A Role for Interstate Compacts in Coastal Resilience and Climate Change Mitigation

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I. Introduction

Interstate compacts are legal tools that can help states address the increasing number of extreme weather events they face. This Comment will discuss how interstate compacts have already been used to deal with such collective problems and will point out additional roles that they can play.

II. Background

On August 29, 2005, Hurricane Katrina blew ashore south of New Orleans. The dike and levee system on the lower Mississippi River failed. More than 1,800 people died and over \$100 billion of damage was done. It was the most devastating storm to hit the United States since 1928. Help for Katrina's victims in Louisiana and Mississippi came from all over the country. The numbers reported by the National Emergency Management Association at its website are impressive:

- More than 1,300 search-and-rescue personnel from 16 states searched more than 22,300 structures and rescued 6,582 people.
- More than 2,000 healthcare professionals from 28 states treated more than 160,000 patients in the days and weeks after the storms, under the most primitive of conditions.
- Nearly 3,000 fire/hazmat personnel from 28 states deployed.
- Two hundred engineers from nine states assisted.
- More than 6,880 sheriff's deputies and police officers from 35 states and countless local jurisdictions deployed across Louisiana and Mississippi—a total of 35% of all of the resources deployed.¹

How were all of these resources marshaled? It wasn't haphazard or spontaneous. Help arrived on the scene thanks to a nationwide interstate agreement adopted in 1996 called the Emergency Management Assistance Compact (EMAC).² Like the successful EMAC, a new type of interstate compact or compacts targeted at mutual state financial assistance could help mitigate coastal disasters caused or enhanced by climate change.

III. Interstate Compacts Generally

The last paragraph of Article I, 1, 10, 0 the U.S. Constitution allows for the creation of interstate compacts so long as they obtain congressional consent. The provision states: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"³

There are some 176 interstate compacts. The first, predating the Constitution, was the Maryland and Virginia Boundary Agreement of 1785, specifying ownership and usage of the Potomac River. It was created under §2 of Article VI of the Articles of Confederation, the language of which was later taken into the Constitution. Interstate compacts not only require the consent of the U.S. Congress, but, like any other state law, they require that each participating state enact a statute incorporating the compact language, and that such legislation be approved by the state's governor.

Typically, the process will begin with one or more states passing legislation authorizing a commission to negotiate with another state on a certain issue. Each respective state wishing to participate will, in turn, create its own commission. The commissioners will then meet. If they can agree on the substance of an interstate compact, then they will report back to their respective legislatures with the draft

For more information, visit the National Emergency Management Association website at www.emacweb.org. These figures are available at its Emergency Management Assistance Compact (EMAC) web page, http://www. emacweb.org/index.php/learnaboutemac/history/emac-response.

Joint resolution granting the consent of the U.S. Congress to the Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877-3883 (Oct. 19, 1996) [hereinafter EMAC], *available at* http://www.gpo. gov/fdsys/pkg/PLAW-104publ321/html/PLAW-104publ321.htm.

^{3.} U.S. CONST. art. I, §10.

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compact, which will be put to a vote. If the commissioners can't agree, the matter ends there.

Once the respective states have adopted the requisite statutes authorizing the compact, they will petition Congress—presumably through their respective congressional delegations—for its required "consent."

IV. Background on the EMAC

There are 54 signatories to the EMAC, including all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The compact sets forth the legal framework for interstate cooperation during an emergency. It is, essentially, a mutual aid agreement among the signatories. The compact itself does not presume to set forth how the mutual aid will be furnished: Those strategies are left to state emergency management officials who work together through the National Emergency Management Association. Instead, the compact sets out the structure of the relationship between the state being aided and the states furnishing the aid.

The triggering event for calling the compact into play is the declaration of a state of emergency by a state governor.⁴ The last three paragraphs of Article III, "State Party Responsibilities," describe the EMAC's specific purposes:

- v. Protect and assure uninterrupted delivery of services, medicines, water, food, energy and fuel, search and rescue, and critical lifeline equipment, services, and resources, both human and material.
- vi. Inventory and set procedures for the interstate loan and delivery of human and material resources, together with procedures for reimbursement or forgiveness.
- vii. Provide, to the extent authorized by law, for temporary suspension of any statutes or ordinances that restrict the implementation of the above responsibilities.

Article IV provides that:

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (except that of arrest unless specifically authorized by the receiving state), duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services. Emergency forces will continue under the command and control of their regular leaders, but the organizational units will come under the operational control of the emergency services authorities of the state receiving assistance.

Article V provides that those working under licenses or permits in the state providing aid are deemed duly licensed or permitted in the receiving state, unless the receiving state says otherwise; additionally, Article VI provides that those officers and employees of the providing state are deemed agents of the receiving state "for tort liability and immunity purposes."

Article VII provides that the states providing aid shall pay their own people, including any death benefits, while Article IX says that the receiving state shall reimburse the state providing the aid unless the providing state declines reimbursement.

The EMAC can be characterized as a "first responder" agreement.⁵ Its purpose is to provide immediate assistance for victims of major emergencies. But an agreement among states could also provide a different kind of assistance: financial aid for rebuilding and recovering coastal areas increasingly at risk from climate change-induced storms.

V. Climate Change and Coastal Disasters

For thousands of years, tropical waves known as African easterly waves have formed off the west coast of Africa, caused by pulses of intense heat coming off the Sahara Desert. Trade winds blow these phenomena into the Western Hemisphere, where some of them intensify into tropical storms and hurricanes.

In 2012, one of these waves spawned Hurricane Sandy, which killed 286 people in seven countries and caused \$68 billion of damage, the second most costly storm in U.S. history after Katrina. Sandy had winds measured at 115 mph at its peak, making it a Category 3 hurricane, although when it came ashore in New Jersey, it had degraded to a Category 2 hurricane. What was shocking about Sandy was not its intensity, but its size—its winds spanned 1,100 miles—and the fact that it struck the densest metropolitan area in the United States.

Scientists tell us that the more our planet warms, the more we can expect extreme weather events. In addition, the more the earth warms, the higher sea levels will rise. Coastal areas will face a double jeopardy of more extreme weather events pushing ever-higher seas at them. This Comment focuses on these more frequent and more destructive events: Not necessarily as bad as Sandy, but still damaging, especially to individual coastal communities. It is these types of storms that will become the new rule, and so these are the events we must prepare for. Moreover, some state officials believe that the annual appropriations for the U.S. Army Corps of Engineers (the Corps), which builds many of the coastal fortifications against storms like Sandy, will dwindle over time.⁶ The states need to prepare themselves for this eventuality.

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^{5.} In addition to the EMAC, there is another disaster relief compact that deals solely with earthquakes: the Interstate Earthquake Emergency Compact. See National Center for Interstate Compacts, Interstate Earthquake Emergency Compact, http://apps.csg.org/ncic/Compact.aspx?id=83. There are, however, only four signatory states. They are Indiana, Mississippi, Missouri, and Tennessee. One might intuitively think that the Pacific Rim states would be the most likely participants in this compact; but, in fact, some of the largest earthquakes in American history occurred in Missouri in 1811-1812.

^{4.} EMAC, supra note 2, art. IV.

Opinions expressed to the author in private conversations.

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VI. Applying the Compact Model

How could an interstate agreement or compact help address coastal disasters? There are three factors or concepts that suggest interstate cooperation could be efficacious. The first factor involves what might be called pre-hurricane fortifications. Among the Corps' traditional coastal chores have been the replenishment of beaches, the building of dunes, and the dredging of channels and back bays—all vital in mitigating coastal storm damage. Most beaches need to be replenished every four years, but there are exceptions: Several years ago, Ocean City, Maryland, was hit by an intense local storm that ruined their beaches less than one year after the most recent replenishment.

Now, let us hypothesize that (in a year of reduced or no appropriations for the Corps) Ocean City had squirreled away 25% of the cost of replenishment. What good would that have done them? None, because they still would have been short 75% of the money they needed for an emergency coastline replenishment. But how would that situation be different if each East Coast community from Narragansett to Virginia Beach had put their 25% into a common kitty? In that case, Ocean City could have gone to the kitty, obtained the additional 75% funding they needed, and paid it back over the next three years.

The second factor that suggests a role for interstate compacts is a community's need to restart its economic engine promptly after a disaster. Again, Ocean City can be used as an illustration. The town's economy revolves around tourism, which in turn revolves around the beach, boardwalk, and amusement park. These are the essential economic engines (E3s) of Ocean City.

People travel to Ocean City from Ohio to walk on the beach, to buy French fries and flip-flops on the boardwalk, and to go to the amusement park and other recreational facilities. They do not come from Ohio to shop at Walmart. They do not come from Ohio to visit Ocean City's churches or libraries. So, if the city's beaches, boardwalk, and amusement parks are destroyed, no one will come from Ohio until they are rebuilt.

To maintain Ocean City's viability, the E3s need to be rebuilt yesterday. This means no grant applications, no approval processes, no inspection visits from federal officials, no FEMA, no ceremonies, and no waiting. What it requires is cash available the day after the disaster so that the mayor and city council can start letting contracts to rebuild the beaches, boardwalk, and amusement facilities—all of the E3s that lure tourists to the city and provide jobs for locals. No E3s, no tourists. No tourists, no jobs. No jobs, no Ocean City.

How much money is involved in rebuilding E3s? The answer is difficult to determine from published damage reports. For example, New York and New Jersey reported over 650,000 homes damaged by Hurricane Sandy.⁷ According to the U.S. Department of Commerce, 19,000 small businesses in New Jersey sustained damages of over \$250,000 for a total of \$8.3 billion.⁸ How many of these were E3s is not known.

Of the \$42 billion of damage that New York says it sustained, about \$14 billion was in the business and infrastructure areas, the two categories most relevant to our concept of E3. Again, how much of this damage was to E3s is unknown. But, let us just assume that 10% of the total hurricane damage was to E3s. In the case of Hurricane Sandy, that would be about \$7 billion. As far as catastrophe insurance and reinsurance are concerned, that is a very reasonable and doable number. Further, since Sandy was the second most destructive storm in history, we can probably prudently estimate that \$5 billion should cover most severe weather events.

The third concept is the use of catastrophe insurance and reinsurance to pay for rebuilding the E3s. A Sandylevel storm can't have a direct hit on every community between Rhode Island and Virginia. The large spread of geography spells spread of insurable risk. With an interstate compact formalizing and acting on behalf of this risk pool, how could such insurance work? Let's use Bethany Beach, Delaware, and Atlantic City, New Jersey, to form an example.

Bethany's post-hurricane needs would be pretty simple: a new beach, new boardwalk, some new shops—perhaps a maximum of \$10 million. Atlantic City, with its massive casinos (each with its own catastrophic coverage insurance policy) might decide it needs another \$100 million over and above the casinos' own insurance to get itself back in business.

Let us hypothesize that there are two catastrophic coverage insurance policies for the Mid-Atlantic offered through an interstate compact. Policy A has coverage from \$1 up to \$10 million. Policy B has coverage from \$10,000,001 to \$100 million. Bethany would buy Policy A only. Atlantic City would buy both. Insurance drives down the cost of protection. And insurance would be possible because all of the coastal communities would buy it, while not all of them would be catastrophically damaged by a single event. This is one of the most important reasons to have an interstate compact serve as the intermediary between numerous vulnerable coastal communities and the private insurance and reinsurance industries.

In summary, we have three working concepts: (1) the pooling of pre-hurricane fortification funding to make sure all communities are covered; (2) immediate rebuilding of E3s in communities devastated by disasters; and (3) using catastrophic coverage insurance and reinsurance to pay for rebuilding the E3s. Taken together, these three concepts would require creating agreements among the states. This means an interstate compact.

An interstate compact could also facilitate the use of municipal bonds to respond to disasters. Going back to Bethany Beach, let us say that of the \$10 million it needs to get back in business, \$3 million represents the beach itself—municipal property. Rebuilding the beach would

^{7.} Numbers based on author's composite estimates.

qualify for a tax-exempt bond. In this case, Bethany might opt for a \$3 million deductible on its Policy A and plan to fund this \$3 million with a tax-exempt bond. On the other hand, issuing so small a tax-exempt bond can be very expensive. Having an interstate compact issue a much larger tax-exempt bond on behalf of not only Bethany, but also the several other nearby communities that were devastated by the same storm, might make a great deal of sense.

The emergency management officers in each state, who are members of the National Emergency Management Association, should be able to make good sense out of these alternative scenarios. They could thus inform their respective state finance officials who, in turn, could inform their state's representative to the interstate compact.

The compact could issue the bond in advance and escrow the funds so that they would literally be on hand the day after the disaster, rather than go through the usual bond issuance process that can take up to two months. Again, this is a fiscal decision for the states, but it is the flexibility afforded by the existence of an interstate compact that makes this work. Suffice it to say there are a myriad of fiscal options that an interstate compact could employ. Commissioners can evaluate them all and make their choices for whatever works best for all.

A final note about money: Can states cede away their sovereign control over imposing charges and fees in their own state to an interstate organization? Yes. The Susquehanna River Basin Commission, for example, has a provision in its charter that enables it to "fix . . . rates [and] charges . . . *without regulation or control by any department, office, or agency of any signatory party*, for . . . any services or products which it provides."⁹

It bears noting that this power works both ways: The participating states can also severely limit the compact's fiscal powers. For example, Article X of the Port Authority of New York and New Jersey Compact requires that the Authority's board formulate a budget and a work plan each year and then *submit it to the legislatures of both states for approval*. Furthermore, Article XVI authorizes governors *to veto actions of the Authority*.¹⁰ And, in fact, this has actually happened. Interstate compacts can be ceded as much or as little fiscal authority as their partnering states are comfortable with.

VII. Conclusion

As the history of the EMAC attests, the legal structure of interstate compacts has played a heroic role in protecting human lives and property from disasters. It is very likely that this same legal structure can be employed in a financial context, both to protect whole coastal communities from disasters caused by extreme weather events spawned by climate change and to rebuild their core economies the day after disaster strikes.

Susquehanna River Basin Compact §3.9, available at http://www.srbc.net/ about/srbc_compact.pdf.

New York-New Jersey Port Authority Compact of 1921, arts. X, XVI (emphases added), *available at* http://ballotpedia.org/New_York-New_Jersey_ Port_Authority_Compact_of_1921.