Intro:

Welcome to Clean Law from the Environmental and Energy Law Program at Harvard Law School. In this episode, EELP founding director and Harvard Law Professor Jody Freeman speaks with Carrie Jenks, EELP's executive director and Ari Peskoe, director of EELP's Electricity Law Initiative. They discuss President Trump's most recent executive orders on climate, energy, and the environment and what they are watching for as agencies begin to implement the administration's directives to roll back environmental regulations; challenge state energy and climate policies, and revitalize the coal industry.

Jody Freeman:

Welcome to CleanLaw. Today we're going to discuss the latest round of Trump administration orders that are focused on energy, environmental, and climate policy. My guests today are two of our main players at the EELP, Carrie Jenks, the executive director, and Ari Peskoe who directs our Electricity Law Initiative. Carrie, welcome.

Carrie Jenks:

Thank you.

Jody Freeman:

And Ari, great to see you.

Ari Peskoe:

Good morning, Jody.

Jody Freeman:

We are going to dive into the new executive orders that the president signed in April. But before we do that, we do need to go backwards first to set the stage, because there was a prior round of executive orders right after the administration took office, and the president in January signed these, focused on the energy climate and environmental policy of the administration. I wanted to start there with that first round and sort of explain why the first round is the predicate or the opening act really for the second round. The first order that is important for stage setting is declaring a national energy emergency, which President Trump did right out of the gate. And there was another order that was titled Unleashing American Energy.

There was another order called Putting America First in International Environmental Agreements, and that had to do with withdrawing us from the Paris Agreement, and then an order about unleashing energy production and development in Alaska. And then finally, there was an order withdrawing all areas of the Outer Continental Shelf from offshore wind leasing and pausing both onshore and offshore wind. And there was another very consequential order that really sought to roll back all environmental justice work in the administration, but all told, that set of initial orders from January. Carrie, can you give us sort of an overview of what you saw the president trying to do immediately after taking office?

Carrie Jenks:

So the initial executive orders we saw in week one were kicking off the deregulatory efforts by the administration. It was signaling to the agencies what steps to take. And so the agencies have been taking the past few months' efforts to list out what rules to roll back, to look at what permits to pull back, and thinking through what efforts it can take under the energy emergency that the administration declared in that first week.

Jody Freeman:

So just as a reminder, and I'll turn to Ari for this, declaring the energy emergency, it didn't really do anything all by itself, right, Ari?

Ari Peskoe:

Well, I think it's worth saying at the outset that there is no energy emergency. Just as an objective matter, energy production in the United States is at record levels, particularly fossil fuels, which obviously this administration is focused on. And certainly nothing in the power sector is allowed based on this generic national emergency declaration.

Jody Freeman:

So that might've been more of a performative moment in the executive orders, invoking the idea of an energy emergency, perhaps as an effort to convey to the public that the administration was going to take a number of steps that would be justified by this notion that there's an emergency. And Ari, as you said, not really. We're the biggest oil producer in the world and we don't have any shortage at the moment of electric power, do we?

Ari Peskoe:

Right. And at the same time, they're trying to cut off wind power development, which doesn't really make a whole lot of sense, but the declaration is out there. Courts are not going to probably overturn that sort of declaration by the President of the United States. And I think you're right that it was really just a signal to the administration and to the public that he intended to take some drastic actions.

Jody Freeman:

So this first set of orders included a number of directions to the agencies, and I think this is an important point to make, again, as background, just to situate everyone, or to remind people that executive orders by and large with some exceptions, don't immediately have an important effect. Sometimes they do. For example, if the president can immediately rely on his foreign affairs power to sign an executive order and really change the playing field immediately. Most of the time executive orders in our field are directing agencies to undertake things. They direct agencies to look at regulations and consider rolling them back. They direct agencies to look at funding that's being dispersed and consider pausing it, and so on. There are some aspects of these initial orders that did seem to have an immediate effect.

The first I would say is the pause on issuing grants, loans that had been approved under the Biden administration that had been contracted for, or what we call obligated. There was a fairly immediate freeze on these funds. And I just wanted, before we move on to the next set of orders, to catch us up on where we are now with that freeze of Inflation Reduction Act funding and infrastructure bill funding that had been passed during the Biden years. That money had been obligated for a number of clean energy projects and developments. And the question is, did the Trump administration effectively freeze all that funding? Carrie, can you give us your sense of where the lay of the land is?

Carrie Jenks:

Sure. I think the status is mixed at the moment. Some grants have been opened up and the money is moving, some grants are still frozen, and other grantees have received actual termination orders. There's also a series of ongoing lawsuits challenging the continued freeze of those funds and the proposed termination of awarded grants. For example, the District of Rhode Island has enjoined several agencies from freezing, halting, or pausing the funding on non-individualized basis. The Southern Environmental Law Center filed a case and the court has

held its first hearing in that case, but that case is ongoing in terms of how those grants will move forward. There's also a case about the Greenhouse Gas Reduction Fund litigation that's separate from these other grants. Six lawsuits have been filed and the DC District Court granted Climate United's motion for preliminary injunction, but then the DC Circuit stayed that preliminary injunction. So at the moment, those funds also remain frozen.

Jody Freeman:

So the administration has had some success freezing these funds. And you remember the big controversy over Lee Zeldin, the EPA administrator saying that he was going to stop the greenhouse gas reduction funding, billions of dollars from being dispersed even though it was already contracted for and already sitting in the Citibank account. The Department of Justice sought to freeze the Citibank account. And of course, that led to a lot of drama. One of the AUSAs, as I understand it, a senior justice department lawyer resigned over being asked to open a criminal investigation with what she viewed as inadequate evidence of any fraud or misdeeds. And so that all unfolded in the press. And this was all about blocking the funding from getting out the door. And as you just said, Carrie, it looks like at the moment where the litigation is, that money is indeed blocked for the moment.

Carrie Jenks:

Exactly.

Jody Freeman:

The other piece of this I just wanted to highlight is in the first batch of executive orders, there was this direction to agencies to look at rules that might be rolled back, rescinded, repealed. And one of the most prominent is the endangerment finding, which is the Environmental Protection Agency's scientific finding that greenhouse gases pose a danger to health and welfare. That scientific finding is the basis, the legal predicate for issuing greenhouse gas rules under the Clean Air Act. So Carrie, that direction to re-examine the endangerment finding was made in the first round of orders. Where are we on that?

Carrie Jenks:

So on the endangerment finding, EPA around mid-March put out a series of press releases and fact sheets. And the endangerment finding was one of those where EPA has signaled, yes, they are going to undertake a proposal and review of the 2009 endangerment finding. In the press release, EPA signals that it intends to argue that EPA must consider each of the six greenhouse gases individually and that EPA needs to consider cost. So we can talk about whether we agree or not on how they're going to do that, but I think we're going to start to see a proposal this spring or summer that reveals how the EPA intends to roll that back.

Jody Freeman:

And why does this matter? Because everybody talks about the endangerment finding, it winds up in media stories and sometimes people think, "Well, what's the significance of this?" Why does this really matter?

Carrie Jenks:

So if we don't have the endangerment finding, EPA has no legal hook to regulate any greenhouse gases under the Clean Air Act. So that would be the power sector rules reducing greenhouse gases, the car transportation rules, as well as oil and gas methane rules for existing sources. And so without that fundamental rule, the statutory obligation to reduce emissions from those sectors would be eliminated.

Jody Freeman:

So with that as table setting, that's still in process. We don't know what will happen. Will the Clean Air Act effectively be sort of knocked out or limited as a source of regulating GHGs in the US economy? That's an open question. So let's turn now to the new batch of executive orders that came out this month in early April. First, there's a set of orders that are about deregulation. Again, an aggressive effort to eliminate or weaken climate and energy-related regulations. And we'll talk about those in detail. It has to do with basically rescinding rules while skipping the normal legal process. The second thing these orders do is they invite the Attorney General of the United States to examine state and local clean energy policies and laws and do whatever she can to challenge them and ensure that those that the administration views as unlawful or unconstitutional are not enforced.

The third thing these executive orders do is they adopt a series of measures that are meant to support the coal industry by exempting coal plants from various regulations and by invoking certain emergency powers. So those are the three big headlines on these executive orders. Let me go in reverse order here and ask Ari to comment first on what I'm going to call the administration's effort to prop up the coal industry. So Ari, can you get us started on what these orders do?

Ari Peskoe:

So I can focus on the one about coal-fired power plants.

Jody Freeman:

Great.

Ari Peskoe:

And go back to Trump's first term, there were a couple of attempts to try to bail out uneconomic coal plants. And just take us another step back for one second, the reason that coal power plants are struggling is because they are very old, on average 45 to 50 years old, and they're just not economic sources of producing power anymore. Natural gas prices and renewable prices have come way down and coal plants simply cannot compete on the market. So the EO tells the Department of Energy to "streamline" its regulations under section 202(c) of the Federal Power Act. And this section of the Federal Power Act empowers DOE to order actors in the power sector to take certain actions in the case of an emergency. And this is typically used for disturbances of a very short duration on the power system. Like for example, a hurricane comes in, and the Department of Energy can order certain power plants to be ready and produce power when needed.

And also importantly, it can allow those plants to exempt them from environmental rules so they can produce more power than they might otherwise be allowed to produce. Orders issued under this section are limited to 90 days, but often it's much shorter duration than that. These are just a few days, typically, these sorts of emergency situations. But the administration here imagines using this section in a wholly new way. They want the Department of Energy to come up with a new methodology for evaluating whether each region of the country has sufficient power plant capacity to keep the lights on. And then they want to develop a separate protocol for identifying which are the power plants that are critical for maintaining that what's called resource adequacy of that regional power system.

Jody Freeman:

So let me guess, Ari, because I think I know where you might be headed. The new methodology and the method of assessing what is critical in terms of supply is going to favor coal?

Ari Peskoe:

Well, that's certainly a good guess, but they say this is all going to happen behind closed doors. And that's one aspect of this that's really problematic. They tell DOE to basically release its findings in 90 days, but there's no opportunity for notice and comment on what DOE is developing. So I think given that this executive order was released on a day that featured other executive orders about coal, and at a press conference where the president repeatedly praised coal, I think we can guess that the results of this will be skewed in favor of economically struggling coal-fired power plants. And the last piece of this is once those plants are identified, those apparently needed plants, the Department of Energy can use its authority to basically prop them up to prevent them from retiring, order them to keep running.

Jody Freeman:

So this, again, as you alluded to at the start, is linked to a similar effort in the first term that failed. And as I recall, you and I wrote an op-ed about this effort in which Rick Perry, then the Secretary of Energy, directed FERC, the Federal Energy Regulatory Commission to adopt a methodology that would basically give an economic boost to coal in figuring out what to pay different energy sources that keep the lights on. And you and I wrote this really terrific, I'll just say, op-ed saying why this was irrational and made no sense and FERC should not do it. And can you remind us of what happened? Because it's very interesting that FERC at the time did not go along with the Secretary of Energy's direction.

Ari Peskoe:

Yeah. So back in 2017, DOE invoked this rarely or never used provision of the DOE Organization Act that allows the department to propose a power sector rule to FERC that then only FERC can finalize. And the rule basically would've carved out coal and nuclear plants from the interstate power markets that FERC regulates, and would've subjected them to separate compensation that would've ensured their economic viability.

And to its great credit, FERC unanimously rejected it, even though it was a three Republican to two Democratic commissioners at the time. And they just said, "Look, this is just totally inconsistent with everything that FERC has done to develop competitive markets over the past 20 years." So this time they're taking a different legal path. Again, it's the section 202(c).

I think there are numerous legal infirmities with what they're trying to do, not to mention the sort of practical issues of basically going around all of the industry's existing rules and market structures they already have that are aimed at keeping the lights on.

Jody Freeman:

So there's already a sort of emergency response system, if you will, that's in place with rules around what gets dispatched and what are the critical resources. Is that fair to say?

Ari Peskoe:

The industry has its standard protocols for maintaining resource adequacy, which the EO suggests ought to be reevaluated. And then after that, the power industry has its own set of emergency protocols, which again, this EO suggests maybe the Department of Energy needs to revisit and do all of that in 90 days without any public process.

Jody Freeman:

The public process piece is also unusual. Am I right that normally this kind of reconsideration of how you approach reliability in emergency situations, that would normally require a lot of input from industry and from the regional managers and so on?

Ari Peskoe:

Yeah. Normally there would be a public process about anything this significant, but it's also I think, legally required because that executive order says this is all about streamlining the DOE's existing regulations that they had on the books for about 40 years that implement 202(c). So you can't change your regulations without going through a notice-and-comment period, at least as far as I'm aware.

Jody Freeman:

Yes. So that theme will reemerge, the sort of ignoring or sidestepping of the normal notice-and-comment process.

This particular order, the emergency authority under the Federal Power Act and section 202(c), it's very technical for most people, right? Electricity regulation and the management of reliability on our grids is quite technical and inaccessible. And so it's really helpful that you explained in these common sense terms.

Is there anything else people should know about this that is sort of not visible to somebody who's not an expert?

Ari Peskoe:

Well, I would also add that typically DOE uses 202(c) to respond to the industry's own requests for emergency help. So usually it's the industry that sees an emergency coming like a weather pattern and asks DOE that, "Hey, we need you to take some action to exempt some power plant from some rule or to make sure it's available." And the statute allows DOE to act on its own without that sort of request from industry, but it's extremely rare that DOE does that. So there's just a couple extraordinary things happening here.

Jody Freeman:

Okay. Well, we expect these orders all to be subject to legal challenge, and we'll be following them as they get challenged. Any prediction, Carrie, I'll ask you for this, on who might challenge this emergency-related executive order and who do you expect to line up on what side of these issues?

Carrie Jenks:

Well, I think there's no doubt that environmental NGOs will line up to challenge the rules. I think what will be interesting is, and Ari can probably speak to this as well, is how does this affect other power sector dynamics? Because I think some companies that own coal may want this additional time exemptions. Other companies that don't own coal are competing against those companies. And I don't think the power sector is united in terms of wanting this type of executive order and action.

Jody Freeman:

So it'll be interesting to see 'cause it's not a monolith. The industry is not a monolith. Different power companies own different resources. Right?

Carrie Jenks:

Exactly.

Ari Peskoe:

I would add though that in 2017, the industry was virtually unanimous in its opposition to that first coal bailout attempt and subsequent attempts that happened after that. And so far there's been a very noticeable lack of response.

It was also the natural gas industry that lined up against the earlier bailout attempts, and I haven't seen any public statements in opposition to this, so I find that a little troubling.

Jody Freeman:

You mean the absence of opposition is interesting?

Ari Peskoe:

Yes, that's right.

Jody Freeman:

Okay. Well, we shall see this play out. Before we leave coal, there are a couple of aspects of the executive orders that are meant to assist coal that I wanted to turn to Carrie to talk about.

The first is the president using a provision of the Clean Air Act in section 112, which is the section of the Clean Air Act that focuses on toxic air pollution. The first set of requirements for mercury and air toxics had been set under the Biden administration and they require coal-fired power plants to control their emission of air toxics. And in this set of executive orders, there's an effort to use an exemption to those rules to really relieve coal-fired power plants from the burdens of meeting these new Biden-era standards by the deadline. I think I have that right, Carrie, but can you talk about why that's important here, what the Trump administration is trying to do with that exemption process?

Carrie Jenks:

Yeah. So what it's trying to do is say that there's a national security interest for these coal plants to continue to operate, and they're using that blanket exemption for that. But as far as we can tell, there was no process by which companies explained why they might need that additional time to comply. The compliance deadline was under the Biden rule 2027. So they're giving them additional time beyond that. And to justify it, they're saying that technology does not exist in a commercially viable form sufficient to comply by 2027.

I will say though, that most companies are already in compliance with the emission standard. So I think that's going to be a high hurdle for them to be able to justify. And we'll have to see if companies therefore don't maintain their equipment in a way that there is a public health consequence and more mercury emissions as a result of this extension.

Jody Freeman:

So this is really a kind of blanket effort to relieve coal plants of having to comply and has real public health consequences if that happens?

Carrie Jenks:

Yeah, potentially significant risks.

Jody Freeman:

Ari, back to you for one final piece of the coal orders if you'd be willing. There's a discussion in one of the executive orders about data centers and the need for electricity. And can you just help us understand what's going on there in that part of the executive order?

Ari Peskoe:

Yeah, so for about 20 years, power demand in this country on a nationwide basis was relatively flat, and that actually really harmed the coal industry because then you had this intense competition between coal and natural gas for the existing market that wasn't growing. But over the past couple of years, we've seen projections of dramatic increases in electricity use in the coming decade, and that growth is being driven by data centers and in large part data centers designed to develop artificial intelligence technologies.

The Biden administration supported development of AI. The Trump administration has said that they support that as well. And so they are using this sort of race against China to develop AI as a justification for keeping these coal plants online.

Jody Freeman:

This is a naive question, Ari, but I'm going to ask it anyway. I thought big tech had made a lot of commitments to grow and develop AI in a way that was consistent with their greenhouse gas reduction and net-zero commitments, that they had said they would be interested in supporting their growing electricity demand with commitments to renewable energy. And now it looks like they're backing off that, or maybe I'm just projecting here, but it seems like they may be backing off those commitments and saying, "No, we're going to be open to using natural gas-fired power for our data centers, or maybe even nuclear power," but how do you see that set of commitments that we thought big tech had made on climate policy?

Ari Peskoe:

So I think results vary here by company. I don't want to group them all together because I think there are distinctions. But we certainly do see some of these very large technology companies going with natural gas-fired power for their data centers.

I don't think any of these companies want coal-fired power. Part of this just gets to the fact that electricity is fungible on the grid.

So if overall demand is going up, you can't necessarily attribute any particular source to a particular consumer. But at the same time, we have some of the utilities that own power plants saying, "We're actually going to keep our coal plants online that we had planned to retire." And the reason that they're giving is because of data center growth. We are seeing a couple of examples of that.

Jody Freeman:

Yeah. I think whereas we had thought that perhaps tech on balance might support a shift to cleaner energy on the grid as part of growing, they would've been a new force to promote renewable energy, cleaner energy. It may turn out not quite that way.

Ari Peskoe:

I think it's a mixed bag, and there's just a lot of uncertainty as well about how quickly this demand from data centers is going to grow and the projections just keep changing.

Jody Freeman:

So let's shift gears now and go to a different executive order. This one has to do with deregulation, the executive order directing agencies to identify categories of unlawful rules and essentially summarily rescind them without going through notice and comment. And the administration justifies this in the executive order by saying, "There are some rules that are just unlawful and we're going to tell you which ones are." And they cite to a list of Supreme Court cases as authority for this.

And the Supreme Court cases they list are a series of cases decided in recent years that on their face appear to constrain agency regulatory authority. They appear to rein agencies back in. But it's not so obvious that all of these cases justify the administration taking this position that it can just decide what rules are unlawful and wipe them away without any process.

So the cases listed include cases like *Loper Bright*, *West Virginia*. I'll get started by asking you, Carrie, to give us sort of an example of what the administration's doing by citing these cases, invoking them as a sort of cover for just eliminating a set of rules. And then we can talk in more detail about why this is problematic.

Carrie Jenks:

Yeah, I'll give one example that shows how broadly the administration is applying this precedent, which is *Ohio versus EPA*. And why I think it's striking is that the Court was not deciding this case on the merits, but they decided to pause the implementation of the good neighbor rule. So this is the air transport rule among states.

And the administration in the executive order says the Court struck down EPA's rule because of scientific and policy premise. But in fact, the Court only paused the implementation of the rule based on the fact that they said EPA failed to consider a comment. And so they kicked it back to the lower courts to decide the merits of the case. But I think it signals how broadly the administration is taking these Supreme Court rule decisions and applying them much broader than anyone thought.

They also did that in the *Michigan* case where they said EPA failed to consider cost, but that was just again, one section of the Clean Air Act that the Supreme Court decided appropriate required EPA to consider cost. I don't think that you can say that EPA has to consider costs in every part of the Clean Air Act, but Congress hasn't expressly required it.

Jody Freeman:

So in other words, the administration is citing a list of individual Supreme Court cases and saying they stand for certain propositions. And based on the administration's view of those cases, they're instructing the agencies to look at a bunch of regulations and decide whether the regulations are still legal. And if the administration decides, "You know, on our reading of the cases, these rules are no longer authorized. We're going to read the statutes narrowly. We're going to say they don't authorize the agency to issue these rules. We're going to go in after the fact and essentially wipe away those rules."

And this is really an audacious thing because this is the administration saying, "We're not going to go to the trouble of reconsidering the rules, going through notice and comment to redesign them and then let them be tested in the courts. We're just going to decide. This is our reading of the Supreme Court cases and we think these rules are illegal and we don't need any process. We're just eliminating them."

That to me is an approach that is in line with the sort of hyper aggressive view of the president's power, not just to implement the law, but to interpret the law usurping the role we normally expect the courts to take. So I'll give you one example of this, Carrie, and I'll let you comment on it.

One of the cases they cite is this landmark decision, *Loper Bright*. And *Loper Bright* overturned an old principle called *Chevron* that people have now heard about. That principle basically stands for the idea that when agencies read a statute like the Clean Air Act or the Endangered Species Act, and the law that Congress passed is

a little bit unclear or doesn't address an issue, well, the agency has a little room to maneuver and can interpret the meaning that they think makes the most sense as long as it's reasonable and the courts should uphold it.

Well, *Loper Bright* said, "No, we're not going to defer to agency's reasonable interpretations. We are going to decide, we the courts, what's the single best meaning of each statutory provision? It's up to us, the courts."

Now, what *Loper Bright* did in addition is say, "Look, all the old cases decided under this *Chevron* decision that deferred to the agencies, those should not be disrupted. Those are good law. They have precedential value." But the administration's reading of the *Loper Bright* case seems to be the opposite. They seem to be saying, "Oh no, all the old cases no longer get treated as precedents. We're going to treat all the instances where courts have deferred to agencies as basically unlawful rules and we're going to eliminate them."

Carrie Jenks:

I agree completely with your framing. The administration is essentially now saying, if the prior rules relied on or were upheld based on *Chevron* step two, then those rules are no longer valid. And, as you explained, that's not what *Loper Bright* says. The Supreme Court said, "We're not going to overturn all of the prior case law that relied on *Chevron*. Just going forward, the courts get to decide the best reading." And so they're going much broader than what the Supreme Court even told the administration they needed to do.

Jody Freeman:

And the final example of this, which I can't resist giving because my internal administrative law professor is coming out as you can see. My final example of what they're doing here is their reliance on the *West Virginia* case. So that's a case in which the Supreme Court announced the major questions doctrine. And what that means is the Court has embraced a principle that says if an agency is addressing a really big deal kind of issue, if it's something of real economic and political importance, the way they're interpreting the statute, we the Court are going to look for very explicit authority from Congress to do the thing the agency wants to do. So if it wants to adopt a clean air rule that we think is extremely far-reaching, that has transformative impact that we think has big consequences, that we're going to treat that as a major question. And the agency just can't do it unless we can find explicit statutory authority.

That's the major questions doctrine. And what the administration seems to be doing is saying, we're going to read that *West Virginia* case the way we want and decide whether a bunch of rules already on the books are really big deal rules. And if they're kind of major questions rules, we think we have the authority to just again, eliminate them without noticing comment. So again, another example of hyper aggressive reading of Supreme Court cases. That's the potential here. That sounds like what they want to do in order to eliminate a bunch of regulations in a summary fashion. So Carrie, back to you on this. How do you see this playing out? What are we watching for as this deregulatory effort unfolds?

Carrie Jenks:

So I think we're going to have to see how do agencies actually follow these executive orders. Do they say without notice and comment, we think it's good cause and therefore we're just going to repeal these rules? Or do they decide, given the legal risks that you were just articulating, that they will still go through notice and comment and then we'll see how to finalize it. I think the showerhead example is one that is important to focus on. The only justification that they cited to repeal the Department of Energy's efficiency standards was they were told to do so under the executive order. And so if we see other agencies do rules like that, I think we're going to see quick challenges. But if they go through notice and comment, then we'll have to watch and see how they justify these rollbacks.

Jody Freeman:

So I really like that. I just want to put a fine point on what you said. This executive order instructs the agency to rescind a Biden-era rule, an energy efficiency rule, but by skipping all the normal legal process, which means they don't get industry input on what this means. They don't get any public input on what this means. Maybe there have been investments made based on this rule, they're going to be upset, but they'll never know about that. And their position is there's no need to explain or justify to a court why they need to rescind this rule. They're just going to do it again, skipping normal process. So this is the administration taking advantage of an exception to the normal notice and comment requirement, which is called the good cause exception. And this is quite a kind of nerdy legal point to make.

But for those listening, I just want to understand the good cause exception is designed to be used in very rare circumstances. Courts have interpreted it narrowly so that agencies can't just bypass notice and comment whenever they want to. They can only cite the good cause exemption in rare instances where there really is an emergency need to get a rule out quickly, and that just does not seem to apply here. And so it looks like the administration is trying to take advantage of a loophole and drive a truck through it. There's real value in notice and comment, right? I mean, yes, there are occasions where it would thwart the whole point of the rule to go through notice and comment, like it would let the market know that something's coming and then people could engage in arbitrage or strategic behavior. And so you definitely don't want notice in common in those rare instances, but most of the time you benefit from it.

We want to hear from the regulated industry about how a rule will affect them. We want to hear from public interest groups, public health groups, the affected communities about say how the consequences the rule might affect public health or something local that we haven't thought of. It makes the rule design process better to hear from the regulated community in those most closely affected. So it's a radical thing in administrative law to say, well, we can just rescind rules with absolutely no process. Anything from either of you on this point about how they're handling notice and comment?

Ari Peskoe:

Yeah, I mean, I just want to jump in on this showerhead rule for a second. I mean, it's a little silly, but I think it's also quite insidious of what they're trying to do on a larger scale here. For whatever reason, the president has been talking about low shower pressure for years on the campaign. And so this is an issue for him. And the idea behind this order is that he wants it done and therefore it shall be done. And we're sort of government based on the whims of an individual rather than the rule of law. And I think it's quite troubling. And so hopefully we'll see some legal action taken against this and courts will not sign off on this way of running our government.

Carrie Jenks:

I would also add, I think people think notice and comment is this long process that just slows down the government, but I think it's important to highlight the purpose of notice and comment. There's a huge value in giving the agency information, as you were saying about how does the rule impact them, what are other ways to design it. The agencies are never going to get everything right in the first instance. And so it's a first draft that they put out with a proposal, comments from the regulated entities, from NGOs, from states, from other people that need to implement it and enforce it, helps them finalize a rule that is much more reasonable, much more grounded in fact and implications and impact that allows those rules to be much more durable. So I think it's a process that takes a long time, but it is a process for a purpose.

Jody Freeman:

Yeah, I mean even when it comes to deregulation or rescinding rules, legal process matters, right? Even there, industry isn't always thrilled about deregulation. It can really upset their expectations and their plans, and there

are instances where they might lose money based on a bunch of investments they made banking on the old rules staying in place. So there's a lot to lose when you skip this process. It's not just like we want to go through notice and comment for its own sake. And just to go back to Ari's point, the way in which this set of executive orders is so cavalier about how to change the regulatory landscape for business, for public health protection, for environmental protection that it can be done at the whim of a president and that all one really needs to know is the president wants it done. That's how the showerhead order reads.

That's a signal of a kind of imperial approach to governance. So let me go now to the final executive order, which is about the administration putting state climate and energy policies in the crosshairs. This order essentially instructs the attorney general Pam Bondi to take a look at state clean energy policies and to examine whether the administration considers them for one reason or another to be unlawful and do whatever is needed to make them unenforceable. And that sounds like a blanket invitation to the attorney general to just examine the policies at the local level and decide the ones they don't like and challenge them either join lawsuits challenging their legality or launch lawsuits challenging their legality. It's a clear shot across the bow that says, we're on the lookout for things that we think don't fit our agenda on energy dominance, fossil fuels as a priority, and we're going to try to disable whatever the state governments are trying to do to advance climate and clean energy goals. So Ari, can you give us a little detail about this executive order and tell us how you think it might play out?

Ari Peskoe:

Yeah, as you said, the executive order tasks the AG, the attorney general, with just basically making a list of clean energy or climate policies to target as well as ongoing proceedings such as litigation where she might intervene on behalf of the government. So we've been tracking litigation against state clean energy policies for the past 10 years, and most of these cases argue that a state clean energy policy is preempted by federal law that either this is an area that only the federal government may regulate, or that there's some conflict between how the federal government regulates it and how the state is trying to regulate it. And therefore the court should find that the state law is invalid.

Or there's another theory based on what's called the dormant commerce clause, that somehow the state is regulating interstate commerce in a way that's impermissible under the doctrine. By and large, these attacks have failed. And there's in fact one lawsuit that was actually filed by the first Trump administration against California's cap-and-trade program that is trying to reduce greenhouse gas emissions. And that lawsuit failed. And yet this executive order specifically suggests they should go after it again.

Jody Freeman:

Yeah, I mean, it's really interesting the order called Protecting American Energy from State Overreach. So clearly they're signaling that somehow they think these state policies inhibit what they would call American energy dominance and that they need to be brought under control. And there's a long list of policies they're targeting. They're specified in the executive order. The order instructs the attorney general to prioritize policies that address climate change, ESG, you know that is environmental, social and governance initiatives. They have a real antipathy to that. They're also supposed to take a look at environmental justice policies and anything that affects greenhouse gases and carbon taxes. The other thing that's in the crosshairs here is, what's come to be known as climate superfund laws. These are state laws. A couple of states have adopted these that allocate a share of liability for climate-related damages to the fossil fuel industry and large producers of greenhouse gases in order to address the cost of climate-related harms.

And the administration seems to be targeting these because they are ideologically opposed to them, and states are experimenting with this approach in order to hold the fossil fuel industry and large emitters accountable. So I think the attorney general is going to be investigating, taking a look at these approaches. They have really not been litigated, so it's possible to imagine that they would join lawsuits or file lawsuits to challenge them. Do you

guys have any observations? Carrie, do you have a view about why those laws are sort of particularly in the sights of the administration?

Carrie Jenks:

I think the key point is what Ari was saying is that they're new and so they haven't gone through the litigation yet to test them out. And so I think this is where you will start to see litigation because it's already ongoing and the administration's probably going to join those suits or encourage others to join those suits. The other cases though, like the cap and trade programs and RGGI, there's been a lot of litigation that's already well settled. And so I think the superfund laws are new.

Jody Freeman:

Right. You're talking about RGGI, the Regional Greenhouse Gas Initiative, which is an agreement among, I think it may be now 11 or so states that have all agreed to cap and reduce their emissions from the power sector. And those kinds of regional agreements at state policies are the ones that are being targeted. They were adopted many of these quite a long time ago, in the early 2000s when the federal government wasn't really adopting greenhouse gas rules and states were trying to step into the breach and they've been quite active on climate and clean energy policy, at least a subset of states have been. And we've seen a lot of these initiatives be quite successful. And it looks like the administration is trying its best not just to roll back federal climate and clean energy policy, but also hamper the states from doing what they want to do to make progress. So it's pretty aggressive in that sense, right, Ari? It's not just sort of shutting down the federal government, but also trying to impede the states.

Ari Peskoe:

It is certainly aggressive to go after the states. States rights is often a cause championed by conservatives. But I would add that when you look at this EO, I think the conventional wisdom will be that they will try to litigate some of these policies in federal court and ultimately hope to get to the Supreme Court and see if they can create new law there. My concern, though is that there'll be perhaps a little more creative in how they attack states and will they come up with some justification for trying to withhold federal funds for some program for states that have certain types of energy policies that they claim are detrimental to the national interest. And that will be a different litigation challenge than going after these clean energy policies directly where I think a lot of precedent is on the side of states that are enacting these policies.

Jody Freeman:

We've seen this strategy, withholding funds, as a really big weapon that the administration's trying to wield here. In our domain, they're trying to claw back or block the disbursement of funds that were appropriated by Congress under the Inflation Reduction Act and the 2021 infrastructure bill trying to block money that has already been obligated for development projects, plants, manufacturing facilities for local communities to do energy efficiency work, all these grants and loans and other subsidies that were on their way out the door already contracted for. We're seeing an effort to block them to the extent possible, even so far as to freeze accounts held in banks that are meant to be dispersed to the organizations they were committed to.

And so far, the results of these lawsuits challenging the freezing of these funds have been mixed. It's unknown ultimately how much of that money the government will be able to block. And Ari, now we're talking about using federal funds in a similar way to try to obstruct what the states want to do to use them as a cudgel, as a lever against the states and say, we're not going to give you a bunch of state funding we normally would give you unless you do the following things, unless you pull back on certain climate and clean energy policies.

And the question is going to be how successful will the federal government be in using that kind of threat? We've got Supreme Court precedent that puts some limits on this kind of use of grant monies in a way to punish states. Normally, those monies that the federal government wants to withhold, it has to be related to the offense or the problem that the federal government is complaining about. So you can't withhold wholly unrelated monies. There's also Supreme Court precedent, of course, on a doctrine called unconstitutional conditions, which means you can't threaten to pull federal grants and monies on the premise or for the exchange of the recipient giving up their constitutional rights. You can't say, hey, you can have this money, but you no longer have any First Amendment rights.

So we have certain Supreme Court precedents that will get in the way of the federal government using these threats just any way they wish. So it won't be as easy perhaps as they want it to be. Ari any commentary on that.

Ari Peskoe:

I mean, I was speculating, but I think we've seen a lot of creative legal maneuvers that it could be seen as sort of negotiating ploys from the administration to try to put pressure on states or other private entities to change their policies. And so I certainly wouldn't rule that out. Here it's comforting to hear that the Supreme Court precedent is on the side of the states on this issue, but I wouldn't put it past them to test the limits or at least try to put pressure on states in ways that we haven't seen other administrations try to do.

Jody Freeman:

Yeah, I mean, even if there are going to be legal limits ultimately on them using federal funding as a lever on the way to those ultimate court decisions that might restrain them, there's going to be a lot of pain. It's true for universities too. It's true for all their targeted funding threats. I mean, even if ultimately you win, on the way to winning there'll be a period of time in which it may be harder to operate, you might have to do without those funds, there might be donors who don't give what they normally give. And states, if funds are frozen, really will have a hard time with their state budget. So you can imagine there being a lot of pain, even though ultimately the administration might find itself restrained by the courts.

It also may prove difficult for the federal government to trample on the states to the extent they may want to and find sympathy in the Supreme Court. Many of the Justices care deeply about federalism, it's such an important constitutional principle. And it's not clear how the Justices will fall out in cases around federal preemption of state law, for example, and challenges to state policies for violating the Dormant Commerce Clause. These areas of jurisprudence don't fall out quite as easily along sort of liberal/conservative lines the way we normally think about these Justices. And so it's not clear that the Trump administration will win cases challenging the exercise of state power.

In fact, in the past, the states have done pretty well, haven't they, Ari?

Ari Peskoe:

Yeah, by and large states are successfully defending their clean energy policies in court. So I'm not sure that there are new arguments here that haven't already been tested. So we'll just have to wait and see what they actually end up targeting here. And it could be that the power sector policies that I'm most familiar with, maybe those aren't the first that they go after, maybe it is these climate liability laws or maybe it's just that they want to make sure that they're intervening in these various climate tort cases that have been making their way through the court systems over the past several years, and maybe they're just going after something else entirely. It's hard to know. As we said at the outset, these EOs sort of set up future action, and it's certainly possible that some of these may fizzle out.

Jody Freeman:

So we have the first set of executive orders from January. We have the second round of executive orders now in April. And let me just ask you, how are you seeing this shape up now with a few months of experience watching what's coming out of the White House and the administration? What are they trying to do in this domain, generally? It seems quite aggressive, the rollback of Biden-era and earlier climate and clean energy policies. But still there's a lot left to unfold, and what they're doing in this domain is a little bit less visible to the public than some other high profile areas like immigration. It's more technical. It's more complicated. So can you give us a sense of what people should be watching for as we look ahead?

Carrie Jenks:

So I think, like you said, we're still waiting. So it's going to be important to see what steps do they take to roll these out. Do they propose it? Do they go through a good cause exemption? But I would also add to what Ari was saying at the very beginning is they are wrapping a lot of this in energy emergency, and so they're trying to justify this on a national security basis and therefore trying to take hold of more of the energy domain than they have in the past. And so I think it's going to be important, as Ari said, to really pull apart how do they justify that we're in an energy emergency, given how much energy we can generate in the US and how much oil and gas we've been producing. I don't think we are in an energy emergency. And so rather than just accepting that as a fact, it's going to be important to really look at that critically.

Jody Freeman:

And as we've said before, this will be a long process. These orders will unfold over time. The agencies have to implement the things they've been told to do. The orders largely aren't self-executing, as we said at the beginning of the podcast, they don't necessarily do anything immediately. They set a stage where agencies have to go and then take action to rescind rules or file lawsuits or challenge state policies or do whatever they're going to do. So this will be a grind, it will require some patience. We're going to see a lot of litigation, a lot of judicial decisions first in the lower courts, then moving up. Maybe there will be temporary restraining orders, maybe they'll be reversed. So you have to be watching as this unfolds.

Ari, do you see the power sector behaving in a certain way now given that these orders have been issued? Are they changing what they're doing? Are they in a wait-and-see mode? How do you see them reacting?

Ari Peskoe:

I mean, as I indicated, there hasn't been a lot of noise from the power sector to try to oppose the new sort of coal bailout executive order that we discussed earlier. So I haven't seen a lot of discussion from the industry yet. And again, maybe because these are just executive orders and they're going to take a wait-and-see approach until they see exactly precisely how the administration is going to implement these directives.

Jody Freeman:

And Carrie, how do you see the environmental groups, the NGOs and the states reacting to this set of orders?

Carrie Jenks:

So the litigation is starting on some of those actions that have immediate effect, but they're going to have to wait to challenge the actual rules, the final rules once they are issued.

I would also add, I think industry is quiet because in the end, the market is what will drive their decisions. An executive order doesn't drive a different market outcome, it can't change the market. And so how companies

respond to the policy priorities of the administration is one thing, but how they respond to the market is actually what's going to matter in the long run.

Jody Freeman:

What's so interesting to me is to see whether the drive toward clean energy can really be arrested by what the administration is doing, or whether the market forces that are driving a cleaner power sector because of wind and solar costs dropping and natural gas being so plentiful, whether those forces just overwhelm the effort to pull back. We see the same in the auto industry globally anyway. The pursuit of electric vehicles, China's way out ahead on this. There's a lot of demand globally for these more efficient vehicles. Is that all just going to continue? Is that going to overwhelm any effort by the Trump administration? This is what I'm watching for. How powerful are the market forces? It's hard to predict right now whether the US can really exert a strong, strong break on what's happening because of technology and demand around the world.

So with that, let me just invite both of you, Ari and Carrie, to give us some closing words on this set of executive orders and anything else you're thinking about at this 100 day mark of the administration?

Ari Peskoe:

Yeah, I think across the power sector what is noticeable is the effort to slow the momentum that I think had been building across the Biden administration at the federal level. That's about numerous things that the Department of Energy was doing and supporting, for example, transmission development for clean energy deployment, what FERC had been doing along similar lines. And immediately all those efforts have been halted. And so a lot of great work is really just going to sit on a shelf. And even if projects, if they don't have their funding rescinded, we're going to see a significant slowdown in that sort of support. So I agree that the market is going to keep doing what the market is doing, but we're really losing momentum that had been building.

Carrie Jenks:

I would agree. I think the pause and the hesitation to make investments is concerning. We're about 100 days into this administration. Our first podcast we titled, It's A Lot. I think now it is definitely more. But we're still waiting for the rules to come out and industry has to wait until they know what the rules are. And I think even once we see the final rules, there's still going to be a hesitancy to keep making investments until they know how the courts respond to them.

Jody Freeman:

So maybe since our first podcast on the first set of executive orders was called, It's A Lot. Maybe this second podcast should just be called It's A Lot More. Listen, it's been great to do this with you guys. I always love to spend time with you and talk about what's happening in climate, clean energy and environmental policy. Carrie Jenks is the executive director of our EELP. Ari Peskoe is the director of our Electricity Law Initiative at the EELP. You guys are both pros. You're the best to work with. I'm so excited we got to have this conversation today. Thank you.

Carrie Jenks:

Thank you.

Ari Peskoe:

Thank you.