Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings: July 27th U.S. Department of Justice Memorandum

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

07/29/2020

United States Department of Justice Environment & Natural Resources Division ("Division") Assistant Attorney General Jeffrey Bossert Clark ("Assistant AG") issued a July 27th Memorandum titled:

Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings ("Memorandum")

The stated purpose of the *Memorandum* is to outline the Division's policy for considering enforcement in civil Clean Water Act cases if a state has previously instituted a civil proceeding under an analogous state law arising from the same operative facts.

The *Memorandum* is transmitted to Environment & Natural Resources Division Section Chiefs and Deputy Section Chiefs of the Environmental Crimes Section, Environmental Enforcement Section, and the Environmental Defense Section.

States have been encouraged since the enactment of the modern version of the Clean Water Act in 1972 to attain delegation of this program. Such state delegation includes the development of its own Clean Water Act enforcement program.

Once the United States Environmental Protection Agency ("EPA") determines a state's enforcement procedures are adequate, it may delegate such authority to the appropriate agency. Most states (including Arkansas) have obtained delegation of Clean Water Act authority (including enforcement).

Despite the fact that a state has been delegated Clean Water Act enforcement responsibility, EPA or the Division has concurrent authority to bring enforcement actions against violators. The federal government's undertaking enforcement action in a state administering the Clean Water Act is often denominated "overfiling."

Advocates of these actions state that it promotes consistent enforcement of the federal environmental programs in the event of inadequate state enforcement. Opponents of the practice have argued that if both state and environmental agencies can undertake enforcement, uncertainty is created for the regulated community.

The Assistant AG in his July 27th *Memorandum* states by way of conclusion that:

. . . as a matter of enforcement discretion – civil enforcement actions seeking penalties under the CWA will henceforward be strongly disfavored if a State has already initiated or concluded its own civil or

administrative proceeding for penalties under an analogous state law arising from the same operative facts. (emphasis added)

This conclusion arguably differs from the Division's predecessors.

The *Memorandum* provides the United States Department of Justice's current view of the role of federal government in pursuing Clean Water Act civil actions as prescribed by the statute. Cited is language in the Clean Water Act noting the responsibilities and rights of the state in regards to water pollution and potential constitutional limitations. The Assistant AG cites the "Petite Policy" applicable to criminal proceedings, referring to what he characterizes as Congress's manifest policy judgment against double-recovery.

Assistant AG Clark concludes the *Memorandum* by noting that requests to bring a subsequent federal civil action in such instances will be considered on a case-by-case basis using certain "touchstones." Seven potential bases for approval are referenced. Two of the examples include the state not diligently prosecuting an initiated civil enforcement action or that the state has been unable to collect its penalty and asks in writing for federal assistance.

The *Memorandum* does not apply to criminal matters.

A copy of the *Memorandum* can be downloaded here.