UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc.,	)	No.: 11-CV-3232 (SRN/SER)
Plaintiffs,	)	**AMICUS BRIEF OF THE MINNESOTA CHAMBER OF COMMERCE AND THE NATIONAL MINING ASSOCIATION**
Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, J. Dennis O'Brien, Commissioner Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, Each in his or her official capacity,	)	
Defendants.	)	
_____	)	

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GLOSSARY

CO_2	Carbon Dioxide
CCS	Carbon Capture and Storage
EIA	Energy Information Administration
EPA	Environmental Protection Agency
GHG	Greenhouse Gases
HELE	Higher Efficiency, Lower Emissions
IEA	International Energy Agency
IGCC	Integrated Gasification Combined Cycle
IPCC	Intergovernmental Panel on Climate Change
MPUC	Minnesota Public Utilities Commission
NMA	National Mining Association
OECD	Organisation for Economic Co-Operation
SC	Supercritical Pulverised Coal Combustion
USC	Ultra-Supercritical Pulverised Coal Combustion

IDENTITY AND INTEREST OF AMICI

The Minnesota Chamber of Commerce (the "Chamber") represents over 2,300 business locations throughout the state of Minnesota, with a diverse range of energy usage levels. As the voice of Minnesota businesses on statewide policy issues, the Chamber's main goal is to make Minnesota's business environment competitive relative to other states and nations. Energy is a critical component to a successful business environment. Therefore, a focal point of the Chamber's work is ensuring Minnesota has a competitively priced, reliable, and diverse energy supply.

The Chamber is interested in this case because the statute at issue will increase business costs by raising electric rates. The state economy is at a critical juncture: companies grapple with frequent electric rate increases, political and economic uncertainty regarding carbon taxation and other environmental regulation, and new advances in the extraction of shale gas that create rapid swings in the natural gas market. Increasing energy rates make Minnesota less competitive regionally, nationally, and internationally. Available data shows that Minnesota rates are fast becoming uncompetitive.[1]

The National Mining Association (the "NMA") represents the producers of most of America's coal, metals, and industrial and agricultural minerals. NMA's member companies mine over 75 percent of the coal produced annually from operations located in 26 states, including North Dakota. NMA is interested in this case because the statute at

[1] U.S. Energy Information Administration ("EIA"), Average Price by State by Provider 1990-2010 (EIA-861).

issue will prevent the importation into Minnesota of electricity produced at new coal-fueled electric generating facilities.

INTRODUCTION

As set forth in the parties' briefs in support of their respective summary judgment motions, Commerce Clause analysis requires a balancing of the effects a state law has on interstate commerce with the local benefits the law may produce. Some state laws have such an intrusive effect on interstate commerce that they are considered to be "*per se*" or "virtually *per se*" violations of the Commerce Clause, and almost no local benefit will justify the law's survival. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). Laws that regulate commerce evenhandedly are permissible but not if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970).

Minn. Stat. § 216H.03 subdiv. 3, subsec. 2 (hereafter the "Import Restriction") prohibits importing electricity into Minnesota from new large energy facilities that contribute to statewide power sector carbon dioxide ("CO_2") emissions.[2] Because the statute exempts intermediate and peaking facilities that use natural gas as a fuel, the statute's burden falls largely, if not exclusively, on coal-fueled facilities (because oil is no longer used for new large electric generation stations). Under the Import Restriction, an entity within Minnesota could import coal-fueled electricity from a new facility only if it

[2] The Chamber and the NMA have similar concerns regarding the unconstitutional effects of §216H.03 subdiv. 3, subsec.3, but will focus their discussion on the Import Restriction imposed by the statute.

incurs a significant penalty. It must reduce its own CO_2 emissions by an equivalent amount or purchase an allowance or offset representing an equivalent CO_2 emissions reduction by a third party, to the extent that is possible under the statute's particular requirements. Alternatively, the facility from which it seeks to import electricity must capture its CO_2 emissions and store the emissions in an underground geologic formation. *See* Minn. Stat. § 216H.03, subdiv. 2, subdiv. 4, subsec. b. The Import Restriction was adopted to further the goal of steeply reducing the state's overall greenhouse gas ("GHG") emissions – by at least 15 percent below 2005 levels by 2015, at least 30 percent below 2005 levels by 2025, and at least 80 percent below 2005 levels by 2050. Minn. Stat. § 216H.02, subdiv. 1.

The Import Restriction, however, cannot survive under the Commerce Clause. The local benefits that the statute may theoretically produce are so insignificant as to be immeasurable. Whatever global climate changes may be underway, and whatever role mankind may have in climate change, the GHG emission reductions that the Import Restriction may create are vanishingly small as compared with worldwide GHG emissions. The Import Restriction therefore cannot improve the climate in Minnesota or slow whatever changes may be occurring. Moreover, the U.S. Environmental Protection Agency ("EPA") has begun a program of regulating power-sector GHG emissions that renders the Import Restriction unnecessary and counterproductive.

In contrast, the Import Restriction will seriously affect interstate commerce. If the Import Restriction is allowed to stand, the precedent will be set for other states to install similar barriers preventing the import into their states of disfavored sources of electricity.

The result will be a balkanization of the electric grid that will be inefficient, that will increase costs to consumers, and that contradicts explicit national energy policy. Moreover, coal has long been the leading fuel for the production of electricity in the Upper Midwest, the United States, and indeed across the world. To decree that Minnesota can ban the importation of new coal-generated electricity is to sharply restrict the supply of electricity that can enter the state, adversely affect the market for electricity in the entire interconnected region, and raise costs for business and residential consumers. Finally, preventing the construction of new coal generating facilities will also impede developing new coal-based technologies that can lower GHG emissions.

For these reasons, the Import Restriction violates the Commerce Clause and should be struck down.

ARGUMENT

I. The Import Restriction Will Produce No In-State Benefits.

A. The Statute Will Have No Effect Whatsoever on Climate Change.

GHGs are unlike other pollutants. The effects of traditional air pollutants are experienced in the location where they are emitted, or downwind. GHGs, in contrast, mix and are transported in the global atmosphere. As a result, global atmospheric levels of GHGs are essentially the same worldwide, and a ton of CO_2 emitted in, for instance, North Dakota has the same effect on global GHG concentrations as a ton emitted in China. Carbon dioxide emissions in North Dakota, thus, do not produce unique effects in Minnesota or the Midwest or the United States. Any ton of GHGs emitted anywhere in

the world is equally complicit with any other ton emitted anywhere else in the world in whatever climate effects global atmospheric GHGs may be producing.[3]

GHGs are also unlike most traditional types of pollutants in that most traditional pollutants are emitted by a relatively limited number of sources, whereas GHGs are emitted by a large and diverse number of sources. The most ubiquitous GHG – CO_2 – is the inevitable byproduct of combusting fossil fuels (oxidizing carbon). In the United States, more than eighty percent of energy is derived from the combustion of fossil fuel.[4] As a result, according to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions."[5] As the Intergovernmental Panel on Climate Change ("IPCC"), a source on which the EPA relies extensively in its climate change analyses,[6] has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities."[7]

Given this context, the Import Restriction cannot meaningfully affect global GHG concentrations or possible climate change. A new large coal-burning electric generation facility, for instance, produces about 5 million tons per year of CO_2.[8] Global GHG emissions in CO_2 equivalent in 2010 were about 50,000 million metric tons.[9]

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[3] 73 Fed. Reg. 44,354, 44,367 (July 30, 2008).
[4] *EIA's Energy in Brief: What are the major sources and users of energy in the United States*? http://www.eia.gov/energy_in_brief/article/major_energy_sources_and_users.cfm (last updated Aug. 1, 2013).
[5] 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).
[6] 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009).
[7] IPCC, *Climate Change 2001*: *Mitigation* ("IPCC 2001") 608 (2001), *available at* http://www.grida.no/publications/other/ipcc_tar/ (last visited Sept. 17, 2013).
[8] For instance, the 600 MW Big Stone II coal-fueled generating unit that a consortium of utilities had been pursuing in South Dakota would have emitted 4.7 million tons of CO_2.

Yet even this comparison does not capture the truly insignificant impact the Import Restriction will have. Global GHG emissions are projected to rise significantly in the future even as U.S. and other developed countries' GHG emissions remain flat or decline. Worldwide economic development is spurring an explosion in global demand for energy, as the rest of the world tries to catch up to Western standards of living. For instance, the average consumer in the United States uses 13,395 kWh of power each year. The average Indian uses just 626 kWh.[10] In India, more than 400 million people have no electricity, 600 million cook with wood or dung, and more than 900 million have no refrigeration.[11] The implications of these statistics for future world energy use – and GHG emissions – are stark.

In fact, the developing world is rapidly increasing its coal use. According to the International Energy Agency ("IEA"), an organization comprised of 28 member countries, including the United States, "[c]oal has met nearly half of the rise in global energy demand over the last decade, growing faster even than total renewables . . . . The policy decisions carrying the most weight for the global coal balance will be made in Beijing and New Delhi – China and India account for almost three-quarters of projected

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Testimony of Ward Uggerud, Minnesota Public Utility Commission Docket No. CN-05-619, Dkt #3107117, June 1, 2006, at 22.

[9] United Nations Environment Programme, *The Emissions Gap Report 2012: A UNEP Synthesis Report*, Nov. 2012 at 1, http://www.unep.org/pdf/2012gapreport.pdf. A metric ton is 2,204.6 pounds.

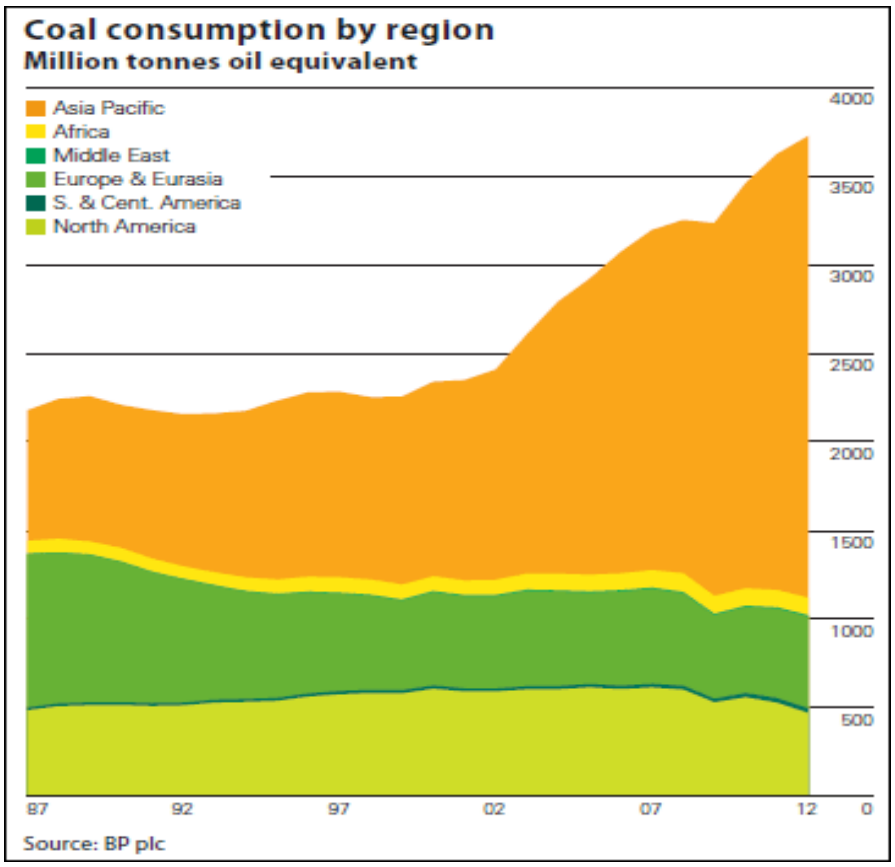
[10] The World Bank, Data: Electric power consumption (kWh per capita), http://data.worldbank.org/indicator/EG.USE.ELEC.KH.PC (2010 data).

[11] IEA, WORLD ENERGY OUTLOOK 574 (2007), http://www.iea.org/publications/freepublications/publications/weo_2007.pdf.

non-[Organisation for Economic Co-Operation] coal demand growth (OECD coal use declines)." The IEA goes on to say that, "***The growth in China's electricity demand over the period to 2035 is greater than the total current electricity demand in the United States and Japan.*** China's coal-fired output increases almost as much as its generation from nuclear, wind and hydropower combined."[12] International GHG emissions will continue to trend upwards as the developing world uses more coal and other fossil resources.

The effect of this trend on energy usage and GHG emissions is displayed graphically below. Since the mid-1990s, the Asian Pacific region has dominated coal usage.[13]

[12] *Id*. at 5, 6 , http://www.iea.org/publications/freepublications/publication/English.pdf (emphasis added).
[13] BP Statistical Review of World Energy, June 2013, at 34, http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf.



The same trend is evident in worldwide GHG emissions, as shown in the following two EIA charts,[14] the first displaying relative worldwide GHG emissions by metric tons and the second showing relative emissions by percentages.

[14] EIA, "Emissions of Greenhouse Gases in the U. S." (Mar. 31, 2011), http://www.eia.gov/environment/emissions/ghg_report/ghg_overview.cfm.

Figure 6. World carbon dioxide emissions by region, 1990, 2007, 2025, and 2035

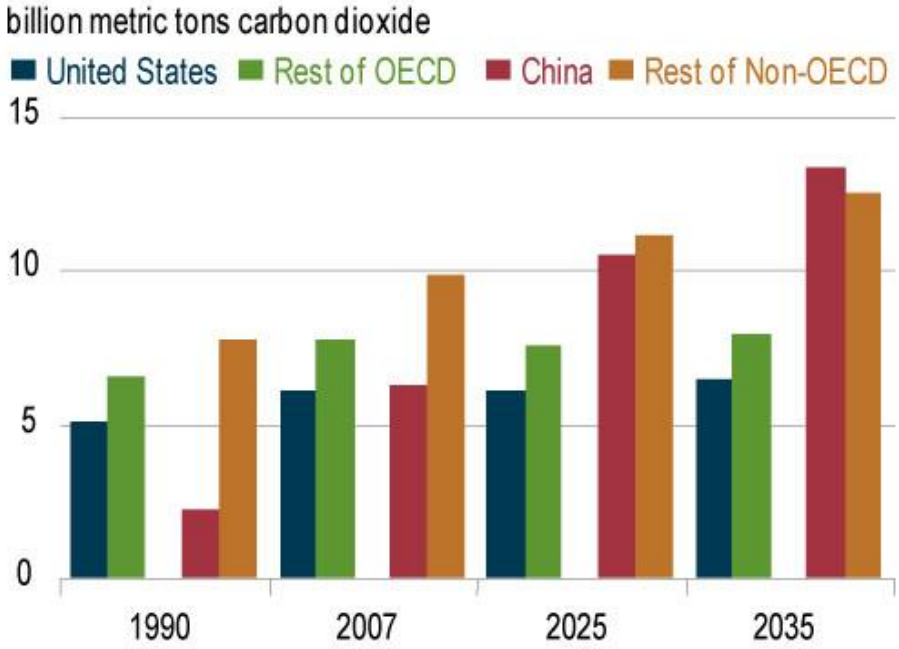
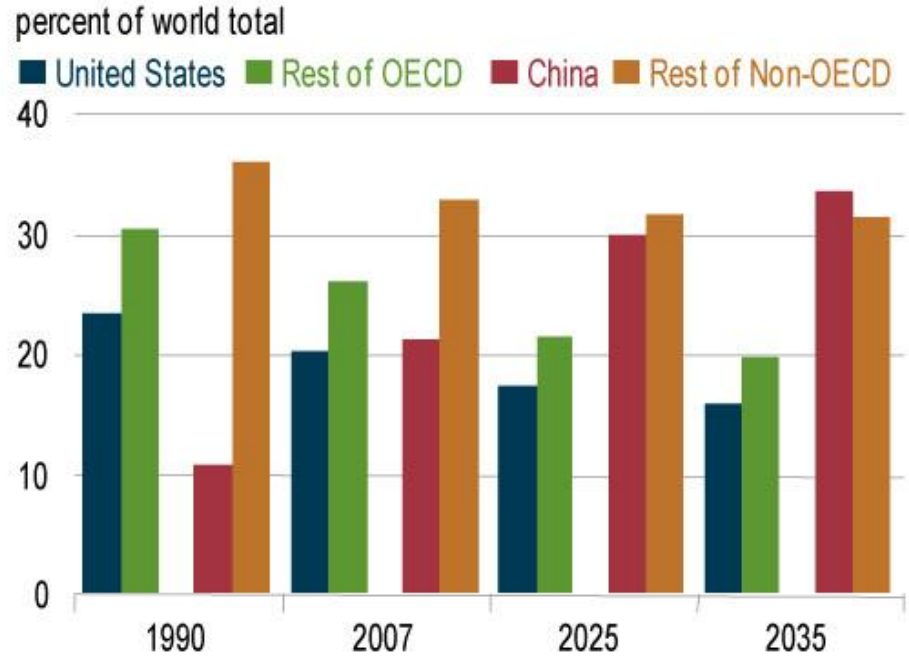
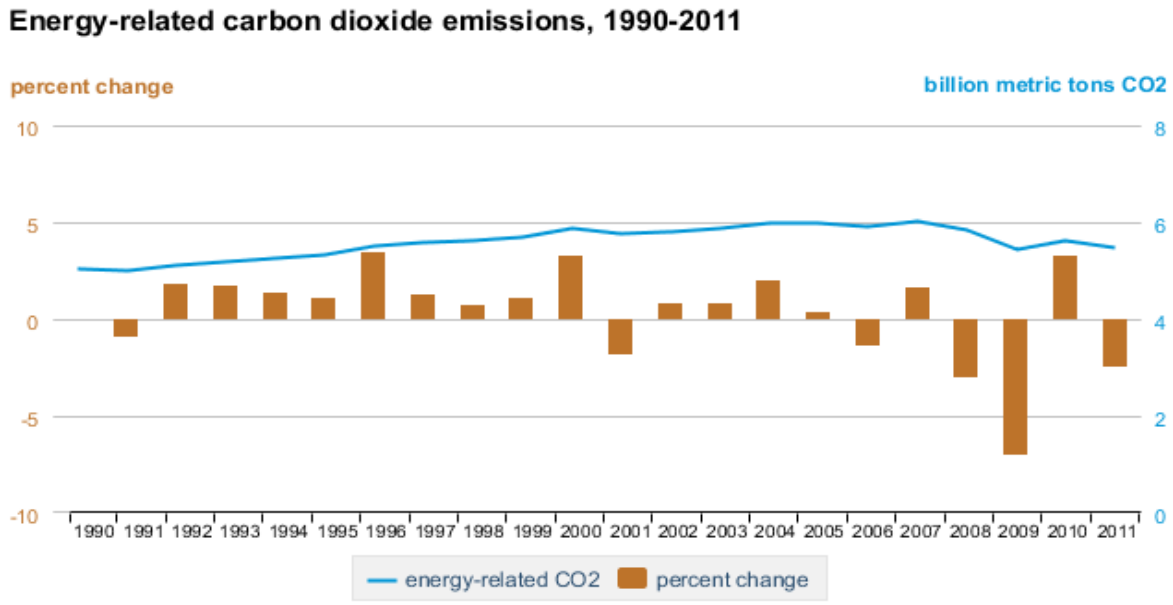


Figure 7. Regional shares of world carbon dioxide emissions, 1990, 2007, 2025, and 2035

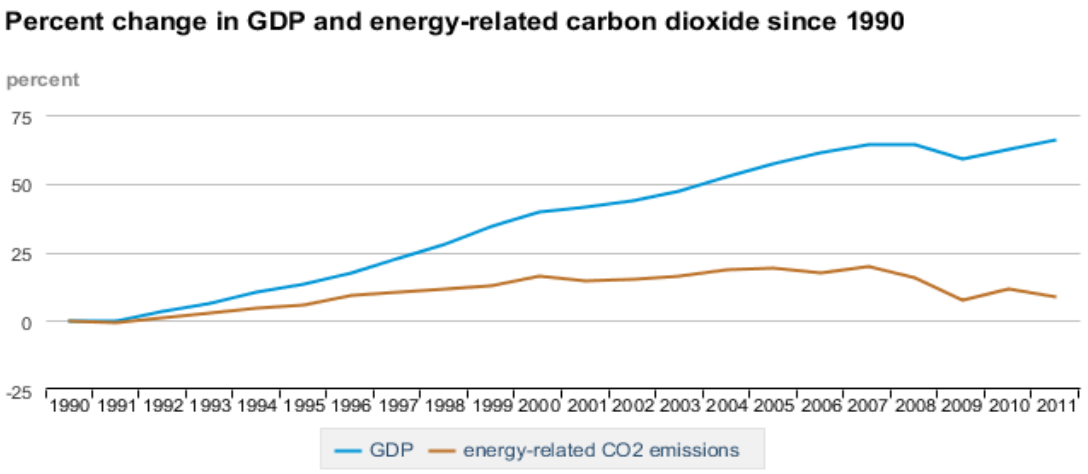


Indeed, domestic energy-related CO_2 emissions **fell** 12% between 2005 and 2012. According to the EIA, emissions are at their lowest level since 1994.



eia **Source:** U.S. Energy Information Administration, *Monthly Energy Review* (July 2012), Table 12.1.

In part, this is because of the 2007 recession, but it is also because of a longer-term decoupling of GHG emissions from GDP, such that the "carbon intensity" of the U.S. economy is dramatically improving:

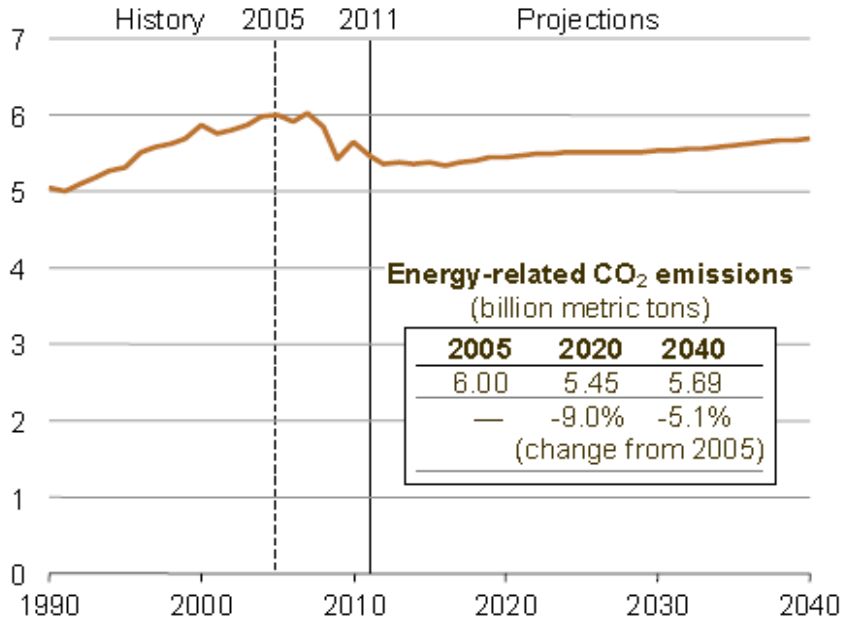


Sources: U.S. Energy Information Administration, *Monthly Energy Review* (July 2012), Table 12.1; Bureau of Economic Analysis, www.bea.gov, as of 7/27/2012.

eia

This trend, moreover, is not short-term; domestic energy-related CO_2 emissions are projected to remain below 2005 levels through 2040 even without new national GHG regulations.[15]

Figure 4. U.S. energy-related CO_2 emissions, 1990-2040 (billion metric tons)



In sum, whatever limited GHG emission reductions the Import Restriction will produce will be overwhelmed by worldwide economic development.

B. Impending EPA Regulations Eliminate Whatever Purpose the Statute Might Have Served.

Minnesota's perceived need to take action on climate change is also unnecessary given the Administration's full engagement on the GHG issue. On June 25, 2013, the

[15] EIA, *Annual Energy Outlook 2013 Early Release Overview* at 3, http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2013).pdf.

President gave a major speech[16] announcing his adoption of a detailed 21-page national Climate Action Plan, the goal of which is to reduce domestic GHG emissions by 17 percent below 2005 levels by 2020.[17] The Plan contains measures for virtually the entire economy but particularly focuses on the power sector. The Plan's power-sector measures include provisions for reducing CO_2 emissions from electric generating stations, further developing renewable resources, and increased innovation in clean energy.

The President also issued a June 25, 2013 Presidential Memorandum entitled "Power Sector Carbon Pollution Standards," which directs EPA to repropose GHG performance standards for new power-sector sources by September 20, 2013. He also directed EPA to propose GHG performance standards for modified and reconstructed power sector-sources by June 1, 2014 and to finalize those standards by June 1, 2015. Finally, he directed EPA to propose regulations by June 1, 2014 that require states to submit plans containing GHG performance standards for existing power-sector sources and to finalize those regulations by June 1, 2015. The regulations must require that each state submit a plan by June 30, 2016.[18]

EPA will issue these standards for new, modified, and reconstructed power sector sources under 42 U.S.C. § 7411(b). Under that section, EPA's standards will require that

[16] "Remarks by the President on Climate Change (June 25, 2013), http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change.

[17] The Executive Office of the President, The President's Climate Action Plan (June 2013) at 4, http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[18] Power Sector Carbon Pollution Standards (June 25,2013), http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

generators limit their GHG emissions to a level "which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

EPA will issue regulations requiring states to submit plans for existing power-sector sources under 42 U.S.C. § 7411(d). The state plans must contain performance standards that meet the same "best system of emission reduction" requirement. Under EPA's § 7411(d) regulations, at the same time that it promulgates these existing-source regulations, EPA will issue Guidelines to states setting forth minimum emission standards that state plans must meet. 40 C.F.R. § 60.24 (2013).

The Presidential Memorandum follows up on EPA climate change efforts that were already well underway. Immediately upon taking office, President Obama's first EPA Administrator announced that regulating GHGs would be one of her highest priorities.[19] Since then, EPA announced that it would proceed first against the two largest GHG-emitting sectors, transportation and electric power, taking advantage of authority given it under *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Massachusetts* held that GHGs are "air pollutants" under the Clean Air Act. *Massachusetts* was issued in response to EPA's denial of a petition seeking EPA promulgation of motor vehicle GHG regulations. The Court instructed EPA to regulate motor vehicle GHG emissions if it

[19] EPA Administrator Lisa Jackson, Opening Memo to EPA Employees (Jan. 23, 2009), http://blog.epa.gov/administrator/2009/01/26/opening-memo-to-epa-employees/.

found that these emissions endanger public health or welfare. One of EPA's first major actions in 2009 was to find that motor vehicle GHG emissions endanger the public health and welfare.[20] EPA followed this "endangerment finding" with GHG regulations for automobiles and light-duty trucks for model years 2012-16.[21] EPA has now also issued GHG regulations for automobiles and light-duty trucks for model years 2017-25 that will require the equivalent of an average fuel economy of 54.5 miles per gallon by 2025.[22] EPA similarly adopted GHG standards for heavy-duty trucks.[23]

EPA had also decided to proceed with power-sector GHG regulation even before the President's speech last June. Since the beginning of the Obama Administration, the EPA Administrator's priority goals have included developing "a comprehensive strategy for a cleaner and more efficient power sector."[24] EPA's first power sector intitiative was to find that its regulation of motor vehicle GHG emissions triggered permitting requirements for stationary source GHG emissions, and thus EPA now requires new and modified large industrial sources, including electric generation facilities, to obtain GHG permits.[25]

EPA also entered into a December 2010 litigation settlement agreement committing to use its authority under 42 U.S.C. § 7411 to promulgate GHG performance standards for new, modified, and reconstructed fossil-fuel-fired electric generators and to

[20] 74 Fed. Reg. at 66,497.
[21] 75 Fed. Reg. 25,324 (May 7, 2010).
[22] 77 Fed. Reg. 62,624, 62,627 (Oct. 15, 2012).
[23] 76 Fed. Reg. 57,106 (Sept. 15, 2011).
[24] 75 Fed. Reg. 45,210, 45,227 (Aug. 2, 2010), quoting the EPA Administrator's January 12, 2010 outline of the Agency's seven priorities.
[25] *See Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

call for state plans containing GHG performance standards for existing fossil-fuel-fired generators. In April 2012, EPA proposed GHG performance standards for new coal-fired generation.[26] Under the Presidential Memorandum, EPA will repropose these regulations.

Given all of this regulatory activity, there is no need for Minnesota to interfere with neighboring states who may export their electricity into Minnesota out of a concern that its neighbors are not doing enough to limit their GHG emissions from new electric generators. As noted, EPA is developing regulations concerning new coal generation, and it will soon require that states submit plans, which will be subject to EPA's approval, setting forth power-sector GHG standards for existing generators. In the rulemaking proceedings that EPA will undertake to review these plans, Minnesota will have the ability to advocate to EPA what its neighbors' plans should be. Minnesota will also have the discretion to set its own plan for its own in-state sources at a level that is more stringent than EPA's minimum requirements, because the Clean Air Act allows states to exceed federal standards. 42 U.S.C. § 7416. But what Minnesota cannot do is dictate to other states how they generate electricity.

C. The Import Restriction Was Enacted to Reduce GHG Emissions And Does Nothing to Protect Electric Consumers Against Future GHG Regulatory Costs.

Perhaps recognizing the utter futility of the Import Restriction as a climate change measure, Defendants attempt to recast it as a measure to protect Minnesota electric

[26] Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units, 77 Fed. Reg. 22,392 (Apr. 13, 2012).

consumers against "an energy source whose future is uncertain." Defendants' Brief at 26. In support of this contention, Defendants cite three snippets out of a total of 175 pages of legislative history that Defendants supplied to the Court. *Id.* at 27. Defendants also claim that a legislative concern with protecting consumers from reliance on GHG-emitting resources would have been "legitimate," citing, of all things, a news article in Bloomberg Business Week, a publication owned by an individual who has donated $50 million to eliminating coal-fueled electricity in the United States.[27]

Conspicuously absent from Defendants' argument is any citation of anything in the legislation that even remotely supports the notion that the Import Restriction was adopted to protect electric consumers against the cost of future GHG regulation, rather than to reduce Minnesota's GHG emissions because of climate change concerns. The Import Restriction is part of Article V of the Next Generation Energy Act of 2007, which is entitled "Global Climate Change; Greenhouse Gas Emissions." The goal of Article V is to reduce *total Minnesota* GHG emissions[28] dramatically – by at least 15 percent below 2005 levels by 2015, at least 30 percent below 2005 levels by 2025, and at least 80 percent below 2005 levels by 2050. Minn. Stat. § 216H.02, subdiv. 1. These goals are plainly directed towards limiting climate change. As Representative Ruud explained at the beginning of the legislative debate:

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[27] NY TIMES, July 21, 2011 at A17, *available at* http://www.nytimes.com/2011/07/22/nyregion/bloomberg-donates-50-million-to-sierra-club-coal-campaign.html.

[28] As Minnesota defines those emissions, which include emissions that occur outside the State and should be beyond its regulatory control.

> So the first part I want to refer to is the section 3 that speaks to the goals. And it establishes three reduction goals. And the first goal, the longest term goal that's out there is 80% that we want to reduce emissions 80% below current levels by 2050. ***And this is a number, members, that has been in science and it speaks to what science is telling us that we need to do to avoid dangerous global warming.*** The shortest term goal is to reduce to 15% below current levels by 2015, and it is only slightly more aggressive than the Governor's own goal of reducing the State's per capita fossil fuel use by 50% in 2015. And we believe it is a goal very much well worth planning for. And the mid-term goal is to reduce 30% below current levels by 2025. And that's designed to keep us on track. We also ask the stakeholders to work on a plan to get us to 45% of that same year just in case as time marches on, that ***science tells us that we need to be more aggressive in this process***.[29]

In accordance with these climate change goals, the legislation provides for the adoption of a "Climate Change Action Plan" under which GHG emissions from every sector of the Minnesota economy will be tracked and plans will be developed to reduce those emissions.

The Import Restriction thus is part of an overall policy of addressing GHG emissions. As Representative Ruud went on to explain:

> The sector that poses the greatest risk of causing large emissions increases before we can have a reduction plan in place is the power chucker. [sic] For example, a new coal plant of 600 megawatts or so would emit the same amount of greenhouse gases as roughly as some 700,000 cars. And unlike our cars, a coal plant lasts for decades. ***And so obviously, such a long-term commitment to technology like that will seriously undermine our solution reduction planning process and it makes it much harder to make the reductions that we know we have to have.*** And so the Bill would prevent new power plants from being built unless they could offset their carbon dioxide emissions.[30]

[29] Brown Aff., Ex. 1 at 3 (emphasis added).
[30] *Id*. at 4 (emphasis added).

Indeed, far from intending to protect electric consumers from the cost of future carbon regulations, the legislature recognized that achieving its GHG goals would entail significant costs. Thus, the legislature directed that the Climate Change Action Plan "assess the costs, benefits, and feasibility" of various options, Minn. Stat. § 216H.02, subdiv. 4, subsec. 3, and recognized that achieving its goals could cause "economic dislocation," Minn. Stat. § 216H.07, subdiv. 5, subsec. 6.

And indeed, the state has found that reducing GHG emissions is difficult economically. As the Minnesota Pollution Control Agency and Minnesota Department of Commerce reported to the legislature in their most recent biennial report called for under 216H.07, subdiv. 3:

> A significant reduction in GHG emissions is seen in 2009. The financial crisis led to a contraction of economic production, which had the effect of reducing energy use and greenhouse gas emissions. With economic recovery, emissions rose in 2010.[31]

Finally, Minnesota has considerably less intrusive ways than the Import Restriction of protecting electric consumers against imprudently incurred electricity costs.[32] As Defendants themselves state, Minnesota utilities have long been required to submit to the Minnesota Public Utilities Commission ("MPUC") long-term resource plans that assess the costs and benefits of resource choices. Defendants' Brief at 11-12. The MPUC is required to consider environmental impacts in these resource decisions; for

[31] "Greenhouse Gas Emissions Reduction Biennial Report to the Minnesota Legislature," January 2013, at 1, a*vailable at* http://www.pca.state.mn.us/index.php/view-document.html?gis=18931.

[32] *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (in Commerce Clause case, state must show both that its statute serves a legitimate local purpose and that the purpose could not be served as well by nondiscriminatory means).

instance, Minnesota utilities are required to incorporate the monetized cost of environmental impacts ("externalities") in their resource plans, including the cost of CO_2.[33] Additionally, although Minnesota utilities have also included projected costs of future CO_2 regulation in their resource plans,[34] § Minn. Stat. 216H.06 (adopted in the Next Generation Energy Act), in the words of the MPUC, "formalize[d] this process" by explicitly requiring that utility resource plans consider the future costs of CO_2 regulation.[35]

Thus, the Import Restriction was not enacted to protect electric consumers against the possibility of future GHG regulation. The Import Restriction was instead imposed to serve another purpose – to reduce the power sector's GHG emissions in accordance with Minnesota's overall GHG emission reduction goals.

II. The Import Restriction Will Seriously Intrude on Interstate Commerce.

Plaintiffs' Memorandum in support of its summary judgment motion demonstrates the interstate and regional nature of the electricity market. The Import Restriction will impede interstate commerce by (a) balkanizing electricity markets; (b) interfering with the regional development and use of coal, which will increase electric rates for all regional consumers and damage the economies of neighboring states; and (c) perversely, disincenting the development of new, more efficient, and lower-emitting coal-fueled electric generation technologies.

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[33] Minn. Stat. § 216B.2422, subdiv. 3.
[34] Order Establishing Estimate of Future Carbon Dioxide Regulation Costs at 2, Docket No. E-999/CI-07-1199 (MPUC Dec. 21, 2007).
[35] *Id.*

A. The Import Restriction Will Balkanize Electricity Markets.

If allowed to stand, the Import Restriction will set a precedent that will seriously disrupt the efficient operation of the interstate electricity market. As Plaintiffs' Memorandum shows, most of the country now has a series of Regional Transmission Organizations and Integrated System Operators that coordinate large regional markets for electric generation and transmission. These markets allow for the selection of the lowest-cost and most reliable resources to serve ultimate consumers.

These markets cannot work if individual states can wall themselves off from electricity that is produced in a way they disfavor.[36] As Plaintiffs show, regional coordinators cannot redirect electricity produced in North Dakota, for example, so that it will be rerouted from Minnesota to another state; the power grid doesn't work that way. Thus, the only way the Import Restriction can work is if new coal generation is not built, because any new regional coal generation will inevitably flow into Minnesota and cause Minnesota utilities to incur significant penalties – in the form of offsets or allowances or reduced generation – that they will be unwilling to bear. The Import Restriction thus confers on an individual state the power to veto the types of facilities that are built to serve the interstate market.

Interstate electricity markets, however, cannot function with this type of state control. If Minnesota can ban the importation of electricity from new coal generators, then Iowa can ban imported nuclear electricity, and Wisconsin can ban imported

[36] Defendants claim other states are adopting similar laws but cite only California. Defendants' Memorandum at 34-35. The California law, of course, is not under review here and is likely unconstitutional for the same reason as the Import Restriction.

hydroelectricity. Indeed, any state could ban imported electricity from any new or even existing facility because the state does not think that the facility represents an acceptable form of generation. Interstate electric markets would collapse under the weight of this type of system.

B. The Import Restriction Will Interfere with the Regional Development and Use of Coal.

Minnesota does not produce coal. North Dakota, however, is the nation's ninth largest coal-producing state. Since North Dakota coal production is used overwhelmingly for electric generation, and since Minnesota is the largest market for North Dakota electric generation, the Import Restriction will prevent the development of North Dakota's coal resources.

The effect, however, will not be restricted to damaging the market for the production and use of North Dakota coal. The effect will include raising costs to electric consumers both in Minnesota and surrounding states. Because coal has historically been the leading fuel for electric generation in the MISO region,[37] preventing the use of coal for new electric generation will – by the basic law of supply and demand – raise the cost of electricity. Given the regional nature of electricity markets, these increased costs will be experienced throughout the region.

The increased costs could be substantial. For instance, EPA presently estimates that the cost for a new coal-fired electric generator to capture and store, rather than emit

[37] EIA, *Annual Energy Outlook 2013,* http://www.eia.gov/forecasts/aeo/.

to the atmosphere, its CO_2 emissions would increase the cost of its electricity by 80 percent.[38]

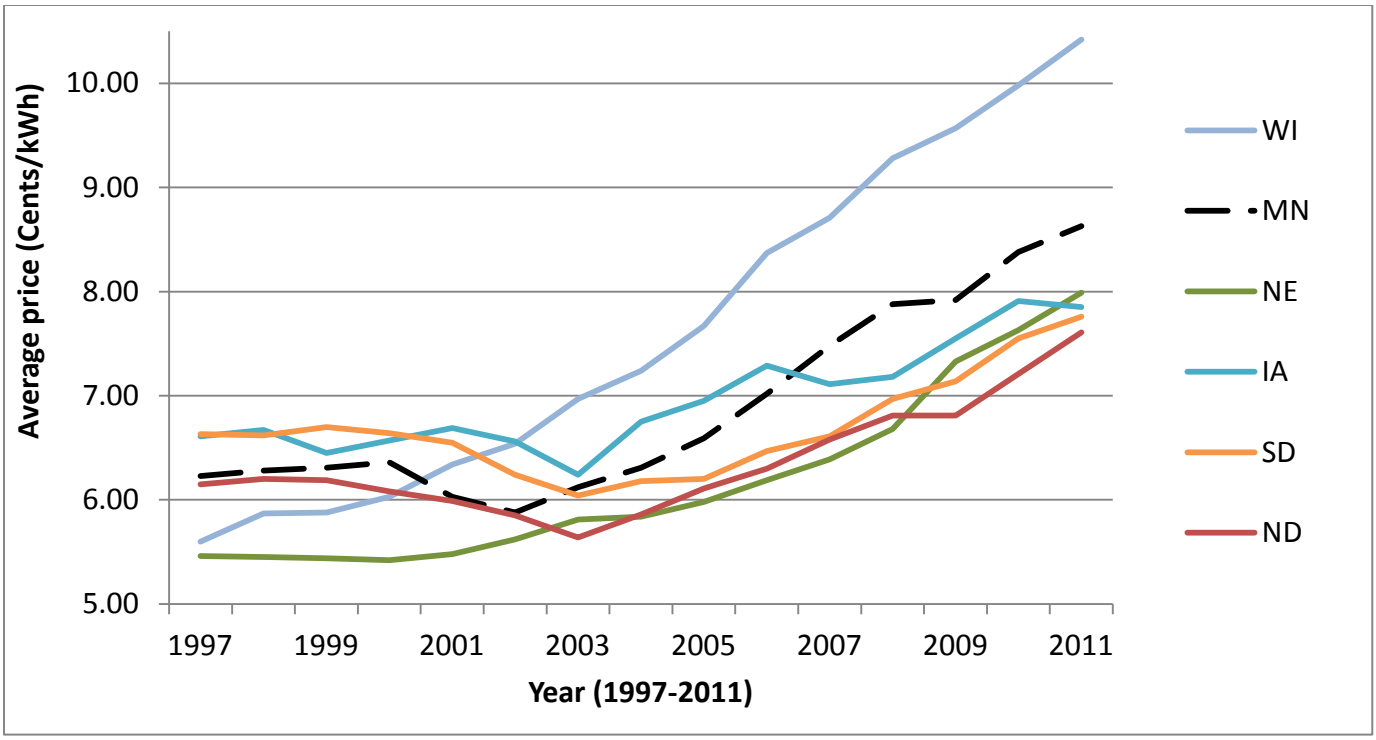
These costs will damage Minnesota business. Minnesota is home to many energy-intensive industries: mining, forestry and paper, steel production, manufacturing, and more. For these companies, electricity isn't just a cost of doing business – it can be one of their largest costs. The following chart, compiled by the Minnesota Chamber of Commerce and based on EIA data, shows that past rate increases have already affected Minnesota business competitiveness.

Minnesota's Electric Rates: Falling in the Rankings

	1990	2011	Competitiveness
Commercial	12th	18th	↓
Industrial	15th	25th	↓
Overall	9th	19th	↓

Of six upper Midwestern states, only Wisconsin's electric rates have increased faster than Minnesota's.

[38] 77 Fed. Reg. at 22,415.



The Import Restriction thus will make an already deteriorating situation worse.

The increased costs caused by the Import Restriction will also disproportionately harm the poor and those living on fixed incomes because increasing electric rates is akin to imposing a regressive tax. As one study has concluded, GHG regulation:

> …will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy, and rising energy costs inflict great harm on minority families. Lower-incomes families are forced to allocate larger shares of the family budget for energy expenditures, and minority families are significantly more likely to be found among the lower-income brackets. This disparity between racial groups means that rising energy costs have a disproportionately negative effect on the ability of minority families to acquire other necessities such as food, housing, childcare, or healthcare.[39]

[39] Management Information Services, Inc., *Executive Summary: Potential Impact of the EPA Endangerment Finding on Low Income Groups and Minorities*, March 2010 at 2-3, www.misi-net.com/publications/APA-0310.pdf.

Indeed, family incomes are not keeping pace with the rising costs of energy.[40] Approximately one-half of American households have average pre-tax annual incomes below $50,000 and real median household income has declined by eight percent since 2007. *Id.* In 2001, households with gross annual incomes below $50,000 spent an average of 12% of their after-tax income on residential or transportation energy costs. This year, these households are expected to spend an average of 20% of their after-tax income on energy. *Id.* In 2011, nearly one-third of American households had gross annual incomes of less than $30,000 and energy costs accounted for an average of 27 percent of their family budgets, before taking into account any energy assistance. *Id.* at 3. Nearly all of the residential electricity price increases over the past two decades have occurred since 2000. *Id.* at 3.

The impact of higher energy costs is not just economic, however. As both common sense and a wealth of literature shows, a rise in energy prices, by depriving consumers of purchasing power needed for the necessities of life, will result in a decline in health and welfare. Summarizing a large body of scientific literature, Dr. Harvey Brenner of Johns Hopkins University recently wrote:

> At the individual level of analysis—i.e., in epidemiological studies—individual income is a standard and fundamental inverse predictor of early mortality (Anderson, Gamborg, Osler, Prescott, Diderichsen 2005; Ecob, Davey Smith, 1999; Ettner, 1996; Kahn, Wise, Kennedy, Kawachi, 2000; Kivimaki, Shipley, Ferrie et al., 2008; Lynch, Smith, Kaplan, House, 2000). In industrialized countries, the higher the level of income of individuals, the lower the illness and mortality rates attributed to the great majority of

[40] American Coalition for Clean Coal Electricity, *Energy Cost Impacts on American Families, 2001-2013*, Jan. 2013 at 2, http://www.americaspower.org/sites/default/files/Trisko%202013.pdf.

> infections, chronic diseases and mental disturbances….Moving from the individual to the national level, however, real GDP per capita indicates the availability of basic goods and services: nutrition, potable water, sanitary engineering, housing and other means of climate control, transportation and primary health care. At the national level, real GDP per capita—especially for industrialized societies [—]conveys the capacity of society to invest in the development of science and technology, improved working conditions at higher technological levels of safety and health, financing of education at all levels, stabilization of the income of individuals and small businesses, and the many types of social protection: unemployment insurance; active labor market policies; health insurance; disability insurance; social welfare payments to impoverished, frail populations and children; social security and retirement benefits.[41]

In sum, the Import Restriction will interfere with North Dakota's coal market and result in increased electric costs to the detriment of North Dakota and Minnesota consumers.

C. The Import Restriction Will Inhibit Technological Development.

Minnesota evidently believes that the key to a low-carbon future is to cap GHG emissions in the hope that non-carbon emitting resources will be built as substitutes. But those who seek to develop a worldwide strategy for GHG emissions counsel that this approach is naïve and counterproductive. The IEA's 2012 report "Tracking Clean Energy Progress,"[42] which constitutes the IEA's input and recommendations to the Clean Energy Ministerial on actions needed to support a goal of limiting global temperature rise to 2º C above preindustrial levels (which the IEA calls "ETP 2DS"), endorses capturing

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[41] *The Clean Air Act and Public Health*, Before the Senate Committee on Environment and Public Works, 112th Cong. 2 (2011) (statement of Dr. Harvey Brenner, Professor, Social and Behavioral Science, University of North Texas), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=37188bea-2c5f-4100-a767-f264f1a1ced2.

[42] Report available at http://www.iea.org/media/etp/Tracking_Clean_Energy_Progress.pdf.

and storing carbon dioxide from fossil fuel electric generation and other industrial facilities that utilize fossil fuels, but notes that progress towards this technology is lagging: "The technologies with the greatest potential for energy and carbon dioxide (CO_2) emissions savings, however, are making the slowest progress: carbon capture and storage (CCS) is not seeing the necessary rates of investment into full-scale demonstration projects."[43] The report notes that the status of CCS development against the 2DS objective is: "No large-scale integrated projects in place against the 38 required by 2020 to achieve the 2DS."

The IEA notes that coal is an important part of the global energy resource portfolio and that the use of coal, even without CCS, is fully compatible with the 2DS goal: "Coal is a low-cost, available and reliable resource, which is why it is widely used in power generation throughout the world. It continues to play a significant role in the 2DS."[44] The IEA believes that coal is compatible with the 2DS goal because the construction of modern highly efficient coal generating units can substitute for less efficient coal generating units, and thereby lower CO_2 emissions:

> Higher efficiency, lower emissions (HELE) coal technologies - including supercritical pulverised coal combustion (SC), ultra-supercritical pulverised coal combustion (USC) and integrated gasification combined cycle (IGCC) - must be deployed. Given that CCS technologies are not being developed or deployed quickly, the importance of deploying HELE technology to reduce emissions from coal-fired power plants is even greater in the medium term.[45]

[43] *Id.* at 5.
[44] *Id.* at17.
[45] *Id.*

The IEA makes an equally important point about the need for developing countries to utilize more efficient new coal technologies rather than less efficient technologies that are still being used in many cases:

> More advanced coal technologies are being deployed, but inefficient coal technologies still account for almost half of new coal fired power plants being built. Unless growth in coal-fired power generation and subcritical coal development curtails, we are unlikely to achieve the 2DS objectives.[46]

By chasing an impractical solution to the global GHG issue – zero CO_2 emissions from new coal plants – the Import Standard, thus, is exactly the wrong approach. Minnesota's statute will prevent the construction of new coal-fueled facilities of any kind in the Upper Midwest because CCS is impractical. If other states with large population centers can do the same, then new coal generation cannot be built in the United States. Technological development of more efficient coal generation plants in the United States will thus cease, removing a major driver of critically needed worldwide technological development. In the end, the result will be opposite of the intended result: the world will continue to build coal facilities, but they will be less efficient and more GHG-emitting than they might have been.

[46] *Id.* at 18.

CONCLUSION

In sum, the Import Restriction's burden on interstate commerce is substantial, whereas the in-state benefit it may produce is non-existent. As a result, it is an unconstitutional violation of the Commerce Clause. Amici the Minnesota Chamber of Commerce and the National Mining Association therefore respectfully request that the Court grant Plaintiffs' motion for summary judgment.

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