

# INTERSTATE AGREEMENTS FOR AIR POLLUTION CONTROL

## I. RECOGNITION OF INTERSTATE ASPECTS OF AIR POLLUTION

The existence of polluted air has been recognized for a long time.<sup>1</sup> Yet prevention and control measures are all of relatively recent vintage in this country.<sup>2</sup> Reasons cited for lack of progress in the past have included political considerations, lack of funds for control agencies, organizational problems, the magnitude of the problem, economic ramifications of aggressive emission control, and public indifference to the effects of pollution and unwillingness to demand adequate control measures.<sup>3</sup> However, the evident nature of pollution, publicity, and prodding by the federal government have produced, in the last few years, a large quantitative increase in the enactment of environmental control legislation by all levels of government. Indeed, in 1967, the legislative output dealing with air pollution, noise control and solid waste disposal was triple that of 1966.<sup>4</sup>

Meteorological data confirms what is obvious to any resident of an interstate (or international)<sup>5</sup> urban or industrial area—contaminated air

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1. . . . this most excellent canopy, the air, look you, this brave o'erhanging firmament, this majestic roof fretted with golden fire, why, it appears no other thing to me than a foul and pestilent congregation of vapours.

W. SHAKESPEARE, *HAMLET*, Act II, scene ii, England has had air pollution laws for 600 years. Leighton, *Geographical Aspects of Air Pollution*, 56 *GEOGRAPHICAL REV.* 151, 152 (1966).

2. See Leighton, *supra* note 1. For a good non-technical discussion of air pollution, see Griffin, *The Air Around Us*, 31 *REP.* 39 (Sept. 10, 1964).

3. Barkley, *Air Pollution Prevention in the United States*, 73 *MECHANICAL ENG.* 284, 288 (1951).

4. 1 *CLEAN AIR NEWS* 1 (Oct. 17, 1967).

5. In 1928, the United States and Canada attempted to deal with some of the problems of international air pollution by forming an International Joint Commission. To date the Commission has examined sulfur smelter contamination problems stemming from a smelter in Trail, B.C., U.S. BUREAU OF MINES BULLETIN No. 453 (1944). It has also held public hearings in 1967 in the Detroit-Windsor, Port-Huron-Sarnia metropolitan areas to determine (1) whether air is being polluted on either side of the international boundary; (2) sources of pollution and their extent; (3) necessary preventive or remedial measures; and (4) cost estimates for these measures, 55 *DEPT STATE BULL.* 688 (1966); 1 *CLEAN AIR NEWS* 15 (June 13, 1967). Agreements for the abatement of international air pollution would apparently be akin to interstate compacts. Megonnell & Griswold, *Federal Air Pollution Prevention and Abatement Responsibilities and Operations*, 16 *J. AIR POLLUTION CONTROL ASS'N* 526, 527 (1966) [hereinafter cited as JAPCA].

respects no political boundaries.<sup>6</sup> Thus with twenty-six standard metropolitan statistical areas<sup>7</sup> including territory in two or more states,<sup>8</sup> and seventy-two regional interstate areas affected by pollution,<sup>9</sup> the need for interjurisdictional control of air pollution is clear.

Various governmental techniques for dealing with an interstate problem are available. The interstate compact is an obvious alternative.<sup>10</sup> Others include informal administrative agreements between states, planning by private or quasi-public organizations, and direct federal intervention.<sup>11</sup> A hybrid approach would provide for federal intervention during the hiatus between recognition of the problem and implementation of a compact.<sup>12</sup> Each technique has been employed, with varying degrees of success.<sup>13</sup> While, in the abstract, federal enforcement of air quality standards would appear to be the most viable means of control, the federal Clean Air Act of 1963<sup>14</sup> and Air Quality Act of 1967<sup>15</sup> have sought, by what is termed "creative federalism"<sup>16</sup> to encourage the states, through technical and financial aid, to develop appropriate abatement programs and to effectuate and enforce them across jurisdictional boundaries by use of a compactually created interstate agency.<sup>17</sup>

Unfortunately, the states have not provided much justification for Congress' belief in their ability and motivation to cope with inter-

6. L. BATTEN, *THE UNCLEAN SKY* (1966); *AIR POLLUTION HANDBOOK* § 14.3 (P. Magill, F. Holden & C. Ackley, ed. 1956); Hartmann, *Legal Regulation of Air Pollution*, 41 *IND. & ENG. CHEM.* 2391, 2394 (1949).

7. A standard metropolitan statistical area is a county or group of contiguous counties which contains at least one central city of at least 50,000 persons or "twin" cities with a combined population of at least 50,000. Other contiguous counties are included in the area if they are essentially metropolitan in character and are socially and economically integrated with the central city. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 17 (86th ed. 1965).

8. Edelman, *Legal Problems of Interjurisdictional Air Pollution Control*, 13 *JAPCA* 310, 311-12 (1963).

9. 5 *AIR/WATER POLLUTION REP.* 128 (1967).

10. See Hofflund, *National Aspects of Air Pollution Legislation*, *AIR POLLUTION* 769 (L. McCabe, ed. 1952) for early recognition of the use of the compact for air pollution control.

11. Tobin, *The Interstate Metropolitan District and Cooperative Federalism*, 36 *TUL. L.R.* 67, 68-9 (1961).

12. 70 *PUB. HEALTH REP.* 638, 640 (1955).

13. See notes 88-159 *infra* and accompanying text.

14. 42 U.S.C. § 1857 (1964).

15. 42 U.S.C. § 1857 (Supp. III, 1968), amending 42 U.S.C. § 1857 (1964).

16. Weaver, *Creative Federalism and Metropolitan Development*, 1 *METRO. VIEWPOINTS* 1 (1966).

17. 42 U.S.C. §§ 1857a, c(a), d(b) (1964), as amended, (Supp. III, 1968).

jurisdictional air pollution problems. Air pollution plagues many multi-state areas, but only in a few instances have there been meaningful interstate attempts at control. Even when such attempts have been made, the results are unsatisfactory. This has been the compact experience to date.

Although implementation of compactual solutions to air pollution problems has been emasculated by the Congressional consent requirement, the federal government still may be potentially the most effective combatant of interstate air pollution. The federal government may eventually assume all responsibility in interstate air pollution control. In any event, prospective compact participants should weigh the control potential of a state-federal relationship, as possible under extant legislation (see note in this symposium on federal law) with that afforded by the interstate compact.

## II. INTERSTATE COMPACTS AS A CONTROL TECHNIQUE

The United States Constitution permits a state, with the "consent of Congress," to ". . . enter into any agreement or compact with another state. . . ," impliedly for the solution of common problems.<sup>18</sup> Until the twentieth century, the states employed this option sparingly. Innocuous boundary settlement agreements were the predominant compact type.<sup>19</sup> Boundary compacts, such as the Missouri and Arkansas Boundary Compact of 1846,<sup>20</sup> were resorted to when other means for the resolution of the dispute were ineffective. None created a permanent administrative agency.

Milestones in the development of the compact as more than a device for the settlement of a single dispute were the New York Port Authority<sup>21</sup> and Colorado River<sup>22</sup> Compacts. These compacts provided, for the first time, a regional approach to a common problem coupled with

18. U.S. CONST. art. I, § 10.

19. R. LEACH & R. SUGG, JR., *THE ADMINISTRATION OF INTERSTATE COMPACTS* 5 (1959) [hereinafter cited as LEACH & SUGG]; Frankfurter & Landis, *The Compact Clause of the Constitution*, 34 *YALE L.J.* 685, 696 (1925).

20. Dig. Ark. Laws, 1857, ch. 13, p. 154 (1857); Mo. Laws, 1847, 13.

21. The compact creates Port of New York Authority for development of transportation and terminal facilities and promotion of commerce in the Port Area. Participants: New York, New Jersey. For text of compact see, e.g., N.J. STAT. ANN. § 32:1-1 to -174 (1963).

22. Compact apportions water of the Colorado River; provides for division of water between upper and lower basin by providing water storage and flood protection facilities. Participants: Arizona, California, Colorado, Nevada, New Mexico, Utah, Wyoming. For text of compact, see, e.g., UTAH CODE ANN. § 73-13-10 (1963).

the creation of an administrative agency necessary for continuous impact.<sup>23</sup> Contemporaneously, Felix Frankfurter and James Landis published their landmark article, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*,<sup>24</sup> which focused attention on the efficacy of compacts as a regulatory device.

Since the 1920's compacts have proliferated in number and treated a spectrum of subject matter.<sup>25</sup> Notable in the recent historical development of compacts have been the Interstate Sanitation (Tri-State)<sup>26</sup> and Delaware River Basin Compacts.<sup>27</sup> The latter first included full federal participation in a compact and fused federal aid to interstate co-operation through compacts, two formerly divergent trends of development.<sup>28</sup> Air pollution control as a subject matter was first recognized compactually in the Interstate Sanitation Compact as amended in 1954.<sup>29</sup>

Interstate compacts can be classified under three headings:<sup>30</sup>

1. Technical: Primary water allocation compacts.<sup>31</sup>
2. Advisory: Bodies created in an investigatory capacity. Usually concerned with a single issue.<sup>32</sup>
3. Operating: Empower bodies created to own and operate various facilities or institutions.<sup>33</sup>

For effective control of air pollution, compacts must be the operating type. Unless the control agency has the ability to evaluate a pollution problem, prescribe its remedy, and administer the process involved in the attainment of a control objective, pollution control will be in-

23. F. ZIMMERMANN & M. WENDELL, *THE INTERSTATE COMPACT SINCE 1925* at 5 (1951).

24. See note 19 *supra*.

25. See COUNCIL OF STATE GOVERNMENTS, *INTER-STATE COMPACTS: 1783-1966* (1966), for a current listing.

26. Participants: Connecticut, New Jersey, New York. For text of compact, see, e.g., N.J. STAT. ANN. § 32:18-1 to 32:19A (1963); N.Y. PUB. HEALTH LAW § 1299-1 (McKinney Supp. 1966). Only New Jersey and New York participate in air pollution study and control. See N.J. STAT. ANN. § 32:19A-1 (1963).

27. Compact creates agency with extensive regulatory and administrative powers for the "multi-purpose" development of water resources in the Delaware basin region. Participants: Delaware, New Jersey, New York, Pennsylvania, United States. For text of compact see, e.g., PA. STAT. ANN. tit. 32, § 815.31 to 815.106 (1967).

28. See Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825 (1963), for a delineation of the formation of the basin compact.

29. N.Y. PUB. HEALTH LAW § 1299-1 (McKinney Supp. 1967).

30. LEACH & SUGG 18, 19-20.

31. E.g., Yellowstone River Compact. Participants: Montana, North Dakota, Wyoming. For text of compact see, e.g., WYO. STAT. ANN. § 41-511 (1959).

32. E.g., Tri-State Compact, N.J. STAT. ANN. § 32:18-1 (1963).

33. E.g., Port of New York Authority, N.J. STAT. ANN. §§ 32:1-1 to -174 (1963).

complete. Reliance on other agencies of government to perform these tasks will produce undesirable results because of the presence of bureaucratic inertia, combination of functions and absence of comprehensive direction. State agencies, oriented towards intra-state problems, thus do not provide an adequate vehicle for control of interstate pollution. Indeed, had the state agencies, in many cases, been more effective in curbing pollution emitters within their respective jurisdictions, would not the need to create an interstate body for air pollution control be diminished or obviated?

Despite an ostensible lack of power, the commissions created by advisory compacts are often delegated a broader scope of function and can exert more influence than operating compact agencies when the compact parties are receptive to the commission's suggestions.<sup>34</sup> This can be meaningful when, as is the case with the Interstate Sanitation Commission, the agency can institute an abatement suit when its less coercive recommendations are ignored.<sup>35</sup>

Despite recognition of compacts as a viable alternative to direct federal intervention for solution of interstate environmental pollution control problems, inherent difficulties in their use exist. It has been observed that ". . . the Compact clause requires something like geological time to achieve the results that are desirable."<sup>36</sup> The average time to complete a water resources control compact has been fixed at eight years,<sup>37</sup> while approximately five years elapse in the typical case from the signing or initial state ratification to the date of congressional consent.<sup>38</sup> Contributing to this glacial slowness is the nature of the formulation and enactment process.<sup>39</sup> Frequently state parochialism and interstate antagonisms impede willing co-operation to anticipate problems. Interstate authority has most often been ". . . ground reluctantly out of the

34. LEACH & SUGG 19.

35. N.J. STAT. ANN. § 32:19-4 (1963); N.Y. PUB. HEALTH LAW § 1299-c (McKinney Supp. 1967).

36. H. LASKI, *THE AMERICAN DEMOCRACY* 156 (1948).

37. Grad, *supra* note 28, at 827 (citing MARTIN, BIRKHEAD, BURKHEAD & MUNGER, *RIVER BASIN ADMINISTRATION AND THE DELAWARE* 131-32 (1960)).

38. F. ZIMMERMANN & M. WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 54 (1961).

39. A technical distinction exists between the terms "enactment" and "execution" as applied to compacts. The former only requires, like an ordinary bill, that the appropriate legislature approve it. Execution adds to the enactment procedure a requirement that the Governor or other official agent, as a separate and subsequent action, formally execute the compact. *Id.* at 12-13.

necessities of the case. . .” as a last resort measure.<sup>40</sup> The elapsed time for securing agreement among states apparently varies in direct proportion to the controversiality of the subject matter and its political-economic ramifications.<sup>41</sup> Many state constitutions, drafted without consideration of their effect on interstate co-operation, contain sections which, arguably, obstruct compacts.<sup>42</sup> Once the compact is finally in force the compact agency probably will encounter difficulty in relating and coordinating with governmental structure in the party states.<sup>43</sup>

Enactment of the compact by the affected states does not bring it to bear on the designated problem, in most cases. The obstacle of Congressional consent must first be overcome. The consent requirement was designed to bring within congressional overview “. . . 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.”<sup>44</sup> The Council of State Governments argued that most interstate agreements, because they do not alter the “political balance,” need not be submitted for consent.<sup>45</sup> Indeed, the “political balance” test may be an anachronism when applied to compacts created for regulation and administration, as contrasted with those for boundary disputes.<sup>46</sup> Apparently, the justification for the congressional consent requirement today is the avoidance of conflict with federal law or interests, especially where pre-emption might be involved.<sup>47</sup> However, with respect to compacts for air pollution control, the Air Quality Act and Clean Air Act compel submission for ap-

40. Leach, *Interstate Authorities in the United States*, 26 LAW & CONTEMP. PROB. 666, 668 (1961).

41. ZIMMERMANN & WENDELL, *supra* note 38, at 54.

42. Tobin, *supra* note 11, at 77, *Contra, e.g.*, ALAS. CONST. art. XII, § 2; HAWAII CONST. art. XIV, § 5; MO. CONST. art. VI, § 16 (specifically sanctioning interstate co-operation).

43. Leach, *supra* note 40, at 672.

44. *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893). Other language in the opinion raises the question of the applicability of the compact clause in terms of its traditional intent to a pollution control agreement:

If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to unite in draining the district and thus removing the cause of disease.

*Id.*, at 518.

45. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION: PROGRAM FOR 1957, 94-95 (1956).

46. See ZIMMERMANN & WENDELL, *supra* note 23, at 35.

47. ZIMMERMANN & WENDELL, *supra* note 38, at 23.

proval.<sup>48</sup> To expedite this process, Congress could pass legislation giving advance consent to compactual solutions of certain issues. The House of Representatives made such an attempt during the deliberations on the Air Quality Act of 1967. But the requirement of congressional ratification was reinserted in conference with the Senate.<sup>49</sup> Once the compact is ratified, amendments that may be urgently needed to make it continuously and prospectively viable must again face the congressional gauntlet. Congress may, by its consent power, impose restrictions on the proposed agency, and thus limit realization of initial objectives.<sup>50</sup>

After a compact has been enacted and ratified, the legal impediments confronting its functioning appear to be the least obstructive phase of the compactual process. The most commonly used challenge to interstate agencies has been that the state's police power cannot be delegated to such a body. Courts have consistently rejected this argument,<sup>51</sup> holding that merely a conventional and permissible grant of legislative power is involved.<sup>52</sup> Less frequently used but available objections, according to one authority, include:

- (1) appropriations for the agency did not have a public purpose;
- (2) the compact was a special law granting corporate powers;
- (3) future legislatures were bound by the compact;
- (4) officials were serving in violation of provisions against dual office holding;
- (5) officials were serving in violation of election provisions;
- (6) expenditures of tax money to out-of-state agencies amounted to loaning credit; and
- (7) the interstate agency was not a constitutionally authorized political unit.<sup>53</sup>

But the Supreme Court has historically upheld compacts against these and similar challenges.<sup>54</sup> Indeed, in *New York v. New Jersey*,<sup>55</sup> the Court suggested a compactual approach to an environmental pollution problem:

. . . the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and

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48. 42 U.S.C. § 1857a(c) (Supp. III, 1968), amending 42 U.S.C. § 1857 (1964).

49. 1 CLEAN AIR NEWS 10 (Nov. 21, 1967).

50. Tobin, *supra* note 11, at 89. Tobin refers to the detrimental effect of Congressional restriction on the Missouri-Illinois compact creating the Bi-State Development Agency.

51. *Id.* at 80 & n.71.

52. *E.g.*, West Virginia *ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1950).

53. Tobin, *supra* note 11, at 80 & n.71.

54. See notes 58-68 *infra* and accompanying text.

55. 256 U.S. 296 (1921).

by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court. . . .<sup>56</sup>

The basis for enforcement of compacts presumably can be derived from the Contract Clause.<sup>57</sup> In an early case, *Green v. Biddle*,<sup>58</sup> the enforcement basis was obtained by terming a compact a contract, thus invoking the Contract Clause.<sup>59</sup> In *Virginia v. West Virginia* the Supreme Court asserted that it would enforce a compact against a balking participant, if necessary, but neglected to delineate how this would be accomplished.<sup>60</sup> Related to the principle that a compact is an enforceable obligation between jurisdictions are instances in which state statutes were held invalid when in conflict with a compact.<sup>61</sup>

The Supreme Court's decision in *West Virginia ex rel. Dyer v. Sims*<sup>62</sup> has strengthened the compact device and expanded its potentialities. The case developed when West Virginia's auditor refused to pay appropriated funds to the Ohio River Valley Water Sanitation Commission, a compact agency.<sup>63</sup> The West Virginia Supreme Court held the statute approving the compact invalid, on the grounds that (1) the compact unconstitutionally delegated power to an agency outside the state; (2) the enactment statute violated the state constitution's debt limitation provision, by seeking to require subsequent legislatures to appropriate funds to the Commission.<sup>64</sup> The United States Supreme Court upheld the validity of the statute, terming it a ". . . conventional grant of legislative power."<sup>65</sup> The Court added:

We find nothing . . . to indicate that West Virginia may not solve a problem such as control of river pollution by compact and by

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56. *Id.* at 313.

57. U.S. CONST. art. I, § 10.

58. 21 U.S. (8 Wheat.) 1, 92-3 (1823).

59. U.S. CONST. art. I, § 10.

60. 246 U.S. 565, 591 (1918).

61. *E.g.*, *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823); *President, Managers & Co. v. Trenton City Bridge Co.*, 13 N.J. Eq. 46 (1860); *State v. Faudre*, 54 W. Va. 122, 46 S.E. 269 (1903).

62. 341 U.S. 22 (1950).

63. Ohio River Valley Water Sanitation Compact. Compact for purpose of water pollution abatement in Ohio River drainage basin. Participants: Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, West Virginia. For text of compact *see e.g.* PA. STAT. ANN. tit. 32, §§ 816.1-7 (1967).

64. *State ex rel. Dyer v. Sims*, 134 W. Va. 278, 294-98, 58 S.E.2d 766, 776-8 (1950).

65. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1950).



the delegation, if such it be, necessary to effectuate such solution by compact.<sup>66</sup>

By eliminating uncertainty as to the ability of states to delegate power and appropriate funds to interstate bodies, *Sims* provides a springboard for the creation of the type of agency needed to combat difficult interjurisdictional problems, such as air pollution. On the strength of *Sims*, compact scholars have predicted that the Supreme Court will sustain compacts and their agencies as valid entities created by the collective legislative power of the states involved.<sup>67</sup> The Court has apparently created a presumption in favor of compacts, and alleged state constitutional curtailment will be sustained only when an obvious conflict, based on specific prohibition, is discerned.<sup>68</sup>

### III. INTERSTATE AGREEMENTS

Recognition of the need to control interstate air pollution will certainly be expressed legislatively in 1968 and thereafter. Many state air pollution control statutes, in states not already participating in an air pollution control compact, specifically enumerate as one of the duties or powers of the control authority, consultation and co-operation with other states, interstate agencies and the federal government.<sup>69</sup> A minority of these statutes include designation of the control authority as the body responsible for negotiation of interstate agreements, indicating a tacit approval of that control technique.<sup>70</sup> Currently, in addition to states eligible for membership in extant compacts, interest in parti-

66. *Id.*

67. LEACH & SUGG 13-14.

68. Zimmermann and Wendell, *The Interstate Compact and Dyer v. Sims*, 51 COLUM. L. REV. 931, 949 (1951).

69. ARK. STAT. ANN. § 82-1935(b) (Supp. 1967); DEL. CODE ANN. tit. 7, § 6001(c)(5), 6203(a)(2) (Supp. 1966); GA. CODE ANN. § 88-904(c) (Supp. 1967); IOWA CODE ANN. § 136B.4(14) (Supp. 1968); KY. REV. STAT. ANN. §§ 224.430(8), 224.440(1) (Supp. 1966); LA. REV. STAT. ANN. § 40:2204(B) (4) (1965); ME. REV. STAT. ANN. tit. 38, § 366 (Supp. 1967); MICH. STAT. ANN. § 14.58(5)(n) (Supp. 1968); MISS. CODE ANN. § 7106-116(c) (Supp. 1966); MONT. REV. CODES ANN. § 69-3909(14) (Supp. 1967); N.H. REV. STAT. ANN. § 125:81(V) (Supp. 1967); N.M. STAT. ANN. § 12-14-5 B.(4) (Supp. 1967); OKLA. STAT. ANN. tit. 63 § 2002(C)(b) (Supp. 1967); R.I. GEN. LAWS § 23-25-5(c) (Supp. 1966); S.C. CODE ANN. § 70-123.1(B)(4) (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 4477-4 § 4(B)(4) (1966); UTAH CODE ANN. § 26-24-8(2) (Supp. 1967); WASH. REV. CODE ANN. § 70.94-[31](4) (Supp. 1967); WIS. STAT. ANN. § 144.31(1)(e) (Supp. 1968). A suggestion for the inclusion of such provisions can be found in Tetzlaff, Rogers & Edelman, *Guiding Principles for State Air Pollution Legislation*, 51 AM. J. PUB. HEALTH 182, 188 (1961).

70. IOWA CODE ANN. § 136B.4(13) (Supp. 1968); MICH. STAT. ANN. § 14.58(5) (n) (Supp. 1968); ORE. REV. STAT. § 449.780(4) (1965); S.C. CODE ANN. § 70-123.1(B)(5) (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 4477-4 § 4(B)(5) (1966); UTAH CODE ANN. § 26-24-8(11) (Supp. 1967).

icipation in regional air pollution control has been evidenced in New England and in the Ohio River Valley. In December, 1967, the Massachusetts legislature considered a bill to permit the governor to enter into a Northeastern regional compact.<sup>71</sup> Rhode Island petitioned the New England Governors' Conference to form a compact.<sup>72</sup> Kentucky recently enacted legislation permitting entry into air pollution control compacts with neighboring states.<sup>73</sup>

The federal government has, by means of legislation and administration, encouraged the formation of air pollution control compacts. Senator Edmund Muskie, the sponsor of the Air Quality Act of 1967,<sup>74</sup> stated, with reference to the act:

The Federal role is expanded both as a supporter of state programs, and, in the event states fail to act, as an active participant in the development and implementation of air quality standards.<sup>75</sup>

To encourage the states to establish control programs, the act provides generous federal financing, for two years, for interstate planning bodies established to develop air quality standards in interstate regions.<sup>76</sup> The Air Quality Act of 1967 and the Clean Air Act of 1963 provide for three-fourths federal financing for interstate authorities.<sup>77</sup> They also declared that prevention of air pollution was a state and local responsibility and ". . . interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided. . . ."<sup>78</sup> At present, sixteen states have employed one form or another of interstate agreement to achieve air pollution control.<sup>79</sup> The vehicles for co-operation have been administrative agreements<sup>80</sup> and two types of compact. In one form of compact, air pollution control has been designated a concern subsidiary, for example, to a boundary problem<sup>81</sup> or mining regulation.<sup>82</sup> The other form

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*Cf.* MISS. CODE ANN. § 7106-116(c) (Supp. 1966). The Kentucky Attorney General is of the opinion that KY. REV. STAT. ANN. §§ 224.430(8), 224.430(1) (Supp. 1966) empowers the state's air pollution control commission to enter into discussions with other states on possible compacts. 67 OP. ATT'Y GEN. 187 (Apr. 19, 1967).

71. H. 3412, Mass. (1967).

72. S. 313, R.I. (1967).

73. KY. LAWS, H. 315 (1968).

74. 42 U.S.C. § 1857 (Supp. III, 1968), *amending* 42 U.S.C. § 1857 (1964).

75. 113 CONG. REC. S16,393 (daily ed. Nov. 14, 1967).

76. 42 U.S.C. § 1857 (Supp. III, 1968), *amending* 42 U.S.C. § 1857 (1964).

77. 42 U.S.C. § 1857c(a) (Supp. III, 1968), *amending* 42 U.S.C. § 1857 (1964).

78. 42 U.S.C. § 1857d(b) (Supp. III, 1968), *amending* 42 U.S.C. § 1857 (1964).

79. See notes 88-159 *infra* and accompanying text.

80. See notes 88-92 *infra* and accompanying text.

81. See notes 98 & 99 *infra* and accompanying text.

82. See notes 100-102 *infra* and accompanying text.

of compact,<sup>83</sup> specifically conceived in response to an extrajurisdictional source of air pollution, provides the potentially most effective technique, at the state level, of regulation and abatement.

Administratively, impetus has been given to compact formation by conferences, focusing on interstate pollution problems, convened by the Public Health Service. Following the Kansas City abatement conference, the Secretary of Health, Education and Welfare called for the creation of an interstate control agency. Institution of abatement suits by the U. S. Attorney General was threatened, if such action was not taken in six months.<sup>84</sup> A Missouri-Kansas compact proposal resulted a few months later.<sup>85</sup> The state participants at the New Jersey-New York abatement conference favored an aggrandizement of the Interstate Sanitation Commission to deal with standard promulgation and enforcement. Federal officials sought an entirely new super-agency.<sup>86</sup> The creation of the Mid-Atlantic States Air Pollution Control Compact<sup>87</sup> conformed to the federal view and absorbed the air pollution activities formerly directed by the Interstate Sanitation Commission.

#### A. *Administrative Agreements*

Interstate co-operation for air pollution control first manifested itself in the administrative agreement or informal co-operation form. Utilization of this form has most frequently occurred in the lower Delaware River basin area. As early as 1956, following a cataloging of emissions that affected Philadelphia by that city's Air Pollution Control Board, a more extensive survey was planned by officials of New Jersey and Pennsylvania.<sup>88</sup> A 1959 report, sponsored by Penjerdel (a non-profit, private organization funded by the Ford Foundation) urged that abatement programs be worked out between the survey authority and the government having jurisdictions of the extent and nature of air pollution in the lower Delaware River basin.<sup>89</sup> Finally, in 1966, Delaware, New Jersey, Pennsylvania and Philadelphia approved a co-operative, administrative agreement to facilitate data exchange and develop air pollution control programs on a regional level.<sup>90</sup>

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83. See notes 103-159 *infra* and accompanying text.

84. 1 CLEAN AIR NEWS 3 (Apr. 25, 1967).

85. See notes 128-146 *infra* and accompanying text.

86. 5 AIR/WATER POLLUTION REP. 27 (1967).

87. See notes 147-159 *infra* and accompanying text.

88. Purdon, *Interjurisdictional Problems in Air Pollution Control*, 77 PUB. HEALTH REP. 681, 685 (1962).

89. 12 JAPCA 331 (1962).

90. 9 METRO. AREA DIG. 7 (No. 4 1966). In addition, a bill (H.R. 7) was before the 1967 Pennsylvania legislature that would direct the state air pollution commission to contact

Co-operation has been sporadic in other parts of the country. Prior to the federally compelled co-operation that culminated in compact proposals, only three other instances are reported. One such survey led to the expansion of the powers of the Interstate Sanitation Compact to deal with air pollution.<sup>91</sup> In the Chicago area, Illinois and Indiana undertook a joint study that concluded that greater co-ordination was necessary. In the Ohio-West Virginia area, the Ohio Valley Air Pollution Control Council encouraged the area's governmental units to establish effective pollution controls.<sup>92</sup>

### B. *Compacts Providing for Air Pollution Control as a Secondary Objective*

Three compacts that deal with air pollution abatement in addition to other objectives currently are in force. Of these, only the Interstate Sanitation Commission Compact<sup>93</sup> attempts to deal with air pollution control in more than a superficial manner. Originally created to combat water pollution, the compact was amended in 1961 to bring interstate air pollution within the purview of the Commission's authority.<sup>94</sup> As currently enumerated, the powers of the Commission are largely limited to those of a survey and recommendatory nature. Lacking specifically granted enforcement powers, it is ". . . to refer complaints to an appropriate enforcement agency. . . ."<sup>95</sup> However, it is conceivable that use may be made of the enforcement power granted elsewhere in the compact.<sup>96</sup> When the Mid-Atlantic States Air Pollution Control Compact obtains congressional approval, it will take over the ISC's air pollution control facilities and responsibilities.<sup>97</sup>

The Minnesota-Wisconsin Boundary Compact, focusing primarily on resource development, suggests that a responsibility of the boundary commission shall be to devise ". . . measures for controlling air and

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its counterpart in New Jersey and establish control measures for pollution caused by auto exhaust from New Jersey vehicles in Philadelphia.

91. See note 94 *infra* and accompanying text.

92. Hatchard, *Administration of State Air Pollution Control Programs, A Survey*, 12 JAPCA 282, 284 (1962).

93. CONN. GEN. STAT. REV. § 25-55 to 25-66 (1953); N.J. REV. STAT. § 32:18-1 to 32:19A-9 (1963); N.Y. PUB. HEALTH LAW § 1299 to 1299-1 (McKinney Supp. 1967).

94. N.J. REV. STAT. § 32:19A-1 to 9 (1963); N.Y. PUB. HEALTH LAW § 1299-1 (McKinney Supp. 1967). Connecticut does not participate in the air pollution control activities sanctioned by the compact. A bill (S. 1843) was introduced in the 1967 Connecticut legislature to permit that state's full participation in the air pollution control program.

95. N.J. REV. STAT. § 32:19A-1(e) (1963); N.Y. PUB. HEALTH LAW § 1299-1(e) (McKinney Supp. 1967).

96. See, e.g., N.J. REV. STAT. § 32:19-4 (1963).

97. E.g., N.J. REV. STAT. § 32:29-38 (Supp. 1967).

water pollution. . . ."<sup>98</sup> However, its authority is wholly advisory; the compact commission could only implore the appropriate governmental units to eliminate an interstate pollution source.<sup>99</sup> North Carolina in 1967 enacted an Interstate Mining Compact.<sup>100</sup> Among the mining problems treated is ". . . the reduction or elimination or counteracting of pollution or deterioration of land, water and air attributable to mining."<sup>101</sup> The compact authority lacks enforcement power and will function largely in a recommendatory manner.<sup>102</sup>

### C. *Interstate Compacts*

At present there are four compacts created exclusively for the control of interstate air pollution. They are the Illinois-Indiana Air Pollution Control Compact,<sup>103</sup> the Interstate Compact on Air Pollution (Ohio-West Virginia),<sup>104</sup> the Kansas-Missouri Air Quality Compact,<sup>105</sup> and the Mid-Atlantic States Air Pollution Control Compact.<sup>106</sup> None is in effect. Either Congress has failed to provide the necessary consent legislation<sup>107</sup> or a necessary party state has not enacted the compact.<sup>108</sup>

#### 1. *Illinois-Indiana Air Pollution Control Compact*

This compact has been in existence since 1965 but, as noted previously, has yet to function because of Congress' failure to grant ap-

98. The compact is set out in MICH. STAT. ANN. §§ 4.144(1)-(8) (Supp. 1966); MINN. STAT. ANN. §§ 1.31-.34 (1965); WIS. STAT. ANN. § 14.752 (Supp. 1967). The quoted material is at MINN. STAT. ANN. § 1.31(1) (1965); WIS. STAT. ANN. § 14.752 (Supp. 1967).

99. MINN. STAT. ANN. § 1.31(1) (1965); WIS. STAT. ANN. § 14.752 (Supp. 1967).

100. N.C. GEN. STAT. § 74-37 (Supp. 1967). No other states have yet become signatories to the compact.

101. *Id.* Art. I(b)(2).

102. *Id.* Art. IV(3).

103. ILL. ANN. STAT. ch. 111½, § 240.31 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4621 (Supp. 1968).

104. OHIO REV. CODE ANN. §§ 3723.01-03 (Page Supp. 1967); W. VA. CODE ANN. §§ 29-1G-1 to 29-1G-5 (Supp. 1968).

105. MO. REV. STAT. §§ 203.600-.620 (Supp. 1967); S. 430, KAN. (1967).

106. N.J. REV. STAT. §§ 32:29-1 to 32:29-39 (Supp. 1967); N.Y. PUB. HEALTH LAW § 1299-m (McKinney Supp. 1967); S. 1957, CONN. (June 21, 1967).

107. In the second session of the 89th Congress, H.R. 9582 and S. 3210 were introduced to secure approval of the Illinois-Indiana Compact. Both were referred to their houses' judiciary committees where they died. The same fate befell H.R. 1150 and S. 470 in the first session of the 90th Congress. H.R.J. Res. 645 sought to obtain federal consent to the Mid-Atlantic States Compact but died in the judiciary committee. H.R. 13034 and S. 2350 sought consent to the Ohio-West Virginia Compact and also died in committee.

108. Kansas-Missouri Compact. A bill to enact the compact "died" in the 1968 Kansas legislature. Letter from Kansas Legislative Council to Peter Ruger, Sept. 27, 1968.

proval. It is doubtful that this compact will ever be approved by Congress, unless drastic revision is undertaken to rectify its glaring deficiencies.<sup>109</sup> While the drafters of this document merit some credit for a "first," this compact should not be regarded as a prototype.

The compact's initial weakness is its statement of "findings and purpose." Statements that indicate a direct causal relationship must be shown between pollution emanating from one party state and resulting injuries in another will create potential enforcement difficulties.<sup>110</sup> If the language of the compact were strictly interpreted, effective pollution control would be inhibited (or even impossible) because of the inability of tracing and identifying pollutants and their effect in a metropolitan area. Perhaps a better solution would be to recognize that interstate pollution does exist and that the enforcement agency can deal with sources of pollution that could reasonably be expected to have a detrimental effect on the air quality of the inter-jurisdictional area.

The compact creates a commission composed of seven persons from each party state.<sup>111</sup> No federal representation is provided.<sup>112</sup> No action will be undertaken by the commission unless a majority of each state's commissioners are present and approve.<sup>113</sup> Such a requirement, while desirable to maintain comity when only two states are signatories to a compact, could retard effective action if a party state was lax in its enforcement attitude. The commission and its employees are not subject to the states' civil service systems.<sup>114</sup> This could diminish its effectiveness as its employees would be subject to "political" pressures and thus arguably less inclined to engage in the aggressive and decisive control activity required for abatement.

The heart of the compact is Article IV—Functions. This section initially outlines a survey and recommendatory function for the commission. The commission "may make studies of interstate air pollution problems" and, when interstate pollution is found, "shall make a report recommending measures for prevention, abatement or control."<sup>115</sup> The

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109. See notes 163-165 *infra* and accompanying text.

110. "The guiding principle of this compact shall be that air pollution originating within a party state shall not injuriously affect humans, plants, animal life or property in the other party state." IND. ANN. STAT. § 35-4621 Art. I(c) (Supp. 1968).

111. *Id.* Art. III(b).

112. *Id.*

113. *Id.* (c).

114. *Id.* (f).

115. *Id.* Art. IV(a).

power to set standards is given the commission but such standards must be "consistent" with (no higher than) those promulgated by the party states.<sup>116</sup> This could be interpreted to mean that the standards of the state with the most permissive pollution control legislation could govern in the interstate region, thus decreasing the ability of the other party state to control interstate polluters within its own borders.

The compact commission's enforcement authority is especially ill-designed to effectively combat air pollution. If the commission's abatement suggestions are not complied with and the pollution problem persists, the commission can take action in its own stead.<sup>117</sup> But, before court action against an offender can be initiated, a number of steps intervene. At least six months must elapse after the control recommendation before the commission can even convene a hearing to determine whether to issue an abatement order to a polluter. If a determination were made of the existence of interstate air pollution and its sources, orders would then be issued upon the responsible parties to take the requisite corrective measures. These orders can be enforced by any court of competent jurisdiction, if the commission chooses to seek enforcement.<sup>118</sup>

The procedural limitations on the commission's enforcement power clearly reduce its potential impact on what is an immediately critical problem—the control of interstate pollutants. A quick response to a serious pollution problem is impossible. Even after it has completed its study of pollution and recommended abatement steps, six months must elapse before the commission can convene the hearing that ultimately may produce an abatement order.<sup>119</sup> At best, this process would take one year. Another possible weakness in the Illinois-Indiana agreement is the high degree of discretion vested in the commission with regard to enforcement decisions. A clearer definition of the commission's authority making their duty more ministerial when the source-effect pollution finding was made would be more desirable.

In addition, the compact does not create an extensive staff even for its survey functions and apparently will utilize existant state and municipal agencies to perform its control objectives. The niggardly appropriation—a total of \$15,000—would further curtail an ambitious program.<sup>120</sup>

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116. *Id.* Art. IV(d).

117. *Id.*

118. *Id.* (e).

119. *Id.* (d).

120. IND. ANN. STAT. § 35-4624 (Supp. 1968); ILL. LAWS 1965, 1045 (June 22, 1965).

## 2. *Interstate Compact on Air Pollution*

The Ohio-West Virginia Compact<sup>121</sup> is merely a copy of the Illinois-Indiana Compact. However, one change is that a tie vote of the commissioners permits the deciding vote to be cast by the vote of a representative selected by the Secretary of the U.S. Department of Health, Education and Welfare.<sup>122</sup> The compact commission functions in the same manner as in the Illinois-Indiana Compact, acting in a recommendatory role. More specific procedures are detailed for allowing a putative polluter to render objections to a commission report.<sup>123</sup> The standard establishment sentence is substantially identical to that of its precursor.<sup>124</sup> A "reasonable" time requirement for implementation of commission recommendations is substituted for the six months minimum of the Illinois-Indiana Compact.<sup>125</sup> The remainder of the enforcement procedures are substantially the same as those enacted in the earlier compact.<sup>126</sup> This flaccid document, while arguably better than no attempt at control, hardly provides a basis for an effective assault on the environmental deficiencies of that region.<sup>127</sup>

## 3. *Kansas-Missouri Air Quality Compact*

The January 1967 Kansas City Interstate Air Pollution Conference, convened by the Department of Health, Education and Welfare under the mandate of the Clean Air Act,<sup>128</sup> recommended that Missouri and Kansas create an interstate control agency and grant it the following:

- (1) Authority to establish uniform ambient air quality standards for at least an affected six county area;
- (2) Adequate rule making and enforcement authority to abate, control and prevent air pollution;
- (3) Authority to establish a regional enforcement agency, with appropriate representation of local governments, supported by local financial resources;
- (4) Assurance of adequate budgetary support by states;

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121. OHIO REV. CODE ANN. §§ 3723.01-.03 (Page 1967); W. VA. CODE ANN. §§ 29-1G-1 to -5 (Supp. 1968).

122. *E.g.*, W. VA. CODE ANN. § 29-1G-2 (art. III) (Supp. 1968).

123. *Id.* art. IV.

124. *Id.*

125. *Id.*

126. *Id.*

127. For an extended discussion of specific weaknesses, see notes 109-120 *supra* and accompanying text.

128. 42 U.S.C. § 1857d (1965).



(5) Federal representation on the interstate agency with the same vote as any state.<sup>129</sup>

The resulting Kansas-Missouri Air Quality Compact substantially embraced these suggestions. Enacted by Missouri in 1967, the compact has yet to be approved by Kansas.<sup>130</sup>

The Kansas-Missouri Compact is a considerably more comprehensive and complete document than the Illinois-Indiana and Ohio-West Virginia agreements. Major provisions include a more complete definitions section,<sup>131</sup> a more precise enunciation of purpose,<sup>132</sup> a vote for the federal government representative if the state representatives are deadlocked,<sup>133</sup> a comprehensive enumeration of general powers,<sup>134</sup> a specific penalty provision,<sup>135</sup> adequate funding,<sup>136</sup> and, most important, extensive standard setting and enforcement powers.<sup>137</sup> The compact commission is given power to collect data on the nature of pollution in the area, and, after hearing, ". . . establish ambient air quality standards for the entire area subject to the commission's jurisdiction or for any part thereof."<sup>138</sup> These standards, significantly, become the minimum norm for the area. State and local legislation must meet (or exceed) the commission's standards.<sup>139</sup>

The compact's enforcement mechanism deals more effectively with polluters. When the executive director of the commission believes that a violation has occurred, he serves notice upon the alleged violator and upon the appropriate state control agency. If a hearing is requested, the commission grants it.<sup>140</sup> Upon finalization of the abatement order, failure to comply permits the commission to seek judicial enforcement in a United States district court.<sup>141</sup> The court shall assess a penalty of up to \$1000 for violation of the compact's provisions or any of the com-

129. 5 AIR/WATER POLLUTION REP. 35 (1967).

130. MO. REV. STAT. §§ 203.600-.620 (Supp. 1967); Kansas S.B. 430 (1967). Kansas failed again to enact the compact during its 1968 legislative session. See note 108 *supra*.

131. *E.g.*, MO. REV. STAT. § 203.600(2.1)-(2.5) (Supp. 1967).

132. *Id.* 3.1.

133. *Id.* 4.3.

134. *Id.* 5.1.

135. *Id.* 9.1.

136. MO. S. B. 408 (1967). An annual appropriation of \$40,000 from each state for the commission would be provided when all signatory parties approve the compact.

137. *E.g.*, MO. REV. STAT. § 203.600 (art. V & X) (Supp. 1967).

138. *Id.* 5.1(1).

139. *Id.* 10.1.

140. *Id.* 5.6.

141. *Id.* 6.6.

mission's regulations or orders.<sup>142</sup> In addition, each day of a continuing offense shall constitute a separate offense.<sup>143</sup> The inclusion of an emergency clause is another significant innovation. It permits the commission to order immediate reduction or cessation of emission of air contaminants when ". . . such condition creates an emergency requiring immediate action to protect human health or safety. . . ."<sup>144</sup>

The Kansas-Missouri Compact represents a considerable advance, in terms of potential effectiveness, from the previously discussed compacts. Ironically many of its provisions bear resemblance to those of the Model Air Pollution Compact,<sup>145</sup> designed for the St. Louis metropolitan area, that the Missouri legislature failed to enact in 1967.<sup>146</sup>

#### 4. *Mid-Atlantic States Air Pollution Control Compact*

Patterned after the Delaware River Basin Compact,<sup>147</sup> the Mid-Atlantic States Air Pollution Control Compact, with Connecticut,<sup>148</sup> New Jersey<sup>149</sup> and New York<sup>150</sup> as initial signatories, is designed to implement a regional "airshed" approach to air pollution problems. Delaware and Pennsylvania are also invited to participate. The regional effectiveness of the compact has been endangered by Pennsylvania's reluctance to join. Governor Raymond Shafer expressed concern that the broad, state-wide scope and standards of the Mid-Atlantic States

142. *Id.* 9.1.

143. *Id.*

144. *Id.* 5.8(a).

145. For a detailed analysis of the Model Act, see Note, *A Model Interstate Compact for the Control of Air Pollution*, 4 HARV. J. LEGIS. 369 (1967). In fact, the Model Act, adopted by the East-West Gateway Co-ordinating Council, was never presented to the Missouri legislature. The Missouri-Illinois Compact proposals before the Missouri legislature (S. 351, S. 370, H. 874), resembled more closely the Illinois-Indiana compact than the Model or Kansas-Missouri compacts.

146. The compact was stricken from the Missouri Senate calendar by Sen. Richard Webster (from rural Carthage, Missouri). Apparently his reason for this action was hostility toward Lewis Green, chairman of the Missouri Air Conservation Commission, whom he denounced when removing the compact from legislative consideration. *St. Louis Post-Dispatch*, May 31, 1967, at 1A, col. 1. Prior to this, Missouri officials had expressed disappointment at the Illinois' officials unwillingness to agree to stringent control standards. 5 AIR/WATER POLLUTION REP. 211 (1967). A measure (H. 644) that would have authorized local governments in Missouri to enter into and perform contracts and agreements for air pollution control with governments in adjoining states also failed to win approval.

147. See note 27 *supra* and accompanying text.

148. CONN. S. 1957 (1967).

149. N.J. REV. STAT. §§ 32:29-1 to 32:29-39 (Supp. 1967).

150. N.Y. PUB. HEALTH LAW § 1299-m (McKinney Supp. 1967).

Compact would preclude Pennsylvania from participating in a compact to control air pollution with the Ohio Valley basin states.<sup>151</sup>

Basically, the compact empowers its commission to:

- (1) Carry out research on air pollution and abatement techniques;
- (2) Establish regional air quality standards (formulate an air pollution code);
- (3) Investigate sources and causes of air pollution, identify polluters and seek court action to penalize violators;
- (4) Declare regional air pollution alerts and emergencies.<sup>152</sup>

The compact does not pre-empt existing state and local control legislation consistent with that promulgated pursuant to the commission's authority. The commission's standards serve as the norm. Thus more restrictive state and local standards are permitted.<sup>153</sup>

The structure and procedures established by the compact can facilitate effective control. The commission consists of one member from each participating state and the federal government. A majority vote of the membership is necessary for action.<sup>154</sup> The compact's enforcement procedures appear to be the least cumbersome of any of the compacts. The commission itself may, after a hearing, proceed directly against any violator of its abatement regulations.<sup>155</sup> The commission may bring an enforcement action in any court of competent jurisdiction.<sup>156</sup> However, before it may exercise its emergency abatement powers, authorization must be obtained from the signatory state from which the emissions emanate.<sup>157</sup> Its penalty provision is also weaker than that in the Kansas-Missouri Compact in that the monetary penalties apply only when no local penal sanctions exist.<sup>158</sup> Adequate financing is accomplished.<sup>159</sup> In summary, this compact provides the machinery for effective interstate action. Full achievement of the original objectives of the compact, however, is contingent upon the participation of Delaware and Pennsylvania.

#### D. *Federal Response to the Air Pollution Compacts*

Expression of the federal attitude toward the existing compacts has yet been incomplete, especially in light of lack of congressional sanc-

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151. 1 CLEAN AIR NEWS 4, 5 (Oct. 24, 1967).

152. *E.g.*, N.J. REV. STAT. §§ 32:29-14 to 21 (Supp. 1967).

153. *Id.* § 32:29-13.

154. *Id.* § 32:29-10.

155. *Id.* § 32:29-18.

156. *Id.*

157. *Id.* § 32:29-17.

158. *Id.* § 32:29-20.

159. *E.g.*, N.J. LAWS ch. 107, § 7.5 (1967). \$50,000 annually appropriated by N.J.

tion, rejection, or modification of the extant agreements. However, in the recent Senate hearings on the compacts, representatives of the Department of Health, Education and Welfare outlined the contents needed for a compact to comply with the Air Quality Act of 1967 and be an effective vehicle for the control of air pollution. In addition, they disparaged the existing compacts.

HEW proposed the following compact criteria:<sup>160</sup>

- (1) Only the states in a designated air quality region should participate in the compact.<sup>161</sup> A compact should provide for participation by all states encompassed by a given air quality region.
- (2) Federal representation, but not voting, on compact commissions.<sup>162</sup>
- (3) Each participating state should have one vote on the compact commission.
- (4) The compact commissions should have broad air monitoring, standard setting and enforcement powers.
- (5) Air pollution should be defined by the compact instrument to permit preventative activities by the compact commission.
- (6) The state's meeting of obligations imposed by the federal air pollution legislation should be enhanced by the compact.

HEW found defects in all the compacts under consideration. The least acceptable compacts were the similar Illinois-Indiana and Ohio-West Virginia documents. The basic defect in both is inadequate standard-setting and enforcement procedures. Preventative action is limited, partly due to an allegedly inadequate definition of air pollution and a difficult proof situation that requires that a finding be made that the pollution has caused actual injury.<sup>163</sup> Neither compact authorizes direct enforcement action by the commission. HEW criticized the apparent intent of the compact drafters to provide for action only when a signatory state's control activities are so lax as to create a pollution problem in an adjoining state.<sup>164</sup> Absence of federal representation on the Illinois-Indiana Compact, and voting membership on the Ohio-West Virginia body were also criticized.<sup>165</sup>

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160. *Hearings on Air Pollution Compacts before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 2d Sess. 464 (1968) (hereinafter cited as *Hearings on Compacts*).

161. Designation of air quality regions will soon be made by HEW, pursuant to the Air Quality Act 42 U.S.C. § 1857c-2(a) (Supp. III, 1968), amending 42 U.S.C. § 1857 (1964).

162. HEW fears that a federal vote would perhaps limit the subsequent review of the compact agency's action by the Secretary of HEW. *Hearings on Compacts* 464.

163. *Hearings on Compacts* 466. *Contra, id.* at 518.

164. *Id.* 466.

165. *Id.* 465-66.

The Mid-Atlantic States Compact was attacked on two grounds: the grant of voting membership to the federal representative<sup>106</sup> and, more significantly, its intent to include states that do not form what is (or will be) an air quality control region.<sup>107</sup> That is, none of these states is affected by a common air pollution problem.

Despite the compact's enactment prior to the Air Quality Act of 1967, the hearings revealed a concern, on the part of HEW and the members of the Senate Subcommittee on Air and Water Pollution, notably Senator Edmund Muskie, that the compacts be compatible with the Air Quality Act or at least not minimize its effectiveness.<sup>108</sup> The hearings indicate that rather than approve these compacts as initial devices for attacking interstate air pollution, the federal government may, by further inaction, leave the status of these compacts in doubt, hoping to provoke revisions by the states. Or Congress may choose to alter the compacts or to reject them. These latter alternatives may be preferable to future compact drafters, but only if Congress enunciates more clearly the requisites of an acceptable air pollution compact.

#### CONCLUSION

If the federal policy toward air pollution control is clearly enunciated by the Air Quality Act of 1967,<sup>109</sup> it is certain that the interstate compact will be extensively employed as a technique for the establishment of a control mechanism, unless states choose, by inaction or design, to have the federal government solely combat pollution along their borders. To be most viable, compacts must take the form of the Kansas-Missouri or Mid-Atlantic States agreements. Federal legislation and Congressional hearings either expressly or impliedly reach this conclusion.<sup>170</sup>

Essential to any meaningful abatement program are provisions empowering the control agency to:

- (1) Set minimum standards for the interstate area.

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166. *Id.* 465.

167. *Id.* 450.

168. *Id.* 292, 426, 463-66, 471, 477, 478.

169. 42 U.S.C. § 1857 (Supp. III 1968), amending 42 U.S.C. § 1857 (1964). However, the dilatory approach of Congress toward examination preparatory to consent or rejection may indicate a contrary tendency. See notes 36-48 *supra* and accompanying text.

170. 42 U.S.C. § 1857 (Supp. III 1968), amending 42 U.S.C. § 1857 (1964); *Hearings on Compacts.*

- (2) Proceed rapidly and decisively against violators of its regulations and orders.
- (3) Seek imposition of heavy penal sanctions that would deter, on economic considerations, potential or actual polluters.
- (4) Act decisively in emergency situations.
- (5) Obtain adequate financing.

Rather than encouraging the proliferation of environmental control agencies for each substance despoiled, perhaps a more viable long term approach would be to merge pollution control activities in a single agency. Today a number of water pollution control districts exist to which the air pollution control function could be grafted.<sup>171</sup>

But perhaps rather than expressing concern over the form the compact is to take, the more appropriate query is whether the compact should be used at all as a device for interstate air pollution control. Certain hindrances to its potential effectiveness are apparent. One of these is the time consuming process of obtaining congressional consent. The historical justification for this, that it is necessary

. . . to protect the nascent republic from such ententes among powerful states as would aggrandize their political power at the expense or the compromise of national sovereignty. . . .<sup>172</sup>

is an anachronism today. Congress can, in advance, grant its consent to a compact. Indeed, this alternative was considered, but ultimately rejected, in the final draft of the Air Quality Act of 1967.<sup>173</sup>

Advance consent legislation would deprive Congress of initial supervisory authority over the compact,<sup>174</sup> but the detriment to federal interests would be minimal, if a federal representative were accorded equal voting rights, as in the Mid-Atlantic States Compact.<sup>175</sup> Advance consent would permit immediate implementation of the compact upon acceptance by the party states, an important consideration.

171. *E.g.*, Columbia Interstate Compact provides for consideration of "common problems" (pollution) with respect to resource development. IDAHO CODE ANN. § 42-3403 (Supp. 1967). New England Interstate Planning Compact provides for broad resource planning and management functions. ME. REV. STAT. ANN. tit. 10, §§ 301-317 (Supp. 1967). Of course, greater enforcement and standard setting power would have to be inserted in these compacts, but their regional focus provides a firm basis for control of environmental pollution problems.

172. *Bode v. Barrett*, 412 Ill. 204, 233, 106 N.E.2d 521, 536 (1952).

173. 42 U.S.C. § 1857a(c) (Supp. III 1968), amending 42 U.S.C. § 1857 (1964).

174. See generally Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416 (1966).

175. N.J. REV. STAT. § 32:29-10 (Supp. 1967).

In the last analysis, control and prevention of interstate air pollution may be best left to the federal government. Historical considerations point to this conclusion. Water pollution control compacts have been only minimally effective, on the whole.<sup>176</sup> For example, under the Ohio River Valley Water Sanitation Compact, effective in 1948, no enforcement power was employed until 1956.<sup>177</sup> As of 1963, the Ohio Valley Compact Agency had never taken legal action against an industry to secure compliance with its water quality standards.<sup>178</sup> Five actions had been begun against municipalities but these were dropped when the alleged offender began to construct treatment facilities.<sup>179</sup> Another persuasive argument for federal pre-emption in this area is the existence of greater financial and technical resources. State governments have traditionally been more susceptible to pressure from economically powerful interests opposed to extensive emission controls. When a problem as immediate and as serious as interstate air pollution exists, as it clearly does today, it hardly is reasonable to deal with it through fictions euphemistically termed "creative federalism" that permit continued lax control in this field. If federal action is not to pre-empt this field, future compacts must be enacted and implemented without the delay that prevails today, and these compacts must provide for regulatory and enforcement techniques far superior to those of their constituent states.

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176. E. MURPHY, *WATER PURITY* 19 (1961).

177. W. BARTON, *INTERSTATE COMPACTS IN THE POLITICAL PROCESS* 36, 39 (1965).

178. *Id.* 39.

179. *Id.*