VI.D.4.

"Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlement on the United States Ability to Sue for same violations", dated June 19, 1987.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1987

MEMORANDUM

SUBJECT: Clean Water Act Section 505: Effect of Prior Citizen Suit Adjudications or Settlements on United States' Ability to Sue for Same Violations

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Regional Counsels
Regions I - X

The purpose of this memo is to clarify, in response to several inquiries that this office has received, the United States' position on the question of whether the federal government is precluded from suing a violator in the face of a previous Clean Water Act citizen enforcement suit adjudication or settlement with the same defendant for the same violations. As indicated in the attached documents, our position is that the United States is in no way estopped from suing a violator (on the same violations) for separate or additional relief after a citizen suit has been initiated or concluded. The maximum potential civil penalty liability of the defendant in the U.S. action would be the statutory maximum reduced by any civil penalty assessed in the earlier citizen suit which was actually paid into the U.S. Treasury for the same violations. This position is supported and explained in three attachments to this memo.

Attachment One is the court's order dated March 16, 1987 in U.S. v. Atlas Powder Company, Inc., Civ. No. 86-6984 (E.D.Pa). The court holds that "the United States is not bound by settlement agreements or judgments in cases to which it is not a party." See also Attachment Two, the United States' memorandum in support of a Motion to Dismiss Atlas's Counterclaims, which asserts the general principle that the U.S. is not bound by the results of prior litigation by private parties over a given set of violations because the U.S. has interests distinct from those of any private citizens. The memorandum also quotes an excerpt from the Legislative History of the Water Quality Act of 1987, which clarifies that the new WQA provision that

provides the United States an opportunity to review CWA citizen suit complaints and consent decrees will not change the principle that the U.S. is not bound by judgments in those cases.

Attachment Three is a letter dated April 1, 1987 from the Department of Justice to the judge in Student Public Interest Research Group of New Jersey v. Jersey Central Power and Light Co., Civ. No. 33-2840 (D.N.J.). This letter discusses in detail the non-preclusion issue, with relevant case citations. The letter also emphasizes that civil penalties must be paid to the U.S. Treasury and that any monetary payments made in settlement of citizen suits which are not paid to the U.S. Treasury do not reduce a defendant's potential civil penalty liability in any future government enforcement action. The Department of Justice is routinely issuing letters such as this to parties to proposed CWA citizen suit settlements which purport to bind the United States or to call for payment of civil penalties to any recipient other than the U.S. Treasury.

If you have any questions on these or related citizen suit issues, please contact OECM Water Division attorney Elizabeth Ojala at FTS 382-2949.

Attachments

cc: Susan Lepow
David Buente
Ray Ludwisewski
Ann Shields
James Elder
Associate Enforcement Counsels
Water Management Division Directors, Region I-X
Water Division Attorneys

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