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Is The Law An Asset

Thomas Power¹, Fiacra McDonnell²

This paper reviews US environmental policy as articulated in various Enactments since 1955, and to deal briefly with the interaction between national and state regulators which arises from the special constitutional relationship between them. It presents and explains the main features of environmental legislation in the USA, and investigates how experience has justified (or otherwise) the main underlying policy assumptions.

Abstract

The peculiar nature of the US Federal Constitution impinges on the implementation of any federal legislation. The tenth amendment to the US Constitution lays down that powers "not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively...." What this amendment means is that political authority is vested in the states unless preempted by the federal government. The most obvious example of federal pre-emption is that of equal rights legislation for African Americans. Such federal action has traditionally come about as a result of the perceived failure of states in the civil rights area. Historically environmental issues were the responsibility of the states. However the emergence of the Green movement in the '70s (like the Civil Rights movement of the '60s) has led to greater involvement by the federal government.

Nevertheless the role of the states remains central to environmental policy implementation and in some cases their legislation has been even stricter than federal laws. (Helme & Pearce 1991).

Moreover the constitutional rights of states can be sued to the detriment of federal policy. This allows the states some room for manoeuvre in their dealings with the federal government on environmental issues. This is especially so as full federal pre-emption, as we shall see, can carry with it unacceptable costs and inadequate levels of control.

(i) U.S. Environmental Legislation:

The Clean Air Act 1955 (CAA):

Amendments in 1970 laid responsibility to the Environmental Protection Agency (EPA) for control of emissions by stationary and mobile sources. Inter alia, the EPA was required by law to:

- (a) Establish uniform national ambient air quality standards for specified pollutants;
- (b) Limit the maximum amounts of such pollutants that could be emitted by new or expanding/modifying sources;
- (c) Oversee the establishment of State Implementation plans - detailed programmes to control existing sources of pollution in non-attainment areas;
- (d) Draw up a schedule for a decrease over time in the rates of emissions ex motor vehicles.

Further amendments in 1977 created a "two tier" system, whereby those areas of the country, which enjoyed air quality in excess of standards, were required to "prevent significant deterioration", in other words maintain as far as possible their superior air quality.

In 1990 amendments were passed which incorporated two major innovations:-

- (1) Technology-based emissions standards [Maximally Achievable Control Technology (MACT)] were required of the EPA for sources of some 200 specified pollutants. A strict and precise timetable was laid down for action by the EPA.
- (11) Annual emissions of Carbon Dioxide from specified sources were to be cut by 59% over a 10 year period. This was the first time that aggregate emissions were capped. Hitherto only rates of emission were regulated. Emissions trading was introduced to minimise the costs of compliance.

The Clean Water Act 1972 (CWA):

Prior to the 1972 individual sources of water pollution were controlled by the individual states. The standards were water based i.e. ambient water quality standards were imposed. This water quality approach was superseded by a technology based

system (i.e. effluent standards) under the 1972 Act. All major sources of water pollution were required to install specific technology according to pre-ordained deadlines, starting with basic technology and progressing through more advanced technology to very sophisticated equipment. Subsidies were introduced for local public bodies affected by the legislation. These subsidies have since been reduced from their initial levels.

The Federal Insecticide, Fungicide, and Rodenticide Act 1972 (FIFRA):

FIFRA was passed in 1972 to regulate the use of pesticides and herbicides on crops. This Act differs fundamental from the CAA and CWA inasmuch as it restricts the manufacture and use of *products* rather than *residuals* of production/use.

Under FIFRA approval by the EPA is required for the introduction of any new product or for any proposed new use of an approved product. The onus of proving that a new product/new use will not be hazardous to the environment or to health lies with the producer/user. The EPA can impose restrictions/conditions (including an outright ban) on the use of the product depending on the results of mandatory tests.

Existing pesticides/herbicides also came under the aegis of the 1972 Act. Subject to the EPA proving that an unreasonable environmental or health risk is posed by their continued manufacture or use, products may be restricted or even banned.

The Safe Drinking Water Act 1974 (SDWA):

This Act required the EPA to set "goals" for the reduction of specified containments in drinking water ex public systems. These are called Recommended Maximum Contaminant Levels (RMCLs) and they aspire to provide a certain level of safety for consumers. Binding national regulations for the specified contaminants, called Maximum Contaminant Levels (MCLs), have been as near as possible to the RMCLs.

The basic trust of the legislation remains the same today although 1986 amendments extended requirements by inter alia the introduction of monitoring of drinking water for the presence of unregulated contaminants, the protection of water sources.

The Toxic Substances Control Act 1976 (TSCA):

Like FIFRA the manufacture and use (or the introduction of new uses for approved products) of potentially harmful chemicals is regulated. However TSCA differs from FIFRA in one important respect - the burden of proof that the chemicals are hazardous falls on the EPA. The EPA has wide powers of control over a chemical product which is proven to be potentially dangerous. It can control the production, transportation, use and disposal of such a product. It also is empowered to impose the ultimate sanction prohibition. The problem of dealing with pre-existing products is similar to that of FIFRA.

The Resource Conservation and Recovery Act 1976 (RCARA):

This Act regulates for the control of the generation, transportation, storage and disposal of hazardous and solid-waste (refuse/garbage). It addresses the problem of waste disposal on land in a way that is analogous to the control of environmental "wastes" in the air and water. The Act requires the EPA, among other things, to:

- (1) Define hazardous waste;
- (2) Create a tracking system from generation to disposal of the waste at authorised facilities by approved means
- (3) Regulate handling operations and design requirements for approved facilities;
- (4) Institute rules governing municipal refuse/garbage dumps. States are given wide scope in implementing the rules. Because of the slow pace at which the provisions of the Act were carried out, stringent amendments were introduced in 1984. In the absence of the EPA demonstrating that it was unnecessary for public safety, a ban was imposed on the land disposal of virtually all hazardous waste. (Again, as with TSCA the onus of proof is with the guardians of the environment rather than with the polluters). The 1976 law was extended to include previously unregulated smaller generators/disposers. However pre-existing disposers remained unregulated under the original Act. As a result problems soon surfaced which had not been provided for.

The "Superfund "1980:

In 1978 wastes from an abandoned disposal site leaked into basements and yards in Buffalo, N.Y. The need for legislation to respond quickly to such occurrences, to set up a fund to compensate the victims and pay for clean-ups, and to define and assign liability was particularly pressing as the extent of the potential for such calamities was

inestimable. Such an Act was passed in 1980 and came to be known as the "Superfund" after the trust fund which was set up to pay for clean ups.

The "Superfund" would be made up of federal monies augmented by inflows from disposers found liable, under the Act, for the damages.

Under the Act, STRICT and JOINT and SEVERAL retroactive liability are controversially imposed. STRICT liability means that even if a disposer has complied with best practices of disposal of the time, he is still liable for the full present day clean up costs. JOINT and SEVERAL liability empowers the EPA to obtain full redress from one known disposers (where there have been several originally involved). It is open to the disposer to recover a proportion of the costs from the other disposers (if he can!).

(ii) Empirical Validation:

That total pre-emption carries with it unacceptable degrees of cost and control is borne out by two actual cases-

- (1) In 1981 the Idaho legislature refused to vote funds for the air quality programme. The EPA were forced to administer the programme at a cost five times greater than would have been the case with stake implementation.
- (2) In 1982 the State of Idaho returned responsibility for its municipal water monitoring programme to the federal authorities. Only 15% of the inspections hitherto achieved by the state were carried out by the EPA.

Legal precedent (1970) rules out the use of the threat of fines, sanctions or contempt citations to force state implementation of federal environmental policy i.e. the EPA cannot use direct coercion.

As direct persuasion is not lawful and as direct intervention (full pre-emption) has proved to be costly and inadequate (this latter phenomenon is not unrelated to the absence of perfect information already discussed in other modules), alternative forms of intervention have had to be explored. Two possibilities arise, namely "cross-over sanctions" and "partial pre-emption" (also called "meet-or-exceed").

"Cross-over Sanctions:

This approach envisages the withholding of federal funding for other state projects as a lever to force compliance with environmental requirements. A precedent exists at state level. In 1977 California Water Resources Board (supported by the State Air Resources Board) withheld a federal grant of \$10 million for sewage system development in Orange County in an attempt to force it to develop a housing policy which would reduce the need for commuting thus contributing a reduction in motor vehicle emissions.

"Meet-or-Exceed":

This is the principle underlying the CAA (Amendments) 1970, 1977 and 1990. Federal authorities set a "floor" (or "ceiling", depending on the perspective) for standards. States may adopt stricter standards but they must, as a minimum, reach the "floor". Emissions trading was introduced to facilitate such an approach with the added incentive of minimising costs.

Emissions Trading in the light of experience:

- (1) Estimates put accumulated capital savings at >\$10 billion.
- (2) Sources have responded to the increased possibilities for easier compliance.
- (3) Between 7,000 and 12,000 voluntary trades have taken place.
- (4) Only 7 states had established emission banks up to 1986. This has inhibited the supply of ERCs in the "non-banking" states and goes some way to explaining why emissions trading has not matched the expectations of its proponents.
- (5) The Emissions Trading Programme has encouraged modest technological progress. While it was expected that the creation of ERCs would be a strong incentive to technological innovation, cheaper ways exist for the creation of credits i.e. fuel substitution. However sluggish trading should in the long term be a spur to technological investment, otherwise the incentive element of the programme will be lost, an undesirable outcome for both regulators and polluters.
- (6) Administrative costs have proved to be higher than projected due to regulatory intervention in every trade.

SUMMARY:

For Helm and Pearce (1991), the efforts of the USA, through legislation, federal/state implementation and adaptation in the light of experience, demonstrates a very real

commitment to the environment. This commitment is the democratic response to the US "green consciousness" of the seventies and onwards. This contrasts with the experience of the Netherlands (see Douthwaite) where both the national political demands of the growth imperative and the supra-national dictates of the EU have conspired to frustrate the palpable will of the citizens.

Finally, it should be noted that the constitutional tensions between federal and state rights do not inherently neutralise action. In fact the commitment of the states is no less than that of the federal government. EPA grants are less than 50% of all states expenditure on environmental management, while in the waste disposal area state regulations are frequently more stringent.

Reference:

Dieter Helm/David Pearce (1991), "Economic Policy towards the Environment: An Overview" in Dieter Held (ed.)