

Citizen Suit/Clean Water Act: Federal Appellate Court Addresses Preclusion Issue



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05/03/2022

The United States Court of Appeals for the First Circuit ("Court") addressed in an April 18th Opinion an issue involving the Clean Water Act citizen suit provision. See *Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., et al.*, No. 19-2095.

The issue involved the Section 1319(g)(6)(A) of Title 33 of the United States Code which places a limitation on Clean Water Act citizen suits.

The limitation addressed involves a prohibition on dual governmental/citizen suit enforcement. In other words, in what instances does governmental enforcement preclude a Clean Water Act citizen suit? As the Court noted in the Opinion, the question it addressed was whether:

. . . that limitation precludes not only a citizen suit that seeks to apply a "civil penalty" to a defendant for an ongoing violation of the CWA but also one that seeks to obtain declaratory or perspective injunctive relief from such a violation.

The governmental action involved in this instance was the issuance by the Massachusetts Department of Environmental Protection ("DEP") of a Unilateral Administrative Order ("UAO") to Arboretum Village, LLC, which was involved in the development of a Worcester, Massachusetts, site.

The UAO alleged that Arboretum Village violated the Massachusetts Clean Water Act by allowing discharge of silt-laden runoff . . . from unstable, eroded suspended soil at the site into an unnamed perennial stream and the Blackstone River.

DEP and Arboretum Village ultimately settled the UAO in the form of an Administrative Consent Order. The settlement was stated to be:

. . . in the form of an Administrative Consent Order with Penalty ("ACOP"). . . [U]nder the ACOP, Arboretum Village [was] required, among other things, to "pay an \$8, 000.00 civil administrative penalty to the Commonwealth," to undertake certain remedial measures at the site, and to agree to "pay stipulated penalties and/or be subject to additional high level enforcement action from the [MassDEP] if any further discharges of turbid stormwater runoff to wetlands resource areas in excess of 150 [nephelometric turbidity units] occur."

The Court held that the limitations set forth in § 1319(g)(6)(A) bars only a citizen suit that seeks to apply a civil penalty for an ongoing violation of the Clean Water Act. It further held that therefore the preclusion language does not bar a citizen suit for declaratory and perspective injunctive relief to redress an ongoing violation of the Clean Water Act.

A copy of the Opinion can be downloaded [here](#).