



The Case for an Interstate Compact APA

By William S. Morrow, Jr.*

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal programs and regulation and are particularly apt for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare. Some 190 interstate agreements are currently in place.

When interstate compact agencies prescribe regulations, adjudicate disputes, respond to requests for information or hold meetings, whose Administrative Procedure Act (APA) applies? Many compacts are approved by Congress. Does that mean those agencies are governed by the federal APA? Having been created by agreements between states, does that mean state APAs apply? If so, which one or ones? Do both federal and state APAs apply? If so, what happens if there is a conflict? Do normal preemption rules apply? Or could it be that neither the federal nor the state APAs apply?

This paper takes a brief look at the intersection of APA and interstate compact precedent and concludes that in many, probably most, cases neither the federal nor the state APAs apply. The solution proposed is the creation of an Interstate Compact APA.

I. Compact Basics

Interstate compacts may be divided into two categories, those that have been approved by Congress pursuant to Article I, section 10, clause 3 of the U.S. Constitution, often referred to as the Compact Clause, and those that have not. The Compact Clause provides that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State*, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. (Emphasis added).

The Compact Clause is not all-encompassing, however. Compacts are in essence treaties between sovereign States, and their use predates the Constitution. *West Virginia ex rel. Dyer v.*

* General Counsel, Washington Metropolitan Area Transit Commission; Vice Chair, State Administrative Law Committee.

Sims, 341 U.S. 22, 31 (1951) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938)). Because the attributes of State sovereignty not surrendered through the ratification of the U.S. Constitution survive to this day, *Federal Maritime Commission v. South Carolina State Ports Authority*, ___ U.S. ___, 122 S. Ct. 1864 (2002), not every interstate agreement requires congressional consent, but those that are properly approved by Congress become federal law.

Where an agreement is not “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,” it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.

Cuyler v. Adams, 449 U.S. 433, 101 S. Ct. 703, 707-08 (1981) (citations and footnote omitted).

Whether approved by Congress or not, interstate compacts are not merely legislative acts, they are in very important respects contracts binding on the signatories. As the Supreme Court has noted: “It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.” *Dyer v. Sims*, 341 U.S. at 28.

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.

C.T. Hellmuth & Assocs., Inc., v. Washington Metro Area Transit Authority, 414 F. Supp. 408 (D. Md. 1976).¹

II. Which, if any, APA Applies?

¹ See also *Northeast Bancorp, Inc. v. Board of Gov’rs of the Federal Reserve System*, 472 U.S. 159, 105 S. Ct. 2545 (1985) (State not free to modify compact unilaterally); *Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power & Conserv. Planning Coun.*, 786 F.2d 1359, 1371 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987) (state can impose state law on compact organization only if compact specifically reserves right to do so); *Alcorn v. Wolfe*, 827 F. Supp. 47 (D.D.C. 1993) (compact terms cannot be modified unilaterally by state legislation and take precedence over conflicting state law); *Arizona Department of Economic Security v. Leonardo*, 22 P.3d 513 (Ariz. Ct. App. 2001) (state may not enact laws that conflict with a compact the state has adopted).

Are compact agencies approved by Congress federal agencies within the meaning of the federal APA? Are compact agencies covered by the signatories' APAs? The answer to each question begins, but does not end, with a look at how APAs define the term "agency."

A. State APA

State APAs typically define the term "agency" broadly enough to encompass an interstate compact agency. For example, Virginia's Administrative Process Act defines agency to mean: "any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases." VA. CODE ANN. § 2.2-4001 (2003). Or take the definition of agency in South Dakota's Administrative Procedures Act:

each association, authority, board, commission, committee, council, department, division, office, officer, task force, *or other agent of the state vested with the authority to exercise any portion of the state's sovereignty*. The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute.

S.D. CODIFIED LAWS § 1-26-1(1) (2003) (emphasis added). It is not uncommon for a compact or court to characterize an interstate agency as an agency or instrumentality of the signatory States. *E.g.*, Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 101-505, § 1, tit. I, art. II., 104 Stat. 1300 (1990) (instrumentality); Delaware River Basin Compact, DEL CODE tit. 7, § 6501, § 2.1 (2003) (agency and instrumentality); *Seattle Master Builders Ass'n*, 786 F.2d at 1371 (agency of each); *Bunk v. Port Authority of New York and New Jersey*, 676 A.2d 118 (N.J. 1996) (instrumentality).

Some compacts require that the agency follow the APA of the State with the most restrictive provisions. For example, article III(d) of the Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, 3237 (1980), provides that "all meetings shall be open to the public to the same extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirements, applicable to local governments at the time such meeting is held."²

Some State APAs, however, expressly exclude interstate compact agencies from their purview. Delaware's APA provides that the term agency "does not include . . . joint state-federal, interstate or intermunicipal authorities and their agencies." DEL. CODE ANN. TIT. 29 § 10102(1) (2003). New York's APA provides that the term agency "shall not include . . . agencies created by interstate compact." N.Y. A.P.A. LAW § 102.1. (Consol. 2003). The District of Columbia's APA has been held not to apply to interstate agencies. *KiSKA Construction Corporation-U.S.A. v. Washington Metro Area Transit Authority*, 167 F.3d 608

² See also 16 U.S.C. 544(c)(b) granting consent to the Columbia River Gorge Compact on the condition that "the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State."

(D.C. Cir. 1999) (citing *Latimer v. Joint Committee on Landmarks of the National Capital*, 345 A.2d 484, 487 (D.C. 1975)).

And compact precedent barring the application of a single signatory's laws in a manner that conflicts with or is inconsistent with the terms of the States' agreement tends to render all State APAs inoperative with respect to interstate compact agencies. Illustrative of this line of cases is the District Court decision in *C.T. Hellmuth & Assocs., Inc*, holding that the Washington Metropolitan Area Transit Authority (WMATA) is not subject to the Maryland Public Information Act, Art. 76A MD. ANN. CODE (1975 Repl. Vol.), because

the mere fact that Virginia and the District have adopted freedom of information laws can hardly be taken as a tacit agreement on their part that WMATA should be governed by the Maryland law, particularly in view of the fact that Art. 76A was enacted subsequent to the Virginia and District of Columbia laws. Moreover, the Court is not persuaded by the alternative premise implicit in Plaintiff's argument, that the existence of comparable legislation eliminates the possibility that one party may impinge upon the others' interests. Whatever force that contention may have in the situation in which the various laws involved are identical, it is plainly unmeritorious here, where the laws involved differ in not insignificant respects. Presumably these laws reflect considered policy decisions on the part of the respective jurisdictions as to the types of information which should be accessible to the public and the circumstances under which it will be made available. Regardless of how similar the laws may be, plainly Maryland may not impose its preferences in this regard upon Virginia and the District, for such an imposition, however minimal, is nonetheless an intrusion upon their interests and in derogation of the compact.

414 F. Supp. at 409-10. See *Salmon For All v. Department of Fisheries*, 821 P.2d 1211 (Wash. 1992) (Compact meetings not subject to Washington's Open Public Meetings Act of 1971).³ It should come as no surprise that there is great variation among the various State APAs, such that no two are exactly alike. Compact precedent thus leaves little room, and in most instances no room, for finding compact agencies subject to these statutes.

B. Federal APA

The federal APA defines agency in pertinent part as:

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

³ See also *Klickitat County v. Columbia River Gorge Commission*, 770 F. Supp. 1419 (E.D. Wash. 1991) (Commission need not comply with Washington State Environmental Policy Act); *California Tahoe Regional Planning Agency v. Harrah's Corporation*, 509 F. Supp. 753 (D. Nev. 1981) (California Government Code does not apply to interstate agency); *California Tahoe Regional Planning Agency v. Sahara Tahoe Corporation*, 504 F. Supp. 753 (D. Nev. 1980) (California Political Reform Act does not apply to interstate agency). Another line of cases views the issue as a matter of federal supremacy, as well. *Alcorn v. Wolfe*, 827 F. Supp. 47 (D.D.C. 1993) (political appointment provisions in Virginia Constitution do not apply to interstate Airports Authority); *Malone v. Washington Metro Area Transit Authority*, 622 F. Supp. 1422 (E.D. Va. 1985) (federal supremacy of compact negates Virginia right-to-work statute).

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia.

5 U.S.C. § 551(1).

When consenting to an interstate compact tending to “encroach upon or interfere with the just supremacy of the United States,” no doubt Congress could qualify its consent by declaring the resulting administrative body to be an “authority of the Government of the United States.” But what would be the point? If creating a federal agency is the appropriate solution, it would be simpler and more direct to have Congress simply pass a federal statute containing the terms of what would have been the States’ agreement and avoid unnecessary negotiations and complications. The value in interstate compacts derives from the States working out their own problems free of federal oversight. Recognizing this basic fact best preserves State sovereignty.

Congress understood this when it consented to the creation of the Pacific Northwest Electric Power and Conservation Planning Council, declaring that the Council “shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law.” 16 U.S.C. § 839b(a)(2)(A).⁴ Similarly, when Congress has ventured beyond merely granting consent to becoming a full compact participant, it has taken pains to disavow the resulting entity as an agency of the federal government. When the United States became a signatory to the Delaware River Basin Compact, section 15.1(m) was added to provide that the Delaware River Basin Commission “shall not be considered a Federal agency’ for purposes of certain statutes, among which is the Act of June 11, 1946, Pub. L. No. 404, 60 Stat. 237, as amended, which statute was the predecessor to the [federal] APA.” *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26, 27 (E.D. Pa. 1981). The United States’s participation as a signatory to the Susquehanna River Basin Compact, likewise was conditioned on the understanding that: “For the purposes of . . . the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), as amended (5 U.S.C. 551-558, 701-706), the commission shall not be considered a Federal agency.” Pub. L. No. 91-575, § 2(l), 84 Stat. 1509(Dec. 24, 1970).

The courts, however, have been quite willing to inquire as to whether a particular compact agency is so endowed with a “federal interest” that it should be considered a “quasi-federal agency.” In *The Bootery, Inc. v. Washington Metropolitan Area Transit Authority*, 326 F. Supp. 794 (D.D.C. 1971), for example, the court determined that Congress’s role as legislature for the District of Columbia supported a finding that the Transit Authority “should be treated like a federal agency subject to the [federal] APA.” *Seal and Co., Inc. v. Washington Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1155 (E. D. Va. 1991). The federal interest sprang mostly from Congress’ plenary jurisdiction over the District of Columbia, but the Compact Clause was not unimportant.

⁴ Only if the affected States failed to create the Council and appoint its members in a timely fashion would the Secretary of Energy be empowered to establish the Council as a federal agency. 16 U.S.C. § 839b(b).

The Constitution makes the consent of Congress the only clear, albeit necessary, relationship of the Federal Government with an interjurisdictional compact. But the Constitution gives to Congress the power to “* * * legislate within the District for every proper purpose of Government. Within the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof.”

Thus the Washington Metropolitan Area Transit Regulation Compact had “authorized and *directed* the Board of Commissioners of the District of Columbia to enter into and execute the Authority Compact *on behalf of the United States for the District of Columbia.* * * *” (Emphasis added). And Congress “*adopts and enacts for the District of Columbia,*” as well as “consents to,” the creation of the Washington Metropolitan Area Transit Authority. (Emphasis added). The Authority itself is merely an agency of each of the signatory parties including the United States on behalf of the District of Columbia.

The Bootery, 326 F. Supp. At 798-99 (citations and footnotes omitted).

It is doubtful that Congress understood it was creating a quasi-federal agency when it agreed to the WMATA Compact anymore than it intended to create quasi-federal agencies by agreeing to the DC home rule charter. In this author’s opinion, the court places too much reliance on the Compact preamble provisions emphasized in the second paragraph quoted and ignores relevant legislative history leading to WMATA’s formation. But that is an argument for another day. The point here is that courts have proven receptive to the “quasi-federal agency” argument. *See e.g., Elcon Enterprises, Inc. v. Washington Metro Area Transit Authority*, 977 F.2d 1472 (D.C. Cir. 1992) (noting intra-circuit split and assuming without deciding WMATA quasi-federal agency); *Coalition for Safe Transit, Inc. v. Bi-State Development Agency*, 778 F. Supp. 464 (E.D. Mo. 1991) (Bi-State quasi-federal agency subject to section 702 of federal APA).

Although Congressional approval of an interstate compact can be a factor in determining quasi-federal agency status, it should not be regarded as dispositive. *See Old Town Trolley Tours v. Washington Metro Area Transit Commission*, 129 F.3d 201, 204 (D.C. Cir. 1997) (it does not follow from Congress’s consent that compact Commission is federal agency governed by federal APA). There must be some other federal-interest factors present such as a federal role in appointing agency members, federal funding or furtherance of federal objective; otherwise, federal status will be denied. *See e.g., The Organic Cow, LLC v. Northeast Dairy Compact Commission*, 164 F. Supp. 2d 412 (D. Vt. 2001) (Commission not the equivalent of federal agency governed by federal APA), *vacated on other grounds, Organic Cow, LLC v. Ctr. for New Eng. Dairy Compact Research*, 335 F.3d 66 (2d Cir. 2003). And sometimes even the presence of one of these federal-nexus factors is not enough. *See California Tahoe Regional Planning Agency v. Sahara Tahoe Corporation*, 504 F. Supp. 753 (D. Nev. 1980) (approval of the Compact by Congress and limited appointment power of president did not thereby establish TRPA as agency of the United States).

Finding that a compact agency approved by Congress is not a federal agency can create an administrative law “gap in need of filling.” *Old Town Trolley Tours*, 129 F.3d at 204. Some

courts fill that gap with the federal APA notwithstanding a finding that the agency is not strictly speaking an authority of the United States government. In *Old Town Trolley Tours*, the DC Circuit did just that when faced with deciding the appropriate standard for reviewing licensing decisions of the Washington Metropolitan Area Transit Commission under the recently amended Washington Metropolitan Area Transit Regulation Compact, which provided for judicial review of Commission orders in the DC Circuit but was silent on the scope of review. The court adopted by reference the standards in 5 U.S.C. § 706(2)(A)-(D).

We do so because this court had basically been following those standards in reviewing Commission actions under the pre-amended Compact. Anyone familiar with these decisions--that is, anyone involved in drafting and approving revisions to the Commission's licensing authority--would likely have taken it for granted that we would follow the same course in cases arising under the amended Compact. For another thing, federal judicial review of agency action according to the standards just quoted is so commonplace that, wholly aside from our past practice, it would have been natural to assume that courts would treat Commission decisions in the same manner. Finally, it is worth remembering that subsections (a) through (d) of APA § 706(2) contained no innovations. When signed into law in 1946, these provisions merely "restated the present law as to the scope of judicial review."

Old Town Trolley Tours, 129 F.3d at 204-05 (citations omitted).⁵ But some courts simply find the federal APA does not apply. See *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249 (D. Mass. 1998) (5 U.S.C. § 706 inapplicable), *aff'd*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). Asking the courts to fill in the gaps introduces risk and uncertainty in compact administration.

III. Proposed Solution

The Section of Administrative Law & Regulatory Practice of the American Bar Association (ABA) proposes embarking on a project to draft an APA for application to or adoption by agencies created by interstate compacts. The immediate goal is to have the project's work product adopted by the House of Delegates as ABA policy. Ultimately, existing compact agencies and future compact signatories could adopt some or all of the resulting guidelines.

Some might question why the model State APA could not be adopted by compact agencies and their signatories instead. This might be problematic for existing compact agencies. States typically do not adopt model legislation without deleting some provisions and modifying and adding others. A court may be reluctant to uphold an agency's adoption of a specific model provision rejected by one of the signatories. Further, the model act was promulgated in 1981. The state of administrative law has changed greatly since then, and while a proposal has been submitted to the National Conference of Commissioners on Uniform State Laws to conduct a study of subsequent developments with an eye toward revision, action is not guaranteed any time soon. Finally, the model State APA does not accommodate the structure of compacts or reflect

⁵ See also *Organic Cow*, 164 F. Supp. 2d at 420(same); *c.f.*, *Mayor and City Council of Baltimore v. Susquehanna River Basin Comm'n*, 2000 U.S. Dist. LEXIS 8199 at 11-13 (D. Md. Mar. 30, 2000) (decisions under federal APA provide helpful analogy in determining appropriate scope of judicial review).

the unique status and experience of compact agencies and pertinent compact precedent. The Interstate Compact APA Project will take these factors into consideration.

Adopting the federal APA presents its own problems, even though some compacts take this approach with respect to rulemaking.⁶ First, adopting the federal APA may be politically unattractive given that one of the reasons compacts are selected as the vehicle for resolving disputes between states and implementing state policies and programs on an interstate level is to avoid or at least minimize federal involvement. Second, if the agency is expressly not a federal agency and/or is held not to be a quasi-federal-agency, applying the federal APA really does not make sense. Third, like the model State APA, the federal APA was not enacted with compact agencies in mind. The project output will be.

IV. Conclusion

State APAs only apply to interstate compact agencies whose governing compacts expressly authorize such treatment, and few compacts so provide. Congressional consent transforms a compact into federal law but does not in and of itself transform a compact agency into an authority of the government of the United States within the meaning of the federal APA. The result is that courts are often left looking for administrative law to apply. That search would be aided by, and one would hope ultimately circumvented by, the development of guidelines that not only embody the modern administrative law principles common to most APAs but reflect compact precedent and the experience of compact signatories and agencies, as well, – an interstate compact APA.

⁶ See Interstate Insurance Receivership Compact, art. VII, § 2, ILL. COMPILED STAT. ch. 45, para. 160 (2003) (providing that rulemaking shall substantially conform to principles of federal Administrative Procedure Act, 5 U.S.C.S. section 551 et seq., and the Federal Advisory Committee Act, 5 U.S.C.S. app. 2, section 1 et seq., as amended); Interstate Compact for Adult Offender Supervision, art. VIII, § (b), ILL. COMPILED STAT. ch. 45, para. 170 (2003) (same); Northeast Interstate Dairy Compact, S.J. Res. 28, 104th Cong., 1st Sess. §§ 5, 12 (1995) (rulemaking proceeding must comply with the requirements of § 553 of the federal Administrative Procedure Act).