U.S. DEPARTMENT OF JUSTICE TO UTILIZE ENFORCEMENT DISCRETION ON "OVERFILING" AUTHORITY FOR STATE-LED CLEAN WATER ACT CIVIL ENFORCEMENT MATTERS

Hodgson Russ Environmental Alert
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The U.S. Department of Justice's ("DOJ") Environment and Natural Resources Division recently issued a memorandum seeking to limit federal enforcement in Clean Water Act ("CWA")-related cases where a State has already commenced or completed an administrative or civil proceeding seeking a penalty. The memorandum is explicit in indicating that it is not applicable to criminal matters under the CWA, which are subject to separate consideration.

The memorandum relies on, in pertinent part, Section 309(g) of the CWA, which precludes Federal civil penalty actions when the State has successfully pursued or is diligently prosecuting a State proceeding pursuant to a penalty regime that is comparable to that found in the CWA. It also cites to a May 2018 policy document entitled the "Policy on Coordination of Corporate Resolution Penalties," also referred to as the "policy against piling on," that encourages the DOJ to "consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators."

Based on the foregoing, the DOJ is now taking the position that it "strongly disfavors" seeking parallel Federal civil penalties on the basis of the same operative facts of a related State action. As such, written authorization from senior DOJ leadership is to be required to justify why a parallel Federal civil judicial enforcement should proceed. Approval is to only be granted if there are exceptional circumstances to justify it, including if:

1. Standing on the prior State enforcement action would amount to an unfair windfall to the Defendant;
2. The State failed to diligently prosecute the action;
3. The State has issued a written request, with justification, asking the Federal government to pursue the matter (and the DOJ determines that such pursuit would not constitute "piling on");
4. The State has been unable to collect the penalty and issues a written request for Federal assistance in doing so;

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5. An important Federal interest has not been or cannot be adequately addressed without Federal action; or
6. The Federal action would only seek injunctive relief that would fill a gap in State relief.

This memorandum follows the broader Trump Administration's initiative, spear-headed by the U.S. Environmental Protection Agency ("EPA"), of refocusing on "Cooperative Federalism." Under this concept, the Federal government places a greater emphasis on States to manage and control ongoing day-to-day management and enforcement for delegated matters, thereby taking some of the broader Federal oversight concerns out of the picture. This is especially important, in the context of the memorandum, as the threat of Federal "overfiling" also looms over States as they proceed through the process if a disagreement arises between the bureaucracies involved. While not definitive, this policy will provide a level of comfort for those entities under CWA administrative or civil scrutiny that settling with the State provides greater certainty for closure than before, as the broader risk of Federal involvement has been minimized. However, the long-term value of this policy shift is currently unknown, as there is the potential for the DOJ to back away from this position with a new administration.

Hodgson Russ will continue to monitor how DOJ operates pursuant to this memorandum, as well as the broader scope of administrative and civil enforcement considerations. If you have questions related to environmental-related regulatory or enforcement issues, please contact Michael Hecker (716.848.1599), Jeff Stravino (716.848.1394), Jennifer Schamberger (716.848.1691), or anyone else on the Hodgson Russ Environmental team, and we would be happy to help.

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