

The Northeast National Petroleum Reserve in Alaska. Photo by BLM. (CC-BY-2.0)

Although the Biden administration has approved the Willow oil drilling project on Alaska's North Slope—the largest proposed oil drilling on U.S. public land in several decades—the legal questions are far from settled.

Much of the media coverage so far has focused on the political dynamics driving the decision (as noted with some alarm here and here) and devoted less attention to the legal dynamics. So, is there merit to the Biden administration's claim that it had limited legal ability to deny the Willow project at this stage in the process?

'Legal ability'

The $8 Billion ConocoPhillips project was first approved by the Trump administration, then legally supported by the Biden administration. Then a federal court in Alaska blocked construction, faulting the original environmental analysis. After completing its own environmental review, the Biden administration gave the greenlight. That approval came a day after the administration said it would bar

drilling in some other areas of Alaska and the Arctic Ocean. This allows ConocoPhillips to move forward with three drill sites—not the proposed five sites—in the northeast area of the National Petroleum Reserve in Alaska. (The Bureau of Land Management Record of Decision is here.)

The Associated Press reports that "administration officials were concerned that ConocoPhillips' decades-old leases limited the government's legal ability to block the project and that courts might have ruled in the company's favor." The Interior Department for its part emphasized the reductions in the scope of drilling, saying the actions "significantly scale-back the Willow Project within the constraints of valid existing rights under decades-old leases issued by prior Administrations." And Alaska Sen. Lisa Murkowski told the NYT that the legal argument was the turning point for Pres. Biden.

So, do the administration's apparent legal concerns stand up to scrutiny?

Partly, this decision illustrates the limits of our environmental laws. The goal of those laws is substantive: to protect the environment. But often those laws impose procedural requirements, not substantive bans on harmful activities. The National Environmental Policy Act (NEPA) provides a good example. Sure, the Biden administration issued its own supplemental environmental impact statement under NEPA for the Willow project, carefully reviewing the project's environmental impacts—but nearly all of the attention in that document is spent comparing some versions of the project against other versions, all of which would result in significant oil extraction. The "No Action" alternative—the only one that involves refusing the Willow project entirely—gets very little attention, on the order of a single paragraph. And even if the Biden administration had fully expounded on that "no action" alternative, nothing in NEPA requires that policymakers choose the least damaging option, even in the face of stakes as overwhelming as global climate disruption. As Justice Stevens (writing for the Court) once wrote: "NEPA merely prohibits uninformed—rather than unwise—agency action."

The Willow decision also shows the limits of politics. Yes, ConocoPhillips has existing lease rights that make it complicated, or maybe even impossible, to stop all oil extraction from this site. But the Biden Administration had tools to curtail those rights to limit harms to the environment and to people, and it's not clear that it used those tools to the greatest degree possible.

For example, the Endangered Species Act theoretically prohibits agencies from

taking actions that jeopardize the continued existence of listed species or adversely affect their critical habitat. Does anyone really imagine that this project's greenhouse gas emissions would not adversely affect the habitat of polar bears, or other ice-dependent listed species? Yet this Administration, along with others before it, has deliberately blinkered its review of the climate impacts of massive fossil fuel extraction projects like this one, in a way that allows federal agencies to conclude that these projects won't jeopardize species. That blinkering is more a symptom of weak political will than of weak law.

Even one of the core statutes governing ConocoPhillips's rights under these existing leases, the Naval Petroleum Reserves Production Act, directs the Biden administration to constrain the exercise of existing lease rights to limit environmental harm. The NPRPA, for example, requires that BLM "provide for such conditions, restrictions, and prohibitions" on activities within the Reserve as it determines necessary to protect the Reserve's surface resources. And BLM may suspend operations and production "in the interest of conservation of natural resources" or to mitigate "reasonably foreseeable and significantly adverse effects on surface resources" under that statute.

And there will certainly be more litigation. Trustees of Alaska and other groups opposed to the Willow project released a statement saying that "authorization of the project comes after a deficient supplemental environmental review process that failed to assess the intense and cumulative impacts of the project on Arctic communities, lands and water, wildlife, and the global climate." Earthjustice has said it could file a lawsuit as soon as this Wednesday to attempt to block the project from going forward.

Global impacts

There's one other pressing question in the aftermath of the Biden administration's decision. How does this approval relate to U.S. international agreements and climate projections?

The wells on these three sites could produce more than 600 million barrels of crude over 30 years. That would release some 280 million metric tons of carbon dioxide, according to a federal analysis. A variety of different estimates have put those greenhouse gas emissions on par with half a million homes, or 75 coal plants on the grid for a year, or adding two million cars on the road. Approving such a project—rather than utilizing all its legal tools to the greatest degree possible to

pursue a different outcome—creates some cognitive dissonance. On one hand, the Biden administration says it remains committed to meeting urgent climate goals while on the other hand approving a new oil project of this size and scope. It's clearly a step in the opposite direction from what the International Energy Agency has indicated is required to meet the Paris Agreement's temperature targets. The IEA's roadmap to net zero by 2050 requires "no investment in new fossil fuel supply projects, and no further final investment decisions for new unabated coal plants."

In The Atlantic, Emma Marris takes an in-depth look at the IEA 2021 report as context to the Willow project and finds it unnecessary to meet U.S. energy goals.

"If renewables keep growing at their current rate, it projects, renewable energy would account for 38 percent of global electricity by 2027—two years before Willow oil would finally start flowing. Add in some serious demand reduction through energy-efficiency improvements and electrification of transport, and our remaining fossil-fuel needs will easily be met by existing drill sites. Forget about not needing Willow at the end of its 30-year life span. It'll be obsolete before the ribbon is cut."

Biden's approval of the Willow oil drilling project came one week before the Intergovernmental Panel on Climate Change is set to release its final component of the Sixth Assessment, the Synthesis Report. News of final approval came as IPCC members met in Switzerland. In his opening remarks, UN Secretary-General António Guterres said, "We are nearing the point of no return; of overshooting the internationally agreed limit of 1.5 degrees Celsius of global warming. We are at the tip of a tipping point." One wonders what that body has to say about this U.S. development. And how they might greet the claim by the Biden administration that "we had limited legal ability' to deny new oil drilling.