DESCRIPTION OF AVAILABILITY INSTRUCTIONAL ALTERNATIVES FOR IMPROVED CHESAPEAKE BAY MANAGEMENT

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Maryland Coastal Zone Management Program

DESCRIPTION OF AVAILABLE INSTITUTIONAL ALTERNATIVES FOR IMPROVED CHESAPEAKE BAY MANAGEMENT

Prepared for the

CHESAPEAKE BAY LEGISLATIVE ADVISORY COMMISSION

by

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PREFACE

This report was prepared for the assistance of the Chesapeake Bay Legislative Advisory Commission. It is the first segment of a two-phase study, and is designed to identify management structures for the Chesapeake Bay.

The Chesapeake Bay Legislative Advisory Commission (CBLAC) came into existence through the passage of resolutions in the General Assemblies of Maryland and Virginia during the 1978 session. The Commission's charge is to examine existing and proposed institutions and to report to the 1980 sessions of both state legislatures with recommendations for the most desirable Bay management alternatives. In carrying out this undertaking the Commission sought and received the counsel of numerous private individuals, scientists, and a plethora of local, state and federal agencies. These contributions have ranged from brief letters to extensive studies on management needs and options for the Chesapeake Bay. The Commission initially identified the basic issues and sought information reflecting on these issues. A substantial amount of raw informational data has been contributed, some of which generated new management ideas.

This report is an attempt to synthesize the collected information for presentation to the Commission. There are no

new discoveries or recommendations in this initial report; this study identifies those management techniques presently utilized for the Bay and secondly explores other available management structures. We have drawn upon the ideas and information submitted to the Commission and to some extent have incorporated that material into the discussions of the respective institutions. The discussion of these institutional choices is not carried out as a pure academic endeavor but as an attempt to relate these institutions to the social, ecologic and political character of the subject, the Chesapeake Bay.

INTRODUCTION: ADAPTING GOVERNMENT INSTITUTIONS FOR A NATURAL SYSTEM

For many years concerned observers have seen an increase in the pressures and stresses placed upon the resources of the Chesapeake Bay and its tributaries. As human activities have increased in intensity throughout the Bay watershed, there has been a growing consensus that the resources of the Bay must be husbanded by the concerted efforts of all concerned jurisdictions.

The Chesapeake Bay was formed by geologic and hydrologic forces without regard to the inter-jurisdictional boundaries which man would later impose across parts of this natura system. The natural forces and human activities which affect this system are unconstrained by physical or jurisdictional boundaries or even interagency divisions of responsibility. For these reasons the question has been presented with increasing urgency whether the residents of the Bay region should reshape their management institutions to better adapt to the natural characteristics of this interstate ecosystem.

The adaptation of governmental institutions to respond to such needs is not a novel concept. The array of problems that state and local governments must address daily have often required solutions that transcend the limitations upon the usual bureaucratic and legislative apparatus. As a result,

many states have sought innovations in governmental machinery which can successfully overcome legal and political constraints imposed by state and local boundaries, without necessarily abdicating their authority in favor of federal controls. Attempts to tinker with the seemingly sacrosanct delimitation of federal and state responsibility date back to the earliest years of the United States itself. More recently, especially in the period since the New Deal, the interest in inter-governmental organizations has proliferated. These precedents offer guidance in analyzing the potential benefits of such organizations as adapted to the Chesapeake Bay situation. A careful examination of their form and effectiveness may lead to a better understanding of potential administrative, legal and political obstacles that may arise as officials formulate alternatives for better management and coordination of governmental activities in the Chesapeake Bay region.

From time to time various specific institutional changes have been suggested as a means of improving one or more areas of resource management and economic development in the Chesapeake Bay region. This report examines a number of these specific alternatives, and defines the characteristics and limitations of each.

1.0 IMPROVED BAY MANAGEMENT UNDER EXISTING INSTITUTIONS

1.1 Introduction

A number of local, state and federal administrative agencies have been assigned roles in management, preservation and development of land and water resources in the Chesapeake Bay region. Some of these agency functions are ineffective, historical artifacts; on the other hand, the responsibilities of many agencies have evolved and developed according to changing needs and today represent the efforts of many years in consolidating, reforming and improving agency functions. Regardless of their faults and limitations, existing agencies may be considered as vehicles for improved Bay management for several reasons. First, existing agencies have a history of action and a familiarity with the problems of the Bay and with the related functions of other agencies. The value of this experience should not be discounted. By adapting existing institutions, management changes would be more evolutionary in nature and would avoid the difficulties in organizing, funding, staffing, equipping, and transferring functions which might be involved with the creation of a new management institution. Existing political relationships would be preserved. Existing funding sources would be available.

The sections which follow summarize the basic governmental functions and the primary roles of existing agencies in each of the six subject areas identified for study by the Chesapeake Bay Legislative Advisory Commission. This outline is followed by a discussion of some past efforts and accomplishments of these agencies and some suggestions for the improvement of existing institutions in their response to interstate problems.

1.2 Overview of Primary Agency Responsibilities

The Commission has identified six functional areas for specific consideration: transportation, fisheries and wildlife, recreation, economic planning and major facility siting, research and information, and water quality. This overview will briefly describe the functions of the various federal and state agencies in each particular area and the relationship of one to the other.[1]

Transportation--Grouped under the general heading of transportation are governmental activities including traffic management, port development, channel dredging, dredge spoil disposal, and the handling of emergencies.

The principal federal agencies having responsibilities in these areas are the Coast Guard, the Army Corps of Engineers and the Environmental Protection Agency. The Coast Guard has authority over vessel traffic control and serves as the primary enforcement tool for ship discharges

and oil spills.[2] The Army Corps of Engineers is responsible in a proprietary and regulatory capacity for the improvement of navigable waters of the Chesapeake Bay. The erection of structures such as wharves, piers, or pipelines requires Corps permission. The Corps of Engineers' authority to regulate dredging and spoil disposal in navigable waters is coordinated with the Environmental Protection Agency and other interested federal, state and local agencies. The Corps may undertake its own dredging projects, after consultation with other agencies and Congressional authorization and it must also regulate private dredging activity.[3] EPA, the Fish and Wildlife Service and other federal agencies charged with protecting environmental interests have the responsibility to comment on the Corps' developmental and regulatory activities.

In Maryland the Department of Transportation is involved with Bay-related transportation issues through the Maryland Port Administration.[4] The Administration is responsible for promoting harbor facilities throughout the State. Because of its relative size and importance, the port of Baltimore is the focus of MPA's attention. The Administration not only facilitates the activities of private industry within port locations, but also operates its own terminal facilities and provides port police. The Department of Natural Resources also regulates certain

transportation related activities. For instance, the Department (together with the Board of Public Works) must also authorize any dredging in Chesapeake Bay waters.[5] The Water Resources Administration, a subagency of Natural Resources, regulates the handling of oil and licenses those facilities which engage in this activity.[6] The Waterways Improvement Fund is administered by the Department to finance dredging projects and other improvements to navigation.[7] The Natural Resources police not only enforce the State game laws, but also enforce boating safety regulations.

In Virginia the transportation sector is managed and regulated by the State Water Control Board, the Virginia Port Authority, and the Marine Resources Commission. The State Water Control Board has responsibility for promulgating and enforcing regulations concerning the discharge of oil and other hazardous substances into State waters.[8] To the extent that transportation activities affect wetlands, the Marine Resources Commission plays an important part by virtue of its responsibility for shellfish beds and administration of the State Wetlands Act.[9] Finally, the Virginia Port Authority functions in much the same way as the Maryland Port Authority.[10] It is charged with the promotion, improvement and long-term management of Virginia's ports.

Fisheries and Wildlife--This topic embraces the management of migratory fin and shellfish, the maintenance of

spawning and nursery areas, wetlands protection, joint fisheries management and wildlife and game resources.

In this area the federal agencies are primarily concerned with enforcing the various game laws which protect migratory species and with regulating activities with a potential for altering the existing environment. The game laws are enforced by wardens of the U.S. Fish and Wildlife Service, who closely coordinate their work with state enforcement agencies in Maryland and Virginia.[11] The Department of the Interior is also concerned with the management of national parks and wildlife refuges in the Bay area. Agencies of the Department of Commerce have two important responsibilities related to fisheries and wildlife. First, the National Marine Fisheries Service is responsible for fishery resources development activities, which include: market research, loan guarantees for rehabilitating or constructing vessels and suggestions for improving market practices.[12] Commerce's second area of responsibility is promotion of state-level coastal zone management through the Office of Coastal Zone Management.[13]

The Environmental Protection Agency has a secondary role in fisheries and wildlife protection through the National Pollution Discharge Elimination System Program and by virtue of its advisory and consulting role in the spoil disposal and wetlands permit programs. Finally, the Corps of Engineers, as the

permitting authority for wetlands alterations and dredged spoil disposal, has significant functions related to fisheries and wildlife.

Within the State of Maryland, primary jurisdiction for fisheries and wildlife is in the Department of Natural Resources. The Department's Natural Resources Police Force coordinates with the federal agencies the enforcement of federal and state game laws. The names of the Department's subagencies are descriptive of their program responsibilities: for fish and wildlife resources: the Tidewater Fisheries Division and Coastal Resources Division, both within the Tidewater Administration, the Wildlife Administration, and the Wetlands Division of the Water Resources Administration.[14] Fisheries and wildlife resources where the State of Maryland has proprietary interest are managed by the Forest or Parks Services. Shellfish sanitation is addressed by the Department of Health and Mental Hygiene.

In Virginia the Marine Resources Commission has responsibility for fin and shellfish and for the environs which they inhabit. The Commission oversees the administration of the state's wetlands laws and regulates the dredging of subaqueous areas.[15] The Commission is assisted by the Virginia Institute of Marine Sciences, which conducts studies of the resource, its environment and the effects of pollutants on the resource. The State Health Commissioner also has responsibility for shellfish: he may inspect shellfish

wherever they are harvested within the State, close shellfish beds, or restrain any entity from selling, buying or marketing shellfish if he finds that the shellfish are unfit for market.[16] The Department of Conservation and Economic Development and the Commission of Outdoor Recreation each have an important impact in this area through their respective management and planning functions related to State-owned lands.

Recreation--This area includes a variety of diverse concerns such as facilities on boats, provision of public access to the Chesapeake, recreational traffic management, hunting and fishing, and regional problems related to marinas and private harbors.

At the federal level the Coast Guard, in consultation with the Environmental Protection Agency is charged with responsibility for establishing and enforcing regulations for marine sanitation devices for boats.[17] The Coast Guard also has responsibility for boating safety and for navigational aids. The National Park Service and the Bureau of Fish and Wildlife, which maintain parks and refuges, respectively, have control over public access to the Chesapeake over lands which they manage. The Fish and Wildlife Service has responsibility, as indicated previously, to enforce game laws for migratory species. The Corps of Engineers may have a developmental or regulatory role in relation to the construct and maintenance of recreational boating facilities.

Maryland has exercised some degree of responsibility in all these areas. Of least regulatory concern has been the overboard disposal of human waste from boats. Through the water quality certification procedure and the wetland regulatory process the state has promoted the use of adequate onshore sanitary facilities and pumpout stations at marinas. The Maryland Department of Natural Resources is the agency of State government with responsibility for providing public access to the Bay. This is accomplished, first, by the Parks and Forest Services which provide access, where appropriate, over State lands, or, second, by the Waterway Improvement Division of the Tidewater Administration, which provides services and improvements to promote recreational boating on the Chesapeake Bay. The Waterway Improvement Division, in cooperation with the Marine Police, supplements federal efforts to provide navigational aids and also marks channels, clears obstructions, and undertakes some dredging.[18] The Marine Police enforce boat safety laws and render assistance where needed. The Counties and municipalities often provide facilities or parks for public access to the Bay and local zoning has a determinative impact on development of marinas and private harbors.

The State of Virginia has a variety of programs affecting recreation. Through its State Water Control Board,

the state has promulgated rules and regulations for controlling the discharge of sewage from boats.[19] The Department of Conservation and Economic Development, Division of Parks, is a primary provider of public access to the Chesapeake Bay in Virginia. The Commission on Outdoor Recreation has overall planning responsibility for outdoor recreational facilities. The Game and Inland Fisheries Commissions is in charge of issuing licenses for sport fisheries. Marinas and private harbors are greatly affected by the actions of the Marine Resource Commission in enforcing the State Wetlands Act. Just as in Maryland, local zoning and harbor regulations may have a significant effect on development of marinas and private harbors.

Economics, Planning and Major Facility Siting--This topic includes the location of Bay-related commercial and industrial activities; the allocation of areas for defined uses; and the long-term projection of trends and opportunities.

None of the federal agencies seek directly to impose a federal plan on the Chesapeake Bay. Nevertheless, the federal presence on the Bay is so pervasive--indeed, overwhelming in certain sectors--that the federal government represents an important planning entity on the Bay. Congress has asked the Corps of Engineers to make a comprehensive study of the Chesapeake Bay and there is currently a congressionally authorized EPA study of the Bay. These studies are in addition to

the ongoing Corps of Engineers planning program to identify appropriate waterway improvement projects. The Coastal Zone Management Program, discussed previously, does not seek to impose a federal plan, but does establish federal standards for state plans. While an effort has been made to coordinate federal activities under the federal permit programs, there is less attention to coordinating federal planning activities and, in fact, these activities are largely independent efforts.

In Maryland the State Department of Planning provides certain overview functions for the northern part of the Chesapeake Bay. The Department of State Planning's functions have been devised to not conflict or impinge upon local zoning authority.[20] The Department engages in studies and reviews designed to provide an understanding of future trends. The Department also seeks to coordinate the activities of federal, state and local entities. The Department plays an active role pursuant to the National Environmental Policy Act by coordinating the various state and local submissions which form a part of the NEPA review. Other resource-oriented planning in Maryland is fragmented among several agencies including the Coastal Resources Division of the Tidewater Administration, the planning sections of the Water Resources Administration and the water and sewer programs of the Department of Health and Mental Hygiene Environmental Administration.

The Maryland Department of Economic Development has primarily served to support Maryland's search for new industry.[21] The basic thrust of the Department is to develop studies which identify economic opportunities and resources in Maryland which can be utilized by outside industry. The Maryland Port Administration, as discussed previously, serves as a catalyst and facilitator of Maryland's port needs. In that capacity long range studies and planning are undertaken, efforts which can have a substantial impact on the location of major port facilities.[22] The Maryland Department of Natural Resources is responsible for the Maryland Power Plant Siting program, which is authorized to acquire power plant sites and to review sites selected by electric utilities.[23] This program was enacted to facilitate the selection of these sites, a process which had sometimes been hampered by local opposition. Another major state program affecting major facilities decisions is the Maryland Coastal Facilities Review Act, providing a particularly comprehensive review mechanism for the siting and construction of energy-related facilities including refineries, pipelines and LNG terminals.[24] Even with these state-level planning and regulatory programs, basic land use decisio in Maryland remain the province of the counties and municipalities.

In Virginia mechanisms for promoting economic

activity in the Bay regions of the State are not as formalized as in Maryland. A principal proponentof economic activity is the Virginia Port Authority, which has been discussed previously. VPA often acts in support of the local jurisdictions, which have their own programs to encourage new industry. Other types of new businesses are promoted by the Division of Industrial Development. Virginia has not enacted a State program for major facilities siting, comparable to Maryland's Power Plant siting law. The Council on the Environment has assumed responsibility for the state's Coastal Resources Management efforts and provides an inter-agency liaison on projects which pose possible environmental impacts.

Research and Information--This area of concern includes means for identifying informational needs; the coordination of research efforts; and the communication of research results to users.

At the federal level, little coordination exists to effectively utilize the massive amount of research that is generated pursuant to federal programs. While efforts have been made to coordinate federal activities related to permit programs there has been less interest and inclination to make similar attempts in the scientific area. Congress has supported this trend by authorizing various federal agencies to conduct Bay studies. Within the last decade

both the Corps of Engineers and the Environmental Protection Agency have been charged with carrying out substantial studies of the Chesapeake Bay. All the federal agencies which have been mentioned in this overview participate to some degree in funding research on the Chesapeake Bay. Without effective coordination, it is inevitable that there is overlap and duplication.

Major state and private research institutions carrying out Bay-related research include the Virginia Institute for Marine Studies, the University of Maryland, the Smithsonian Institution, Johns Hopkins University and numerous private consulting firms. Also many state agencies conduct extensive research programs in their respective areas

Water Quality--This area of concern includes effluent and receiving water standards; stormwater management and sediment control and other nonpoint source water quality problems.

Since the passage of the Federal Water Pollution Control Act Amendments in 1972 the Environmental Protection Agency has been the lead agency at the federal level in insuring water quality. Under the National Pollution Discharge Elimination System, EPA has established pollution control and has disbursed funds for the construction of sewage treatment plants.

EPA comments upon Corps permit applications to assur

the protection of water quality. When periodic or accidental water quality incidents, such as oil spills, occur, EPA works with the Coast Guard to enforce regulations in this area.

In Maryland the Department of Natural Resources has been delegated responsibility for administering the federal discharge permits program. The State Department of Health and Mental Hygiene, acting through its Environmental Health Administration, shares responsibilities for determining whether shellfish beds are safe and for regulating toxic substances. It has regulatory control over county comprehensive sewer and water plans. The Environemntal Health Administration directs the wastewater treatment works program for the state and is responsible for approving the construction of treatment plants and operating certain of these facilities. Another important component in insuring water quality is proper stormwater management and sediment control. While the Maryland Department of Natural Resources has oversight responsibility in this area, the primary regulatory focus is upon local governments to enforce adequate sediment control plans for active construction sites.

In Virginia, the State Water Control Board has the regulatory responsibility for setting water quality standards and regulations and for enforcing the same.[26] Virginia, like Maryland, has a water quality program acceptable to the federal government and has been delegated N.P.D.E.S authority. The Virginia Institute of Marine Sciences provides

extensive scientific backup and analysis for the water quality program. The Water Control Board shares responsibility with the State Department of Health for the construction, planning operation and monitoring of sewage treatment facilities.[27] Sediment control in Virginia is a mixture of state and local responsibility. A State plan is developed which is administered at the local level. If localities choose not to follow the state plan, legal action can be initiated to force compliance.

The following sections will highlight the way in which existing institutions have responded to problems of interstate concern in the past, and how this might be further adapted for greater coordination across state lines.

1.3 Past improvements in the interstate management capabilities of existing agencies.

In recent years a variety of agencies and institutio have been involved in cooperative efforts in response to Bay-related problems which concerned more than one state.[28] In interviews with agency personnel conducted under the sponsorship of the Chesapeake Bay Legislative Advisory Commission,[29] a number of such instances were discussed which reveal the scope of past efforts. For example, as water consumption in the greater Washington, D.C. area approached the limits of available supplies in the Potomac River, it became necessary for the two states and the Distric

of Columbia to negotiate a "Potomac River Low Flow Allocation Agreement" to assure an equitable distribution of water. (In these negotiations the District of Columbia was represented by the U.S. Army Corps of Engineers, which is charged with the maintenance of the city's water supply). This resolution avoided the need to resort to litigation for an apportionment.

Oil Spill emergencies have sometimes resulted in cooperative action. In 1978, for example, Maryland volunteered to make its oil containment and clean-up resources available to Virginia on a contractual basis to assist with an oil spill near Chesapeake Beach, Virginia. More recently, in October, 1979, the State of Maryland provided assistance to the Coast Guard on a contractual basis in the containment of a barge spill in the Potomac River. In another instance Virginia officials sued to recoup the costs of cleaning up an oil spill from a Steuart Petroleum Company barge. The State of Maryland, among others, submitted an amicus brief in that case supporting the right of the State of Virginia to conduct an oil spill cleanup program independent of that maintained by the federal government.

A more permanent example of past interstate cooperation is the Potomac River Compact of 1958 creating the Potomac River Fisheries Commission. The waters of the Potomac are the only waters which are shared by the fishermen of both

states. The Commission has been authorized to regulate this joint fishery and in doing so it frequently exchanges technical information with the fisheries agencies in each state. Similarly, both states have joined with 13 other states in the Atlantic States Marine Fisheries Commission, which received congressional approval in 1942. This Commission is oriented principally toward problems of migratory, marine species and has provided a forum for discussion among the member states of issues confronting their coastal fisheries.

Another ongoing activity is the interaction required under federal law when a discharge authorized by one state may affect water quality in another state. The principal effect of this requirement has been to require Virginia to notify the Maryland Water Resources Administration when considering the issuance of discharge permits into the Virginia tributaries of the Potomac River. Also, because the entire Potomac River is within Maryland's regulatory jurisdiction, Maryland must issue any discharge permit for Virginia sources discharging into the Potomac. The administration of this program in each state under the National Pollution Discharge Elimination System has thus provided a formalized, albeit limited, interaction in the management of pollution in a major waterbody of the Chesapeake Bay drainage basin. A interjurisdictional cooperation occurred in the development of Section 208 areawide water quality management

plans for the Washington metropolitan area on both sides of the Potomac through the exchange of drafts and comments.

In the area of research, the organization of the Chesapeake Research Consortium has enabled the principal research institutions in the Bay region to share their complementary resources in undertaking a wide range of studies. The Virginia Institute of Marine Science, the Johns Hopkins University, the University of Maryland and the Smithsonian Institution as members of CRC, have benefitted not only through direct participation in joint scientific investigations, but have also obtained indirect benefits from the open communication among scientists fostered by this association.

A related joint research effort is being conducted by the Virginia Institute of Marine Science and the Maryland Geological Survey, which have undertaken separate but complementary research programs for the purpose of collecting baseline information on the sediments, chemicals, and benthic organisms of the Chesapeake Bay bottom. These two research programs were funded jointly by federal grants and the implementation of this research effort has resulted in a high level of cooperation and coordination, including exchanges of equipment when necessary. To the extent that one agency may have special expertise in carrying out certain types of analyses on bottom samples, it is assigned these responsibilities for the entire Chesapeake Bay study. As a result, the entire study is being conducted in a more effective manner than either

state could have achieved acting alone.

These interactions are by no means exhaustive of the number of times Maryland and Virginia have cooperated on problems of mutual concern. However, they are illustrative of the various ways in which the two states can interact and suggest the possibility of extending these types of efforts into new fields.

Three vehicles have been (and continue to be) availa for the evaluation of the adequacy of past efforts to solve problems of interstate concern. Bi-state conferences have been held in recent years to provide a forum for an exchange of views and information. While these conferences have been widely attended and well publicized, the conference format inherently has limited utility in producing concrete changes in legislation or administrative regulations. The lack of a scheduled series of follow-up activities to produce the detail work needed to act upon insights gleaned at the conference ha limited the conference impact to an educational one. The interaction of personnel from both states which has occurred at conferences is an important benefit, yet is difficult to appraise in its actual contribution to improved management.

The impermanence of the conference format may be remedied to some extent by the recent initiatives of the legi lative and executive branches of the two states. The Chesape Bay Legislative Advisory Commission, although only programmed

at present for a two year period of investigation, is not subject to the one-time-only constraints of previous conferences. Such a Commission could be empaneled as a permanent aid to the legislatures, meeting in the months between sessions to investigate problems of baywide interest and to work out specific recommendations for concerted action. The Commission is in an advantageous position to evaluate the views and needs of the Chesapeake Bay citizenry and to critique objectively the performance of existing agency programs.

On August 22, 1979, the Governors of Virginia and Maryland formalized an agreement to coordinate research, planning and management activities affecting the Bay through a "Bi-State Working Committee" of agency representatives from both states. The committee is responsible for reporting annually on major coastal and Chesapeake Bay issues of mutual concern with recommendations for bi-state action. While it is too early to appraise the effectiveness of this approach, it has the potential for sustaining an effort far beyond the limits of a conference-type of interaction.

As can be seen from this discussion, existing institutions have not been totally intractible in the face of growing interest in favor of coordinated management. To be sure, interstate interaction has generally occurred in isolated instances, often in response to unusual circumstances or problems. The recent efforts of the legislature and

executive agencies have not had sufficient time to effect any significant changes and any attempts to appraise those efforts would be premature. Nonetheless, these examples illustrate the general pace and scope of past approaches to problems of mutual concern by existing agencies and institutions.

1.4 Potential for improvements of existing institutions for baywide problems.

Existing institutions in Maryland and Virginia can be used to achieve more coordinated and effective baywide management in two general ways: first, each state can separately adopt uniform laws and regulations in those areas in which the difference in jurisdictions does not justify a difference in management; and second, the two states can develop joint, reciprocal programs on an ad hoc basis to provide an exchange of benefits in those areas in which each state has unique advantages or abilities. These two approaches, which are illustrated below, are nonetheless dependent upon some means of assuring open and frequent communication between the two states. These are the types of changes which can be accomplished without creating a new institution, assuming that a consensus is reached between the two states through the liaison efforts of the executive and legislative branches of the two states.

In the interviews of agency personnel conducted for the Commission, one opinion which was expressed many times was that activities in each state which affect Chesapeake resources would be best managed through the application of uniform laws in each state governing similar resources or activities. This observation was qualified with the comment that there are, of course, certain instances in which the physical or other differences between the states warrant a disparity of treatment. However, the establishment of uniform regulations was seen as a means of eliminating the need for combining governmental functions for the respective states in a joint or regional agency. For example, a Maryland Department of Health and Mental Hygiene representative noted that uniform bacteriological standards for shellfish waters established by the federal Food and Drug Administration eliminated the need for a regional or bi-state approach to determinations whether to close or open shellfish beds. Representatives of this department also commented that the question of pumpout facilities at marinas for on-board marine sanitation devices might best be addressed by uniform, Bay-wide regulations. The Maryland Natural Resources Police commented that many of the difficulties presented in the enforcement of fisheries laws result from regulatory differences in Maryland, Virginia and the Potomac River, especially in the areas near the boundaries. Perhaps these officers, more than anyone else,

are afforded the most concrete day to day illustration of the arbitrariness of the differing fishery restrictions on either side of th Maryland-Virginia border. Clearly, enforcement would be a far easier task if biologists and fisheries managers in the two states could reach a consensus on the proper fisheries regulations necessary for sound management. Greater uniformity, where appropriate, would also promote a more favorable public perception of the rationality of fisheries management.

The most direct form of pollution control on the Chesapeake Bay is through the National Pollution Discharge Elimination System established under federal law for implementation by qualifying states (including both Maryland and Virginia) subject to extensive federal regulations and guidelines which assure a large measure of uniformity from state to state. Nonetheless, agency representatives have noted differing interpretations of federal regulations so as to create differences in the regulation of discharges from seafood packing houses, poultry processing plants, and municipal waste water treatment plants (as to allowable chlorine residuals). One interviewee suggested that Maryland's strict standards for seafood packing houses has resulted in more business for Virginia's packing houses. In these and other areas uniformity of approach restores the equitable treatment of similar businesses which is often compromised in the regulation of a single resource which occupies more than one

jurisdiction.

Other areas offer advantages through joint or complementary action by the two states. Again, these possibilities would be limited to those actions which can be carried out through agreements between the states without the necessity of creating a new interstate institution. For example, the growing need for specialized facilities for the handling and disposal of hazardous wastes has prompted the suggestion that each state might agree to store certain types of wastes from both states, rather than have each state handle every type of hazardous wastes.

Another area of potential mutual advantage would be a joint effort in the marketing and promotion of Chesapeake Bay seafood products. Such a cooperative venture could be supported by contributions from each state (or from businesses in each state) with the expectation a concerted marketing scheme would yield greater demand, higher prices and more stable markets to the benefit of all Chesapeake Bay watermen and seafood processors and vendors than could be obtained by the independent efforts of each state.

One dimension of fisheries management, the management of the oyster industry, has been cited as a good candidate for joint management, if not uniform regulation. The Virginia oyster-growing areas are particularly well-adapted for reproduction and are excellent sources of seed oysters; yet

Virginia waters do not excel as oyster growing areas. Maryland waters, on the other hand, have proved excellent as growing areas yet are far less productive of oyster seed. These complementary characteristics suggest the need for a joint management program which capitalizes upon the special advantages in each state and creates an integrated Chesapeake Bay oyster industry. To a great extent this goal can be advanced by modifying the oyster laws in each state to encourage private enterpreneurs to take advantage of these complementary characteristics. Laws which prevent oyster seed and oystermen from crossing state bounda must be critically reexamined by each legislature to determi whether the current isolationism is in the best interest of the states.

Finally, a area offering mutual advantages is in research directed at problems present throughout the Chesape Bay. The conduct of the Bay bottom survey by the Maryland Geological Service and the Virginia Institute of Marine Scie is an excellent example of benefits which can be obtained through cooperation. In the private sector the Chesapeake Research Consortium organized by private and state supported educational and research institutions in both states has bee an effective medium for bringing together the special abiliti and facilities of these various institutions to carry out research projects which were beyond the capability of any single institution.

1.5 Summary

The incremental adaption of existing governmental institutions to enable them to respond to problems of interjurisdictional concern has been a slow and fragmented process. Until recently there existed no body to oversee this process or to serve as a liaison between the two states. Even now the bi-state working committee of agency representatives exists solely at the pleasure of the Governors. The legislative advisory commission itself has an uncertain tenure beyond the 1980 session unless the General Assemblies take action to continue its existence. The lack of permanent liaison between the two governments compounds the uncertainty of the future adequacy of continued, ad hoc improvements in interstate cooperation in Bay management. Nonetheless, in terms of implementation this option would be easiest to achieve, since existing agencies and authorities would continue as presently constituted.

FOOTNOTES - SECTION 1.0

1. The coastal zone program documentation prepared by each state includes a more detailed summary of authorities in each state. The Environmental Law Institute has recently produced the "Environmental Quality Management Study: Agency and Legal Authorities Survey" under contract with the Environmental Protection Agency. This 1000+ page study is somewhat difficult to use for lack of a table of contents, index or page numbers.

2. 33 U.S.C. 1251-1376

3. 33 U.S.C. 1344

4. Md. Ann. Code, Art., Sections 6-201 through 6-401.

5. Md. Ann. Code, Nat. Res. Art., Title 9.

6. Id., Section 8-1401.

7. Id., Section 8-707.

8. Va. Code Sections 62.1-44.7 et seq.

9. Va. Code Sections 62.1-13.1 et seq.

10. Va. Code Sections 62.1-133.

11. 16 U.S.C. 742(1) et seq.

12. Id.; see also Reorganization Plan No. 4, effective October 3, 1970.

13. 16 U.S.C. 1451 et seq.

14. See generally, Md. Ann. Code, Nat. Res. Art.

15. Va. Code Section 62.1-13.1.

16. Va. Code Section 28.1-176 et seq.

17. 33 U.S.C. 1322

18. Md. Ann. Code, Nat. Res. Art., Section 8-701 et seq.

19. Va. Code 62.1--44.3.

20. Md. Ann. Code Art. 88C Section 1 et seq.

21. Md. Ann. Code, Art. 41, Section 257E.

22. See also, Md. Deepwater Port Act, Md. Ann. Code, Nat. Res. Art. §3-601.

23. Md. Ann. Code, Nat. Res. Art., Section 3-301 et seq.

24. Id., Section 6-501 et seq.

25. Id., Section 8-1401 et seq.

26. Va. Code Section 62.1-44.2 to 62.1-44.34:7.

27. Va. Code Section 62.1-44.19.

28. For a review of Maryland-Virginia interaction in earlier years, see Eveleth, D., Historical Account of Maryland's and Virginia's Relationship in Governing the Chesapeake Bay, prepared for the Chesapeake Bay Legislative Advisory Commission, June 1979.

29. See Kinsey, Analysis of Virginia and Maryland: Interstate Activities, Part I, The Virginia Agencies, prepared for the Chesapeake Bay Legislative Advisory Commission, August 1979; and Friedlander, Part II: The Maryland Agencies, September 1979.

2.0 INTERSTATE COMMISSIONS

2.1 Introduction

The United States Constitution limits the extent to which two or more states may join in contracts, agreements, compacts and other forms of alliances.[1] These limitations are discussed more fully in the Appendix to this report, along with the legal consequences of entering into a compact. Although the law in this area is not well settled, some generalizations may be made. A number of interstate agreements may be valid without the consent of Congress: these would include agreements to consult, coordinate, exchange information or to adopt uniform laws in a given area. On the other hand, an agreement among two or more states to consolidate their regulatory powers over navigable waters in a single interstate agency may well be invalid without congressional consent. Thus any regulatory (as opposed to advisory) interstate agency should have the consent of Congress to be assured of constitutional validity. An interstate commission can take any form selected by the participating states, assuming, of course, that Congress would not find it objectionable.

Although there is a limitless variety of interstate

institutions which could be formed to deal with Chesapeake Bay problems, certain types of categories of interstate commissions have been recognized. As used in this study the term interstate commission will be used to refer to a compact agency approved by Congress in which only the affected states participate. This is to be distinguished from the category of federal-interstate commissions in which the federal government participates. The degree of federal participation and federal submission to the authority of such a commission would be specified in the compact and in the ratifying legislation passed by Congress.

Strictly speaking, a commission formed under the terms of Title II of the Water Resources Planning Act of 1965, Section 309 of the Coastal Zone Management Act of 1972 or Section 208 of the Federal Water Pollution Control Act Amendments of 1972 would be within the category of federal-interstate commissions. Nonetheless, because of the unique characteristics of each of these subcategories they are treated in separate sections of this report.

The section which follows will set out the basic characteristics of the simple interstate compact commission.

2.2 Creating an Interstate Commission

An interstate commission is created in two steps. First,

legislation must be passed by each state authorizing its participation in a specific compact. Second, if constitutionally required, Congress must give its consent to the compact either by a resolution or by passage of ratifying legislation.

As discussed in the Appendix, no prior congressional consent is necessary to allow the states to enter into negotiations undertaken in contemplation of making a compact.

2.3 Authority Relationships

Unlike those categories of compacts to which Congress has given its prior consent, there are no specific constraints upon the allocations of authority within an interstate commission or upon the authority of the commission over the signator states.[2] Obviously, these decisions will be the product of the bargaining which will precede a specific compact, yet a review of the compacts reached in other situations will illustrate the range of choices.

In general, states have been entitled to equal numbers of representatives on an interstate commission. An individual state delegation comprised of as little as three or as many as five commissioners is common. For example, the Interstate Sanitation Commission has five commissioners from each of the three signatory states in the New York Harbor Compact: New York, New Jersey, and Connecticut.[3] Similarly, the signatorie

of the New England Interstate Water Pollution Control Compact appoint five representatives each to serve on the commission created by the compact.

Stipulations concerning the representatives themselves often differ, however. While the New York pact allows the states some discretion in naming individuals as representatives,[5] the New England pact requires the following: "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."[6] The Great Lakes Basin Compact entitles each member state to no less than three but no more than five commissioners on the Great Lakes Basin Commission, but each state delegation has only three votes altogether.[7]

The rules governing the numbers and qualifications for each state delegation, together with a compact's rules on voting, generally establish the mechanism for wielding the power of an interstate commission.

Interstate compacts characteristically contain very specific provisions that outline under what circumstances the

action of a commission may be considered "binding" on its member states. Typically, the vote of an interstate compact commission will be considered binding only if the following two conditions are met: 1) a quorum of the commissioners (which is usually defined as a majority of the commissioners) is present for the vote; and 2) if action is being directed toward a particular signatory state, a majority of that state's commissioners must concur in the decision. These criteria for a binding action have been adopted by the New England Interstate Water Pollution Control Commission[8] and the Interstate Commission on the Potomac River Basin.[9] Other compacts have included even more stringent requirements and stipulate that a majority of members from each state must vote in favor of a particular commission action for it to be considered binding.[10]

The states have great flexibility in determining the amount of authority which can be conferred upon an interstate commission. A commission may be empowered only to recommend water quality standards, or it may be authorized to set and enforce standards of pollution control for the areas within its jurisdiction. Some examples are discussed in the section below.

The interstate commission, therefore, may be authorized to advise and make recommendations, or it may be delegated any of the powers exercised by the signatory states. The authority contained in a properly adopted and ratified compact will

supercede any inconsistent law or action of one of the signatory states, yet almost any limitations on the authority of a commission or the manner in which it is exercised can be prescribed in the compact. Note also that congressional ratifaction of a compact may have the effect of preempting prior inconsistent federal laws. (See Appendix).

2.4 Experience with Interstate Commissions

Simple interstate compact agencies have been created for water pollution abatement purposes since 1935, when the states of New York, New Jersey, and Connecticut formed the New York Harbor (Tri-State) Interstate Sanitation Compact. There are now more than a dozen interstate agencies and commissions created by compact and charged with studying, advising, and, in some instances, regulating interstate water resource problems.[11] Commentators generally have found that although the attributes of interstate compacts would appear to make them well suited to water pollution control and water resource management, in practical application the agencies created by compact have had only limited success in achieving their objectives.[12]

There are several factors characteristic of the compact process that serve to limit the effectiveness of interstate commissions. A disadvantage of planning a regional

program noted by one commentator is the lack of regional awareness on the part of the public.[13] This is attributable to several factors, including many persons' reluctance to develop a sense of support or affinity for a regional governmental unit. Another factor is the great range of interests present in a large area, such as a river basin, which can lead to difficulties in trying to establish a management system that has broad political support.[14]

Another observer has noted that traditionally there has been little integration of the compact agencies into the "administrative fabric" of state government.[15] Unless there is a challenge to legislative authority, most state legislatures consider the interstate commission to be beyond their range of authority and seldom provide adequate liaison and coordination mechanisms.[16] The state executive agencies generally try to be more aware of the commissions' functions because compacts usually provide that the governor has authority to appoint his state's commissioners, but few compacts have provided mechanisms for ongoing communications and coordination between the states and the interstate agencies.

Another problem faced in attempting to form a regional governmental unit is obtaining sufficient power from the compacting states to implement an effective program. Legislative reluctance to relinquish authority to an agency which can be

controlled by representatives of other states often results in grants of limited authority[17] or voting requirements which may inhibit effective action.[18]

Formation of an interstate agency by compact has often been a time-consuming process. For the water pollution control compacts of the past the average length of time necessary to draft and ratify the agreement has been five years,[19] although individual compacts have varied greatly from this average. The Delaware River Basin Compact[20] (a federal-interstate compact) became effective only two years after the preliminary study was completed. In contrast, the New England Interstate Water Pollution Control Compact required eleven years.[21]

In the past, once a compact has been ratified by the member states, the amount of success the interstate commission has had in improving water quality and managing the body of water has been dependent upon several factors, most notably its authority to establish standards, its enforcement powers, and the amount of funding available to the commission and its programs.

As noted above, the amount of authority existing commissions have been given to set standards has varied greatly. As of 1972, several compacts, including the Arkansas River Basin Compact[22] and the Red River of the North Compact,[23] contained no reference to standard setting authority. The commissions

established by these compacts were given authority only to study problems, make recommendations to appropriate state agencies and coordinate activities of the member states.[24] As the commissions were given no authority to plan or implement long range programs, most significant activity in the area of water pollution control was left up to the individual states.

Other compacts, such as the one creating the Commission on the Potomac River Basin, authorized the commission to research and recommend minimum standards for waste treatment to the signatory states.[25] The commission, however, was not given any authority to compel a member state to enact the recommendations or to enforce the standards. At the other end of the spectrum, the Ohio River Valley Water Sanitation Compact (ORSANCO) and the Interstate Sanitation Compact incorporated directly into the compact documents specific standards for sewage discharges.[26]

Another problem for interstate commissions has been in the area of enforcement. An effective administrative-regulatory agency must be vested not only with the authority to establish rules and standards but also with the power to enforce the actions it has taken. States, however, have been hesitant to relinquish the necessary enforcement power to interstate agencies and commissions, and often have reserved

enforcement authority to their appropriate state agencies.[27] Those interstate bodies that have been given enforcement powers have been reluctant to use them; historically, enforcement has not been vigorous, with agencies relying primarily on education, persuasion, and the good faith of the member states to accomplish their objectives.[28] Absent sufficient enforcement powers to act independently of state initiatives, a compact containing regulatory objectives becomes essentially a contract to be enforced, if at all, in the courts.

The problems an interstate commission can face when it lacks enforcement authority is evidenced by the experience of the New England Commission. The responsibilities of the Commission as provided in the compact consist of establishing water use classifications and corresponding water quality criteria.[29] The Commission was granted no authority to compel a state to reclassify its waters for a particular use or to enforce the standards it set.[30] This resulted in lengthy delays in reaching agreements on classifications for various streams. In 1967, the Commission had been in existence for twenty years and the states had still not agreed on classifications for eleven streams in the area. One of these waterways, the Connecticut River, was found in a 1964 study to contain a bacteria count 315 times greater than the maximum used by Connecticut in approved swimming sites.[31]

2.5 Funding Sources

There are no special sources of funding for which a new interstate commission automatically qualifies. Generally interstate compact agencies depend upon the states for the appropriation of funds for operating expenses. Often the exact sum to be contributed by each state is set forth in the terms of the compact or a formula for the equitable distribution of the fiscal burden is delineated. For example, the Tri-State Compact calls for the Interstate Sanitation Commission to submit budget recommendations to the Governors of the three signatory states for approval; the actual percentage of the budget that must be paid for by each state is stated exactly.[32] In the Red River of the North Compact, each state must bear its proportionate share of expense of the Tri-State Waters Commission based on the pro rata value to the state of the activities of that commission.[33] In the New England Interstate Water Pollution Control Compact, the actual dollar amounts that each state must contribute are specified.[34]

Any compact may authorize the agency created to apply for and accept grants from the federal government or from private foundations. For example, a number of interstate compact agencies receive grants under Section 106 of the

Federal Water Pollution Control Act Amendments for various water quality planning and abatement programs.[35] While there are numerous federal grants programs, whether a compact agency qualifies in a given instance will depend upon the functions conferred upon it.

FOOTNOTES - SECTION 2.0

1. U. S. Const. Art. 1 & 10.

2. See F. Zimmerman and M. Windell, The Law and Use of Interstate Compacts (1976).

3. New York Harbor (Tri-State) Interstate Sanitation Compact Art. IV, 49 Stat. 932 (1935). [hereinafter cited as Interstate Sanitation Compact].

4. New England Interstate Water Pollution Control Compact Art. III, 61 Stat. 682 (1947). [hereinafter cited as the New England Compact].

5. "[E]ach [commissioner] shall be a resident voter of the State from which he is appointed. The Commissioners shall be chosen in the manner and for the terms provided by law of the State from which they shall be appointed...." Interstate Sanitation Compact Art. IV, 49 Stat. 932 (1935).

6. New England Compact Art. III, 61 Stat. 682 (1947)

7. Great Lakes Basin Compact ARt. IV, 82 Stat. 414 (1968).

8. "[N]o action of the commission imposing any obligation on any signatory state...shall be binding unless a majority of the members from such signatory state shall have voted in favor thereof." New England Compact Art. IV, 61 Stat. 682 (1947).

9. "[N]o action of the Commission relating to polic or stream classification or standards shall be binding on any

one of the signatory bodies unless at least two [of the three] Commissioners from such signatory body shall vote in favor thereof." Potomac Valley Conservancy District Compact Art. I, 54 Stat. 748 (1940), Amended 84 Stat. 856 (1970). [hereinafter cited as Potomac Valley Compact].

10. E.g., Interstate Sanitation Compact Art. V, 49 Stat. 932 (1935). "[N]o action of the commission shall be binding unless at least three of the [five] members from each State shall vote in favor thereof." Bi-State Metropolitan Development District Compact Art. V, 64 Stat. 568 (1950). "[N]o action of the Bi-State Agency shall be binding...unless a majority of the members from each state present shall vote in favor thereof."

Tahoe Regional Planning Compact Art. III, 83 Stat. 360 (1969). "A majority vote of the members representing each state shall be required to take action with respect to any matter."

11. E.g., Ohio River Valley Water Sanitation Compact 49 Stat. 1490 (1936); Tennessee River Basin Water Pollution Control Compact, 72 Stat. 823 (1958); Klamath River Basin Compact, 71 Stat. 497 (1957); Potomac Valley Conservancy District Compact, 84 Stat. 856 (1970); New England Compact, 61 Stat. 682 (1947); Arkansas River Basin Compact, 80 Stat. 1409 (1966).

12. Curlin, "The Interstate Water Pollution Compact: Paper Tiger or Effective Regulatory Device?" 2 Ecology L.Q. 333 (1972); Chambers, "Water Pollution Control through Interstate Agreement," 1 University of California, Davis L. Rev. 43 (1969).

13. Chambers, supra n. 12 at 44.

14. Id.

15. Leach, "Interstate Authorities in the United States," 26 Law & Contemp. Prob. 666, 672 (1961).

16. R. Leach and R. Sugg, The Administration of Interstate Compacts 47 (1959).

17. See, e.g., Potomac Valley Compact, 84 Stat. 851 (1970) and text accompanying note 25, infra.

18. See n. 10 and accompanying text, supra.

19. Chambers, supra n. 12 at 45. The time period is computed from the time negotiations begin until final congressional consent is obtained. The author noted that the average time span would be substantially higher if the date at which the last member ratified was taken as the closing point, citing, for example, the Potomac Valley Compact, to which congressional approval was given in 1940 but which was not ratified by Pennsylvania until 1945. Id. n. 11.

20. 75 Stat. 688 (1961).

21. Congress gave consent to begin formal negotiations in 1936. 49 Stat. 1490 (1936); final consent to the

agreement was granted in 1947. 61 Stat. 682 (1947).

22. 80 Stat. 1409 (1966).

23. 52 Stat. 150 (1938).

24. Arkansas River Compact Art. IX(E), 80 Stat. 1409 (1966); Red River Compact, Art. VII, 52 Stat. 150 (1938).

25. Potomac Valley Compact Art. II §(F), 84 Stat. 856 (1970).

26. Art. VI, 54 Stat. 752 (1940) and Art. VII, 49 Stat. 932 (1935, respectively.

27. Four compacts, the Great Lakes Basin Compact, the New England Compact, the Potomac Valley Compact, and the Red River of the North Compact, do not provide for any enforcement authority.

28. Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality," 52 Ia. L. Rev. 432, 451 (1966). For example, the Ohio River Valley Water Sanitation Compact provided enforcement procedures consisting of a hearing, issuance of an order and time schedule, and court enforcement of the order if necessary, but through 1972 the commission had made use of those powers only six times. In none of those instances was the commission forced to get court enforcement of its order; each time it intervened at the request of the state in which the polluter was located, and its mere intervention was always sufficient to force compliance. See Cleary, The

ORSANCO Story, 117-122 (1967) for a history of these enforcement actions.

29. Art. V, 61 Stat. 682 (1947).

30. Under the compact, individual states have the duty to classify the waters within their jurisdiction and enforce the requirements set by the Commission. The states' classifications must be submitted to the Commission for approval. Any state to be affected may veto a proposed classification if it feels the classification is insufficient to insure acceptable water quality.

31. Chambers, supra n. 12 at 64.

32. Art. XIV, 49 Stat. 932 (1935).

33. Art. X, 52 Stat. 150 (1938).

34. Art. VIII, 61 Stat. 682 (1947).

35. Oral communication with Mr. Don Brady, Office of Water Planning and Standards, United States Environmental Protections Agency, Washington D.C. (202-755-7003). Those interstate commissions receiving §106 grants included the Delaware River Basin Commission, the Interstate Commission on the Potomac River Basin, the Interstate Sanitation Commission, the New England Interstate Water Pollution Control Commission, the Ohio River Valley Water Sanitation Commission, and the Susquehanna River Basin Commission.

3.0 FEDERAL-INTERSTATE COMMISSIONS

3.1 Introduction

As the name indicates, a Federal-interstate commission includes the Federal government as a participant with the interested states. The commissions are authorized by acts of Congress pursuant to which participation of the Federal authority may range from the role of the final approving authority to that of equal partner or even passive observer, depending upon the terms of the particular act involved. To be strictly accurate, this category would include Title II commissions and possibly the agencies created under Section 208 of the FWPCAA and Section 309 of the [illegible]. However, this section will treat the general category of federal-interstate agencies unconfined by the statutory limitations involved in each of those subcategories. The most well known example of this general type is probably the Delaware River Basin Commission.[1]

3.2 Creation of a federal-interstate commission

The mechanics of creating a federal-interstate compact agency are much the same as for creating a simple interstate agency. The legislature of each participating

state must pass a law authorizing the state's participation according to the terms of the compact. Next, Congress must enact ratifying legislation. Certainly the most difficult aspect of creating a federal-interstate agency would be the negotiations preceding these legislative actions to reach agreement upon the allocation of authority among the state and federal participants and the degree to which the federal government would be bound by the decisions of the commission.

3.3 Authority Relationships

Federal-interstate compact commissions can relate to any issue involved with interstate commerce in its broadest sense. Commissions concerned with water quality control vary in power and responsibility from those that act solely in an advisory capacity, to those with limited enforcement authority and to those with comprehensive powers for water quality management.

The unimplemented Potomac River Basin Compact would be classified in the first category. It authorizes a commission to gather information on the pollution of streams in the consanguinity district, promotes the adoption of uniform laws, rules, and regulations for the abatement and control of pollution, cooperates with other organizations in fact-finding and research activities on the treatment of sewage and industrial wastes, and recommends minimum standards for waste treatment.[2] The Ohio

River Valley Sanitation Compact falls in the second category. It has limited power to issue abatement orders against municipal or industrial polluters and can go to court to pursue compliance.[3]

The authority of the Delaware River Basin Commission extends to a large number of areas: pollution control, flood protection, watershed management, recreation, hydroelectric power, and the substantial authority of water appropriation in accordance with the equitable allocation formula.[4]

The membership of federal-interstate compact commissions varies according to the particular compact in question. Generally, the signatory states are granted equal numbers of commissioners. For example, the Ohio River Valley Sanitation Commission and the Interstate Commission on the Potomac River Basin consist of three commissioners from each state (appointed according to a procedure which each state specifies) and three commissioners from the United States government.[5] The Delaware River Basin Commission consists of the Governors of the signatory states, ex officio, and one commissioner appointed by the President of the United States to represent the federal government.[6] The Susquehanna River Basin Compact stipulates an identical arrangement for commission membership.[7]

There is a qualitative difference in the membership schemes as well. The federal government became a signatory member of the Delaware and Susquehanna pacts, thereby becoming a full-fledged voting participant in the business of those two

commissions.[8] In other compacts, federal members serve as commissioners, without the federal government as a signatory to the agreement creating an interstate commission, and, in other cases, federal members serve in a liaison capacity and do not have full voting privileges.[9]

Federal-interstate compact commissions do not uniformly allow federal commissioners to vote on all matters. The Susquehanna and Delaware River Basin Commissions, which each have one federal commissioner and one commissioner from each signatory state, permit full federal participation in voting.[10] The SRBC or DRBC may take action only if an absolute majority of the commissioners concur in the decision. However, the apportionment of the budget of the commission among the respective members must be approved unanimously.

The Ohio River Valley Sanitation Commission (ORSANCO) has different voting rules.[11] A quorum for the transaction of business is defined as one or more commissioners from a majority of the member states. A commission order prescribing a deadline for the elimination or modification of industrial or sewage discharges by municipalities or corporations may be issued only if a majority of the commissioners from not less than a majority of the signatory states vote in favor, and a majority of the commissioners from the affected state agree as well.

The enabling legislation may distinguish between the

regulatory and proprietary roles of Federal and State agencies and projects. Obviously those commissions without regulatory authority will not pose potential conflicts with established state or federal roles. Even where such powers are conferred, provisions in the organic statute may exempt Federal or State projects and may allow for concurrent regulations. If no specific conflict provisions exist it is presumed that the later enacted federal act would confer priority to Commission authority over inconsistent federal laws. (See Appendix)

3.4 Experience with Federal-Interstate Commissions

The leading example of this type of intergovernmental body is the Delaware River Basin Commission, which was formed in 1961. The five voting members of the DRBC include New York, New Jersey, Pennsylvania, Delaware (represented by their respective Governors or their substitutes) and the United States (represented by an appointee of the President). Part of the impetus for this agreement came from an unusual source: the Army Corps of Engineers. The Corps began a comprehensive study of water resource needs in the basin in 1955 which culminated in a report five years later recommending to Congress a half-billion dollar plan for the construction of 54 dams and reservoirs. It strongly urged the states to form a permanent interstate entity to assist in the financing of the non-federal share of these projects.[12]

The compact provided for both regulatory and proprietary (developmental) powers to be exercised by the commission. The breadth of these powers had been compared to those vested in the Tennessee Valley Authority.[13]

The Commission has jurisdiction over almost all water-related problems--water supply, pollution control, flood protection, watershed management, recreations, hydroelectric power and regulation of withdrawals and diversions--except for regulation of navigation.[14]

The Justice Department and other federal agencies objected to the original terms of the agreement and sought certain modifications in it prior to congressional approval. The basis for these objections was that the Compact transferred substantial federal authority to an agency in which the United States had a minority voice.[15]

The final text provided that although the Commission is charged with making policy for all five signatory states simultaneously by the adoption of a comprehensive water resources plan for the basin, the federal government is not bound by any provision of the comprehensive plan unless the federal member has assented to it.[16] In addition, "whenever the President shall find and determine that the national interest so requires, he may suspend, modify, or delete any provision of the comprehensive plan to the extent that it affects the exercise of any powers, rights, functions, or jurisdiction

by law on any officer, agency, or instrumentality of the United States."[17]

The Commission, though it is charged by the Compact with maintaining a comprehensive plan for development and use of water in the basin, does not have the staff capacity for independent comprehensive planning. Rather, its principal function has been to review and approve proposals submitted by other agencies--the Corps of Engineers being the most important. This was especially true in the early years of operation: the initial phase of the DRBC comprehensive plan confirmed the previous Corps study and endorsed the Corps' recommendation for immediate construction of eight projects.[18] The role of the DRBC evolved over the years, providing a voice for the states in the implementation of federal water development schemes and other projects in the basin: "The Commission, rather than being a medium for securing federal commitments to development, has more often been a medium through which governors have protected their states against unwanted private or federal projects or project features."[19]

As a coordinating body, the DRBC has had some of the same difficulties experienced in Title II commissions. While states expected the federal representative on the Commission to coordinate the positions of various federal agencies, this has not happened: "Federal unwillingness to make commitments through the DRBC is one major limitation on the federal commissioner

(and, of course, the organization as a whole). Another is the federal inability to arrive at unified positions. Including in the Commission a single federal representative was supposed to make it an instrument for resolving interagency differences but neither the federal commissioner nor the DRBC staff is able to intervene successfully."[20]

Although it was vested with extremely broad powers, the DRBC has never fully exercised its authority or developed into a primary management entity. Pollution control planning and regulatory functions were largely displaced by EPA and the states under the programs of the FWPCAA: the DRBC has had very little to do with planning under Sections 303 and 208 or discharge permits under Section 402. The consensus is that the Commission has functioned most effectively in the area of water supply allocations. There are several reasons for this: (1) water supplies are limited in that basin and there has been an urgent need to resolve conflicts between the basin states; (2) the basin states had a mutual interest in avoiding resort to the Supreme Court for an application of the "equitable apportionment" rule; (3) there have not been any alternative allocation programs to deal with the problem (in contrast to the development of state and federal pollution control programs); and (4) the necessary water supply projects have been supported by the development agencies.

3.5 Funding Sources

Federal-interstate agencies for water quality or river basin management have a variety of funding arrangements. The following examples are illustrative of the approach used by such commissions. ORSANCO is funded by the signatory states according to an apportionment formula that considers both population and land area.[21] Upon the request of the Governor of any of the signatory states, the Commission submits a budget of estimated expenditures "as may be required by the laws of such state for presentation to the legislature thereof".[22] Although ORSANCO provides for the apportionment of three federal commissioners, the compact contains no commitment of federal funding. Nonetheless, the agency has received federal money, in part through Section 106 grants under the FWPCAA. Other federal-interstate agencies have more detailed funding schemes and procedures. The Delaware River Basin Commission and the Susquehanna River Basin Commission have identical arrangements for funding. The DRBC and SRBC are required to prepare both an annual capital budget[23] and a yearly current expense budget.[24] After the current expense budget is adopted, the executive director of the commission informs the respective signatory parties the amount of money each must pay in accordance with existing cost sharing established for each project[25] and transmits certified copies

of the budget to the principal budget officer of the states according to the requirements of their respective budgetary procedures.[26] The pact stipulates that expenses (funds to balance the current expenses budget and the aggregate amount due for capital projects) must be apportioned equitably among the signatory states; the commission must approve the apportionment scheme unanimously.[27] The member states agree to include their contributions toward the current expense budget in their respective budgets, "subject to such review and approval as may be required in their respective budgetary processes".[28] The funds must be paid in quarterly installments to the commission during its fiscal year.[29] The commission may draw from its working capital to finance its current expense budget pending remittances by the member states.[30] Finally it should be noted that the DRBC and SRBC also receive Section 106 grants from the Environmental Protection Agency.

FOOTNOTES - SECTION 3.0

1. This commission was created by the Delaware River Basin Compact, 75 Stat. 688 (1961).
2. 84 Stat. 856 (1970).
3. 54 Stat. 752 (1940).
4. 75 Stat. 688 (1961). See Delaware River Basin Commission Annual Report 1978.
5. Art. IV, 54 Stat. 752 (1940).
6. Art. II, 75 Stat, 688 (1961).
7. Art. II, 84 Stat. 1509 (1970).
8. 75 Stat. 688 (1961) and 84 Stat. 1509 (1970), respectively.
9. See, e.g., Ohio River Valley Sanitation Compact, 54 Stat. 752 (1940).
10. Art. II, 84 Stat. 1509 (1970) and Art. II, 75 Stat. 688 (1961).
11. Art. IV, 54 Stat. 752 (1940).
12. W. Barton, Interstate Compacts in the Political Process 104 (1967).
13. Id. at 109.
14. 75 Stat. 688 (1961).
15. M. Derthick, Between State and Nation: Regional Organizations of the United States 50-53 (Brookings Institute 1974).
16. 54 Stat. 752 (1940).
17. Id. Art. XV
18. Barton, supra n.12 at 109.
19. M. Derthick, supra n.15.
20. Id.

21. Art. X, 54 Stat. 752 (1940).

22. Art. V, 54 Stat. 752 (1940).

23. Art. 13, 755 Stat. 688 (1961); Art. 14, 84 Stat. 1509 (1970), respectively

24. Id.

25. Id.

26. Id.

27. Id.

28. Id.

29. Id.

30. Id.

4.0 TITLE II COMMISSIONS

4.1 Introduction

In an effort to encourage regional water resources planning in the United States, Congress provided an administrative mechanism for that purpose--the river basin commission--in Title II of the Water Resources Planning Act of 1965 [1] to promote better coordination of state, local, and federal water policies. There are presently six Title II commissions in the United States.[2]

The Title II Commission falls into the general category of federal-interstate commissions, and includes a significant degree of federal agency participation. Title II of the Water Resources Planning Act of 1965 confers the advance consent of Congress upon those commissions which are established according to the terms of the Act, eliminating the need for specific congressional approval of each new proposed commission.

4.2 Creating a Title II Commission

A Title II commission must be established by executive order of the President of the United States pursuant to a

request from the Water Resources Council or a request addressed to the Council by a state within the river basin concerned.[3] The request must: 1) define the area, river basin, or group of related river basins for which a commission is requested; 2) be made in writing by the Governor or according to the laws of the particular state concerned, or by the Council; and 3) have the written concurrence of the Council and not less than one-half of the states located in the basin or basins concerned.[4]

4.3 Authority relationships

The functions of Title II commissions are set forth in the Water Resources Planning Act: 1) to serve as the principal agency for the coordination of Federal, State, interstate, local and non-governmental plans for the development of water and related land resources in the river basin concerned;[5] 2) to prepare a comprehensive, coordinated joint plan for federal, state, interstate, local and nongovernmental development of water and related land resources, with the requirement that the plan be kept updated and include: an evaluation of alternative means for achieving optimum development of water and related land resources of the basin concerned; and recommendations with respect to individual projects,[6] 3) to recommend long-range schedules of priorities

for the collection and analysis of basic data and for investigation, planning, and construction of projects;[7] and, 4) to conduct the studies necessary for the preparation of the comprehensive plan.[8] Title II commissions are essentially non-regulatory, planning and coordinating bodies.

A Title II commission consists of representatives from both state and federal governments and, in certain instances, interstate agencies and international commissions. Ten individuals, representing particular cabinet departments or federal cabinet-level agencies and appointed by the department or agency head, serve on a commission.[9] States within the river basin concerned send one representative each to the commission; these representatives may be appointed according to the laws of the state concerned.[10] If an interstate compact agency, which has been approved by Congress, has jurisdiction over the waters or a portion of the waters of the river basin concerned, it also sends a representative to the commission.[11] If considered appropriate by the President, he may appoint a representative from the United States section of any international commission created by a treaty whose jurisdiction overlaps that of the newly-formed river basin commission.[12]

The President is authorized to appoint the chairman of the commission,[13] while the state members of the commission elect the vice-chairman.[14] The chairman serves as coordinating

officer of the Federal members of the commission, and represent the Federal Government in Federal-state relations on the commission;[15] the vice chairman carries out similar responsibilities for the state members.[16]

The decisionmaking process prescribed for Title II commissions is an unusual one. The Water Resources Planning Act stipulates that "in the work of the commission every reasonable endeavor shall be made to arrive at a consensus of all members on all issues."[17] In the event that consensus cannot be reached, the position of the chairman, acting in behalf of the federal members, and the vice-chairman, acting for the state members, must be set forth in the record.[18] In the absence of a consensus or an applicable by-law adopted by the commission, the chairman, in consultation with the vice-chairman, has final authority to fix the times and places for meetings, to set deadlines for the submission of annual or other reports, to establish subcommittees, and to decide other procedural questions necessary for the commission to perform its functions.[19] The existing commissions have adopted various working procedures to deal with the situation presented by a lack of consensus among members. The Missouri River Basin Commission by-laws require unresolved questions to be settled by a majority vote, which requires six state members and six federal members voting in favor of the question.[20] The Ohio

Commission has no such procedure, if the commissioners fail to agree on a course of action, no action is taken; a majority vote is only controlling for procedural questions.[21] The Upper Mississippi Commission also resolves deadlocks by majority vote of the panel, but votes regarding Master Plan activities require a two-thirds vote of the commissioners to be considered valid.[22] For both the Ohio and the Upper Mississippi Commissions, a "majority" is defined as a majority of the state members and a majority of the federal commissioners.[23]

A Title II commission may be dissolved in two ways: by a decision of the Water Resources Council or by agreement of a majority of the states composing the commissions.[24]

4.4 Experience with Title II Commissions

Thirty two states now participate in the six existing Title II commissions. Most of the regions covered by these commissions involve waterbodies unlike the Chesapeake, although the resources addressed by the Great Lakes River Basins Commission and the New England River Basins Commission have many similarities to the Bay and its tributaries. As discussed below, the current activities of these two particular commissions offer some guidance for how such an agency might be most effective on the Bay.

The Title II program has been in existence less than fifteen years and for much of that time has been ham-

pered by a lack of guidance or direction from the oversight body created by Congress, the Water Resources Council, and other difficulties. Much of the need for river basin planning which existed in 1965 has been subsequently eliminated by the intense planning efforts funded pursuant to the Federal Water Pollution Control Act Amendments of 1972. Under the 1972 Amendments river basin plans were developed to guide the pollution control programs which were also created, and areawide wastewater treatment planning was undertaken as an integral part of the massive federal construction grants program. Generally, the Title II commissions have had little to do with these planning programs, although there has been some interaction between some of the commissions and state agencies in studying pollution from nonpoint (stormwater runoff) sources.

Studies of the Title II agencies have often been critical of them. Aside from the basic contention that these agencies simply have no authority to effect changes based upon their planning efforts, it has been argued that other characteristics of Title II commissions tend to impair their effectiveness. A 1974 study for the Brookings Institution noted the difficulties presented by the type of representation on the commissions:

> The forum is supposed to foster goodwill, facilitate communication in matters of shared interest, and provide a setting

> within which mutual adjustments may take place, but it lacks authority or other means for inducing mutual adjustments. Also, members have a very limited capacity to speak to their organizations, which in Title II commissions are whole federal departments or whole governments, the States. The represented units are large aggregates of diverse interests, and coordination within them is too ineffectual to sustain the functioning of representative coordinating council at a higher level. [25]

A state representative to the Great Lakes and Souris-Red Rainy River Basin Commissions, Guy J. Kelnhofer, stated in 1970 that "the basin planning approach to water management is much more beneficial to the Federal interest than to the states" and that the commissions are "no more than interagency coordinating committees with a staff that the states have been coerced into supporting."[26]

Despite the potential for federal domination of a Title II commission, the affected basin states have usually joined nonetheless. One explanation for this behavior which has been offered is the following:

> Most states appear to join for defensive purposes, on the chance that they may be able to veto federal actions that threaten them, such as diversions of water. They seek defenses against one another as well as against federal action. Collectively, they may seek defense against another region.[27]

Other appraisals of the Title II program have also been critical. Ernst Liebman, the Legal Advisor to the Water Resources Council, reported on progress made by the

Title II commissions in 1972. His report noted several problems with their efforts: the plans produced are often noncritical justifications for projects desired by development agencies; the plans are often dominated by the biases of the federal agencies; planning staffs cannot be sustained because of inadequate funds and funding uncertainties from year to year; there has not been adequate coordination between Title II planning and other types of planning activities (such as pollution planning); and, environmental interests had not been brought into a planning process "in a constructive role".[28]

A 1977 review of the performance of the Water Resources Council, undertaken by the Government Accounting Office, faulted the Council for its lack of clearly defined goals and failure to provide adequate guidelines for the planning activities of the Title II commissions.[29] Because of the statutory role of the Council in overseeing the activities of the commissions, coupled with its influence over federal budget allotments to each commission, the Council is an added political force (or layer of bureaucracy) with which a commission must contend. In view of the criticisms of the G.A.O., the necessary interaction with the Council may compound the difficulties presented to a Title II commission in accomplishing useful goals for its region.

It should not be assumed that difficulties experienced in the past will confront a new Title II agency. A

new agency will certainly benefit from the experience of the existing commissions and can plan from the outset to have a useful interaction with newer programs for pollution control planning and coastal zone planning.

In recent years the Title II commissions now in existence have adapted their program goals and priorities to the character of the region involved. Individual commissions and their staffs have also been important in shaping their agencies activities, oftenin response to new governmental programs and grant opportunities. For example, in 1977 the Ohio River Basin Commission expended significant efforts in lobbying in Congress over changes in the Corps' dredge and fill authority and proposed surface mining control laws, in addition to its basic planning activities.[30] Similarly, the Upper Mississippi River Basin Commission describes itself as "an effective regional influence on policies formulated in Washington."[31] Other principal concerns of that commission include floodplain management, river transportation issues (e.g., locks, dredging, etc.) and water supplies.[32]

The planning efforts of the Pacific Northwest River Basins Commission are directed at accomodating competing needs: flood control, water supply, hydroelectric power generation and the maintenance of fisheries.[33] The focus of the Missouri River Basin Commission are reflected in its most current list of research priorities for its region: soil

surveys, topographic mapping and additional stream gauging data collection.[34]

Two of the six Title II commissions have integrated their activities into other related planning programs created by Congress subsequent to the 1965 Act. The Great Lakes Basin Commission has worked closely with the 208 planning agencies of the regions and has undertaken certain key studies to provide information to those agencies on nonpoint source (runoff) pollution.[35] The Commission has also provided a forum for the exchange of views and information among the state coastal zone program managers in the Great Lakes area.[36]

The New England River Basins Commission has been cited as one of the most vigorous of the Title II agencies.[37] It has become actively involved in the coastal zone programs of its member states, providing full time staff assistance to the New England/New York Coastal Zone Task Force.[38] The Commission has conducted a variety of studies in response to developing concerns of the area, examining the potential impacts resulting from offshore oil and gas development, developing a comprehensive dredging and spoil disposal plan, as well as addressing topics such as floodplain management and power plant siting.[39] Although each Title II commission is required to prepare an annual priorities report ranking regional research needs which deserve federal or state support, the New

England agency is developing a follow-through procedure to assure consideration of its recommendations.[40]

The influence of the Title II commissions was increased somewhat by a new policy adopted in mid-1978 by the Water Resources Council which directs that programs and policies of federal agencies be consistent with approved river basin plans.[41] Since these plans are developed with the participation of the same federal agencies, large scale conflicts with an approved plan are unlikely to occur. Thus, the significance of this policy is not likely to become apparent immediately.

4.5 Funding

Under the terms of the Water Resources Planning Act, the federal government pays the salary of the chairman of the commission and pays a proportion of the expenses of the commission.[42] The commission itself decides what amount the federal government should allocate.[43] This request must be approved by the Water Resources Council and be included in the budget estimates submitted by the Council under the Budgeting and Accounting Act of 1921.[44] The apportionment of the remainder of the budget is the responsibility of the commission.[45] Title II commissions "may accept for any of its purposes and functions appropriations, donations and grants of money, equipment, supplies, and materials from any state or the United States or any subdivision or agency."[46]

The following allocation scheme is followed by the six operating Title II commissions: for all program costs other than Level B studies, the federal government contributes two and one-half times the combined share of the states. For certain studies, the federal government pays 75% of the cost and the states the remaining 25%.[48] The federal share of the costs of administration is usually 50%.

The federal budget for fiscal year 1979 appropriated $2,886.000 for administrative costs for all six Title II commissions, $3,179,900 for the preparation of plans by the commissions, plus four grants for specific named studies ranging from $135,000 to $828,900.[49]

The budget of the Title II commissions generally includes total revenues of $750,000 to $1,600,000, of which an individual state will typically contribute $20,000 to $60,000 annually.[50] Note, however, that a Title II commission for the Chesapeake Bay would put a greater than usual financial burden on the principal Bay-region states, Virginia and Maryland, because there would be relatively few contributors.

4.6 Summary

Presumably, it would benefit everyone interested in Chesapeake Bay management to have improved coordination and more frequent communication among the federal agencies having

responsibilities over activities in the Bay's drainage basin. The creation of a Title II commission would provide this benefit without requiring the affected states to yield up any part of their sovereign powers. These and other factors (such as the availability of federal funds) have been cited in the past in support of creating a Chesapeake Bay Title II commission. Nonetheless, the success of such a commission would appear to require innovative leadership to adapt it to the present network of planning activities and the choice should be made with a clear understanding of the difficulties experienced by other such commissions in the past.

FOOTNOTES - SECTION 4.0

1. Pub. L. 89-80, 42 U.S.C. § 1962b (1965).

2. Ohio River Basin Commission, New England River Basin Commission, Great Lakes Basin Commission, Upper Mississippi River Basin Commission, Pacific Northwest River Basin Commission, and the Missouri River Basin Commission.

3. 42 U.S.C. § 1962b(a)

4. Id.

5. 42 U.S.C. § 1962b(b)(1)

6. 42 U.S.C. § 1962b(b)(2)

7. 42 U.S.C. § 1962b(b)(3)

8. 42 U.S.C. § 1962(b) 4

9. 42 U.S.C. § 1962b-1(b)

10. 42 U.S.C. § 1962b-1(c)

11. 42 U.S.C. § 1962b-1(d)

12. 42 U.S.C. § 1962b-1(e)

13. 42 U.S.C. § 1962b-1(a)

14. 42 U.S.C. § 1962b-2(b)

15. 42 U.S.C. § 1962b-1(a)

16. 42 U.S.C. § 1962b-2(b)

17. 42 U.S.C. § 1962b-2(d)

18. Id.

19. Id.

20. Bylaws of the Missouri River Basin Commission Art. IV §2(b). (1973).

21. Ohio River Basin Commission Bylaws Section 9(b).

22. Upper Mississippi River Basin Commission Bylaws Section VIII; letter from Judy Salonek, secretary of the Commission, dated September 18, 1979.

23. Ohio River Basin Commission Bylaws Section 9(b)(3). Upper Mississippi River Basin Commission Bylaws Section VIII(b)(3).

24. 42 U.S.C. § 1962b-2(a)

25. Derthick and Bombardier, Between State and Nation: Regional Organizations of the United States, Brookings Institution, 1974.

26. Id.

27. Id.

28. Liebman, National Water Commission Legal Study (1972).

29. United States General Accounting Office, Improvements Needed by the Water Resources Council and River Basin Commissions to Achieve the Objectives of the Water Resources Planning Act of 1965. (1977).

30. Ohio River Basin Commission 1977 Annual Report.

31. Upper Mississippi River Basin Commission Annual Report for Fiscal Year 1978.

32. Id.

33. Pacific Northwest River Basins Commission Annual Report for Fiscal Year 1978.

34. Missouri River Basin Commission 1978 Annual Report.

35. Great Lakes Basin Commission 1978 Annual Report.

36. Id.

37. Derthick, "Comparisons of Management Institutions," in The Role of a Title II Commission as an Alternative to Chesapeake Bay Management and Discussions of the Virginia-Maryland Coastal Zone Management Programs. (Citizens Program of the Chesapeake Bay, 1975).

38. New England River Basins Commission Annual Report 1978.

39. Id.

40. Id.

41. Pacific Northwest River Basins Commission Annual Report for Fiscal Year 1978.

42. 42 U.S.C. § 1962d(a).

43. 42 U.S.C. § 1962b-6(a).

44. Id.

45. Id.

46. 42 U.S.C. § 1962b-6(b).

47. Memorandum from Robert Kaiser, 9/27/79 regarding conversation with Joel Frish, United States Water Resources Council, Washington, D.C., Operations Division.

48. Id.

49. 42 U.S.C. § 1962a (1979).

50. See 1978 annual reports for the six commissions named in footnote 2.

5.0 COASTAL ZONE MANAGEMENT ACT--SECTION 309 AGENCY

5.1 Introduction

The Coastal Zone Management Act of 1972 is structured around the assumption that the primary responsibility for the management of the nation's coasts should remain with the states.[1] The Act provides a package of guidelines, incentives and subsidies to encourage each coastal state to develop and implement a comprehensive plan for the management of the various resources and activities occurring at the interface of land and tidewater.

Both Maryland and Virginia have worked for several years to develop qualifying programs under the Coastal Zone Management Act. At this time the Maryland plan has been approved by the Department of Commerce Office of Coastal Zone Management. Virginia has made substantial efforts in the preparation of a plan; however, the Virginia General Assembly has not as of this date passed legislation necessary to obtain federal approval of its program. As a result, the future of the Virginia plan is uncertain.

In many respects the Coastal Zone Management Act is a response to the same sort of problems which are presented in the management of the entire Chesapeake Bay. Essentially, the Act provides federal funding for the development of statewide

coastal zone plans which include the following requirements:

1. An identification of the boundaries of the Coastal Zone subject to the management program.

2. A definition of what shall constitute permissible land use and water uses within the Coastal Zone which have a direct and significant impact on the coastal waters.

3. An inventory and designation of areas of particular concern within the Coastal Zone.

4. An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph 2, including a listing of relevant constitutional provisions, laws, regulations and judicial decisions.

5. Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

6. A description of the organizational structure proposed to implement such management program, including the responsibilities of interrelationships of local, area wide, state, regional, and interstate agencies in the management process.

7. A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, aesthetic, ecological, or cultural value.

8. A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing impacts from such facilities.

9. A planning process for (A) assessing the effects of shoreline erosion (however caused) and (B) studying and evaluating ways to control or lessen the impact of, such erosion, and to restore areas adversely effected by such erosion.[2]

By providing for an integrated management of land and water uses in a statewide plan, the lack of uniformity which might otherwise exist among local jurisdictions is minimized to some extent. As implemented in Maryland, the program provides for a coordinated network of authority among state and local agencies having regulatory responsibilities in the coastal zone. This network largely preserves the important role which local (county and municipal) governments have traditionally occupied in land use regulation in Maryland, supplemented by the resources and oversight capabilities of the state's Tidewater Administration. Although state boundaries within which the coastal zone program of a single state must be confined do not necessarily coincide with the natural limits of ecosystems and watersheds, this type of program offers less fragmentation of policy and regulation than would be present under a system of independent local controls absent the statewide constraints of a coastal zone plan.

5.2 Creating a 309 Agency

Section 309 of the Coastal Zone Management Act provides that adjacent coastal states are encouraged to give high priority to coordinating state coastal zone planning, policies, and programs with respect to contiguous areas of such states and to studying, planning and implementing unified coastal zone

policies with respect to such areas.[3] To encourage such coordination, Section 309 specifically grants the consent of Congress to any two or more states to negotiate and enter into agreements or compacts for developing and administering coordinated Coastal Zone programs. Although no provision is made for formal participation by the federal agency, Section 309 also encourages the adoption of a federal-state consultation procedure for use whenever such consultation is requested by the interstate instrumentality for agencies. Furthermore, in the absence of a formal interstate agreement or compact, adjacent coastal states may also create and maintain a temporary planning and coordinating entity which is likewise eligible for grants covering up to 90 percent of their operating expenses.

The development of an agency pursuant to Section 309 would take advantage of the fact that substantial planning and organization efforts have already been undertaken in the participating states in the preparation of their Coastal Zone Management Plans. It would build upon the experience developed in each state in operating on an intergovernmental basis and would rely upon the network of contacts and communications which have been established on an intrastate basis.

Another characteristic of an interstate Coastal Zone agency would be its broad concern not only with protection of particular environmental values and resources, but also with the rational accommodation of competing demands for preservation,

recreation, residential, commercial and industrial development. Because there are areas of mutual interstate interest presented by each of these demands on the Chesapeake Bay resources, an interstate 309 agency could be charged with any necessary responsibilities in all of these areas.

Even though Virginia has not received program approva the Federal statute suggests that Virginia and Maryland may participate in a 309 interstate compact even in the absence of an approved program in one of the states. The statute encourages "coordination, study, planning, implementation" of unified Coastal Zone policies. Certainly, an interstate agreement or compact may be established which will carry out this purpose even though it does not result in an approved plan in one of the respective states. Participation by the two states will carry each further towards the goal of optimum management of coastal resources, even if the particular requirements of program approva are not met immediately by one of the participating states. Participation by Virginia would encourage that state to continue to maintain an interest in the program which may eventually result in an approved program. The specific language conferring th consent of Congress grants consent to enter into an agreement or compact for "developing and administering coordinated Coastal Zone planning, policies, and programs" (Emphasis added). The coordination of planning and policies can be achieved notwithstanding the fact that a developing program has not been approved

in one of the two states.

To date the federal Office of Coastal Zone Management has not made any determination as to whether a joint Maryland-Virginia agency would be eligible for funding under Section 309.

5.3 Authority Relationships

Section 309 is completely open-ended about the types of responsibilities which might be delegated by the states to an interstate agency. Therefore, it would be left to the states to decide what authority would be conferred upon a 309 agency and how that authority would be exercised. The consent granted in 309 does not in any way constrain federal agencies, but the establishment of a consultation procedure is encouraged.

Although the program cannot prevent the duplication of government activities at the state and federal levels, the Act does provide that federal activities in a state which has an approved coastal zone program must conform to that program.[4] Thus, uniformity of decision is achieved between federal and state agencies, even though duplication of effort may not be avoided. If the states established uniform approaches to Chesapeake Bay problems of mutual concern, the consisting provision would help assure federal conformity in Maryland and, perhaps, eventually in Virginia as well.

5.4 Experience with Section 309 Agencies

Section 309 has two dimensions: it confers the prior consent of Congress upon certain types of interstate agreements, and it authorizes the Secretary of Commerce to make grants to advance the purposes stated in the section. In the former sense, Section 309 already operates to confer constitutional validity upon any interstate agreement or compact formed for the stated purposes. Nonetheless, the second aspect pinpoints the status of the implementation of the section: so far no grants have been awarded for Section 309 activities. For example, the New England River Basin Commission, which has provided some interstate liaison among the New England states involved in coastal zone planning, has tried for some time to obtain such funding, without success.

Although there are no Section 309 agencies in existence, there are many coastal zone programs which have been developed and approved. To a very great extent, the probability of success of a 309 interstate agency is linked to the fortunes of the nation's coastal zone management program.

5.5 Funding Sources

Section 309 allows up to 90% federal financing for a qualified organization.[5] As noted above, no federal funds

have been disbursed under this Section. At present the only assured source of funding is the states themselves. Possible the federal coastal zone operating grants to the state of Maryland could be used in part to support an interstate liaison of this type. It is possible that, with the support of the Virginia and Maryland delegations, Congress could be persuaded to appropriate funds for 309 activities. Also, certain activities may qualify for other funding sources, such as Section 106 of the FWPCAA.

5.6 Summary

A Section 309 interstate agency could take almost any form deemed desirable by the states. No further action by Congress is necessary before organizing such a body. Up to 90% financing may eventually be available from the Department of Commerce, although such funds have not been available in the past. This agency would be an extension of the executive branches of each state, not a separate governmental entity. It would build upon prior coastal zone management efforts in each state and could be enlarged or reduced in response to the needs of the states.

FOOTNOTES - SECTION 5.0

1. 16 U.S.C. 1451 *et seq.*
2. 16 U.S.C. 1454(b)
3. 16 U.S.C. 1456b
4. 16 U.S.C. 1456(c)
5. 16 U.S.C. 1456B(d)

6.0 SECTION 208 INTERSTATE PLANNING AGENCY

6.1 Introduction

In 1972, Congress enacted a sweeping body of legislation to deal with the nationwide problem of water pollution, the Federal Water Pollution Control Act Amendments (FWPCAA).[1] This statute attempted to coordinate research, planning, construction grants and the regulation of activities affecting water quality.[2] Section 208 of the Amendments established the areawide comprehensive planning program which was designed to serve as a basis for all activities affecting water quality.[3] This planning process is intended to result in an areawide stategy either on an intra or interstate basis. The plan is updated annually setting forth major objectives, the methods to be used to attain these objectives and priorities for preventing and controlling pollution over a five year period.

6.2 Creation of a Section 208 Interstate Planning Agency

The first step in this process is to identify either the intra or interstate area which, as a result of urban-industrial concentrations or other factors, has substantial water quality problems.[4] Water quality problems are deemed to exist when water quality either has been or may in the future be degraded to the extent that extensive or desired water uses

are impaired or precluded and when the water quality problems are complex.[5]

The procedures involved in the designation of both the planning areas and the planning organization are cumbersome. The emphasis, however, at the first stage of designation is for the Governor of each state to call on the experience of local governments which exercise jurisdiction within the planning area or which have the capability of water quality management planning.[6] In fact, the Governor may allow self designation for elected officials of local units of government who would then deal with the Environmental Protection Agency directly. The area designated and the choice of the planning agency are subject to the approval of the Regional Administrator of EPA.[7] In the event the Administrator disapproves any of the designations he must specify his reasons in a public notice in the Federal Register.[8] The interstate or state planning agency may delegate, with the approval of the Regional Administrator, responsibility for portions of the water quality management plan, after consultation with local elected officials.[9]

A rather detailed water quality management plan is required for each designated area.[10] The plan must include water quality assessments for each segment of the area, an identification of sources of pollution, an inventory of municipal pollutant sources, a summary of existing land use patterns, demographic and economic growth projections for at least a twenty year period and projected industrial waste loads. Of major concern within the 208 process is an assessment of

nonpoint source pollutants: identifying the types of problems and the affected waters as well as any nonpoint sources which originate outside a 208 area and which affect water quality standards within the area. The plan also must include a discussion of existing state and local regulatory programs which will be utilized to implement the plan. The plans are subject to review by the local and state agencies and then are submitted to the Environmental Protection Agency for final review and approval. Once a plan is approved no permits or construction grants may be issued which are in conflict with the plan. EPA has attempted with limited success to require all construction grants to be consistent with interior outputs from the plan, prior to plan completion, although there is no express statutory authority for this requirement.

The above discussion highlights the fact that the functions carried out by the 208 agency relate directly to water quality issues. There is only an indirect relationship between the water quality issues and other resource management activities. For example, fisheries management would be indirectly affected by procedures designed to improve water quality. Marine transportation and development would likewise be indirectly affected by the control of nonpoint source discharges. In all these areas the local determinations would be subject to EPA review and approval authority.

6.4 Experience with Section 208 Planning Agencies

Experience to date with 208 interstate agencies has been minimal and only partially successful. An example of an interstate agency in this area is the Council of Government 208 agency for the metropolitan District of Columbia area. This was a locally designated agency agreed to by the various counties and incorporated cities within the D.C. area. It is presently composed of seventeen (17) jurisdictions. The Council has designated a number of subordinate boards which work on the various components of the interstate plan. Such boards are designated for water resources, health and transportation components, and other areas. Experience has indicated that while there is general agreement on the goals of water quality improvement there is a significant disparity in the methodology for attainment of these goals. The Council has not been successful to date with the regional handling of the common problems of sewage treatment and sludge disposal. There has been constant court litigation on these issues.

Other examples of interstate 208 agencies which have been designated include the Ark-Tex Council of Governments, which recently completed the Texarkana Areawide Water Quality Management Plan, the Ohio-Kentucky-Indiana Regional Council of Governments, the Arkhoma Regional Planning Council, the Washoe Council of Governments, the Mid-America Regional Council, the Delaware Valley Regional Planning Commission and the Tahoe Regional Planning Agency

Generally the basic thrust of 208 planning has been directed at the planning of wastewater treatment facilities, with a secondary emphasis upon abating pollution from nonpoint sources. As these programs mature it is expected that they will generate plans of a more comprehensive nature which address the entire spectrum of activities which may adversely affect water quality.[11]

6.5 Funding Sources

The qualified 208 agency is entitled to 100% funding for start up costs. 75% funding is available subsequent to the initial two year period allocated for plan development.[12]

6.6 Summary

Section 208 planning is now an integral part of the water quality strategy of the states and directly influences decisions concerning grants for sewage treatment works and concerning permits for the discharge of pollutants. It may be used to embrace a wide range of problems having water quality impacts. This choice has a potential for substantial federal funding, yet such an agency will be preoccupied to a large extent with the detailed, somewhat specialized planning requirements spelled out in EPA's regulations for 208 planning.

FOOTNOTES - SECTION 6.0

1. 33 U.S.C. §1251 et seq.
2. Id.
3. 33 U.S.C. §1288.
4. 33 U.S.C. §1288(a)(2).
5. 40 C.F.R. §130.13(a)
6. 33 U.S.C. §1288(a)(2).
7. 33 U.S.C. §1288(a)(7).
8. 40 C.F.R. (130.13(h)
9. 40 C.F.R. §130,14(a)
10. See Generally 40 C.F.R. §§130-131.
11. Report of the Comptroller General of the United States Water Quality Management Planning is Not Comprehensive and May Not Be Effective for Many Years. p.33
12. 33 U.S.C. §1288(f).

7.0 FEDERAL REGIONAL AUTHORITY

7.1 Introduction

One alternative which would achieve unified comprehensive management for the entire Chesapeake Bay would be the creation by Congress of a single authority vested with all the necessary power to carry out management purposes. The most notable example to this approach is represented by the Tennessee Valley Authority, a public corporation established by federal law.[1] The TVA, controlled by three directors appointed by the President, was given the power to condemn land in the name of the United States, construct fams, generate and sell electricity, erect flood control works and provide for the navigation of the Tennessee River and its tributaries.[2] Generally speaking, the TVA has exercised these powers fully and is recognized for its effectiveness in implementing its goals of flood control, power production and the maintenance of navigation. The Authority assumed a distinct regional character in carrying out these activities. Conceivably, a comparable institution could be created for the Chesapeake Bay.

Then entity in existence today which most resembles the TVA is the Army Corps of Engineers. This single agency

of the Department of Defense has been given far-reaching control over the physical development and modification of the Chesapeake Bay, its tributaries, and wetlands. In addition to this broad regulatory power, the Corps has public works responsibilities which involve it in port development, harbor and channel maintenace, and critical dredge disposal problems. Clearly, the Corps represents the greatest present concentration of power over the Chespeake Bay system. By virtue of the National Environmental Policy Act the exercise of these powers is guided not only by developmental and navigational purposes, but also by consideration of environmental consequences, water quality, historical preservation, recreational needs and a host of other public interest goals. In connection with its larger public works and regulatory action, the Corps is also in the role of a major information gatherer and researcher. Its study of existing and future conditions on the Chesapeake Bay represents one of the most comprehensive syntheses of knowledge about the estuary ever produced. The preparation of environmental impact statements as required by NEPA for the more significant Corps regulatory and developmental actions represents a substantial commitment of public resources for applied research and information gathering in the Chesapeake region.

All that would be necessary to complete the concentration of authority under one roof would be an executive order

transferring remaining areas such as water quality and fisheries management from other agencies to the Corps. Also, it would be necessary to consolidate parts of the Norfolk and Baltimore Districts into a new Chesapeake District. Federal-state interaction would be carried out under the consulting procedures required by NEPA and the water quality certification procedures of the FWPCAA. A number of costly and duplicative state programs, such as wetlands regulation, could be eliminated. All funding would be from Congressional appropriations.

This option clearly involves a departure from the state-federal allocation of responsibilities which has evolved in the region, and is unlikely to have significant political support.

FOOTNOTES - SECTION 7.0

1. 16 U.S.C. 831 *et seq.*
2. 16 U.S.C. 831c

APPENDIX A

OVERVIEW OF THE LAW OF INTERSTATE COMPACTS

A.1. What is an Interstate Compact?

When considering the legal consequences of an interstate compact, the threshold issue to be faced is determining when an agreement between two or more states is an "interstate compact" within the meaning of Article I, Section 10 of the Constitution. This section provides as follows:

> No State shall enter into any treaty, alliance or confederation...(clause 1)
>
> No State shall, without the consent of Congress...enter into any Agreement or Compact with another State or with a foreign power... (clause 3, the compact clause.)

This section places two restrictions on state action; states are absolutely prohibited from entering into treaties, alliances, and confederations and may enter into interstate agreements and compacts only with the consent of Congress. The Constitution, however, provides no insight into what elements distinguish a treaty from a compact, nor does it indicate what differentiates a compact from other interstate actions which would be valid without congressional consent. In the case of Virginia vs. Tennessee, decided in 1893, the Supreme Court stated what has become the generally accepted test for determining when a compact between states requires congressional consent: "[l]ooking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is

directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[1]

One commentator, trying to explain what distinguishes those agreements needing consent from those that do not, has suggested that the difference may be in the degree to which the agreements affect the federal-state allocation of power in either their immediate form or their potentialities.[2] He noted, for example, that consent is unnecessary when a state contracts with Canada to change the course of a drainage stream[3] or when two states agree to give land for a proposed railroad.[4] However, when states join to fight a natural resources problem[5] or to treat some social problem[6] there exists a potentiality of union which at some time could threaten the supremacy of the federal government.

An alternative explanation, based upon the same distinction, is that interstate arrangements "made in a governmental capacity" require consent while those of such a nature that they could be made by individuals in a private capacity do not.[7]

Another commentator has defined a compact as a <u>transaction</u> between states, noting that neither "mere similarity of conduct arising from common motives, nor acquiescence of one state in the acts of another" will be sufficient to constitute a compact in the absence of an interstate promise or grant.[8] Thus, he argued that it has never been suggested that the enactment of uniform laws constitutes an impermissible

compact. The absence of an interstate promise or commitment is a key difference between reciprocal, repealable legislation and a compact.[9] Additionally, neither mere preliminary negotiations toward a final and formal agreement[10] nor concurrent charters granted to a single corporation[11] are within the compact clause.

In the past courts explained the test of the scope of the compact clause in terms of the actual consequences of the particular agreement, rather than in terms of its potential effect. Nonetheless, commentators have argued that the rule is more plausible when stated in terms of the possible, as opposed to actual, effect of the compact.[12] The test would then examine the degree to which an agreement may conceivably conflict with federal law or interests, so that any possibility of conflict would indicate the need for submission of the compact to Congress. This interpretation of the Virginia rule has become the general standard used today by compacting states to try to determine the necessity of consent and has been adopted by the Supreme Court in the 1978 case of United States Steel Corporation vs. Multistate Tax Commission.[13]

Applying this rule to specific interstate agreements is not always easy. From the statement of the rule apparently only the exceptional agreement will require consent, and in every case subsequent to Virginia vs. Tennessee in which an interstate agreement has been challenged for lack of congressional consent the reviewing court has found the agreement exempt from the consent requirement.[14] Despite this fact, until recently draftsmen have been so uncertain of the application of the

compact clause that the great majority of formal interstate agreements have been submitted to Congress for its approval. For its part, Congress has been equally uncertain as to how and when to exercise its power of consent. For example, Congress refused to approve the Southern Regional Education Compacts.[15] The states involved, however, have since implemented the agreement without Congressional consent. Notwithstanding this, two subsequent and substantially similar agreements, the New England Higher Education Compact[16] and the Western Regional Education Compact[17] were submitted to and approved by Congress.

In recent years states have been more willing to assume that consent is unnecessary and to proceed without it.[18] The majority of their judgments, however, have not yet been subjected to judicial scrutiny in these instances. The courts, for their part, have had a difficult time in trying to apply the rule uniformly to actual agreements. Two compacts which were submitted to Congress and received approval[19] were substantially similar to one the New Hampshire court found to be exempt from the clause.[20] These examples illustrate the rule's inherent ambiguity.

In general, therefore, the applicability of the compact clause is limited to those agreements which tend to increase the political power of the states and which may "encroach upon or interfere with the just supremacy"[21] of the federal government. Thus, an agreement which purports to authorize the signatory states to exercise any powers they could not exercise in its absence would require congressional consent.[22] Another formulation of the test which has been suggested examines

whether the states have delegated any of their sovereign power to an agency or commission established by the agreement, or whether the states have retained their freedom to adopt or reject the rules and regulations of that agency or commission.[23]

Using these guidelines the recent executive agreement between the governors of Maryland and Virginia to establish a bi-state working committee for the purpose of providing a forum for the exchange of information, the coordination of problem solving, and the study of new means of bi-state Chesapeake Bay management[24] is probably valid under the compact clause, for the agreement does not have the potential to enhance the states' powers and authority at the expense of the federal government. Similarly, the joint Maryland-Virginia Legislative Advisory Commission on the Chesapeake Bay[25] is also probably valid. The commission's purpose is to review existing state and federal roles within the Bay region and to examine and evaluate available alternatives for more effective coordination in Bay management, and, based upon its appraisal, to recommend the most desirable Bay management alternatives to the Maryland and Virginia state legislatures. The commission has not been given any of the signatory states' sovereign power, but is to operate in solely an advisory capacity.

In contrast, a bi-state regulatory commission or authority with the power to establish rules and regulations binding on the states and their citizens is likely to require congressional consent, for such a body would have the potential

of impinging upon federal authority or for enhancing and concentrating the authority of the states. Thus, broadly speaking, the consent of Congress is probably not necessary for an advisory body created to enhance communication and coordination between the two states. A commission which is delegated regulatory powers by the participating states should receive Congressional approval to assure the validity of its existence and authority. Finally, the consent of Congress may be desirable to the extent that the compacting states seek to require federal agencies to be governed to some extent by the interstate commission or to limit the effect of federal laws as they apply to matters within the jurisdiction of the commission.

As a final point, states considering entering into an interstate agreement must remember that their power to make compacts is restricted also by other constitutional provisions. The restrictions of other prohibitive clauses of Article I, Section 10 and the Fourteenth Amendment, for instance, apply to actions taken by several states as well as to a state's individual acts. Constitutional provisions delegating certain powers to the federal government, such as the commerce power, also limit states' powers to enter into compacts. Again, the rules that apply to the actions of an individual state apply to those of a coalition.[26]

A.2 Form and Effect of Congressional Consent

Neither the Constitution nor federal law provides a formula for the fulfillment of the consent requirement, thus

the consent of Congress may take the form of any action signifying acquiescence in the terms of the compact. Consent may either precede or follow the making of the compact and may be manifested in numerous methods.[27] Since consent is a condition precedent to compact validity, such a difference merely determines the time at which the compact becomes effective.[28] Consent may be specific: that is, it may be given to a particular compact between particular states;[29] or general, where authorization is given in advance to all compact which may be made subsequently in a designated field.[30] As a general rule, congressional silence may not be regarded as assent in the absence of a broad resolution assenting in advance to such agreements, but it is at least arguable that consent may be implied from a congressional act recognizing a situation resulting from a compact, from acquiescence over a long period, or until disapproved by some affirmative action by Congress.[31] Consent is subject to Presidential veto,[32] although the veto has rarely been invoked.[33]

An important issue is whether consent once given can be rescinded by Congress at a subsequent time. The authorities are in disagreement on this issue; as a result, a typical procedure followed is for Congress to consent to a compact with a limitation attached regarding its tenure, with renewed congressional consent required at designated intervals.[34] Proponents of the view that the consent requirement is a continuing one argue that as the compact clause gives Congress the responsibility of safeguarding both national interests and the interests of compacting states, Congress' power cannot be

limited to passing on the compact in the first instance alone but must include the ability to subsequently alter, amend, or repeal the consent given. This, it has been argued, is necessary because the administration of the compact may not be consistent with the purposes for which Congress originally gave its approval. As conditions and needs change, plans which at the time of implementation do not adversely affect interstate commerce or another federal province may do so at a later time.[35] It has been suggested[36] that in the absence of a change in circumstances or a fraud upon Congress,[37] however, the withdrawal of consent by Congress, unless accompanied by the passage of legislation inconsistent with the substantive terms of the compact, should not be sufficient to invalidate the agreement, for the Constitution does not give Congress the power to abrogate valid existing agreements that do not conflict with Congress' own powers. For the same reason, the express reservation of Congressional power to amend or revoke ratification might be held ineffective.[38] However, while Congress' jurisdiction is not enlarged by giving its consent to an interstate compact,[39] it also is not diminished.

It has been established that Congress may regulate in the field covered by the compact despite inconsistency with that agreement. If Congress were to be prevented from regulating because of its prior consent to a compact, "the Congress and the two states would possess the power to modify and alter the Constitution itself."[40]

A.3 Legal Consequences of Entering into a Valid Interstate Compact

Compacts are frequently analogized to contracts between the signatory states,[41] supplemented by necessary state legislation, and once a compact has been ratified by Congress and becomes legally effective, it is binding upon the legislatures, administrative officials,[42] courts,[43] and citizens[44] of the compacting states. Compacts are, therefore, similar to treaties and their legal status has been developed in terms analogous to international law doctrine. It has been noted, however, that compacts differ from treaties in an important respect--the degree of superiority over inconsistent legislation.[45]

Compacts cannot be unilaterally changed or modified by one signatory,[46] and when properly ratified, invalidate any subsequent statutes passed by the state legislatures which are inconsistent with them.[47] The Supreme Court has determined that the inconsistent state statute is an unconstitutional impairment on the obligation of contracts.[48]

A related issue is the effect of inconsistent federal statutes upon an interstate compact. If the federal statute was enacted prior to the making of the compact, and if the interstate agreement is one to which the consent of Congress has not been obtained, the agreement would be invalid under the supremacy clause of the Constitution.[49] On the other hand, if Congress had given its consent to the agreement, that consent might be held to repeal the prior statute.[50]

One commentator has noted that the use of general congressional consent to a given category of compacts may lead to complications if that consent is given preemptive significance.[51] Compacts made by virtue of such consent may or may not be inconsistent with prior congressional acts, and the question arises whether Congress intended the general consent to cover all compacts or only those consistent with federal laws. Where the general consent conflicts with a later federal statute in the same field, the consent may well be deemed to have been retracted insofar as it is inconsistent with that stature.[52]

Similar considerations apply when the terms of a compact conflict with a prior federal treaty. Congress has the power to abolish treaties by subsequent legislation,[53] and whether the prior treaty or the subsequent compact would be superior depends upon whether the consent given by Congress has the usual effect of giving the compact the force of federal law.

There has been substantial debate as to the legal status of a compact when properly ratified by Congress. Although it has been severely criticized,[54] the Supreme Court subscribes to the doctrine that a sanctioned compact is a federal statute or "law of the Union".[55] This theory forms ths basis for certiorari review of issues arising in state compact cases,[56] and for the principle that in construing a compact the intent of the consenting Congress is controlling.[57]

Because of the federal character of ratified interstate compacts, the Supreme Court has ruled that these agreements

form an exception to the established rule that the decision of a state's highest court is the final authority on the validity of a state statute under the state constitution. Where a state court has directly passed upon the question of the validity of a state statute under the state constitution, the decision is usually considered conclusive and binding upon the federal courts, regardless of whether the state court has determined that the statute and constitution are in conformity[58] or has ruled the statute void because in conflict with the state constitution.[59] In contrast, the Supreme Court in Dyer vs. Sims,[60] overruled the decision of the West Virginia Supreme Court of Appeals[61] and held that the state statute authorizing the state to enter into an interstate compact was not in conflict with the state constitution. The Court's reasoning has been criticized,[62] but the end result seems necessary considering the nature and purpose of interstate compacts. A contrary holding which limited the scope of federal judicial review would mean that an "agreement solemnly entered into between states by those who alone have political authority to speak for a state could be unilaterally nullified or given final meaning by an organ of one of the compacting states." "A state," the Court observed in Dyer, "cannot be its own ultimate judge in a controversy with a sister state".[63]

The Dyer decision clearly established the character of a ratified interstate compact as a body of federal law of which the Supreme Court will be the final arbiter and which that Court will enforce against the member states which may later seek to avoid its terms.

A.4 Terminating a Compact

As indicated above, one signatory state may not act unilaterally to terminate a compact by revocation or by the passage of subsequent inconsistent legislation.[64] This rule can be explained by two theories of the nature of interstate compacts. In Green vs. Biddle,[65] the Supreme Court held that inconsistent subsequent state legislation was invalid on the theory that a compact is within the contract clause of the Constitution and cannot be abrogated by one state.[66] That conclusion can also be justified on the basis of the analogous rule of international law that one signatory cannot rightfully terminate its conventional obligations.[67]

In light of this rule, compacting states sometimes provide in the compact itself for termination by a signatory upon the giving of stipulated notice. If termination is provided for, a state may withdraw even though the rights of the citizens are affected adversely; the Supreme Court has held that subjects of the signatory states are not parties to the compact.[68]

A remaining question is whether a compact may be terminated by the withdrawal of congressional consent or by the passage of inconsistent federal legislation. In Pennsylvania vs. Wheeling Bridge Company,[69] a federal statute which allowed for the obstruction of the Ohio River was upheld by the Court, even though Congress had previously assented to an interstate compact whereby the signatory states had agreed to keep the river free from obstruction. Any other result would conflict

with the rule of the supremacy clause and the general rule of statutory construction that when two acts of Congress conflict, that which is adopted later in time controls.[70] These same considerations would appear applicable to Congress' power to terminate a compact by withdrawal of consent given the prevalent view today that the federal government retains the power of continuing consent.[71] However, whether or not Congress can revoke without explicitly reserving the power, in several instances Congress has reserved the right to withdraw its assent when it granted consent.[72]

A.5 Condition on Consent and Increasing Congressional Involvement

In recent years there has been a noticeable tendency on the part of Congress to exert increased powers of supervision and control over compacts and compact agencies. With increasing frequency, Congress has included conditions in its consents to interstate compacts, such as a reservation to "amend, alter or repeal" its resolutions of consent.[73] Also common in compacts which affect navigable waters are reservations of the authority and jurisdiction of the United States over the water and area involved.[74] Other conditions imposed by Congress include limitations on the duration of its consent. Congress may restrict the compact agency by limiting its activities to its enumerated functions and requiring congressional consent for each new and additional duty imposed on the agency by the signatory states.[75] In the past two decades, members of Congress have amended bills granting consent to compacts by adding provisions giving Congress and its

committees the right to examine all books, records, and papers pertaining to the activities and operations under the compacts.[76] Congress has justified these efforts at greater federal control as a necessary protection of federal authority from encroachment by states.[77]

The issue of the legitimacy of these congressional actions came to the forefront in the early 1960's in a case involving the Port of New York Authority. In 1960 the Authority announced plans to build a jetport in New Jersey, leading a House Judiciary Subcommittee to begin investigating charges that the proposal overstepped the Authority's powers.[78] The committee issued subpoenas seeking the production of documentary evidence concerning the agency's operations and activities.[79] The Authority's Executive Director, Austin Tobin, refused to answer the subpoenas, arguing unsuccessfully that Congress could scrutinize compacts only prior to authorizing them, after which he was convicted of contempt of Congress. The Court of Appeals reversed[80] on technical grounds[81] to avoid the constitutional issue.[82] Subsequently, the jetport plan was shelved by the Authority and the investigation became unnecessary. The issue of the extent of Congress' powers to inquire into the operation of a bi-state agreement created with approval of Congress thus remains somewhat unsettled.

The Supremacy Clause has been interpreted to mean that any state action encroaching upon an area of federal competence may be to that extent preempted by the superior power of Congress. The difficult issue presented by the Port

Authority investigation, however, as one commentator noted, is whether Congress can restrict the states' powers to govern state concerns under a ratified compact; not whether Congress can rightfully require periodic reports by, or conduct investigations into those compact agency operations affecting federal interests, but whether it can demand complete reports and conduct comprehensive investigations of all activities carried out pursuant to an approved compact; not whether Congress can require supplemental consent before compact agencies undertake additional powers which might impinge federal concerns, but whether it can require such consent when the additional activities affect matters wholly within the states' own domain.[83]

A.5 Judicial Review of Interstate Agreements

The validity of a compact may be challenged or its obligations enforced in suits brought either by states[84] or by individuals.[85] Depending upon the parties to the action and the nature of relief sought, suit may be brought in state court,[86] lower federal court,[87] or in the United States Supreme Court.[88] Suit may be brought for a variety of remedies: to have a compact declared invalid, to void legislation, or to prevent executive action pertaining to the subject matter of the interstate agreement, either on the ground that it is premised upon a compact whose validity is questioned,[89] or that it is inconsistent with a valid and operating compact.[90]

Because of possible immunities or defenses which may be available to certain types of defendants, it is useful to group

cases involving compact litigation into three categories. The first includes suits against an individual, brought either by the state or by another individual. In this context a plaintiff can test the validity of a compact or the subsequent legislation or executive action in a suit against a private individual[91] or to prevent an executive officer from enforcing the compact or subsequent legislation.[92] Such a suit may be brought in either state or lower federal court. The validity of state legislation alleged to be in violation of a valid compact also can be raised as a defense in a suit brought in any court by a state against a private defendant.[93]

In any suit brought against an official, however, it is important to note that the defendant may be able to claim immunity. In Lake Country Estates, Inc. vs. Tahoe Regional Planning Agency,[94] individual plaintiffs brought suit against the compact agency, individual members of the agency and its executive director alleging that an ordinance enacted by the authority (TRPA) destroyed the value of the plaintiffs' property in violation of the Civil Rights Act, 42 U.S.C. Section 1983, and the Fifth and Fourteenth Amendments. The Supreme Court held that to the extent the individual defendants had acted in a legislative capacity, they were immune from liability for damages under 42 U.S.C. Section 1983.[95] Although the Court did not find it necessary to address the issue, the Ninth Circuit had suggested that the officers also might be given the same qualified executive immunity given state executive officers.[96]

The second type of suit is an action brought by an individual against a state. Although this is prohibited by the principle of sovereign immunity and the Eleventh Amendment,[97] a suit to restrain a state officer from enforcing an unconstitutional statute is not barred bacause it is not considered a suit against the state.[98] This applies in a suit to restrain a state official from carrying out a compact when the compact itself is alleged to be unconstitutional.

An individual plaintiff may be able to maintain a suit against the interstate compact agency when he cannot maintain his cause of action against the state. In Lake Country Estates, the Supreme Court found that the TRPA was not immune from suit under the Eleventh Amendment.[99] The Court considered the states' intentions in creating the TRPA, the terms of the compact, the TRPA's actual operations and concluded that there was no reason to believe that the states had structured the new agency to enable it to enjoy the special constitutional protection given the states by the Eleventh Amendment.[100]

The third type of suit involves an action by one signatory state against another. The Supreme Court can hear a suit brought by one state against another challenging the validity of the latter's activities in regard to the subject matter of the compact,[101] or to compel action by that state's executive officers[102] or legislators.[103] In such a suit neither the proscriptions of the Eleventh Amendment nor the principles of sovereign immunity apply.[104]

FOOTNOTES

1. 148 U.S. 503, 519 (1893). The Court expressly applied this dictum in a holding for the first time in New Hampshire vs. Maine, 426 U.S. 363 (1976).

2. "Legal Problems Relating to Interstate Compacts," 23 Iowa L. Rev. 618, 623 (1938).

3. McHenry County vs. Scott, 37 N.D. 59, 163 N.W. 540 (1917).

4. Union Branch Railroad vs. East Tennessee Railroad, 14 Ga. 327 (1853).

5. See, e.g., Colorado River Compact, Arizona vs. California, 292 U.S. 341 (1933).

6. See, e.g., People vs. Central Railway, 42 N.Y. 283 (1870).

7. See, e.g., Virginia vs. Tennessee, 148 U.S. at 518-19. "If...Virginia should come into ownership of land in New York which the latter state might desire,...it would hardly be deemed essential...to obtain the consent of Congress... to make a valid agreement to purchase the land."

8. 35 Col. L. Rev. 76, 77-78 (1935).

9. The Supreme Court, however, has stated in dictum that reciprocal legislation could be subject to congressional consent, since "the mere form of the interstate agreement cannot be dispositive," and agreements reached through reciprocal legislation might present opportunities for an interstate union which could threaten federal supremacy similar to the threats

inherent in a "compact". United States Steel Corporation vs. Multistate Tax Commission, 99 S. Ct. 799, 811 (1978).

10. See Virginia vs. Tennessee, 148 U.S. at 520.

11. Dover vs. Portsmouth Bridge, 17 N.H. 200 (1845). See St. Louis and San Francisco Ry. vs. James, 161 U.S. 545, 562 (1896).

12. Engdahl, "Characterization of Interstate Agreements: When is a Compact Not a Compact?" Mich. L. Rev. 64:63,69 (1965). See United States Steel Corporation vs. Multistate Tax Commission.

13. 99 S. Ct. 799, 812 (1978).

14. See, e.g., United States Steel Corporation vs. Multistate Tax Commission, 99 S. Ct. 799 (1978); North Carolina vs. Tennessee, 235 U.S. 1 (1914); Wharton vs. Wise, 153 U.S. 155 (1894); State vs. Doe, 149 Conn. 216, 178 A.2d 271 (1962); Duncan vs. Smith, 262 S.W.2d 373 (1953); McHenry County vs. Brady, 37 N.D. 59, 163 N.W. 540 (1917).

15. See Ferguson, "The Legal Basis for a Southern University-Interstate Agreements Without Congressional Consent," 38 Ky. L.J. 847 (1950).

16. Consented to by Congress, Act of August 30, 1954, Ch. 1089, 68 Stat. 682.

17. Consented to by Congress, Act of August 8, 1953, Ch. 380, 67 Stat. 490.

18. Consent was not requested for the Compact on Juveniles, the Corrections Compacts, or the Welfare Services Compact. See also, Council of State Governments, 1964-1965 Book of the States 276-77; 1962-63 The Book of the States 268; 1960-61 The Book of the States 245-46.

19. See Petty vs. Tennessee--Missouri Bridge Commission, 359 U.S. 275 (1959); Delaware River Joint Toll Bridge Commission vs. Colburn, 310 U.S. 419 (1940).

20. Ham vs. Main-New Hampshire Interstate Bridge Authority, 92 N. H. 268, 30 A.2d 1 (1942).

21. Virginia vs. Tennessee, 148 U.S. at 519.

22. United States Steel Corporation vs. Multistate Tax Commission, 99 S. Ct. at 812-813.

23. Id. at 813.

24. An Agreement between the Governor of the Commonwealths of Virginia and the State of Maryland concerning Management of the Resources and Activities of the Chesapeake Bay and Coastal Areas.

25. Maryland Senate Joint Resolution No. 75; Virginia Senate Joint Resolution No. 101.

26. See "Legal Problems Relating to Interstate Compacts," 23 Iowa L. Rev. 618, 624-27 (1938).

27. Prior to state action, consent may be given expressly by Act or by Joint Resolution. Consent following state action may be granted expressly by Act, by Joint Resolution, by ratification of a state constitution which embodies the compact, or inferred from a compact between Congress and a state. See "The Interstate Compact--A Survey," 27 Temple Law Quarterly, 320, 323 (1953).

28. State vs. Cunningham, 102 Miss. 237, 243, 59 So. 76, 78 (1912). Congress frequently grants a preliminary authority to states to negotiate an agreement, reserving the right to consent. See, e.g., 66 Stat. 737 (1952).

29. See, e.g., 64 Stat. 568 (1950).

30. Congress first enacted a general consent act in 1911. "Consent...is given to each of the several states of the Union to enter into any agreement or compact, not in conflict with any law of the United States, which any other State or States for the purpose of conserving the forests and the wate supply of the States entering into such agreement or compact." 86 Stat. 961 (1911), 16 U.S.C. §522 (1946).

31. See Ferguson, "The Legal Basis for Southern University--Interstate Agreements Without Congressional Assent," 38 Ky. L.J. 347, 356-57 (1950).

E.g., In Wharton vs. Wise, 153 U.S. 155, 173 (1894), the Court stated that the compact in question had not been forbidden by the Articles of Confederation, continued in force after the adoption of the Constitution and received the consent of Congress by the adoption or approval of proceedings taken under it.

32. U.S. Const. Art. I, § 7, Cl. 13.

33. President Franklin Roosevelt refused to approve the Act consenting to the Atlantic States Marine Fisheries Compact. The compact was subsequently redrafted and signed.

34. For example, until 1943 consent to the Interstate Oil Compact was limited to two year periods, at which time the consent period was extended to four years.

35. "Congress, Compacts, and Interstate Authorities," 26 Law and Contemporary Problems 682, 685 (1961).

36. Note 35 Col. L. Rev. 76, 84-85 (1935).

37. Changes in circumstances which give rise to previously non-existent political overtones might lead Congress to believe the "compact" had become a treaty, and fraud in the enducement of congressional consent would probably render the agreement voidable. Id. at n. 61.

38. See 41 Stat. 1447 (1921); 45 Stat. 300 (1928); 45 Stat. 1502 (1929).

39. Cf. Hamburg American Steamship Co. vs. Grube, 196 U.S. 407 (1905). (Consent to an agreement regulating state jurisdiction over boundary waters did not extend exclusive federal admiralty jurisdiction to the area affected by the compact).

40. Pennsylvania vs. Wheeling and Belmont Bridge Co., 18 How. 421, 430 (U.S. 1855); Missouri vs. Illinois, 200 U. S. 496, 519 (1906).

41. See, e.g., "Some Legal and Practical Problems of the Interstate Compact," 45 Yale L.J. 324 (1935).

42. Kansas City vs. Fairfax Drainage District, 84 F.2d 357 (10th Cir. 1929); cert. denied, 281 U.S. 722 (1930).

43. Couch vs. State, 140 Tenn. 156, 203 S.W. 831 (1918).

44. Hinderlider vs. LaPlata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938); Poole vs. Fleeger, 36 U.S. 185 (1837).

45. "Some Legal and Practical Problems of the Interstate Compact," 45 Yale L.J. 324, 329 (1935).

46. Virginia vs. West Virginia, 220 U.S. 1 (1911); Virginia vs. West Virginia, 78 U.S. (11 Wall.) 39 (1870).

47. Missouri vs. Illinois, 200 U.S. 496, 519 (1906); Green vs. Biddle, 21 U.S. (8 Wheat.) 1,69 (1823); Pennslyvania vs. Wheeling and Belmont Bridge Co., 54 U.S. (13 How.) 508, 565

(1852); 59 U.S. (18 How.) 421, 430 (1856); C.T. Hellmuth vs. Washington Metro. Area Trans. 414 F. Supp. 408 (D. Md. 1976).

48. For a discussion of the application of this doctrine when the compact is concerned with essentially private rights or with "political rights", see 45 Yale L.J. at 329-30.

49. Pennsylvania vs. Wheeling Bridge Co., 54 U.S. (13 How.) 518 (1852).

50. This would seem to be true under the "law of the Union" doctrine. See text accompanying note 55, infra. For a discussion of the effects upon an interstate compact of a federal statute enacted following Congress' ratification of the compact, see text accompanying notes 65-66, infra.

51. "Legal Problems Relating to Interstate Compacts," 23 Iowa L. Rev. 618, 628 (1938).

52. The effect of subsequent consent in both specific and general form, even if it does act to repeal prior inconsistent federal statutes, would be limited in any case by the restriction of the Fifth Amendment where rights have become vested under the statute.

53. Hijo vs. United States, 194 U.S. 315, 324 (1911).

54. Engdahl, "Construction of Interstate Compacts--A Questionable Federal Question," 51 Va. L. Rev. 987 (October 1965).

55. The Court had first advanced this theory in the mid-nineteenth and early twentieth centuries in such cases as Missouri vs. Illinois, 200 U.S. 496, 519 (1906); Pennsylvania vs. Wheeling Bridge Co., 54 U. S. (13 How.) 518, 555-56

(1851); Green vs. Biddle, 21 U. S. (8 Wheat) 1 (1823). the Court rejected the doctrine in Hinderlider vs. LaPlata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938), but later overruled the decision in Delaware River Joint Toll Bridge Commission vs. Colburn, 310 U.S. 419 (1940).

It should be apparent that compacts are not "acts of Congress." They are agreements between states, and unlike federal statutes in content, form, or administration. In some cases, a federal statute in the field would be unconstitutional, as in the adjustment of a state boundary. The "law of the Union" theory is also inconsistent with the concepts that Congress' consent is only a limitation on state power and that state constitutions restrict the compacting powers of the states. See, Rhode Island vs. Massachusetts, 37 U.S. (12 Pet.) 1 (1838).

In some instances, however, the "law of the Union" theory might be justifiable. For example, if the dispute is between two states over which of two possible interpretations should be given the agreement, the supremacy clause of the Constitution might properly be used on the theory that Congress intended to consent to only a particular interpretation. See Lessee of Marlott vs. Silk, 36 U.S. (11 Pet.) 1 (1837).

56. Dyer vs. Sims, 341 U.S. 22 (1951); Delaware Bridge Commission vs. Colburn, 310 U.S. 419 (1940). "[T]he

construction of a compact sanctioned by Congress...involves a federal 'title, right, privilege, or immunity' which when 'specially set up and claimed' in a state court may be reviweed on certiorari...." Colburn at 427. For a criticism of the Colburn rule, see Engdahl, supra, note 54.

57. Petty vs. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1958).

58. Merchants Bank vs. Pennsylvania, 167 U.S. 461 (1896).

59. Post vs. Supervisors, 105 U.S. 667 (1881).

60. 341 U.S. 22 (1951).

61. State ex rel Dyer vs. Sims, 58 S.E. 2d 766 (W.Va. 1950).

62. Ladendorff, "Interstate Compacts - An Exception to the Rule of Supremacy of State Court Decisions," 7 Intra. L. Rev. (N.Y.U.) 249 (1951).

63. Dyer, 341 U.S. 15,28.

64. See text accompanying notes 47,48, supra.

65. 21 U.S. (8 Wheat.) 1 (1823).

66. One commentator has noted, however, that the contract clause was probably intended to apply only to contracts between private parties and should not be applied to agreements between sovereigns. The clause was intended to protect individuals from state action, not to protect one state from another state's attempts to terminate an interstate agreement. Note, "Legal Problems Relating

to Interstate Compacts," 23 Iowa L. Rev. 618,630 (1938).

67. Courts do uphold abrogations of federal treaties by Congress, but this is on the basis that the Constitution's supremacy clause puts statutes and treaties on an equal basis. In the basence of such a clause in the organic law of a sovereign, however, the Supreme Court has recognized the general international law rule. As there is no clause putting compacts and state legislation on a parity, the general rule of international law should apply. See Note, 23 Iowa L. Rev. at 631.

68. Georgetown vs. Alexander Canal Company, 37 U.S. (12 Pet.) 91, 95-96 (1831).

69. 59 U.S. (18 How.) 421 (1855).

70. Petri vs. Creelman Lumber Company, 199 U.S. 487 (1899).

71. See text accompanying notes 34-35, supra.

72. See, e.g., 36 Stat. 961 (1911); 16 U.S.C. Sec. 552 (1927).

73. See, e.g., resolutions approving the Port of New York Authority, Ch. 77, 42 Stat. 174 (1921); Ch. 277, 42 Stat. 822 (1922).

74. E.g., Port of New York Authority resolutions, note 63, supra.

75. E.g., Wabash Valley Compact, 73 Stat. 698 (1959); Tennessee Valley River Basin Water Pollution Compact, 72 Stat. 828 (1958); Bi-state Development Agency Compact, 64

Stat. 568 (1950).

76. See, e.g., Wabash Valley Compact, note 65 supra, Tahoe Regional Planning Compact, 83 Stat. 360 (1969).

77. This was the announced objective of the House Judiciary Committee which investigated the Port of New York Authority. "In imposing...restriction[s], Congress has doubtless been motivated by a desire to protect the exercise of its constitutional responsibilities against erosion by fait accompli and the possible application thereto of a doctrine of implied consent." Celler, "Congress, Compacts and Interstate Authorities", 26 Law & Contemp. Prob. 682, 689 (1961). See United States vs. Tobin, 195 F. Supp. 588 (D.D.C. 1961); rev'd 306 F.2d 270 (1962), cert. denied, 371 U.S. 902 (1962).

78. The subcommittee believed that Congress had jurisdiction to investigate as the Authority had been created by a compact requiring Congress' approval. "Inquiry Before Subcommittee No. 5 of the House Committee on the Judiciary on the Return of Subpoenas, Port of New York Authority," 86th Cong. 2d Sess. (1960).

79. The records sought concerned the internal managing, financing, and decisional processes of the Authority. Celler, "Congress, Compacts and Interstate Authorities," 26 Law & Contemp. Prob. 682, 696 n. 103 (1961).

80. Tobin vs. United States, 306 F.2d 270 (1962).

81. The ground was that Congress had not authorized as broad an investigation as the subcommittee had attempted. Tobin, 306 F. 2d at 276.

82. "A contempt of Congress prosecution is not the most practical method of inducing courts to answer broad questions...when the answers sought necessarily demand far-reaching constitutional adjudications. To avoid such constitutional holdings is our duty....[W]e have adopted the policy... to obviate the necessity of passing on serious constitutional questions." 306 F.2d at 274-75.

83. Engdahl, "Characterization of Interstate Arrangements: When is a Compact Not a Compact?" 64 Mich. L. Rev. 63, 72 (1965).

84. E.g., Virginia vs. West Virginia, 246 U.S. 565 (1918); South Carolina vs. Georgia, 93 U.S. 4 (1876).

85. E.g., Green vs. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

86. E.g., State vs. Cunningham, 102 Miss. 237, 59 So. 76 (1912).

87. E.g., League to Save Lake Tahoe vs. Tahoe Regional Planning Agency, 507 F. Supp. 517 (9th Cir. 1977).

88. The Supreme Court has original jurisdiction in suits in which a state is a party. U.S. Const. Art. III, §2.

89. La Plata River and Cherry Creek Ditch Co. vs. Hinderlider, 93 Colo. 138, 25 P. 2d 187 (1933), rev'd on other grounds, 304 U.S. 92 (1937).

90. Kentucky Union Co. vs. Kentucky, 219 U.S. 140 (1910).

91. Green vs. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

92. Jacobson vs. Tahoe Regional Planning Agency, 566 F.2d 183 (9th Cir. 1977), aff'd in part, sub nom; Lake Country Estates vs. Tahoe Regional Planning Agency, 99 S. Ct. 1171 (1979).

93. Kentucky Union Co. vs. Kentucky, 219 U.S. 140 (1910).

94. 99 S. Ct. 1171 (1979).

95. Id. at 1179. The Court found no reason why "regional legislators" should not be accorded the same immunity as their state and national counterparts. Id. A suit against state or national legislators may not be maintained in either state or federal courts. Tenney vs. Brandhove, 341 U.S. 367 (1951).

96. Jacobson vs. Tahoe Regional Planning Agency, 566 F. 2d 1353, 1365 (9th Cir. 1977). The Ninth Circuit remanded on this issue and suggested as a guideline that the individuals charged could not receive executive immunity if they had known or should have known the action taken would violate constitutional rights, or if they took the action with malicious intent to deprive the plaintiffs of their constitutional rights. Id., citing Wood vs. Strickland, 420 U.S. 308 (1974).

97. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State..."

98. Ex Parte Young, 209 U.S. 123 (1908).

99. 99 S. Ct. at 1178.

100. Id. at 1177. Even if the states had so intended that the TRPA have immunity, such intent would not be binding unless Congress had concurred. Id.

101. Kentucky vs. Indiana, 281 U.S. 163 (1930); Pennsylvania vs. West Virginia, 262 U.S. 553 (1923).

102. E.g., Kentucky vs. Indiana, 281 U.S. 163 (1930).

103. Virginia vs. West Virginia, 246 U.S. 565 (1918). In 1862, West Virginia assumed by compact part of Virginia's public debt. Upon subsequent refusal to satisfy this obligation, Virginia obtained a judgment in the Supreme Court. When West Virginia still took no action to pay the debt, the Court asserted its power to coerce action by West Virginia, presumably through the other branches of the federal government, and the judgment was then paid.

104. Kentucky vs. Indiana, 281 U.S. 163 (1930); Pennsylvania vs. West Virginia, 262 U.S. 553 (1923).