The Persistence of Cooperation: Government Regulation of Great Lakes Water Pollution, 1945-1978

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The shift from a cooperative style of regulation to an adversarial one in the area of environmental protection and other fields of social policy has been the target of a growing tide of criticism from scholars and those involved in the policy process. Critics of this transformation, which they trace back to the reforms of the Public Interest Era[1] that spanned the period from the late 1960s through the mid-1970s, argue that the adversarial approach, with its rigid regulations and "short-term quick fix, litigious mechanisms," is wasteful and in some respects counter-productive [16, p. 187; 19, 25, 12]. The New Social Regulation of the Public Interest Era built upon earlier efforts to control corporate social conduct, but these new Federal laws were unprecedented in their ambitious goals and requirements. The New Social Regulation cut across industry lines and dealt with a broad range of issues, including product safety, corporate hiring practices, workplace safety, and environmental protection [17, 26].

While conducting research for my work on government regulation of water pollution in the Great Lakes Basin, I found that indeed the gradual improvement in regional water quality of recent decades was linked to ambitious new Federal legislation, high-profile law suits directed against major corporate waste dischargers, national compliance deadlines, and other methods that we associate with the New Social Regulation. But I also found that important elements of government-business cooperation and negotiation continued to play a critical role in advancing the regulatory process in the region. In this paper, I shall examine the persistence of cooperative modes of regulation even in the face of sweeping cultural, legal, and political changes.

The Postwar System of Cooperation

In the late 1940s and early 1950s, a flurry of new water pollution control legislation in the Great Lakes states and other parts of the nation established new regulatory authorities and strengthened existing ones. These new laws were in part a response to the growing public demand for outdoor recreation opportunities. For example, overnight visits to state parks increased from 3 million in 1946 to over 20 million in 1960 [15, p. 16]. The specter of Federal intervention also encouraged

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[1] I borrowed this term from Robert L. Rabin [17].

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the states to put their own houses in order. Citizen conservationists and their allies had been lobbying for Federal legislation since the 1930s, and in 1948 Congress finally enacted the first major Federal water pollution control law, although Federal regulatory authority remained limited.

The state department heads who made up the part-time boards and commissions responsible for implementing the new laws relied on the expertise and advice of the sanitary engineers who headed their staffs. In each of the states, a sanitary engineer acted as the executive secretary and made sure that the board's policies were carried out. Together, the board members and the engineer-secretaries administered a regulatory program that relied on voluntarism and informal cooperation. These state officials tried to balance the need for pollution control with other social and economic considerations.

The sanitary engineers who headed the state water pollution control programs in the Great Lakes region subscribed to a philosophy of professional resource management that dated back to the Progressive Era conservation movement. According to this view, the ideal conservation professional was a specially-trained expert who used his skills to make objective decisions about resource use that would be in the best interests of the people as a whole. Clarence Klassen, Technical Secretary of the Illinois Sanitary Water Board, was one of the foremost practicing sanitary engineers in the country and a prolific writer on the subject of water pollution regulation. Klassen, like other sanitary engineers, favored a flexible approach to pollution abatement that balanced the needs of competing interest groups and that did not attempt to apply uniform water quality standards to all state waters. Instead, the experienced regulatory official based waste treatment requirements on the receiving water's capacity to assimilate waste, the primary uses of the waters in question, economic considerations, and other local factors [9, pp.439-440]. For Klassen, pollution was a relative concept: "Pollution as it affects water quality management is objectionable only in relation to the intended use of the water" [10, p. 142].

Although the state boards possessed the power to issue legally binding orders, the board members and sanitary engineers preferred to obtain informal commitments from dischargers to take the necessary steps to reduce pollution. And when orders were issued, board members usually did all they could to avoid turning to the courts to force compliance. Klassen admitted that legal action might occasionally be necessary, but he felt that "every legal case involving stream pollution indicates the failure on the part of someone, and very often the regulatory agency, to work out a voluntary solution" [8, p. 218].

Despite Klassen's rhetoric about balancing the needs of competing interesting groups, it is clear that business enjoyed a privileged position in this regulatory system. Postwar business leaders in the Great Lakes region and throughout America embraced the ideology of cooperation and voluntarism espoused by government regulatory officials. Industry officials in the Great Lakes Basin realized that it was in their best interest to develop a close working relationship with regulatory officials and encourage the regulators' reliance on voluntarism. For example, at a 1957 symposium on state water pollution regulation, D. Milne discussed the excellent relations that he and other General Motors engineers had with the sanitary engineers representing the Michigan Water Resources Commission. According to Milne, as a result of the "mutual trust and confidence in each other's objectives . . . a working relationship has been

established which has made unnecessary the application of statutory procedures. Problems have always been solved on a conference level, thus avoiding hearings, formal orders, and other legal proceedings." Another benefit, Milne explained, was that Commission engineers had learned about the problems inherent in industrial processing methods and so avoided the adoption of unrealistic effluent standards [18, p. 14].

Business firms also benefitted from the state governments' practice of including private citizens as members of the water pollution control boards. These private members were usually appointed by the governor to represent affected interests such as industry or agriculture. Moreover, some of the state programs relied on industrial advisory committees to help formulate water pollution control policy. It is not surprising that business interests in the Great Lakes region and elsewhere strongly supported keeping water quality regulatory authority at the state level.[2]

The Breakdown of Cooperation

The system of cooperative regulation that had developed over decades in the Great Lakes Basin began to break down in the mid-1960s as a result of increasing levels of pollution, the rise of environmentalism, and entrepreneurial politics at the Federal level. The new system that emerged corresponded in many ways to the adversarial system of regulation that scholars link to the Public Interest Era.

In the years following the end of World War II, state regulatory authorities in the Great Lakes Basin succeeded in imposing at least some degree of waste treatment on the effluent discharged by the largest municipalities and industries in the region. In spite of these efforts, the tremendous growth in population and manufacturing activity in the basin placed an increasing strain on the Great Lakes and their tributaries, especially in the highly developed metropolitan belt that extended along the lower shores of lakes Michigan, Erie, and Ontario [20, pp. 95-102]. As popular interest in environmental issues began to grow, in part because of the highly visible evidence of environmental decline, the number of people actively involved in organizations concerned with protecting the Great Lakes increased. During the early 1960s, the media also began to focus more attention on environmental ills. The expanding media coverage conveyed the message, in both implicit and explicit terms, that not nearly enough was being done to deal with mounting environmental problems.

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[2] Except for the presence of private interest representatives on the water pollution control boards and the occasional use of advisory committees, water pollution control in the Great Lakes states lacked the elaborate public-private networks and formal recognition of interest group influence that, according to scholars, characterized the American style of corporatism. The private members of the boards, it is important to note, were chosen because of their background and experience in business, municipal government, or other areas. The private members were representatives of interest groups in the broad sense that they supposedly shard the perspective and concerns of others in that group; they were not officers or official representatives from organizations such as the Chamber of Commerce or the Farmer's Union.

In the Great Lakes Basin, clean water advocates and the local media criticized state officials for their willingness to accept degraded water quality in some areas and their unwillingness to engage in formal enforcement actions against major polluters. These critics looked to Washington for help and found a receptive ear. Johnson administration officials embraced environmental protection and enhancement as an important part of the president's domestic program, while younger Democratic members of Congress, including some prominent figures from the Great Lakes states, also seized upon environmental issues as an extension of the traditional liberal agenda. The combination of bold new legislation and aggressive action by Federal agencies continued through the Nixon administration, as the Republican president and his advisers competed with liberal Democrats in Congress for leadership in this increasingly prominent policy area.

As a number of scholars have noted, the reformers of the Public Interest Era, including environmentalists, shared a distrust of government bureaucracies. An important component of the ideology of the public interest movement--best articulated in the rhetoric of citizen activist Ralph Nader--was the argument that most government agencies had been "captured" by special interests and were incapable of acting in the public interest. This assumption was one reason why legislation enacted during the Public Interest Era sought to limit administrative discretion and make it easier for citizen organizations to participate in the regulatory process [29, pp. 386-387; 27, 14, pp 91-92; 1, pp. 37-38]. The creation of consolidated environmental protection agencies with enhanced capability and less direct participation by regulated interests was another response to this attitude. In the Great Lakes states, political appointees--often lawyers--took over administration of pollution control programs from the sanitary engineers. William Ruckelshaus, the first administrator of the Environmental Protection Agency, later explained that his desire to restore public confidence in the commitment and ability of government to take strong action to protect the environment accounted for the emphasis on tough enforcement action during the agency's early years [23, p. 9].

Business leaders in the Great Lakes region responded with indignation to this new style of regulation that--in their eyes--featured capricious and uncoordinated enforcement action from different levels of government, continually tightening treatment requirements, and an unfair portrayal of industry as the major culprit behind all of America's environmental problems. Industry officials were particularly concerned about the element of uncertainty that had entered the water pollution control field. Corporate executives also expressed alarm at the trend towards imposing high minimum levels of treatment on all dischargers regardless of local circumstances or "treatment for treatment's sake," as U.S. Steel president Edgar B. Speer put it. This wasteful approach to pollution control pandered to the citizenry's emotional demands, he said, but was poor public policy [3, p. 25]. Industry engineers and executives also complained that most pollution problems called for technical solutions, but that the government regulatory agencies had become dominated by lawyers, who relied on litigation to force solutions to these complex problems [7, pp. S9-S10; 11].

Thus, by the early 1970s, the system of cooperation that had framed the ground rules for pollution control in the Great Lakes Basin for decades lay shattered, temporarily replaced by a haphazard series of law suits and formal enforcement actions directed at polluters by state and especially Federal agencies. The authors of the landmark 1972 Amendments to the Federal Water Pollution

Control Act wanted to continue the more aggressive approach to pollution control, but in a more organized, planned fashion. The new law established a framework of national effluent standards and compliance deadlines that, in conjunction with streamlined procedures for enforcement action, was designed to completely eliminate all waste discharges to America's waters by the mid-1980s.

The Persistence of Cooperation

Extensive litigation, national standardization, and formal procedures characterized water pollution control in the 1970s. But at the same time, key elements of the cooperative system of regulation continued to play an important role in the regulatory effort, albeit in an altered context.

The sheer complexity of water pollution control made necessary the continued reliance on cooperative modes of regulation and administrative judgment. The efforts of regulatory officials to implement the 1972 Amendments in the Great Lakes Basin and across the country soon demonstrated the immense difficulties of carrying out the bold program contained in the new law. Environmentalists and their allies in Congress had made persuasive arguments about the need for national effluent standards, but determining the guidelines for different industries proved to be an enormously difficult task for EPA officials, especially in light of the firm compliance deadlines contained in the law and the tremendous diversity of the American manufacturing economy. The new Federal law specified 27 industrial categories for which the EPA was to establish effluent guidelines, but agency officials subsequently identified 180 industrial subcategories and 45 additional variances that required distinct effluent standards [22, pp. 141-142].

As Robert Rabin has pointed out, "best practicable control technology" and similar legislative standards "create only the illusion of precision" and depend on administrative agencies to give them meaning [17, p. 1291]. And given the lack of detailed government knowledge about industry processes, substantial business input into the development of such guidelines was essential. Although the new law provided public interest groups with formal means for participating in the process, the deputy administrator of the EPA testified that the absence of specific technical expertise handicapped environmental organizations [21, pp. 478-479, 493].

A second, related point is that while the authors of the 1972 law sought to limit agency discretion and allow greater input from private citizen groups, they also included provisions in the law that allowed industry to challenge and appeal agency decisions. The statutory right to stall served as an impetus for government compromise, especially in the face of strict legislative deadlines. The Federal statute granted dischargers the right to contest the terms of their permits through adjudicatory hearings. If unsatisfied with the administrative ruling, the discharger could appeal to the federal courts. The hearings could last anywhere from ten days to six months and court appeals could drag out the process even longer. The officers and attorneys of the major industrial dischargers in the Great Lakes Basin and throughout the country did not hesitate to contest permit terms when they believed that doing so was in their best interests. Most of the major steel mills in the region took this path, along with other large dischargers such as the Ford River Rouge complex.

But in some respects, the discharger permit system developed after the enactment of the 1972 Amendments merely formalized the give and take that had

been at the heart of previous regulatory efforts. The national guidelines developed by the EPA established the parameters of negotiation, but the adjudicatory hearing and even court appeals allowed the discharger an opportunity to bargain with state and Federal regulators over the terms of the permits. In fact, the litigation process often served as a vehicle to expedite a negotiated settlement between the two parties, often with minimal judicial interference. Because of the economic importance of industrial polluters and the financial realities faced by many municipal polluters, it was rarely just a matter of a judge ordering dischargers to comply with government orders.

In addition, even though they now possessed much greater enforcement powers, regulatory officials were still somewhat cautious in taking enforcement action against polluters. The Federal government's reliance on state authorities to implement the national program was an important factor in the persistence of cooperation. By the mid-1970s, most of the Great Lakes states had assumed responsibility for implementing the national water pollution control program contained in the 1972 law. Although the EPA continued to initiate enforcement action in the second half of the 1970s and retained considerable oversight authority over the state programs, manpower limitations and political constraints left much of the initiative with state officials.

State efforts could vary widely, depending to some extent on the character of the gubernatorial administration in power, but, except unusual circumstances, state regulatory officials were more sensitive to the economic and social impact of water pollution regulation on local communities. Michigan, for example, possessed one of the most effective state programs in the country. But in late 1977 a special internal task force that was created to examine the State Department of Natural Resource's enforcement program criticized the department's "excessive reliance on voluntary compliance efforts." Investigators found that staff members were reluctant "to pursue formal enforcement action on the premise that such action suggests`failure' on the part of the Department to achieve compliance through negotiations and voluntary cooperation" [13, pp. 7-8][3].

Conclusion

David Vogel and other scholars have emphasized how the economic difficulties of the 1970s provoked a backlash against the New Social Regulation and allowed business to block new regulatory initiatives and slow the implementation of existing statutes [24]. Economic concerns were certainly a factor in slowing the regulatory impulse in the Great Lakes Basin, but one has to wonder if events would have been all that different even without stagflation, the energy crisis, growing foreign competition, and other economic problems. Certainly, most Americans have come to believe in the need for strong efforts to protect the environment, but in a

[3]In a 1982 article, two scholars concluded after reviewing the literature on state air and water pollution enforcement efforts--mainly from the 1970s--that industry-government bargaining continued to be the primary determinant of treatment requirements and the timetables for implementing these controls. The literature also revealed that agency inspections were infrequent and that informal negotiation, rather than formal legal action, remained characteristic of the enforcement process [2].

liberal-capitalist system concerns about economic growth and the related value of individual economic security will always place certain limits on the ability and willingness of regulatory officials to impose costs on private economic interests, except in unusual cases of direct and unambiguous threats to public health [4].

In addition, the basic framework of the American political-legal system, with its numerous avenues for appeal, makes it relatively easy for corporate officials to stall or alter polices that they do not agree with. Ironically, the reforms of the Public Interest Era, while increasing the formal authority of regulatory officials, also made it easier for any organized interest group to challenge and influence administrative policy. This was the paradox of the public interest movement: reformers wanted strong government to check private interests, but activists deeply distrusted the ability of the state to act in the broad public interest [6].

Moreover, while American firms face numerous, complex laws governing their behavior, the small size of the government bureaucracy relative to the laws and regulations it must oversee means that regulatory officials have no choice but to depend on voluntary compliance among most of the entities covered by these laws [28, pp. 376-378][4]. And while Federal preemption of state authority in pollution control and other areas was a major development of the Public Interest Era, state authorities have retained primary responsibility for implementing these national programs. State administrative capability increased greatly during the 1960s and 1970s, but state officials continue to be more sensitive to the local economic impact of regulation than their Federal counterparts.

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[4]And perhaps, as Saumuel Hays has argued, the necessary continuing interaction between regulatory officials and polluting sources leads inevitably to "a process of political accommodation and compromise" designed to smooth out the frequent disputes and create a more peaceful and stable managerial climate [5, p. 401].

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