

Lessons from 2013's State Battery Stewardship Bills

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John F. Kennedy famously noted after the Bay of Pigs debacle that "victory has a thousand fathers, but defeat is an orphan." As most 2013 state legislative sessions come to a close, many in the battery industry will rue orphanhood, but some will celebrate paternity.

Five battery stewardship bills were considered in states in 2013, but none were passed. Bills in Minnesota and California to establish primary battery stewardship programs similar to other expansive state programs for other materials were bottled up in committee. The bills were initially written by others but were endorsed by the National Electrical Manufacturers Association. They were viewed warily by rechargeable battery manufacturers and opposed by many product manufacturers. Far narrower bills promoted by PRBA-The Rechargeable Battery Association in Washington and Oregon also died in committee in the face of opposition from both battery-powered product manufacturers and regulators who sought more authority than the bills granted. A lead-acid battery recycling bill introduced by a freshman legislator in Maryland met the same fate, even though it was revised in committee to mirror analogous legislation endorsed by the Battery Council International and in place in almost three dozen other states.

Most of the reasons for these outcomes are not unique to battery stewardship proposals. It is no secret, for example, that it is far easier to kill "green" legislative proposals in committee, even (or perhaps especially) in a state legislature controlled by Democrats, than on the floor. Nor is it highly surprising that promoting legislation opportunistically, without having put a thought-through strategy in place, has a low likelihood of success. But several lessons from this experience merit highlighting.

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First, the mutual understandings between cell manufacturers and product manufacturers that made possible enactment in 1996 of the federal Mercury Containing and Rechargeable Battery Management Act, and thus the success of the Call2Recycle® rechargeable battery stewardship program, has frayed substantially. That statute preempted inconsistent state regulatory requirements, and thus made possible operation of a single national rechargeable consumer battery stewardship program.

The early 1990s had been marked both by state legislative attention to the post-life handling of then-state-of-the-art nickel-cadmium batteries and with the blossoming of the “Superfund” program. Hundreds of companies—including major consumer electronic products suppliers and distributors—who previously had fully complied with the law now found themselves facing enormous assessments to pay for the cleanup of “recycling” sites. In return for the cell manufacturers' commitment to bear all post-use handling responsibilities of the batteries, product manufacturers agreed to provide financial support for the collection and recycling programs.

But times have changed. Superfund liabilities are now a lesser concern. This reflects both the shift away from nickel-cadmium batteries and the 1999 enactment of a Superfund amendment that protects from liability companies that have made bona fide efforts to ensure safe recycling.

Moreover, product stewardship pressures increasingly have come from local governments seeking to shift waste management costs to the private sector. But the governments also want to specify collection and handling techniques in ways that drive up costs. And in many companies, tight budgets have meant that responsibility for dealing with those pressures has shifted predominantly to marketing or government relations staffs, not lawyers or environmental compliance teams. Finally, but perhaps equally important, the enormous growth of electronic waste stewardship legislation has led many companies to either initiate their own recycling programs or join in product-manufacturer consortia to address these pressures. Needless to say, when portable products are collected, rechargeable batteries often are collected as well. And while not all portable products are yet subject to e-waste mandates, some are and the handwriting as to others is on the wall.

Whatever the specific cause, the proper allocation of post-life responsibilities between cell manufacturers and product manufacturers was a major intra-industry issue in California, Minnesota, Oregon, and Washington. The resistance of companies in several key product segments to accepting new, or at least mandatory, stewardship obligations was central to blocking the legislation in all four states. And the only thing that seems likely to change those segments' positions is a widespread perception—not yet the case—that some companies are being disadvantaged competitively by the failure of others to mirror “green” policies.

Second, while some environmental activist groups can be convinced to adopt reasonable positions—that is, positions supported by a significant portion of the private sector—they cannot be relied upon to pressure self-protective bureaucrats. Exhibit number one on this point is the legislation that failed in Washington and Oregon. The two bills were quite similar, and designed primarily to assist companies that had accepted stewardship responsibilities to collect costs from “free-riders”—that is, those which had put batteries into the marketplace but were not supporting recycling programs. The principal role contemplated for state

environmental agencies was to monitor plans enough that such claims could only be asserted by bona fide stewardship programs, thus avoiding creation of a new, Proposition 65-like industry for creative plaintiffs' lawyers.

With this goal in mind, the bills required submission of stewardship plans to the state environmental protection agency, that plans meet a relative handful of requirements, and that annual reports be filed. But they did not impose the detailed, burdensome supervisory requirements, percentage collection mandates, and enforcement tools so beloved by many regulators. Instead, they envisioned that the prerequisite that private plaintiffs demonstrate they had met statutory standards before they could collect costs from free-riders would be enough to ensure discipline in the systems.

Several important product stewardship activists and groups endorsed this approach. But they were unwilling to challenge the resistance of state agency personnel, who insisted that more enforcement activity would be required. Thus, a key reason the legislation died in Washington was the Department of Ecology's estimate that to cover its administrative expenses the legislature would have to assess program sponsors considerably more than the existing Call2Recycle® program spends annually to supervise that successful program. Not surprisingly, program sponsors were unwilling to more than double their costs in return for an opportunity to encourage free-riders to participate. And, significantly, the activist endorsers of the legislation were not prepared to take on in this context an agency with which they work so closely.

Third, when viewed through the prism of governmental cost avoidance, batteries are a far smaller problem than such larger-volume materials as e-waste, household paint, carpet, and mattresses. The stewardship bill first introduced by the Democratic Governor of Minnesota to the state's Democratic legislature covered used primary batteries, carpet, and paint. The legislation finally enacted covered only paint, notwithstanding strong support from the primary battery industry and some portions of the carpet industry. While many factors influenced the ultimate political outcome, the simple fact of the matter is that it is far harder to complain about either a greater volume or environmental hazard arising from disposal of used primary batteries than used mattresses. This helped tilt the outcome of the committee debates.

None of the foregoing considerations was the sole contributor to the outcome in any of the five states addressed here. As in all legislative battles, the votes of each individual legislator and positions of each committee chair were influenced by a number of factors. But proponents of legislation to support rational battery recycling programs that do not create administrative monstrosities, and of product stewardship programs for other materials, will do well to consider these lessons as next year's legislative sessions approach.