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NEWSLETTER

Lawsuit Claims that Scientific Consensus Points Toward Shutting Down Arctic Oil and Gas Extraction

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A recent set of provocative claims in an ongoing lawsuit about the effect of new offshore oil and gas leases in the Arctic on global climate change threatens to upset longstanding norms regarding the use of scientific evidence in environmental analyses performed pursuant to the National Environmental Policy Act (NEPA). If accepted, these claims could have a profound impact on oil and gas extraction in the United States and force the idling of trillions of dollars' worth of U.S.-based energy infrastructure.

The lawsuit, *Alaska Wilderness League, et al. v. Jewell*, challenges the Department of Interior's (DOI) decision to offer offshore oil and gas leases in approximately 29.4 million acres of the Chukchi Sea, which is off the northwestern coast of Alaska.[1] Plaintiffs challenge DOI's approval of the leases in its supplemental environmental impact statement (SEIS), claiming that DOI inadequately considered a "new scientific consensus" that most fossil fuels—particularly Arctic fossil fuels and undiscovered resources like those in the Chukchi Sea—must remain undeveloped to minimize the risk of unacceptable environmental effects caused by global climate change.

The "new paradigm" for this purported scientific consensus apparently has three components, according to Plaintiffs:

- Global temperatures must not increase more than two degrees Celsius over current levels.
- To avoid reaching that two degree threshold, "no more than one-third of proven fossil fuels can be consumed prior to 2050 . . . ."[2]

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- Specifically, "large portions of the reserve base and an even larger proportion of the resource base should not be produced"[3] and "all Arctic resources should be classified as unburnable."[4]

Plaintiffs argue that this "carbon budget" model for assessing climate change effects must be reconciled with every Federally-owned fossil fuel reserves development proposal. The upshot of this claim is that unless or until the Federal government adopts a calculation of each development's contribution to the total amount of global GHG emissions released into the atmosphere from human activity, no projects can be approved.

For its part, DOI argued in the SEIS that it was not required to consider the degree to which increased GHG emissions would result from the consumption of the oil and gas extracted through the leases. DOI argued further that it had no reliable way of calculating the effects of the lease sale on fuel markets and, in turn, on fuel consumption and resultant GHG emissions. Such calculations would, at best, be highly speculative.

In its response to this suit, DOI should more actively challenge Plaintiffs' purported scientific evidence that any new Arctic oil and gas leases would be unacceptable under NEPA. Plaintiffs' argument would have troubling consequences. It would hold DOI to a rigorous procedural standard that it engage in "reasonable discussions" about the effect of lease sales on global climate change[5] and potentially shut down the majority of domestic oil and gas production.

It is certainly not clear, for example, that plaintiffs' citation to a few select articles and statements in intergovernmental agreements is evidence of a "scientific consensus," or that it provides the basis for plaintiffs to claim that a "reasonable discussion" of the lease sales should contemplate shutting off all oil and gas production in the Chukchi Sea, 52 percent of the U.S. conventional oil reserves, 100 percent of the unconventional oil reserves (i.e., fracking and enhanced recovery), and 75 percent of the natural gas reserves.[6] Yet that is precisely what the plaintiffs seek from DOI. However, as DOI Secretary Sally Jewell was reported to say on the subject in a recent interview, that is simply not going to happen. She stated that "[w]e are a nation that continues to be dependent on fossil fuel...You can't just cut it off overnight and expect to have an economy that is, in fact, a leader in the world."[7] Jewell stated further that "I think it oversimplifies a very complex situation to suggest that one could simply cut off leasing or drilling on public lands and solve the issue of climate change."

Jewell's remarks suggest that extreme positions such as those in the *Alaska Wilderness* case are unlikely to prevail in Court. But such positions are likely a harbinger of the increased use of contested climate change science in the service of impractical and unworkable litigation goals, and they should be watched carefully. Stay tuned.

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[1]Brief in Support of Plaintiffs' Motion for Summary Judgment, No. 08-cv-00004 (D. Alaska, Aug. 28, 2015), ECF No. 309.

[2]*Id.* at 12 (internal quotation and citation omitted).

[3]*Id.* at 13.

[4]*Id.*

[5]*Id.* at 10, 24.

[6]*Id.* ex. 17 at 13 (attaching study published in the journal *Nature*).

[7]Sally Jewell, Secretary, Dep't of the Interior, Interview at the Christian Science Monitor Breakfast (Sept. 15, 2015).