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Shumaker Lawyers Score Win in a Case of First Impression Regarding Citizen Suit Under the Safe Drinking Water Act, and the Scope of the SDWA's "Diligent Prosecution" Bar

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TOLEDO, OH – In Carr, et al. v. Arrowhead MCH, LLC, et al., 518 F.Supp.3d 1018 (N.D. Ohio 2021), the United States District Court for the Northern District of Ohio held that the fact that Defendants had entered a Consent Decree with the State of Ohio did not constitute a bar to a citizen suit under the "diligent prosecution" bar provided in 42 U.S.C. section 300j-8(b) (1) (A)-(B).

Under the Safe Drinking Water Act (SDWA), if either the State or United States is diligently prosecuting a civil action for the same violations in "a Court of the United States," the preclusion provision of the SDWA provides that no action may be commenced:

> "If the Administrator, the Attorney General, or *the state has commenced and is diligently prosecuting a civil action in a court of the United States* to require compliance with such requirement, but in any such action in a court for the United States, any person may intervene as of right…" (Emphasis added)

On May 12, 2020, plaintiffs sent a 60-day notice letter to defendants, the State of Ohio, and the United States, alleging multiple violations of the SDWA, including violation of the reporting, testing, and numerical standards for various contaminants, including radionuclides.

On July 10, 2020, the defendants and the State of Ohio entered into a Consent Decree for Injunctive Relief and Civil Penalties in the Lucas County, Ohio, Court of Common Pleas. The Decree addressed many of the alleged violations cited in the notice letter, and provided for substantial improvements to the defendants'

drinking water treatment plant, stipulated penalties, and a civil penalty of $25,000. The Decree forgave $20,000 of the penalty amount in exchange for a Supplemental Environmental Project, consisting of a backup electric generator.

On July 12, 2020, two residents of Arrowhead Mobile Home Park commenced a civil action in the United States District Court for the Northern District of Ohio, seeking increased penalties and enhanced injunctive relief, based on alleged continuing violations and the defendants' past track record of multiple violations over the preceding years.

Defendants moved to dismiss the case, relying on the "diligent prosecution" bar found in SDWA's citizen suit provision. Defendants contended that under the "totality" of the SDWA, State Consent Decrees satisfy the diligent prosecution exception to citizen suits, despite the fact that the statute does not mention state court proceedings as the basis for the diligent prosecution defense. They suggested that to rule otherwise would frustrate the Congressional preference for implementation of the SDWA via state delegated programs. Allowing the federal case to proceed, in light of a State Consent Decree, defendants argued, would frustrate the state's choices as to how the program should be implemented.

In denying the motion to dismiss, the Federal District Court noted that "the threshold issue in this dispute is whether the Lucas County Court of Common Pleas is a "court of the United States" as contemplated under the SDWA." If not, the Court need not examine whether the matter was "diligently prosecuted." The court's decision relies primarily on the plain language of the SDWA – which does not expressly identify "diligent prosecutions" brought in a court "of a State" as barring a citizen suit – as do other analogous federal statutes, such as the Clean Water Act (CWA) and Clean Air Act (CAA)." In other words, the CWA and CAA demonstrated that Congress clearly knew how to create jurisdiction preclusion when it chose to do so. The District Court also dismissed defendants' reliance on legislative history, namely a June 24, 1996, House Report from the House Committee on Commerce, which stated, in part, "This section amends section 1449 to indicate that pending State, as well as Federal Court action to require compliance may serve as a bar to civil action". (emphasis added) (H.R. Rep. No 104-623 at 48). Despite this expression of intent in one committee report, the Court found it persuasive that Congress ultimately decided not to include this language in the statute. Obviously, Congress was aware that the language of the SDWA did not preclude federal enforcement when State Consent Decrees were entered, and chose not to extend the SDWA prelusion to those circumstances.

Unlike the CWA and the CAA, there are a few published cases involving citizen suits under the SDWA. For the environmental law practitioner, it may be easy to overlook the difference in language under the SWDA preclusion provisions; however, it should be clear that to resolve compliance issues under the SDWA prior to a citizen suit, a putative defendant will need to achieve agreement with the federal government.

Plaintiffs' (Carr, et al.) were represented in the case by Shumaker lawyers Louis E. Tosi and Joseph S. Simpson.

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