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Climate Change Makes Poor Weapon In Oil, Gas Lease Fights

By **Keith Goldberg**

Law360, New York (June 21, 2013, 6:48 PM ET) -- Opponents of oil and gas drilling who claim the government should have taken global warming into account before issuing leases are having little success as courts repeatedly find that plaintiffs are unable to make a direct link between greenhouse emissions and harm to their communities.

The latest blow came June 14, when a Montana federal judge ruled that conservation groups Montana Environmental Information Center, Earthworks Oil & Gas Accountability Project and WildEarth Guardians didn't have standing to challenge oil and gas leases issued by the U.S. Bureau of Land Management because they couldn't prove methane emissions from proposed gas wells on the leased sites would cause damage to adjacent properties.

A similar conclusion was reached in July 2011 by a Virginia federal judge, who tossed a National Environmental Policy Act suit challenging the U.S. Department of Defense's acquisition of oil made from Canadian oil sands because the alleged injuries stemming from global warming caused by greenhouse gas emissions were too broad to be actionable. A month later, a New Mexico federal judge dismissed a NEPA challenge of BLM oil and gas lease sales, saying the plaintiffs hadn't shown any actual or imminent climate change threat to their communities, nor traced it to the challenged lease sales.

Attorneys aren't surprised by the latest ruling, which they say shows that courts are hewing closely to the Article III standing test established by the U.S. Supreme Court in the 1992 case Lujan v. Defenders of Wildlife. In that case, the court held that in order to bring a suit, plaintiffs must suffer a concrete injury that is actual or imminent, which can be traced to the challenged conduct and can be redressed by the court.

"Courts are not departing from their traditional standing principles just because climate change is involved," Pillsbury Winthrop Shaw & Pittman LLP environmental partner Mike McDonough told Law360.

Unless plaintiffs can provide sufficient evidence that specific oil and gas leases issued by the BLM are significantly contributing to global warming in a way that's directly affecting their local communities, courts will be reluctant to allow them to pursue a NEPA challenge, attorneys say.

"It's going to be very difficult to challenge agency actions for greenhouse gas emissions for small-scale oil and gas sales under the current state of the law," Arnold & Porter LLP litigation partner Matt Douglas told Law360.

In the Montana case, not only did U.S. District Judge Sam E. Haddon find that the plaintiffs had failed to allege a concrete injury because they couldn't prove methane emissions from the lease sites would cause localized damages, but he also said they couldn't trace climate change damages to emissions to the lease because they didn't show that the emissions would make a meaningful contribution to global greenhouse gas emissions or to global warming.

"The problem with plaintiffs in these cases is that they trip on either one or both of those elements," McDonough said. "I think what this decision showed you is that they're all basically linked together. If you can't show injury in fact, how are you going to show there's causation? If you can't show causation, how do you redress any of that?"

The uncertainty over how exactly the effects of global climate change will show up in a local area makes convincing courts that stopping local oil and gas leasing will make a huge dent in greenhouse gas emissions a tough sell, attorneys say.

"The courts have said that effects of greenhouse gas emissions are so huge and unpredictable [that] even if a particular development action doesn't go forward, it doesn't follow that the injuries to plaintiffs that they are seeking to prevent won't occur," said Perkins Coie LLP attorney Tyler Welti, formerly the lead fracking litigator for the U.S. Department of Justice's Environment and Natural Resources Division.

Still, NEPA challenges to BLM oil and gas leasing certainly aren't dead, says Mayer Brown LLP counsel Roger Patrick. He pointed to the Center for Biological Diversity and the Sierra Club's successful challenge of California lease sales in March, in which a magistrate judge ruled that the BLM didn't take the NEPA-required "hard look" at the environmental impacts of hydraulic fracturing before issuing the leases.

"I think that plaintiffs will continue to draw upon NEPA in challenging oil and gas projects and they will find another way to skin the cat," Patrick told Law360. "That may entail changing their allegations as to standing, or it may entail appeals in the Ninth Circuit, which has traditionally taken a broader view of standing in NEPA cases."

However, the California suit revolved around the BLM's alleged use of an outdated analysis of fracking activity and cited possible effects on local groundwater and endangered species. Climate change was mentioned in the suit, but it wasn't a central issue, like it was in the Montana case.

"In my view, the [Montana] case properly applied the law in its current state, and in order to get a different result, I would think some kind of change would need to happen at the executive level," Douglas said.

The White House Council on Environmental Quality is still finalizing guidance first drafted in 2010 on considering the effects of climate change and greenhouse gas emissions, though it hasn't explicitly called for federal agencies to regulate the emissions through NEPA.

"Mandatory guidance from CEQ on how agencies are to consider greenhouse gases under NEPA will provide courts a basis for determining whether the agencies have followed the procedures that CEQ sets out for them," McGuireWoods LLP partner Bernadette Rappold, a former EPA official, told Law360. "After all, NEPA is a procedural statute; it doesn't prescribe a particular result."

--Additional reporting by Vin Gurrieri. Editing by Elizabeth Bowen and Richard McVay.