

DOJ Memo Indicates Potential Changes to Federal Enforcement:

By Nathan E. Vassar

Following the last election, before he formally left the Department of Justice, then-Attorney General Jeff Sessions issued a memorandum that has the potential to alter the landscape of one of the federal government's primary enforcement tools – the use of Consent Decrees to bring about municipal compliance. The seven-page memo seeks to curtail the use of Consent Decrees in enforcement matters against local governments, and to tailor the scope of such tools such that their duration and requirements are more limited.

While most believe that the Sessions memo was aimed at controlling the use of decrees in the context of civil rights abuse matters, its language is not limited to a particular type of enforcement subject. Accordingly, municipalities, POTWs, and other local governments may see the benefits of a scaled-down enforcement approach, depending upon how the DOJ and its client agencies use the memo moving forward.

In particular, the Sessions memo states that the Consent Decree tool should be reserved for entities with unique compliance challenges, including those where a utility has shown a pattern of violations over time or where the utility has not successfully complied with other enforcement mechanisms. It further highlights impacts of lengthy court-ordered compliance mechanisms on the decision-making authority of local governments, along with the cost implications when a Consent Decree mandates corrective actions that may go beyond the violation that gave rise to the enforcement action. The memo also recommends that Consent Decrees (or portions thereof) should sunset after appropriate time periods, when compliance is shown.

It is too early to know how the federal government will use the memo's directives, although there are components of it that can be used to argue against expansive requirements that

may go beyond infrastructure/O&M fixes that would otherwise address a violation issue. The chief of EPA's enforcement office has made clear that the memo does not equate to a sea-change in EPA's enforcement approach, however, other staff have stated that it may take some time until the full effects of the memo are known. For Texas utilities facing potential state/federal enforcement, the policy shift may be used in a manner to justify a more utility-centric approach to corrective action, with deadlines that more appropriately reflect the realities of system and infrastructure management.

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