Intro:

Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode, EELP staff attorney Erika Kranz talks with Andy Mergen about the recent decision to exempt oil and gas exploration and development in the Gulf of Mexico from complying with the Endangered Species Act.Andy is the director of the Emmett Environmental Law and Policy Clinic here at Harvard Law School.

The administration has invoked a never before used national security provision to bypass the Endangered Species Committee's normal process-intensive exemption procedure. Andy and Erika break down how the Act usually works, and why this maneuver is so legally extraordinary.

They discuss why the administration's litigation-focus explanation is surprising, how this approach short circuits potential action by courts and Congress, what may happen with legal challenges to this exemption decision, and what it may mean for endangered species protections in the Gulf. We hope you enjoy this podcast.

Erika Kranz:

Welcome to CleanLaw. I'm Erika Kranz, an attorney with the Environment and Energy Law Program at Harvard Law School. And I'm so lucky today to speak with Andy Mergen, faculty director of the Emmett Environmental Law and Policy Clinic here at the law school. Andy is also the former chief of the Environment and Natural Resource Division's Appellate Section at the Department of Justice, where he litigated for over 30 years. Andy, thanks so much for speaking with me today.

Andy Mergen:

It's a pleasure to be here.

Erika Kranz:

So we're talking today because there's been some big Endangered Species Act news recently. A body called the Endangered Species Committee, also sometimes called the God Squad, just convened for the first time in more than 30 years, and it's approved an exemption for oil and gas activities in the Gulf of Mexico using a national security exemption provision that has never been used before.

I think to understand what that means and its significance, we'd better start with some basics. And I'm so glad that we have you here today, Andy, because you know a lot about the Endangered Species Act, you've spent a lot of time with it. And, especially helpful, you've thought about how the Act interacts with national security interests and with oil and gas production. So would you mind telling our listeners a little bit about your relationship to and history with the Endangered Species Act?

Andy Mergen:

Yeah, thanks. I worked in the appellate section of the Environment and Natural Resources Division. And for a considerable chunk of that time, basically from 2001 until 2022 when I left the Justice Department, I supervised Endangered Species Act work in the Court of Appeals. So at some level, I was involved with every case that had an ESA component that went through the Court of Appeals or the Supreme Court. I really enjoyed working in this area. I'm very proud of my work defending the constitutionality of the Act, which I did for a long time. Also, very interesting to work on ESA matters like the *Weyerhaeuser* case and the *Home Builders* cases they went to the Supreme Court.

In addition to that work, I also did a lot of work on the intersection between national security concerns and environmental laws, including the National Environmental Policy Act, the Marine Mammal Protection Act and the Endangered Species Act. I worked on Navy sonar cases for many years. That work culminated in a Supreme Court case called *NRDC v. Winter* that is a pretty well-known and frequently cited case for a lot of issues.

And then also throughout my career, I was involved in litigation arising from oil spills, most notably the Exxon Valdez spill, which actually occurred well before I was a lawyer, but there was still litigation going on when I came to the Department of Justice, and I worked on some litigation related to the Valdez. And I also worked on litigation related to the Deepwater Horizon Macondo spill. Specifically, I worked on those issues around the moratorium that the Department of Interior put in place for Gulf of Mexico activities.

So I have a sense of basically how all of these laws interact, and also a sense of just how damaging oil spills can be in the Gulf of Mexico, which is of considerable concern to people who care about endangered species like whales and turtles.

Erika Kranz:

So to help us understand what the administration has just done, we've got to start with the Act itself and how it ordinarily works, and I think you're overqualified to do this, but can you walk us through the Act, and especially the section seven consultation process?

Andy Mergen:

Yeah, I'd love to. We teach the Act in law schools, we basically focus on three or four provisions.

The first provision that we focus on the Act is the listing provision, or section four. And that's the manner in which animals go onto the endangered species list as either endangered or threatened species, or come off the list when they're recovered. And there are five statutory factors that apply. And interestingly, any citizen or group of citizens can say, "An animal should be listed," or, "An animal should come off the list." And so when people think about the Endangered Species Act, they think of this category of animals that are threatened or endangered and that are on this list.

The other section that's really important is section nine, which is the prohibition on taking, encompassing the killing of endangered species. And I think if you ask people on the street, they would think, "Well, the Endangered Species Act prevents the killing of endangered species." And that lift is done by section nine of the Act.

I want to really focus on what we're going to talk about today is section seven, which is a really profound part of the statute. And what it does is it creates a process by which if you come to the federal government for an authorization to do something, to open a mine, to cut trees, or to engage in oil and gas drilling either offshore or onshore, there's a series of permissions you might need from the federal government under a range of statutes, and those statutes trigger the section seven requirements.

And basically section seven says, "If you have to get federal approval to do something, we're going to look at how your proposed action affects threatened endangered species or their habitat." And the process is set up at several tiers. There's an informal tier that maybe your action isn't going to implicate any species at all, because they're just not present or the habitat's not present. And then there's a deeper dive when the animals are present. It could be one animal, one species, or multiple species. In the Gulf of Mexico, there are more than one listed species.

And at that point the question becomes, how does the action affect the species or its habitat? And if it is likely to cause jeopardy, then you have to go through a formal biological opinion (BiOp). And that's a hard look at how the action could affect the animal. And then usually baked into that process, if it's possible that the species will be jeopardized, are a series of what we call RPAs, or reasonable, prudent alternatives that are intended to basically mitigate that risk of jeopardizing the threatened or endangered species. So it's a process by which you look at the action and you come up with a set of measures that might mitigate for that action, and that's been occurring in the Gulf of Mexico for a long time.

The last thing I would say about section seven is that early in the history of the Act... The Act has passed in 1973. In 1978, a case gets to the Supreme Court called *Tennessee Valley Authority v. Hill*. And that case involves a species called the snail darter, which has obtained quite a lot of renown for its role in this

litigation. The challenge was to a dam that was being built by TVA, that it was determined would jeopardize this species. And the matter gets to the Supreme Court, and the Supreme Court decides the case in 1978.

And the government, the United States government is very conflicted about how it feels about this. TVA is a quasi-governmental independent agency, and it looks like the snail darter is going to prevent this project from going forward. In fact, the government's brief submitted to the Supreme Court is a little bit confusing. It represents both TVA and the wildlife agencies. And there's an element of all of this that so much has been invested in this project that this little fish can't stop the project.

And it gets to the Supreme Court, which is a long time ago, 1978. But it's not a liberal Supreme Court. The Chief Justice is Warren Berger, is a pretty conservative guy. And the Court gives the fish a resounding win in 1978, and the Court does that basically on the text of the statute. It looks to its purpose as well. They did that back in 1978. But focusing on the text, the Court says, "This is a really serious statute." And this provision, section seven, Congress felt was really important and it must be adhered to. And at that moment, from that decision, we have understood this Act to have real bite, sometimes referred to as the pit bull of environmental laws.

Now, a lot's changed since 1978, and we can talk about that. But one of the first cases they read is *TVA v. Hill*. And the takeaway is that when you can discern Congress's plain intent from statutory language, then you have to follow it. And that even affects how you might think about remedies and equity. It's a powerful decision that vested the statute with a lot of power, and that is what folks on the street may know about the ESA. Like I said, we'll talk about how it's changed over time, but it's really important, I think, to contextualize section seven in the TVA case.

Erika Kranz:

Well, and one important thing that came out of TVA v. Hill was congressional action. Congress created a release valve, an exemption process for situations where perhaps the pit bull statute was too aggressive for Congress's taste. And so they created within section seven this exemption process. And I'm going to call this the "normal" exemption process, although it's been used very, very infrequently since it was created in 1978.

So under this process, an applicant or an agency that's gone through this consultation process under section seven that essentially doesn't like the result or can't live with the results, can apply for an exemption. And the body that will ultimately decide whether an exemption will be granted is called the Endangered Species Committee. It's a committee designated by statute of several high level administrative officials. And the committee makes this decision upon a really robust factual record. Again, first, there's been the consultation process and the results of it, including the reasonable, prudent alternatives to help protect species.

We have a factual record that's developed, we have hearings, we have reports prepared, we have public notice about all of this, about the application, the report, the hearings. And then the committee must apply four factors that are, again, listed in the statute. They have to find that there are no reasonable and prudent alternatives to the agency action, that the benefits of that action clearly outweigh the benefits of alternative courses of action, that the action is of regional or national significance and that the federal agency or the private applicant involved basically acted in good faith and followed the rules moving through this process. And then the other important thing that the committee has to do is even if it's finding that an exemption is warranted and meets all of these factors under the statute, they also have to establish such reasonable mitigation and enhancement measures that are necessary to basically minimize the effects of this agency action.

And again, I've called this the normal exemption process, but it's been used just three times since 1978. Twice immediately after Congress passed this provision, one once to consider the dam, Andy, that you just talked about and the snail darter. A second time that year to consider another dam that was going to have effects on the whooping crane. And then in 1991, 1992, the committee met to consider logging projects in Oregon that would have effects on the spotted owl. And it had not met since then, since 1992. Critically though, each time that it met, it had before it an application. It had specific projects. It was undergoing this robust public fact-intensive process.

Andy Mergen:

I think one reason that it's come up so rarely is because I think it's been understood that there's a lot of public support for the Act. And as you say, when we're talking about the normal God Squad process, which has a lot of process built into it, it's very public facing. One thing about the spotted owl controversy from the late '80s and '90s that some listeners may be aware of is that the stakes were understood to be very high for timber harvesting and for the spotted owl and other creatures dependent on old growth habitat.

And President Clinton actually got very much involved in resolving those disputes in the Northwest Forest Plan. Again, engaging conservationists, and the timber industry and local folks on a solution. And I think that illustrates how generally we have understood that there's a lot of public support for the ESA, and that presidential administrations and the executive branch have approached these issues very, very gingerly. But this time, it doesn't seem ginger at all. It seems like something else altogether. And this is an exemption that's a whole different animal. Erika, do you want to talk about that?

Erika Kranz:

Sure. So what the administration has done this time is not use any of the process that I just explained. Instead, they're using a different exemption provision within section seven, and it's just about a sentence long. It says that the committee shall grant an exemption for any agency action if the Secretary of Defense, who by the way, is not usually involved in God Squad decisions, finds that such an exemption is necessary for reasons of national security.

This provision has never been used before, and the administration has now told us that it understands that by using this national security provision, none of the normal requirements for the God Squad apply. There's no application for an exemption. There's been no factual record developed, no hearings, there's been no report and there's been almost no public notice. And when the committee met, there was no consideration of those four statutory factors I talked about. The only thing we have is a finding by the Secretary of Defense that an exemption from section seven of the Act is necessary for oil and gas activities broadly within the Gulf of Mexico.

And just for context, there have been section seven consultation processes about oil and gas activities in the Gulf that have resulted in determinations that those activities may jeopardize the continued existence of a species of whale in the Gulf, Rice's whale, and that's a species with only about 50 individuals still alive. Those consultations resulted in agencies determining reasonable and prudent alternatives, essentially requirements for oil and gas operators to avoid striking whales with vessels. There's been litigation about whether that consultation and those measures were enough, and also litigation about whether they were too much.

The Secretary of Defense's national security finding doesn't say anything about those measures. Instead, it says, in essence, that all oil and gas activities in the Gulf no longer have to comply with section seven, because litigation around those questions threatens oil production. It risks a court ordering that oil and gas activities have to be halted, and it creates too much uncertainty for companies to want to invest and develop, and all of that together is a national security matter.

After the Secretary of Defense made that finding, the God Squad convened and granted the exemption, and that exemption is being applied to an enormous geographic area and an enormous scope of potential actions, quite unlike the times when we've seen the committee meet in the past when it has considered individual actions. So the process is unusual, the scope is unusual, and the basis is really, really unusual.

And the secretary's finding is not based on an inability of oil and gas developers to comply with the reasonable and prudent alternatives to protect species in the Gulf. Instead, the focus is on litigation, particularly on litigation by environmental organizations that have sought to ensure that protections under the Act were sufficiently robust to protect those endangered species.

So what can you tell us, Andy, about why this litigation focus is so unusual? And also, what does this all mean for those species in the Gulf?

Andy Mergen:

Yeah. I think it's important to understand that people who work in this field, whether they work for industry, and I have worked with many folks and many law firms who work with the oil companies in this space, or if they work for environmental NGOs, we're all gobsmacked by this. It's a national security exemption. I think it's provision J that allows for this national security exemption, and H is the normal exemption process. A national security exemption has never been pursued before.

And the reason the administration offers for this is that they are afraid of litigation, and they are afraid of litigation challenging ESA compliance, the biological opinions and the adequacy of the look provided by the wildlife agency here, it would be NOAA Commerce. And that is truly remarkable. It's remarkable for several reasons. They cite two cases. They cite a sort of ongoing case in the District of Maryland, brought in Maryland because that's where NOAA is headquartered, where the court has given the agency a hard time about the adequacy of its documents, but has not enjoined any oil and gas activities.

And they also mentioned a case in Louisiana where the challengers have prevailed in showing that the biological opinion in their opinion goes too far. It's too protective of the species of whale, the Rice's whale, which is the focus of endangered species protection efforts in the Gulf of Mexico. It's not the only endangered species in the Gulf, there are many others. There are interesting deep water corals, there are sea turtles. But the whale has become the symbol of the endangered species community that live in the Gulf of Mexico.

And there's nothing to suggest that there's any real risk of an injunction at this point. The Louisiana Court is certainly not inclined. The Louisiana Court says, "You're bending yourself too far to help these species." And the Maryland court, although having found some flaws in prior analyses, has also not granted any injunction. So this is all anticipatory. It is this deployment of this extraordinary process that's never been utilized before where there's no real threat at this point. And there's no indication that the oil industry has asked for this.

Bobby McGill at Bloomberg has reported that the folks that he's heard from didn't ask for this. So this seems to be entirely driven by the administration, and there's a couple of things that I find really extraordinary about that. Because it telegraphs a lack of confidence in the federal judiciary. It's saying to all of us, "Well, we had to do this because we don't trust the courts, or we think the courts are going to create problems." That is truly extraordinary. And I think it's going to be a little tricky. We can talk about how the litigation's going to proceed for them to explain themselves in court.

Also, I think it's extraordinary. I don't think I would be doing justice to litigation around fossil fuel if I didn't say that there are cases out there where fossil fuel projects have really suffered in litigation, and one notorious example might be the Mountain Valley Pipeline and the Atlantic Coast Pipeline, two pipelines developed to move fracked gas from Pennsylvania and West Virginia to the Atlantic Coast. And those pipelines were tied up in courts for a long time. I worked on those cases. And ultimately Congress got involved and said, "We're exempting the Mountain Valley Pipeline from environmental laws."

And that is a pretty traditional response when things get bogged down in litigation, and that happened with the TVA case. That has happened in a reclamation project called the All-American Canal in California. Even the World War II Memorial on the National Mall, Congress was concerned about litigation and essentially made that project exempt from environmental laws.

So there's an established process that's been utilized when Congress deems that there's too much litigation around an issue. And that would have been one way to proceed here, and my guess is that Congress would never have had to step in because every indication is that the courts have found a way to make the government responsible for fixing its errors without enjoining projects. So this is really remarkable.

And so the second question you ask me is, what does this mean in terms of on the ground? And I think we're really trying to sort that out. The determinations say that mitigation measures from prior BiOps will be in effect. So what do those mitigation measures look like? One thing it looks like is vessel speed. One thing that threatens Rice's whale in particular is boat collisions. So if you slow down vessel speed, ship speed, you might be able to reduce some of that. And our sense is, although these findings are lacking in detail, that

those requirements will continue to apply. And in fact, they've already likely been incorporated in letters and notices to operators in the Gulf of Mexico.

Now, will they be enforced? Extremely hard to be enforced. Something that likely NOAA would do in the normal course. Hard for citizens to get at that. So difficult to know how that enforcement is going to work. It looks like that the RPA that was contemplated by the 2025 biological opinion will not go into effect. And that RPA is geared at making sure that there's an apparatus to track whales where they appear. The gist of the RPA is that we need to know more about where Rice's whales are, but it doesn't seem that anything in that 2025 BiOp or the RPAs are going to apply here. We're going to know more as the litigation unfolds.

Erika Kranz:

But again, one thing that's really interesting about this, like you already said, is that it doesn't appear that any of the operators were leading the charge here saying, "These RPAs are just way too much for us to comply with." Right?

Andy Mergen:

No, not at all. Nobody wants this. I think that's a theme of a lot of what Trump has done in the environmental space. No one's been asking for it. And I think the one thing I would just stress is that has been the experience, and I'm glad you mentioned this, of section seven in general. You don't hear about activities not going forward because the wildlife agencies, Fish and Wildlife Service and NOAA, are pretty good at finding solutions and tweaking these things in a way that... It's a negotiated instrument, and it doesn't always make environmental communities happy and it doesn't necessarily make operators happy. But it's generally things that will improve the likelihood that the species will persist ... Just slowing down vessel speeds seems like a good step here.

Now, for a lot of environmental activists, and the administration has a lot to say about this, the biggest threat to these species is oil spills. And that was certainly true with the Deepwater Horizon, where the whale species took maybe up to a 22% decline. So when the administration says, "Well, these zealots just want to shut down oil and gas operations," there's some truth to that because that's the biggest risk to species in the Gulf. But it's also the administration is sending such a terrible message.

I just want to talk about Deepwater Horizon, and the toll that it took on the natural environment and the Gulf, which was enormous. That well spilled oil for days and days. And Congress didn't really act after that as they had under Exxon Valdez when they enacted the Oil Pollution Act. But the administration did. It created two new agencies, the Bureau of Ocean Energy Management, and the BSEE, the enforcement agency for offshore.

It separated out those offshore enforcement responsibilities. And the reason they did that is because we had a record where we could look and know that operators weren't necessarily doing everything that they could to promote safety in the Gulf of Mexico. And one really worries that the message that's being sent here is that BSEE, the Bureau of Safety and Environmental Enforcement, is going to have less to do. We need to make sure that these operators are complying with the law, and this seems to send a message that these operators are off the hook.

Erika Kranz:

So it sounds like there's a couple ways to think about this. We can think about this as the administration's contempt for judges. We can think about it as the administration stepping into a role that Congress historically, maybe in the deep history Congress had filled. Is another way to think about this as a shot across the bow for environmental organizations as they are bringing cases, challenging a variety of agency actions?

Andy Mergen:

Yeah. I think that we have to think about everything that happens right now in the environmental space is about narratives, and telling stories. And we have powerful stories to tell about environmental law and the offshore fossil fuel industry. The Santa Barbara oil spill in the late 60s really prompted a lot of environmental law, and a lot of environmental reforms.

We're at this particular moment where people on both the left and the right are saying, "There's too much process, there's too much environmental protection and we can't get things done." And on the left they're saying that because they want to see clean energy being developed. And as we know, and probably a subject for a lengthy podcast, the administration has declared war on renewable energy sources while promoting fossil sources.

But the administration is trying to pump into a narrative here that the environmental groups drive everything to a halt and that we need to step in through all sorts of emergency orders, claimed emergencies, national security exemptions. All of these things tap into a narrative that I think is mostly fundamentally false, and it is very much a shot across the bow at environmental organizations.

And I do think that it's also, just to tap into something you said earlier, like everything else with this administration, it seems to be all about executive power. They're saying deliberately that they don't like the courts, and Congress has had a role in stepping in and saving fossil projects like Mountain Valley Pipeline, and they're getting out ahead of Congress when there's no need. And I think that taps into an agenda where they really are working very, very hard to dismantle environmental laws and environmental protections.

Erika Kranz:

So can we talk about this broader pattern that you're seeing just a little bit more? You mentioned the energy emergency. We've seen coming out of that a creation of alternative arrangements for a really broad category of projects under NEPA, the National Environmental Policy Act. We've seen Federal Power Act 202(c) orders. These are orders to keep coal plants running, even sometimes over operators' objections. We're seeing national security emissions waivers for coal plants. What else are you seeing that fits into this framework of streamlining, exemptions, emergency provisions, and also leaning on national security as the explanation for much of this?

Andy Mergen:

The one thing that is, I think, very disturbing is that the cutting the public out of the process. We're seeing good cause exemptions from rulemaking. We're seeing them dialing way back on public participation and public process. We are seeing them leaning into these national security justifications and emergency rationales as you noted earlier.

And I think it would also be... We have to be honest that these agencies have been gutted by the DOGE process. So many people have left the agencies. The Department of Interior, the Department of Commerce have lost tons of people. And this is really important. One of the big lessons from Deepwater Horizon is that having experts in the agency responsible for safety is really important, and they've stripped that away. Notably, in the last few days, they've announced that they're getting rid of the two agencies, Bureau of Ocean Energy Management and the Bureau of Safety and Energy Enforcement, BOEM and BSEE, and combining them into a single agency with really no explanation. These agencies were created in the wake of Deepwater Horizon to better manage risk and energy development in the Gulf of Mexico.

At the end of the day, there are many, many people who may not, maybe they don't care too much about the whales and the turtles, but I think many, many Americans do, but we also have many livelihoods based on shrimping in the Gulf of Mexico. And redfish, both recreational and commercial fishing. And people really, really care about these resources, and these agencies have a duty to protect them.

Erika Kranz:

Well, we've talked a lot about the exemption, but one thing we haven't talked about yet is whether it's legal. And there have already been some challenges filed to the Endangered Species Committee's exemption

action to the national security finding that underlies it. Any predictions about what we can expect from that litigation?

Andy Mergen:

I think that there are reasons to be optimistic about this litigation. I think that the litigation is going to be challenging for both sides, just because there's no road map to this. This is an exemption that's never really been deployed before. But I think the administration is losing credibility in the courts on terms of its narrative about the need for these kinds of things, and I think it's going to be really hard to justify these findings.

Because the reality is that the courts have been hesitant to shut down oil and gas development. Some listeners may be familiar with the controversy around the Dakota Access Pipeline that resulted in huge public demonstrations against this pipeline running through the traditional territory of many Native Peoples. And the Corps of Engineers, which authorized that pipeline, suffered some real setbacks in court. But that oil never stopped flowing. Courts are somewhat reluctant when so much of our lives is dependent on energy. What they may be good at as in Mountain Valley pipeline, is stopping infrastructure that hasn't been built, although I do think that case is more or less a one-off.

But what they don't do is they're very careful about balancing the equities in this energy space. And so I think that the explanation that's been offered by the government is both, as we said, somewhat disrespectful to the judiciary, but also wholly unsupported. And again, as noted, we don't think the companies ask for it. Now you'll hear the trade associations say, "This is good, and we're great stewards." I don't think we're going to see any of the companies like Shell say, "Oh, we really needed this."

Because I don't think that there's anything in it for them to align themselves with the Trump administration right now. I think that oil operators have to worry about reputational harm. I think that they're sincere when they say they try to do their best, and they didn't ask for this. And I think all of those things give the challengers a way forward. The government will definitely argue that there's no law to apply here, that it's not subject to judicial review, but they've made a set of findings.

I'm reminded of cases like the Antiquities Act, which gives the president a lot of power to create national monuments, but there's some key terms about that, like how big the monument has to be. And courts have said, "Well, we generally don't think that this is reviewable." But there are some statutory terms that we need to kick the tires on, and here, that statutory term is national security, and there's a national security finding. And that national security doesn't have anything to do with the kind of national security work that I did, which was mostly focused around defending, what I think the Trump administration would call the homeland, from enemies, and making sure that we had the necessary military training and expertise to do that in terms of anti-submarine warfare and things like that.

This is not this case. Their national security exemption is that we're afraid our own courts, our own federal judges, will enjoin operations in the Gulf of Mexico with really no record to draw on. That seems like something that courts who are being disparaged in this process might want to probe a little bit.

Erika Kranz:

That's great to hear. I know that sometimes courts are reluctant to probe too deeply when an administration cites national security. Courts sometimes think, "That's outside our domain. That's a political question, not our business." But it sounds like you have some optimism that courts here have enough law to apply, have enough record to review that they can at least kick the tires, peek behind the curtain, assess whether the explanation the administration has given is reasonable and supported. Does that sound right?

Andy Mergen:

I think that's right. I don't want to walk back from my optimism, but it is complicated in that the administration has said that any challenge should only be heard in the Eleventh and Fifth Circuits. And these are traditionally conservative courts, they're courts of appeals. So if that part of this holds, it could be a tough road. Although I do think that there's still some hope there in the way that they've set this up.

And I also think that what the administration says about where this case should be filed is... All of this is sort of hard to parse through just because no one's used this exemption before. I think Congress really thought that the default would be the exemption process that I think is laid out in section h, which is the process that you alluded to, which is very, very detailed and requires a very, very developed record. And the administration seems to want to lean into pieces of the statute when it wants to, and then at the same time say, "Well, this is wholly separate," and the courts are going to have a lot of work to do.

And I also just want to say, I'm always grateful for the work of journalists and the time that they spend on this. I think they're really interesting questions that journalists should pay attention to. Where did this come from? Who asked for this? I think that good journalists will may be able to tell us a little bit more soon about where this came from, and the hard work that the litigants have already put into this.

There was a lawsuit filed very early in this, and the benefit of that lawsuit, as soon as the meeting was convened, is... The benefit of that lawsuit is that the government responded and said, "We're going to go with a national security exemption." Win or lose, these lawsuits shed important light about what's going on here.

Erika Kranz:

And it's possible that as a result of those lawsuits, we'll also get more information from the administration about how exactly it thinks this exemption is supposed to play out on the ground. How the requirements in the 2020 BiOp and the requirements in the 2025 BiOp, how they all interact, what's enforceable, what's not going forward.

Andy Mergen:

Right, I think that's exactly right. And it's a shame that that wasn't laid out in their reasoning, which is what we expect from good government. And what courts expect, which is that they shouldn't have to ferret things out. But this is a pretty thin set of explanations, and you're exactly right that the lawsuits... and when the government files its brief, we'll know a little bit more about what's intended here.

Erika Kranz:

So I know you don't have a crystal ball, but this administration has now used this provision for the first time ever. Do you think we're going to see more of this?

Andy Mergen:

I can't possibly describe to you just how shocking the deployment of this exemption is. I think that the administration is rapidly losing credibility, and I do think ultimately that there's going to be some real pushback. I don't know when exactly the tide is going to change here, but I think it's coming. And so the administration may try to do more of this, and they have other things in the works, other ESA things related to section nine issues pending.

But I do think that what we're seeing in the courts is more and more pushback, which may slow the pace of some of this just unprecedented, I know that's an overused word in the Trump administration, but these absolutely unprecedented maneuvers that, as we've indicated, show a lack of faith in the other branches and I think are intended to deceive the public in terms of what's really going on, so really quite shocking.

So I'm saying that this can only go on so long, and I'm optimistic that they're not going to be able to do more of this. But we'll see. No one has a crystal ball.

Erika Kranz:

No one has a crystal ball, but I also think the word unprecedented is warranted here. We talked about the pattern that this fits into. It seems like this administration is testing limits, triggering provisions in new and expanded ways. And we're, along the way, learning that a lot of what we used to think of as limits on executive authority were really just norms, and those norms depend on people believing in them and

observing them. And right now, we have an administration that doesn't see norms as important or as limiting.

But I appreciate that you identified some reasons for optimism. You talked about journalism, people paying attention, lights being shown and courts being willing to engage in serious review. Anything else we should be thinking about to help buoy us in this difficult time?

Andy Mergen:

I just think that listeners who care about this issue should just also make sure that their representatives and the like know that they care about the environment. Sometimes we get so focused on affordability and the price of gasoline that when polls are done and when people are polled, they're slow to respond about these environmental issues. But I think that for most Americans, these issues really do matter, and there's some polling on that issue. And as somebody who grew up thinking that it was important to save the whales, I think there are still a lot of people who think that is important.

Erika Kranz:

That seems like as good a point to end on as any. Andy, I so appreciate you bringing your experience and your perspective, and helping put this action into context for our listeners. Thank you.

Andy Mergen:

Thank you.