The EPA and Federalism: A Pracademic Perspective

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I am grateful for the American Political Science Association Pracademic Fellowship to experience federal government service firsthand, in my case at the Environmental Protection Agency (EPA) from August to December 2019. This particular moment at the EPA felt like a passing of the torch to an uncertain future, as the agency is celebrating its 50th anniversary in 2020. Today's EPA faces many severe challenges, including political polarization and its consequences for environmental policy. My focus for the Pracademic Fellowship was an examination of how those challenges were evident in the EPA's treatment of federalism.

THE OCIR AND EO 13132

At the EPA, I was assigned to the Office of Congressional and Intergovernmental Relations (OCIR), a subunit of the Office of the Administrator (OA), owing to my research interests in federalism. The OCIR is a very small office by EPA standards but a vital one for the Agency. One of my co-workers described it as "the tail on the dog," with fewer than four dozen employees including congressional liaisons. I was working on the intergovernmental side of the office, which liaises between the EPA and the state and local governments that are asked to carry out its policies. According to the Environmental Council of the States (ECOS), a group of state environmental agency officials, "Approximately 96% of federal environmental programs that can be delegated to the states have been delegated. Roughly 97% of inspections that take place are performed by states. About 90% of all enforcement actions, nationally, are performed by states. Approximately 94% of all data collection is performed by states" (U.S. GPO 2007). In many ways, the EPA is the ideal case for measuring state-federal interaction (Seifter 2014a). EPA writes the regulations, and the states administer them through "cooperative federalism" (Scheberle 2004).

A Congressional Act/rule and a presidential executive order undergird the work of the OCIR, the executive order today much more than the rule. The Unfunded Mandates Reform Act (UMRA), passed by Congress in 1995, mandated that agencies planning on adopting a regulation projected to cost state, local, and tribal governments over $100 million yearly (since inflation-adjusted to $154 million) must give notice to these subgovernments and provide them with an opportunity to comment on the proposed regulation (Garrett 1997). This is a privileged position for state/local/tribal governments, as the normal public disclosure requirements of the Federal Advisory Committee Act (FACA) do not apply.

In practice, the most important directive for the EPA is Executive Order 13132, which President Clinton issued in 1999. EO 13132 directs agencies to account for federalism concerns before taking actions that would limit the policy making discretion of the states. If a proposed rule would have "Federalism Implications" (FI), the relevant agency must consult with state and local officials and/or their representatives during development of the rule. If the agency finalizes the rule, it must include a "Federalism Summary Impact Statement" describing consultation with state and local governments, any concerns raised, and the agency's response.

The EPA initially adopted the UMRA level of $100 million in yearly costs of a proposed regulation or preemption of state law to trigger extra consultation; however, this led to only two formal consultations in the first seven years after EO 13132. OCIR advocated a lower cost trigger to make state/local participation more meaningful; eventually, EPA leadership redefined "Federalism Implications" to include actions costing over $25 million yearly (EPA Action Development Process: Guidance on Executive Order 13132: Federalism 2008). This change has been significant: in the decade-plus since, the EPA has engaged in about 24 federalism consultations (OCIR Briefing on EO 13132: Federalism 2019). One scholar described the EPA's process as "at the forefront" of federalism consultation and "exemplary" (Sharkey 2009).

REPRESENTING STATE AND LOCAL GOVERNMENTS

In traditional rulemaking, the EPA would involve state and local stakeholders at the outset. These stakeholders might be representatives of the so-called "Big Ten" of intergovernmental groups (EPA Action Development Process: Guidance on EO 13132: Federalism 2008), including the National Governors Association (NGA), the National Conference of State Legislatures (NCSL), the Council of State Governments (CSG), the National League of Cities (NLC), the US Conference of Mayors (USCM), the National Association of Counties (NACo), the International City/County Management Association (ICCMA), the National Association of Towns and Townships (NATT), and the County Executives of America (CEA). These groups represent state and local interests across the board of policy (Haider 1974; Arnold and Plant 1994; Cammisa 1995; Seifter 2014b), but the EPA lineup also includes the Environmental Council of the States (ECOS), representing state environmental officials.

Some scholars (Young 2001; Sharkey 2009; Bulman-Pozen 2019) have applauded the benefits of accounting for state/local interests through intergovernmental groups, including more accurate knowledge of local conditions, improved democratic participation, and a check on an increasingly unitary executive branch. Still, this view is not universally shared. Seifter (2014b) highlights the potential unrepresentativeness of groups in which actual membership/participation can be haphazard, the lack of transparency in group proceedings, the silencing of local voices in favor of a lukewarm "consensus position," especially in a time of partisan polarization, and even outside private funding for these "public" organizations.

Under the Action Development Process Guidance for EPA employees, new regulations should generally proceed through "workgroups" before they are formally proposed. These workgroups by membership are internal to EPA, but members should consult with state/local officials and/or their representatives during rule development. I saw little evidence of these

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workgroups, though. Regarding one of the policy issues that I focused on, lead in drinking water (usually known as the Lead and Copper Rule, or LCR), there were a number of state/local representatives on the National Drinking Water Advisory Council (NDWAC). I attended a NDWAC meeting featuring presentations from EPA staff and discussion/input from the council. Previous NDWAC meetings had informed the LCR comprehensive revisions proposed in October 2019 (Docket ID: EPA-HQ-OW-2017-0300-0001 on Regulations.gov). The NDWAC was influential; however, it is an ongoing body chartered under the Federal Advisory Committee Act and not tied to any particular regulatory proposal.

Though active workgroups do not seem common in this administration, EO 13132 provides formal avenues for state/local input into federal decision making. EPA will ordinarily provide a briefing, termed a federalism consultation, for the Big Ten groups plus related associations before a draft rule goes to the Office of Management and Budget (OMB) for review. The groups will be given 60 days after the briefing to submit written pre-proposal comments to EPA which should then inform the Notice of Proposed Rule Making (NPRM). Additionally, EPA will often provide a briefing for an individual association, including its members. This privilege of pre-proposal consultation provides the agency valuable input from state/local governments.

Regarding individual state input versus group consensus positions, I saw some evidence on both sides at EPA. In most of the webinars and in-person consultations I witnessed, only intergovernmental representatives attended. They were more interested in gathering information than taking positions and did not immediately offer state-specific information. One common theme was that the representatives of elected officials tended not to ask as many questions, being policy generalists, while the environmentally-focused official organizations (e.g., the Association of State Drinking Water Administrators (ASDWA), the Association of Metropolitan Water Administrators (AMWA), the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), and others) tended to engage with EPA staff more. These affiliated groups had not always been invited to federalism consultations; their presence seemed to benefit discussion. Still, the affiliated groups tended to ask questions based on their broader membership.

Once a proposed regulation went public on Regulations.gov, individual state officials could and did submit comments. In OCIR, one of my tasks was to examine the debates over regulation of coal combustion residuals (CCRs), otherwise known as coal ash. In the wake of the massive CCR spill in 2008 in Kingston, Tennessee, the EPA had to decide whether to treat coal ash as a hazardous waste. Thirty-eight states weighed in with comments, the vast majority of which advocated against classifying it as hazardous. The EPA eventually agreed with that consensus.

Another controversial issue concerned Clean Water Act Section 401 permits. Under the Act, the EPA should issue a federal permit for a project (e.g., a new natural gas pipeline) that would affect clean water only if the relevant state(s) have also identified the project as not harmful to water quality. This seems to give states a very meaningful role in the process. The Trump EPA, however, has proposed limiting state permit review to one year, and to restrict valid state permit denials to those that are explicitly for water quality, not any other environmental concerns (Docket ID: EPA-HQ-OW-2019-0405-0025 on Regulations.gov). Although some states agree with the administration, the majority are strongly opposed, seeing the proposal as contrary to the act and destructive of full state review and reasoned decision making. Thirty-five states have submitted comments on Regulations.gov alongside the intergovernmental association comments.

In both examples above, the agency had already made a formal proposal, and individual states were using the same commenting process as the general public. I witnessed a different way of proceeding, though, regarding the Vessel Incidental Discharge Act (VIDA), which Congress passed in 2018 to standardize rules for materials discharged by vessels into waters of the United States. The EPA and the US Coast Guard have primary roles in the regulation development. There were EPA-led regional conference calls with representatives of any relevant state agency that wanted to participate. Often, EPA personnel asked participants for any state-specific information that might aid in the rule development, either through oral input or written comments to the agency. There was no attempt to paper over differences to force a state consensus.

CURRENT CHALLENGES TO STATE/LOCAL PARTICIPATION

In the relationship between state/local governments and the EPA, both sides need to maintain trust. I saw some challenges to this. Regarding Section 401 of the Clean Water Act discussed above, under the administration's proposal, states' permitting authority would be effectively reduced, and the agency could override a state if necessary. In the public proposal on Regulations.gov (Docket EPA-HQ-OW-2019-0405-0025), though, the Agency claimed that the proposal "may not have federalism implications." The agency pointed to a pre-proposal, in-person consultation that it had done with Big Ten groups, and a later webinar, as signs that state and local interests were not being ignored—but the EPA was claiming in principle that the consultation was not required. This reading might change in the final rule; if it stands, though, most states would interpret it as belying reality and demonstrating bad faith.

A much larger challenge to federalism consultation arose in September 2019, when acting administrator Andrew Wheeler, apparently with presidential approval, revoked California's waiver under the Clean Air Act that allowed the state to set higher auto emissions standards to combat climate change (Davenport 2019). Thirteen states had followed California's lead in the stricter emissions limits. This decision was effectively preemptive of those states. There was no prior federalism consultation, as EO 13132 would seem to require, certainly in spirit if not in form, blindsiding states. A telling reaction came from the ECOS, the organization of state environmental agency officials. ECOS wrote Wheeler a letter stating in part "[We are] seriously concerned about a number of unilateral actions by US EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states..." ECOS "respectfully demanded" a meeting with Wheeler to discuss its concerns—strong language from a group representing a wide range of states (Lee 2019). Seifter (2014b) says that states generally are effective in representing their interests as states per se, and ECOS was doing its part. The administrator, though, declined the requested meeting, stating that EPA officials were already consulting with ECOS on multiple issues; an additional meeting was not necessary. The dispute over California auto emissions

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might have long-lasting impacts on EPA federalism consultation. States in particular, along with intergovernmental association representatives, will likely have long memories about EPA's ignorance of consultation on a very significant policy issue. From interacting with association representatives, I gathered that many had been in Washington for 20 or 30 years.

Perhaps emblematic of the challenge to the consultation was a message from Wheeler containing updates to the agency's Strategic Plan for 2018–2022 (EPA Press Release 9/9/2019). Strategic Goal 2 had been: "Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people." The updated language was: "More Effective Partnerships: Provide certainty to states, localities, tribal nations, and the regulated community in carrying out shared responsibilities and communicating results to all Americans." So "cooperative federalism" was being downplayed in favor of "certainty." Immediately related to the California conflicts, but with wider implications, one of my EPA colleagues referred to "vindictive federalism."

This is not to say that EPA's recent actions enjoy no state support. A handful of states endorsed the administration's proposed changes to Clean Water Act Section 401 permitting. One strategy that this administration employs regularly, although it began earlier, is the use of "public validators," prominent political figures who issue statements at the time of a proposed regulatory change to cheer the administration's actions. For example, in November 2019, the EPA announced proposals concerning coal ash disposal and guidelines for effluents from steam-powered electric plants. The press release contained blurbs from state officials in West Virginia, Oklahoma, and Kentucky (EPA Press Release 11/4/2019).

Some of the EPA's recent policies have been trying to return power to the states. Regarding coal ash disposal, under the Water Infrastructure Improvements for the Nation (WIIN) Act, states are allowed to create their own regulatory programs "in lieu of" federal regulation if they are at least as strict as federal guidelines. Two states, Oklahoma and Georgia, have successfully applied for this authority. Also under the WIIN Act, however, the EPA is supposed to set up a federal permit program in the other 48 states, which it proposed in February 2020 to do (Docket EPA-HQ-OLEM-2019-0361-0001).

CONCLUDING THOUGHTS

As this example shows, even when administration policy is empowering states, the practical effects can vary considerably. Over the past 20-plus years, the EPA has created its federalism consultation to manage the difficult task of setting national environmental policy without the means to directly enforce it in most cases. The current administration, despite traditional Republican party preferences for devolution to the states, seems to be putting state preferences on the back burner.

This approach might have some advantages. Seifter (2014b, 149) recounts an incident in 2011 regarding lead in drinking water. The EPA was considering stricter regulation, but state and local governments objected strongly because of the costs (e.g., a letter from the National League of Cities and US Conference of Mayors to EPA). Regarding the water crisis in Flint, Michigan, EPA Region 5 scientist Miguel Del Toral wrote an internal memo worrying that EPA was spending more effort "trying to maintain state/local relationships than we do trying to protect the children" (Spangler 2016). Previous administrations had not comprehensively updated the Lead and Copper Rule for drinking water since 1991; the Trump EPA was the first in 28 years to propose a very significant rewrite in October 2019 (Docket ID: EPA-HQ-OW-2017-0300-0001 on Regulations.gov.) This administration may be less concerned about imposing significant costs on large urban areas compared to the Obama administration, but the proposal could also have positive consequences for public health.

As a long-term strategy, though, overriding or ignoring state and local concerns likely will not succeed. As noted, despite formal authority, EPA's lack of enforcement resources on most issues means that it must work closely with state and local governments at the forefront of protecting clean air, clean water, and many other important environmental objectives (Scheberle 2004). The EPA in the past decade-plus has built a state-of-the-art federalism consultation process, with input from state and local interests throughout rulemaking. The administration should not sacrifice it for short-term gain.

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