

Practice Update

# Justice Department Refines Policy for Clean Water Act Enforcement

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By Silvia M. Alderman

This week, the Justice Department has memorialized a policy that will give the states primacy in enforcement of Clean Water Act civil cases. On July 27, 2020, the U.S. Department of Justice Environment & Natural Resources Division issued a memorandum, the purpose of which was to set forth the Division's policy for approaching enforcement in civil Clean Water Act cases when a state has previously instituted a civil penalty proceeding under an analogous state law arising from the same operative facts.

The memorandum indicates:

“(a) Going forward, if, prior to any federal civil penalty action, a State has already initiated or concluded a civil enforcement action for penalties under an analogous state law for the same conduct, no federal civil judicial enforcement matter may be pursued without prior my [Assistant Attorney General] prior approval;

(b) Pre-approval requests should be made in the form of a privileged memorandum submitted to the ENRD front office through the normal chain of command (i.e., through the appropriate Assistant Chief, and Deputy Assistant Attorney General;

(c) Approval will be granted only if:

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Silvia M. Alderman

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1. Standing on 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 has requested in writing, citing reasons for doing so, 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 asks in writing for federal assistance;
5. A federal action is necessary to protect an important federal interest not adequately addressed already or to be addressed by the state action;
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; and

(d) Requests to pursue a subsequent enforcement action where the State sought a penalty and the relevant tribunal denied that request will ordinarily be disfavored, though exceptions may be granted with my express authorization.”

The policy does not apply to criminal matters. While the policy is national in scope, it may be particularly significant with regard to dredge and fill violations in Florida. It will certainly dovetail with the long-awaited plan to delegate certain Corps of Engineers permitting to the Florida Department of Environmental Regulation.

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