

Box 74-4

COPY

May 26, 1967

MEMORANDUM

To: The Honorable Edmund S. Muskie
Chairman, Subcommittee on Air and Water Pollution

From: Leon G. Billings

Subject: Congressional Preconsent to Interstate Compacts.

During our brief discussion during the week of May 8 of the concept of Congressional preconsent to interstate compacts you raised the question as to whether such preconsent made the compact provisions binding on the party states or if, in fact, for such compact to be binding additional Congressional action after completion of a compact would still be required.

Article I, Section 10 of the Constitution states as follows:

"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." (Underscoring supplied.)

The Constitution of the United States of America, Revised and Annotated, 1963, provides the following analysis of the consent of Congress provision.

"The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified. While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.

COPY

- 2 -

The required consent is not necessarily an expressed consent; it may be inferred from circumstances. It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it. The consent of Congress may be granted conditionally 'upon terms appropriate to the subject and transgressing no constitutional limitations.' . . . " (pp. 417-18)

The annotated version goes on to describe the legal effect of interstate compacts which is of some interest.

"Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory States and are conclusive as to their rights. Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights. Valid interstate compacts are within the protection of the obligation of contracts clause; and a 'sue and be sued' provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment. Congress also has authority to compel a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest State court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the State constitution in such a case rests with the Supreme Court." (pp. 418-19)

It seems, therefore, that preconsent to a binding compact is in fact a possible approach. However, it can be seen from the attached listing of compact areas for which preconsent has been received that little, if any, Federal or national interest is involved. In other words, the compacts to which Congress has agreed in advance are primarily oriented toward facilitating activities of mutual benefit to the States in those areas in which Federal authority or Federal interest is not sacrificed.

COPY

- 3 -

The difficulty with attaching this type of provision to an area in which there is a definite national interest such as air pollution is indicated by the variation in approaches among those compacts either enacted by the States or in process of enactment by the States (Indiana-Illinois; New York-New Jersey; Ohio-West Virginia). While there is some similarity in these compacts, there is also a great deal of dissimilarity. The first, Indiana-Illinois, does not provide for Federal representation and provides that the compact commission must first request the State in which the pollution source is located to move against the polluter. Also, that compact essentially provides that a particular emission must both be traced to interstate commerce and to a particular health effect. This in itself would make the compact meaningless.

If it is important to expedite the making of compacts by eliminating the necessity of coming back to the Congress while at the same time preserving the national interest, it would seem that there are two possible courses. The first would be to, in essence, draft into Federal law the provisions which would have to be adopted by the States in order for a compact to become effective. The second and novel approach could be providing for secretarial certification of the compact as being consistent with the purposes and intent of the Clean Air Act and including in that certification assurance that the Federal Government would have equal representation on the commission with any single member State. If both of these provisos were met, the compact would then become effective.

Any consideration of preconsent should also include the right of the Congress to alter, amend, or withdraw consent to the compact, and a further proviso that that compact cannot be in conflict with the Constitution or any laws of the United States.

I do not frankly see how a great deal would be accomplished in time saving by this method. If a compact is well designed to accomplish interstate air pollution control, it should have no difficulty in receiving early Congressional authorization. I might add that the novel approach of providing the Secretary with authority to certify might be in conflict with the "separation of powers doctrine." However, because this would be novel and unprecedented, I have been able to find nothing which would either confirm or deny this possibility.

COPY

I am also attaching a memorandum prepared by the Manufacturing Chemists Association which is an attempt to make the case for preconsent.

Leon G. Billings

Attachments

ADDENDUM

TITLE 4, SECTION 111:

Compacts between States for Cooperation in Prevention of Crime;
Consent of Congress.

(a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

(b) For the purpose of this section, the term "States" means the several States and Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the District of Columbia. (Added May 24, 1949, ch. 139, section 129(b), 63 Stat. 107, and amended Aug. 3, 1956, ch. 941, 70 Stat. 1020; Feb. 16, 1962, Pub. L. 87-406, 76 Stat. 9.)

TITLE 15, SUPPLEMENT 1, SECTIONS 1357 and 1358

Section 1357-Interstate cooperation in administration and coordination of plans and programs.

Two or more States may cooperate in administering and coordinating their plans and programs supported under this chapter, in which event all or part of the sums authorized and payable under section 1360 of this title to all of the cooperating States may be paid to the designated agency, participating institutions, or persons authorized to receive them under the terms of the agreement between the cooperating States. When the cooperative agreement designates an interstate agency to act on behalf of all of the cooperating States, it shall submit to the Secretary for review and approval under section 1356 of this title an interstate five-year plan and an annual interstate technical services program which, as nearly as practicable, shall meet the requirements of sections 1354 and 1355 of this title. (Pub. L. 89-182, Sec. 7, Sept. 14, 1965, 79 Stat. 681.)

Section 1358-Consent of Congress for interstate compacts; reservation of right to alter, amend, or repeal.

(a) The consent of the Congress is given to any two or more States to enter into agreement or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance and in designating agencies, under section 1357 of this title, for accomplishing the purposes of this chapter.

ADDENDUM - Page 2

(b) The right to alter, amend, or repeal this section, or consent granted by this section, is expressly reserved. (Pub. L. 89-182, Sec. 8, Sept. 14, 1965, 79 Stat. 682.)

TITLE 16, SECTION 552

Consent to agreement by States for conservation of forests and water supply.

Consent of the Congress of the United States 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, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact. (Mar. 1, 1911, ch. 186, Sec. 1, 36 Stat. 961.)

TITLE 16, SECTION 779(a)

Cooperation with States on projects; use of funds; joint projects between states; consent to interstate compacts; reservation of right to alter, amend or repeal consent.

(a) The purpose of this chapter is to authorize the Secretary of the Interior to cooperate with the States through their respective State agencies in carrying out projects designed for the research and development of the commercial fisheries resources of the Nation. Federal funds made available under this chapter will be used to supplement, and, to the extent practicable, increase the amounts of State funds that would be made available for commercial fisheries research and development in the absence of these Federal funds.

TITLE 23, SECTION 313, fn.

Interstate Compacts for Highway Safety

Pub. L. 85-684, Aug. 20, 1958, 72 Stat. 635, as amended by Pub. L. 88-466, Aug. 20, 1964, 78 Stat. 564, provided:

"That the consent of Congress is hereby given to any two or more or the several States, and one or more of the several States and the District of Columbia, to enter into agreements or compacts--

"(1) for cooperative effort and mutual assistance in the establishment and carrying out of traffic safety programs, including, but not limited to, the enactment of uniform traffic laws, driver

ADDENDUM - Page 3

education and training, coordination of traffic law enforcement, research into safe automobile and highway design, and research programs of the human factors affecting traffic safety, and

"(2) for the establishment of such agencies, joint or otherwise, as they deem desirable for the establishment and carrying out of such traffic safety programs."

TITLE 33, SECTION 11

Authority for compact between Middle Northwest States as to jurisdiction of offenses committed on boundary waters.

The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917. (Mar. 4, 1921, ch. 176, 41 Stat. 1447.)

TITLE 40, SECTION 461(f)

(f) Consent of Congress to agreements or compacts between States for cooperative efforts and mutual assistance in comprehensive planning.

The consent of the Congress is given to any two or more States to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in the comprehensive planning for the physical growth and development of interstate, metropolitan, or other urban areas, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. (Aug. 2, 1954, ch. 649, title VII, Sec. 701, 68 Stat. 640; Aug. 7, 1956, ch. 1029, title III, Secs. 307(d), 308, 70 Stat. 1102; July 12, 1956, Pub. L. 85-104, title VI, Sec. 606, 71 Stat. 305; Sept. 23, 1959, Pub. L. 86-372, title IV, Sec. 419, 73 Stat. 678; May 1, 1961, Pub. L. 87-27, Sec. 15, 75 Stat. 58; June 30, 1961, Pub. L. 87-70, title III, Sec. 310, 75 Stat. 170; Sept. 2, 1964, Pub. L. 88-560, title III, Secs. 314-317, Stat. 792, 793.)

TITLE 49, SECTION 1103(a)

Interstate Compacts For Airport Facilities

The consent of Congress is given to each of the several States to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of developing or operating airport facilities. The right to alter, amend, or repeal this section is expressly reserved. Pub. L. 86-154, Aug. 11, 1959, 73 Stat. 333.

TITLE 50, SECTION 2281(g)

Encouragement of State Civil Defense Work.

Assist and encourage the States to negotiate and enter into interstate civil defense compacts; review the terms and conditions of such proposed compacts in order to assist to the extent feasible in obtaining uniformity therein and consistency with the national civil defense plans and programs; assist and coordinate the activities thereunder; aid and assist in encouraging reciprocal civil defense legislation by the States which will permit the furnishing of mutual aid for civil defense purposes in the event of an attack which cannot be adequately met or controlled by a State or political subdivision thereof threatened with or undergoing an attack: Provided, That a copy of each such civil defense compact shall be transmitted promptly to the Senate and the House of Representatives. The consent of the Congress shall be granted to each such compact, upon the expiration of the first period of sixty calendar days of continuous session of the Congress following the date on which the compact is transmitted to it; but only if, between the date of transmittal and expiration of such sixty-day period, there has not been passed a concurrent resolution stating in substance that the Congress does not approve the compact: Provided, That nothing in this subsection shall be construed as preventing Congress from withdrawing at any time its consent to any such compact;