

DOJ Pledges to Abstain from Seeking Clean Water Act Penalties Where States Pursuing Comparable Enforcement

On July 27, 2020, the Assistant Attorney General in charge of the U.S. Department of Justice's Environment and Natural Resources Division announced that the federal government will not, as a general policy, seek civil penalties in Clean Water Act (CWA) cases where states have already taken action to enforce analogous state laws.

The [memorandum](#) introducing the policy argues that federalism principles and the prosecutorial policy against "piling on" support restraining federal enforcement when CWA violations have been addressed by state civil enforcement actions.

Pursuant to the new policy, if a state has already brought a similar action for civil penalties under the same operative facts, a subsequent federal enforcement action can only proceed if approved by the head of the Environment and Natural Resources Division. Requests to file such actions will only be approved if at least one of the following factors applies:

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.

The policy does not apply to criminal cases or to civil cases where the penalty is sought based on new conduct post-dating the prior state proceeding.

The policy will not effect a dramatic change in federal CWA enforcement, as duplicative enforcement actions are generally uncommon, but the new policy does provide welcome assurance and certainty to the regulated community that they will remain so.

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