

Minn. Carbon Emissions Case Sets Path For Future State Regs

By Sean McLernon

Law360, New York (October 22, 2013, 7:18 PM ET) -- A stringent Minnesota emissions law blocking electricity from new coal-fired power plants is facing a vigorous court challenge from resource-rich neighbor North Dakota, and experts say the outcome will provide a blueprint for other states looking to enact their own greenhouse gas regulations.

The 2007 Next Generation Energy Act takes a hard line against coal, preventing any new coal sources from adding to the state's energy mix unless there are equal carbon dioxide reductions elsewhere. North Dakota sued the state over the law in 2011 and recently moved for summary judgment, arguing the statute illegally discriminates against out-of-state resources.

U.S. District Judge Susan Richard Nelson heard from both sides during a summary judgment hearing last week and could come down with a ruling in the coming weeks to determine whether the case proceeds. Her decision and any subsequent appeals will inform how many states eager to enact their own regulation will move forward, according to Stoel Rives LLP partner Kevin D. Johnson.

"This particular approach taken by Minnesota is unique," said Johnson, who is the managing partner of the firm's Minneapolis office. "Now that we've got a dispute between two bordering states front and center, other states will be watching very closely before they act."

Many states have shown an eagerness to take charge on the climate change front, especially since congressional action seems more and more unlikely. Gibson Dunn LLP partner Raymond B. Ludwiszewski noted that the last major environmental statute to be comprehensively rewritten was the Clean Air Act in 1990.

"There are a lot of environmental laws that are decades old," Ludwiszewski said. "If there are new ideas out there, the states are going to move forward with their own state laws, given the impasse we have seen in Congress."

Nevertheless, many states remain wary of moving ahead with legislation that will be knocked down by industry challengers or neighboring states, like North Dakota, that face negative economic consequences.

North Dakota hosts the largest single deposit of lignite coal in the world, and its extensive coal industry has invested more than \$1 billion toward controlling emissions, according to the suit. The state is fighting hard to protect the industry's interests, and the same could easily happen in other parts of the country, attorneys say.

"When you have one state with an energy policy that has even perceived detrimental impacts on another state, it clearly has potential for litigation," Johnson said.

For Minnesota, it has meant a lengthy court battle that could end up going all the way to the U.S. Supreme Court.

The challenge from North Dakota and its industry allies hinges largely on whether the law favors resources from one state over those from another, according to University of Minnesota law professor Alexandra B. Klass.

“There is lots of case law about regulations that impact industries,” Klass said. “You can do that as long as you're treating in-state and out-of-state resources alike.”

But according to North Dakota and industry challengers like Lignite Energy Council and the Basin Electric Power Cooperative, the law illegally interjects Minnesota policy into North Dakota by blocking importation of power from any new energy facility that contributes to carbon dioxide emissions. The challengers have also made a preemption argument, claiming the federal government has asserted total jurisdiction over direct control of emissions, including greenhouse gases.

Klass, who was in the courtroom last week for the summary judgment hearing, said U.S. District Judge Susan Richard Nelson had pointed questions about the state's position that it can regulate energy transactions and emissions that occur outside the state, even if they are tied to consumption in Minnesota.

“She was looking very narrowly at the resources and where the emissions took place,” Klass said. “Breaking it down that narrowly benefits the plaintiffs.”

The case bears similarities to litigation over California's low carbon fuel standards, which was challenged by industry groups who said the law unfairly penalized energy from out of state by counting distribution and transportation costs against manufacturers when applying its carbon intensity analysis. The Ninth Circuit ruled in favor of California last month, reversing a lower court's ruling that the state's initial provision concerning crude oil was discriminatory.

Klass said that ruling would likely spur more state action on the issue and that the Minnesota case will likely have a similar effect.

“I think states wait and watch,” Klass said. “There are some states poised to adopt low carbon fuel standard rules that were waiting for the Ninth Circuit. Unless the Supreme Court grants cert, more states will enact those kinds of rules. It's the same on how to structure a ban on coal-fired power.”

The impact on industry may be hard to quantify, but it certainly won't be a welcome development, particularly with the EPA recently enacting proposed regulations for new coal-fired power plants and scheduled to issue regulations for existing sources next year, according to Akin Gump Strauss Hauer & Feld LLP partner Paul E. Gutermann.

“It's another stick added to the pile, and one of them could break the camel's back,” Gutermann said.

North Dakota is joined in the suit by the Industrial Commission of North Dakota, trade association Lignite Energy Council, the North American Coal Corp., Basin Electric Power Cooperative, Great Northern Properties LP and Missouri River Basin Municipal Power Agency.

The plaintiffs are represented by Thomas H. Boyd, John A. Knapp, Brent A. Lorentz and Derek R. Allen of Winthrop & Weinstine PA, William Taylor of Woods Fuller Schultz & Smith, and in-house attorneys.

The case is North Dakota et al. v. Swanson et al., case number 0:11-cv-03232, in the U.S. District Court for the District of Minnesota.

--Edting by Elizabeth Bowen and Philip Shea.

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