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# Issues to Consider When Crafting Clean Power Plan Multi- State Compliance Approaches

Part I: The Compact Clause

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## Issues to Consider When Crafting Clean Power Plan Multi-State Compliance Approaches, Part I: Compact Clause

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### I. Introduction

The Clean Power Plan establishes carbon dioxide (CO<sub>2</sub>) performance targets for existing electric generating units (EGUs, or power plants) and requires states to submit plans for implementing these targets.<sup>1</sup> EPA's rule encourages states to consider cooperative compliance options, ranging from limited trading of emission credits between states with similar compliance strategies,<sup>2</sup> to formal agreements along the lines of the northeast Regional Greenhouse Gas Initiative (RGGI).

Some have raised constitutional and practical implementation issues related to multistate compliance approaches, perhaps most notably when Senator McConnell argued that Congress would have to approve each multi-state plan.<sup>3</sup> While Senator McConnell was offering an interpretation of the Clean Air Act,<sup>4</sup> his argument implicates the "Compact Clause."<sup>5</sup>

This paper focuses on the Compact Clause and Section 102(c) of the Clean Air Act and concludes that states may work together to achieve reductions of CO<sub>2</sub> emissions within the confines of the Compact Clause and without additional Congressional approval.

The online version of this paper includes hyperlinks and enables readers to share new case law and legal perspectives on key issues.

### TAKE-AWAYS

- The passage of reciprocal statutes by states generally does not create a "compact".
- Compacts requiring Congressional consent are those encroaching on federal authority.
- Congress may provide consent prospectively, and may delegate approval to an agency.
- The Clean Air Act authorizes states to enter into agreements or compacts, to create joint air pollution control agencies, and to enforce their respective laws. 42 U.S.C. § 7402(c).
- Congress requires additional approval for states to be bound by such compacts. States may avoid this by crafting agreements that: (1) do not create a super-regulatory joint agency that can regulate and enforce across state lines; and (2) enable states to modify their terms of participation or to leave the compact entirely.

### II. Regional Approaches to the Clean Power Plan

#### A. Summary of Clean Power Plan

The Clean Power Plan is based on Section 111(d) of the Clean Air Act.<sup>6</sup> Once EPA sets performance standards for *new* sources, Section 111(d) triggers a process for regulating the same pollutants from *existing* sources in the same source category. EPA must determine the "best system of emission reduction" (BSER) for the category,<sup>7</sup> which in turn provides the basis for enforceable performance standards. EPA determined that the BSER for existing EGUs is one

that increases coal-fired power plant efficiency where possible, and otherwise shifts utilization to cleaner power sources.

Therefore, EPA projected achievable CO<sub>2</sub> emission reductions from (i) coal plant efficiency upgrades, (ii) increased utilization of natural gas plants, and (iii) new carbon-free generation such as nuclear and renewable energy.<sup>8</sup> EPA used these projections to establish interim and 2030 target emission rates for two sub-categories of EGUs: steam generating EGUs (mostly coal plants) and combustion turbine natural gas plants.<sup>9</sup> Using the target rates and each state's generation mix, EPA then calculated state-wide average emission rates and overall mass CO<sub>2</sub> goals.<sup>10</sup> These goals describe a lowering of the overall rate of pounds of CO<sub>2</sub> per megawatt hour of electricity produced, or a mass amount of CO<sub>2</sub> emitted from affected EGUs.

Each state then submits a plan to EPA describing how it intends to implement enforceable performance standards based on these target rates or goals.<sup>11</sup> EPA will review each plan to determine whether it meets minimum requirements as described by the rule.<sup>12</sup>

Once EPA approves a plan, the plan's provisions are federally enforceable, so that not only may the state enforce the plan, but EPA and citizens groups may as well.<sup>13</sup>

## B. Regional Approaches to Clean Power Plan Compliance

The final Clean Power Plan offers “additional, more flexible options for states and utilities to adopt multi-state compliance strategies” than the proposal.<sup>14</sup> EPA included these options in response to the “strong interest” in multi-state approaches expressed in public comments,<sup>15</sup> and even stronger interest in “trading ready” plans that would enable “market-based coordination [between states], rather than state-to-state coordination.”<sup>16</sup>

The rule's preamble stresses repeatedly the *regional* nature of the electric grid and suggests that compliance should build on this reality. EPA argues that multi-state approaches “can lead to more efficient implementation, lower compliance costs for affected EGUs and lower impacts on electricity ratepayers.”<sup>17</sup>

Grid operators agree. The Midcontinent Independent System Operator (MISO) estimates that a regional compliance approach to EPA's proposed rule would save approximately \$3 billion annually compared to sub-regional compliance paths.<sup>18</sup> The mid-Atlantic and Ohio River Valley grid operator, PJM, likewise found that “state-by-state compliance options, compared to regional compliance options, likely would result in higher compliance costs for most PJM states.”<sup>19</sup>

The rule points to RGGI as a model for multi-state compliance strategies. RGGI is a CO<sub>2</sub> mass-based trading program for EGUs. Additional states could join RGGI or create similar trading programs. States may also allow EGUs to trade emission reduction credits (ERCs) or emission allowances with EGUs in other states without entering into a formal multi-state plan, under certain conditions.<sup>20</sup>

## II. **Model of a Regional Approach to CO<sub>2</sub> Mitigation - RGGI**

RGGI is a regional CO<sub>2</sub> allowance trading program designed to accommodate different air quality policies in the participating states, in a cost-effective way. In 2003, then New York

Governor Pataki invited ten other New England and Mid-Atlantic states to develop a regional CO<sub>2</sub> program. These states executed a Memorandum of Understanding (MOU), committing to “propose for legislative and/or regulatory approval” in each state a trading program that “substantially” reflected a Model Rule agreed upon by the states.<sup>21</sup> A state’s participation in RGGI is mandatory only to the extent required by that state’s laws.

A state may withdraw from the agreement with thirty days written notice, subject to any procedural requirements in that state’s laws.<sup>22</sup> States have joined and left RGGI during the planning and implementation stages. Today, nine states implement RGGI through individual state statutes and/or regulations.

The RGGI MOU establishes basic parameters of the program; a Model Rule provides more detail. In brief, the MOU creates a “regional” CO<sub>2</sub> budget for fossil fuel-fired EGUs with a rated capacity equal to or greater than 25 megawatts that burn more than 50% fossil fuel and sell more than 10% of their energy output to the grid. Facilities must hold sufficient allowances to offset their total CO<sub>2</sub> emissions within each three-year compliance period.

The regional cap can be and has been adjusted to accommodate the entry or exit of states, or as otherwise needed. For instance, following a 2012 comprehensive review of RGGI that reflected the EGUs were operating well within the existing cap, participating states agreed to reduce the regional budget by nearly 45%.

The MOU divides the regional emissions budget between the participating states, but leaves the allocation of allowances to each state’s discretion, including the method of distribution (i.e., direct allocation or auctions) and identity of eligible recipients. All states have distributed allowances via open auctions; the resulting revenues fund renewable energy and energy efficiency programs, assist consumers with utility bills, or contribute to states’ general funds.

The MOU created RGGI, Inc. to set up the auction system and “facilitate the ongoing administration” of RGGI.<sup>23</sup> The MOU makes clear that this regional “technical assistance organization” has no regulatory or enforcement authority; instead, such authority “is reserved to each Signatory State for the implementation of its rule.”<sup>24</sup>

Given its status as the first mandatory, market-based CO<sub>2</sub> emissions reduction program in the nation, RGGI faced surprisingly few legal challenges. Of those, two raised Compact Clause issues.<sup>25</sup> The litigation was largely resolved before reaching the substance of any arguments.

### III. Compact Clause

Article I, Section 10, Clause 3 of the Constitution provides in relevant part that “*No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State*” (emphasis added).<sup>i</sup>

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<sup>i</sup> “Whatever distinct meanings the Framers attributed to the[se] terms, those meanings were soon lost.” *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 453, 462-63 (1978). The Supreme Court perceives no substantive difference between compacts and agreements; thus, we use the terms interchangeably. *See Virginia v. Tennessee*, 148 U.S. 503, 520 (1893) (noting the term “compact” is somewhat more formal).

On its face, the Compact Clause appears to require all multi-state agreements to be approved by Congress. However, the Supreme Court has never read this clause to require federal consent for agreements about which “the United States can have no possible objection or ... any interest in interfering”.<sup>26</sup> “Even when states have customarily sought congressional consent for reasons of caution and convenience, the mere act of consent is not dispositive of when it is required.”<sup>27</sup>

Initially used to resolve boundary disputes, today’s interstate compacts address issues from transportation,<sup>28</sup> water allocation,<sup>29</sup> cooperative treatment of prisoners,<sup>30</sup> and disposal of radioactive waste,<sup>31</sup> to mental health care and treatment.<sup>32</sup> A compact operates as a contract and can by its express terms trump statutory law in member states.<sup>33</sup>

Congress has approved approximately two hundred compacts.<sup>34</sup> When Congress approves a compact, it is “presumptively transformed into the law of the United States absent compelling evidence that consent was not required.”<sup>35</sup> Courts will apply federal law to interpret the agreement;<sup>36</sup> moreover, as federal law, the compact preempts conflicting state laws.<sup>37</sup>

Having rejected a reading of the Compact Clause that requires universal approval, the Supreme Court has looked at: (1) whether an interstate cooperative effort constitutes an agreement or compact, (2) which compacts or agreements *do* require Congressional approval, and (3) when and how Congress gives approval when required.

#### 1. Is an Inter-State Cooperative Effort an “Agreement” or “Compact”?

The Supreme Court has made clear that not all multi-state cooperative efforts, even those involving negotiations over shared interests and passage of reciprocal statutes, are compacts.<sup>38</sup> Reviewing a border dispute in 1893, the Court held that state legislation reflecting multi-state negotiations was not a compact unless it recited consideration for the action from another state.<sup>39</sup>

Over time, the Court has enumerated factors that reveal the existence of a compact. A 1985 case summarized these “classic indicia”. Massachusetts and Connecticut enacted statutes lifting bans on bank acquisitions by out-of-state regional holding companies so long as the home state of the holding company afforded reciprocal privileges. Reviewing a Compact Clause challenge to these statutes, the Supreme Court observed that the statutes were:

- Reciprocal in nature;
- Sought to achieve the same goal; and
- Reflected cooperation between the two States.<sup>40</sup>

However, the statutes did not contain all of “the classic indicia of a compact” because they:

- Did not establish a joint regulatory body;
- Were not “conditioned on action by the other State” or require reciprocity; and
- Did not restrict each State’s ability to modify or repeal the law unilaterally.<sup>41</sup>

Thus, the statutes did not constitute a compact, let alone one requiring Congressional approval.

## 2. When Does an Interstate Agreement or Compact Require Congressional Approval?

Even if state actions constitute compacts, they do not necessarily require Congressional approval.<sup>42</sup> Instead, consent is only necessary for “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>43</sup>

The leading case on this point is *United States Steel Corp. v. Multistate Tax Commission*.<sup>44</sup> There, the Supreme Court held the Multistate Tax Compact was a valid compact despite the lack of Congressional consent. Citing its own precedent,<sup>45</sup> the Court described the inquiry as “whether the Compact enhances state power *quoad* the National Government.”<sup>46</sup> It is irrelevant to the inquiry whether the compact increases state leverage over private actors.<sup>ii</sup>

The Multistate Tax Compact addressed an activity Congress could regulate (interstate taxation).<sup>47</sup> However, the Compact “does not purport to authorize the member States to exercise any powers they could not exercise in its absence”. Moreover, “each State retains complete freedom to adopt or reject the rules and regulations of the Commission” or “withdraw at any time”.<sup>48</sup> Therefore, it did not pose a threat to federal power, no matter how many states joined.<sup>49</sup>

As illustrated by *Multistate Tax*, a compact may encroach on the federal interest by acting where Congress has jurisdiction, or by altering the balance of power between states and the federal government.<sup>50</sup> Consent is not always required for the first type of encroachment, although Congress may limit state and multi-state action by legislating in the area. By contrast, consent is always required when a multi-state compact increases state power over the federal government.<sup>51</sup> As the analysis in *Multistate Tax* reflects, this inquiry tracks the “indicia” mentioned in the previous section; for instance, a regional authority that can bind multiple states to a bargaining position or action might increase the power of those states relative to the federal government.

Once Congress has given consent, *Multistate Tax* does not apply. “[I]f Congress enacts some kind of consent legislation, the Court will defer to Congress’ political judgment that the compact is good for the nation and simply ignore the *Multistate Tax Commission* test.”<sup>52</sup> Where Congress has approved a compact, the Court will only review to ensure consent was given, and that the subject matter of the agreement “is an appropriate subject for congressional legislation”; that is, that Congress had authority to approve this type of multi-state agreement.<sup>53</sup>

Litigation concerning the Compact Clause has “steadily increased” since 1975;<sup>54</sup> hundreds of opinions have analyzed and interpreted interstate compacts. Yet we found only one opinion invalidating an interstate agreement for lack of Congressional approval. In a cursory 2015 opinion, a Missouri court found that the Smarter Balanced Assessment Consortium, a multi-state agreement that offers tests to meet federal Common Core educational standards, was invalid for lack of Congressional consent.<sup>55</sup> This judgment has been appealed.

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<sup>ii</sup> On similar reasoning, courts have upheld a multi-state tobacco settlement without Congressional approval because it only increased the bargaining power of the States vis-à-vis tobacco manufacturers. See, *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir. 2002), *cert. denied*, 537 U.S. 818 (2002); *S&M Brands Inc. v. Caldwell*, 614 F.3d 172, 176 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011).

### 3. How is Congressional Approval Given?

“The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement”.<sup>56</sup> Prospective approval may be broad or conditional.<sup>57</sup> And, as the Court noted, Congressional approval may be implied.<sup>58</sup> For instance, the Supreme Court found that Congress implicitly approved a boundary agreement between Virginia and West Virginia when it admitted West Virginia into the union.<sup>59</sup>

In addition, Congress can delegate its approval authority. In *Milk Industries Foundation v. Glickman*,<sup>60</sup> the D.C. Circuit held that Congress could delegate Compact Clause approval authority to the Secretary of Agriculture, because:

[I]t has become widely accepted that Congress may, as a general matter, confer substantial authority upon a coordinate branch of government, as long as it provides an ‘intelligible principle’ to guide the delegatee’s exercise of the power conferred.<sup>61</sup>

The Court could find no reason the Compact Clause “should be understood differently from Congress’ other Article I powers for the purpose of the delegation doctrine.”<sup>62</sup>

Having concluded that not all multi-state efforts would require Congressional consent under the Compact Clause, and that in any event such consent may be granted in a number of forms, we now turn our attention to Section 102 of the Clean Air Act.

#### IV. Section 102 of the Clean Air Act

Section 102(c) of the Clean Air Act provides:

The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by Congress.<sup>63</sup>

The Clean Water Act (CWA)<sup>64</sup> and Resource Conservation and Recovery Act (RCRA)<sup>65</sup> contain virtually identical authorization language.

The first sentence of Section 102(c) clearly authorizes states to negotiate *and enter into* multistate agreements regarding air pollution prevention and control. These agreements can create joint agencies, and give rise to parallel pollution laws and enforcement by each state of its “respective laws”. The second sentence in Section 102(c) requires Congressional consent only for those compacts that are “binding or obligatory” on a state. The question, then, is what it

means for a state to be bound or obligated by a compact, as something distinct from entering a compact or enforcing laws relating to it. We examine each sentence of Section 102(c) in turn.

A plain text analysis of the first sentence in Section 102(c) indicates pre-approval for many multi-state agreements. Moreover, the Supreme Court has interpreted nearly identical language as Congressional pre-approval for the Interstate Agreement on Detainers.<sup>66</sup> In that instance, Congress had previously provided that:

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.<sup>67</sup>

Legislative history bears out that Section 102(c) grants prospective Congressional approval for most multi-state cooperative efforts addressing air pollution.<sup>68</sup> The purpose appeared to be to clarify that Congress welcomed these efforts alongside federal action. The provision was enacted in 1963,<sup>69</sup> as Congress was increasing its presence in this field. Congress could have preempted state and multi-state control efforts; however, as New York explained in RGGI litigation, the first sentence in Section 102(c) made clear that “far from being viewed as an encroachment on federal power, agreements among states to address air pollution are favored by Congress.”<sup>70</sup> Once Congress made the political calculation that multi-state cooperation over air pollution control was appropriate, it was more efficient to pre-approve most such cooperation, reserving scrutiny for those few that might change the balance of state-federal power.

The second sentence of Section 102(c) appears to address this balance of power, by limiting pre-approval to those inter-state compacts that are not “binding or obligatory upon any State”. Compact Clause case law does not neatly overlay the question of when Section 102(c) requires Congressional approval. Whether a compact binds a state is not one of the “classic indicia” used to identify a compact. Moreover, when courts are determining whether a compact binds a state, the validity of the compact or the need for Congressional consent is not generally in question.

However, cases reviewing a state’s possible obligations under a compact often implicate two indicia relating to abdication of state sovereignty<sup>71</sup> – the existence of a super-regulatory authority that can unilaterally create or enforce compact rules across participating states, and restrictions on a state to modify the terms of its participation or withdraw altogether.<sup>72</sup> Absent these factors, the Supreme Court has reviewed “numerous cooperative undertakings among States by the formation of agencies which study joint problems and make suggestions for *internal management* within individual States” which do not require Congressional consent.<sup>73</sup>

Section 102(c) tracks this distinction in this case law. The first sentence of 102(c) authorizes compacts that involve states enforcing “their respective laws” even where a joint agency exists, whereas the second sentence appears to require additional approval for compacts that create new authorities which reach across state lines in a way that only the federal government can.

The only case referencing Section 102(c) recognizes this distinction as well. An Illinois state court held that “the Clean Air Act forbids a neighboring state, such as Illinois, to insert itself as a regional super-authority with the power to enjoin, penalize, or otherwise regulate out-of-state sources.”<sup>74</sup> Therefore, Illinois could not invoke its state law to enjoin sulfuric acid emissions

from a power plant located in Indiana.<sup>75</sup> However, the Court distinguished this remedy from a negotiated solution with Indiana like that sanctioned by Section 102(c).<sup>76</sup>

We can apply this analysis to the Clean Power Plan, to determine how states might craft their multi-state arrangements to avoid the “binding” line in Section 102(c).

## V. Application to Clean Power Plan Compliance Strategies

The Clean Power Plan requires the full compliance burden to rest ultimately with the affected EGUs. Under most plans, this burden rests on the EGUs from the outset; state plans impose either a CO<sub>2</sub> rate or a CO<sub>2</sub> mass tons limit on each EGU or across a group of EGUs. Alternatively, for CO<sub>2</sub> mass-based plans, states may opt to rely initially on “State Measures,” such as state-enforceable trading programs, energy efficiency programs, or renewable portfolio standards, to achieve some or all of the required standards.<sup>77</sup> Should these measures fail, backstop standards will be applied to EGUs to make up the difference.<sup>78</sup> As designed, RGGI fits most clearly as a State Measure that would help EGUs achieve a multi-state mass CO<sub>2</sub> goal.

State Measures are not federally enforceable against the state or a responsible third party (i.e., a distribution company).<sup>79</sup> Only the EGU backstop provisions, once triggered, will be federally enforceable. Even if a state refuses to submit any plan, EPA has no recourse under the Clean Power Plan but to directly impose emission standards on that state’s EGUs.<sup>80</sup> Third parties, including citizens groups or other states, likewise have no legal recourse against these states.

The final rule describes a number of approaches to multi-state compliance. States can make:

1. One joint submittal describing the multi-state arrangement.<sup>81</sup> “In this instance, the joint submittal will have the same legal effect as an individual submittal for each participating state.”<sup>82</sup> The single plan should identify components that apply jointly for all member states, and components that apply for each state – the example used in the regulation is a recitation of legal authorities each state will rely on to implement and enforce the plan.<sup>83</sup>
2. A single submittal addressing “common plan elements,” with separate individual plan submittals to address state-specific elements of the multi-state arrangement.<sup>84</sup>
3. “[I]ndividual submittals that address all elements of the multi-state plan” so long as the submittals are “materially consistent” for all common plan elements that apply to participating states.<sup>85</sup>

Across these submittal options, the Clean Power Plan enables multi-state compliance strategies that set mass CO<sub>2</sub> goals to impose standards directly on the EGUs in their plans, or to reference a state enforceable interstate trading regime, like RGGI, as a State Measure.<sup>86</sup>

In addition, a “state may elect to allow its affected EGUs to interact with affected EGUs in other states through mass-based trading programs or a rate-based trading program *without entering into a formal multi-State plan* ... so long as such programs are part of an EPA-approved state plan.”<sup>87</sup> The Clean Power Plan places certain restrictions on these individual but “trading-ready”

plans, to prevent leakage of emissions from one state to another. For instance, if states want to trade ERCs with other states, they will need to submit a plan that imposes the subcategory-specific emission rates established by EPA on each coal and gas plant in their state.<sup>88</sup>

Regardless of the form of a multi-state submittal, the only federally enforceable requirements in the plans will be emission standards for affected EGUs, initially or as a backstop. The Clean Power Plan directs states to describe EGU trading programs in their plans<sup>89</sup> including, for instance, how allowances will be allocated in a mass-based program and whether EGUs can bank allowances for future compliance periods. However, as noted, these details are not intended to create binding plan requirements for a state that EPA or a citizens group could enforce.

To the extent these options “bind” states at all, the restrictions are imposed by the Clean Air Act through the Clean Power Plan, and not by any underlying multi-state agreement. A more detailed look at possible multi-state arrangements is necessary to determine whether the arrangements themselves could bind a state such that they would require additional approval.

As discussed, states may “negotiate and enter into” agreements to cooperate on Clean Power Plan compliance. This may include establishing joint agencies,<sup>90</sup> perhaps to register ERCs or operate an interstate trading platform. This may also include state “enforcement of their respective laws” to implement the program.<sup>91</sup> A state can choose to adhere to a multi-state plan by its *own* laws – for instance, limiting its allowance auctions by law to the allowances agreed upon by the group of states. The Clean Power Plan reflects this by requiring submittals to include “components that apply for each individual state in the multi-state plan, including necessary state legal authority to implement the plan.”<sup>92</sup> These are exactly the parallel “internal management”<sup>93</sup> arrangements that the Supreme Court has found do not need Congressional consent. What states may not do, absent additional consent, is grant a joint agency the power to promulgate rules or enforce program requirements against states or their EGUs.

Nor can these agreements force a state to remain in the cooperative arrangement against its will. RGGI demonstrates that multi-state arrangements can be designed to enable states to depart the program. Of course, if a state relied on a multi-state EGU trading program like RGGI for its Clean Power Plan compliance strategy, withdrawal of any state would trigger specific mechanisms. The departing state would have to submit another “satisfactory” plan for approval by EPA, or EPA would begin directly regulating its EGUs.<sup>94</sup>

Meanwhile, the remaining states in a CO<sub>2</sub> trading program would have to adjust their emissions cap, which would likely require filing a plan revision with EPA.<sup>95</sup> Moreover, if a state withdrew during an interim step or final compliance period, and EGUs in other states previously had purchased allowances from EGUs in the departing state, some EGUs might exceed the interim or final standards. If so, and if standards were applied directly to the EGUs, the multi-state plan might trigger the Clean Power Plan’s “corrective measures” provisions.<sup>96</sup> Or, if the trading program were operated as a State Measure to supplant or supplement federally enforceable standards against EGUs, the Clean Power Plan’s “backstop” provisions would come into play.<sup>97</sup> To the extent these mechanisms place limits on a state’s departure from a multi-state program or modification of its terms of participation, these limits again flow from the Clean Air Act. Meanwhile, if states wanted to mitigate potential compliance issues, they could agree to write

notice requirements, or provisions for the immediate retirement of EGU allowances in the event of a withdrawal, into their respective laws. The multi-state agreement would not need to bind the participating states to anything to achieve this result.

A state's participation in a multi-state trading effort could be viewed as a commitment to provide a potentially lower-cost mechanism for EGU compliance with Clean Power Plan emission standards. However, the state is not obligated by the rule or the Clean Air Act to select the most cost-effective compliance pathway. Nor is it likely that an EGU could prevent a state's withdrawal from a multi-state program. The adjustment mechanisms in the Clean Power Plan provide notice to the EGUs of changed circumstances and time to adjust to new emission standards. A state's decision to leave a multi-state program might limit EGU compliance options, but a state need not be bound to that compliance path so as to require consent under the Compact Clause or Section 102.

Finally, even if a commitment made in a plan were to bind a state to a multi-state compliance pathway, EPA's approval of the compliance plan arguably provides the required consent. In approving a state's compliance plan, EPA is exercising authority delegated to it by Congress through the Clean Air Act. As noted, Congress may delegate its authority under the Compact Clause. An argument can be made that EPA's may approve a binding multi-state agreement by binding its members to the terms through federally enforceable plans.

## **VI. Summary and Recommendations**

Multi-state cooperation over air pollution control may or may not constitute a compact; as discussed, courts as a rule do not find the passage of reciprocal state statutes rising to the level of a compact, even when such laws evolve from state negotiations or cooperative planning efforts. Moreover, even air pollution control compacts may not require Congressional approval so long as they do not alter the balance of power between states and the federal government. Courts look to particular federal statutes to determine whether Congress has granted the requisite authority.

Congress has pre-approved multi-state air pollution control efforts, including those that:

- Establish joint agencies, for instance to register ERCs or run allowance auctions; and
- Suggest provisions that each member state will implement and enforce in its own laws, to facilitate the smooth operation of the multi-state effort.

Congress or EPA must provide additional consent if states wish to:

- Create a super-regulatory regional body that can unilaterally create or enforce requirements across state lines, and
- Write a compact that places restrictions on member states wishing to modify the terms of its participation or to leave the effort entirely.

## **VII. Concern for Non-Participating States**

One source of criticism for the *Multistate Tax* test has been its “wholesale disregard of federalism’s horizontal dimensions.”<sup>98</sup> Justice White dissented in *Multistate Tax* in part out of a concern for the potential competitive disadvantage of non-participating states.<sup>99</sup>

However, other constitutional provisions protect a state disadvantaged by other states’ actions. For instance, the Fourth Circuit struck down measures taken by South Carolina to restrict hazardous waste flows into the state, finding these measures discriminated against other states and impeded interstate commerce, in violation of the dormant Commerce Clause.<sup>100</sup> Congress may pre-approve state cooperative action or delegate approval of a piece of the statutory program to an agency (here, authorizing EPA to approve one state or multi-state hazardous waste disposal capacity assurances); however, this approval does not authorize states to discriminate against interstate commerce. Indeed, “congressional intent to authorize the discriminating law must be either ‘unmistakably clear’ or ‘expressly stated.’”<sup>101</sup> Given that EPA approval cannot cure a scheme that discriminates or unduly burdens interstate commerce, the next paper in our series will explore the dormant Commerce Clause and its implications for multi-state agreements.

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<sup>1</sup> U.S. EPA, Final Rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: EGUs (Clean Power Plan Final Rule), Aug. 3, 2015, <http://www.epa.gov/airquality/cpp/cpp-final-rule.pdf> .

<sup>2</sup> 40 C.F.R. § 60.5750(d).

<sup>3</sup> Clare Foran, “Mitch McConnell Has a New Plan to Block Obama’s Climate Agenda,” NATIONAL JOURNAL (Apr. 29, 2015), <http://www.nationaljournal.com/energy/mitch-mcconnell-has-a-new-plan-to-block-obama-s-climate-agenda-20150429>.

<sup>4</sup> 42 U.S.C. § 7402(c).

<sup>5</sup> U.S. Const. art. 1, § 10, cl. 3.

<sup>6</sup> 42 U.S.C. § 7411(d).

<sup>7</sup> 42 U.S.C. § 7411(a)(1)

<sup>8</sup> See, e.g., Clean Power Plan Final Rule, at 27.

<sup>9</sup> 40 C.F.R. Pt. 60, Subpt. UUUU, Table 1.

<sup>10</sup> See, e.g., Final Clean Power Plan, at 12; 40 C.F.R. Pt. 60, Subpt. UUUU, Tables 2-4.

<sup>11</sup> 42 U.S.C. § 7411(d)(1). State performance standards must be based on what EPA determined is the BSER for the source category. 42 U.S.C. § 7411(a)(1).

<sup>12</sup> 42 U.S.C. 7410(k)(1)(A) (directing EPA to set forth “minimum criteria”); 40 C.F.R. § 60.5740.

<sup>13</sup> 42 U.S.C. § 7413(a)(1), (b); 42 U.S.C. § 7604(a)(1).

<sup>14</sup> Clean Power Plan Final Rule, at 60.

<sup>15</sup> Clean Power Plan Final Rule, at 351.

<sup>16</sup> Clean Power Plan Final Rule, at 375.

<sup>17</sup> Clean Power Plan Final Rule, at 910; see also, Clean Power Plan Final Rule, at 573.

<sup>18</sup> Midcontinent Independent System Operator, GHG REGULATION IMPACT ANALYSIS – INITIAL STUDY RESULTS (2014), [http://www.eenews.net/assets/2014/09/18/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2014/09/18/document_ew_01.pdf).

<sup>19</sup> PJM, INTERCONNECTION ECONOMIC ANALYSIS OF THE EPA CLEAN POWER PLAN PROPOSAL (2015), <http://www.pjm.com/~media/3C832213F02B4E5D9CE0D5FB08AA92E3.ashx>.

<sup>20</sup> 40 C.F.R. § 60.5750(d).

<sup>21</sup> REGIONAL GREENHOUSE GAS INITIATIVE MEMORANDUM OF UNDERSTANDING (RGGI MOU), ¶ 2.A, [http://www.rggi.org/docs/mou\\_final\\_12\\_20\\_05.pdf](http://www.rggi.org/docs/mou_final_12_20_05.pdf).

<sup>22</sup> See, *In re Regional Greenhouse Gas Initiative*, 2014 WL 1228509 (N.J. Super. Ct. App. Div. 2014) (finding New Jersey’s repeal of RGGI rules had to comply with state Administrative Procedures Act, but noting no one challenged legality of New Jersey’s withdrawal from RGGI), but see, An act relative to New Hampshire’s regional greenhouse gas initiative cap and trade program for controlling carbon dioxide emissions, H.B. 1490 (2012), § 281:17, <http://www.puc.nh.gov/Regulatory/CASEFILE/2010/10-188/LETTERS,%20MEMOS/10-188%202012-07-10%20STAFF%20LTR%20FILING%20HB%201490%20INTO%20THE%20DOCKET%20SO%20THAT%20ALL%20PERSONS%20ON%20THE%20SERVICE%20LIST%20CAN%20VIEW%20IT.PDF> (providing New

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Hampshire may not withdraw from RGGI unless two other New England states, or a New England state with 10% of the energy load of participating New England states, withdraw from the program).

<sup>23</sup> RGGI MOU, ¶ 4.

<sup>24</sup> RGGI MOU, ¶ 4.A.5; *see also* RGGI, Inc. Bylaws, art. XII (“The Corporation shall have no regulatory or enforcement authority with respect to any existing or future program of any Signatory State, and all such sovereign authority is reserved to each Signatory State”); N.H. REV. STAT. ANN. § 125-O:21 VIII (clarifying no state actions under RGGI shall constitute a waiver of sovereign immunity).

<sup>25</sup> *Thrun et al. v. Cuomo*, N.Y. Sup. Ct., Compl. (June 27, 2011); *Indeck Corinth, L.P., v Paterson et al*, N.Y. Sup. Ct., Joint Pet. and Compl. (Jan. 29, 2009).

<sup>26</sup> *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893); *see also, U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-60 (1978).

<sup>27</sup> Caroline N. Broun et al., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS (INTERSTATE COMPACTS)* (ABA Publishing, 2006), 52.

<sup>28</sup> NEW YORK-NEW JERSEY PORT AUTHORITY COMPACT, Pub. Res. 67-17; 42 Stat. 174 (1921); revised, Pub. L. No. 96-163; 93 Stat. 1242 (1979).

<sup>29</sup> COLORADO RIVER COMPACT, Pub. L. No. 67-56; 42 Stat. 171 (1921).

<sup>30</sup> INTERSTATE CORRECTIONS COMPACT, Pub. L. No. 73-293, 48 Stat. 909 (1934); 4 U.S.C. § 112A (2004).

<sup>31</sup> CENTRAL MIDWEST LOW-LEVEL RADIOACTIVE WASTE COMPACT, Pub. L. No. 99-240, 99 Stat. 1842 (1986).

<sup>32</sup> INTERSTATE COMPACT ON MENTAL HEALTH, Pub. L. No. 92-280, 86 Stat. 126 (1972).

<sup>33</sup> INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, art. XIV, § A (stating compact takes precedence over any conflicting state law); *see also McComb v. Wambaugh*, 934 F. 2d 474, 479 (1991) (finding the Interstate Compact on Placement of Children, despite not having or requiring Congressional consent, by its own terms “takes precedence over statutory law in member states”).

<sup>34</sup> *See e.g.,* Joseph F. Zimmerman, *INTERSTATE COOPERATION: COMPACTS & ADMINISTRATIVE AGREEMENTS*, 2d ed., App. A (SUNY Albany 2012).

<sup>35</sup> INTERSTATE COMPACTS, 55 (citing *Old Town Trolley Tours of Wash. v. Wash. Metrop. Area Transit Comm’n*, 129 F.3d 201, 204 (D.C. Cir. 1997); *Reed v. Farley*, 512 U.S. 339 (1994)).

<sup>36</sup> *Carchman v. Nash*, 473 US 716, 719 (1985); *Cuyler v. Adams*, 449 U.S. 433, 443 (1981).

<sup>37</sup> *Tarrant Regional Water Dist. v. Hermann*, 133 S.Ct. 2120, 2130 (2013).

<sup>38</sup> INTERSTATE COMPACTS, 16-18; *Multistate Tax*, 434 U.S. at 469 (citing Court decisions upholding “a variety of interstate agreements effected through reciprocal legislation without congressional consent”).

<sup>39</sup> *Virginia*, 148 U.S. at 520.

<sup>40</sup> *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve*, 472 US 159, 175 (1985).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (citing *Virginia*, 148 U.S. 503).

<sup>43</sup> *Virginia*, 148 U.S. at 519.

<sup>44</sup> 434 U.S. 452.

<sup>45</sup> *Multistate Tax*, 434 U.S. at 468-69.

<sup>46</sup> *Id.*, at 473.

<sup>47</sup> *Id.*, at 481 (dissent).

<sup>48</sup> *Id.*, at 473.

<sup>49</sup> *Id.*, at 472.

<sup>50</sup> *See also, Virginia*, 148 U.S. at 517-18; INTERSTATE COMPACTS, 48-49

<sup>51</sup> *Id.*

<sup>52</sup> Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 523 (2d ed. 1988).

<sup>53</sup> *Cuyler*, 449 U.S. at 440.

<sup>54</sup> Council of States Governments, “Interstate Compact Case Law, 1976-2000,”

<http://www.csg.org/knowledgecenter/docs/ncic/caselaw.pdf>.

<sup>55</sup> *Sauer v. Nixon*, Cause No. 14AC-CC00477 (Cir. Ct. Cole County, Mo., Div. II, Feb. 24, 2015)

<sup>56</sup> *Virginia*, 148 U.S. at 521.

<sup>57</sup> *Cuyler*, 449 U.S. at 439-40.

<sup>58</sup> *Virginia*, 148 U.S. at 521.

<sup>59</sup> *Virginia v. W. Virginia*, 78 US 39 (1871). *See also Safe Harbor Water Power Corp. v. Fed. Power Comm’n*, 124 F.2d 800, 806-08 (3d Cir. 1941).

<sup>60</sup> 132 F.3d 1467 (D.C. Cir. 1998).

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<sup>61</sup> *Milk Indus. Fdn.*, 132 F.3d at 1473.

<sup>62</sup> *Id.*, at 1474.

<sup>63</sup> 42 U.S.C. § 7402(c).

<sup>64</sup> 33 U.S.C. § 1253(b).

<sup>65</sup> 42 U.S.C. § 6904(b).

<sup>66</sup> *Cuyler*, 449 U.S. 433. Detainers are requests by other jurisdictions to hold a prisoner scheduled for release, to transfer for trial on additional charges.

<sup>67</sup> *Id.* at 441.

<sup>68</sup> Senator Muskie noted, and Senator Ribicoff agreed, the provision was intended to “give the consent of Congress in advance to interstate compacts designed to deal with the problem of pollution.” *First Session on S. 432, S. 444, S. 1009, S. 1040, S. 1124, and H.R. 6518: Hearings before a Sp. Subcomm. on Air and Water Pollution of the S. Comm. on Public Works*, 88th Cong. 45 (1963).

<sup>69</sup> Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 393, § 2(c).

<sup>70</sup> *Indeck Corinth*, Mem. of Law of Respondents/Defendants, at 72 (May 15, 2009).

<sup>71</sup> *Ne.Bancorp, Inc.*, 472 U.S. at 175. As a general matter, courts are reluctant to find that states have ceded sovereignty in interstate agreements. *See, e.g., Tarrant Reg’l Water Dist. v. Hermann*, 133 S.Ct. 2120, 2132 (2013) (declining to read into the compact the ceding of a participating state’s sovereignty over internal water allocations).

<sup>72</sup> *See* INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, art. IX (“Withdrawal of a party state shall not affect the rights, duties, and obligations under this compact . . . with respect to a placement made prior to the effective date of withdrawal”), *but see Multistate Tax*, 434 U.S. at 473 (noting “each State retains complete freedom to adopt or reject the rules and regulations of the Commission . . . [and] to withdraw at any time”); *see also Kimberley-Clark Corp. & Subsidiaries v. Comm’r of Revenue*, 2015 WL 3843986, at \*16 (Minn. Tax Ct. Regular Div., Ramsey Cty.) (confirming Minnesota could modify its terms of participation in the Multistate Tax Compact).

<sup>73</sup> *New York v. O’Neill*, 359 U.S. 1, 10 (1959); *see also Virginia*, 148 U.S. at 519.

<sup>74</sup> *People ex rel. Madigan v PSI Energy, Inc.*, 364 Ill. App.3d 1041, 1045-46 (2006).

<sup>75</sup> *See Madigan*, 364 Ill. App.3d at 1045-46.

<sup>76</sup> *Id.* at 1045.

<sup>77</sup> 40 C.F.R. § 60.5745(a)(6); 40 C.F.R. § 60.5780 (enabling States to rely on State Measures “in support” of plan).

<sup>78</sup> 40 C.F.R. § 60.5740(a)(3).

<sup>79</sup> *See*, 42 U.S.C. § 7413(a),(c) (limiting EPA enforcement to violations of a “requirement or prohibition of an applicable implementation plan” or “a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved” under the Clean Air Act); 42 U.S.C. § 7604(a) (limiting citizen suit enforcement to violations of “an emission standard or limitation”).

<sup>80</sup> 40 C.F.R. § 60.5720; LEGAL MEMORANDUM ACCOMPANYING CLEAN POWER PLAN, at 47. EPA has proposed a “SIP Call” mechanism for revising state plans. Clean Power Plan Final Rule, at 905 n. 797; Federal Plan Requirements for GHGs from EGUs Constructed on or Before January 8, 2014; Proposed Rule, at 346, 351-56.

<sup>81</sup> 40 C.F.R. § 60.5750(b)(1).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 40 C.F.R. § 5750(b)(2).

<sup>85</sup> 40 C.F.R. § 5750(b)(3).

<sup>86</sup> *See, e.g.*, 40 C.F.R. § 60.5780(a)(3) (noting the requirement that a state measure must be non-duplicative does not prevent that measure from being incorporated into a multi-state plan).

<sup>87</sup> 40 C.F.R. § 5750(d).

<sup>88</sup> 40 C.F.R. § 60.5750(d)(2).

<sup>89</sup> 40 C.F.R. § 60.5790(b), (c); 40 C.F.R. § 60.5815.

<sup>90</sup> 42 U.S.C. § 7402(c); 40 C.F.R. § 60.5750.

<sup>91</sup> *Id.*

<sup>92</sup> 40 C.F.R. § 60.5750(b)(1).

<sup>93</sup> *O’Neill*, 359 U.S. at 10.

<sup>94</sup> 40 C.F.R. § 60.5720; EPA, Federal Plan Requirements; Proposed Rule (2015).

<sup>95</sup> 40 C.F.R. § 60.5785.

<sup>96</sup> 40 C.F.R. § 60.5740(a)(2).

<sup>97</sup> 40 C.F.R. § 60.5740(a)(3).

<sup>98</sup> Michael Greve, “Compacts, Cartels, and Congressional Consent”, 68 MO. L. REV. 285, 380 (2003).

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<sup>99</sup> *Multistate Tax*, 434 U.S. at 495-96.

<sup>100</sup> *See, Envtl Tech Council v. South Carolina*, 98 F.3d 774 (1996).

<sup>101</sup> *Id.* at 782 (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984)).