



Double Jeopardy? Citizen Suit May Proceed Despite Government Enforcement Action

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A Clean Water Act citizen suit may proceed against a coal operator notwithstanding government enforcement action addressing the same alleged violations, according to a federal district judge in West Virginia. On August 18, 2009, Judge John Copenhaver ruled that an administrative enforcement action, including penalty assessment, by the West Virginia Department of Environmental Protection ("WVDEP") against Powellton Coal Company for alleged violations of Powellton's NPDES water discharge permit did not preclude the Sierra Club from pursuing a citizen suit in federal court seeking penalties for the same alleged violations. WVDEP finalized an administrative order in October 2008 that imposed over \$120,000 in penalties against Powellton to address reported exceedances of effluent limitations and other potential permit violations from July 2006 through October 2008. The Sierra Club later filed suit in federal court seeking to impose additional penalties for the same alleged excursions. Powellton asked the court to dismiss Sierra Club's suit on the basis that WVDEP's enforcement action precluded a citizen suit.

Under the federal Clean Water Act, citizen suits concerning alleged violations are generally barred if the U.S. Environmental Protection Agency or a state agency has pursued enforcement action concerning the same alleged violations either through administrative means or by filing a civil action. However, a state administrative enforcement scheme must be "comparable" to the administrative enforcement program under the federal Clean Water Act to prevent a citizens suit. Judge Copenhaver ruled that WVDEP's administrative enforcement program is not "comparable" to the Clean Water Act because WVDEP does not have the power, through the administrative process, to unilaterally assess administrative penalties against a permittee. WVDEP may, of course, pursue (generally higher) civil penalties against a permit holder by filing a civil action if the administrative process is unsuccessful.

Judge Copenhaver's decision means that Powellton and any other NPDES permit holder who has resolved permit violations through an administrative enforcement action with WVDEP still faces the prospect of being assessed additional penalties through a citizens action, as well as paying attorney fees and costs incurred by the party bringing a citizen action. As with any other Clean Water Act suit, such a citizen plaintiff would still be required to show that he was adversely affected by the alleged violations, and that such violations are ongoing.