The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device?

James W. Curlin*

In seeking means of dealing with pollution of interstate waters, the states have traditionally turned to the mechanism of the interstate compact—and continue to do so. The success or failure of the interstate compact commissions clearly has serious implications for the future of water pollution control, particularly along the multi-jurisdictional river basins of the eastern half of the United States. This study of the compact mechanism first examines the features of interstate compacts in general, and then treats in some detail the provisions of the fourteen interstate compacts listed in the Appendix, which deal expressly with water quality control. The Article's treatment is instructive in pointing out both the inherent weaknesses in the compact approach, as well as the many avoidable pitfalls which often are not, in fact, avoided.

Protection of environmental quality presents a significant challenge to federalism—how to regulate pollution which originates in one state and flows or disperses into another state. Environmental pollution has no respect for legal boundaries. In interstate pollution cases at least three legal authorities—the two sovereign states and the United States—have overlapping and concurrent responsibilities. With two categories of legal jurisdiction, state and federal, a pragmatist might desire to avoid the complexities of concurrent jurisdiction and opt either for exclusive judicial supervision by state courts or, in the alternative, for total federal preemption. It is probable that Congress could fully preempt the field of water quality control of all navigable waters, interstate or intrastate, under the authority of the commerce clause of

* Senior Staff Associate (Law and Policy), ORNL-NSF Environmental Program, Oak Ridge National Laboratory, Oak Ridge, Tennessee. B.S. 1954, University of Arkansas at Monticello; M.S., Ph.D. 1964, Louisiana State University; J.D. 1972, University of Tennessee; member of the Tennessee Bar.

† This work was supported by the National Science Foundation under NSF Interagency Agreement No. AAA-R-4-79.
the Constitution. Instead, Congress has chosen to "recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution . . . ."2

The only ad hoc enforcement action permitted the federal government by the Federal Water Pollution Control Act is in specific instances where "[t]he pollution of interstate or navigable waters . . . endangers the health or welfare of any persons . . . ."3 It is, therefore, the express intention of Congress that the states are to bear the responsibility for the control of pollution of both intrastate and interstate waters, and that federal intervention is to be restricted to the following specific instances of danger to public health and welfare through pollution of interstate waters: (1) where the states have refused to accept this responsibility,4 (2) when requested by the downstream state receiving the pollutant, (3) when requested by the governor of the state in which the discharge originates, or (4) when substantial economic injury to shellfish has occurred in a state other than where the discharge originated.5 A fair interpretation of all the provisions for federal intervention, when read together, supports the conclusion that federal action is not authorized unless there is a showing that a discharge in fact endangers the health or welfare of identified persons.6 Therefore, it appears that it is not enough to justify federal intervention that the discharge merely reduces the water quality below the approved federal standard.

The net effect of the carefully worded statutory language which distinguishes state and federal authority is that water quality standards

---
4. Id. § 1160(c)(5).
5. Id. § 1160(d)(1).
6. Dunkelberger, supra note 1, at 16; but see S. 1014, 92d Cong., 1st Sess. § 10(f)(1) (1971). The proposed amendments to the Federal Water Pollution Control Act, if enacted, would remove the noted restrictions on federal enforcement powers:

Whenever, on the basis of any information available to him, the Administrator determines that any person is in violation of water quality standards . . . he shall notify such person and the water pollution control agency of the State or States in which such violation is occurring . . . . If the Administrator determines at any time after thirty days following such notice that required remedial action or appropriate State action has not been taken, he may issue an order for compliance or request that the Attorney General bring a civil action . . . .

Id.
for interstate waters can be violated so long as the discharge does not endanger human health or welfare and does not cause significant damage to the marketability of shellfish. Abatement of subhazardous violations depends upon voluntary action by the state wherein the discharge occurs; there is no statutory recourse under the present act for the state receiving the pollution.

I

LEGAL AND INSTITUTIONAL BASES

A. Historical Precedents

There are two constitutional modes for adjusting interstate conflicts—the jurisdiction of the United States Supreme Court over "controversies between two or more States" and the constitutional authority which permits a state to "enter into any Agreement or Compact with another State" with "the consent of Congress." The Supreme Court has recognized the deficiencies of litigation as a solution for regional pollution problems. In dismissing an action between the states of New York and New Jersey involving the discharge of sewage into New York Harbor, the Court said:

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it, than by proceedings in any court however constituted.

Most questions of interstate pollution are not justiciable, in a practical sense, whether within the jurisdiction of the Supreme Court or some lesser court. Felix Frankfurter and James M. Landis concluded that interstate problems require legislation which is "coterminous with the region requiring control" and since "regions are less than the nation and are greater than any one State . . . [t]he mechanism of legislation must therefore be greater than that at the disposal of a single State." Cooperation among the states to solve regional environmental pollution problems therefore must be sought through the second constitutional alternative—interstate compacts.

Historically, compacts evolved from colonial boundary disputes; the compact clause of the Constitution is directly rooted in colonial

8. Id. art. I, § 10, cl. 3.
history. At that time there were two modes of resolving boundary disputes—negotiations through joint commissions and, in lieu of direct settlement, appeal to the Crown. Both forms of adjustment were incorporated into the Constitution, but because interstate agreements may affect national interests as well as serve regional needs, the framers created a mechanism of legal control by requiring congressional consent for interstate agreements and compacts.

Interstate compacts received relatively little application except in boundary disputes and minor administrative agreements until the creation of the New York Port Authority Compact in 1921, and the Colorado River Compact in 1922. The New York Port Authority Compact, although limited to a two-state boundary area, created a joint planning and administrative agency to deal with interstate urban transportation problems. In 1935, for the first time, the compact arrangement was applied as a regulatory device for water pollution abatement in the New York Harbor by the states of New York, New Jersey, and Connecticut. Thus, as a direct or indirect result of dicta in New York v. New Jersey, interstate cooperation was implemented to abate the states' sewage problems fourteen years after the Court's dismissal of the suit. The Colorado River Compact evolved from the upper basin states' desire for protection against monopolization of the water supply by lower states, through establishment of prior appropriation rights, and from the lower basin states' need for a secure supply of water. This compact was the first to involve a group of several states over a large area and also was the first to handle the common problem of allocating waters over an entire river basin.

Since the establishment of the Colorado River Compact, there has been steady progress over nearly half a century in the use of the interstate compact for allocation and administration of the waters of Western rivers. There has been a similar expansion of interstate compacts in

11. Id. at 692.
13. 45 Stat. 1057 (1929). Consent to negotiate was given by Congress in 1921 contingent upon its being ratified by the signatory states no later than January 1, 1923. 42 Stat. 171 (1921).
15. 256 U.S. 296 (1921).
17. Eighteen interstate compacts for allocation of Western waters have received congressional approval to date. These include: Upper Niobrara River Compact, 83 Stat. 86 (1969); Arkansas River Basin Compact, 80 Stat. 1409 (1966); Amended Costilla Creek Compact, 77 Stat. 350 (1963); Bear River Compact, 72 Stat. 38 (1958); Klamath River Basin Compact, 71 Stat. 497 (1957); Sabine River Compact, 68 Stat. 690 (1954); Canadian River Compact, 66 Stat. 74 (1952); Yellowstone River Compact, 65 Stat. 663 (1951); Snake River Compact, 64 Stat. 29 (1950); Arkansas River Compact, 63 Stat. 145 (1949); Pecos River Compact, 63 Stat. 159 (1949);
the East, but there the emphasis has been on water resources development and pollution control. These administrative-regulatory compacts are the subject of this Article.

B. Congressional Consent—Federal Approval

The current Federal Water Pollution Control Act\textsuperscript{18} recognizes the need for coordinated administration of regulatory activities among the states by encouraging the enactment of improved uniform state laws and the creation of compacts among states for the prevention and control of water pollution.\textsuperscript{19} After thirty-five years of history of the use of interstate compacts as administrative-regulatory devices for intrabasin pollution control, the following questions might be asked: Have interstate compacts been effective? Are changes in the philosophy of interstate cooperation needed? Are there other governmental institutions which may better serve public needs?

Advance congressional consent is given to two or more states to negotiate and enter into agreements or compacts for the prevention and control of water pollution and for enforcement of their respective laws. Consent is not carte blanche; a restrictive clause further provides that no such agreement is binding upon a party state unless and until it is approved by Congress.\textsuperscript{20} The nature of the federal-state relationship under the compact clause is fundamental to the effectiveness of interstate compacts as administrative-regulatory devices. Although it is arguable that a compact is a treaty between sovereign states, it seems more properly to be a contract. Consideration is by exchange either of objects of value or mutual promises, and enforcement by the United States Supreme Court resembles litigation of ordinary contractual agreements.\textsuperscript{21}

The categorical language of the compact clause implies that all interstate agreements, whether compacts or some other form, must have the consent of Congress. The early cases seemed to adopt this view,\textsuperscript{22} but from Virginia v. Tennessee\textsuperscript{23} and Wharton v. Wise\textsuperscript{24} there evolved the political balance doctrine which holds that consent is required only

\begin{flushleft}
Upper Colorado River Basin Compact, 63 Stat. 31 (1949); Belle Fourche River Compact, 58 Stat. 94 (1944); Republican River Compact, 57 Stat. 86 (1943); Rio Grande Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); La Plata River Compact, 43 Stat. 796 (1925); Colorado River Compact, 42 Stat. 171 (1921).
20. \textit{id.} § 1154(b).
\end{flushleft}
if the agreement actually impairs federal authority or has "political" effects.\textsuperscript{25} As the interstate compact becomes more a device for administration and regulation than for arbitration of singular interstate disputes, it may become necessary to wrestle with this question of constitutional division of powers.

One of the most effective interstate administrative-regulatory agreements to deal with water resources problems was the Interstate Commission on the Delaware River Basin (INCODEL), which existed from 1936 to 1948 without the formal consent of Congress. INCODEL was created by parallel legislation among the states of Delaware,\textsuperscript{26} New Jersey,\textsuperscript{27} New York,\textsuperscript{28} and Pennsylvania,\textsuperscript{29} and operated on the principle of voluntary interstate cooperation.\textsuperscript{30} Interestingly, the initiative for the formation of INCODEL came in substantial part from the federal government even though the formal consent of Congress was never received. In 1961 the functions of INCODEL were merged into the broader Delaware River Basin Compact.\textsuperscript{31} The question remains whether two or more states can enter into an agreement to coordinate the administration and regulation of water quality without the consent of Congress, notwithstanding the advance consent and express approval provisions of the Federal Water Pollution Control Act.\textsuperscript{32} Can it be said that an interstate agreement that grants independent administrative enforcement powers to a duly appointed interstate commission, charged with the responsibility to enforce state standards anywhere within a delineated river basin, may be considered disruptive of political balance within the definition of Virginia v. Tennessee?\textsuperscript{33} The express statutory limitations on federal intervention, namely, that the violation must endanger human health or welfare,\textsuperscript{34} would seem to preclude the argument that enforcement, by an interstate agency, of state water quality standards intrudes upon federal statutory authority.


\textsuperscript{26} Ch. 202, [1936] Del. Laws 432.
\textsuperscript{27} Ch. 21, [1936] N.J. Laws 32.
\textsuperscript{28} Ch. 600, [1939] N.Y. Laws, 162d Sess. 1409.
\textsuperscript{29} No. 35, [1937] Pa. Laws 109.
\textsuperscript{30} R. Martin, G. Birkhead, J. Burhead & F. Munger, River Basin Administration and the Delaware 282 (1960) [hereinafter cited as Martin].
\textsuperscript{31} 75 Stat. 688 (1961).
\textsuperscript{32} 33 U.S.C. § 1154(b) (1970).
\textsuperscript{33} 148 U.S. 503 (1893).
\textsuperscript{34} See text accompanying notes 3-6 supra.
C. Federal—State—Compact Relationships

Interaction among the compact agencies and the signatory legislatures and Congress after ratification appears to be minimal. Unless a challenge to legislative authority arises, most legislatures consider the interstate commission beyond their purview and provide inadequate mechanisms for liaison and coordination. The executive branch of a state government is generally more aware of the functions of an interstate commission because compacts usually provide that the governor has authority to appoint his state's commissioners. Congress reflects the same attitudes as the state legislatures, viewing its responsibilities as terminated upon its consent, and has not developed the necessary institutional machinery for liaison with the compact agencies. The House of Representatives assigns continuing responsibility of compacts to three standing committees, none of which regards its assignment as involving anything more than expedition of congressional approval.

There has been little integration of the compact agencies into the administrative fabric of state government. Although compact agencies may develop close relationships with federal departments and although federal representatives may sit on compact commissions as full partners, such agencies are no more a part of the federal administrative organization than any department of a state government. To this extent the interstate compact agency is an administrative orphan. Few compacts provide for positive relationships between states and interstate agencies, and ratifying legislation often creates additional controls not provided for in compacts themselves. Moreover, an important consideration in the case of pollution control compacts is that states generally withhold the power to make and enforce penalties for violation of their administrative rulings. The vital power of enforcement remains with the states.

Congress is prone to append reservations to the compacts which it considers necessary to protect federal interests from possible actions of interstate agencies. Under the theory that there is a continuing re-

36. Id. at 55. The Committee on the Judiciary is responsible for compacts in general; the Committee on Interstate and Foreign Commerce for the Interstate Oil Compact; and the Committee on Interior and Insular Affairs for compacts relating to apportionment of waters. A similar division of responsibility is reflected in the Senate.
quirement of congressional consent Congress has included in the con-
senting statutes to recent compacts an express reservation of its right
to alter, amend, or repeal the compact. Judicial recognition of the
congressional prerogative to repeal its consent was announced in
Louisville Bridge Company v. United States; there the Supreme Court
rejected the defendant's argument that the terms of congressional ap-
proval were irrevocable and held that even in the absence of a re-
served right to alter, amend, or repeal, Congress still retains an implied
right to do so.

The power of Congress to require the disclosure of information
and data which it deems appropriate is generally expressly reserved
ever since the refusal of the Port Authority of New York to respond to
a subpoena for internal memoranda of the agency. The refusal re-
resulted in the recalcitrant state officials being cited for contempt of
Congress. The actions of Congress in the Port Authority incident
imply that it considers the right to inquire into all activities of inter-
state compact agencies inherently granted by the compact clause. Upon appeal of the criminal contempt convictions of those officials re-
fusing to respond to the subpoena, the Court of Appeals reversed on
technical grounds, thus avoiding the constitutional question. The
issue was dropped without finally deciding whether Congress has the
power to require disclosure of information concerning the business
aspects of the compact agency.

Presidential approval of an interstate compact is not specifically
required by the compact clause, but executive approval is implicit for
consent legislation just as for any other order, resolution, bill, or legis-
lative enactment. The presidential veto has been used only once in
compact legislation. President Roosevelt refused to sign the approval
of the Republican River Compact in 1942, stating the reasons to be
the apparent attempt of the compact to restrict the authority of the
federal government to construct irrigation works and to appropriate
irrigation water, and the infringement on federal jurisdiction over navi-

41. 242 U.S. 409 (1917).
45. Id.; see Note, supra note 25, at 1417.
46. U.S. Const. art. I, § 7, cl. 3.
The compact was subsequently modified to overcome the specific objections and was confirmed in 1943. The legal effect of entering into an interstate compact is that the agreement becomes the law of the signatory states. Constitutional machinery is provided for enforcement of compacts by the original jurisdiction of the Supreme Court over suits between states. Dual operation of the compact and contract clauses of the Constitution provide a basis for judicial enforcement. In the leading case of Green v. Biddle, a state statute was struck down because it was in conflict with a compact. The Court based its decision on the constitutional prohibition of impairment of contractual obligations by a state. Thus, a state statute which conflicts with an interstate compact is invalid and unenforceable.

In 1962 a federal statute was enacted to grant original, concurrent jurisdiction to United States District Courts in controversies arising from the construction or application of an interstate compact which . . . relates to the pollution of the waters of an interstate river . . . and . . . [the Compact] expresses the consent of the States . . . to be sued in a district court in any case . . . involving the application or construction thereof.

The statute removes the consideration of amount and diversity of citizenship from federal jurisdiction in pollution cases under the applicable compacts. There is no appar-
Thus, in instances where the compact includes a consensual agreement permitting the states to be sued in a federal district court, the district court has concurrent jurisdiction with the Supreme Court and other federal or state courts which had original jurisdiction in the case.

A question still remains unanswered: Once rendered, how can the Supreme Court execute a judgment against a state? The separate sovereign theory would imply that a recalcitrant state could only be made to obey a mandate by military force. The forceable imposition of a judicial decision upon a state has been characterized as "one of the anomalies of our federal system." Fortunately, Supreme Court decisions are usually honored without confronting the constitutional basis for the separation of powers. There can be no wholly satisfactory judicial solutions for disagreements arising in the administration of interstate compacts, for if comity among the signatory states is so lacking as to require adjudication by the Court, the interstate agreement is probably doomed to practical failure.

More important to the effectiveness of interstate compacts is the grant of power to the interstate agency and the mechanisms provided for the use of such power. Since compact agencies are joint agencies of two or more governments, it is logical that they derive their power from the authority jointly conferred by the parent governments. However, it would not seem that the parent governments could delegate power in derogation of their respective constitutions. In State ex rel Dyer v. Sims it was argued that the West Virginia legislature's entry into the Ohio River Valley Water Sanitation Compact (ORSANCO) violated the state's constitution. The West Virginia Supreme Court of Appeals found that the legislature had unconstitutionally delegated the state's police power in perpetuity to other states and the federal government and, by binding future legislatures to make appropriations for the Compact Commission, had created a state debt in derogation of the state constitution.

The United States Supreme Court quickly disposed of both these arguments. Noting that nothing in the West Virginia Constitution specifically prohibited the delegation of police power to agencies not controlled by the state, the Court characterized the legislative act as ent authority given a state to sue its own citizens in district court, nor does the statute authorize suits against nonsignatory states. Id.

54. See ZIMMERMANN & WENDELL, supra note 21, at 47-48.
55. Id.
58. 134 W. Va. at 288-89, 58 S.E.2d at 775-76.
59. Id. at 288, 58 S.E.2d at 775.
a "conventional grant of legislative power." The Court then reasoned that since it could, pursuant to its original jurisdiction over controversies between states, "enter a decree requiring West Virginia to abate pollution on interstate streams," the state should certainly be able to solve its own interstate pollution problems "by compact and by the delegation, if such it be, necessary to effectuate such solution by compact." Thus, the Court summarized:

Nothing in its Constitution suggests that, in dealing with the problem dealt with by the Compact, West Virginia must wait for the answer to be dictated by this Court after harassing and unsatisfactory litigation.

The debt limitation argument was dispatched with even greater haste, albeit upon sounder logic. The Compact "was evidently drawn with great care to meet the problem of debt limitation," and required (1) that the Governors of the signatory states approve the annual budget of the Compact Commission, (2) that the Commission not incur obligations in advance of adequate appropriations, and (3) that the Commission not pledge the credit of signatory states without legislative approval. Therefore, the Court concluded that West Virginia's obligation was not in conflict with its constitution.

An effective administrative-regulatory agency must be vested with the authority to establish rules, regulations, and standards; to subpoena documents and compel attendance at hearings; and to issue orders and have those orders enforced through legal action. Unfortunately, states

60. 341 U.S. at 31.
61. Id.
62. Id.
63. Id. Justice Reed concurred, but based his opinion on the rationale that "since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action." Id. at 34. In effect, the supremacy clause permits the Court's interpretation of a compact to override the state's interpretation of its own law. Id. at 33.

Justice Jackson also concurred, on the basis that West Virginia, having consented to the Compact, "assumed a contractual obligation with equals by permission of another government that is sovereign in the field," [id. at 36] and was thus estopped from repudiating her consent.

Although one may applaud the result of the holding—and indeed, its virtual necessity if complete federal preemption of interstate water pollution control is to be avoided—the varied and unconvincing rationales advanced by members of the Court seem to stand principally for the proposition that "where there's a will there's a way." Others have rationalized the decision as being implicitly based upon the determination that the Compact Commission was in effect a West Virginia agency, inasmuch as the Compact became an integral part of the state's law. See E. Cleary, supra note 57, at 228; Zimmermann & Wendell, supra note 21, at 96. However, no such reasoning is apparent from the face of the Court's or either of the concurring opinions.

64. 341 U.S. at 32.
65. Id.
66. Id.
have been loath to relinquish the necessary enforcement power to interstate agencies, and usually have reserved enforcement authority in the appropriate state department. Interstate commissions, on the other hand, are considered bodies "corporate and politic" by express provisions in most interstate agreements and by judicial recognition of the United States Supreme Court. As such, they may be provided the authority to enter contracts and promulgate rules affecting their internal organization and functions.

Administrative-regulatory agencies must be equipped with sufficient scientific and technical expertise to develop and administer a comprehensive plan for river basin management including the development of criteria, standards, and monitoring and investigation techniques. Maintenance of a competent staff to perform these functions is a major expenditure. Financial support for compacts has come largely through donation financing from the states and compact provisions for fiscal support of interstate agencies have been enforced against a reluctant legislature. Donation financing subjects the interstate agency to the vagaries of state politics, and as budgetary requirements increase, there is increasing reluctance to fund a program which affects only a portion of the state. Regulatory compacts have been relatively inexpensive in the past, and the states have generally been willing to contribute modestly to their subsistence. However, as these organizations continue to assume a broader responsibility for river basin management, financing will necessarily have to be increased significantly.

Financial innovations such as a "compact district tax" have not been tried on a large scale, although intrastate district taxes have been successful where permitted by state constitutions. The power of taxation is one of the most jealously guarded state powers, and it is improbable that state legislatures would opt for creating an intermediate taxing authority based on interstate cooperation. Most states have "uniformity clauses" which prohibit the levying of tax by a state agency on less than the whole state, but in a minority of states uniformity is satisfied if the tax is uniform within the affected area. Creation of an interstate taxing authority could be attacked in some states as an unconstitutional delegation of taxing power. It has been suggested that where the federal government is a proper and interested party to

69. Id. at 65.
70. Id. at 68.
71. Id.
the compact, the federal taxing power might be invoked to overcome any state constitutional conflict which arose.\textsuperscript{72} Perhaps the most equitable mode of taxation would be a user tax levied against the quantity or quality of effluent returned to the watercourse. User taxation would have the advantage of internalizing the societal costs which the polluter is presently transferring to the general public and would thus serve as an incentive to reduce pollution, which would become a production cost.\textsuperscript{73}

II

WATER POLLUTION CONTROL COMPACTS

There are currently fourteen interstate compacts in operation which expressly refer to water pollution control as a function authorized by the compact agreement.\textsuperscript{74} The emphasis placed on pollution control varies among the compacts from the mere recital “for the prevention of the pollution of such waters” contained in the Red River of the North Compact\textsuperscript{75} to an intricate scheme of enforcement procedures contained in the Susquehanna River Basin Compact,\textsuperscript{76} the most recent compact to receive congressional consent.

A. Administration

Each of the interstate compacts is administered by a commission having express powers granted by the agreement. The size of the commissions and the manner by which commissioners are appointed differ among the compacts. The number of commissioners appointed from each signatory state ranges from one to five.\textsuperscript{77} In most instances the

\textsuperscript{72} Id. at 78.


\textsuperscript{74} See the Appendix for a list of the compacts, the signatory states, and complete citations.

\textsuperscript{75} Art. II.

\textsuperscript{76} Art. 5, § 5.3.

\textsuperscript{77} Three of the compacts provide for one commissioner from each state:

- Delaware River Basin Compact art. 2, § 2.2;
- Klamath River Basin Compact art. IX, § A.1;
- Susquehanna River Basin Compact art. 2, § 2.2.

The following six compacts provide for three commissioners from each state:

- Arkansas River Basin Compact art. V, § A;
- Bear River Compact art. III, § A;
- Ohio River Valley Water Sanitation Compact art. IV;
- Potomac Valley Conservancy District Compact art. I;
- Red River of the North Compact art. V;
- Tennessee River Basin Water Pollution Control Compact art. IV.

Two compacts provide for five commissioners from each state:

- New England Interstate Water Pollution Control Compact art. III;
- New York Harbor (Tri-State) Compact art. IV.
commissioners are appointed by the governor without conditions other than citizenship of the appointing state. However, the Klamath River Basin Compact specifies that the appointees shall be representatives of the water pollution control agencies of the signatory states and the New England Interstate Water Pollution Control Compact requires, in addition, a representative of the state health department, and a member each to represent municipal, industrial, and conservation interests.

Seven of the interstate compacts provide for federal representatives to sit as commissioners. Usually there is a single federal representative, however, the Ohio River Valley Water Sanitation Compact and the Potomac Valley Conservancy District Compact provide for three federal representatives on the commissions. The Tennessee River Basin Water Pollution Control Compact did not provide for federal participation, but Congress included a reservation in the consent which directed the President to "appoint a Federal representative... who shall be recognized by and admitted to said Commission." The representative is directed to maintain liaison between the federal government and the Commission. The federal representative on three of the commissions serves as chairman or presiding officer, but in these cases he does not vote. In both the Delaware and Susquehanna River Basin Compacts the federal government became a signatory party to the agreement, covenanted with the member states. Both compacts

The Great Lakes Basin Compact provides for a minimum of three and a maximum of five commissioners from each state, but each state has only one vote on the commission. Art. IV, §§ B & C.

78. The Commission shall consist of three members. The representative of the State of California shall be the Department of Water Resources. The representative of the State of Oregon shall be the State Engineer of Oregon who shall serve as ex officio representative of the State Water Resources Board of Oregon.

Art. IX, § A.1.

79. For each state there shall be on the commission a member representing the state health department, a member representing the state water pollution control board (if such exists), and, except where a state in its enabling legislation decides that the best interests of the state will be otherwise served, a member representing municipal interests, a member representing industrial interests, and a member representing an agency acting for fisheries or conservation.

Art. III.

80. Arkansas River Basin Compact art. X, § A; Bi-State Metropolitan Development District Compact art. III, § 4; Klamath River Basin Compact art. IX, § A; Ohio River Valley Water Sanitation Compact art. IV; Potomac River Valley Conservancy District Compact art. I; Tahoe Regional Planning Compact art. VIII, § 2.

81. Art. IV & art. I, respectively.

82. Art. XIV, § 3.

83. Arkansas River Basin Compact art. X, § A; Bear River Compact art. III, § A; Klamath River Basin Compact art. IX, § A.1.

84. The Preamble of the Delaware River Basin Compact states: "Be it enacted that the United States hereby consents to, and joins the States of... in the following compact..." The Preamble to the Susquehanna River Basin Compact
make it clear that Congress may withdraw as a party to the agreement or "revise or modify the terms . . . under which it may remain a party by amendment, repeal or modification of [the] statute applicable thereto . . . ."85 Four of the compacts contain no provisions for federal representation.86

B. Water Quality Standards

Federal water pollution control statutes recognize the responsibility of the states for establishing water quality standards and implementing plans for interstate waters flowing through their jurisdictions.87 No express or implied authority for promulgating standards is extended to interstate agencies by the federal statutes,88 however, the states, by delegation of their police powers, can confer upon interstate agencies the authority to set water quality standards.

Three of the compacts contain no reference to standard-setting authority.89 The Potomac Valley Conservancy District Compact, the Susquehanna River Basin Compact, and the Tahoe Regional Planning Compact provide for recommendatory functions. The Interstate Commission on the Potomac River Basin is authorized "[t]o make . . . revise and to recommend to the signatory bodies, reasonable, minimum standards for the treatment of sewage and industrial or other

reads: "The states of . . . and the United States of America hereby solemnly covenant and agree with each other . . . to the Susquehanna River Basin Compact . . . ."

85. Delaware River Basin Compact art. I, § 1.4; Susquehanna River Basin Compact art. I, § 1.4.
86. Great Lakes Basin Compact; New England Interstate Water Pollution Control Compact; New York Harbor (Tri-State) Interstate Sanitation Compact; and Red River of the North Compact.
87. 33 U.S.C. § 1160(c)(1) (1970). If a state failed to adopt water quality criteria and an implementation plan by June 30, 1967, the Secretary of the Interior was authorized to convene a conference to promulgate the required standards. Id. § 1160 (c)(2). In this event, the interstate agencies would participate as interested parties.
88. See 33 U.S.C. § 1160 (1970). However, implicit administrative recognition of the authority of interstate commissions to establish water quality standards was indicated by approval of the standards promulgated by the Delaware River Basin Commission in 1965. But see S.J. RES. 67, 91st Cong., 2d Sess., 116 CONG. REC. 13,477 (1970) wherein congressional consent was withheld from a proposed amendment to the Potomac Valley Conservancy District Compact which purported to grant explicit powers to the Commission to establish basinwide water standards. In opposing the proposed amendment, the Department of the Interior stated: "In our judgment, it would cause duplication, confusion, and delay . . . if the Interstate Commission . . . were empowered to establish water quality standards." Id. at 28,996.
89. Arkansas River Basin Compact, Klamath River Basin Compact, and Red River of the North Compact.
wastes . . . ."  

Provisions in the Susquehanna River Basin Compact are similarly worded but do not specify minimum standards. However, the debate in the House of Representatives preceding the passage of the consenting act emphasized that the power granted by the Compact implied that such standards were to be considered minimum water quality standards, with the states retaining the right to set more stringent standards. It is interesting to note the subtle difference in the wording of the recommendatory provisions of the Potomac and Susquehanna Compacts. The Susquehanna instrument refers to "standards of quality for any waters of the basin"; the Potomac instrument refers to "minimum standards for the treatment of [waters] discharged [into] the streams of the Conservancy District." When read in conjunction with the definition of "basin" in the Susquehanna Compact, one could argue that the standards provision gives the Commission an advisory role with respect to the water quality standards of intrastate waters within the basin, as well as with respect to the interstate waters (to which the Potomac Compact clearly applies). It is doubtful, however, that this interpretation reflects the legislative intent of the signatory states. The Great Lakes Basin Compact provides that "[e]ach party state agrees to consider the action the Commission recommends in respect to . . . measures for combating pollution . . ." but provides no further authority for establishing standards per se.

90. Art. II, § (F); the Tahoe Regional Planning Compact grants authority to set "criteria and standards for uses of land, water, air, space and other natural resources . . . ." Art. V(b)(1). It further provides that such standards are "minimum standards applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to its territory." Art. VI(a).

91. "The commission shall recommend to the signatory parties the establishment, modification, or amendment of standards of quality for any waters of the basin . . . ." Art. 5, § 5.2(c).

92. See statement of Representative Long (Md.) supporting passage of S. 1079, 91st Cong., 2d Sess., 116 CONG. REC. 40,102 (1970). But see Susquehanna River Basin Compact art. 5, § 5.2(e): "The commission may assume jurisdiction whenever it determines . . . that the effectuation of the comprehensive plan so requires [and] the commission may adopt such rules, regulations, and water quality standards as may be required to preserve, protect, improve, and develop the quality of the waters . . . ." This general clause may be construed to grant discretionary power to set basin standards when the states fail to do so to the satisfaction of the Commission. Cf. Delaware River Basin Compact art. 5, § 5.2.

93. Art. 5, § 5.2(c) (emphasis added).

94. Art. 5, § 5.2 (emphasis added).

95. Compare the Susquehanna River Basin Compact's definition ("'Basin' shall mean the area of drainage of the Susquehanna River and its tributaries into Chesapeake Bay . . . .") Art. 1, § 1.2(1) with the definition in the Delaware River Basin Compact ("'Basin' shall mean the area of drainage into the Delaware River . . . .") Art. 1, § 1.2(a) (emphasis added).

96. Art. VII.
The New York Harbor Tri-State Interstate Sanitation Compact and the Ohio River Valley Water Sanitation Compact (ORSANCO) incorporate directly into the compact instrument specific physical and bacteriological standards for sewage discharges. When these early compacts were drafted, paramount concern behind each was the release of untreated domestic sewage into the watercourse. The direct incorporation of sewage standards into the agreements serve to establish the discharge of raw sewage as prima facie evidence of pollution, thereby precluding the need for time-consuming litigation required to prove injury to human health. Once it is proven that substandard treatment exists, the commissions can act expeditiously to assert their enforcement authority. Pollutants other than sewage are referred to only incidentally in the instruments. The ORSANCO agreement provides only that

All industrial wastes discharged . . . shall be modified or treated . . . in order to protect the public health or to preserve the waters for other legitimate purposes . . . to such degree as may be determined . . . by the Commission . . .

The New York Harbor Compact implies that other "polluting matters" shall conform to the same physical and biological requirements as established for sewage.

The Tennessee River Basin Water Pollution Control Commission is given the authority to "establish reasonable physical, chemical and bacteriological standards of water quality satisfactory for various classifications of use." Signatory states expressly agree to "work to establish programs of treatment of sewage and industrial wastes which will meet [the] standards established." Similar wording is used in the New England Interstate Water Pollution Control Compact. It is generally the express responsibility of the states to classify their interstate waters as to proposed highest use prior to establishing interstate standards. This policy recognizes that no single or universal standard is practicable because of variability in location, size, character, flow, and uses made of the watercourse.

The Delaware River Basin Compact contains the most comprehensive procedure of any of the interstate water pollution compacts for establishing standards of water quality, providing that

97. Art. VII & art. VI, respectively.
98. E. CLEARY, supra note 57, at 54.
99. Art. VI.
100. Art. VII, § 1.
101. Art. VII, § B.
102. Id.
103. Art. V.
the commission, after such public hearing may classify the waters of the basin and establish standards of treatment. . . . After such investigation, notice and hearing the commission may adopt and from time to time amend and repeal rules, regulations and standards . . . in accordance with the comprehensive plan.\textsuperscript{104}

A well-defined set of effluent quality requirements has been adopted for the Basin by action of the Delaware River Basin Commission pursuant to this authority.\textsuperscript{105} The Susquehanna River Basin Compact closely follows the wording of the Delaware instrument. A provision regarding the authority of the Susquehanna River Basin Commission to set standards through investigations and hearings is incorporated into the Susquehanna Compact;\textsuperscript{106} however, the drafters modified the Delaware provision so as to permit the Susquehanna Commission only to "recommend" and "encourage" the member states to establish standards and uniform enforcement measures that meet the objectives of the Commission's comprehensive plan. It remains to be seen to what extent these restrictive provisions will reduce the effectiveness of the standard-setting authority of the Susquehanna Commission in comparison with the apparent success of the Delaware Commission which is empowered to establish standards on its own.

C. Enforcement

Enforcement power is the key to successful water quality management. Uniform standards are of little value if they are differentially enforced among the signatory parties. Successful operation of an interstate compact relies heavily upon the good faith of the party states, but unless the interstate agency is granted sufficient enforcement powers to act in the absence of state initiative, the agreement is but a naked contract to be enforced, if at all, in the courts. Four compacts do not provide for any enforcement authority.\textsuperscript{108} The Arkansas River Basin Compact utilizes "the provisions of the federal water pollution control act in the resolution of any pollution problems which cannot be resolved,"\textsuperscript{110} but there is no direct reference to inclusion or exclusion of enforcement power in the Compact. Reference to the Federal Water Pollution Control Act in the Arkansas Compact does not provide en-

\begin{footnotesize}
\textsuperscript{104} Art. 5, § 5.2.
\textsuperscript{106} Art. 5, § 5.2(e).
\textsuperscript{107} Id. § 5.2(c); see note 91 supra.
\textsuperscript{108} Id. § 5.2(d).
\textsuperscript{109} Great Lakes Basin Compact; New England Interstate Water Pollution Control Compact; Potomac Valley Conservancy District Compact; Red River of the North Compact.
\textsuperscript{110} Art. IX, § E.
\end{footnotesize}
enforcement authority for the compact agency but merely permits the usual federal intervention at the request of the governor of a state subject to interstate pollution which is endangering the health or welfare of the public.\textsuperscript{111}

The Klamath River Basin Compact and the Tennessee River Basin Water Pollution Control Compact require a complaint or certification by a state agency that interstate water pollution is not being properly abated by a signatory party before the enforcement procedure is initiated.\textsuperscript{112} Upon proper complaint, these Commissions are authorized to investigate, hold hearings or conferences among the state water pollution control agencies, and recommend appropriate corrective action. If appropriate action is not taken within a reasonable time, the Commissions may hold further hearings (with notice to the alleged violators) and issue an abatement order.\textsuperscript{113} The Tennessee Compact requires that the order shall be withdrawn, modified, or made permanent within thirty days after the hearing, contingent upon the approval of a majority of the Commissioners from each of not less than a majority of the party states, provided that such order receives the assent of not less than a majority of the Commissioners from such state.\textsuperscript{114}

Upon its own cognizance, the ORSANCO\textsuperscript{115} Commission may issue abatement orders, subsequent to proper investigation and hearings, when violation of the interstate standards incorporated into the agreement occur. Such order becomes effective only if it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.\textsuperscript{116}

Early critics of ORSANCO regarded the restraints imposed by this clause as greatly limiting the effectiveness of the Compact for enforcement purposes. Through 1967 there had only been six occasions of

\textsuperscript{111} See text accompanying notes 3-6 supra.

\textsuperscript{112} Art. VII, § C & art. VIII, § A, respectively. The Klamath Compact has no provision for establishing interstate water quality standards; "pollution" is defined as "the deterioration of the quality of the waters of the Upper Klamath River Basin within the boundaries of such state which materially and adversely affects beneficial uses of waters of the Klamath River Basin in the other state." Art. VII, § C. The Tennessee Compact provides that "[a] state pollution control agency of any party state may certify to the Commission an alleged violation of the Commission's standards of quality of water entering said state." Art. VIII, § A.

\textsuperscript{113} Klamath River Basin Compact art. VII, § C; Tennessee River Basin Water Pollution Control Compact art. VIII, § A.

\textsuperscript{114} Art. VIII, § A.

\textsuperscript{115} Ohio River Valley Water Sanitation Compact.

\textsuperscript{116} Art. IX.
formal intervention by the Commission.\textsuperscript{117} However, the success of an interstate compact is not measured by the number of enforcement actions brought by the agency, but rather by the effectiveness of its abatement procedures. Through 1967 there had been only six occasions for party states to ORSANCO to look to the enforcement power of the Compact when their own individual police powers failed to resolve a pollution problem.\textsuperscript{118} The requirement of approval both by a majority of the Commission as a whole and by the individual state affected as conditions precedent to an enforceable order thus does not necessarily reduce the effectiveness of a compact if the signatory states perform their respective obligations in good faith.

The Delaware River Basin Compact, the New York Harbor Compact, and the Susquehanna River Basin Compact grant enforcement authority to their respective commissions upon the finding that commission standards, rules, or regulations are being violated. Provisions are made for proper investigations and hearings. Each of these three compacts permits the commission to institute judicial action in its own name to compel compliance with its orders or regulations.\textsuperscript{119}

Judicial enforcement of final abatement orders is provided by six of the compacts.\textsuperscript{120} The Delaware, Klamath, and Tennessee River Basin Compacts provide for review of the administrative decisions leading to the order.\textsuperscript{121} Judicial power to enforce or review an abatement order is variously granted to “any court of general jurisdiction of the state where such discharge is occurring,” “any court of competent jurisdiction in any of the party states,” or “any court of competent jurisdiction in any of the party states.”\textsuperscript{122} or “any court of competent jurisdiction in any of the party states.”\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{117} E. Cleary, \textit{supra} note 57, at 117.
\item \textsuperscript{118} In almost every instance where the enforcement power of ORSANCO has been invoked, the state in which the pollution originated has requested the enforcement action be taken. \textit{Id.} at 117-22.
\item \textsuperscript{119} Art. 5, § 5.4, art. XI, § 1 & art. 5, § 5.3(b), respectively.
\item \textsuperscript{120} Delaware River Basin Compact art. 5, § 5.4; Tennessee River Basin Water Pollution Control Compact art. VIII, § B; Klamath River Basin Compact art. VII, § 3; New York Harbor Compact art. XI; Ohio River Valley Sanitation Compact art. IX; Susquehanna River Basin Compact art. 5, § 5.3(b).
\item \textsuperscript{121} Delaware River Basin Compact art. 5, § 5.4.
\item \textsuperscript{122} Klamath River Basin Compact art. VII, § C.3.
\item \textsuperscript{123} Tennessee River Basin Water Pollution Control Compact art. VIII, § B.
\end{itemize}
jurisdiction.”124 The Klamath River Basin Compact and ORSANCO expressly grant jurisdiction to United States District Courts.125 Congressional reservations in the consenting acts to the Delaware and Susquehanna River Basin Compacts purport to grant original jurisdiction to the United States District Court and provide that

all cases or controversies arising under the Compact . . . and any case or controversy so arising initiated in a State Court shall be removable . . . in the manner provided by [28 U.S.C. § 1446].126

Although federal jurisdiction is not expressly mentioned in the section of the Susquehanna Compact which deals with enforcement procedures with respect to water quality management and control, the general grant of powers to the Commission implies such jurisdiction, and when read with the congressional reservation, places enforcement of abatement orders within the jurisdiction of the district courts.

CONCLUSIONS

In reply to the rhetorical question posed by the title of this Article: The Interstate Compact—Paper Tiger or Effective Regulatory Device? —the answer is that compacts are both. ORSANCO is probably the best example of interstate dedication to the improvement of basinwide water quality although there is still much to be done on the Ohio River with respect to industrial discharges and acid mine drainage.127 ORSANCO’s relative effectiveness evolved from a spirit of cooperation among the eight signatory states which had the foresight to identify the collective problems of environmental degradation resulting from untreated sewage long before the current concern for ecology. More importantly, the Ohio Valley states created an interstate administrative agency which is capable of assuming the custodial functions of monitoring and stream quality evaluation, maintaining a hazard-alert system, investigating citizens’ complaints and patrolling the river to detect violations.128 Without the capability to perform these necessary detection and policing functions, an interstate agency is unable to administer an effective regulatory program. The Delaware River Basin Compact and the similar Susquehanna River Basin Compact have the

124. Delaware River Basin Compact art. 5, § 5.4.
125. The Klamath River Basin Compact grants jurisdiction to the “United States District Court for the district where the discharge is occurring.” Art. VII, § C.3; The Ohio River Valley Water Sanitation Compact grants jurisdiction inter alia to “any United States District Court in any of the signatory States.” Art. IX.
126. Delaware River Basin Compact pt. II, § 15.1(p); Susquehanna River Basin Compact § 2(o).
128. E. Cleary, supra note 57, at 273.
potential for developing regulatory machinery capable of effective water quality management. However, the earlier prosecution of basin-wide pollution control under INCODEL suffered because of the differing approach to pollution problems among the four signatory states. In many respects the interstate compact agency is an image of its progenitors, the states, and reflects the deficiencies and faults of the parent governments. Dedicated pollution abatement programs within the signatory states will carry their momentum into the interstate compact and result in an effective regulatory institution, given adequate resources.

Other compacts are indeed "paper tigers." The Tennessee River Basin Water Pollution Control Compact remains quiescent because of the failure of Alabama, Georgia, North Carolina, and Virginia to ratify the Compact. Other compacts, though fully ratified by the signatories, remain inchoate and less than viable regulatory devices. The federal government is partly to blame for the emasculation of the interstate compact approach to water quality management. Congress has failed fully to recognize the interstate compact agency as a regulatory entity within the Federal Water Pollution Control Act. An amendment to the Act in 1965 recognized only the responsibility and authority of the states to adopt water quality criteria by the June 30, 1967 deadline. Prior to 1965 the Ohio Valley states relied on ORSANCO for 18 years to promulgate their water quality standards, but after enactment of the amendment each state was required to conduct its own hearings and submit water quality standards for federal approval.

The lack of recognition by the federal government of interstate compact agencies as mechanisms to conduct hearings and establish interstate water quality standards must be construed as either a serious oversight or a manifestation of poor understanding on the part of federal authorities as to the place and function of interstate regulatory agencies.

129. Interstate Commission on the Delaware River Basin, which was active from 1936-1948; see text accompanying notes 26-31 supra.

130. Martin, supra note 30, at 82.

131. E.g., Arkansas River Basin Compact, Bear River Compact, Red River of the North Compact.


134. E. Cleary, supra note 57, at 282.

135. One must recognize the argument advanced by those who oppose granting interstate compact agencies the authority to set and enforce standards, on the basis that conflicts between the interstate authority and a signatory state might result in jurisdictional confusion. However, the superiority of the interstate compact in such conflict cases seems well established by Green v. Biddle, 21 U.S. (8 Wheat) 1 (1823). See text accompanying note 52 supra. Furthermore, state representation on the commission
The fact remains that the key to effective interstate administration of water quality management through interstate compacts is good faith performance among the states in carrying out the intent of the covenant. Until necessity forces relaxation of the tenacious hold with which states cling to their sovereign powers there is little chance that jurisdictional boundaries will be adjusted to allow significant delegation of interstate police powers to secondary governmental units.

While it is possible to structure innovative new institutions to handle water quality management, it is doubtful that any practical institution could be devised at the present time which would possess the powers needed to initiate an effective program and yet be acceptable to the states within the present philosophy of state and federal sovereignty. Perhaps not until their own failings impel the federal government to begin to move toward increased preemption of standard-setting and enforcement, will the states seek constructive and cooperative enforcement of the interstate compacts so as to avoid federal interference.

should assure that its interests are protected and balanced against the interests of sister states if the proper administrative framework is constructed.
### Appendix: Interstate Compacts Dealing with Water Quality Control

<table>
<thead>
<tr>
<th>Interstate Compact</th>
<th>Signatory States</th>
<th>Date of Consenting Act</th>
<th>Statutes at Large</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas River Basin Compact</td>
<td>Kansas, Oklahoma</td>
<td>Nov. 7, 1966</td>
<td>80 Stat. 1409</td>
</tr>
<tr>
<td>Bear River Compact</td>
<td>Idaho, Utah, and Wyoming</td>
<td>Mar. 17, 1958</td>
<td>72 Stat. 38</td>
</tr>
<tr>
<td>Bi-State Metropolitan Development District Compact</td>
<td>Missouri and Illinois</td>
<td>Aug. 31, 1950</td>
<td>Initial Compact: 64 Stat. 568</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Additional Powers Conferred: 73 Stat. 582</td>
</tr>
<tr>
<td>Klamath River Basin Compact</td>
<td>California and Oregon</td>
<td>Aug. 30, 1957</td>
<td>71 Stat. 497</td>
</tr>
<tr>
<td>Potomac Valley Conservancy District Compact</td>
<td>District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia</td>
<td>Jul. 11, 1940</td>
<td>Initial Compact: 54 Stat. 748 Amended: 84 Stat. 856</td>
</tr>
<tr>
<td>Red River of the North Compact</td>
<td>Minnesota, North Dakota, and South Dakota</td>
<td>Apr. 2, 1938</td>
<td>52 Stat. 150</td>
</tr>
<tr>
<td>Tahoe Regional Planning Compact</td>
<td>California and Nevada</td>
<td>Dec. 18, 1969</td>
<td>83 Stat. 360</td>
</tr>
<tr>
<td>Tennessee River Basin Water Pollution Control Compact</td>
<td>Kentucky, Mississippi, and Tennessee†</td>
<td>Aug. 23, 1958</td>
<td>72 Stat. 823</td>
</tr>
</tbody>
</table>

† Tennessee became a signatory party conditional upon adoption by North Carolina and Alabama, neither of which have yet ratified the compact.