

Environmental and Regulatory Update: Opportunities and Challenges for the Renewables Industry in the Midwest

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Thursday, October 8, 2015

Overview

- Eagle Permits: American Bird Conservancy Case
- Implementation of EPA Clean Power Plan
- EPA Clean Water Rule Implementation
- Potential Implications of the Sandpiper Pipeline Case
- Minnesota Community Solar Program

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ABC Case

- December 2013: USFWS Revises Eagle Incidental Take Permits from Five Years to Thirty Years
- 2014: American Bird Conservancy (ABC) Sues USFWS Alleging Violations of National Environmental Policy and Endangered Species Acts
- August 2015: Northern California U.S. District Court Sets Aside 30-Year Permit
- No Adequate Basis for Decision to Not Prepare an EIS Under NEPA

USFWS Current Response

- Not Issuing 30-Year Permits
- Conducting a Full NEPA Analysis
- Hoping to Issue When NEPA Analysis Completed in a Year or So
- Other Aspects of the Permit are Still Valid
- Assessing Ability to Include Eagles in Habitat Conservation Plans

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EPA Clean Power Plan

- Will Continue to Be Subject to Multiple Legal Challenges
- Minnesota is Proceeding With Implementation
- Other States in Upper Midwest Have Different Views
- Highly Complex and, If Upheld, Will Have Significant Impacts

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Minnesota CPP Implementation

- MPCA Stakeholder Group
- State Implementation Plan (SIP) Rulemaking Process
- Strong Orientation Toward Cap and Trade
- Rate-Based vs. Mass Based Approaches
- Potential for Significant Additional Renewable Energy Development
- October 2015: Xcel Energy Resource Plan Proposal

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Clean Water (WOTUS) Rule

- September 2015: EPA and Corps of Engineers Announce Final Rule Seeking to Clarify Years of Controversy Regarding Jurisdiction Over Navigable Waters
- Focus is on Significant Nexus of Tributaries and Adjacent Waters; Some View as Too Expansive
- Particular Concerns for New Developments, Including Renewable Energy Facilities at Sites With Wetlands and Other Water Resources

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Clean Water Rule

- Subject to Multiple Lawsuits
- Late-August: U.S. District Court in North Dakota Stayed Implementation; Likely That EPA Exceeded Its Authority
- Minnesota Not Part of Stay; MN Wetland Conservation Act Already Embodies Much of the Rule

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Sandpiper Pipeline Case

- November 2013: North Dakota Pipeline Company LLC (Enbridge and Marathon Oil) Filed for Certificate of Need and Routing Permit
- 300-Miles of Pipeline in Northern Minnesota to Transport Oil from North Dakota to Clearbrook, MN and Superior, WI
- Minnesota Public Utilities Commission (MPUC) Bifurcated CON Process From Route Permit; Issued CON Without Conducting Environmental Review Under Minnesota Environmental Protection Act (MEPA)
- September 2015: Minnesota Court of Appeals Remands CON to MPUC; Issuance of CON Without EIS Violates MEPA

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Sandpiper Implications

- Plaintiff, Friends of Headwaters, Argued that CON is a Final Governmental Decision to Grant a Permit and Court Agreed
- Past Practice Has Included Issuance of Some Permits Prior to Environmental Review Subject to Issuance of Final Major Permit After Environmental Assessment Worksheet or EIS Completion
- Case Could Mean No Permits Issued Before Completion of MEPA Environmental Review

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MN Community Solar Program

- Established by Legislature in 2013
- Directs Xcel to Create a Program
- Provides Larger Subscribers up to 11.5¢ KWH
- Massive Interest by Developers and Customers
- Currently Applications Representing Over 1.5 GW

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Community Solar Co-location

- Much Controversy Over Definition of Co-location
- Many Applications Seeking to Co-locate 10 to 20 MW
- Xcel Argued That Non-Participants Would Bear Burden of Program Costs
- August 2015: MPUC Acted to Limit Co-location to 5 MW Total
- September 25: MPUC Deadline for 5 MW Projects; Now Maximum of 1 MW
- Program Design Likely to Continue to Evolve Based Upon MPUC Decisions

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Major Themes

- Tension Between Federal and State Relationships and Approaches
- Differing Regulatory Approaches and Responses Among Midwestern States
- Minnesota Usually at the Forefront Through Regulation and Case Law

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