d 1241, 1246 (10th Cir. 1998) (limiting applicability of statute of limitations against government when government acts as sovereign); Rosette Inc. v. United States, 141 F.3d 1394, 1397 (10th Cir. 1998) (construing Quiet Title Act's statute of limitations in favor of United States); California v. Montrose Chem. Corp., 104 F.3d 1507, 1513 (9th Cir. 1997) (construing statutes of limitations strictly in favor of government).


\textsuperscript{24} See Stephen D. Ramsey & Maureen M. Crough, \textit{The Superfund Amendments and Reauthorization Act of 1986}, in \textit{Envtl. L.} 29, 39 (A.L.I.-A.B.A. Course of Study, Feb. 1988) (providing overview of SARA's effect on CERCLA, including statutes of limitations); \textit{see also} Velsicol, 9 F.3d at 528. The \textit{Velsicol} court noted that "[b]y passing SARA, 'Congress sought to better define cleanup standards, to expand resources available to EPA for investigations and cleanups, to clarify EPA's authority under Superfund law, and to expand and clarify the states' role in any remedial action undertaken, or ordered, by EPA.'" \textit{Id.} at 528 n.3 (quoting United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1417 (6th Cir. 1991)).

For a discussion of the House Committee reports discussing the passage of the statutes of limitations within SARA, see \textit{infra} note 72 and accompanying text.

\textsuperscript{25} See \textsc{Allen J. Topol \\ \\ & \textsc{Rebecca Snow}, \textit{Superfund Law and Procedure} § 5.10 (1992) (explaining new SARA statutes of limitations under section 113(g)(2) and their effects on litigation); \textit{see, e.g.,} Velsicol, 9 F.3d at 528 (stating, "[a]s originally enacted in December 1980, CERCLA did not have a statute of limitations governing a cost recovery action under section 107(a)").
limitations related to cost recovery claims under CERCLA section 113(g)(2).26

Section 113(g)(2) divides cost recovery claims, available under section 107(a), into removal actions and remedial actions.27 Remedial actions are further divided into initial remedial actions and subsequent remedial actions.28 Under CERCLA, a cost recovery claim falling within the "removal" category is understood as "the clean-up or removal of released hazardous substances from the environment."29 The definition of a "remedial" action under CERCLA includes "those actions consistent with [the] permanent remedy taken instead of or in addition to removal actions."30 CERCLA does not define the two types of remedial actions — initial and subsequent — found within the statute of limitations.

Generally, a three-year statute of limitations, which begins to accrue “after completion,” governs removal actions.31 Claimants

27. See id. For the relevant text of section 113(g)(2), see infra notes 31-33.
28. See id.
29. Id. § 101(23), 42 U.S.C. § 9601(23). CERCLA defines the terms “remove” or “removal” as:
[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, ... or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Id.

30. Id. § 101(24), 42 U.S.C. § 9601(24). The statute defines “remedy” or “remedial action” as:
[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. This term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

Id. (emphasis added).

31. See CERCLA § 113(g)(2); 42 U.S.C. § 9613(g)(2). The statute provides: An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
(A) for a removal action, within 3 years after completion of the removal action, except that such recovery action must be brought within 6 years after a determination to grant a waiver under sec-
must bring claims for initial remedial actions within six years "after initiation of physical on-site construction of the remedial action." The government may bring a subsequent remedial claim "any time during the response action, but [such a claim] must be commenced no later than 3 years after the date of completion of all response action."  


a. Distinguishing "Initial" and "Subsequent" Actions.

Whether an action for the recovery of costs is characterized as "initial" or "subsequent" dictates which period of limitations will apply under section 113(g)(2)(B) of CERCLA. Courts, however, have been unable to reach a clear consensus regarding which actions are properly deemed "initial" or "subsequent" under the statute.
While courts have had little difficulty interpreting the term "initial," problems arise when a party, involved in an earlier cost recovery action, becomes involved in further cost recovery actions but in a different litigation position. The dispute centers on whether the latter actions are deemed "subsequent" or, due to the change in litigation position, are characterized as further "initial" actions.

A common interpretation of section 113(g)(2) is that, as a prerequisite to any "subsequent" action, a court must have previously entered a declaratory judgment assigning liability to the party against whom relief is sought in the action. Both the Fourth and Sixth Circuits appear to follow this view. Furthermore, this construction receives support from the statute's legislative history as well as unadopted Environmental Protection Agency (EPA) rules.

COMPLIANCE UPDATE 4 (1997) (presenting critical analysis of distinction between initial and subsequent actions as formulated by district court in Navistar).

36. See Beazer, 1997 WL 173225, at *1. In Beazer, the problem arose when the plaintiff moved to dismiss its first cost recovery claim against the defendant, but wanted to maintain a second cost recovery claim against that same defendant. See id. A similar situation existed in Navistar; the government sought to bring suit directly against parties who had been third-party defendants in an earlier action. See Navistar, 152 F.3d at 705-06.

37. See Beazer, 1997 WL 173225, at *2 (declining to find action "subsequent" and barring action under res judicata); Navistar, 152 F.3d at 708-09 (concluding action was "initial").

38. See Beazer, 1997 WL 173225, at *2 (holding section 113(g)(2) requires declaratory order regarding liability before subsequent action may be brought); Kelley, 17 F.3d at 844 (stating that under section 113(g)(2) "[t]he entry of declaratory judgment as to liability is mandatory") (citing United States v. Kramer, 757 F. Supp. 397, 412 (D.N.J. 1991)); see also In re Dant & Russel, 951 F.2d at 249-50 (explaining benefits of obtaining declaratory judgment before recovery action).

39. See Beazer, 1997 WL 173225, at *2 ("As the Navy points out, however, Beazer's interpretation ignores the first sentence of [section 9613(g)(2)(B)], which requires that the court enter a declaratory judgment as to liability 'that will be binding on any subsequent action.'"); Kelley, 17 F.3d at 844 (stating, "entry of declaratory judgment as to liability is mandatory [for a subsequent action]") (citing United States v. Kramer, 757 F. Supp. 397, 412 (D.N.J. 1991); see also United States v. Atlas Minerals & Chemicals, Inc., No. CIV.A.91-5118, 1995 WL 510304, at *107 (E.D. Pa. Aug. 22, 1995) (entering declaratory judgment binding on third party plaintiffs' recovery from third party defendants in subsequent actions); Kramer, 757 F. Supp. at 437 (noting that while government "may not recover costs not yet incurred, it may obtain a declaratory judgment pursuant to section 113 (g)(2)").

40. See H.R. REP. No. 99-253, pt. 3 (1985), reprinted in 1986 U.S.C.C.A.N. 3038 (stating "[i]n the initial cost recovery action, in order to conserve judicial time and resources, the court is to enter a declaratory judgment on liability for response costs; this judgment will be binding in future cost recovery actions to obtain additional costs").

41. See 57 C.F.R. §§ 34.742, 34.752 (1992) (stating "[u]nder the provisions of section 113(g)(2)(B), where a declaratory judgment on liability has been entered by a court, the statutory limitation period for a subsequent action is extended to three years after "completion of all response action"").
A far less common interpretation rejects this narrow reading of the statutory language and advocates a more liberal definition of the term "subsequent." This argument suggests that the statutory language does not create a prerequisite for subsequent actions, and that means other than a declaratory order may accomplish the policy objectives cited in the legislative history.

b. Actions That Trigger the Statute of Limitations for Initial Actions

According to section 113 of CERCLA, the statute of limitations for an "initial remedial action" begins to run six years after "initiation of physical on-site construction of the remedial action." The District Court for the Eastern District of California, in California v. Hyampom Lumber Co., set forth the test for determining what actions serve to trigger the statute of limitations for initial remedial actions. The Hyampom Lumber court stated that the relevant event must possess four attributes; namely it must: 1) be "physical"; 2) have occurred "on-site"; 3) be part of the "construction of the remedial action"; and 4) constitute the "initiation" of the remedial action. These requirements track the language of the statute and appear to accord with its plain meaning.

Other courts, however, have either suggested that the Hyampom Lumber test is not comprehensive, or have appeared to determine whether an act triggers the statute of limitations without applying

42. See Navistar, 152 F.3d at 709 (adopting view that declaratory judgment is not prerequisite to subsequent action). For a critical discussion of the Seventh Circuit's holding, in this context, as against the clear weight of authority, see infra note 110.

43. See id. at 710.

44. CERCLA § 113(g)(2)(B), 42 U.S.C. § 9613(g)(2)(B). For a complete discussion of the CERCLA provisions related to the statutes of limitation for removal and remedial actions, see supra notes 23-33 and accompanying text.


46. See id. at 1391. In Hyampom Lumber, the defendants operated a lumber mill which treated lumber by dipping it into a chemical solution. See id. at 1390. As a result of spillage and seepage from the dip tanks, the government discovered "widespread contamination" of the soil. See id. The State of California sought recovery under CERCLA for costs incurred as a result of cleaning-up the defendant's lumber mill site. See id. The defendants opposed the action on the grounds that it was time barred by CERCLA section 113(g)(2)(B). See id. The district court, reasoning that section 113(g)(2)(B) is "unambiguous," accepted the defendant's interpretation of the statute and refused to apply the rule that statutes of limitation should be construed in favor of the government. See id. at 1393. But see Kelley, 17 F.3d at 842-44 (holding that section 113(g)(2)(A) is ambiguous).

47. Hyampom Lumber, 903 F. Supp. at 1391.

48. See id. (noting that court begins with statutory language). For the text of CERCLA section 113(g)(2)(B), see supra note 32.
any clear test.\textsuperscript{49} The District Court for the Eastern District of Michigan in \textit{United States v. Akzo Nobel Coatings, Inc.},\textsuperscript{50} used a variation of the \textit{Hyampom Lumber} approach, reasoning that “[n]othing in \textit{Hyampom Lumber}... prohibits additional requirements from being considered.”\textsuperscript{51} The \textit{Akzo} court added a fifth requirement which provides that the event constitute a “critical role in implementation of the permanent remedy.”\textsuperscript{52}

The \textit{Akzo} court’s modification of the \textit{Hyampom Lumber} test produced wide disparity between the respective courts’ decisions regarding what actions were sufficient to trigger the statute of limitations.\textsuperscript{53} The \textit{Hyampom Lumber} court held that installation of water and electric utilities at the site initiated the tolling of the statute of limitations.\textsuperscript{54} Conversely, the \textit{Akzo} court held that the con-

\begin{itemize}
  \item \textsuperscript{50} 990 F. Supp. 897 (E.D. Mich. 1998).
  \item \textsuperscript{51} Id. at 905. In \textit{Akzo}, the federal government brought a cost recovery action against numerous potentially liable parties in connection with the clean-up of a Michigan landfill. \textit{See id.} at 899. The \textit{Akzo} court characterized the clean-up as a “remedial action” to which section 113(g)(2)(B)’s six year statute of limitations applied. \textit{See id.} at 904. Without concluding whether the statute was ambiguous, the \textit{Akzo} court asserted that it should interpret section 113 in accordance with the rule that statutes of limitations be construed in favor of the government. \textit{See id.}
  \item \textsuperscript{52} Id. The \textit{Akzo} court stated that the \textit{Hyampom Lumber} test “establishes a floor, meaning an event must at least meet these criteria to be considered the initiation of physical on-site construction.” \textit{Id.} The \textit{Akzo} court concluded both that the additional requirement, that the action “play a critical role in implementing the permanent remedy,” did not violate the \textit{Hyampom Lumber} opinion, and that the \textit{Hyampom Lumber} decision itself implicitly applied this fifth requirement \textit{Id.} The \textit{Akzo} court based this conclusion on a statement by the \textit{Hyampom Lumber} court that “the utilities played a critical role in the implementation of the permanent remedy.” \textit{Hyampom Lumber}, 903 F. Supp. at 1393; \textit{see also Navistar}, 152 F.3d at 712-13 (explaining governments’ reliance on \textit{Akzo} opinion in \textit{Navistar} case).
  \item \textsuperscript{53} \textit{See Akzo}, 990 F. Supp. at 905-06 (describing actions court held insufficient to trigger statute of limitations); \textit{Hyampom Lumber}, 903 F. Supp. at 1393-94 (describing action held sufficient to trigger statute of limitations). For the language of the courts’ opinions depicting these actions, see \textit{infra} notes 54 and 55.
  \item \textsuperscript{54} \textit{See Hyampom Lumber}, 903 F. Supp. at 1393-94. The actual work which triggered the statute of limitations was described by the court as follows:
    \item A subcontractor installed a twenty foot lumber pole and necessary electrical hardware and ran a power line into an office building at the site. Over the following few days, the same subcontractor installed new pipes which provided water to the site from a nearby pond. Both the water and the electricity were installed temporarily to be used only for the duration of the State’s response action. Phone service was also connected at this time.
    \textit{Id.} at 1391.
  \item The court further explained why these actions served to trigger the statute of limitations as follows:
\end{itemize}
struction of staging/storage pads, the excavation of approximately 235 drums from the site and the hookup of both utilities and sanitation services was not sufficient to begin the statutory period.55

Alternatively, the District Court for the Southern District of Georgia, in Union Carbide Corp. v. Thiokol Corp.,56 simply relied on the statute’s “ordinary meaning” in deciding the issue and did not adhere to any clear test.57 Noting the existence of minimal judicial guidance on this point, the Union Carbide court determined that the building of a steel fence, intended to keep animals out of the site in

[T]he installation of the utilities was “remedial” rather than a “removal” action. The installation of the utilities was also part of the “construction of the remedial action.” It is undisputed that the utility pole and the water lines were installed for the sole purpose of providing power and water to the Jensen site during the implementation of the permanent remedy. Moreover, water and power were central to various aspects of the remedy, including fire control, dust suppression, steam cleaning, and lighting.

Finally, since the installation of the utilities was the first step taken in implementing the remedy, it marked the “initiation” of the remedy as well.

Id. at 1393-94.

55. See Akzo, 990 F. Supp. at 905-06. The Akzo court described the action at issue in the following manner:

Plaintiffs do not dispute defendants’ characterization of the work necessary to complete construction of the [two] 125 feet long by 125 feet wide pads . . . . According to defendants’ calculations, the pads alone required about 175 15-ton truck loads of mason sand (2604 tons) and about 7,000 square yards of geofabric and PVC liner.

[The State agency] began using these pads . . . when it started excavating drums from Areas 1 and 4. The excavation continued for two weeks. The 235 drums excavated during this time were stored in “over-pack” containers and placed on the pads . . . . They remained on the pads for approximately 18 months while [ ] tests were conducted.

Id. at 901-02 (footnote omitted).

The Akzo court explained that these actions were not sufficient to trigger the statute of limitations because they were conducted for “testing purposes” and therefore did not play a critical role in “implementation” of the remedial action. See id. at 905-06.


57. See id. at 1042. Union Carbide involved an action to recover costs between two private parties. See id. at 1039. The plaintiff, Union Carbide, executed a plan, which Georgia’s environmental agency approved, to close the landfill in question. See id. at 1040. Union Carbide then filed a cost recovery action, under section 107 of CERCLA, which governs all actions to recover costs, against Thiokol, the previous owner of the site. See id. at 1039. Thiokol defended the action based upon the relevant statutes of limitations. See id. Thiokol attempted to characterize Union Carbide’s actions as “removal” rather than “remedial” and, therefore, asserted that the action was subject to the three-year statute of limitations under section 113(g)(2)(A). See id. at 1042. The district court rejected this characterization and sought to apply the six-year statute of limitations for “remedial” actions under section 113(g)(2)(B). See id. at 1041-42. Union Carbide, however, was unable to prove that its action was timely, even under this longer statutory period. See id. at 1042.
anticipation of installing the clay cap, was sufficient to trigger the statutory period.\textsuperscript{58} Central to the \textit{Union Carbide} court’s reasoning was the fact that building the fence was listed as “the first element of the final closure plan submitted to the [state environmental agency].”\textsuperscript{59} Therefore, the \textit{Union Carbide} court appeared comfortable deciding that the action was undertaken pursuant to the “permanent remedy,” as required to trigger the statute.\textsuperscript{60} These district court opinions illustrate the disparity that exists between actions courts deem sufficient to begin accrual of the statutory period and the differing approaches used to reach those decisions.

c. Policy Considerations Reflected in Case Law

Courts repeatedly have construed CERCLA’s statutes of limitations in favor of the government.\textsuperscript{61} The policy underlying this general rule of construction is that the negligence of public officers, who fail to act within the statutory period, should not prejudice the public interest the statute seeks to protect.\textsuperscript{62}

58. See id. at 1042 (“Court can find very little guidance in determining when physical on-site construction of a remedial action begins.”).

59. Id. The \textit{Union Carbide} court argued that “[e]ven if the purpose of the fence was to keep animals out of the landfill in anticipation of installing the clay cap, it was an ‘action consistent with a permanent remedy,’ 42 U.S.C. § 9601(24), as an integral step in the final closure process.” Id.

60. See id. Furthermore, the \textit{Union Carbide} court noted that even if it employed the time line Union Carbide favored, it would reach the same result. See id. Union Carbide relied upon an unadopted EPA rule which marked the “completion of the remedial design and issuance of the Notice to Proceed” as the beginning point of any remedial action under section 107. Id. The \textit{Union Carbide} court stressed that this unadopted rule had no “precedential value.” Id. The unadopted rule’s application to this case, however, would not change the result since the building of the fence took place after the Notice to Proceed was issued. See id.

61. See Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 842 (6th Cir. 1994) (holding CERCLA’s statute of limitations ambiguous and therefore resorting to rule of statutory construction favoring government); Reardon v. United States, 947 F.2d 1509, 1513 (1st Cir. 1991) (allowing broad interpretation of statute of limitations so as not to bar government’s CERCLA claim); United States v. Akzo Nobel Coatings, Inc., 990 F. Supp. 897, 907 (E.D. Mich. 1998) (construing statute of limitations’ trigger, initiation of physical on-site activity, narrowly in favor of government); United States v. United Nuclear Corp., 814 F. Supp. 1552, 1562-63 (D.N.M. 1992) (holding applicable statute of limitations did not begin to run until EPA issued its Record of Decision, thus finding government’s claim timely); United States v. Petersen Sand & Gravel, Inc., 824 F. Supp. 751, 755 (N.D. Ill. 1991) (stating, “[statute of limitations] must be afforded a broad and liberal construction so as to avoid limiting the liability of those responsible for cleanup costs beyond the limits expressly provided”). For a discussion of cases where federal courts have rejected this rule, see infra notes 73-82 and accompanying text.

62. See 51 Am. Jur. 2d \textit{Limitation of Actions} § 50, n.18 (1970) (stating that “[t]he general principle of public policy applicable to all governments, that the public interest should not be prejudiced by the negligence or default of public officers, underlies the rule of strict construction for statutes of limitation in gov-
Although the Supreme Court has not yet specifically addressed the interpretation of CERCLA's statutes of limitations, the Court has, in a variety of situations, announced the broad rule that courts should strictly construe statutes of limitations in favor of the government. The Sixth Circuit applied this broad rule in *Kelley v. E.I. DuPont de Nemours & Co.*, stating its “willingness to give CERCLA provisions a broad construction, ‘consistent with the legislative purposes of the act’” and thereby acknowledged that “CERCLA’s limitations periods are to be broadly construed.”

Several district courts have reached conclusions similar to that of the Sixth Circuit. For example, in *United States v. United Nuclear Corp.*, the District Court for the District of New Mexico stated that “[c]ourts have interpreted the [CERCLA] statute of limitations lib-

government cases”) (citing United States v. St. Paul, M. & M. R. Co., 247 U.S. 310, 314 (1918)).

Courts have historically shown deference to the government in litigation matters. See United States v. Dalm, 494 U.S. 596, 608 (1990). Under the traditional concept of sovereign immunity, courts barred private parties from bringing suit against the government. See id. In modern times, the government has consented to being held liable by private parties in numerous situations. See id. However, courts construe the laws which permit such suits against the government in favor of the government. See id. Thus, the statutory period in which the government may be sued is also to be construed strictly. See id.; see also Holdsclaw, *supra* note 21, at 885-88 (explaining common law basis of rule).


64. 17 F.3d 836, 843 (6th Cir. 1994).

65. *Id.* (quoting Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)). In *Kelley*, the State of Michigan brought a CERCLA action against the defendants for recovery of costs incurred during the clean-up of an industrial waste site. See id. at 837-39. Relying on the rule of construction that statutes of limitations be interpreted in favor of the government, the district court held that the actions at issue did not represent a separate “removal action” subject to a different limitations period. See id. at 840. The Sixth Circuit determined that the statute of limitations was ambiguous, and therefore, upheld the district court’s reliance on the rule of statutory construction. See id. at 842-44. In its liberal interpretation of the statute, the *Kelley* court stated that “[i]n general, the passage of an additional year will do little to dim memories that are already almost 30 years old.” *Id.* at 843-44. The court’s interpretation of the statute of limitations ensured that the purpose of CERCLA, that responsible parties be liable for the prompt clean-up of hazardous waste sites, would be achieved. See id. at 843.

erally in favor of EPA." 67 Likewise, the District Court for the Northern District of Illinois in United States v. Petersen Sand & Gravel, Inc. 68 concluded that "the remedial intent of CERCLA requires a liberal statutory construction in order to avoid frustrating its purpose." 69

Conversely, a competing policy favors the prompt filing of government claims under CERCLA in the interest of resolving environmental liability in a timely manner. 70 This view was most clearly articulated in the legislative history of SARA. 71 There, Congress explicitly stated that its intention in promulgating SARA was to ensure that cost recovery actions against responsible parties were brought as soon as the government gathered enough information to proceed. 72

67. Id. at 1561. In United Nuclear, EPA sought to recover clean-up costs associated with seepage of hazardous liquids from one of United Nuclear's "tailing ponds." See id. at 1554. These ponds contained solid and liquid waste from United Nuclear's uranium mine. See id. The government brought its action after discovering that the seepage from the ponds had contaminated various subterranean aquifers, including one which provided drinking water to some area residents. See id. The district court concluded that EPA was engaged in a "removal" action subject to a three year statute of limitations. See id. at 1561. The district court then held that the limitations period would be triggered on the date EPA filed its Record of Decision. See id. at 1563. Because the government filed its claim exactly three years after the date of filing its Record of Decision, the claim was timely. See id.


69. Id. at 755. EPA brought an action under CERCLA to recover the costs associated with an environmental study conducted at the defendant's site. See id. at 752. The study concluded that "the chemical contaminants at the site presented little risk to public health and the environment" and authorized EPA to take "no further action." Id. at 752-53. Similar to the United Nuclear court, the district court in Petersen Sand held that the statute of limitations for a removal action began to run when EPA issued its Record of Decision. See id. at 755.


71. See id.

72. See id. The congressional report states:
The Committee believes that cost recovery and damages actions should be brought at the most appropriate time in light of the response action taken, and that in general these actions should be brought as early as EPA has the necessary information to do so. Therefore, the Committee amendment [sic] provides revised statutes of limitation for bringing natural resource damages actions and cost recovery actions under section 107. Id. at 3043 (emphasis added); see also H. R. REP. No. 99-253, pt. 1, at 79 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861. The congressional committee also stated:
CERCLA currently includes no explicit statute of limitations for the filing of cost recovery actions under section 107. This amendment provides for the timely filing of cost recovery actions, to assure that evidence concerning liability and response costs is fresh and to provide a measure of finality to affected responsible parties . . . .
Although not common under CERCLA, federal courts have been willing to apply statutes of limitations against the claims of the federal government in other contexts. In *United States v. $515,060.42 in United States Currency*, for example, the Sixth Circuit time barred the government's forfeiture action against currency seized as part of an illegal gambling operation. The statute under which the government sought forfeiture included a five-year statute of limitations, which began to run "after the time when the alleged offense was discovered." The Sixth Circuit rejected the government's argument that because there was a continuing violation of the gambling laws, it was permitted to seize money obtained through recent illegal activities.

Further, the Sixth Circuit noted

H.R. REP. No. 99-253, pt. 1, at 79. Furthermore, the committee added that "the Federal government recognizes the need for filing of cost recovery actions in a timely fashion, to assure that evidence concerning liability and response costs in [sic] fresh, to help replenish the Fund." *Id.* at 2920.


74. 152 F.3d 491 (6th Cir. 1998).

75. See *id.* at 503. In *$515,060.42*, the government had seized money during a federal investigation of bingo game operations in Tennessee. *See id.* at 495. The government claimed that such currency was subject to forfeiture because it "was used to commit and facilitate the commission of an illegal gambling business." *Id.* at 496. In connection with these findings, the government obtained several convictions over the next two years. *See id.* Hurst, the party whose currency the government seized, was convicted of conspiracy to conduct, and of conducting, an illegal gambling operation in 1993. *See id.* at 495. The government, however, waited until 1994 to bring this forfeiture action. *See id.* Hurst asserted that the five-year statute of limitations began to run in 1988, when the government first discovered his illegal activities. *See id.* The *$515,060.42* court agreed with Hurst's interpretation of the statute, and time barred the government's claim. *See id.* at 503.

76. *Id.* at 502 (quoting 19 U.S.C. § 1621, made applicable to forfeiture proceedings by 18 U.S.C. § 1955(d)). The statute under which the defendants were convicted, provides in pertinent part: "[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." *Id.* at 501 (quoting 18 U.S.C. § 1955(d)).

77. *See id.* at 502-03. The Sixth Circuit held that "[t]he statute of limitations does not run from the date of a particular violation, but from the date of 'discovery' of an offense." *Id.* at 502 (citing *United States v. Complex Mach. Works Co.*, 1998).
that “[s]tatutes of limitation are statutes of repose representing ‘a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period . . . ’ [and such] notice would be undermined in this case if the Government was allowed to prosecute its action.”

Similarly, the Ninth Circuit barred a government claim because the claim violated the relevant statute of limitations in United States v. Te Selle. The Te Selle court refused to interpret the limitations period as beginning “when the government learned of the dismissal of its first complaint” in lieu of the statute’s plain meaning, which established the act of dismissal itself as the triggering event. The Ninth Circuit stated that “this court takes a dim view of the sort of ‘tolling’ claim urged by the government . . . . The government did not exercise diligence in this case . . . . There thus is no cause for tolling the limitations period beyond the time set forth in [the statute].” Thus, federal courts are willing to time bar the government’s claims, even in the face of a reasonable interpretation of the statute which would permit such a claim, if they determine that policy interests in favor of prompt action outweigh the government’s interest in enforcing the law.

937 F. Supp. 943, 944 (Ct. Int’l Trade 1996)). Therefore, since the discovery of the violation occurred in 1988, the action brought in 1994 was not timely. See id. at 503.

78. Id. at 503 (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979)).
79. 34 F.3d 909 (9th Cir. 1994). In Te Selle, the government brought a default action against a recipient of a National Health Service Corps scholarship. See id. at 909. As a condition of receipt of the scholarship, Ms. Te Selle was obligated to provide two years of service in a “health manpower shortage area.” Id. at 909-10. She failed to do this and the government sought to reclaim the value of the scholarship through a default action. See id. at 909.

80. See id. at 910. The government first notified Ms. Te Selle that she was in default of her scholarship in 1984. See id. The government filed suit to recover the debt in late 1989. See id. In 1991, however, the district court dismissed this claim for failure to prosecute. See id. However, the district court clerk did not mail the notice of dismissal to either party, and it was some time before the parties learned of the court’s action. See id. Following receipt of notification, the government refiled the charge. See id. Due to the delay in notification, Ms. Te Selle was able to successfully argue that the statute of limitations for such action had lapsed. See id.

81. Id. at 910-11. The court emphasized that public policy dictates that each party has an independent duty to keep informed of the case disposition, regardless of the negligence of public employees in failing to facilitate access to information. See id.

82. See $515,060.42, 152 F.3d at 503 (stating that “purpose of the statute of limitation’s notice [requirement] would be undermined . . . if the Government was allowed to prosecute its action”); United States v. Midgley, 142 F.3d 174, 177 (noting compelling interests favoring statute of limitations defense as protection “against charges when the basic facts may have become obscured by the passage of time”).

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III. FACTS

The hazardous waste site at issue in *Navistar* was a municipal landfill, in use from approximately 1967, until it was closed in 1976. In 1986, EPA placed the site on the National Priorities List of areas "presenting the greatest danger to public health or welfare or the environment." Pursuant to this action, EPA evaluated the site's potential harm and formulated a plan to remedy the environmental danger.

In February of 1989, the United States and the State of Indiana (the governments) filed complaints against SCA Services of Indiana, Inc. (SCA), the then current owner and operator of the site. The governments sought to recover response costs incurred, and to be incurred, in conducting the remedial action. Shortly after the action was filed, however, the governments and SCA entered into a

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83. *See Navistar*, 152 F.3d at 704. The site giving rise to this litigation, the Fort Wayne Reduction Site, is located on the Maumee River in Fort Wayne, Indiana. *See id.* The site was used as a municipal land fill from approximately 1967 until June 1976. *See id.* The governments asserted that during this time frame, a number of hazardous substances were disposed of at the site, including residential and industrial waste. *See id.*


The National Priorities List (NPL) is a compilation of hazardous waste sites, which pose the greatest threats to public health and require a long-term response. *See William H. Rodgers, Jr., Environmental Law: Hazardous Wastes and Substances § 8.7 (C) (1992).* In 1990, there were 1,246 sites on the NPL. *See id.* The list is meant to be informative and serve management needs. *See id.* Inclusion on the list does not require EPA to act or assign liability to any party. *See id.* However, as a practical matter, most of the sites which EPA does select for clean-up are on the NPL. *See id.*

85. *See Navistar*, 152 F.3d at 704 (citing Environmental Protection Agency, 40 C.F.R. §§ 300.400-440 (1997) (describing methods and criteria for evaluating, prioritizing and remediating environmental threats)). In conformity with these rules, EPA completed its Remedial Investigation Report concerning the Fort Wayne site on June 10, 1986. *See United States v. SCA Servs., Inc.,* No. CIV.1:89cv29, 1995 WL 569634, at *2 (N.D. Ind. Aug. 15, 1995). On August 26, 1988, EPA issued a Record of Decision describing the course of action necessary to clean-up the site. *See id.* Included in this process was the construction of a "clay cap" which would cover the site and prevent the spread of hazardous material to the surrounding environment. *See Navistar*, 152 F.3d at 704.

86. *See Navistar*, 152 F.3d at 704.

87. *See id.* CERCLA imposes strict liability on persons within four categories: 1) current owners or operators of the facility where hazardous waste has been disposed; 2) owners and operators of the facility at the time of disposal; 3) transporters of a hazardous substance; and 4) those who arranged for disposal at the facility. *See CERCLA § 107(a),* 42 U.S.C. § 9607(a).
consent decree which provided that SCA would pay for and perform the necessary remedial action.\textsuperscript{88}

On September 11, 1992, SCA filed a third-party complaint for contribution against numerous other potentially responsible parties, including Navistar, for the cost of the cleanup.\textsuperscript{89} The governments did not assert any claims against the third-party defendants, nor did the third-party defendants present any claims against the governments.\textsuperscript{90} In fact, the governments unsuccessfully sought severance of the third-party actions from their litigation with SCA.\textsuperscript{91} SCA eventually resolved its claims against the third-party defendants through multiple settlement agreements to which the governments were not a party.\textsuperscript{92}

These settlement agreements could have been construed as precluding future actions against the third-party defendants concerning their liability for the clean-up, including actions brought by

\footnotesize{88. See United States v. SCA Servs., Inc., 849 F. Supp. 1264, 1268 (N.D. Ind. 1994). The United States filed the proposed Consent Decree with the district court on February 22, 1989, the same day that the United States filed its complaint against SCA. See \textit{id.} at 1267-68. SCA had already accepted the terms of this Consent Decree several weeks earlier, on October 3, 1988. See \textit{id.} at 1268. The District Court for the Northern District of Indiana entered the Consent Decree on July 18, 1989. See \textit{id.} The Consent Decree provided that SCA would carry out the remedial measures outlined in EPA's Record of Decision, as well as make periodic payments to the government as reimbursement for oversight costs. See \textit{id.} The cost of the clean-up, pursuant to EPA's directives, was estimated at over $15 million. See \textit{id.}


89. See United States v. SCA Servs., Inc., 849 F. Supp. 1264, 1268 (N.D. Ind. 1994). SCA filed its third-party complaint against over fifty potentially liable parties on September 11, 1992. See \textit{id.} Later, SCA amended its third-party complaint and asserted claims for both contribution under section 113(g)(2) and cost recovery under section 107 of CERCLA. See \textit{SCA Servs.}, 849 F. Supp. at 1268-69. The third-party defendants asserted that SCA was barred by section 113(g)(2)'s three year statute of limitations, and that there was no private right to recovery costs under section 107(a). See \textit{id.} at 1269. The district court agreed with the third-party defendants regarding the section 113 contribution claim, but allowed SCA to pursue its claim for cost recovery under section 107. See \textit{id.} at 1284.

90. See \textit{Navistar}, 152 F.3d at 705.

91. See United States v. SCA Servs., Inc., 150 F.R.D. 141 (N.D. Ind. 1993). The governments posited that "it should be granted severance because it has no claims or controversy with the Third-Party Defendants and the Third-Party Defendants have no claims against the government." \textit{Id.} at 145. The district court did not grant the severance because of the discovery difficulties that the third-party defendants would face if the government were not a party to the action. See \textit{id.} at 146-47.

92. See \textit{Navistar}, 152 F.3d at 705; \textit{see also} United States v. SCA Servs., Inc., 827 F. Supp. 526 (N.D. Ind. 1993) (discussing liability of settling parties and rights of non-settling parties regarding agreement reached between fourteen third-party defendants and SCA).}
the governments.\textsuperscript{93} Thus, the governments sought a declaratory order from the district court preserving their right to bring future actions against the third-party defendants.\textsuperscript{94} The United States filed for a declaratory order on September 19, 1996; the State of Indiana filed a claim on September 20, 1996.\textsuperscript{95}

The third-party defendants asserted that CERCLA's six-year statute of limitations for recovery of costs from initial remedial actions time barred the governments' claims.\textsuperscript{96} They argued that the statute began to run on September 18, 1990, or earlier, when workers placed the first layer of clay upon the site to build the "clay cap" EPA required.\textsuperscript{97} Thus, the third-party defendants asserted that the governments failed to bring suit before the statute of limitations expired — the United States by one day, the State of Indiana by two days.\textsuperscript{98}

The district court declined to accept the third-party defendants' interpretation of the statute of limitations, holding that the governments' claims were not time barred, and thereby denying the defendants' motion for summary judgment.\textsuperscript{99} The Seventh Circuit reversed the district court's holding, basing its decision upon the plain meaning of the statute.\textsuperscript{100} The Seventh Circuit held that operation of the statute of limitations time barred the governments' cost recovery claims.\textsuperscript{101}

\begin{itemize}
  \item \textsuperscript{93} See Navistar, 152 F.3d at 705.
  \item \textsuperscript{94} See id.; see also CERCLA § 113(g)(2)(B), 42 U.S.C. § 9613(g)(2)(B) (providing "[i]n any . . . [cost recovery] action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages").
  \item \textsuperscript{95} See Navistar, 152 F.3d at 705. For a discussion of the Seventh Circuit's resolution of the state claim, see infra note 102.
  \item \textsuperscript{96} See id.
  \item \textsuperscript{97} See id. at 711. Navistar also pointed to a number of other actions, prior to the construction of the clay cap, which might have triggered the statutory period. See id. Among these actions were the hook up of utilities at the site, the set up of trailers at the site, construction of an access road and preparations made to the landfill for the clay cap. See id. Because the Navistar court determined that construction of the clay cap triggered the statutory period, it refrained from addressing whether any of these earlier actions would also have been sufficient. See id. at 713.
  \item For a more complete discussion of activities which other courts have deemed sufficient to trigger the statute of limitations, see supra notes 44-60 and accompanying text.
  \item \textsuperscript{98} See Navistar, 152 F.3d at 713.
  \item \textsuperscript{99} See id. at 706.
  \item \textsuperscript{100} See id. at 714. For a narrative analysis of the Seventh Circuit's reasoning, see infra notes 102-35 and accompanying text. For a critical analysis of the Seventh Circuit's opinion, see infra notes 136-49 and accompanying text.
  \item \textsuperscript{101} See id.
\end{itemize}
IV. NARRATIVE ANALYSIS

At the outset of its discussion in *Navistar*, the Seventh Circuit framed the two precise issues to be addressed in the appeal. First, the Seventh Circuit needed to determine "[w]hether the six-year statute of limitations for 'initial actions' or the open-ended statute of limitations for 'subsequent actions' . . ." applied to this case. Second, the Seventh Circuit stated that if the six-year statute of limitations for initial actions was applicable, then it must address "whether the governments’ actions were filed more than six years following the [start of the statutory period]."102

The governments urged the court to interpret the statute of limitations in the interest of furthering Congress’s goals.103 As the *Navistar* court noted, the Supreme Court previously articulated the rule: "statutes of limitation sought to be applied . . . [against] the Government[ ] must receive a strict construction in favor of the Government."104 Although the *Navistar* court recognized the exist-

102. *Id.* at 706-07. In addition, the *Navistar* court addressed state law claims made by the State of Indiana under a statute substantially similar to CERCLA. *See id.* at 713-14. For the state statute under which Indiana brought its claim, see *Ind. Code* § 13-25-4-8 (West 1990). The state law does not include any statute of limitations. *See Navistar*, 152 F.3d at 713. Therefore, Indiana argued that the state’s default statute of limitations, ten years, should apply in the absence of a specific period. *See id.* at 713-14. The Seventh Circuit, however, held that the Indiana statute expressly established liability “in the same manner and to the same extent” as CERCLA. *Id.* (quoting *Ind. Code* § 13-25-4-8 (West 1990)). Thus, CERCLA’s statute of limitations, which limits the extent of liability, was adopted by the state statute. *See id.* As a result of this determination, the *Navistar* court was able to apply the same reasoning applied under the federal claim to resolve the state law action. *See id.*


ence of this rule of statutory construction, the court instead placed greater emphasis on Congress's intention that the government bring CERCLA suits in a prompt and timely manner.\textsuperscript{105} The Seventh Circuit therefore declined to give special deference to the governments' interpretation of the statute.\textsuperscript{106}

A. Which Statute of Limitations Should Apply?

The Seventh Circuit began its analysis with the relevant statutes of limitations found in section 113(g)(2)(B) of CERCLA.\textsuperscript{107} This section includes two different periods of limitations for remedial cost recovery actions brought by the government. The first statutory period provides that claimants must bring "initial" actions within six years after the beginning of the clean-up; the second states that claimants must bring "subsequent" actions either during the clean-up or within three years of its completion.\textsuperscript{108} The Navistar court, therefore, had to determine whether the governments' September 1996 claims were "initial" or "subsequent" within the meaning of CERCLA.\textsuperscript{109}

In addressing this issue, the Seventh Circuit declined to follow the line of cases which held that a declaratory judgment against a party is a prerequisite for any "subsequent" action against that same party.\textsuperscript{110} Although CERCLA states that any action against a party

\textsuperscript{(1978)} (noting "as a matter of Constitutional law" Congress has plenary power over statutes of limitations). For a more complete discussion of the policy reasons for construing statutes of limitations strictly in favor of the government, see supra notes 61-69 and accompanying text.

\textsuperscript{105}. See Navistar, 152 F.3d at 707. The Navistar court also relied upon the Supreme Court's decision in \textit{Galloway v. General Motors Service Parts Operations}, which held that "statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." \textit{Id.} at 707 (citing 78 F.3d 1164, 1165 (7th Cir. 1996)); see also United States v. Kubrick, 444 U.S. 111, 117 (1979) (recognizing importance of statutes of limitations and applying statute to bar claim of private party against government); Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1996) (discussing useful functions of statutes of limitations in context of Title VII sexual harassment suit).

\textsuperscript{106}. See Navistar, 152 F.3d at 707-08. For a critical analysis of this decision by the Navistar court, see infra notes 135-49 and accompanying text.

\textsuperscript{107}. See Navistar, 152 F.3d at 708. For the text of section 113(g)(2)(B), see supra notes 31-33.

\textsuperscript{108}. See CERCLA § 113(g)(2)(B), 42 U.S.C. § 9613(g)(2)(B). For the relevant text of section 113(g)(2)(B), see supra notes 31-33.

\textsuperscript{109}. See Navistar, 152 F.3d at 707-10.

\textsuperscript{110}. See id. The Seventh Circuit adopted the "common sense" approach to the term "subsequent" without providing any authority for its position. See id. The Navistar court distinguished both the \textit{Beazer East} and \textit{Kelley} opinions. See id. Perhaps, in reaching this decision, the Navistar court relied on the interpretation of CERCLA provided by the District Court for the District of New Hampshire in
with a declaratory judgment entered against it will be "subsequent," the Navistar court noted that "there is nothing to indicate that the entry of such a declaratory judgement is a prerequisite to the prosecution of a 'subsequent action . . . for further response costs.'" 111 Thus, the Seventh Circuit refused to characterize the governments' claims as "initial" solely because the governments had not previously obtained a declaratory judgment against Navistar regarding the clean-up. 112

The Seventh Circuit also rejected the governments' contention that the action filed against SCA in February 1989 was the "initial action" that established liability regarding the site. 113 Thus, the government argued, any later suits concerning liability for the site would necessarily be "subsequent." 114 Under this interpretation, it was insignificant that the governments did not specifically name Navistar or the other potentially liable parties as defendants in the

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111. Navistar, 152 F.3d at 710 (quoting CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2)). The Seventh Circuit stated that "the intent of Congress in including the sentence was to avoid the necessity of relitigating liability questions." Id. at 709. In Navistar, however, the court had not held Navistar or the other third-party defendants liable for any of the response costs in the action against SCA. See id. Thus, the Navistar court found no policy reason to require a declaratory order in the case. See id.

112. See Navistar, 152 F.3d at 710. However, this part of the Navistar court's holding is arguably dicta, since the court concluded that the governments' claims were for "initial actions" under its "common-sense" approach. See id. at 708-10.

113. See id. at 710. The governments argued that the "initial" action regarding the site was against SCA. See id. at 708. Therefore, the governments urged that the second trial against Navistar was a "subsequent" action as to liability for the clean-up. See id.

114. See id. at 708.
litigation with SCA. The governments also noted that although Navistar was not a defendant in the action against SCA, Navistar was a third-party to the litigation, and was on notice that the governments intended to bring claims against it at a later date.

This reasoning, however, did not persuade the Seventh Circuit, which instead adopted the "common sense" approach to the statutory language. The Navistar court concluded that an "initial action" under CERCLA referred to the first suit brought against a particular party and that any later suits brought against that same party were "subsequent actions." In support of this construction, the Seventh Circuit noted that it was the only plausible interpretation of Congress's intent in drafting the statute of limitations. Conversely, if the governments' construction was to control, the government need only bring suit against one potentially liable party regarding a clean-up, and thereafter it could sue any other potentially liable party at any time during the clean-up, or within three years after completion of the clean-up. Since environmental clean-ups often take decades to complete, such a holding "would largely write the limitations restriction for initial actions out of the statute." The Seventh Circuit therefore held that the six-year statute of limitations for initial remedial actions applied to the case.

115. See id.
116. See id. at 710. There was evidence that EPA notified the third-party defendants through letters that they might incur liability regarding the site as early as 1988. See United States v. SCA Servs., Inc., No. CIV.1:89cv29, 1995 WL 569634, at *3 (N.D. Ind. Aug. 15, 1995).
117. See Navistar, 152 F.3d at 708-10.
118. See id. at 710. The Navistar court stated that "[t]he first time an action is brought against a given party, it cannot be anything other than an 'initial action'...[and] that a 'subsequent action' against a party can be brought only after an 'initial action' has been brought against it." Id.
119. See id. In making this determination, the court relied on CERCLA's legislative history which demonstrated Congress's desire to promote prompt government claims and to protect defendants from stale claims. See id.; see also H.R. Rep. No. 99-253, pt. 1, at 138 (1985), reprinted in 1986 at U.S.C.C.A.N. 2835, 2920 (stating purpose of CERCLA's statute of limitations is "to provide some measure of finality to affected responsible parties").
120. See Navistar, 152 F.3d at 710.
121. Id. The Navistar court noted that the clean-up at issue in the case would probably continue for at least thirty more years. See id. Thus, under the governments' interpretation, they would still have over three decades in which to bring suit against Navistar. See id. The court inferred that such a result was not Congress's intention in adding the statutes of limitations. See id.
122. See id. at 710.
B. Were the Governments' Claims Filed Within the Six Year Statutory Period?

After concluding that the six-year statute of limitations applied to the case, the Navistar court turned to the question of whether the governments' claims were filed within that period. The statute provides that the government has six years to bring a claim "after initiation of physical on-site construction of the remedial action . . . ." Although CERCLA defines "remedial action," it leaves the other terms in the statute of limitations undefined.

The Seventh Circuit agreed with Navistar's assertion that the statute was triggered on September 18, 1990, when the first lift of clay for the clay cap was placed upon the landfill. In support of this ruling, the Seventh Circuit noted that CERCLA specifically mentions a "clay cover" as among those actions which are considered "remedial." In addition, the Navistar court relied upon the plain meaning of the other terms within the statute, as well as the Hyampom Lumber decision for further support.

The Seventh Circuit rejected the governments' argument that "remedial action" is a term of art including only those actions taken pursuant to a final remedial design which EPA has approved in writing. Such a holding, the governments argued, would establish a

123. See id. at 711-13.
124. Id. at 711. For the text of section 113(g)(2)(B), see supra note 32.
126. See Navistar, 152 F.3d at 713. In addition, Navistar argued that actions which workers performed at the site earlier than September 18, 1990 might also have triggered the statute. See id. at 705. The Seventh Circuit declined to rule on whether these actions were sufficient to trigger the statute, since it concluded that the governments' claims were time barred by initiation of the clay cap construction. See id. at 713 n.19.
127. See id. at 711. For the text of section 101(24), see supra note 30.
129. See id. at 711-12. It was this argument by the governments which the dissenting judge also believed should prevail. See id. at 715. For a discussion in favor of this argument, see infra notes 140-49 and accompanying text.
The majority of the Navistar court, however, could find no support for this interpretation in the wording or structure of CERCLA. Furthermore, the Navistar court declined to accept the governments’ assertion that an act which initiates the remedial action must play a “critical role in [the] implementation of the permanent remedy.” The governments claimed that the court could not consider the lift of clay placed upon the site on September 18, 1990, a “critical” part of the permanent remedy triggering the statute because its initial construction was defective and the job had to be corrected. Although the governments cited judicial precedents and portions of CERCLA’s legislative history to lend credibility to their position, the Seventh Circuit focused exclusively on the plain meaning of the statute. Thus, the Navistar court held that the actions on September 18, 1990, “clearly” triggered the six-year statutory period, and thereby barred the governments’ claims made more than six years after that date.

V. CRITICAL ANALYSIS

A. The Seventh Circuit Carelessly Abandoned the Policy that Courts Strictly Construe Statutes of Limitations in the Government’s Favor.

In reaching its holding, the Seventh Circuit failed to give substantial weight to the policy rule that courts should construe statutes of limitations in the government’s favor.

130. See Navistar, 152 F.3d at 711. For a further discussion of the impact that may have occurred had the Navistar court adopted the governments’ position, see infra notes 150-63 and accompanying text.

131. See id. at 711-12. The Navistar majority held that if Congress had intended the final decision to mark the point at which a remedial action may begin, it would have said so clearly. See id. at 712. In the absence of such a clear statement by Congress, the Seventh Circuit was unwilling to write such a provision into the statute based upon the overall structure of CERCLA or in the interest of judicial economy. See id.

The Navistar dissent, however, presented a strong argument in favor of this statutory interpretation. See id. at 715. The dissent was particularly fond of the governments’ argument because of the ease at which it could be applied. See id.

132. Id. at 712-13. For a discussion of the Akzo case, where the district court did apply the “critical role” requirement, see supra notes 50-55 and accompanying text.

133. See Navistar, 152 F.3d at 713. The court explained that the initial layer of clay which workers applied on September 18, 1990, did not comply with the relevant standards, and its construction was halted because it could not be completed before winter. See id. at 713 n.18.

134. See id. The Seventh Circuit stated, “we do not consider that fact [that the clay cap was inadequate] relevant because the statute does not indicate that the initial construction must be successful.” Id.

135. See Navistar, 152 F.3d at 713.
utes of limitations in favor of allowing the government's claims to proceed. The authority which the Navistar court cited in support of its decision was dubious. The Navistar court relied upon two broad statements from SARA's legislative history, and improperly analogized cases in which courts applied, or refused to apply, statutes of limitations against private parties. Thus, the Seventh Circuit conducted the remainder of its analysis without the usual deference courts accord to the government. This lack of defer-

136. See id. at 707-08. The Navistar court acknowledged the existence of the general principle that courts are to construe statutes of limitations in the government's favor. See id. at 707. However, due to Congress's "specific purpose" in adding this statute of limitations to CERCLA through amendment, the Seventh Circuit refused to apply the rule unless faced with ambiguity. See id. The Seventh Circuit found no ambiguities. See id.; see also California v. Hyampom Lumber Co., 903 F. Supp. 1389 (E.D. Cal. 1995) (applying CERCLA's statute of limitations to bar State of California's claim). But see Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836 (6th Cir. 1994) (holding CERCLA's statutes of limitations for cost recovery ambiguous and construing issue in government's favor).

137. See Navistar, 152 F.3d at 707 n.7. The Seventh Circuit directly relied upon New Castle County v. Halliburton NUS Corp. See id. In New Castle, the dispute concerned applying CERCLA's statute of limitations against a private party. See New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1119-20 (3d Cir. 1997). Likewise, the Navistar court's reliance on Galloway v. General Motors Service Parts Operations, a case between two private entities, was also misplaced. See Galloway, 78 F.3d 1164 (7th Cir. 1996). The portion of the Galloway opinion which the Navistar court quoted concerned two Supreme Court cases in which the Court found the claim of a private person against the government to be time barred. See Galloway, 78 F.3d at 1165. Through its reliance on cases where the statute of limitations was applied against private parties, the Navistar court ignored the special interest in construing statutes of limitations in favor of the government. See Navistar, 152 F.3d at 707 n.7; see also Board of Regents v. Tomanio, 446 U.S. 478 (1980) (barring private plaintiff's civil rights action against State of New York); United States v. Kubrick, 444 U.S. 111 (1979) (enforcing statute of limitations to bar private plaintiff's action against United States under Federal Tort Claims Act).

ence may have lead the *Navistar* court to decide to time bar a CERCLA cost recovery action brought by the United States government.\(^{139}\)

**B. The Governments’ Assertion of the Bright Line Rule for Triggering the Limitations Period was a Proper Interpretation of Section 113(g)(2).**

The Seventh Circuit ignored a reasonable and useful interpretation of the statute of limitations when it rejected the governments’ contention that the date upon which “EPA issues final, written approval of the remedial design for the site at issue” marks the beginning of the remedial action.\(^ {140}\) Section 101 of CERCLA defines “remedial actions” as “those actions *consistent with the permanent remedy.*”\(^ {141}\) Further, a House Judiciary Committee report states that the statute of limitations begins to accrue with “commencement of physical on-site construction of the remedial action, *that is, after the Remedial Investigation/Feasibility Study and after design of the remedy.*”\(^ {142}\) It appears, therefore, that Congress intended the statute of limitations to begin, not simply with the initiation of any remedial action, but only with those remedial actions that EPA’s administrative process fully approved.\(^ {143}\)

\(^{139}\) For a more complete discussion of judicial action in this area of law prior to the *Navistar* decision, see *supra* notes 33-55 and accompanying text.

\(^{140}\) *Navistar*, 152 F.3d at 711-12 (rejecting governments’ bright line rule argument). In his dissenting opinion, Judge Evans argued that the court should have established final, written approval of the design as a requirement for the remedial action. See *id.* at 715 (Evans, J., dissenting).


\(^{142}\) H.R. REP. No. 99-253, pt. 1 (1986) (emphasis added). Further, in a proposed, but unadopted rule, EPA also appeared to require some form of written approval of an action before it would be considered part of the “remedial” action. See 57 C.F.R. §§ 34742, 34752(b) (1992). The proposed EPA rule stated that “[t]he term ‘physical on-site construction’ for remedial actions is limited to actions that occur after completion of the remedial design and issuance of the Notice to Proceed on which remedial action personnel are authorized to begin remedial construction activities.” *Id.* But see *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035, 1042 (S.D. Ga. 1994) (rejecting argument based upon proposed rule and noting rule has no precedential value).

\(^{143}\) See *Navistar*, 152 F.3d at 711-12 (explaining governments’ argument in support of claim). The governments asserted that “remedial action” was a term of art “which refers to the specific action determined to be required as a result of the evaluative administrative process.” *Id.* Under this view, the issuance of written approval of the final design might not necessarily mark the beginning of the statutory period for remedial actions, but no action taken prior to this point would act to trigger the statute of limitations. See *id.* at 712. Actions taken after issuance of written approval of the final design, so long as pursuant to EPA directives, would trigger the statute. See *id.*
This interpretation of the statute of limitations gains additional support from a line of cases which distinguish between “removal actions” and “remedial actions.” These cases note that “[a] removal action is a short-term, temporary response to a release or threatened release, while a remedial action is a long-term, more thoroughly researched and planned permanent remedy to a release or threatened release.” Courts adopting this view reason that removal actions and remedial actions are mutually exclusive. Based upon case law and EPA literature, removal actions are completed “with the signature of the EPA decision.” Any action taken after that date would be termed a remedial action. Thus, the statute of limitations for a remedial action cannot begin to accrue until the administrative process ends. In light of the policies and equities involved in CERCLA litigation, the Seventh Circuit should have adopted this analysis and held that the actions in this case were not sufficient to trigger the statute of limitations for recovery actions.


145. See Union Carbide, 890 F. Supp. at 1041; see also Reilly Tar, 546 F. Supp. at 1117 (stating “[g]enerally, removal actions are short term clean up actions while remedial actions contemplate a long term approach consistent with a permanent remedy”) (citing Environmental Defense Fund v. Gorsuch, Civ. No. 81-2083, slip op. at 2 (D.D.C. Feb. 12, 1982)).

146. See Union Carbide, 890 F. Supp. at 1042 (stating CERCLA clean-ups “must be defined as either a removal or remedial action” (emphasis added)). But see California v. Hyampom Lumber Co., 903 F. Supp. 1389, 1393 (E.D. Cal. 1995) (stating “court need not address the question of whether ‘removal’ and ‘remedial’ actions are mutually exclusive”).

147. United States v. Petersen Sand & Gravel, Inc., 824 F. Supp. 751, 754 (N.D. Ill. 1991). The Petersen Sand court referred to EPA’s “Superfund Program Management Manual” as support for the court’s holding. See id. For a discussion of the Petersen Sand case, see supra note 69. See also Reilly Tar, 546 F. Supp. at 1118 (adopting view that remedial and removal actions are mutually exclusive). In Reilly Tar, the United States, the State of Minnesota and two municipalities brought actions under CERCLA against the owners of a coal refinery. See id. at 1105. The plaintiffs alleged that as a result of conduct at the refinery, hazardous substances capable of severe harm to human health contaminated the area groundwater. See id. 1105-06.

148. See Navistar, 152 F.3d at 712 (stating governments’ contention that “initiation of construction of the ‘remedial action’ can never begin, within the meaning of 42 U.S.C. § 9613(g)(2)(B), until the EPA issues, final, written approval of the remedial design for the site at issue”).

149. For a discussion of the advantages to the governments’ proposed bright line rule, see supra notes 151-63 and accompanying text.
VI. IMPACT

The Seventh Circuit forfeited an opportunity to both enforce the goals of CERCLA, as well as provide greater certainty in a troubled area of law.150 Contrary to the majority of cases addressing similar issues, the Navistar court chose not to follow the policy rule of strictly construing statutes of limitations in favor of the government.151 This led the Seventh Circuit to reject a plausible reading of the statute, specifically, that a remedial action cannot begin until EPA issues final, written approval of the action.152 If the Navistar court had adopted this interpretation, it would have promoted the purposes of CERCLA, lent certainty to the meaning of the law and advanced judicial economy.153

Congress enacted CERCLA in the interest of accomplishing two broad goals. First, Congress sought to provide the government with the tools necessary to promptly respond to, and clean-up, hazardous waste disposal sites which endangered public health.154 Second, Congress strove to ensure that those responsible for the contamination of the environment would be held accountable for the cost of clean-ups.155 As Judge Evans noted in his dissenting opinion in Navistar, the majority opinion impairs, rather than promotes, these goals.156 At the price of only one day, the Seventh

150. See Navistar, 152 F.3d at 715 (Evans, J., dissenting) (stressing that majority in Navistar ignored strong policy interests in favor of governments' argument).
151. See id. at 714. For examples of court decisions strictly construing CERCLA's statutes of limitations in the government's favor, see supra note 138. For examples of court decisions applying a statute of limitation against the government in other contexts, see supra notes 73-82 and accompanying text.
152. See Navistar, 152 F.3d at 711-13.
153. See id. at 715 (Evans, J., dissenting) (stressing advantages of governments' argument).
155. See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994) (stating "Congress intended that those responsible for the problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created").
156. See Navistar, 152 F.3d at 715 (Evans, J., dissenting). Judge Evans reasoned that:
As a result of the Navistar [opinion,] [p]arties will now invest time, energy, and money in what is ultimately an issue peripheral to the real question—liability. The resulting distraction will undermine CERCLA's primary purposes: To provide a safe and efficient means of cleaning hazardous waste sites as quickly as possible, and to recover from those responsible the money spent to pay for the cleanup.
Id.
Circuit has mandated that the governments, rather than the responsible parties, bear the cost of a multi-million dollar clean-up. If the Seventh Circuit had adopted similar reasoning, it may have correctly concluded that “the passage of an additional day will do little to dim memories already 6 years old.” If the Seventh Circuit had adopted similar reasoning, it may have correctly concluded that “the passage of an additional day will do little to dim memories already 6 years old.” The benefit which the Navistar court secured for the defendants, namely the right to be protected from a claim which has become stale by only 24 hours, seems negligible when compared to the cost society will pay to preserve that right.

In its zealous adherence to the statute’s plain meaning, the Seventh Circuit rejected an interpretation that would promote both judicial economy and certainty in CERCLA litigation. If the governments’ interpretation, that a “remedial action” begins upon the issuance of EPA’s final decision, had prevailed, courts and private parties could easily establish the span of the statutory period. Long litigation battles concerning whether a particular event was sufficient to trigger the statute of limitations, as illustrated by the Navistar case itself, would be unnecessary. The Seventh Circuit’s
opinion further complicates an already complex area of law, and, in so doing, diverts attention from CERCLA’s purpose: to ensure that persons responsible for the contamination of the environment undertake or pay for the prompt clean-up of hazardous waste sites.

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