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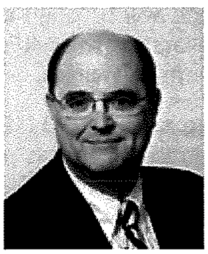
Water Pollution

Trump Administration

Where is the new Trump Administration heading in terms of water quality, say, in terms of the Safe Drinking Water and Clean Water Acts? Tracy Mehan, executive director for government affairs at the American Water Works Association, and former EPA assistant administrator for water in the administration of President George W. Bush, shares his thoughts on the prospects for the Clean Water Rule, water infrastructure funding and other issues to be addressed by President-elect Donald Trump.

Water Pollution

Practitioner Insights: Quest for 'Crystal Clear Water:' Water Quality and the Trump Administration



By G. Tracy Mehan, III

G. Tracy Mehan, III, is the executive director for government affairs at the American Water Works Association (AWWA) and an adjunct professor at the Antonin Scalia Law School, George Mason University. He previously served as the EPA assistant administrator for water during the administration of George W. Bush.

Where is the new Trump Administration heading in terms of water quality, say, as it relates to the Safe Drinking Water and Clean Water Acts?

During the March Republican primary debate, President-elect Donald J. Trump promised to eliminate the "Department of Environmental Protection." However, in a subsequent speech in Pittsburgh, he said, "I will refocus the EPA on its core mission of ensuring clean air and clean, safe drinking water for all Americans." Further, "I believe firmly in conserving our wonderful natural resources and beautiful natural habitats. My environmental agenda will be guided by true specialists in conservation, not those radical political agendas."

In a recent November interview with reporters and editors of The New York Times, President-elect Trump expressed the view "that clean air and 'crystal clear water' were vitally important."

Two major pathways to "crystal clear water" involve infrastructure financing and regulatory policy.

Water Infrastructure

Mr. Trump's campaign website, under the heading of "Infrastructure," addresses this issue in broad terms.

"Make clean water a high priority. Develop a long-term water infrastructure plan with city, state and federal leaders to upgrade aging water systems. *Triple funding for state revolving loan fund programs* [emphasis added] to help states and local governments upgrade critical drinking water and wastewater infrastructure."

This would be a jump from just over $2 billion today to over $6 billion. The website quotes USA Today which "identified almost 2,000 additional water systems [out of 53,000 community water systems regulated under the Safe Drinking Water Act] spanning all 50 states where testing has shown excessive levels of lead contamination over the past four years," which includes 350 systems that supplied drinking water to schools or day care facilities.

Recall that Mr. Trump made a highly publicized visit to Flint, Mich., to observe and comment on the lead crisis in that city.

His website also cites a $1 trillion infrastructure need over 10 years noting, "The Trump Infrastructure Plan is aimed at achieving a target of investment to fill this gap." This promise is also contained in the president-elect's 100-day action plan to Make America Great Again. It quotes a National Association of Manufacturers' finding that $8 billion in infrastructure tax credits could support $226 billion in infrastructure investment over 10 years. "Innovative financing programs also provide a 10-to-one return on investment."

How Much Infrastructure Funding Will Go for Water Projects?

It is problematic as to how much of the announced figure of $1 trillion in infrastructure investment will go to the water and wastewater sectors as opposed to roads, bridges, ports, airports, locks and dams. Does the Trump's campaign's pledge to triple state revolving loan funds (SRFs) for water and wastewater exclude further funding for such infrastructure under a future tax credit program? Hopefully, not. The Bureau of Economic Analysis at the U.S. Department of Commerce estimates in its 2008 report, Local Government Investment in Municipal Water and Sewer Infrastructure: Adding Value to the National Economy, that for every dollar spent on water infrastructure, $2.62 is generated in the private economy. And for every job added in the water workforce, the bureau estimates that 3.68 jobs are added nationally. (Full disclosure: I worked for Cadmus, the contractor responsible for the report, at the time of its preparation.)

Moreover, given previous congressional authorization, the American Water Works Association (AWWA) and other water advocacy groups, are making the case that the new Water Infrastructure Finance and Innovation Act program, or WIFIA, yields loan leverage ratios of up to 60-1 for credit-worthy utilities. This is because the combined default rate of water and wastewater utilities is an almost invisible 0.04 percent. A WIFIA loan will support up to 49 percent of eligible costs for large projects up to $20 million and is modeled on TIFIA, the Transportation Infrastructure Finance and Innovation Act. Hopefully, the new administration will be open to full funding of the WIFIA pilot which has bipartisan support in the House and Senate. More dollars for the SRFs and WIFIA are not mutually exclusive. Funding the WIFIA pilot involves mere millions, not billions of dollars.

There is also a question of what impact current congressional budget scoring and PAYGO ("Pay as you go") rules will have on attempting to triple the SRF funding. It would be a momentous thing. The EPA is probably worried that a major portion of any budget offsets would come out of its other programs and personnel. It is doubtful that either the Trump Administration or the GOP Congress would lose much sleep over that eventuality, but the Democratic minorities on the Hill would circle the wagons.

Growing Public Debt

A bigger problem for any infrastructure investment strategy is the state of the federal fisc writ large. According to the Congressional Budget Office's "The 2016 Long-Term Budget Outlook," federal debt held by the public, which was equal to 39 percent of gross domestic product (GDP) at the end of fiscal year 2008, has already risen to 75 percent of GDP in the wake of a financial crisis and a recession.

"In CBO's projections, the debt rises to 86 percent of GDP in 2026 and to 141 percent in 2046—exceeding the historical peak of 106 percent that occurred just after World War II," the outlook said. "The prospect of such large debt poses substantial risks for the nation and presents policymakers with significant challenges."

It gets worse.

Niall Ferguson, a Harvard economic historian and host of the PBS television documentary, "The Ascent of Money," argues in his book, *The Great Degeneration: How Institutions Decay and Economies Die* (2012), that "the statistics commonly cited as government debt are themselves misleading, for they encompass only the sums owed by governments in the form of bonds."

"But the official debts in the form of bonds do not include the often far larger unfunded liabilities of welfare schemes [*sic*] like...Medicare, Medicaid and Social Security," writes Ferguson. "The best available estimate for the difference between the net present value of federal government liabilities and the net present value of future federal revenues is $200 trillion, nearly thirteen times the debt as stated by the U.S. Treasury." Add to this the unfunded liabilities of state and local governments.

This will be a crucial point of discussion between House Speaker Paul Ryan (R-Wis.), who has made a career out of entitlement reform, and the president-elect.

Regulation

Under the heading of "Regulations," the Trump campaign website reports the president-elect's resolve to "Issue a temporary moratorium on new agency regulations *that are not compelled by Congress or public safety* [emphasis added] in order to give our American companies the certainty they need to reinvest in our community, get cash off of the sidelines, start hiring again, and expanding businesses." The only specific reference to water issues is contained in its pledge to "Eliminate our most intrusive regulations, like the Waters of the U.S. Rule [WOTUS]," which will be rescinded along with the Clean Power Plan, the EPA's carbon regulation, presently stayed by order of the Supreme Court.

I recall one of my senior colleagues at EPA telling me that, in his 40-year career at the agency, he "could count on one hand the number of regulations issued *without* a court order" under the Clean Water Act. This is less true, at least for now, under the Safe Drinking Water Act. That said, my former colleague's comment points to the reality of the citizen suit provisions in most environmental laws that drive a large part of EPA's regulatory agenda. Third-party lawsuits force action on mandatory statutory duties prescribed by existing law. With a Republican in the White House, and GOP control of both houses of Congress, for the nonce, maybe the statutory rules could change. But for now the courts will still be a major player in the great regulatory game.

The EPA will be a major subject of the website's statement that Mr. Trump intends to "Decrease the size of our already bloated government after a thorough agency review." And in the 100-day plan he calls for "a hiring freeze on all federal employees to reduce the federal workforce through attrition (exempting military, public safety, and public health)." This latter reference may be a consolation to the agency.

Of course, God is in the details, and personnel is policy. Without the knowledge of the new administration's precise policies and personnel, speculation as to future directions, while entertaining and a hallowed Washington pastime, is perilous.

Anticipating regulatory developments in clean and safe water policy in the new Trump administration yields many uncertainties. One thing is clear: The WOTUS regulation is history, at least the expansive version promulgated by the Obama administration. The rule seized upon Supreme Court Justice Anthony Kennedy's solo opinion on the meaning of "significant nexus" in *Rapanos v. United States* (547 U.S. 715, 62 ERC 1481 (2006)), a 4-1-4 decision, as a vehicle for clawing back jurisdiction under the Clean Water Act, which seemingly had been lost in the earlier *SWANCC* decision (*Solid Waste Agency of N. Cook Cnty. v. United States,* (531 U.S. 159, 51 ERC 1833 (2001)). *SWANCC* basically said that wetlands that were non-navigable, isolated and intrastate were not jurisdictional. Using Kennedy's concept of "significant nexus" to navigable waters, EPA seeks to reclaim that jurisdiction. With Congress biting at the bit to overrule WOTUS, and given the president-elect's campaign promise, the virtual gutting of this rule is as near a sure thing as can be imagined.

Two for One

Also in his "100-day action plan to Make America Great Again," Trump sets forth "a requirement that for every new federal regulation, two existing regulations must be eliminated." It is a kind of "net reduction" regulatory metric. Reading this, all the issues regarding statutory mandates, citizen suits and court orders come to mind. Still, the clear message contained in this two-for-one plan will set the tone for the administration that only someone who is clinically brain dead could miss. The specifics may not be as important as the overall strategic thrust of the exhortation. This is what President Abraham Lincoln may have had in mind with his famous General War Order No. 1, issued out of frustration with General George McClellan's failure to engage the Confederates. It directed that on a day certain there be a general movement against the enemy on land and sea.

"But undoubtedly Lincoln did not intend the order to be taken too seriously as a program of action," claims the eminent Civil War historian T. Harry Williams in his 1952 book *Lincoln and His Generals*. "His probable purpose was to stir McClellan to some kind of action." Maybe this is what the president-elect intends.

Maybe. Maybe not. Two former directors of OMB's Office of Information and Regulatory Affairs (OIRA), the overseer of all regulations promulgated by federal agencies and the primary implementer of presidential executive orders mandating benefit-cost analysis, have both opined as to the feasibility of carrying out a "one in, two out" approach. One is Republican, one a Democrat.

Susan E. Dudley, who ran OIRA for President George W. Bush, believes the proposed Trump policy "would provide agencies incentives to evaluate the costs and effectiveness of those accumulated regulations and determine which have outlived their usefulness." In a November article that appeared in *Forbes,* she cites experiences in the Netherlands, Canada, Australia and the United Kingdom, which "have all adopted similar requirements to offset the costs of new regulations by removing or modifying existing rules of comparable or greater effect."

In truth, the other programs mentioned are a bit different. The Netherlands established a net quantitative burden reduction target that reduced regulatory burdens by 20 percent between 2003 and 2007. Canada uses a "one-for-one rule," Dudley said.

Dudley recognizes that Mr. Trump has yet to provide any details, and that there is no mention of relative economic costs of the regulations being exchanged. "But that could just be shorthand for a policy that looks more like other countries and focuses on comparable regulatory costs," she said.

Cass Sunstein, who ran OIRA for the Obama Administration, is a firm believer in benefit-cost analysis and refers to the Trump proposal as "one in, two out." In the abstract, "it sounds like a gimmick, and it's a pretty dumb idea," he said in a Nov. 29 column for Bloomberg View. But having faked left, Sunstein breaks right.

"But life isn't lived in the abstract. It's reasonable for the Trump administration to reduce regulatory activity, certainly in some domains, and the 'one in, two out' idea is likely to deter new rulemaking—which may be the main goal. It is also reasonable to create a strong incentive for agencies to get rid of unjustified rules."

Sunstein quickly gets into the weeds and sets out four implementation problems and their solutions to making the Trump program workable. For instance, some regulations are deregulatory in nature and should get a pass. Others, are necessary to implement funding programs (infrastructure?). The key issue, as for Dudley, is the relative financial weight of each rule implemented or rescinded.

"If you are imposing $1 billion in costs but eliminating two regulations whose total cost is $10,000, you get 'one massive rule in, two tiny rules out'—hardly what Trump has in mind," writes Sunstein. "What most matters is the cost of rules, not the number."

While calling the Trump proposal "silly," Sunstein concedes that "with a little flexibility, and a lot of determination, executive branch officials might be able to make it work."

Very Tentative Conclusions

So, net-net, what does all this mean in terms of where the new administration comes out on water quality issues and public health? The major gains in environmental quality resulting from the Trump program will come from greater investments in water and wastewater infrastructure. It may be less than promised, but it will be significantly more than the nation has seen over the past decades.

On the regulatory front, specifically public health protections, say, under the Safe Drinking Water Act, will be viewed as part of EPA's traditional "core mission" as will regulation of wastewater discharges. But the entire National Water Program, like the rest of EPA, will experience a hardening resistance to regulation from a unified front made up of the White House, Congress and most immediately, an OIRA liberated to do what they were made to do: make the agency prove the net social benefit of any proposed regulation. How regulatory streamlining goes is a difficult call given the many citizen suits certain to be filed over the next four years.

It is now 46 years since the nation's major environmental statutes were enacted, in an age when most Americans trusted the federal government in far greater numbers than they do today. We are heading into uncertain waters, awaiting a new world of environmental policy yet to be born. If the next four years are as unpredictable as the last one, it should be a very interesting time to be alive.

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