Importing Cooperation

Graham K. Wilson
La Follette School of Public Affairs and Department of Political Science,
University of Wisconsin-Madison

wilson@lafollette.wisc.edu
IMPORTING COOPERATION

Graham K. Wilson
Department of Political Science
La Follette School of Public Affairs
University of Wisconsin-Madison


I wish to acknowledge the support of the PriceWaterhouse Foundation for this research.
IMPORTING COOPERATION

Introduction

This study arose from the rare opportunity in political science to observe a real world experiment. In the late 1990s, the State of Wisconsin, inspired by policy practices in Europe, particularly in the Netherlands and in Bavaria, moved to create a new form of environmental governance that it entitled Green Tier. Green Tier is a comprehensive approach to environmental protection that attempts to create a new structure of governance in order to improve the performance of industries and agriculture. The nature of Green Tier is described below. Green Tier several interesting features from the viewpoint of public policy.

The attempt to introduce Green Tier offered political scientists the opportunity to test two important propositions. The first is that it is impossible to create and maintain neocorporatist political institutions in the United States, institutions through which interest groups usually thought to be inherently antagonistic (usually business and labor, in this case business and environmental groups) are brought into an institutionalized partnership with government to both make and implement policy. At the heart of Green Tier was the belief that the program should be developed and implemented by a Council on which previously antagonistic interests, business and environmental groups, would cooperate. The designers of the Council were very much aware of neocorporatist systems in Europe and indeed had visited Germany and the Netherlands many times in order to examine their operations.

The second proposition that the attempt to create Green Tier provided an opportunity to test is that collaborative, cooperative forms of regulation cannot be made to work in the United States. The Green Tier Council is intended to create and preside over a regulatory system that reduced the legalistic and adversarial character that a number of us had seen as characteristic of the American regulatory system and move towards an approach characterized more by trust and collaboration, characteristics that have been associated with European systems of regulation.

My previous published work had argued that attempts to create neocorporatist style forms of governance and more collaborative forms of regulation in the United States are doomed to failure. In the late 1970s, I had published a book chapter that is still sometimes cited setting out “Why there is No Neocorporatism in America?” a title that was deliberate echo of Sombart’s classic on the weakness of socialism in the United States.¹ I believe that much of the argument that I advanced then is still relevant and will be revisited below. In brief, I argued that neither the American interest group system, which consists of numerous competing and conflicting groups even within a single societal or industrial sector, nor American government which is also divided into numerous competing and conflicting institutions, was capable of sustaining

neocorporatist arrangements. Similarly, along with many others I had also cast doubt on whether collaborative regulation is possible in the United States. As we shall see later, political scientists have offered a number of reasons why American regulation is more adversarial, conflictual and legalistic than is the case in other advanced industrialized democracies. My own argument had emphasized the importance of the weakness of “the state” in the United States. Cooperative regulation, I suggested, is most likely to arise when the regulated are sure that the regulators will ultimately prevail in any conflict. It is therefore rational for the regulated to cooperate if that cooperation results in any amelioration of the regulations imposed on them. British and Swedish businesses cooperate with regulators because they know that in the end the regulators can always prevail; American business is less likely to cooperate because it knows that American regulators can often be defeated. The ultimate goal of Wisconsin’s Green Tier initiative was to create a more collaborative form of regulation. The experiment therefore seemed to provide a wonderful opportunity to observe an experiment to see whether important propositions in political science were correct.

Of course all experiments take place under circumstances that are in some ways unique. The Green Tier experiment took place in a state, not at the federal level. The behavior of some groups may have been influenced significantly by this fact. The environmental groups in particular may have been prepared to tolerate a policy experiment at the state level that they would not have accepted at the national. Federal law and policy provided a safety net for the environmentalists insuring that the consequences of Green Tier for their groups would not be disastrous. No state is typical of the United States as a whole. Wisconsin has a more developed, higher quality bureaucracy than most states. Its environmental movement, business trade associations (particularly in key industries such as paper) and business peak association, Wisconsin Manufacturers and Commerce (WMC) are clearly also better stronger than in many states. The state is also the proud possessor of a “progressive tradition” that on the one hand encourages policy innovation and on the other prompts considerable concern about whether the state is seen as possessing an “anti business” environment that discourages investment. The allegation that Wisconsin is the state with the third highest tax burden in the nation adds to these fears. Yet in some respects these characteristics make the state a suitable site for an experiment in neocorporatism. Neocorporatism is unlikely to happen in a setting without strong interest groups. Wisconsin’s fears about perceptions of its business climate, tax levels and problems in reconciling strong environmental are reminiscent of the conditions that have facilitated the development of neocorporatism in social democratic “small states in world markets” heavily dependent on trade.\(^2\) I also enjoyed unusual and considerable opportunities for access to those involved in Green Tier. In 1999, for example, I was able to travel with Wisconsin Department of Natural Resources (DNR) officials, business executives and officials from interest groups to study environmental regulation in the Netherlands and Germany.

The Green Tier Project

What are the main features of Green Tier? The Green Tier program consists of two major features. The first was the creation of a Council that we have to consist of representatives of environmental organizations, businesses, and local governments, appointed by the Governor. The Council was to be responsible for the development and implementation of the Green Tier program.

The second element in the program provides recognition for businesses that achieve different levels of superior environmental performance. In order to be eligible for Tier 1, a business must not have incurred criminal penalties for infractions of public health or environmental laws for sixty months, civil judgments or penalties for thirty-six months, and an enforcement action by the Wisconsin Department of Justice on environmental issues for twenty-four months. Businesses must also have developed an Environmental Management System that, as is usually the case with EMSs, identifies the business's current performance levels, develops plans for improving it, monitors the results annually (in a process known as EMS auditing) and develops plans for further improvements. Every third EMS evaluation must be performed by an external “third party” auditor. In return for a business’s superior performance, the DNR will provide public recognition for its success. The business will be allowed to use the publicity and logo it receives for its environmental performance in promoting its products or seeking to attract capital. The DNR would assign an official to expedite and facilitate the business’s dealings with the DNR. Moreover, the DNR would cut back its inspections of the business’s plants to the lowest level permitted by law.

Businesses have to achieve a higher level of performance to be eligible for Tier 2 of Green Tier but are also eligible for greater rewards if they succeeded. Businesses have to stay out of trouble for lengthier periods than for Tier 1 (ten years without criminal penalties, five years without civil judgments) while, as for Tier 1, the company had to avoid an enforcement action by the state Department of Justice in connection with environmental law for twenty-four months. Entry into Tier 2 also requires that businesses create an EMS that is consistent with the best international practices set out in the ISO 14000 series of the International Organization for Standards based in Geneva. Another more stringent requirement than for admission into Tier 2 is that annual, rather than triennial, third party auditing was required. Finally, businesses admitted to Tier 2 are required to achieve “superior environmental performance” negotiated without the DNR and approved by the Green Tier Council. This vaguely defined superior performance agreed in a contract between the business and the state lasting for between three and ten years is intended to take businesses well beyond mere compliance with existing law. Agreements can also be made with approved (“chartered”) organizations, most probably trade associations that are able to develop and enforce plans for improving environmental performance, another bow towards neocorporatism. In addition to the benefits for Tier 1 businesses, tier 2 businesses will be exempted from minor permitting requirements, receive accelerated approval for permit changes, be subjected to fewer inspections, and the reporting requirements on their operations will be reduced. It is intended – as with Tier 1 certification – that businesses will benefit commercially from the State’s recognition of their environmental performance, for example in marketing products and attracting capital.
We may summarize these rather complicated provisions as follows. Firms that achieve higher levels of environmental performance will be recognized by the award of a Green Tier logo. It is hoped that this award will help firms commercially thereby providing a commercial incentive. The DNR will also regulate environmental high fliers more flexibly, sympathetically and predictably providing an administrative inducement to superior performance.

**The Background in Regulatory Policy: Welcoming Conflict**

Many people do not like politics because they do not like conflict. The sentiment that “someone should lock them in a room until they all agree” is widespread. Politicians, many of their voters suspect, could cooperate more and fight less if only they tried. Cooperation would make the country a better place as avoidable conflicts are resolved and more legitimate points of view are taken into account. This antipathy to conflict normally results in criticism of elected politicians. It can also result, however, in criticism of interest groups. Approving of both the goals of environmentalists (such as reducing pollution) and of business (such as economic growth), citizens wish that there was some to achieve both and a compromise between them. Perhaps, members of the public think, interest group officials like elected politicians could work together if they really tried.

The traditional response from defenders of politics including many social scientists has been to reject such attitudes emphatically as at best naïve, at worst out of line with democratic politics. Democratic citizens, they suggest, need to accept that conflict is a normal part of democratic politics. Democratic politics exists to allow the peaceful expression and reconciliation of diverging interests and opinions through forms of political conflict such as elections, debates, campaigns and lobbying not to conceal or suppress differences. One of the glories of American politics is that it facilitates the expression of numerous different opinions and interests. The pluralist political scientists of the 1960s argued that any significant interest or opinion could find expression and exert some leverage within the American political system. The glory of the American political system was not that it avoided conflict but that it facilitated its peaceful expression and that it allowed an unusually wide range of groups to have influence. One of the advantages of the US political system compared with even other admittedly democratic political systems was that it provided more interest groups with the chance to engage in the policy making process than in some parliamentary systems where only a limited number of groups really had leverage in the system. Even before the Constitution was adopted, Madison had gloried in the opportunities it provided for numerous interests to find expression. The dangers that interests might pose to the public were best solved by inviting yet more groups into the fray, setting interest against interest, faction against faction so that they were all held in check by each other in another example of the checks

---


and balance beloved by the framers. The best way to avoid the dangers of democratic politics was for faction to be set against faction, interest against interest.\(^5\)

Both studies of regulation and policies towards it have reflected this acceptance of conflict. In the 1950s and 1960s, the main concern about regulation in the United States was that it lacked sufficient conflict and contestation of policies by conflicting groups not that there was too much conflict. Critics of regulation in the United States in the 1950s 1960s had often worried that a single interest dominated regulatory agencies resulting in its “capture.” A well-organized interest vitally affected by a regulatory agency would insure that its views and interests dominated its policies, often to the detriment of the public interest. The most celebrated and durable form of interest group domination of an agency came in the form of an “iron triangle” in which an interest group, a congressional committee and an agency would congeal around an approach to public policy that did not serve the public interest.\(^5\) Many authorities thought it more or less inevitable that regulatory agencies would be captured by the interest group most affected by their policies even if the agencies started out as determined advocates of the public interest. One of the most commonly cited books on regulation argued that there was a “life cycle” effect. A popular campaign against some evil or abuse resulted in the creation of a regulatory agency. Once the agency was created, however, the industry it regulated redoubled its efforts to influence policy because it realized how important the agency’s work was to its profitability. The movement that had campaigned for the creation of the regulatory agency tended in contrast to think that once the agency had been created, their cause had triumphed and they could disband politically. The heavy preponderance of pressure from the industry gradually turned the regulators into their friends and advocates.\(^7\) Huntington argued that the Interstate Commerce Commission (ICC), had been created to police the railroads but by the 1950s worked to defend their interests. Sharing in this skepticism about the regulatory system but approaching the problem from a very different perspective, admirers of markets suggested that regulation was not about serving the public interest at all but was used by narrow interests to secure economic “rents” and boost their incomes. The regulation of barbers was intended not to protect the public but to reduce the number of barbers and therefore to raise their price.\(^8\) Both left of center critics of “capture” and right of center economists agreed that regulation was likely to be subverted by the domination of the regulatory process by self-serving interests.

Whereas conservative economists’ critiques of regulation made them skeptical of the whole enterprise, others attempted to make the regulatory process more open to a wider range of interests. The massive expansion of regulation that occurred in the United States between the late 1960s and late 1970s occurred at a time when the critique of


\(^6\) Theodore Lowi *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (New York: W.W.Norton, 1969.)


regulatory capture was at its strongest and was often voiced by those who advocated the creation of new regulatory agencies. This apparent paradox is explained by the fact that the advocates of creating additional regulation believed that they had found ways to prevent capture. Congress would set more specific goals and targets for regulatory agencies to meet. Regulatory agencies would be obliged to include fresh voices such as environmental groups in their policy making. The environmental groups would be given effective levers over the regulatory agencies through the courts. If regulatory agencies did not provide environmental groups with the opportunity to speak or did not listen to them when they did, the groups could go to court. Congress increased the opportunities for interest groups to use the courts precisely to insure that regulatory agencies were alive to the conflicts that in fact existed between contending interests and did not fall peacefully under the sway of just one.

The attempts to avoid regulatory capture crafted by policy makers in the late ‘60s and early ‘70s have generally worked. Few have thought that the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA) et cetera have been overly sympathetic to business. More importantly for our purposes, the reforms also generally succeeded in increasing opportunities for public interest groups to have access and influence. David Vogel suggested that the political system in the United States was better at providing for the representation of “diffuse interests” than the political systems of other democracies such as Britain. In other words, the American regulatory system was better at recognizing and incorporating conflict between interests and values than were other regulatory systems.

**Too Much of A Good Thing?**

In some respects the reformers of the 1970s had succeeded brilliantly. As we have seen, the major fear of critics of the regulatory process in the past had been that it would be captured. This danger was rarely mentioned from the 1970s onwards. Armed with the legal powers that Congress had provided, public interest groups were able to insure that pressures from industry on regulatory agencies to be responsive to their needs were unsuccessful. While the victories of a succession of Republican presidents ended the impetus towards a major extension of regulation, the environmentalists were able to hold the ground that they had won. Environmentalists were able to maintain both the procedural rights they had gained in regulatory policy making and nearly all existing regulations. Conflict had been institutionalized in the federal regulatory process. A new critique of American regulation soon emerged, however.

This critique was that regulatory agencies were inclined to excessive regulation often referred to as “over-regulation.” All regulation, it was argued, must strike a balance between conflicting goods such as safety and convenience, environmental protection and economic growth, consumer safety and the availability of a wide range of products. According to their critics, American regulatory agencies, however, were likely to over-emphasize regulatory goals such as environmental protection or workplace safety and unlikely to pay sufficient attention to competing goals. Numerous explanations were advanced to explain this tendency towards “over regulation.” Regulators were, some claimed, overly committed personally to the goals their agencies pursued. A surprisingly

---

9 David Vogel, *op. cit.*
high proportion of the civil servants at OSHA were, or had relatives who were, victims of workplace accidents.\textsuperscript{10} The EPA was staffed by zealous environmentalists. An alternative explanation emphasized not the background or beliefs of regulators but the incentives that confronted them. Regulators, it was argued, have to strike a reasonable balance over the degree of risk. How likely is it, for example, that exposure to a substance will result in illness or death? How much should we spend on reducing exposure levels in return for saving an additional life or worker’s health? How much safety should we build into the design of bridges, aircraft or nuclear power plants? Critics alleging over-regulation contended that in practice the only outcome that would compromise a regulator’s career was the occurrence of a very rare disaster, the one in a million chance that results in a highly publicized disaster.\textsuperscript{11} Little good would it do a regulator then to argue that it had been reasonable to take the risk of not mandating the highest possible (and most costly) level of regulation. Career incentives would cause officials to provide too much regulation. Others, while agreeing that an excessively legalistic approach was a problem, attributed it more to the generally contentious and adversarial character of American society.\textsuperscript{12} My own explanation for the character of American regulation was more institutional. Others argued that the, for example, it was easier to make compromises between the centralized employers association and labor federation in Sweden than between the numerous competing and contending interest groups of the United States. The political institutions of the United States provide so many opportunities for interest groups to win that they had less incentive to compromise than their counterparts in countries in which power is more centralized; an interest group that loses with the regulatory agency itself in the United States, for example, may still hope for victory in Congress, the courts or at the White House.\textsuperscript{13}

Whatever, the differences in the explanations offered, there was much agreement on the adverse consequences. American regulation suffered from problems in both the implementation and development of regulations. American inspectors had a tendency to “go by the book” focusing on imposing penalties rather than on improving environmental performance. The standard relationship between regulators and the regulated was adversarial, not cooperative. Similarly, the process of making regulations tended to be much more conflictual in the United States than in other democracies. In spite of the existence of a much stronger and more militant labor movement, British unions and employers were able to work together on the Health and Safety Commission to agree on regulations to govern the workplace. In the United States, every major regulation created by OSHA was contested bitterly, often all the way the Supreme Court. Whatever the disagreements over the explanation, all could agree that the degree of conflict in the American regulatory system was unusually high.


\textsuperscript{11} Eugene Bardach and Robert Kagan \textit{Going By the Book: The Problem of Regulatory Unreasonableness} (Philadelphia: Temple University Press, 1982.)

\textsuperscript{12} Kelman, \textit{op.cit.}

\textsuperscript{13} Graham K Wilson \textit{The Politics of Safety and Health} (Oxford: Clarendon Press, 1985.)
We have seen that much of the criticism of American regulation was implicitly or explicitly comparative. Crucially for our story of importing cooperation, the feeling developed that in an era of increasing globalization, the United States was significantly handicapped by its regulatory system. Regulations resulted in unnecessary and excessive expenditure by corporations. In an influential book, Nivola in an era of increasing international competition, the United States could not afford to burden its businesses with the unnecessary costs of a costly, inefficient and perverse regulatory system. The push for reform that this argument created joined with the impact of developments within the regulatory system itself.

The Context; Trends in Environmental Regulation

During the last few decades of the twentieth century, the United States made important progress in reducing many of the obvious sources of pollution. Rivers that had been toxic, even flammable ditches became pleasant recreational resources for fishing and swimming. Emissions from the smokestacks of power plants and the tail pipes of cars were dramatically cleaner than in the recent past. The US regulatory system could claim many successes.

Somewhat surprisingly, therefore, a consensus also emerged that the traditional “command and control” form of regulation could not make many additional contributions to solving what were widely agreed to be the very significant environmental changes that remained. The disadvantages of the American system we described above resulted in a regulatory system that was clearly cost ineffective. Too many resources were required to be devoted to fitting equipment and conforming to detailed specifications in regulations rather than to making the best possible improvement in the environment. Firms, so the argument went, could often achieve a greater environmental “bang for the buck” if they were trusted to put their environmental investments where the impact was greatest, not necessarily where a regulation mandated. It might be, for example, that a greater environmental gain might be achieved by modernizing a corporation’s delivery fleet retiring highly polluting trucks in favor of more modern, lower emission equivalents than by spending an equivalent amount on minor improvements to smokestack scrubbers. Sometimes flexibility could allow a greater gain in one medium than could be achieved in another; a firm might be able to achieve a dramatic reduction in water pollution, for example, by spending a sum of money that would have brought only modest improvements in air pollution. In addition, there was growing consensus that the easiest to tackle sources of pollution had already been tackled. Smokestacks are important sources of pollution to tackle but they are also easily identified and monitored; the same cannot be said for pollution from lawnmowers, automobiles or even dairy cattle. It was hard to imagine a system of regulation and inspection comparable to that which covers, for example, power plants that could solve the problems of such “non point sources” of pollution.

There were good environmental arguments, therefore, in favor of a more flexible and cooperative system. Corporations or farmers working in good faith with environmentalists could provide a greater gain in environmental performance than the

---

slow, cumbersome, inflexible and adversarial regulatory system to which the United States was accustomed. However, cooperation and flexibility were hard to imagine within the American context. Flexibility for many people was a code word for arbitrary discretion or favoritism. The inflexible application of rules provided a context in which firms were clear about what the expectation were of them. It also prevented politically motivated decisions to apply regulations less rigorously to one firm than to another. Administrative discretion does not sit easily in the American political culture because government officials are not trusted to use it reasonably. But even corporate executives liked the certainty of the finite goals. Fixed requirements made it easier to justify environmental expenditures to stockholders; it also made it less likely that a corporation could place itself at a competitive disadvantage by spending money on environmental goals that its rivals ignored. In both business and government circles, a culture change was required to move towards a more flexible and collaborative system.

There were, however, signs that such a change could be occurring. Among government officials and environmental interest groups, there was awareness that the prospects for extending the traditional regulatory system were poor. The balance of political power nationally and in most states made it had to imagine that anything approaching the regulatory initiatives of the 1970s was in prospect. Additional progress required less politically costly measures. Among business executives there was also awareness that environmentalists and environmental concerns were not going to disappear. Even the anti regulatory rhetoric of the Reagan Administration had produced few real reductions in environmental standards. Environmental groups were not losing members or vigor. Farsighted executives recognized that they needed to find a way of handling environmental issues in a way that did not damage business interests. Indeed, some executives that a good environmental record could be good business.

Several factors motivated the “greening” of corporations. The first was the importance of their image in marketing to consumers. Many products today are not significantly different from their competitors and are sold as much on the basis of image as on price. In an era in which corporations had invested heavily in developing a favorable image for their brand, it is important therefore to avoid issues or controversies that damaged the corporations’ image. Consumers wanted to feel that they were being “like Mike” [Michael Jordan] when they bought Nike products not the products of exploitative sweat shops. Motorists wanted to be reminded of glamour and speed when they bought gas, not the possible pollution of the North Sea or Nigeria by Shell. Corporations including Nike and Shell have therefore devoted considerable efforts to improving and maintaining their reputations. Meetings between the executives of international corporations and environmental groups such as Greenpeace are now quite common. Corporations have undertaken more expensive projects (such as Shell bringing assure oil storage platforms to break then up rather than sinking them\textsuperscript{15}) in order to maintain the standing of the brand with consumers.

A good environmental image was also expected to have other commercial benefits. One important hope was that corporations with good environmental records could attract the best “knowledge workers” more readily. The products of the best

\textsuperscript{15} Grant Jordan, Grant Jordan \textit{Shell, Greenpeace and the Brent Spar} (Basingstoke: Palgrave, 2001.)
business schools or skilled computer staff, for example, might prefer to work for an environmental leader rather than, for example, a tobacco company. Similarly, a company that was recognized as an environmental leader might well attract capital more easily than one that was regarded as a polluter. This was not merely a matter of attracting money from the significant, growing but still limited socially responsible investment sector. Investors in general might see a good environmental image as a sign of good management in general. At the very least, a corporation that was highly regarded as an environmental leader was less likely to be hit by regulators with a flurry of expensive and high profile enforcement proceedings. A loan to an environmental leader was therefore a better bet commercially than a loan to a polluter.

Thus business sentiment began to shift towards cooperating rather than fighting with environmentalists. Perhaps a smart corporation could enter a “virtuous circle” in which a superior environmental performance helped establish a better image with consumers helping to sell the product, a better image with potential employees helping to attract talent and a better image with investors helping to attract funds.

The Wisconsin Context

Why did the state of Wisconsin prove to be an active testing ground for new approaches to regulation?

Wisconsin is a middle-sized state that has long been dependent on manufacturing, agriculture and tourism. Attempts to combine these industries are seen most vividly in Kohler, Wisconsin where the luxurious American Club is located across the street from the Kohler toilet factory. The state has been acutely aware of a tendency for its comparative position in the rankings of states by income per capita to decline. Wisconsin is also a state with a long tradition of Progressive policy experimentation. The “Wisconsin Idea” of linking policy intellectuals in the University to policy making helped to produce at the state level an early version of the New Deal that was later implemented at the federal level with the help of University of Wisconsin faculty such as Witte brought to Washington to assist in that purpose. Wisconsin has had more extensive government policies and programs than most states; it has been a “high service, high tax” state. There has been extensive discussion of whether the state’s record of activist government damages its attempts to achieve higher levels of economic growth. Conservatives contend that Wisconsin has trouble attracting higher levels of investment because it is, to quote a business magazine, a “tax hell.” Liberals contend that the state’s reputation for high taxes is exaggerated and that in any case the quality services the state provides also help to attract business. Similarly, the state has been regarded as a particularly active defender of the environment prompting conservative attacks on the Department of Natural Resources, DNR, as standing for “Damned Near Russia.” Again, this has prompted fears that the state’s strict environmental standards deter investment and slow growth.

Nonetheless, it was clear that there could be no conspicuous or clear retreat from environmental standards. Wisconsin in fact typified the stalemate that had emerged in environmental policy. The state had a very active and influential environmental movement; the Sierra Club, for example, claims YYY members. On the other hand, the state also has a highly politically organized business sector. Wisconsin Manufacturers and Commerce is a highly professional organization that claims to speak for all aspects of
business in the state; WMC is one of the relatively few examples of the state branches of the National Association of Manufacturers (NAM) and Chamber of Commerce combining. The long period of Republican dominance in state politics that began with election of Tommy Thompson in 1982 insured that the WMC and individual corporations were effective in communicating their concerns to policy makers. One particularly important figure in attempting to create collaborative regulation in the state was Thompson’s former chief of staff, James Klauser who subsequently became Vice President for Government Operations at the Wisconsin Electric Power Company (WEPCO.) WPC could be sure of access to the Governor’s staff under Thompson and under his successor, Scott McCallum.

The state had not only a highly developed interest group sector but also a highly developed bureaucracy. Wisconsin state government has a high reputation in general for the quality of its officials. The DNR was a case in point. It acquired a national, even international reputation for the quality of its work. The DNR became a crucial actor in the story of the attempt to adopt collaborative regulation. DNR officials took the lead in arguing for a new approach to regulation in the state. DNR officials sustained the driven for collaborative regulation when the attempt stumbled. The DNR provided a broader perspective on developments in other states end even in other countries that no other actor in the process could match. Indeed, the DNR even organized study trips to other countries, notably the Netherlands and Germany, to see collaborative approaches in operation. These visits had a powerful impact on the thinking of business groups and executives.

The Problems

Some businesses as well as the top officials of the DNR realized that more collaborative approaches to regulation had the potential to solve many of their problems by the early 1990s. The Wisconsin Paper Council approached the DNR in the early 1990s with a deal that rested on many of the points that we have encountered already. Environmental concerns, the Paper Council recognized, were not going to disappear. Yet paper companies feared that further regulation could undermine their ability to compete nationally and internationally. The Paper Council approached the DNR with an offer; the industry would promise to make progress on reducing discharges of a limited number of the pollutants of most concern to the DNR in return for a DNR promise not to burden the industry with additional regulations covering other problems. The agreement was generally successful and notable reductions in all but one of the problem discharges were achieved; the one problem that was not resolved was in part unsolvable because its elimination would have limited progress on other pollutants. The state also adopted an experimental program in which up to ten corporations could enter into agreements with the DNR to improve their performance “beyond compliance” in return for greater flexibility from the DNR in the imposition of regulations.

Why, then, has it been difficult for Wisconsin to adopt regulatory change?

The first and fundamental problem that confronted attempts to reform regulation was the deep level of distrust that exists between business, environmental groups and the DNR. In Wisconsin as in the country more generally, there was a tendency by all these groups to distrust the motives of the others. Environmentalists believed that business executives were simply trying to avoid obligations to protect the environment. Business
executives felt that environmentalists were more interested in competing with each other for members by taking extreme positions than in making sound policy that balanced environmental concerns with other objectives such as economic growth. Both business and the environmentalists believed that the DNR was really sympathetic to their opponents. Business groups were inclined to see DNR officials as wedded to an anti-business approach to environmental policy; environmental groups, conscious of the links between business groups and Republicans, believed that DNR policy was designed to allow business to overcome the environmental policies that they had won with difficulty in the past. A lawyer who was brought into the policymaking process as a neutral facilitator was struck by the lack of trust between all parties involved; environmentalists and business not only distrusted each other by distrusted the DNR in addition. In general, she thought, the tensions between the DNR and the environmentalists were the greatest. An executive from the paper industry doubted the sincerity of environmental groups arguing that moves towards cooperation or compromise by them took away their ability to use “scare tactics” to raise money. A utility executive questioned whether environmental groups had any special standing; everyone wants to protect the environment he argued, not just environmental groups who had no right to claim to speak for the public or the public interest as a whole. Even after the numerous meetings to develop Green Tier (discussed later) one business lobbyist said, “Do I trust Caryl Terrell (of the Sierra Club)” anymore [than before?] Bluntly, no.” A senior DNR official argued that the most serious problem in achieving Green Tier was the “real need to build a degree of trust that does not exist and will not exist until we learn to exercise a degree of civility…in the process.”

The distrust between environmentalists and business spilled over into the political system more generally. Liberal Democrats were likely to see arguments for innovation in environmental regulations as arguments for abandoning the protection of the environment; conservative Republicans believed that proposals to reform regulation were a distraction from the real goal of repealing excessive regulations.

The second problem in securing reform was that although both business and environmentalists were well organized, they did not have clearly established peak associations that could bargain with each other. The environmentalists were on the face of it the least cohesive. Only two environmental organizations groups – the Sierra Club and Citizens for A Better Environment – were involved extensively in discussions about Green Tier. Some groups that would have seemed to be obvious potential participants such as the Environmental Defense Fund and the Nature Conservancy were not. As it happened, however, environmental groups were able handle prevent potential rivalries and resentments emerging through informal means. Chronically short of resources, environmental groups not involved seemed to have agreed informally that the two groups involved could in effect represent the environmental movement more generally. One environmentalist involved argued, “We have a regular means of communicating with other groups dealing with other(s) [environmental] organizations. We trust each other enough that we don’t all need to go to every meeting.” [CT] Ironically the problem seemed to be greater for business. As we shall see below, major differences emerged between the peak association for business in Wisconsin, Wisconsin Manufacturers and Commerce (WMC) on the one hand trade and both trade associations and individual corporations on the other. One major electricity utility, WEPCO, resigned from WMC in
part over these differences; the business people involved in Green Tier came close to publicly rebuking WMC for its tactics.

A third problem was that the attempts to achieve a closed policy process in which the environmentalists and business would bargain with each other kept breaking down. One fundamental problem was that Green Tier needed legislation to be established. Changes in environmental policy required legislation. Collaborative regulation could not be introduced by administrative fiat. The need for legislation placed reform in a more precarious position. At the state level as at the federal, there are numerous points at which a bill can fail -- in committees, in the Assembly, in the Senate or by the Governor’s use of what is not merely a line item but letter veto.

The intention of DNR officials in planning the process by which Green Tier was developed was to promote trust between interests involved. The Green Tier Advisory Committee was central to this process. Composed of eighteen people from industry, environmental groups and law, the Committee was intended to create the realization among groups used to thinking of themselves as adversaries that they could instead be partners. The Committee was surprisingly successful in this endeavor. By the end of the process, the members of the committee had united behind the Green Tier proposal described below. Unfortunately, no sooner had the Committee endorsed a plan to be the basis of legislation than the hard won unity was undermined.

The original attempt to enact Green Tier had been based on a plan to include it in the state’s Budget. This was an attractive idea for a number of reasons, the most important of which was that the Budget is the one piece of legislation that the legislature must pass. While attempts to include policy making in the Budget are routinely decried, every group and legislator hopes to avail it if the opportunity the Budget represents. The inclusion of Green Tier in the Budget therefore enhanced its prospects considerably. However, the budget also struck the WMC as a wonderful opportunity to secure the enactment of one of its longstanding legislative favorites, audit immunity. Audit immunity is the idea that businesses that detect a breach of environmental regulations themselves and who report the breach to regulatory authorities should be exempt from penalties or proceedings. The Green Tier Advisory Committee had not discussed audit immunity was not discussed by the Green Tier Committee, however. It was highly unlikely to approve the form of audit immunity favored by WMC because environmental groups were strongly opposed believing that they would be cut out of the regulatory process by secretive deals between businesses invoking audit immunity and the DNR. The WMC nonetheless used its links to the office of the Republican Governor, Scott McCallum, to have audit immunity grafted onto the Green Tier component of the Budget. The environmentalists on the Green Tier Advisory Committee saw this move as duplicitous. Many business members of the Committee sympathized with this view. The staff of the WMC, however, believed that they had merely behaved as any interest group would; they had seized whatever opportunities the political system offered them. The fact that the Green Tier Advisory Committee had worked to achieve consensus was no barrier to using links to the Governor’s Office to achieve a cherished policy goal. Unfortunately for WMC, the profound feeling of betrayal their tactic created in the environmental groups prompted them to use their allies in the legislature to block the entire Green Tier proposal, including Audit Immunity. With difficult enough issues to face in the Budget, legislative leaders agreed to strip the now contentious Green Tier proposal from it.
Proponents of Green Tier were faced with the more daunting task of securing its passage as freestanding legislation. What had gone wrong? In brief, the political system had worked as we predicted earlier; interest groups that failed to win what they wanted in one forum (the Green Tier Advisory Committee for WMC) encouraged them to shift to a venue in which they could (the Governor’s Office.)

A fourth problem was that in the middle levels of the DNR, there was considerable resistance to change. A large number of officials had established their careers in the period when “command and control” regulations were adopted. This generation had developed the regulations, had implemented them and took pride in their success in protecting the environment. This was all understandable; however it also made it unlikely that these officials would rush to accept innovations in environmental policy.

A fifth problem was the federal government. State environmental regulators generally operate under mandates from the federal government. Significant change in policy must be approved by the federal Environmental Protection Agency (EPA.) Most state officials believe that the EPA is unsympathetic to attempts at reform, a view supported by a number of studies, particularly by the General Accounting Office (GAO.) These studies point to a number of legitimate concerns on the part of the EPA. Will reforms really improve performance? Will new approaches to environmental regulation even produce a demonstrable improvement in environmental protection as the law requires before existing arrangements are abandoned? However, such studies also suggest that EPA officials have a suspicion of reform that goes beyond these concerns and again reflects a culture of support for traditional regulation and antipathy to innovation.

A sixth problem was that there was few outside government who felt that they had a strong stake in Green Tier. Both environmentalists and business executives on the Green Tier Advisory Committee agreed that Green Tier was good public policy. They were even willing to accept a shift away from the current system of regulation with which they were familiar and in which environmentalists felt that they had an important stake. Neither business nor environmentalists, however, felt that Green Tier offered them a major advantage. Neither business nor environmental groups showed much inclination to fight for Green Tier as opposed to being willing to accept it if it happened. Green Tier is not something we’d go in and lobby for “said one utility lobbyist. “We’ll lobby for Green Tier if we are asked” a paper company lobbyist remarked “but it isn’t a priority.” “Will business spend a lot of capital to get it passed?” a business lobbyist asked and answered his own question: “No.” An environmental lobbyist explained participating in the Green Tier process with a marked lack of enthusiasm. “It’s a big time commitment to talk about something you don’t think is going to happen but you need to be there to make sure your interests are represented.” Green Tier might be good public policy but it was not worth fighting for. Part of this difficulty stemmed from the compromise between environmentalists and business that Green Tier represented. Business executives had expressed fears from the first meetings of the Green Tier Council that it did not offer them sufficiently great incentives to participate. Environmentalists, of course, feared that it offered business too much.

---

Solutions

Why might these major obstacles be overcome?

First, the top leadership of the DNR provided steady and determined leadership, responding to each set back with new initiatives. Many officials in the DNR had concluded that there was little additional scope for improving the environment through traditional regulation. One high DNR official said that from the early 1990s, the DNR had been aware that the current regulatory system had reached important limits. Regulated firms were naturally focused on prescribed levels of pollution irrespective of whether or not they were the optimal environmental outcome. At the same time, numerous sources of pollution such as mercury, non point source greenhouse gasses or possible means of environmental improvement such as habitat restoration were not covered. The movement towards Green Tier came not out of some sudden and sharp crisis but “out of continuous frustration that we couldn’t do more.” The DNR leadership stuck with Green Tier because it saw in the program the only real hope for progress. George Meyer while Secretary of DNR summarized these concerns about the established regulatory system; “the regulatory system may have reached the limits of its effectiveness and could benefit from more adaptive approaches.”

Second, well politically well-connected business leaders provided enough support for Green Tier to keep it alive. An important element in the business community had concluded that Green Tier did offer a way to solve some of their important problems. For these business executives, Green Tier provides the escape route from a future of more expensive, more frustrating and ever more pointless command and control regulations. An executive from the paper industry argued that traditional command and control regulation had reached the point at which the industry “was spending more and more money for smaller and smaller reductions in pollutants.” Another paper company executive believed that the lack of a comprehensive approach under the traditional regulatory approach created intolerable problems for his industry. Different proposals for reductions in different pollutants proceeded without regard for each other. “It’s the incrementalism that drives our folks crazy.”

Green Tier did hold out some prospects for business. Perhaps Green Tier certification would provide business with the commercial advantages it proponents hoped. Perhaps it did promise a more stable, less costly and less frustrating regulatory future for firms that took part.

Third, while Green Tier failed to arouse enthusiastic support, it was also hard to oppose energetically. Green Tier did offer business some redress for its regulatory problems. Green Tier also could not be portrayed by environmentalists as causing immense damage because it was a “beyond compliance” program, adding to but not replacing regulations.

Conclusions: Outcomes and Implications

Real world experiments suffer from the considerable disadvantage of being beyond the control of the investigator. Much to the frustration of this investigator, Green

---

17 George Meyer *A Green Tier for Greater Environmental Protection* (Madison WI: DNR, 1999.)
Tier remains in limbo at the time of writing; it has passed the state Assembly but awaits approval, perhaps as part of the emergency budget currently under consideration. There are of course two possible endings to the experiment. The first is that Green Tier will be rejected, or more probably, simply not approved. If so, my youthful doubts about whether neocorporatist institutions and collaborative approaches to regulation are viable in the United States will receive some further support in middle age. If Green Tier is implemented, why might my earlier views have been wrong? My current belief is that I had underestimated the capacity of American bureaucracy to be autonomous and provide leadership. The highly skilled, globally informed top officials of the DNR have been the mainstay of Green Tier. They developed the program, they have been its major supporter, they have recruited allies and supporters and in the face of numerous setbacks, they have persisted. Green Tier is not a representative issue. It is a low profile somewhat technical issue that so far has not attracted popular attention; the scope of conflict about Green Tier so far has been narrow. Nonetheless, if Green Tier succeeds it will provide me with a salutary lesson about the capacity of American bureaucrats for policy leadership.