

DOJ to Stop “Piling On” and “Overfiling” Under Clean Water Act

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Is federalism alive and well? Has the federal government decided to give up “piling on” and “overfiling” in environmental enforcement actions? It seems so. On July 27, 2020, in an effort to promote federalism, U.S. Department of Justice (DOJ) Assistant Attorney General (AAG) Jeffrey Bossert Clark issued a [memorandum](#) limiting federal civil enforcement discretion concerning certain Clean Water Act (CWA) matters involving prior state proceedings (CWA Memo).

The CWA Memo provides that civil enforcement actions seeking penalties under the CWA will be “strongly disfavored” if a state has already initiated or concluded its own civil administrative proceeding for penalties under an analogous state law arising from the same operative facts. The CWA Memo is consistent with recent changes made in the DOJ Justice Manual that now require additional coordination with state and local authorities to prevent the practice of “overfiling” and “piling on.” Such a development should give the regulated community comfort that the federal government won’t be “jumping on the bandwagon” after a company has resolved its CWA violations with the state.

This is not an absolute prohibition by the federal government to pursuing a civil enforcement action after resolution of the state enforcement case. Rather, this is a policy which “disfavors” civil enforcement action for penalties under analogous state law for the same conduct without pre-approval from the AAG. Obtaining pre-approval for pursuing a federal action requires that one of seven factors be met:

1. The outcome of the prior state enforcement action would amount to an unfair windfall to the would-be defendant;
2. The State is not diligently prosecuting an initiated civil enforcement action;
3. The State requests in writing that the federal government pursue a separate enforcement action, *and* that request, in light of all circumstances, would not amount to unfair “piling on”;
4. The State has been unable to collect its penalty and makes a written request for federal assistance;
5. A federal action is necessary to protect an important federal interest that the state action will not adequately address;
6. The federal action would seek only appropriate injunctive relief to fill a discernible gap in the prior state relief; or
7. There are other exceptional circumstances justifying federal involvement.

These factors certainly set a high bar for initiating a separate federal action and require formal approval from AAG Jeffrey Bossert. These factors also provide a roadmap for the regulated industry in resolving CWA violations with the state. The pre-approval factors should be carefully examined and incorporated into administrative consent orders and settlements when resolving CWA violations brought by the state. This is especially true for violations occurring in states which do not have a delegated Clean Water Program. States with a delegated program are likely to remain the lead on enforcement actions.

In sum, the era of “overfiling” and “piling on” by the federal government is beginning to fade away. Regulated parties still need to know the circumstances in which a separate federal action may be initiated and plan accordingly when negotiating administrative consent orders and settlement agreements. Regardless, the CWA Memo and changes to the DOJ Justice Manual are a welcomed sight to the regulated community.

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