Update on North Dakota v. Heydinger
By Jimmy Greenlatt

In 2007 Minnesota passed the Next Generation Energy Act (NGEA), which mandated that no person could construct a new "large energy facility" in Minnesota that would contribute to statewide power sector carbon dioxide emissions, and that no person could import or agree to import power from a new large energy facility outside the state that would contribute to statewide power sector carbon dioxide emissions.[1] The statute also provided that no person could enter into a "new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions" without offsetting those emissions to the satisfaction of the Minnesota Public Utilities Commission (PUC).[2] The NGEA, with specific exceptions, effectively banned the construction of new coal power plants within the state as well the import of electricity from coal power plants in other states. This legislation, meant to curb greenhouse gas emissions and increase energy production from renewable sources, is not unique to Minnesota—twenty-nine states have enacted similar renewable energy legislation.[3] Like many of those statutes, the NGEA was soon challenged as regulating out-of-state commerce and thus violating the Dormant Commerce Clause.

On April 18, 2014 the U.S. District Court for the District of Minnesota agreed with this interpretation, striking down the prohibition and finding that it violated the Dormant Commerce Clause by regulating electricity generators and utilities outside the state.[4] The nature of the regional power grid in Minnesota and across much of the country is such that power is constantly

[1] Minn. Stat. § 216H.03 subd. 1 & 2 (2007).
[2] *Id* at subd. 3.
[3] http://statepowerproject.org/.
[4] North Dakota v. Heydinger, 2014 WL 1612331 (D. Minn. Apr. 18, 2014).

shared and transported across state borders.[5] Therefore, the Court found that a ban on coal-produced energy in Minnesota would also necessarily have "the practical effect of controlling conduct beyond the boundaries of the state."[6] In particular, the Court took issue with two clauses—one that imposed a restriction on "any person" importing electricity into Minnesota from a new coal plant, and one that required "any person" entering into a power purchase agreement with a new coal plant to offset those emissions to the satisfaction of the PUC.[7] The Court found that the first restriction would bar an electricity generator outside Minnesota from supplying coal-powered electricity to the regional grid because it might inadvertently be transported through the state.[8] The second restriction, meanwhile, would mean that electricity generators outside the state would have to get the PUC's acceptance on offsetting emissions before entering an agreement to provide power to the regional grid.[9]

Minnesota has appealed the District Court decision to the Eight Circuit. Nine local and national environmental and renewable energy groups as well as two energy professionals filed four friend of the court briefs in support of Minnesota's position. North Dakota must submit its briefs by early January with a decision by the Eight Circuit Court of Appeals not likely until mid to late 2015.

Looking toward the future, however, it is uncertain just what effect this case may have on other state renewable energy regulation.[10] If the Eight Circuit adopts the District Court's

---

[5] *Id* at 22.
[6] *Id* at 15.
[7] *Id*; Minn. Stat. § 216H.03 subd. 2 & 3 (2007).
[8] *Id*.
[9] *Id* at 16.
[10] Ari Peskoe, *How Far Can States Go In Supporting Renewable Energy?* THE ENERGY COLLECTIVE (Apr. 22, 2014), http://theenergycollective.com/ari-peskoe/371011/how-far-can-states-go-supporting-renewable-energy.

reasoning, many other renewable energy regulations may be in jeopardy unless they specifically exempt inadvertent electricity imports from out-of-state generators to out-of-state customers.[11] And while fixing the language of the legislation to specifically exclude incidental energy imports from out-of-state might make these regulations constitutional, there is still the chance that a court would rule that it is unconstitutional in any context for a State to prohibit coal-powered energy imports. Overall, *North Dakota v. Heydinger* stands as an interesting development in the debate over federal limitations on state renewable energy regulation as well as a signal that legislators may need to be more careful going forward in how they construct renewable energy regulations.

Jimmy Greenblatt is a dual degree student at the University of Minnesota pursuing a J.D./M.B.A. He is currently a law clerk at the Hennepin County Attorney's Office. Jimmy earned his Bachelor of Arts degree in English from the University of California, Santa Barbara in 2010.

[11] James Coleman, *Federal Court Strikes Down Minnesota's Limit on Coal Power Imports: A Critical Moment for State Regulation of Imported Fuel and Electricy*, ENERGY LAW PROFESSOR (Apr. 23, 2014), http://energylawprof.wordpress.com/2014/04/23/federal-court-strikes-down-minnesotas-limits-on-coal-power-imports-a-critical-moment-for-state-regulation-of-imported-fuel-electricity/.