

Potomac River Compact History

In 1785, the State of Maryland and the Commonwealth of Virginia entered into a Compact following protracted disputes concerning each jurisdiction's efforts to regulate fishing and passage of vessels in the Potomac and other territorial waters. The Compact gave broad rights to citizens of both jurisdictions to use the river.

In 1894, the U.S. Supreme Court held that the Compact was valid under the Articles of Confederation, which were in force when the Compact was adopted. The Court also found that the Compact's validity continued after the ratification of the new Constitution in 1789, and that Congress further consented to the Compact when it confirmed the Black-Jenkins Award in 1879. The Black-Jenkins Award resulted in a determination, among other things, that the boundary between Maryland and Virginia lay at the low-water mark on the southern shore. However, it also provided that:

Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five...

Maryland attempted unilaterally to abrogate the Compact in 1957. Virginia responded by filing suit against Maryland in the Supreme Court. The controversy ultimately led to the negotiation of the Potomac River Compact of 1958, which was subsequently ratified by both jurisdictions and also approved by Congress.

Although the Potomac River Compact of 1958 replaced the Compact of 1785 and dealt principally with the protection of fishing, it expressly recognized Virginia's rights concerning the construction of "wharves and improvements" in the Potomac that had been protected by Article VII of the Compact of 1785. Thus, Article VII, Section 1, of the Potomac River compact provided:

The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this compact, and the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.

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Potomac River water. Using water further from shore will reduce this by 50 percent, saving processing, removal, storage, and transportation costs in excess of \$500,000 a year.

An offshore intake would reduce exposure to events affecting the quality of water along the shore. In 1993, a rupture in the Colonial Pipeline Company's transmission line near Herndon spilled petroleum into Sugarland Run. The spill was large enough to require the Corbalis Plant to close for two weeks—a step that would have been far less likely had the intake been located offshore. A water supply emergency was averted because the spill occurred when water demands were low, and the Authority was able to supply the entire system from the Occoquan during the crisis.

Background and Sequence of Events

Maryland requires that anyone seeking to withdraw water from the Potomac River secure a state “appropriation” permit. Appropriation permits have been routinely granted to the Authority for withdrawals as the amount of water required in Virginia has increased. Currently, the Authority is permitted to withdraw an annual average of 100 million gallons a day (mgd) from the Potomac with a maximum day withdrawal of 200 mgd.

On January 4, 1996, the Fairfax County Water Authority applied to the

Maryland Department of the Environment (MDE) for a permit to construct a replacement raw water intake along the Potomac River.

The Authority received a construction permit from Montgomery County, a clearance from the U.S. Fish and Wildlife Service, and a permit from the U.S. Army Corps of Engineers. These permits constituted a finding that the project would not cause environmental damage. Despite this, and after protracted proceedings, MDE denied the permit on December 10, 1997.

Subsequently, the Authority's application for a “contested case hearing” before a Maryland Administrative Law Judge (ALJ) was granted. After hearing MDE's witnesses, the Honorable Neile Friedman found that MDE had been unable to show that the project would cause any environmental damage and ruled that MDE should have granted the Authority's permit.

On May 30, 2000, the U.S. Supreme Court agreed to hear a case filed by the Commonwealth of Virginia against the State of Maryland regarding Virginia's access to the Potomac River. The suit filed by Virginia seeks clarification as to whether previous compacts between the two states (see Potomac River Compact History on page 9) were applicable upstream of the tidal portion of the Potomac River. The suit also questioned whether Maryland has the right to require Virginia to obtain permits to

construct improvements to properties on the Virginia shore and to withdraw water from the Potomac River. On October 10, 2000, the Supreme Court appointed The Honorable Ralph I. Lancaster, Jr., as special master, to conduct hearings, collect evidence, and make recommendations to the high court.

On November 6, 2000, Bernard A. Penner, Maryland's Final Decision-Maker in the contested case proceeding between the Maryland Department of the Environment and the Authority over the Potomac Intake, issued a Final Decision in the matter. The decision concurred with Maryland's ALJ, Neile Friedman, who twice had ruled that the permit be granted. He found that issuance of a permit to construct the offshore intake would not have a significant adverse environmental impact on the Potomac River, would promote the public welfare, and was in the best public interest. Addi-

tionally, he concurred with the ALJ that MDE had failed to show that the permit should be denied.

On December 5, 2000, Maryland filed an appeal in Baltimore Circuit Court to stay the approval of the offshore intake project by the Maryland Department of the Environment, putting Maryland in the unprecedented position of suing to stop a decision of its own department. But on January 16, 2001, the Baltimore City Circuit Court denied Maryland's motion and ordered MDE to issue the waterway construction permit. On January 24, 2001, the Maryland Department of the Environment complied with the court order and issued a waterway construction permit to the Fairfax County Water Authority for a drinking water intake project on the Potomac River.

Construction began in February 2001.

Work on construction of the replacement intake began in February 2001. When construction is complete, the underwater intake will extend 725 feet from the shoreline.



Aerial photography by Patrick J. Hendrickson