CONSTITUTIONAL LIMITS TO GREENHOUSE GAS REGULATION: 8TH CIRCUIT RELIES ON THE DORMANT COMMERCE CLAUSE TO REJECT MINNESOTA'S GHG LIMITS ON IMPORTED POWER

Date: 20 July 2016

Energy Alert

Many states have enacted their own laws to regulate greenhouse gas ("GHG") emission reductions. Although the specific requirements of each state law differ, many of the laws incentivize the use of renewable energy and discourage, or even prohibit, the use of non-renewable energy.

As these laws have been passed, several state-imposed renewable energy standards have been challenged on the ground that they impermissibly limit interstate commerce. These legal challenges, which raise complicated issues of federalism, have had mixed results. Nonetheless, these cases ask a question that is becoming increasingly pressing: what are the limitations on a state's authority to regulate GHGs?

Recently the Eighth Circuit Court of Appeals weighed in on that issue in *North Dakota v. Heydinger*.[1] In *Heydinger*, North Dakota, along with electric power cooperatives and coal companies, filed suit against Minnesota challenging the constitutionality of certain provisions of Minnesota's 2007 Next Generation Energy Act ("NGEA"), a statute that regulates aspects of the use and generation of electric energy.[2] The challenged provisions prohibited any person from importing or committing to import power from an out-of-state, new large energy facility, or from entering into a new long-term power purchase agreement that would increase Minnesota's statewide carbon dioxide emissions.[3] If an entity could demonstrate to the Minnesota Public Utility Commission's satisfaction that it would offset prohibited carbon dioxide emissions, it could be exempted from the prohibitions.[4] The plaintiffs in *Heydinger* argued that the GHG provisions of the NGEA violated the dormant Commerce Clause of the U.S. Constitution.[5]

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States."[6] Although the Commerce Clause does not expressly limit authority of states to regulate interstate commerce, the United State Supreme Court has interpreted the Commerce Clause to contain an implicit limitation on state authority.[7] This implicit limitation is known as the dormant Commerce Clause, which prohibits states from passing laws that unduly interfere with interstate commerce.[8]

The U.S. District Court of the District of Minnesota agreed with the plaintiffs in *Heydinger*, and held that the challenged provisions of the NGEA were unconstitutional under the extraterritoriality doctrine of the dormant Commerce Clause. Under that doctrine, a state statute is per se invalid if it has the practical effect of controlling conduct beyond the boundaries of the state.[9] Minnesota appealed that ruling to the Eighth Circuit.

On June 15, 2016, the Eighth Circuit affirmed the District Court's judgment in favor of the plaintiffs, but the appellate panel disagreed on the basis. Judge Loken, writing the lead opinion, agreed with the District Court's

©2005-2026 K&L Gates LLP. All Rights Reserved.

reasoning that the challenged provisions violated the extraterritoriality doctrine of the dormant Commerce Clause because they had the "practical effect" of controlling conduct beyond the boundaries of Minnesota.[10] In reaching that conclusion, Judge Loken looked to the structure and operation of the regional transmission grid that serves Minnesota and fourteen other states. He explained that non-Minnesota producers that contribute electricity to the regional grid for non-Minnesota customers cannot guarantee that those electrons "will not flow into and be consumed in Minnesota. Likewise, non-Minnesota utilities that enter into power purchase agreements to serve non-Minnesota members cannot guarantee that the electricity eventually bid into the [regional grid] markets . . . will not be imported into and consumed in Minnesota."[11] Thus, the Minnesota prohibitions had the "practical effect" of controlling conduct beyond the borders of Minnesota, because they restricted the ability of non-Minnesota producers to contract with non-Minnesota utilities. The only way to avoid violating the Minnesota provisions was to either unplug from the regional grid or seek regulatory approval from the Minnesota agency enforcing the NGEA.[12]

Judge Loken's lead opinion, however, did not draw unanimous support from the panel. In separate concurring opinions, Judges Murphy and Colloton agreed that the NGEA provisions were unconstitutional, but not because they violated the dormant Commerce Clause. Rather, both Judges Murphy and Colloton concluded that the provisions were invalid because they were preempted by federal law.

In her concurrence, Judge Murphy disagreed with Judge Loken's extraterritoriality analysis and explained that, under a correct reading of the statute and a correct understanding of how the electricity grid operates, the challenged provisions would only regulate entities outside of Minnesota if the entities "import" electric power to Minnesota or enter into power purchase agreements that result in power being imported into Minnesota.[13] Because a state may regulate out-of-state companies when they enter into commerce within the state, and because the Minnesota law allows generators to contract freely with utilities outside of Minnesota, Judge Murphy concluded that the provisions did not control conduct wholly outside of Minnesota and, therefore, did not violate the dormant Commerce Clause.[14]

In any case, Judge Murphy explained that the case could be resolved without reaching the Commerce Clause argument, because the provisions are preempted by the Federal Power Act ("FPA").[15] The FPA gives the Federal Energy Regulatory Commission exclusive jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce, which was what the provisions in this case sought to regulate.[16]

Judge Colloton took a similar approach in his concurrence, noting that the court should not reach the Commerce Clause argument because the case could be resolved on preemption grounds.[17] Judge Colloton agreed with Judge Murphy that, to the extent that the Minnesota statute bans the wholesale sales of electric energy in interstate commerce, the law is preempted by the FPA.[18] However, Judge Colloton concluded that the provisions do not constitute a complete ban on wholesale sales, because an exception exists for entities who have obtained carbon offsets.[19] Nonetheless, because the offset requirements also conflict with federal law under the Clean Air Act, Judge Colloton concluded that the challenged provisions were preempted. [20]

ADDITIONAL CASES CONCERNING STATES' ABILITIES TO REGULATE GHG EMISSIONS

Heydinger adds to a growing number of cases considering how the dormant Commerce Clause limits a state's authority to regulate GHG emissions within its borders.

©2005-2026 K&L Gates LLP. All Rights Reserved.

For example, in 2013, the Ninth Circuit Court rejected a dormant Commerce Clause challenge to California's Low Carbon Fuel Standards ("LCFS") in *Rocky Mountain Farmers Union v. Corey*.[21] In 2006, California adopted its Global Warming Solutions Act, which aimed to lower the state's greenhouse gas emissions to 1990 levels by the year 2012. The Act directed the California Air Resources Board ("CARB") to issue regulations to reduce greenhouse gas emissions from the transportation sector. In response, CARB adopted the LCFS, which established a cap on the average carbon intensity of California's transportation-fuel market. To comply with the LCFS, a fuel blender had to keep the average carbon intensity of its fuel below the LCFS annual limit.[22] The LCFS assigns carbon intensity to fuels based on the amount of lifecycle greenhouse gas emissions caused by the production and transportation of the fuel. [23]

The Ninth Circuit panel held that the LCFS did not violate the dormant Commerce Clause because the LCFS were not facially discriminatory and did not regulate extraterritorial conduct. The Court explained that, although California could not impose its regulations on other jurisdictions, it could "regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale in California."[24] Accordingly, the Court held that it was proper for California to regulate based on the harmful properties of fuels and that the LCFS "does not control the production or sale of ethanol wholly outside California."[25] The Court also reversed the District Court's holding that particular provisions of the LCFS were discriminatory in purpose or effect.[26] Plaintiffs filed for Supreme Court review of the decision, which the Supreme Court denied in 2014.[27]

Similarly, in *Energy and Environment Legal Institute ("EELI") v. Epel*,[28] the Tenth Circuit affirmed a District Court's decision that Colorado's Renewable Energy Standard ("RES") statute did not violate the dormant Commerce Clause. Colorado's RES requires that twenty percent of electricity sold to Colorado customers come from renewable sources.[29] Similar to electricity consumers in Minnesota, consumers in Colorado receive their electricity from a regional electrical grid that serves eleven states and portions of Mexico and Canada.[30]

Before the Tenth Circuit, the plaintiff argued that the Colorado RES controlled "extraterritorial" conduct and therefore violated the dormant Commerce Clause. The Tenth Circuit rejected that argument, finding it dispositive that the Colorado RES is not a price control statute, does not link prices paid in Colorado with those paid out of state, and does not discriminate against out-of-staters.[31] The court noted that the Supreme Court "has never suggested" that "non-price standards for products sold in-state," such as the RES, are *per se* violations of the dormant Commerce Clause. The court further highlighted that, although non-price regulations can impact the price of goods, "without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers," the near *per se* rule of invalidation would not apply.[32]

The Court rejected the plaintiff's broad reading of the extraterritoriality line of dormant Commerce Clause cases, concluding that that line of cases has never gone as far as saying that any state regulation that has the practical effect of controlling conduct beyond the boundaries of the state is automatically unconstitutional.[33] Because all fossil fuel producers in the area served by the grid would be hurt equally and all renewable energy producers in the area will be helped equally, the Court concluded that the plaintiffs had failed to demonstrate how Colorado's RES "disproportionately harms out-of-state businesses."[34] The Supreme Court denied review of the *EELI* decision in 2015.[35]

IMPLICATIONS ON STATE AUTHORITY TO REGULATE GHG EMISSIONS

©2005-2026 K&L Gates LLP. All Rights Reserved.

These cases demonstrate that the contours of a state's authority to regulate GHG emissions is still uncertain. The lead opinion in *Heydinger* indicates that a dormant Commerce Clause argument may prevail in certain circumstances. And the concurring opinions in *Heydinger* signal that other arguments may prove successful in challenges to state emissions regulations. However, the decisions in *Rocky Mountain* and *EELI* demonstrate that a Commerce Clause challenge to a state emissions law will not always be successful. Until the Supreme Court weighs in, it is uncertain whether, or to what extent, Commerce Clause challenges to state emissions regulations will be viable.

Moreover, the issue of state authority to regulate emissions may be further complicated if the U.S. Environmental Protection Agency's Clean Power Plan ("CPP") rule is implemented. The CPP, which is currently under judicial review at the D.C. Circuit, will require states to meet certain emission standards based on the individual states' emission profiles.[36] It is unclear at this point whether the CPP would preempt states' existing renewable energy standards, or whether Commerce Clause challenges would remain viable if renewable energy standards are allowed under the CPP. We will continue to monitor and report on the key cases and new challenges as they arise.

NOTES:

[1] *North Dakota v. Heydinger*, No. 14-2156, 2016 WL 3343639 (8th Cir. 2016).

[2] *North Dakota v. Heydinger*, 15 F.Supp.3d 891, 903 (2014), *aff'd*, 2016 WL 3343639 (8th Cir. 2016).

[3] Minn. Stat. § 216H.03, subd. 3(2)–(3).

[4] Minn. Stat. § 216H.03, subd. 3(4).

[5] *Heydinger*, 15 F.Supp.3d at 910.

[6] U.S. Const. art. I, § 8, cl. 3.

[7] *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

[8] *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (Commerce Clause of U.S. Constitution includes a "dormant" limitation on state authority to enact legislation that interferes with interstate commerce).

[9] *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (stating that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State").

[10] *Heydinger*, 2016 WL 3343639, at *7.

[11] *Id.* (emphasis omitted).

[12] *Id.*

[13] *Id.* at *9–12.

[14] *Id.* at *11–12.

[15] *Id.* at *12.

©2005-2026 K&L Gates LLP. All Rights Reserved.

[16] *Id.*

[17] *Id.* at *13.

[18] *Id.*

[19] *Id.*

[20] *Id.* at *14. Judge Colloton reasoned that the Minnesota statute's effort to require an out-of-state entity to comply with the statute's offset provision conflicted with the regulatory scheme that Congress had designed in the Clean Air Act ("CAA"). *Id.* Judge Colloton explained that, under that scheme, each state has "primary responsibility for assuring air quality within its entire geographic region," and the CAA was "designed so that each operator of a pollution source need look to only one sovereign–the State in which the source is located–for rules governing emissions." *Id.* Thus, the "offset requirements of the Minnesota statute encroach on the source State's authority to govern emissions from sources within its borders," thereby conflicting with the regulatory scheme of the CAA. *Id.*

[21] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *rehearing denied*, 740 F.3d 507 (9th Cir.), *cert. denied*, 134 S. Ct. 2884 (2014).

[22] *Id.* at 1080.

[23] *Id.* at 1080 n.1.

[24] *Id.* at 1104.

[25] *Id.*

[26] *Id.* at 1100–01.

[27] *Rocky Mountain Farmers Union v. Corey*, 134 S. Ct. 2884 (2014).

[28] *Energy and Env't Legal Inst. v. Epel*, 793 F.3d 1169, *cert. denied*, 136 S. Ct. 595 (2015).

[29] *Id.* at 1170.

[30] *Id.* at 1171.

[31] *Id.* at 1173.

[32] *Id.*

[33] *Id.* at 1174.

[34] *Id.*

[35] *EELI v. Epel*, 136 S. Ct. 595 (2015). *See also* California Public Utilities Commission Decision 13-10-074 (Nov. 1, 2013) (rejecting commerce clause challenge by out-of-state utility to California's Renewable Portfolio Standard ("RPS"), concluding that the RPS did not discriminate against out-of-state entities).

[36] *See* K&L Gates, "EPA's Clean Power Plan: A Regional Analysis," K&L Gates Legal Insight (Sept. 11, 2015), *available at* http://www.klgates.com/epas-clean-power-plan-a-regional-analysis-09-11-2015/; K&L Gates, "Update on EPA's Clean Power Plan," K&L Gates Legal Insight (April 27, 2016), *available at* http://www.klgates.com/update-on-epas-clean-power-plan-04-27-2016/.

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.