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DOJ Directive Changes Federal Water Enforcement Practices:
By Nathan E. Vassar

As we approach the second Texas Water under the Trump Administration, the details of federal enforcement priorities and directives are becoming clearer. Although the early months of the administration included references to "cooperative federalism" and a return to the "four corners" of Clean Water Act enforcement, we are now seeing the implementation of those policy shifts. Most recently, the Department of Justice issued a memo in January ending the practice of enforcing guidance through settlement agreements. The impacts of this memo – and of the EPA's broader policy shifts – affords opportunity to wastewater utilities in Texas and across the country.

The memo, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" bans the use of enforcement authority to muscle defendant utilities and private entities into compliance with guidance documents. Many utilities, including some represented at this year's Texas Water, have experienced the effects of prior enforcement practices by which an agreed order or consent decree is used to force compliance with a variety of programs and initiatives that have never undergone notice-and-comment rulemaking and are not required by statute. These initiatives have included a variety of concepts that utilities may voluntarily pursue (as good practices), but in a manner that becomes mandatory when the enforcement vehicle requires compliance. For example, while a community may be in the process of developing a CMOM plan, or has targeted infrastructure fixes in areas near economically disadvantaged populations, if that same community faces federal enforcement, then those CMOM/environmental justice approaches (and corresponding structured time frames) can be required by court order.

For Texas utilities with compliance concerns, the new DOJ directive means that they should not accept settlement terms that have no basis in regulatory or statutory law. It also means that noncompliance with guidance materials will not become a basis for subsequent enforcement.

TCEQ enforcement is not affected by the DOJ memo itself, and as such, utilities are encouraged to remain in tune to both state and federal enforcement trends. Furthermore, to the extent that utilities are undertaking novel asset management practices and developing programs in line with existing guidance, those practices can be helpful in showing compliance and best practices when/if notices of enforcement are received.

The best approach is to maintain an ongoing narrative of system control and proactive management. Even though the federal government is returning to a more traditional, "four corners" enforcement posture, violations of Chapter 26 and of the federal water code can subject utilities to unwanted enforcement mechanisms with significant penalty and injunctive requirements. As such, the DOJ memo affords relief to the *extent* of prior federal enforcement, but it isn't a shield against enforcement in the first place.

Nathan Vassar is a Principal at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin, Texas. Mr. Vassar assists communities and utilities with environmental permitting and enforcement matters with both state and federal regulators, with a focus on water quality-related enforcement. His involvement includes negotiating settlement terms and counseling clients with respect to compliance strategies. For questions related to this article or other matters, please contact Nathan Vassar at (512) 322-5867 or nvassar@lglawfirm.com.