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Federal Court Strikes Down State of Minnesota's Limits on Coal Power Imports: A Critical Moment for State Regulation of Imported Fuel & Electricity

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Case commented on: *State of North Dakota, et al., v. Beverly Heydinger, et al.*, Case No. 11-cv-3232, (D. Minn., Apr. 18, 2014).

On April 18, the U.S. District Court for the District of Minnesota struck down the State of Minnesota's restrictions on importing electricity from coal power plants in other states. The court held that these restrictions improperly regulated electric generators and utilities outside the state. The decision sets a precedent that could threaten state regulations of imported fuel and electricity, such as the numerous renewable power standards and California's low carbon fuel standard. These regulations have been a flashpoint for conflicts between in-state and out-of-state interests, including Canadian energy producers who believe that the standards discriminate against them.

Minnesota adopted the restriction on electricity imports in its 2007 *Next Generation Energy Act*, which placed a moratorium on construction of new coal power plants within the state. The point of the moratorium was to limit greenhouse gas emissions from coal burning, which contributes to climate change. Without the import restriction, Minnesota's moratorium might have little effect: companies looking to build a new coal plant could simply build in neighboring states, exporting electricity to Minnesota and increasing greenhouse gas emissions. So Minnesota declared that "no person shall . . . import or commit to import from outside the state power from" new coal plants or "enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions." Minn. Stat. § 216H.03, subd. 3. New coal plants could only avoid this ban if they paid to reduce emissions elsewhere or qualified for an exception.

North Dakota and utilities with coal power plants brought a lawsuit alleging that Minnesota's restrictions unconstitutionally regulated outside of Minnesota's territory, and the court agreed. The U.S. Constitution's Commerce Clause gives the federal government the authority to regulate interstate commerce and implies that states cannot "discriminate against or unduly burden interstate commerce" without congressional authorization. This rule is called the "dormant commerce clause" because it applies when congress has not authorized state regulation. One aspect of this rule is that states cannot adopt a regulation that "has the practical effect of controlling conduct beyond the boundaries of the state."

The court held that the import restriction necessarily regulated out-of-state conduct because electricity on the grid "does not recognize state boundaries." Electricity is not like a package that is shipped from a seller to a buyer. Instead, the interstate electric grid creates a pool of power. Electric generators contribute electricity and consumers withdraw electricity. It is as though one group was emptying buckets of water into a lake and another group was filling buckets of water from a lake. Companies may talk about purchasing electricity "from" a specific utility, but that is an accounting convention, not a description of a physical process—the electricity purchased comes from an undifferentiated pool. Thus, when a North Dakota utility sells to a North Dakota customer, some of the electricity might be diverted into Minnesota, violating Minnesota's import restriction. So Minnesota's law regulates out-of-state conduct, and the court held that it violated the U.S. Constitution and enjoined any enforcement.

The decision raises two potential problems for state regulation of imported electricity and fuel. First, more than half of the fifty states have renewable power standards that apply to imported electricity. Under the court's decision these standards would be invalid unless they exempted incidental imports from out-of-state utilities serving out-of-state customers. The Harvard Environmental Law Program's Policy Initiative's Energy Fellow Ari Peskoe has suggested some ways that states could try to insulate their regulations from a similar challenge.

Second, the court suggested that there may be strict limits on a state's ability to regulate imported fuel and electricity through renewable portfolio standards or the low carbon fuel standard. The usual rule under the dormant commerce clause is that states "may not attach restrictions to exports or imports to control commerce in other states" or otherwise "project" their regulation into other states. But the entire point of state restrictions on imported fuel and electricity is to affect out-of-state greenhouse emissions. States want to regulate imported fuel and electricity because they are concerned that out-of-state energy producers are contributing to climate change—they don't want to import oil from places where it takes a lot of greenhouse gas emissions to produce oil and they don't want to import electricity from states that are producing it using a lot of greenhouse gas emissions. And that concern makes sense: even if those greenhouse gas emissions take place in other states or countries, they're just as bad for the entire world's climate. As a result, the U.S. Court of Appeals for the Ninth Circuit recently suggested that the dormant commerce clause's prohibition on extraterritorial regulation is only meant for extraterritorial *price-regulation*, so it doesn't threaten California's low carbon fuel standard or, presumably, state renewable power standards.

The Minnesota court, however, rejected the Ninth Circuit's reasoning, noting that the Supreme Court and several appellate courts have held that states may not project their regulation into neighboring states, even when the regulation was not about prices. This conflicting reasoning comes at an important moment for state regulation of imported fuel and electricity. There is still no legal consensus on the validity of these regulations, which are being challenged in several lawsuits around the country. Statepowerproject.org, a website created by the Harvard Environmental Law Program's Policy Initiative, is tracking these lawsuits.

Moreover, there is no consensus on whether these state import restrictions are a wise way to make climate policy. Although states have good reason to be concerned about the fossil-fuel industry in their trading partners, other states and countries worry that these import regulations are aimed at burdening out-of-state industry. Canada doesn't think California should tell it how to produce oil, and is concerned that California's regulation has been rigged to harm it. Quebec

believes that state renewable portfolio standards discriminate by refusing to credit its hydropower exports as renewable. And states like North Dakota have the same concerns about Minnesota's regulation. These conflicting interests may create conflicting regulations and state-to-state trade wars that would splinter interstate energy markets. In a forthcoming article in *Fordham Law Review*, titled "Importing Energy, Exporting Regulation," I argue that the federal government should address this problem by supervising state regulation of imported energy, exempting non-discriminatory regulations from dormant commerce clause review.

No one yet knows how this legal and policy debate will be resolved. The Minnesota decision frames the legal debate through its searching dormant commerce clause review and clarifies the stakes by striking down a closely watched state electricity regulation. The one certainty is that the debate will continue.

This post originally appeared on James Coleman's blog Energy Law Prof.