

Court Allows Clean Water Act Citizen Suit to Proceed Despite FDEP Action

On January 19, 2018, the U.S. District Court for the Middle District of Florida denied Defendant City of St. Petersburg's motion for summary judgment in a citizen suit under the Clean Water Act (the "CWA"). Led by the nonprofit group Suncoast Waterkeeper, the Plaintiffs alleged the City violated the CWA by discharging pollutants into the waters of the United States without permit authorization.

The key question in the court's decision was whether the Florida Department of Environmental Protection ("FDEP") had commenced and was diligently prosecuting a comparable action against the City under Florida law. Under the CWA, citizen suits are barred whenever: (1) the state has commenced an enforcement action against a polluter; (2) the state is diligently prosecuting the enforcement action; and (3) when the state's statutory enforcement scheme is comparable to the federal scheme. In this case, FDEP had proposed a consent order with the City on August 29, 2016, to address the same violations the Plaintiffs alleged in their complaint. The Plaintiffs filed their citizen suit just over three months after FDEP proposed a consent order with the City.

Notwithstanding FDEP's proposed consent order, the court allowed the Plaintiffs' case to proceed. The court held the Plaintiffs' suit was not barred under the CWA because FDEP's enforcement procedures are not sufficiently comparable to the CWA's. The court's decision hinged on the fact that the CWA gives the general public a substantial right to participate in the enforcement process, whereas FDEP's enforcement process does not. Under the CWA, the rights of "interested persons" in enforcement proceedings include the right to public notice, a reasonable opportunity to comment, the right to present evidence if a hearing is held, and the right to petition for a hearing if one is not held. By contrast, the court found Florida law does not provide the general public with a comparable right in enforcement proceedings. Rather, Florida's scheme limits participation to those whose "substantial interests" are affected by an FDEP enforcement proceeding. Thus, the court held the public's statutory right to participate in FDEP's enforcement proceedings is not sufficiently comparable to the CWA's, and the Plaintiffs' citizen suit survived the City's motion for summary judgment.