MEMORANDUM

To: Section Chiefs and Deputy Section Chiefs of the Environmental Crimes Section, Environmental Enforcement Section, and the Environmental Defense Section

From: Jeffrey Bossert Clark, Assistant Attorney General

Re: Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings

Date: July 27, 2020

As President Trump remarked not long ago, "our air and water are the cleanest they've ever been by far."[1] This reality is a testament to the effectiveness of bipartisan Congresses in the Clean Air Act and Clean Water Act, as well as to the hard work of this Division in enforcing these laws in conjunction with our many state and local partners.

Both statutes are noteworthy for their expansive scope and the amount of discretion they give to the federal government to set and enforce environmental policy. That authority, however, is cabined by important limitations, including restrictions designed to prevent over-enforcement and double recovery. Thus, for example, in pursuing civil enforcement actions, EPA can proceed under either Clean Water Act § 309(d) or § 311(b), but not under both. *See* 33 U.S.C. §§ 1321(b)(6)(E) & (b)(11). Similarly, the venerable "Petite Policy" precludes successive criminal prosecutions except in a narrow set of cases where the appropriate Assistant Attorney General determines that doing so is necessary to vindicate a substantial federal interest. *See* JUSTICE MANUAL § 9-2.031. More recently, this Administration has updated the Justice Manual to require Department attorneys to actively coordinate with state and local authorities as well as other components in the Department to ensure that the federal government does not "pile on" when

[1] Aris Folley, THE HILL, *available at* https://thehill.com/policy/energy-environment/449239-trump-says-air-and-water-are-the-cleanest-theyve-ever-been-before (June 18, 2019).

state, local, or other federal enforcement actions are sufficient. *See* JUSTICE MANUAL § 1-12.100.

As Assistant Attorney General for this Division, I have an obligation to ensure that we are respecting these limitations and to use my enforcement discretion in a manner consistent with Congress's underlying policy decisions, Department guidance, and—ultimately—fundamental constitutional principles of federalism and due process.

The need for prudent civil enforcement discretion is particularly acute when a case that we are contemplating bringing involves a prior state enforcement action. Both the Clean Air Act and Clean Water Act were designed to solve dysfunctionalities that Congress perceived to prevent states from adequately protecting the environment.[2] And both statutes give the federal government a unique role in protecting the environment for the entire nation. Thus, for example, while CWA § 404 allows States to assume

[2] "The characteristic insistence in federal environmental legislation upon geographically uniform standards and controls strongly suggests that escape from the Tragedy of the Commons by reduction of transactions costs has been an important reason for such legislation." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (one aspect of this Tragedy is said to be that "[g]iven the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards." *Id.* at 1211-12). Richard Stewart is a respected scholar who once himself held the office of Assistant Attorney General of the Environment and Natural Resources Division. However, his conceptual arguments have been questioned, including on empirical grounds. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992) ("This Article challenges the accepted wisdom on the race to the bottom. It argues that, contrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare; indeed, as in other areas, such competition can be expected to produce an efficient allocation of industrial activity among the states. It shows, moreover, that federal regulation aimed at dealing with the asserted race to the bottom, far from correcting evils of interstate competition, is likely to produce results that are undesirable.").

responsibility for regulating the discharge of dredge or fill material into federal navigable waters, Congress made sure to add that nothing in that section should be "construed as affecting or impairing the authority of the Secretary [of the Army] to maintain navigation," a quintessentially federal interest. 33 U.S.C. § 1344(t). Similarly, Congress gave the U.S. the lead role nationally for enforcing water quality violations, including by granting the U.S. special oversight over citizen suits, *see* CWA § 505(c)-(d), 33 U.S.C. § 1365(c)-(d), and by granting the U.S. emergency authority to sue "any person" in order to prevent imminent and substantial endangerments to health or welfare, *see* CWA § 504(a), 33 U.S.C. § 1364(a).

At the same time, Congress was careful to preserve the States' role as the primary regulator of their own air and water. Consider, for example, this instruction from the Clean Water Act:

> It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (emphasis added). *See also* Clean Air Act, 42 U.S.C. § 7407(a) (similar).

This is not merely efficient environmental policy. It is constitutionally required or, at the very least, constitutionally prudent as an exemplar of the principle of governmental subsidiarity: that government which tends to govern best is the level of government closest to the people. As Justice Scalia noted in his landmark majority opinion in *Printz v. United States*, "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" 521 U.S. 898, 918–19 (1997) (quoting *The Federalist* No. 39, at 245 (C. Rossiter ed. 1961) (J. Madison)).[3]

[3] This memorandum does not endeavor to trace the exact lines demarcating the boundary between federal and state authority. As Alexander Hamilton observed, these lines are sometimes quite hard to perceive: "The erection of a new government, whatever care or

This Division has a long history of working cooperatively with States to ensure that the environment is protected in a way that respects these principles of federalism and state sovereignty. Many times, this occurs through joint federal/state proceedings. It also occurs when a State asks EPA to bring an enforcement action. There are also many instances where States proceed under their own legal authority without involvement from ENRD or its client agencies.

The purpose of this Memorandum is 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.

In some cases, Congress has taken the discretionary element out of our hands. For instance, Congress has expressly precluded federal civil penalty actions when a State has (1) commenced and is diligently prosecuting or (2) has successfully pursued a state proceeding pursuant to a state law regime "comparable" to the federal administrative penalty regime codified in

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wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." *The Federalist* No. 82, at 490 (C. Rossiter ed. 1961) (A. Hamilton). The difficulty of these "questions of intricacy and nicety" underscores the need for the federal government to tread carefully in asserting its authority over matters traditionally governed by the States alone.

Clean Water Act ("CWA") § 309(g)(6).[4] Both the text of that statute and the cases interpreting it, however, make clear that this preclusion applies *only when* the State used administrative proceedings similar to subsection (g) of that provision. *See, e.g.*, *California Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868, 877 (9th Cir. 2013).

Strangely, however, nothing in the CWA affords similar preclusive effect to state civil *judicial* enforcement actions, even though such civil judicial enforcement actions will inherently include more robust processes to protect the rights of defendants than the § 309(g)-referenced state administrative proceedings. Likewise, the CWA does not explicitly prevent the federal

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[4] CWA § 309(g) provides, in relevant part, as follows:

> **"(6) Effect of order**
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> **(A) Limitation on actions under other sections**
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> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—
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> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
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> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
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> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title."

33 U.S.C. § 1321(b) concerns oil and hazardous substance pollution penalties. 33 U.S.C. § 1319(d) concerns civil penalties for violations of 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342. And 33 U.S.C. § 1365 is the citizen suit provision.

government from pursuing a subsequent administrative action even when civil judicial enforcement would be precluded by CWA § 309(g). Taking a step back, it is hard to say whether it is more odd

> (1) that state administrative proceedings (brought and resolved by non-judicial state actors) can have preclusive effect but not state civil proceedings brought before and tested by state judges (who are typically subject to gubernatorial selection, popular election, or a hybrid system of gubernatorial selection and retention elections) *or*
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> (2) that state administrative proceedings produced by non-judicial state actors can preclude federal civil proceedings that would come before and be tested by Article III federal judges, but not federal administrative proceedings brought by executive actors inside the EPA to be heard before mere administrative law judges.

Both are passing strange features of the statute. Indeed, each of these dimensions of the statute seems upside down. The text, structure, or legislative history[5] of the CWA provide scant justification for these asymmetries, which could increase the likelihood that federal resources invested into such cases will not achieve desired results.

Accordingly, I have come to the conclusion that—as a matter of enforcement discretion—civil enforcement actions seeking penalties under the

[5] As I hope to explain soon in more detail in a separate Directive, legislative history should not be used to expand or to justify stretched interpretations of the law as written by Congress and signed by the President. Concerns about fair notice, due process, and running afoul of the constitutional structure are, however, less acute when (as here) the legislative history is not being used to impose additional burdens on the public but instead to preserve liberty and the constitutional structure. As those in the Executive Branch do, members of Congress take an oath of office and the respect they accord to the limits of their powers should be respected.

CWA will henceforward be strongly disfavored if a State has already initiated or concluded its own civil or administrative proceeding for penalties under an analogous state law arising from the same operative facts.[6]

Among other virtues, this approach echoes the "Petite Policy" applicable to criminal proceedings, ensures a healthy respect for federalism, and it defers to Congress's manifest policy judgement against double-recovery. It is also underscored by recent additions to the Justice Manual warning against "piling-on." *See* JUSTICE MANUAL 1-12.100. As then-Deputy Attorney General Rosenstein explained in describing this addition to the Manual,

> "Piling on" can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement. We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one.

Rod Rosenstein, *Remarks to the New York City Bar White Collar Crime Institute* (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar. *See also* Attorney General William Barr's *Remarks at the Securities and Exchange Commission*, https://www.justice.gov/opa/speech/us-attorney-general-william-p-barr-delivers-remarks-us-securities-and-exchange-commission (Oct. 3, 2019) ("The DOJ is mindful of these issues. That's why, in May 2018, the Department issued the 'Policy on Coordination of Corporate Resolution Penalties,' known colloquially as 'the policy against piling-on.' It can be found both online and in our *Justice Manual*. This policy emphasizes that, to achieve an equitable outcome, the DOJ 'should consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators.'").

[6] This policy does not apply to cases where the proposed civil penalty action would seek relief based on new conduct post-dating the state proceeding.

In light of all this, a prudent response to the logic of the principles illustrated in CWA § 309(g), construed against the backdrop of the Policy Against Piling-on, will lead me to consider requests to bring a subsequent federal civil action in the clean water area on a case-by-case basis using the following touchstones:

(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 my prior written 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, Chief, and Deputy Assistant Attorney General);

(c) Approval will be granted only if:

(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.

Multiple factors may bear on the decision in each case and the factors are not intended to be applied mechanically but to inform my exercise of discretion.

Requests for approval should include a discussion of the underlying state law. Generally, federal involvement is less likely to be called for in cases where the state law is federally approved or otherwise imposes restrictions that are similar to (or more stringent than) federal law. So, for example, if a State has assumed a federal permitting program under CWA § 402, this tends to increase the chances that the federal interests will have been adequately vindicated.

Nevertheless, nothing in this guidance should be understood as narrowing federal enforcement options. Rather, the purpose of these checks is to ensure that federal involvement is limited to instances where it is actually necessary and proportional.

Finally, this policy does not apply to criminal matters, as CWA § 309(g)'s preclusion provisions are wholly silent on prior criminal actions (as opposed to that provision's references to both civil and administrative enforcement), leading one to the conclusion that Congress intended clean water criminal matters to be subject to the ordinary background principle of the dual sovereignty doctrine. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("We have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sover-

eign. Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."). Of course, division attorneys in the Environmental Crimes Section remain bound by the "Petite Policy" and Department-wide policy against "piling-on." *See* JUSTICE MANUAL §§ 9-2.031 & 1-12.100. My point in this paragraph is that CWA § 309(g) adds nothing to the Petite Policy or to the policy against piling-on.

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This memorandum was developed in consultation with Chiefs and Deputy Chiefs of the Environmental Crimes Section, Environmental Enforcement Section, and the Environmental Defense Section. This memorandum relates only to internal procedures and management of ENRD. It does not create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, officers, or any other person.

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