Chapter 2

COOPERATIVE FEDERALISM AND REGULATION OF HAZARDOUS WASTES: CAN WE HAVE BOTH?

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> "The success of federal programs has been gravely compromised by this dependence upon state and local governments, whose generally poor record in controlling environmental deterioration triggered the initial resort to federal legislation, and whose subsequent performance in the context of federal programs has in many instances remained inadequate.
>
> (Stewart, 1977)

One of the greatest controversies in enacting an environmental policy arises over which level of government should put the law into effect. The federal government has passed legislation to clean up resources such as air and water and has regulated several sources of pollutants. Although the legal provisions vary, one common factor stands out: in each case the states are delegated day-to-day responsibility for a policy framed at the federal level.

Questioning the appropriateness of federal vs. state action is nothing new, and is hardly unique to environmental legislation. Given the seriousness of environmental problems, however, a central concern of regulators should be the efficacy of laws.

It has been suggested that environmentalists often intentionally overstate the goals of legislation (Stewart, 1977), but one doubts that they would consciously create an unworkable regulation. One must ask, then, why policy-makers persist in framing legislation which leaves the states to protect the environment, when the states' ineffectiveness was exactly what prompted the federal action.

This paper will examine the rationale for the regulatory scheme of the Resource Conservation and Recovery Act of 1976 (RCRA) with respect to hazardous wastes, then will evaluate the effectiveness of that mechanism, and finally will suggest some means to make the program more effective.

Federalism: The Compromise

Federal-state relations have gone through several distinct phases. In order to understand the current situation, which allows policies such as RCRA, one must examine the previous models and see why they no longer function.

The Articles of Confederation envisioned the United States as a loose compact among sovereign states with a weak central government. The largest problem in this system came from competition between the states. Each state established tariffs against the others, and each developed its own relations with foreign nations, in order to promote its own interests.

The resulting chaos led to the establishment of the Constitution and the Bill of Rights, which created a stronger central government, but with restrictions on the power of that government. Since that establishment, which reserved all powers to the states and the people which were not delegated to the federal government, there has been no structural change in federal-state relations, but different interpretations have dominated.

The most important interpretation is that of dual federalism, in which it is postulated that the federal government and the state governments have separate spheres of authority: each supreme in its exclusive domain, prohibited from intruding into the areas delegated to the other. One envisions something like a layer cake, with each layer representing the realm of one level of government, completely separate, yet together encompassing the whole of matters to be governed.

Most commentators have noted that federal power seems, since the Civil War, to have increased greatly at the expense of the state "layer." This centralization is seen by many as a breakdown of the two-tiered federal system, although others insist that it is merely the system at work (Friendly, 1977).

For the most part, however, this "layer cake" theory has been supplanted by a "marble cake" model, in which both the federal and state governments act in nearly every area of legislation and regulation (Gold, 1982). The resulting amalgam is referred to as cooperative federalism. If any single area has been the groundbreaker in this area, it is environmental control.

The theory of cooperative federalism rests on the premise that there are two kinds of powers granted to each level of government: exclusive powers, which may be exercised only by a specific level of government, and concurrent powers, which are shared by different levels.

Most of the powers delegated to the federal government are not exclusive, but concurrent. That is, both federal and state governments may legally act in most areas. Using its exclusive power to regulate interstate commerce and the concurrent power to tax and spend, the federal government has regulated a number of environmental threats in conjunction with state efforts. The laws either divide the responsibility for standard-setting and/or enforcement, or require the states to implement programs which meet federal standards.

Federal Pollution Statutes

All the major environmental policies in effect today involve joint federal-state implementation. In general, there are two kinds of standards to be set, ambient standards or limits on the total amount of pollution in the environment, and source standards which regulate emissions from a single pollution source.

Under the Clean Air Act Amendments of 1970 and 1977, the federal government establishes national ambient air quality standards (NAAQS) and new source performance standards, and the states set standards for existing sources of air pollution. Each state must produce a state

implementation plan (SIP) to regulate the sources for which it is responsible and to meet NAAQSs. If a state produces an inadequate SIP, EPA rejects it, and if acceptable amendments are not made by the state, EPA produces binding amendments which satisfy the standards.

Unlike the air pollution scheme, the structure under the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977 allows the states to set ambient standards while reserving effluent and technology standards to the federal government. State permitting of discharges maintains control over polluters once the state's program has been approved by EPA.

The structure under RCRA is both similar to and quite different from that of the other federal environmental regulatory schemes. Subtitle C of RCRA defines hazardous waste, then establishes a "cradle to grave" manifest system in order to produce adequate records on what is produced and where it goes. RCRA also provides for the regulation of transportation and disposal of hazardous wastes.

Like the Clean Air and Clean Water Acts, RCRA plans for states to assume responsibility for administering their own hazardous waste programs. The program proceeds in phases so as to allow a state to begin permitting activities (interim authorization), but withholds final approval until the state has promulgated all the regulations needed to administer the complete program to EPA standards. Until that point, EPA administers the state hazardous waste management programs. As of the end of 1983, only one state (Delaware) had received final authority to run its own program.

This kind of structure allows each state to enact regulations with a certain amount of flexibility in the degree to which wastes are regulated. A state may enact standards which are more stringent than the federal standards as long as they do not interfere with interstate commerce. (See the discussion of small quantity generators below.) Such provisions were not included by the Congress so much in deference to state authority, but rather in recognition of the inadequacy of federal resources to implement and enforce such a huge nationwide program.

What is sacrificed by abandoning a uniform federal program? By delegating authority to the states, RCRA allows decnetralized action, but increases the difficulty of guaranteeing any action. If EPA does exercise its authority to administer programs in states which have not produced adequate regulations, the advantages of state implementation are lost, as are the time and resources spent in the interim.

There is the possibility, then, that states could act at varying speeds and produce varying regulations. Given the potential dangers of hazardous wastes, it would be wise to examine the reality of RCRA implementation, and evaluate the effectiveness of the cooperative regulatory scheme.

Mechanics of Implementations of RCRA

A complete analysis of federal-state cooperation must look at both legal and practical aspects. Most analyses have concentrated on legal questions, primarily the constitutional issues of federalism (for example, Lee, 1981). Few have dealt with practical aspects: whether the program will achieve

the stated goal of Subtitle C of RCRA, the proper disposal of all hazardous wastes.

In attempting to fit RCRA into the current structure of cooperative federalism, Congress left several loopholes which seriously impair the effectiveness of the law. Four of these will be examined here. First is the allowance of variations in the process of implementing state programs. Second is the potential for substantive differences in state regulations. Third is the lack of requirements for hazardous waste siting plans. Finally, there is a lack of uniform emphasis in the state programs. The ultimate question must be whether we can have both cooperative federalism and effective control of hazardous wastes.

State Program Implementation - Although EPA began issuing hazardous waste regulations under RCRA in May, 1980, and states began receiving interim authorization in December of that year, applications have trickled in. Several states have not yet received Phase I authorization, which would enable them to begin administering some portions of their programs.

RCRA allows for "cooperative arrangements," wherein the state and EPA jointly operate the hazardous waste program, pending authorization for the state to assume full control. Even so, states reach that condition at varying times, over a range of approximately three years. This should serve as an index of the responsiveness of the different states to the need to enact the appropriate legislation and regulations.

In addition, some states have elected not to seek Phase II authorization at all, proceeding directly to final authorization. Although EPA projects that 45 states will have final status by the legislated deadline in January, 1985 (Skinner, 1983), present progress might call that target date into question. Even if the deadline is met by some states, one must seriously question how effective those state programs will be. Several examples will serve to illustrate the potential difficulties.

One state which will gain approval is California. EPA projects that the state will submit its final application for authorization in June, 1984, indicating that the full regulatory apparatus is in place. The same report notes, however, that

> [i]mplementation of the authorized hazardous waste program has been slow and has suffered serious fragmentation due to organization and management deficiencies of the two agencies responsible for implementation. (EPA, 1983a)

Although the report goes on to indicate that EPA's regional staff is working to improve such performance, it also reveals a number of other problems with state programs in the region, notably in the areas of compliance monitoring and enforcement.

The states in this region tend not to enforce effectively against violators, even though the states do carry out required inspections, which leads to low compliance rates (EPA, 1983a). California is relying on voluntary compliance based on education of the regulated community.

Another state with considerable problems in implementing RCRA is Wisconsin. Traditionally short on facilities for hazardous waste disposal, Wisconsin also must deal with internal political and economic problems in achieving final EPA authorization. The RCRA progam may face budget cuts in Wisconsin because of budgetary problems. All the states in EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin) face similar economic trouble. As EPA noted last year, "[t]his resource situation in the States may adversely impact implementation of the RCRA program once the Region V States receive final authorization" (EPA, 1983b).

This is a polite way of saying that this region cannot or will not carry out the RCRA mandate by itself. Several changes in state laws will have to be made before Wisconsin receives final authorization, but state program administrators feel that those changes may not be possible, given Wisconsin's current political climate (EPA, 1983b). Furthermore, writing of regulations is taking longer than anticipated, making it unlikely that Wisconsin will be able to achieve final authorization by the 1985 deadline. Although the EPA review does not say exactly this, it gives Wisconsin one of the least optimistic outlooks of any state that is attempting to get authorized (EPA, 1983b).

One of the most ambitious programs in the country is in New Jersey. Regulations there are even stricter than those required by RCRA, and the state is aggressively pursuing the manifest system. However, shortages of enforcement personnel and problems of hiring and budgeting seem to be inhibiting progress. At least six offices in the state divide responsibilities for implementing the hazardous waste program. As a result, it is hard to tell what is going on, or to measure the effectiveness of the overall program. Given the overall shortage of resources in New Jersey, efficiency ought to be a foremost goal (EPA, 1983c).

Each of these states will probably be administering its own hazardous waste program soon. The effectiveness of each must be called into question, primarily due to lack of financial resources, often caused by a lack of commitment on the part of state officials. If RCRA is to protect all of the nation from hazardous wastes, then delegating the authority to the state governments must be viewed as suspect at best.

Substantive Differences in State Regulations - For the most part, RCRA excludes from regulation generators who produce less than 1000 kg per month of hazardous wastes. Estimates are that about four million metric tons annually escape RCRA coverage due to this exemption, which applies to approximately 600,000-800,000 small businesses. EPA estimates the amount of hazardous wastes produced by small generators at about one percent of the total generated (EESC, 1983; Lent, 1983). Legislation currently under consideration in Congress would lower the limit to 100 kg per month.

California, however, does not exclude small generators from regulation. The state operates under the assumption that smaller quantities of waste are not less hazardous, and that the likelihood of public exposure from them may actually exceed that from large generators because small

generators are numerous and dispersed.

It is unlikely that small businesses are deterred fromlocating in California because of this provision, though there are possible problems with wastes transported in and out of the state (although federal law wouldpreempt the state regulation if it were deemed to interfere with interstate commerce).

It is important to understand the impact of a difference in a law such as this. Even if there are no tangible effects from this particular variation, one state's differing determination on a major issue brings another consideration to light: if the states are to protect the public from hazardous wastes because of a decree from the national government, why should the citizens in some states be protected more than those in others?

California deems it necessary to regulate all hazardous wastes in order to protect its people, whereas Congress and EPA determine that the threat is insignificant from small quantity generators. One of the main arguments against regulating small quantity generators is that doing so could create a greater threat to public health by adding incentive for "midnight dumping," the illegal dumping of wastes down drains or off the sides of roads, as a means of avoiding compliance with complicated regulations. California implicitly rejects this finding.

A state determination in opposition to a national policy which is nominally uniform raises the issue of where to draw the line on variations in state implementation of federal policies. Implicit in California's action is its right to determine what is necessary to protect its citizens. This dispute is substantive, however, not procedural. If national policies are to have any meaning, conformity with not only the letter of the law, but also with the rationale behind it, would seem appropriate.

In essence, then, we must question the right of states to regulate activities which the national policy explicitly chooses not to handle. Once one exception is allowed, it is difficult to determine exactly where the limits lie.

Siting of Disposal Facilities - Perhaps the most important sort of variation among states in the implementation of RCRA comes with regard to siting of hazardous waste disposal facilities. Hazardous waste management facility standards under RCRA are mandatory. If a state does not implement a proposal for a hazardous waste management program which is substantially equivalent to the federal program, EPA will impose one on the state.

Siting of hazardous waste disposal facilities is not covered by Subtitle C of RCRA, however, but under Subtitle D, which deals with solid waste management planning. Hazardous waste siting is part of hazardous waste planning, which is in turn part of solid waste planning in RCRA. The key difference is that Subtitle D planning is not mandatory. The law only provides guidelines for planning, and serves as an incentive for action through grants of assistance money, but states are

not compelled to plan for or to provide adequate facilities for the disposal of hazardous waste (Davidson, 1982).

This might not seem to be a major problem, except that hazardous waste facility siting has become a difficult issue lately. With the publicity surrounding such places as Love Canal and Stringfellow, public opposition to siting of hazardous waste facilities in their own communities has grown to the point that it is difficult to get a facility built anywhere.

The underlying causes of this problem are manifold, and the solutions are not easy, but the fact remains that unless adequate facilities are provided for disposal of hazardous wastes, an even greater problem than that posed by the facilities themselves will be upon us. It would be in the interest of the general welfare, then, to amend RCRA to require states which assume responsibility for their hazardous waste programs to provide some mechanism for dealing with siting problems and ensuring the adequacy of disposal capacity. There should also be efforts to coordinate these efforts among the states.

Program Emphasis - One of the points made in EPA's review of RCRA implementation last year was that certain regions tend to emphasize permitting of facilities more than enforcement. For example, California will not have the resources to process all the applications for permits it has so far received--the state is overextended in the area of permitting. On the other hand, enforcement efforts are deemed inadequate here: many inspections are made, and thus many infractions are uncovered; but since not enough resources are being devoted to enforcement, most infractions go unpunished or unremedied (EPA, 1983a).

Thus, resources and priorities are assigned differently in different states. Within regions the EPA offices seem to be effective at keeping efforts consistent, but it is clear that nationwide EPA coordination is lacking. Presumably a continuation of the Regional Implementation Reviews will help to alleviate this.

Implications of Variations

The legal and constitutional implications of a federal policy which mandates state implementation have been examined in great detail by much better legal minds than mine. Some of the more obvious conclusions, though, need to be restated, particularly in light of the special nature of hazardous waste programs.

The original purpose of the commerce clause in the Constitution was to prevent competition among states. In recent years the federal government has stepped into a number of areas involving environmental problems on the grounds that states would not act independently for fear of putting themselves at a competitive disadvantage. The federal government must ensure that it still prevents such competitive discrepancies when it allows variations from the national policy.

The potential for competition exists for several reasons. First is the past history of environmental legislation. In no case has the original deadline for complete implementation been met, and in most, deadlines have been pushed back. Given this proclivity of the government to change deadlines rather than punish those who fail to meet them, there is no incentive for a state to enact its regulations by the deadline. Indeed, if the state feels that not enacting the program would give it an advantage, say in attracting industry, then it actually has a strong incentive not to promulgate the required legislation.

A second potential problem arises because of the lack of federal control of hazardous waste disposal siting. If a state feels that it does not want hazardous wastes contaminating its environment, it can simply refuse to grant operating permits to disposal facilities, relying on facilities in neighboring states. Although this certainly subverts the intent of RCRA, it is arguably not a violation of the letter of the law (Davidson, 1982).

Opportunities exist under the present laws to create either havens for polluters or havens for those fleeing pollution. The only major difference so far in RCRA regulations is California's non-exemption of small generators of hazardous wastes. This difference does not seem to have much potential to disrupt larger trade interests, as it might at most deter some small businesses from opening in California out of unwillingness to be subjected to hazardous waste regulation.

More likely is the possibility that California small quantity generators will evade the law, disposing of their wastes privately, rather than at a Class I site as required by the state law. Since this is probably what they did prior to passage of the law, the net effect will not be noticeable. In fact, the chance that some of the small quantity generators who previously disposed of their wastes unsafely will begin to deal effectively with their wastes should outweigh any increase in illegal dumping.

In the long run one must hope that Congress and EPA will in fact enforce their deadlines. Public pressure seems to favor such action. The RCRA reauthorization bill that passed the House last fall contains so-called hammer provisions, stipulations that if EPA does not come up with regulations by a certain time, uniform, strict regulations will automatically take effect. Similarly, if a state does not receive final authorization for its hazardous waste program by January 26, 1985 (assuming the deadline is not extended), EPA will assume responsibility for administering that state's program.

Recommendations

In light of all this, several changes in the present administration of the hazardous waste program are in order. The first and potentially most serious change is the centralization of control over siting of hazardous waste disposal facilities. If states are permitted to block completely the development of disposal facilities, capacities in several areas will soon be inadequate

(Harrington, 1983). If waste management planning becomes mandatory rather than optional, the added costs will likely be balanced by a lack of future emergencies.

Another important concern must arise when the states ultimately assume full authority to run their programs. During the interim authorization period, regional EPA offices are doing an excellent job of maintaining uniformity of approach within their regions. The ongoing process of regional implementation review by the central EPA office should help to improve uniformity between regions. Once states assume control, however, EPA effort must continue, to ensure that all states place the same emphasis on certain facets of the program (such as enforcement).

At present, hazardous waste issues remain high on the lists of concerns of many people, but experience shows that time will diminish interest in the subject, and steps may be taken at the local level to reduce the cost of regulations on hazardous wastes. Given that the dangers of hazardous wastes exceed those of most other forms of environmental pollution, regulations must ensure that decentralizing the regulatory authority does not cut off the central commitment to preserving the public health uniformly across the nation. It is incumbent upon EPA to keep a watchful eye over the states, both now while states are formulating their hazardous waste programs and next year when they assume control over the entire program.

In order to create a program in line with both the resources available and the current interpretation of federalism, Congress has reduced significantly the chances that RCRA will succeed in controlling hazardous wastes. In order to tip the scale in favor of a safer environment, Congress would do well to review both its relationship with state governments and the resources devoted to the problem.

Ultimately, a determination will have to be made as to whether the tradeoff between federalism and effectiveness is a necessary one, or whether more care must be taken in the formulation of workable regulatory schemes. Given that other environmental schemes have had greater success within the framework of cooperative federalism, it is likely that a better system can be--and should be--created for hazardous wastes.

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