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DOJ Guidance Aimed At Curbing Police Abuses Affects CWA Consent Decrees

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The Department of Justice (DOJ) issued [new guidance](#) on November 7, 2018, imposing restrictions on consent decrees. The purpose of [the guidance](#), issued on Attorney General Jeff Sessions' final day in office, is widely understood to limit the DOJ's use of consent decrees to address civil rights abuses by police departments. The guidance, however, potentially affects all consent decrees and settlements with state and local government entities, including those for alleged environmental violations.

The most common area for these state and local settlements for environmental concerns are Clean Water Act (CWA) consent decrees, which the U.S. Environmental Protection Agency (EPA) and DOJ commonly use to settle and resolve CWA enforcement matters. For example, many municipalities around the country are currently subject to CWA consent decrees to minimize the impacts of sewer overflows, nutrients, and other environmental concerns. Similarly, many industrial dischargers are subject to consent decrees requiring injunctive relief aimed at minimizing or eliminating future pollution.

Resolving enforcement matters through consent decrees provides regulators with an ability to require facility or plant improvements that prevent future pollution on a schedule that the permittee can reasonably comply with.

EPA and DOJ will still be able to use consent decrees to resolve environmental enforcement actions, but the guidance contains new procedural and consultation requirements. Notably, top federal political appointees must sign off on the consent decree, rather than the career federal government lawyers who have sometimes done so in the past. The consent decrees must contain a sunset date as well, and the guidance urges terms of not more than three years. The guidance also requires specific

remedies as opposed to “general policy goals.

On the one hand, some of these new requirements will have little to no effect on CWA consent decrees. For example, CWA consent decrees typically already contain rather specific injunctive relief, as opposed to broad policy objectives.

On the other hand, CWA consent decrees typically last much longer than three years. Often, state and local permittees will seek a lengthier consent decree timeframe to allow more time to make the costly capital improvements necessary to minimize future pollution.

These differences between the provisions of the new guidance and the way that CWA decrees are usually designed reinforce the widely-held view that the guidance is aimed primarily at limiting DOJ’s ability to issue consent decrees to police departments, not at limiting DOJ’s ability to use CWA consent decrees. So, while the guidance will affect CWA consent decrees insofar as it requires new and additional considerations, statements made by EPA’s Office of Enforcement and Compliance Assurance to environmental reporters indicate that the agency does not expect the guidance to have a significant practical effect on existing, and possibly future, CWA consent decrees.