



Streamlining or watering down? Assessing the 'smartness' of policy and standards for the promotion of low and zero carbon homes in England 2010–15



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ABSTRACT

The knowledge and enforcement problems faced by governments in defining traditional 'command and control' regulation are well known. Significant legal scholarship offers alternative models of 'smart,' 'responsive' environmental regulation, emphasising the need for policy instrument mixes, including the vital role of voluntary, industry-led sustainability standards. Yet, as is being increasingly recognised, these contributions leave open the need for detailed, qualitative evaluation of instrument mixes as a complement to primarily quantitative cost-benefit analyses that predominate in regulatory impact assessments by governments. Addressing this need, this paper evaluates policy and standards for low and zero carbon homes in England during the Coalition government (2010–2015) when the ecological modernisation discourse of the previous New Labour government became subsumed by a deregulation agenda. Our study, incorporating 70 stakeholder interviews, suggests that, in supplier-driven markets such as housing in England, a 'smart' mix of mandatory and voluntary standards requires a strong, central role for government in setting national, mandatory standards and supporting their delivery. There is an important potential supplementary role for voluntary tools and local authority discretion, though our study highlights problems that can arise when such different instruments promote diverging road-maps towards a policy goal.

1. Introduction

A central challenge for contemporary governance is developing policy strategies and regulatory tools that steer towards goals, such as a low carbon economy, while allowing industry sufficient flexibility to adapt to change (Greenwood, 2012). In western, industrialised countries, recent years have seen a shift from traditional 'command and control' regulations to increased use of new instrument types, including market-based and voluntary tools. These shifts reflect an ecological modernisation (EM) approach, in partly transferring steering capacity to non-state and private sector actors (Jordan et al., 2013) and emphasising potential innovations that improve both environmental and economic performance. Yet a contrasting, market liberal, deregulation agenda has also had significant influence. This paper addresses the identified need for detailed evaluation of policy instrument mixes (Enevoldsen, 2005; Jordan et al., 2013) to assess the competing claims of these prominent, competing ideologies. The focus is on policy and standards for low and zero carbon (LZC) homes in England, where ambitious targets set by Labour were a key example of the influence of

EM discourses (Lemprière, 2016). Our study focuses on this agenda under the Conservative-led coalition government 2010–15 where discourses of deregulation became prominent.

Section 2 introduces our theoretical framework, drawing from literature on the politics, design and evaluation of environmental regulation, particularly EM and the notion of 'smart regulation' (Gunningham et al., 1998). Sections 3.1 and 3.2 introduce the LZC homes policy agenda under New Labour and the Conservative-led Coalition government respectively. Section 3.3 discusses previous academic studies, highlighting the need for evaluative research on LZC homes policy strategy, with a particular absence of research on Coalition policy. Section 4 presents our methods and key findings. Section 5 discusses the implications of our findings, while Section 6 concludes.

2. Evaluating regulation

2.1. Ideologies and the politics of regulation

The 'new right,' market liberal deregulation agenda, which views

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regulation as a cost, or ‘burden,’ that hampers economic competitiveness, has been influential in the UK since the 1980s. The deregulation discourse became especially prominent under the Conservative-led Coalition government who introduced the ‘One In, Two Out’ rule and the ‘Red Tape Challenge’ that aimed to reduce the costs of regulation. Previously, New Labour’s proposed ‘Third Way’ involved a more substantial role for states in shaping markets and promoting public goods provision than is countenanced by the new right. The international ‘Better Regulation’ agenda, concerned with improving the *quality* of regulatory instruments and processes, was influential in the late 1990s (Radaelli and Meuwese, 2009). However, the emphasis was that much regulation represented a burden in need of reduction (Tombs, 2016) and the move towards a ‘risk-based’ regulatory model after the 2005 Hampton Review (2006)¹ represented a significant shift in emphasis towards de-regulation (Dodds, 2006). This involved a targeted approach to enforcement, based on careful calculation of the risks entailed by non-compliance.

The deregulation discourse has origins in the public choice and Austrian schools of political economy, which offer somewhat contrasting reasons for scepticism towards regulation (Parker, 2002). Public choice theory emphasises the danger of regulatory processes being ‘captured’ by specific interest groups. The Austrian school, particularly Friedrich Hayek, stress the inevitably limited knowledge available to regulators (Greenwood, 2012). The indispensable functions of markets in transmitting knowledge and promoting innovation, Hayek argues, will be impeded by even the most well intentioned governmental efforts to promote public policy goals through regulatory interventions. Yet the assumption underpinning new right arguments that regulation is a cost to business has been subject to recent challenge, notably in the literature on environmental regulation. Helm (2006) is critical of what he views as generalised claims about macro level costs of regulation that overlook the potential benefits of regulation in providing public goods, such as reducing pollution and promoting more equitable social outcomes. He argues that there is not necessarily a tight, negative causal relationship between regulation and economic efficiency. The de-regulation agenda, Helm contends, lacks an evidence base. He stresses the need for more detailed evaluation of the costs and benefits of specific policy instruments, given the significant variation in their susceptibility to problems of information and regulatory capture.

Helm’s argument can potentially lend support to ‘ecological modernisation’ (EM), which involves use of a range of regulatory instruments for fostering ‘win-win’ environmental and economic outcomes. EM is sensitive to the epistemological challenges involved in selecting and defining instruments for addressing complex problems, emphasising the need for ‘governance’ to draw from the expertise of state and non-state actors (Greenwood, 2015). However, some vested economic interests can be resistant to EM-inspired regulatory initiatives. This would seem to partly explain why, although EM discourses have had significant international influence, especially in Europe, this influence has been somewhat patchy (1998).

The term ‘ecological modernisation’ has been used to refer to a range of approaches to promoting ecological sustainability in the context of a thriving economy. Useful here is the distinction drawn by Christoff and Dryzek between ‘weak’ and ‘strong’ versions of EM. Weak EM, they suggest, focuses on environmental policy as promoting ‘win-win’ innovations that both improve environmental performance and foster economic competitiveness. The danger with weak EM, Christoff argues, is that it suggests a “technocratic” view of achieving change (Christoff, 2000: 191–192). Strong EM is advocated as promoting a more holistic approach (Dryzek, 1987: 11) involving broader socio-cultural transformation of established production and consumption patterns, which are viewed as significant constraints upon the

achievement of ecological sustainability goals. Strong, as well as weak, versions of EM recognise the significance of regulatory instruments as potential drivers of ecological improvement. Indeed, the EM literature, with its challenge to the deregulation agenda of the new right, opens up the need for further evaluative research on regulatory policy, starting from recognition of the conflicting interests and epistemological challenges at stake (Greenwood, 2015).

2.2. Evaluating instrument mixes and the challenge of complexity

The need for alternatives to traditional command and control is identified in the legal studies literature on regulation. However, rather than focusing on the challenges of instrument definition, the primary focus is on incentivising regulatory compliance. Proposed alternative compliance models start from the premise of the prohibitive costs involved in seeking to uniformly enforce mandatory regulations through a command and control approach. The ‘responsive regulation’ model (Ayres and Braithwaite, 1992), which influenced the Hampton Review, proposes that non-punitive measures, such as persuasion and education, be used initially with action only being escalated up the pyramid to increasingly punitive measures for firms who are found to fail to behave as required. Proposals for ‘smart regulation’ (Gunningham et al., 1998) similarly advocate an escalator approach, including the use of voluntary tools as supplements to mandatory regulations. In proposing ‘really responsive regulation’, Baldwin and Black (2008) seek to build on the above models whilst advocating greater sensitivity to the norms, understandings and institutional contexts that shape the incentives and behaviour of individuals and firms being regulated.

The epistemological challenges involved in instrument definition are recognised, at least implicitly, by smart regulation (Gunningham et al., 1998), which echoes EM in emphasising the need to draw from the knowledge and expertise of non-state and private sector actors (Gunningham et al., 1998: 40). A prescriptive approach, involving industry adopting specific technological solutions, it is commented, requires regulators to acquire an especially large body of knowledge about technologies which might be contested, uncertain and soon outdated (1998: 44). Yet, epistemological challenges involved in instrument definition are not the subject of sustained focus in this literature. There is a need for closer consideration of approaches to this challenge, such as the ‘performance-based’ approach, articulated for UK building regulations, that defines a required outcome while allowing firms flexibility in how to achieve it, thus aiming to reduce vulnerability to negative unintended consequences.² While it may be possible to provide a measure of some sought outcomes, such as for some maximum pollution levels, this may, as discussed in our policy study below, involve balancing difficult trade-offs between multiple qualitatively distinct criteria. Hence, a performance-orientated approach can still be susceptible to epistemological challenges (Greenwood, 2012).

The possible complexities of defining sought outcomes is reflected in debates about policy evaluation methodologies. Widely used cost-benefit analysis (CBA) methods have been criticised for assuming that costs and benefits are monetarily measurable, given the complexities and uncertainties involved (O’Neill and Spash, 2000). While some regulatory impact assessments have sought to combine CBA with qualitative criteria to capture public or non-monetised goods, these have often been criticised for being “vague and indeterminate” (Helm, 2006). Applying CBA to regulatory evaluation involves particular methodological difficulties. Notably, there is a danger of businesses

¹ Christopher Hampton was commissioned by the British government to conduct a review regulatory systems.

² Jordan et al. (2013), in placing all forms of state-defined, legally binding regulations in the single category of ‘command and control,’ overlook differences between prescriptive and performance-orientated approaches. This distinction is important to consider in evaluating instrument selection. Jordan et al.’s definition of command and control is valid and reflects their focus on distinguishing ‘new’ policy instruments that are indicative of a shift to ‘governance’ in involving actors beyond the state, in contrast with government-defined regulations.

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