

Jody Freeman:

Welcome to CleanLaw. Today is our 100th episode, and to mark the occasion, we have a suitably important topic. I'm joined by our crackerjack HLS team, Richard Lazarus, who's a professor of law at Harvard Law School, Andy Mergen, the director of our Environmental Law and Policy Clinic, and Carrie Jenks, the executive director of the Environmental and Energy Law Program. And we are here to discuss the environmental and energy policies of the new Trump administration.

We're just shy of one month into the president's second term, and we've seen a barrage of activity, numerous executive orders on everything imaginable, including, of course, in our domain of climate, energy, environment, and natural resources. Today we'll be discussing the president's executive orders declaring a national energy emergency, Unleashing American Energy, fossil energy primarily, pausing wind leasing in federal waters, unleashing Alaska's energy potential and more. Under these orders, the president has revoked all the Biden-era climate policies, announced an end to the so-called EV mandate, paused all IRA funding for the so-called Green New Deal, withdrawn the US, again, from the Paris Agreement, directed agencies to look for emergency powers they can use to exploit oil, gas, and coal extraction, emphatically declared an end to all environmental justice initiatives and much more.

We'll talk about the impact of these executive orders, what takes effect immediately, what will take time and the implications. We will also discuss the administration's moves regarding the federal workforce, firings and reassignments that are wreaking havoc across the government, which are affecting the environmental agencies and DOJ's ENRD, of course, and the deferred resignation offer to 2 million career employees. We'll talk about pending litigation, what's likely to happen to the challenges currently in the courts, and finally what offense and defense we can expect from the states and the NGOs over the next four years. It's a lot. So let's begin. First, can I welcome everyone? Richard, welcome. Andy, welcome. And Carrie, welcome. It's great to be with you for this episode.

Richard Lazarus:

Thanks, Jody.

Carrie Jenks:

Yes, we're looking forward to it.

Jody Freeman:

Carrie, can I ask you to kick us off? Can you start by talking about the president's declaration of an energy emergency? Is there one? I thought we were the world's biggest producer of oil.

Carrie Jenks:

We can talk about whether there is an emergency. The fact is that they did declare it, which kicks off procedural requirements for the president's emergency powers. It includes an obligation to name the specific statutory authorities he intends to rely on. So this order lists several statutes including the Clean Water Act, the Endangered Species Act, and the Defense Production Act, and it directs all agencies to evaluate their legal authorities and respond to the emergency by facilitating increased domestic energy production. So one central question is the one you start with is whether there is an emergency. And the second question is what authorities do the agencies have to respond to the order?

To take a step back, I think the objective that they're trying to achieve is to expedite permitting of certain projects. But we saw this happen in the first Trump administration, we saw the Biden administration also try to increase permitting for certain projects, and it's hard for several reasons. One challenge is that the federal government or NEPA doesn't control all the permitting for energy projects because there's also state and local dynamics. The other challenge is that it takes people to do the permitting process to do it well. And we'll talk about the role of career staff. But if you don't have enough people or people who know how to get

decisions that will be upheld by courts through, then there's a risk that the process is even going to take longer than they intend. So in the end, I don't think we know exactly how agencies will implement this order, but it'll be important to watch what each agency does and evaluate each action as they come in light of the emergency that they've declared.

Jody Freeman:

And is it also right that if agencies are going to actually rely on some emergency authority in their statute, there's going to be a procedure that they have to follow, right, to actually initiate that process and so on. So it's not like the president in an executive order declaring this emergency somehow declares it for all purposes and all statutes, right?

Carrie Jenks:

Correct. And I think it also sets up a constraint on the president to make sure that there is a process of going to Congress and telling Congress what it intends to do, and it's time limited as well. So it actually creates a process for the president to follow.

Jody Freeman:

So the National Emergencies Act is actually constraining on the president?

Carrie Jenks:

Exactly.

Jody Freeman:

Let's move now to the Endangerment Finding. Carrie, kick us off and explain what the president has said about that.

Carrie Jenks:

So this was part of the Unleashing American Energy executive order. There are a lot of different components to it, but one of them was the Endangerment Finding and it directed EPA to submit recommendations to the White House Office of Management and Budget, or OMB, on the legality and applicability of the 2009 Endangerment Finding. And that's the scientific determination made under the Clean Air Act that greenhouse gas emissions endanger human health and welfare. And there's a lot of different ways the administration may attempt to do this and there's legal risk associated with each. But this executive order is consistent with the tone we're seeing, signaling a very aggressive legal strategy to push the limit of the president's authority and test how courts respond. I don't know if you agree.

Richard Lazarus:

Yeah, absolutely. Being extremely aggressive and quite interesting to contrast with Trump 1.0, the first term. So the Clean Air Act doesn't regulate all air pollutants that go into the atmosphere. It only regulates those that endanger public health and welfare. So that's the trigger for the statute. So it was really big news in December, 2009 when the Obama administration made the first finding that greenhouse gas emissions endanger public health and welfare that led to the motor vehicle rules, the power plant rules, the oil and gas production facility rules, the landfill rules. You need that initial finding. The first Trump administration in 2017, they made noises about revisiting an Endangerment Finding, but they never did, never came close to doing it. I think they realized how hard it would be. Well, this one, right at the beginning, at the start, there it is, the Endangerment Finding, that's going after the whole ball of wax. It's trying to remove any possible regulation of greenhouse gas emissions under the Clean Air Act. That's a big deal. That will be hard for them to do.

Jody Freeman:

So can we talk about this for one sec, back and forth, guys? Because while I've seen a lot of commentary actually going after the scientific determination, for them to say the science of climate change doesn't support an Endangerment Finding, that sounds very unlikely. But short of that, there are some things they could do to eliminate that finding.

Carrie Jenks:

Yeah, so the one that they could do is go back to what they tried to do last time, which was to set a threshold by which they say, "This amount of emissions is a significant contribution and anything below that we won't regulate." And so they set a 3% threshold last time, the effect of that was that they would only regulate power plants. So they might try to do that and we'd have to see if they could have the record justify that standard.

Jody Freeman:

And they said that right at the very end of the first Trump administration so it didn't really have any effect. But they could try that again. Anything else, Richard, that you think is vulnerable here, short of going after the science?

Richard Lazarus:

Well, we have to remember that in *Massachusetts v. EPA*, the Court in that case by a 5-4 vote rejected the Bush administration decision not to make an Endangerment determination. And that was a 5-4 vote. And at this point, none of those five are left. So there are probably three Justices, there are probably more than three Justices with the new Justices on the Court, who are skeptical about ordering EPA to do certain things, make certain findings. So if the new administration comes in and says, "We need to rethink how we interpret what thresholds might be needed. None of that was thought before. So we are going to basically suspend, put our hold that Endangerment Finding while we rethink it." And if they try to attack the science directly, I think you're right, they lose that easily, but they make it part of agency expertise, agency discretion, they try to go a different kind of interpretation, there's a chance they might find a receptive audience in the Court. Some of the Justices, which may still be sort of biting a little bit about their loss in *Mass v. EPA*.

Jody Freeman:

Let's turn now to the rescission of the environmental justice policies that the Biden administration launched. The Trump administration has rolled them all back. And Andy, can you help us understand what they've done here, with Richard adding some detail and some commentary about the history of environmental justice?

Andy Mergen:

Yeah, I want to start, and then I'm going to kick it over to Richard, with two points. The first point to me that I think we really need to emphasize throughout our discussion today is the human cost of the Trump administration's actions. And in this regard, one of the first things that the new administration did was eliminate the EJ positions at EPA and the Department of Justice by putting people who had that role, that is to say the role of developing policies and programs to help burdened communities. These are communities that are economically challenged, these are communities of color. And the Biden administration had done quite a bit in this area to raise the profile of these issues. And those offices were all sort of eliminated. The people working in them were put on administrative leave. And this is really, really tragic and it's part of an overall theme of sort of traumatizing, and that word is a word that Russell Vought at OMB has used, the new OMB director, to inflict trauma on federal employees.

The first real victims of this trauma were people working in the EJ space. And this is a tragedy because these programs are really intended to help communities across the country. And I would also just sort of mention that one of the things that has really troubled me is the immediate withdrawal of the Clinton administration's

executive order on EJ. This executive order has found expression in several executive branch policies, but I think it has been very meaningful in the National Environmental Policy Act space.

Richard Lazarus:

It's an extraordinary moment, Jody. And another example of sort of the no-holds-barred, no-nuance, no-subtlety sort of "destroy" mentality of this administration. Environmental justice is fairly common sense. The basic idea is that historically, and it's been shown, communities of color and low-income communities suffer disproportionately from environmental contamination around the country. That's because the actual standards themselves don't reflect their particular lifestyles and needs and exposure pathways. And it's because the lack of enforcement targeted to those areas historically over time. This began with the Bush administration, we're talking about the early 1990s, they created an office at EPA at that point, Bill Reilly, head of the Environmental Protection Agency, dealing with what was called environmental equity / environmental justice. It expanded under the Clinton administration with the executive order that Andy talked about. It didn't go away during the administration of George W. Bush, and it expanded some during the Obama administration and wasn't eliminated during the Trump administration. The offices weren't eliminated, the executive orders weren't completely withdrawn, destroyed.

But this time they come in and they target what is sort of a common sense notion of equity and justice, and they go after it with a vengeance. Now, that's probably partly because under the Biden administration, it really dramatically expanded. It became a whole government approach. And under the Inflation Reduction Act, billions of dollars of money was spent to address the needs of environmental justice communities, including the issues related to climate. So this group comes in and it's like they view environmental justice almost like a disease. And anything that's touched it has to be eliminated, every nook and cranny.

So they basically do the dismissals of personnel with often heartbreaking results, that Andy described a moment ago. They scrub everything, they want to eliminate offices, every possible grant. It's like you can't even say the words justice or environmental justice anywhere. And they're going to have to absolutely every single sort of word. It's almost Kremlin-esque, like the Kremlin. The words don't exist anymore, you can't talk about it. And anyone who has anything on their resume anywhere, they may have helped on these issues, they get suspended without pay. It's sort of pathological to an extent that I don't grasp.

Jody Freeman:

And as you say, for environmental policy, what matters is making sure that we don't further burden disproportionately certain communities, which seems just unjust and unfair. So let me move now to the other key component of the executive order on Unleashing American Energy, which is to pause the disbursements, the spending under the Inflation Reduction Act. And Carrie, help us understand what's going on here. Can the president actually pause these disbursements? And in particular, there's this part of the order that says they're going to eliminate the EV mandate. I just want to suggest there is no EV mandate. But can you talk a little bit about those components of the Unleashing American Energy order?

Carrie Jenks:

Yes. So the order, as you said, directs all agencies to immediately pause disbursements appropriated through the Inflation Reduction Act, the IRA and the Infrastructure Investment and Jobs Act, the IJIA. So when the EO first was released day one, the scope of the pause was really unclear. I think that lack of clarity has continued into the next three weeks. It's led to a lot of confusion among states, agencies and funding recipients from the federal government. And we've seen that confusion play out as OMB has released a few memos and the courts have rejected those memos. As of today, I think some of the funding is now moving, but others is not moving. And so there's still a lot of confusion.

I think the administration is trying to assert that it has the authority, despite the breach of agreements and despite the fact that this was at the direction of Congress. I think we expect these issues to continue to play out. It's also important to know how did they define domestic energy? And so interestingly, it's defined energy

as oil, natural gas, coal, hydropower, biofuels, critical minerals, and nuclear energy. So what they've excluded is wind, solar, and storage, even though these sources are in the US and they've reduced cost for energy consumers, and they're a key role in reliable energy. But I think the themes that we're hearing and seeing them play out is that they're looking to pull back money that have to do with wind, solar, and storage, as well as EVs, as we've talked about.

Jody Freeman:

So when the order defines energy to exclude those renewable sources, it's really saying go unleash and facilitate oil, gas, coal, nuclear power-

Carrie Jenks:

Yeah, only certain energies.

Jody Freeman:

And only certain energies. And just to underscore the point of the confusion over this, when the order purported to halt all funding for the Green New Deal and so on, there were agencies that cut off highway funding to states because they were reading this as a very broad pause, which started to wreak havoc in the states for all kinds of funding. And then just to underscore again, Carrie, I think you made this point, but I want to make sure folks understand it. Many of these funds are contractually obligated to the recipients, the developers, or to the states or to whomever. And if the government says, "We're not going to give it to you," they're in breach of contract. They can get sued and subject to interest payments as well coming from the US Treasury. So it's the American taxpayer on the hook if the Trump administration decides to illegally refuse to pay these funds.

And finally, these are congressionally appropriated funds under the Inflation Reduction Act. So if you want to cut off monies that Congress has spent, you probably need to go to Congress to get it to amend the Inflation Reduction Act. Does this make sense? Does this sound right?

Carrie Jenks:

Yeah. So Congress is looking at what to pull back through reconciliation. They're going through that process now and they might pull stuff back, which is the option that Congress has. But the contracts that are already under agreement, the government's federally obligated to continue to pay those. The uncertainty that's been created I actually think might be the objective, and that's concerning.

Jody Freeman:

Yeah, it's so interesting to think about how the market will react to this kind of uncertainty. Capital doesn't like uncertainty, right? So capital for projects may move elsewhere if they feel like we have an unreliable system here kind of created by this uncertainty. Let's move to the announcement that the United States would once again withdraw from the Paris Agreement. Not a surprise, because we, of course, experienced this in the first Trump administration and it was well forecasted that if he won, the president would withdraw the US again. But just to briefly remind us, that's a very significant loss for the international climate negotiation process. The executive order suggested this would be effective immediately. Of course, legally it's not. It takes a year to withdraw from the Paris Agreement under the procedures established by that accord. But it's quite consequential, right? It depletes the impetus, the energy that the Biden administration had put back into climate negotiations. The United States may decide not to participate in any round of communications or talks and basically pay no attention to its commitments under the Paris Agreement to reduce emissions and so on, not submit updated plans.

So I think we all are aware of the loss this represents to momentum going forward for a problem that really can't afford any loss of time or attention. But I think there is still going to be a commitment in the EU obviously to at least maintaining progress until a new administration can come to town. I also think there's

an opening here for China to possibly, instead of retreating, lean into things and become the sole leader on this issue with the absence of the US. So we'll see how this unfolds. I'm going to hold judgment until I see what the international community can do while waiting for the United States to show up again in the international arena.

Richard Lazarus:

Jody, I say give us hope, Jody. Give us hope.

Andy Mergen:

Yeah.

Jody Freeman:

But let me move us to a new topic, which is a subject of the separate order. Andy, can you help us understand what the administration has done on Alaska in particular, singling out Alaska for its own order to help advance resource development there?

Andy Mergen:

Yeah, I think the Alaska order, this specific order addressed to Alaska issues, which is really in part granting of a wish list by Alaska's conservative governor is really worth paying attention to in relation to what public lands management looks like going forward. On the one hand, it's just more of the, "Drill, baby drill," agenda and a reversal of steps that the Biden administration took to slow down and protect areas from oil and gas drilling. But on the other hand, it touches on some really important issues of sort of public land management. And Alaska is making a very muscular attempt to sort of ease the federal government out of, or maybe eject is the better word, eject the federal government from land management in Alaska.

And that bears watching because the federal government manages a third of the nation, and these include our national parks and our national forests and the like. And these resources belong to all Americans. And Alaska's attempt to sort of pull away from government management of resources in Alaska might be very meaningful for other states as well that bristle at the federal government's role. But these battles should have been considered settled like so much a long time ago. So they're very concerning.

Jody Freeman:

In addition to the Alaska order, there is the order that concerns withdrawing the outer continental shelf from offshore leasing for wind. It's a pause on leasing. Carrie, can you tell us something about this? This is in addition to saying there will be no new leases offered, the order suggests that there should be a re-examination of existing leases to see if there might be a legal basis for removing those. The president's authority here rests on using section 12(a) of the Outer Continental Shelf Lands Act to withdraw those areas from leasing. And ironically, they rely in part on concern about harming marine mammals and worries about inadequate environmental impact statements in this one context in order to say, "We want to pause leasing." Carrie and Andy, can you just say a quick few words about the impact of this order?

Carrie Jenks:

Yes. I think there is a tension that we're seeing where they're saying, "We're concerned about species for one type of energy, but we're going to speed up the permitting of oil and gas leasing," for example.

Jody Freeman:

There's an ideological impetus here, and it's shown in the way they handle endangered species. "Let's reconsider their protection when it comes to oil and gas development, but let's really care about them when it comes to stopping renewables like wind."

Carrie Jenks:

Exactly.

Andy Mergen:

Yeah, if I could just add in, the overall trajectory of this administration on endangered species and species like marine mammals is just complete abject hostility. The Interior orders call for the convening of the Endangered Species Act God squad on a quarterly basis. That is not a sign that this administration wants to find ways to protect species.

Jody Freeman:

And the quarterly convening is even if there are no applications to have them use their exemption authority, they should look around to see if they want to use their exemption authority spontaneously.

Andy Mergen:

Exactly right. And that's why I want to say that, going back to the Outer Continental Shelf Lands Act order on offshore wind, it is this rationale, this marine mammals rationale is so plainly pretextual that no one is going to be convinced that they care one whit about these species. And in the Trump 1.0, one of the biggest losses in the Court that the administration suffered was the Commerce Clause Census case. And again, the Roberts Court saw through sort of the pretext being deployed in terms of the changes to the census form. And I think here we see the Trump administration heading down a road that I think that environmental groups and folks who care about these renewable energy developments should see some success in court because this is so blatantly pretextual.

Jody Freeman:

Let's turn though to something we're all I think extremely concerned about, it's very distressing, is what's happening to the federal workforce, to the civil service through a series of actions that the Trump administration has taken. OMB and the Office of Personnel Management have taken a number of steps to reassign people, to offer this deferred resignation to all federal workers. The firings we all are aware of and removals of people without regard to legal or procedural requirements and so on. Andy, I'm going to turn to you again to kick us off. This has been extremely distressing and it's really affected both the Environmental and Natural Resource division within the Department of Justice and the Environmental Protection Agency, along, of course, with many, many other agencies.

Andy Mergen:

Yeah, thank you, Jody. As you know, I spent over three decades in the federal government before coming to HLS. So what I see happening, which is the series of actions against the federal workforce, are really heartbreaking. And it's so tragic because these are all public servants doing their very best. They've foregone higher salaries in the private sector because they see great value in the work that they're doing protecting the environment and managing resources in a thoughtful way following the directives of Congress in this regard. And there's nothing subtle about this attempt really to inflict, and again, in Russell Vought's words, trauma on the federal workforce. This deferred resignation offer is not a scalpel, it's a cudgel. It is intended to cut the workforce sort of immediately. The offer really does appear to be unlawful on its face. It advances promises that would be in violation as the court filings have made plain of the Antideficiency Act. The offer is conveyed in a way that's plainly insulting. It tells federal employees, to paraphrase, "Now is the time for you to get out of government and to become productive members of society in the private sector."

I want to be clear that there are undoubtedly efficiencies to be had in the federal government. No one could credibly say otherwise. But you want to deploy a scalpel. You don't want to deploy a sledgehammer to the federal government unless your goal, and you used the word earlier, Jody, is to just inflict chaos. Because it's so important, the vice president was recently in East Palestine, Ohio making promises to those communities

about redress of that catastrophic railway disaster, he will need EPA to fulfill those promises and he will need DOJ and EPA to meet the needs of a community when the next disaster occurs, which it will inevitably happen. And you are senselessly cutting this workforce. And even those people who have not been reassigned or riffed or fired as probationary employees, which is what we fear next, many, many good people are going to leave and it's going to be catastrophic.

The one last thing I just want to say is that there's both madness to this method, which is this cudgel sledgehammer they're applying, and also some method, which is that they're very focused on teeing up these Article II of the Constitution arguments related to the executive's authority over the civil service. They have advanced a very, in my judgment, extreme view of the unitary executive theory, which suggests that civil service reforms, which go back well over 100 years, unconstitutionally infringe on the president's authority over his workforce. I think those arguments are wrong, but I think part of the calculus here is that they think that they will find support for many these actions in the US Supreme Court. And I think this is all very terrifying. And I think of more than anything else, these actions over the first few weeks of the Trump administration, if not arrested soon, are likely to really set us back on environmental protection and enforcement and public health.

Jody Freeman:

Well said. And Richard, what would you add? What are your observations?

Richard Lazarus:

Well, the first thing I'd add is I think Andy is dead on on all of his points. At every level, there's an enormous personal cruelty to what's going on. The impact on existing government and its ability to provide essential services to people is being catastrophically threatened. I would add a couple of things. One is it's not clear to me from what they've said if they lose in the Supreme Court, they will acquiesce. There's that third thing we've heard, which is sort of unprecedented, which is this notion which the vice president has been touting in the past several weeks of, "What business does the Supreme Court have in telling the president of the United States what he can do in the executive branch with his own employees?" It's crazy. Trump referred to one of the rulings by Judge Paul Engelmayer involving access to technical information at Treasury as illegitimate. So the levels of constitutional crisis teed up by this group.

The other thing I'll say is just the obvious, no one has ever done this before. We've had presidential whiplashings back and forth from Carter to Reagan, to Clinton, to Bush, to Obama, the career core, everyone has recognized, they're not the deep state. They're there with expertise. They're committed to public service. They do their job. They serve those political leaders. But no one has ever sought to destroy that career public service with repercussions far, far beyond the current administration and with a personal cruelty, which is really deplorable.

Jody Freeman:

The problem here, of course, is I think the political calculation is quite likely to be right, which is the Democrats are not going to fight back hard against this because you don't want to look like you're defending the bureaucrats. The bureaucrats have no friends, right? So it's really incumbent on us to explain what the so-called bureaucrats are doing with their time, right? They're implementing laws that Congress has tasked the agencies with implementing and enforcing. They're busy protecting public health and the environment and food safety and protecting consumers from being defrauded. They're doing the work that Congress has assigned them, and these agencies are full of expertise, Richard, as you cited. That is we have wildlife biologists and economists, we have engineers, we have experts in public health, epidemiologists. And the fear is that bad things will happen because we'll have a lack of capacity in these agencies.

The final mention here is just of the Schedule F reclassification, that it sounds very obscure, but the administration has announced that it intends to follow through on something they thought they might do in the first administration, which is to reclassify a broad swath of career employees who can't be fired normally



under civil service rules, to reclassify them as political or at-will employees on the theory that then the administration can install people they prefer, who will be more aligned, who will be loyal, and that will further decimate this idea of a permanent career professional set of experts. And if that is executed, as you said, Andy, and as you said Richard, there will be long-term damage to the federal government's expertise and independence from the political priorities of any administration.

Let me turn to litigation. You alluded to it, some of it, Andy, starting, and Richard too, the cases moving through the courts, challenging some of these policies. How is the administration going to handle the pending legal challenges to Biden administration rules that are still in the courts? Can you talk us through that, Richard? Start us off.

Richard Lazarus:

Sure. So one way to think about it, divide them into two categories, their offense cases and their defense cases. The offense cases, the ones being filed right now, they're challenging all these initiatives being done by the Trump administration. The funding freeze challenges, the personnel challenges. Because the fact is they're doing it in such a broad sweeping fashion, seemingly to not care whether they lose some cases and not care about existing law. With that said, you have to bring the lawsuits, you have to get this beginning part of the courts to speak, and you can't acquiesce the notion that Trump administration won't acquiesce in them.

So there's a whole series of lawsuits being brought around the country, challenging the fund freezing, the closing of agencies, the personnel filings, the deferred resignation letters, all that stuff. And that's very important. We have to see how it plays out in the courts. The birthright, not environmental, but the birthright citizenship issue. And we have to actually hope, at least my hope is the first issue which goes up to the Court is one in which the Court rules against the Trump administration. As Andy alluded, I'm a little bit worried when it comes to the power of the president to remove officers of the executive branch. That's one in which the Court almost seems ready to rule in their favor, not necessarily on the career people throughout the government, but on the high ranking officers. So I'm hoping that's not the first issue that goes up before the Court because it's important to me at least the Court announces it wants to put some guardrails on what's happening.

Jody Freeman:

So you mean maybe overruling Humphrey's executive or something going one step further from Seila Law and so on?

Richard Lazarus:

Exactly. That one seems to be pitched, and that's one reason they are smartly pushing that one fast by ruining some of the NLRB and other people like that. They'd like that to be the first issue. I don't want it to be the first issue.

Jody Freeman:

Right. So Trump firing independent agency heads we're talking about, right?

Richard Lazarus:

Yeah. And the inspector generals, not giving 30 days notice, that's the kind of thing which I worry don't want to be the first wave before the Court. I want some of the funding freeze issues to be there, some of the personnel issues on the lower career people to be there. But the big litigation we're seeing right now is just the normal stuff of the pivot from the Biden administration to Trump administration. Biden administration was very ambitious in executive orders, but also in rulemakings on various environmental and natural resources issues. And the new administration is coming in and they've targeted almost everything for review, a rescission. Same thing they did before in 2017. Same thing Biden did in 2021.

So there are a whole series of cases all pending before the courts around the country. These are cases in which now the environmental NGOs and the states sympathetic to those Biden regulations, they now have to step in. They have to step in and be the primary defenders of those regulations because the federal government was defending them, they're going to step out. So here are some of the general categories of cases. We've got several relating to motor vehicles, rules put out by EPA and National Highway Traffic Safety Administration.

Jody Freeman:

So these are standards for GHG emissions?

Richard Lazarus:

These are standards for regulating greenhouse gas emissions for motor vehicles, one of our largest sources of greenhouse gas emissions. You've got all the waivers dealing with California, if the federal government's falling out, whether California can enact tougher requirements on motor vehicles or not. That was approved in the Biden administration. Those are now targeted for rescission, reversal, and their case is pending right now.

Jody Freeman:

It's worth noting since you mentioned it, that one of the executive orders of course targets the California waiver for elimination, which would remove California's really important role driving greenhouse gas standards forward. So that's something to watch too.

Richard Lazarus:

Yeah, California has played an outsized role historically in air pollution and certainly for greenhouse gas emissions, and that's exactly why the Clean Air Act actually keeps singled out California to allow them to do tougher standards. No one else gets singled out. Other states can piggyback on California. Not surprisingly, very important to people who care about climate change. And not surprisingly, for the same reason targeted by the Trump administration.

We have several rulemakings related to power plants. We've got ones dealing with, again, sort of power plant greenhouse gas emissions for the power plants across the country. We have interstate air pollution rules now pending in the DC Circuit. We have mercury rules with power plants. We've got very important Clean Water Act rules and hazardous waste rules dealing with power plants, which target coal combustion residuals known as coal ash. Those are extremely important for public health and welfare, and they play a big import role on climate indirectly.

Jody Freeman:

And just to underscore this, Richard, the question here is this administration going to defend Biden era environmental protection rules in the courts? Is it going to reverse its position? So can you give us a little flavor? I'll turn to you, Andy for this. What are the choices the administration has in terms of its posture toward the courts? Does it just say, "Oh, wait a minute, we'd like you to hold all these cases in abeyance while we go reconsider these rules because we want to go weaken them"?

Andy Mergen:

What the administration should do is for these rules that they don't like that have been through notice and comment rulemaking is if they disagree with the policy judgments contained in that rule or they question the agency's authority in the first instance to promulgate that rule, they should repeal that rule with a valid rulemaking. And some of that occurred during Trump 1.0. In my prior time at DOJ, I was involved in decisions relating to the Obama hydro fracking rule, the BLM's waste prevention rule or so-called venting and flaring

rule for oil and gas. And in those instances, the Trump administration sought stays of those rulemakings and then proceeded to roll them back through a notice and comment process. I am genuinely concerned that there are particular cases out there where the administration may try to allied those processes and lean into the courts to basically invalidate these regulations in order to streamline obtaining the result that they're seeking.

Jody Freeman:

And that's not the tradition, right? The tradition isn't to let the courts do the work for the administration of undoing rules. They should take the rules back and take accountability for weakening them. Is that basically your point?

Andy Mergen:

That is exactly my point.

Richard Lazarus:

Yeah. And some of these rules will be more vulnerable in the courts than other rules. The ones that can be defended more based upon the strength of the rulemaking record, which says, "This is in fact an available technology, this is in fact what people can do," I think those are less vulnerable. So it's not clear to me that the Biden rules won't be upheld in some respects in some courts on some of these issues.

Andy Mergen:

I would like to mention for our listeners two particular areas of litigation that I think that they should pay attention to. One is litigation around the National Environmental Policy Act. This is the environmental statute that is litigated more than any other environmental statute. It becomes an issue in countless decisions regarding oil and gas permitting, LNG permitting, renewable energy permitting. And a lot has happened in the last several weeks around the statute. A DC Circuit case decided a few months ago held that the regulatory regime for the National Environmental Policy Act was invalid because Congress never gave authority to the agency that promulgates the regulation's express authority. Rather, that authority came through an executive order. And this has unsettled sort of what we understand to be the status of NEPA regulations. And just a week ago in a challenge to Biden administration NEPA regulations, a court in North Dakota held that in fact there was no authority for those regulations.

The Trump administration, mindful of this controversy, revoked the Carter era executive order, which gave the Council on Environmental Quality the authority to issue these regulations. So we are entering into a world of incredible uncertainty about the National Environmental Policy Act. If the administration thinks that there's no regulatory regime, can it lean into the court's decision in the DC Circuit case, which cast doubt about this regulatory regime and sort of say, "Well, we're done here," or does it have to go through the rulemaking process? And that'll be an important one to watch.

The other cases that I would just mention in the public lands arena also relate to this executive authority issue. We know in Trump 1.0, there was a lot of litigation about national monuments, and the Biden administration has been very ambitious in creating national monuments. Does President Trump have the authority to change the boundaries of those monuments or eliminate them altogether? And this too, like the federal personnel issues, goes to the president's authority in Article II of the Constitution, and worth watching. Same with Biden's decision to withdraw certain areas from development as oil and gas leases under the Outer Continental Shelf Lands Act. The question is, can President Trump undo those withdrawals? So I just want to indicate that there's a lot going on as this administration moves towards the most muscular, powerful executive in sort of the history of our country.

Jody Freeman:

And Andy, as you're pointing out, these themes around pushing the boundaries of executive power, trying to really destroy the capacity of the civil service, all of that is playing out in lots of areas, but in our area in particular, environmental regulation, climate change, it seems to be a targeted focus area for the administration. We're watching them because they're sort of an indicator, if you will, of what the administration is doing more broadly.

Carrie, let me turn to you and ask you to comment a bit on the private sector and its reaction to the possibility, the potential for regulatory rollbacks, these cases moving through the courts that seek to overturn Biden-era regs. Do you think all of this is something the private sector wants to see? Are they absolutely aligned with the Trump administration agenda? How are you seeing it?

Carrie Jenks:

No, I think it's potentially really harmful. I think the uncertainty is giving me a lot of concern because as we've discussed, some of the actions of the executive orders have immediate effect. But most should take time. It either requires an act of Congress, if we're talking about the Inflation Reduction Act, or it requires agencies to propose, take comment, finalize the rules, all of that should take time. And we'd expect the agencies to have to justify their decisions. So when Trump states in one executive order, you mentioned that there's an EV mandate and he's removed the EV mandate, it's actually not true. But I worry that the uncertainty is giving people pause and it gives the market pause, and so then it becomes somewhat true. If everyone stops making investments, then corporations stopped responding, and that uncertainty slows the process down.

Jody Freeman:

But do you really think, for example, the auto industry says, "Oh, in an executive order, the president says there's an EV mandate that he's lifted," so the auto companies that have put billions and billions of dollars into the EV transition making many more models of electric vehicles and so on, are they just going to stop? Do you see it that way?

Carrie Jenks:

I don't think they stop, but I think it creates a hesitancy, and so things start to slow. And so then I think it matters what are the reasons, like you said, that they already made those commitments? Is it due to a competitive advantage? Is it due to customer demand? Is there a long-term risk planning that they're doing? But does that uncertainty pause them? I think most companies' investment decisions go beyond four years, and we're seeing this president cycle of back and forth every four years. Companies are making 10-year investment decisions. And so I worry that this uncertainty and the executive power that we're seeing being pushed does that slow people down, but I don't think we yet know.

Jody Freeman:

Can I ask you about one more example? Let's take methane. The oil and gas industry was very involved in the development of the Biden era methane rule to control methane emissions from their facilities. It looks like the Trump administration would want to roll back those methane rules, and of course you might think industry would be aligned with that, but is it possible that that would actually be something that oil and gas industry isn't 100% on board with?

Carrie Jenks:

I think there are definitely companies that wanted the methane rules in place. They might want more time, they might want changes to them, but there are companies that want to know what the rules are, and they made some decisions to reduce methane emissions. Because remember, if you reduce methane emissions, you've got more product to sell. And so I don't think that the industry's uniform in saying, "Get rid of all these rules." But if you go back to what we were talking about, the Endangerment Finding, if they get rid of the Endangerment Finding, then there is no trigger for those rules. So I think it's going to be important to

understand, does the administration just try to take a sledgehammer to these rules or do they try to hear what industry wants and try to fix them? I don't yet think we know what the administration's going to do, but it's going to be important to see what they hear from the EPA within the next 15 days at this point on the Endangerment Finding.

Jody Freeman:

Okay. Last topic, who's running these agencies? The confirmation process continues. We have new leaders, of course, at the Department of Energy, at the Environmental Protection Agency, at the Department of the Interior, and of course at OMB and Russ Vought. Richard, let's start with you with Administrator Zeldin at EPA.

Richard Lazarus:

Zeldin's an interesting appointee. He's not been a high-profile figure, unlike some of the nominees like Robert F. Kennedy, Jr, Tulsi Gabbard-

Jody Freeman:

Pete Hegseth.

Richard Lazarus:

Hegseth at Defense. He's a former congressman. He doesn't seem to have any particular interests or expertise in environmental law. He's an energy guy and everything he said so far is about EPA in terms of energy. We don't have yet seen him be as extreme as he might turn out to be. We have to wait and see whether he is willing to do the legwork of the more extreme people in the administration. We don't know. The Deputy Administrator of EPA, the designee, David Fotouhi, he actually looks like he's an expert in environmental law. A lot of the people they've appointed aren't experts in the area at all. They're ideologues. They belong to trade organizations. He actually has been a practicing lawyer, a partner doing environmental law at Gibson Dunn. He's done CERCLA, he's done clean air, he's done clean water. He was acting general counsel of EPA under Trump, the first of administration. There's nothing about him, which makes him look like he's some radical effort to destroy the agency.

So again, we have to see does he have an independent view? Does he want to get things done? Or is he sort of drinking the same Kool-Aid that all the rest of them are? Look at the other EPA appointees, they're like trade association people, American Petroleum Institute folks the rest, head the Air Division, the Chemical Safety Office Division, the Deputy General Counsel is sort of part of Project 2025 on EPA. These are people whose credentials are ideologues. That's why they're there. That's not a good sign. So let's wait and see.

Jody Freeman:

Andy, what about the Department of the Interior?

Andy Mergen:

Yeah, I mean, in some ways, Doug Burgum is a very traditional pick for Secretary of the Interior, right? He is from a high plain state, so a Western state, North Dakota, he's a governor and elected official. For years and years, Secretaries of Interior have been politicians from Western states, whether it's Bruce Babbitt or Udall or Gale Norton or Ken Salazar. These are all folks who have been through the rough and tumble of elected politics and have a feel for these issues by virtue of the geography from which they're coming. So in some ways, I think this is a good sign. I feel like David Bernhardt, who was Secretary of the Interior during Trump 1.0, was maybe more of an ideologue. On the other hand, Burgum's direction and comments to the agency are not very encouraging, and it seems like he really understands his job to promote fossil fuels to the maximum extent possible.

I'm interested, of course, because my career was spent at the Department of Justice, at what's happening there, and I'll make a couple of observations. One that Bondi's directives to Justice Department and attorneys were just incredibly shocking across the board. They seem to insist on loyalty to the president and not to the institution. And DOJ has a very strong institutional culture, and these directives will not be received. Most DOJ lawyers consider themselves highly nonpartisan, and these directives that Bondi has issued actually seem to politicize the department to an extreme degree.

I think it's very interesting that none of the familiar names from Trump 1.0 are back in the Environment of Natural Resources Division. I was there in ENRD, as we call it, during Trump 1.0, and I had good relationships with the people that President Trump had appointed to run that, to run ENRD and to have leadership roles. The fact that they're not coming back is concerning to me because I think it says something about how things have shifted in terms of these demands for loyalty oaths and sort of efforts to extinguish the institutional values of the Department of Justice.

Jody Freeman:

It took over 100 years, as you said, dating to the 19th century to convert the federal government from a system of spoils and loyalty to the politicians, to a system of professionalism and independence and dedication to mission with protections for career people. And I think what we're all saying here is we're very concerned about the upending of that system and that really what people in the government should do is just be loyal to the president. That is a giant step backwards and worrisome for not just environmental protection and climate change, natural resources, but worrisome for our system of checks and balances, really for the foundation of law in this country.

Let me just say a quick word about Chris Wright as the Secretary of Energy. I mean, this is an oil and gas executive, but not just an oil and gas executive, somebody who in the past has made an argument that there's a moral case for fossil fuels. It's a very familiar perspective from the oil and gas industry that is about advancing fossil energy. So if you care about climate change, that particular appointment is extremely worrying. The only good news is Department of Energy really doesn't have anything to do with energy production. They have a lot to do with managing the cleanup of nuclear waste facilities around the country. A little bit of regulatory authority over appliance standards, but most of his power has to do with having a hand on the lever of federal funding through the Department of Energy. And I think that so far the indication is he would support funding for nuclear and fossil energy, perhaps for CCS and so on, and not for renewables, wind and solar.

But there might be a bright spot here. There might be some support for critical minerals. And so I want to inject a little bit of optimism in suggesting that at EPA, Richard, with Zeldin, you could see someone who's willing to focus on safe drinking water and willing to focus on traditional public health concern. You could see at the Department of Energy funding for things like critical minerals and maybe nuclear for some folks who think that nuclear energy is an important part of addressing greenhouse gas emissions. Well, I think we have to wait and see on these questions. Let me give you all a chance to make some closing remarks. What is your general sense short of a month into the Trump administration? What are you looking for? What are you bracing for? Richard, let me start with you.

Richard Lazarus:

Sure. Thanks, Jody. Well, what we're seeing is the siege, right, on the nation's environmental laws. This isn't the first time it's happened. There have been past efforts to uproot environmental law. It happened under several administrations in the past, there was a bullseye right at it, and they all failed. One is tempted to say, "Well, here we go again," but environmental law will show its surprising resilience. It's part of the legal landscape of the country. It's settled economic expectations for a lot of people's property values, for business. There's a billion dollar pollution control industry in the United States. This too will fail. This too will pass. The problem is this one is unprecedented depth, breadth and, mostly, apparent lack of care whether what they're doing is lawful or not. That we've never seen before. The lack of care whether they're acting

lawfully in freezing funds, in firing people, and maybe, right, lack of care acquiescing in court orders when they're found to be unlawful. That makes it unprecedented. That has me deeply concerned.

Jody Freeman:

Carrie?

Carrie Jenks:

I would agree with Richard. What I'm watching for is what do the other branches of government do? We've talked about the role of Congress, we've talked about the role of courts. Do they step up and hold the Trump administration to the same rules that we saw the courts hold the Biden administration to? For example, does the new administration respond to comments? We saw the Supreme Court say that in the Good Neighbor rule, that agencies have to respond to all the comments. Do they require the executive branch to act consistent with clear congressional delegation? It requires the courts to act, and I hope that people hold the Trump administration accountable to those actions. I think the chaos that's been created is the most concerning. But if I'm going to be optimistic, I hope that courts and Congress step up to say they have a role in this government.

Jody Freeman:

Andy?

Andy Mergen:

Yeah, I agree with Richard and Carrie. I do think there's a saying around law schools that the courts can't save us, and I think they can do a lot of the heavy lifting, but I think it's going to fall on the American people to put an end to this. I'm really very concerned about the gutting of the civil service. I think that's broader than the scope of the work that we do here in environment and energy. But its repercussions are really catastrophic, and we need to put an end to that. And people should be mindful on paying attention to this, and the media should be paying attention to this.

I think that if people understand and just think about who they know who work in the federal government, they will realize that it's not a deep state. It's not filled with the ideologues. My family is from the Western US, that's why I care so passionately about public lands. And the people who work for the Federal Land Management Agencies tend to be local people. They tend to have, by and large, pretty conservative instincts, just like all of the members of the FBI tend not to be radicals, they tend to be conservative law and order people. I think that's across the board in the federal agencies. I would ask people to think about the people that they know in the federal government and reflect on the important work that they do.

I think that because so much of this is sort of people led, there's reasons to be optimistic. Because people care about public health, because they care about inequity, there are reasons to be hopeful. But people have to remain super engaged in order for us to make progress. The administration is fond of in its first few weeks here of saying, "Promises made, promises kept," but they told us they knew nothing about Project 25, never heard of it. And yet that seems to be driving the decision making. They tell us that they care about, more than anything, merit and meritocracy, but they're applying a cudgel to the federal government. People need to pay attention and engage on these issues.

Jody Freeman:

I just have a few points myself. First, I was in Los Angeles in January and experienced the terrible catastrophic fires, and those fires were made more intense and more destructive because of the effects of a warming planet. And there's no question that climate change is making natural disasters worse than they would otherwise be. And my point is simply that climate change is going to continue to unfold, and the government is going to have to deal with it at one point or another. It may come in the form of billions and

billions of dollars of disaster relief, in the form of a collapsing insurance market, but we are going to have to deal with these problems.

The second point I'd make is politics could save us. Members of Congress have districts that depend on funding from the Inflation Reduction Act and the Infrastructure Bill. They're not going to want to see those billions of dollars get reversed by Congress. And from what I have seen, up to 80% of the funding from these pieces of legislation have gone to Republican districts. So I think there could be some real resistance to undoing all of that work that Congress did in those two bills. The final point to make is just I have great faith in the states. The states, as Richard said, are going to have to step up, and they're prepared to step up to keep advancing progress on these issues, to step in as litigators to challenge what the federal government's doing.

My very final note is to our students who I think are in the right place if they're at law school, learning about the legal system, learning about the rule of law, learning about respect for procedure, this sounds all very quaint, doing things the right way, doing things lawfully, respecting the Constitution and so on. But it's of the utmost importance at the moment, so I want to encourage our students to keep at it and to see themselves as doing something very important at the moment and getting the skills they need for the future. Richard?

Richard Lazarus:

Yeah, I just want to echo what you just said. That's a wonderful closing remark. If you're interested in public service, if you're interested in these issues, this is your time. This is exactly why you wanted to work on these issues. It's exactly why you wanted to care about these issues, exactly why you wanted to study and become an expert on the rule of law and our nation's law. This is your time. There's nothing incidental about it. And I think that's a fabulous way to talk to our students.

Jody Freeman:

I want to thank you all. This is rare to have the Fab Four together for one of our CleanLaw podcasts. I'm so glad we could do this for our 100th episode. Thank you, Richard. Thank you, Carrie. Thank you, Andy. We'll come back and do another one of these maybe six months in to see where we are at that point. Thank you all.

Richard Lazarus:

Thanks, Jody.

Carrie Jenks:

Thank you.

Andy Mergen:

Thank you.