

Mallory IPAA 0:03

section on ONRR. And earlier this year in May, we had a longer session in Houston where they presented on all this information as well. So if you were lucky enough to get, this is really long. And it was a much longer session. This was the abbreviated version. But ONRR is something that is a really important issue for IPAA members right now, especially if you're operating on federal lands. So we thought it was a good issue to highlight. So we're moving from micro issues into kind of a more macro view with another legal panel. But we really think that the fight right now for all these regulations, is always ending up in the court. So we want to give kind of a more holistic view of what you can expect to see in the next couple of years. And, and I also so I wanted to mention that this session, like every other session is off the record, I kind of asked our panelists to estimate and theorize on where we go from here and some of this discussion so we can get pretty genuine and real. And so this is going to be off the record. And obviously, we will not hold anything they say against them, or hold them to any comments. So with that, we have three leading attorneys here for this panel. Wayne D'angelo is a partner at Kelly, Drye and Warren. Kathleen Schroder is a partner with Davis Graham and Stubbs. And Mark Baron is a partner with Baker Hostetler, I know all of you are probably very familiar with them and with their backgrounds, they have worked for IPAA on a variety of different issues at different times. So rather than reading the lengthy bios that you have in your packets, you all probably know them pretty well. And we're going to go ahead and get straight into discussion. I've asked each of them to kind of give a 10 minute overview 10 to 15 minute overview of the issues that they're working on right now. And then we're going to kind of move into more of a discussion setting. And I really hope that we will get audience participation at that time. So with that, Wayne D'angelo.

Wayne D'angelo 2:30

Well, thank you very much for having me, I'm glad to be here. I always loved coming here through the years. And it is wonderful to be here speaking with this panel. I'm going to take things to a very, very general level with respect to looking at litigation, for two reasons. One, it sets up a discussion for my colleagues here who are working on some important pieces of litigation. And two because I'm far more of a regulatory lawyer, where I do most of my work before the federal agencies and rulemaking comments, and some of those mature into litigation, but not all of them. And right now, the one case I have pending is the definition of solid waste. And if you ever want to have someone finish the drink quickly and walk away from you to use the can in order to get out of that conversation, start talking about what you're doing with the definition of solid waste. So important rule, went to DC Circuit multiple times, but really not cocktail conversation. And and there's plenty of other rules over here for that my colleagues will talk about more in depth. So taking it to the general level to talk about the sort of the legal landscape and do some level setting here. Couple takeaways. One, there is a metric butt load of litigation going on with respect to the regulatory agenda, that is a industry term I believe. So this, this administration, 885 days old, I looked trying to find like if I can figure out the number of lawsuits that have been filed in a energy, environmental context, and I

couldn't find it, I found plenty of organizations talking about how many that specific organization has filed. And so for Earthjustice 121 lawsuits Center for Biological Diversity check before I came out here, it was 137, that ticks up every couple of days. Natural Resources Defense Council is nearly 60. So some of those are probably suing on the same rules doing the same type of thing, but probably not in most cases. So it's tough to say, with precision, but basically a lawsuit every three days for environmental or energy regulation under this administration. So who are these suits against? Well, they've been against the the president, the executive office, I think the the, the leading defendant is the Environmental Protection Agency, followed by you know, Fish and Wildlife Service Department of Interior, Forest Service, National Marine Fishery Service, BLM. So what are the nature of these suits a wide variety, obviously, but so many of them are attacking the regulatory actions. So those new rules that the administration is putting in, that are considered deregulatory. So that is not a single, that is not a single. That is not something that happens with one single act. So as we've seen, in a lot of cases, there's first you have to stay or eliminate the impact of a prior agency decision, and delay the implementation delay the enforcement until there's a lawsuit with respect to that, then there's the promulgation of a new rule, and the administration has been doing it in steps sometimes they go for guidance, and then later, mature the guidance into a rulemaking. Sometimes they go straight to rulemaking either way, there's gonna be a lawsuit. So right there, you have three potential lawsuits for every each deregulatory action. And there's even the rules for how this administration was gonna approach us the deregulatory agenda, like the two for one those have been in suit, sued upon. And so the deregulatory actions, you know, I'd say a very large majority of those. And incidental to those are Freedom of Information Act, litigation. I've seen more under this administration, or against this administration than I've seen in any other prior administration, and lawsuits are coming quick. Agencies never make their freedom of information act deadlines, but they're getting sued at 60 days out, sometimes successfully by these environmental groups. And the information they're seeking is all kinds of different things. Some of it is just to sort of chill any sort of interaction between our industry and other industries with the administration. Some of it is to shame, some of it is to just attempt to slow down and throw some sand into the gears of this administration. Other types of lawsuits we're seeing is any authorization any permit any lease decision, every 100% of those who've been sued. have been there's been lawsuits filed on likely multiple lawsuits that somebody probably would have seen under the Obama administration as well, to the extent that they made any of those authorizations or permit decisions. There's also suit to compel. So these are the deadline suits. We see these you know, a lot of the environmental statutes you would see have specific deadlines, which, for agency rulemaking, ESA, is one from clean air act is one of them. And so the deadlines, which were a huge part of the Obama administration, particularly with the Endangered Species Act, we file a petition. And within 12 months of receiving a petition Fish and Wildlife Service has to make a decision whether to list or not whether to go for a listing, and they never did that to Obama. So they admitted, the Center for Biological Diversity said this is great. I'm going to do a petition for 400 and something species and they did that, you know, clock starts now. Are you ever gonna hit

it? And then pretty soon there's a cozy, cozy settlement under which the listing agenda for the Fish and Wildlife Service reflects the interests and policy interests of Center for Biological Diversity and Wild Earth Guardians, and we hated that, because it wasn't always the species that were most at risk, or the most imperiled, but often the species that were I don't know, just happen to be hanging around where you guys would like to do work. So ton of those under the Obama administration. And so those got settled out into a listing plan. That listing plan ended in the summer of 2016. And then it was time to look, what are they going to do looking forward for the next four year cycle? Center files, biological diversity did whay they always did they have their petitions already listed, they did their notice of intent to sue for 200 something species, they filed that notice of intent to sue in August with the expectation that they were 60 days later, they were going to follow that lawsuit. elections have consequences. They never filed that lawsuit. So they were assuming that it was going to be Hillary Clinton in there and that they could get into a cozy settlement and that they would want her to actually make her administration to make that list those listing decisions. They did not want this Trump administration to make those listing decisions. Because unlike deadline suits, with deadlines suits, agencies, the administration, you get no difference. The 12 month deadline means 12 months, and you can't interpret it otherwise. But other expert decisions like whether to list the species or not whether there's peril or not whether you need to protect it, particular piece of habitat, whether an air rule protects against risk enough. Those are things that are where courts, the Chevron doctrine, under the administrative procedures, Procedures Act, they give deference to the the agency, you're the experts. We're not going to second guess you. So in those respects, the rulemaking under the APA context, generally, there's a thumb on the scale for the agencies. And they know that more of those get through and CBD did not want that on the scale for the Trump administration. They turn that machine back on January 1 2019. I, we saw deadline cases, again, they now have four over three different species, lawsuits, deadline dates, so if you want to know what the pollsters at center biological diversity and wild earth guardians, think that the next administration is going to be it's gonna be there thinking it's going to be a democratic administration. And that this lawsuit, Trump administration is going to get saddled with defending against the deadline suit but the next administration one that they think is going to be philosophically aligned with them, is going to be the one that's going to make those substantive decisions. And those substantive decisions will be entitled to deference unless they are arbitrary, capricious, abusive discretion or inconsistent with the act. And so, I went a little bit off on that tangent and passionate about that I can get a couple drinks me later. And often, I'll go further. But a couple of couple of other thoughts, the results of all this litigation, again, hundreds and hundreds of lawsuit. Lot of early wins for the environmental groups. Brookings Institute, slanted as they may be said, 90% of the suits there they won, couple of things to think about with these. The first is we have decisions on these are the things that the administration has done most quickly. And before they had their people, and so it's not necessarily indicative of the overall record of the administration. It's those things that were done through governance through those things were done without necessarily doing notice and comment rulemaking and other things which are

required. So those the ones that have matured to the point where you could actually get a listing decision. And so that's one big reason why you see the environmentalist with early wins. Another thing is just, you know, practically speaking, the agencies are getting a bit better. They're getting people in there that know how to practice, environmental law and regulatory policy. They're also recognizing that there's things that you can do quickly, and there's the things that you want to be legally defensible and to hang out and endure. And they're investing or resources into those bigger ticket items, like waters, the United States. And so you see them adapt, adapting a bit more to fight back against these. And I think you'll see the record improve. But I also think you'll see fewer regulatory actions, it's we're now 580 days from the next administration be it Trump part two or the next person coming in. And so it's it's triage and prioritize time. So I think you'll see the agencies focusing more on the fewer higher impact rules, maybe doing some stuff. Could introduce stuff, through guidance, but full knowledge That's easy come easy go. Whatever you do, through guidance can be taken away through guidance. Yeah, as I look forward, you know, with that framework that I've set up as what we've released, the first 885 days have been all about more the same. There's no been no prioritization among these environmental groups, no budgetary constraints, they are fundraising, like you wouldn't believe in every one of these lawsuits is another fundraising opportunity. They've got huge war chest, and they're going to push through all the way towards the end. The aim for them at this point is even if they don't win, substantively, they will put so much sand in the years the Trump administration that fewer things will happen, they'll be more vulnerable. And again, they're hoping that the next administration can take the reins from there and shift things more towards policies their philosophically aligned with them. Thank you very much.

Katie Schroder 14:26

Hi, everyone. Thanks for having me here. My name is Katie Schroder and Davis Scrams and Stubbs in Denver, as you heard earlier, and Wayne did a really nice job laying out the legal landscape, particularly in the rulemaking effort. I have to agree with Wayne with where we are now from a legal matter is that we are in the process of either defending a Trump efforts to repeal obama repeal or replace or revise Obama rules, or else back as Poe discussed in the last session, challenging the underlying rules where perhaps the repeal or revision effort has been thrown out, that puts industry in the position of trying to defend those underlying or excuse me, trying to attack those underlying rules that were put in place by Obama. So it's sort of an interesting place to be, particularly with venting and flaring, venting and flaring role. Obviously, that's one of IPAA's big efforts, that that rules in a spot where right now we're defending the the Trump administration's attempt to revise the venting of flaring rule that that effort is in the Northern District of California, where I think we determined there were something like 40, some federal oil and gas leases in the area covered by the Northern District of California. But nonetheless, what we're seeing is a an effort by ENGOS to go to what they perceive as rightfully, or wrongfully friendly forums. So and I think that'll continue, I mean, Northern District of California, I would love someone to do an analysis just generally of the Trump administration success there, because not only have environmental rules can

challenge and thrown out there, but other types of rules as well. So I think I think that's what we'll continue to see on the legal front. And to be honest, I don't know when there's an end in sight. Some days, I wonder that with respect to venting and flaring, how much longer Am I going to be doing this, but because it just these efforts are long I bet mark, you might have some sentiment in there when it comes to the hydraulic fracturing rule. Maybe we should take a wager on, like which rules going to outlast us. You know, it's hard to say, but, but it's those are long, kind of long, drawn out fights, for better for worse. In addition to rulemaking efforts, we're also seeing very, very focused attacks on leasing on federal lands, and also approvals for development on federal lands. And I was thinking about what is the unifying theme among some of these challenges to leasing and development? What we're not seeing, interestingly, is ENGOs really attacking very, very discrete permitting issues or I'm not at least. Permits are still being issued, and some of those permits aren't being challenged. And I thought to myself, okay, why, particularly, because you know, that one of the big issues now is climate change. So why is, you know, that's, that's universal issue that would arguably affect any federal oil and gas project. And I think what there's a couple reasons, I think ENGOs, first off, they're there, there's an element of convenience, it's a lot easier to attack a single lease sale, kind of try and take down a bunch of leases at once. And it's also easier to try and attack a programmatic document, for example, that authorizes multiple, hundreds, thousands, even 10s of permits at once, rather than trying to wade through a field office and try and determine when the field office approved each APD and try and take each one to state director review. So I think we're seeing some big bang for the buck challenges with leasing and development. And that isn't to say that will that local ENGOs was really pet issues are still you know, out there that you're seeing that with respect, I guess, perhaps to Chaco Canyon, for example, you've got kind of more regional disputes in certain areas. But I think the big, the large scale challenges are really going for splashy bang for your buck type issues. And what's interesting, too, is that, particularly with respect to climate change, I think there's a very purposeful end to these big challenges. Like I said, when you're talking about regional challenges, it's pretty easy to see what the what the issue is, someone doesn't want oil and gas development right there. And with these climate change, these climate change lawsuits are much more nebulous in the sense of, you know, it's part of this, keep it in the ground movement, let's just attack the overall decision to lease or to permit with the effort of really trying to stop fossil fuel development. And what the end goal is of some of these ENGOs is I mean, obviously, keep it in the ground is the ultimate end goal. But I think it kind of the intermediary steps are trying to perhaps get a new administration to agree to a programmatic environmental impact statement to analyze the whole department and the interiors oil and gas management. We saw a petition by Wild Earth guardians filed for a PEIS and the last administration, the last administration didn't fight. So we'll see if that's what what they're headed for. And then obviously, there's a there's also I think, in effort to try and have climate change, or greenhouse gas emissions at any level, no matter how miniscule be a significant impact that warrants an EIS rather than a FONZI. So I think those are sort of the angles of these lawsuits beyond just simply keep it in the ground. One other thing that I think is interesting is we're also seeing a

demand for more information. **And Wayne touched on that briefly with respect to those Freedom of Information Act challenges he mentioned. But what I'm seeing too, is, is there's this desire for ENGOs to really get in the business, the everyday business of oil and gas operators figure out what's being challenged where and why. And sometimes I think BLM in an effort to be transparent, sort of enables this, this disclosure of half as much information as necessary, because I noticed that with BLM's revisions to AFMS, for example, now the public has more information to what permits are approved, but doesn't really have the full story. So often, that leads to confusion.** One thing also to note in the challenges to project development, and leasing approvals, is that challenges can be still occurring at both the administration administrative levels, such as before the state director, before the interior Board of land appeals, but also in federal court. And one thing and I'll just I'll save, this is a little bit of free advice here, I'll save y'all a phone call is because and that is that you can have a project or a lease be challenged both administratively and in federal court at the same time and having those efforts going concurrently. And we're seeing that sometimes. And so I think operators really, really need to be vigilant, pay attention to what those challenges are, and get involved and head them off at the pass no matter what forum. And I think, finally, I think I want to echo a theme that Wayne hit on, which is the timing of resolution of all these issues. In the last session, we heard that ONRR declined to appeal, the Northern District of California is decision challenging, or throwing out the new rule replacing the ONRR regulation or the the Trump ONRR valuation rule. And I'm not going to opine on whether that was a good or bad decision. And I think there's pros and cons on both sides. But one thing that I'm always mindful of is that there's sometimes an urge to, you know, keep on keep on pushing, keep on fighting, but you have to look at it. I think at this point, we have to look up at the shot clock and say, Okay, we're if we're in, we're headed into we're not far from 2020. And we're not far from the next election. And will some of these appeals, will some of this litigation be resolved by the time a new administration comes in, and I think that's always part of the calculus, that doesn't mean there's always that's going to drive the decision. But I think that's always something important, and it needs to become a bigger part of the calculus as we get closer and closer to the end of this administration. So those are my I guess thoughts. And I welcome any thoughts counter thoughts from Mark or Wayne, as we set up our panel discussion in a bit, thank you very much.

Mark Barron 23:27

Good afternoon, everybody. It's always a pleasure to be at an IP double A event and to have an opportunity to speak and see so many friends and colleagues in the room. And, you know, Katie's reference to 2020, I think is a nice segue, because while we're a legal panel, I want to focus for a second on on the connection between our lawsuits and politics. Because you know, the politics are important because it has a meaningful impact on the merits of the cases that we've been discussing. **We made a reference to the environmental organizations, early wins, and kind of the first two and a half years of the Trump administration. And I would trace that back directly to the implications of quote unquote, draining the swamp. And**

what I mean by that is at the very highest levels of leadership in public land agencies, and all the way to the White House, we're saying all the right things about the policies we want to adopt. But the issue comes down to who's actually implementing that policy. And so we've been charged, you know, Katie and I are involved in cases where we are charged with defending the rescission of important Obama rules. And I'm going to be candid, some of those rescissions were done too by too few people and it too fast a pace. Now, some of that, of course, was driven by the fact that industry was in the middle of lawsuits against the Obama administration, the Obama rules. So some of that pace was compelled by industry. But in early 2017, there weren't the right people in those organizations to actually execute the rescissions. And I think it's pretty obvious to me that comes down to sort of two reasons why that happens. One is the Trump administration's political decision to implement what their so called loyalty tests that if you weren't loyal to the administration, from the beginning of the electoral cycle, that you weren't going to get a job in the administration. And so you have, you know, the other side will criticize and say the swamp hasn't been drained. But when it comes to sort of government, technocrats, the swamp has really been drained. The current secretary, Mr. Bernhardt is a competent technocrat but the other folks who are in the office are inexperienced government folks. And so they may want to implement policy, but at some point, you need some people who are familiar with Washington, who know how to draft a regulatory rule, and have experience doing it in at a big level. And this administration, I'm going to respectfully disagree with Wayne, two and a half years later, I don't see the agencies getting better, I still don't see that leadership or that competence, in the administration. So the first issue, of course, is this idea of of the loyalty test. The second is, and I know from private conversations over cocktails, with some of the people in this room, there was some reticence of folks who might traditionally consider themselves traditional republicans or kind of Bush era Republicans, we just didn't want to be in this particular administration, for some of the rhetoric that comes out of the leadership, I'd say in non-energy components. So this is what we all do for a living. And it's the most important thing to us. But we're also well rounded, you know, people and so some of the things that he may say about some other issues, or that you may read tweets about me may suggest to yourself, that you don't want to have kind of speeches like this for the next 25 years of your career and get introduced that such and such and the Trump administration. And so there was a real, there's a real reluctance for some real competent people to have served in this administration, apart from the fact that they weren't going to invite you in if you hadn't been supporting him, electorally, from the beginning. The other thing is just a reality of human nature, the people who are doing the work, who are actually writing the regulatory preambles and conducting these regulatory decisions, are more often not the very same people who dedicated five to seven years of their life propagating the Obama rules. And so the idea that they are emotionally committed to writing excellent, rescission rules is just foolish. I mean, that's it's not realistic, and their product, the product

proves it. I mean, our goal when we drafted technical comments for IPAA, for the regulatory rescission of the hydraulic fracturing rule, we used to the same template, the same headings, the same font as a regulatory preamble, we wanted it to look like a like the comments and and we basically said, Here's your preamble, please, please put it in. And they omitted really, really important points that we made. And so now, as we're defending this rule in the rescission in San Francisco, I personally think that all of the counter arguments necessary to defeat the environmental groups challenges are in the administrative record. The problem is there's not necessarily a connection between the government's thoughts and actions and what they've said in the in the preamble to that evidence in the record. So that's going to be a challenge that we're going to face as we when we actually get to merits briefing in San Francisco. The other thing is they, while the administration has been generally supportive, and I think we'd say the overwhelming majority of their sort of policy position statements have been supportive, they haven't gotten all the way. So again, I'll use our hydraulic fracturing case. I mean, we won in Wyoming on the argument that BLM lacks regulatory jurisdiction to regulate hydraulic fracturing, because that jurisdiction Congress had assigned to EPA under the Safe Drinking Water Act. BLM even today, despite the fact they've switched sides of the V in our lawsuit, will not support that argument. And it will not raise it in merits briefing. In this case, we made numerous arguments about technical deficiencies in the rule. And rather than bore folks about, you know, above ground steel tanks and disclosures of hydraulic fracturing plans, BLM thinks that it still says that if it wanted to it could ask for your proprietary hydraulic fracturing designs, the Trump administration has said they're not going to do that, but they haven't said that they don't have a legal right to ask you for those things. So industry still plays an important role, even when we're on the same side of government, because we're making arguments that even this new supportive government won't make on on our behalf. Others, you know, Poe, in the last session made the reference today, the top story on energy 360, a lot of folks saw this, is the Trump administration's opposition to nationwide injunctions. And this administration wants to eliminate that policy. I mean, let's let us not forget that that's our playbook, that we went to Wyoming in 2015 and we said, do not implement this rule anywhere in the United States. We were successful doing that. So you know, he may be upset about nationwide injunctions, frustrating immigration policy, or sort of national security issues or presidential prerogatives and defense. But don't forget that nationwide injunctions were a very important and successful tool for this industry in defending against the Obama administration for six years. And I think the idea of taking that out of our toolbox if things change in in 18 months, is something that we really need to think twice about when you all are in Washington and advocating for what's best, or want to sort of support the administration. This is something we may want to think about rolling back a little bit. I want to address just for two more minutes before I can kind of sit down and have our conversation, we've been talking mostly about regulatory litigation. But Katie made the reference to climate change

litigation. My view is this is without question, the most important thing that's happening in our business right now. And I want to sort of emphasize that for many years, there is discussions in this room about, you know, the facts of climate change the science of climate change, whether you know, sort of investor activism about climate change, but some of your company's got a closed session, let me offer my view. It doesn't matter whether it's real or not real or what the issues are, that ship has sailed from a political perspective. And here's why. I can tell you that at the risk of being adversal I'm 42. My entire education was climate change was a real thing in school, it's all we talked about. There's nobody younger than 40 years old in the entire United States, whose entire growing up education and science class, climate change was taken for granted as an existential crisis that we need to address. And so the political wins on this are, it's silly to say, we can talk our way around it, or we can address it. And I was very, very proud of this association, when we went to our congressional call up in March call up in March, where we were the first time I'm aware of one of the major fossil fuel trade associations went to Congress and said we're going to talk about this, and we're going to talk about it as us being the solution. We're going to talk about it from a real realistic sort of policy perspective, not some sort of fanciful, we can ignore it. some sort of fanciful, we can ignore it. And so I think IPAA is the leader on this issue. And it's something that we all need to be to be aware of the the lawsuits about the least sales are getting the most sort of media attention, because you can kind of address a bunch of them at once the there was 210 leases that are involved, I'm sorry, the 360 leases that are involved in the DC Circuit challenge to Wyoming Colorado and Utah. The lease sale challenge was filed a month ago challenging sort of the Lisa's and Roswell over the last 18 months, talking about \$1.7 billion and bonus payments, those leases generated in the biggest play in the world. But and Katie touched on this, BLM's climate change analysis and its decision making is pretty standard and it's pretty consistent, in lease sales, but also resource management plans and master development plans and combined permit applications. So the idea that this is limited to these sort of big lease issues, and it's not going to extend to the the day to day operations of your company is is wrong, it will touch every time you file an APD this analysis and these cases are going to be important to whether or not that a APD gets approved and the level of environmental analysis that's that will be relevant to it. Rather than get into the details of some of those cases, I just want to raise sort of one issue though that I think is the upside of all this and kind of leave on a positive. All of these cases, the the Wild Earth gardens, lease sale cases around the country, many of the other climate change focused cases when I've got one for a small independent producer, the western slope of Colorado right now, the focus has the biggest section of their complaint, the first 20 pages is is climate change, the kind of next eight to 10 pages is impacts on water and air from hydraulic fracturing. And just your general sort of operational objections to oil and gas development. And one thing that I you know, take a little bit of heart in is, in those cases, the energy wire in La 360 has covered the fact that the judges have said to climate change analysis has

been deficient, but they overlook is that industry, we're winning on every single other issue. So we got a decision in Colorado three months ago, the judge, there were nine claims, the judge said actually, your model, your climate change model is fine. You just have to change your inputs A little because we can talk about they want us to calculate downstream combustion. And we can talk about that in the question and answer folks want. But there were other claims about impacts to wildlife impacts to water impacts to air quality, socio economic review, and we won on every single other claim. So the while we need to be focused on the vulnerabilities of climate change litigation. I think it's fair to characterize it as kind of the last resort of the environmental community. And the issue, I think here is what our true goal should be from from these cases is that theoretically, NEPA is a procedural statute and not a substantive statute. So theoretically, even if we lose, because we haven't modeled climate change analysis correctly, courts can tell us what the deficiencies were the agency can go back, correct those deficiencies. And theoretically, if the analysis is done correctly, BLM can then still approve the projects. And so I think that if industry gets out of these lawsuits, a standard that BLM and other federal agencies can regularly meet and implement, then much of the other stuff is kind of side noise. And that will be that will be worth it. I mean, that that would be something good to take out of this out of the Trump administration. Thank you.

Mallory IPAA 36:21

Thanks, Wayne, and Katie, and Mark, will kind of move into a discussion and I'd encourage anyone to raise your hand if you have questions. But I first wanted to ask if Wayne or Katie had anything they would like to add or respond to, with Marks and if not, that's okay. We can move on.

Wayne D'angelo 36:40

He respectfully disagree with me. So no, but I actually I'm going to respectfully agree with you. **A lot of early losses have a lot to do with the fact that there was not the right people in place. I worked at EPA, under the Bush administration came in the bush administration and no administration, Republican immigration comes in well, for all there's going to be limits on how much you can rely on the career folks, but, you know, Wittman was not Pruitt and Trump is not Bush. And so I think it was a more profound issue. But I do see signs of improvement. Bill Wehram, who was the Deputy for air under the Bush administration has come in and he's actually moving very methodically through MSR phone, and doing a very good job. He is one of those really smart folks that this administration brought in David Ross in the water office of EPA, I think is based on the rule that they put out for Wotus. It's really a thoughtful rule.** People are are getting all angry about the pace of that rulemaking. But I think it's because they are weaponizing for legal defensability. And I think that's, that's sign of progress. So I'll agree to disagree a little bit. Is that fair?

Mark Barron 37:57

I mean, the only thing I'd add is that weaponizing, it's already getting pretty late, like you couldn't file a suit now and expect to be resolved before the election. So anything that they do now, if the election flips will probably be defended at some point by a democratic administration. I mean, that's just anything new now. That's the reality for today, probably from many weeks ago. But today forward.

Unknown Speaker 38:27

I'll ask one quick question. Let's assume for the moment if the election doesn't flip to the Democrats. Do you think and four more years, still doing nonsense?

Mallory IPAA 38:45

Who wants to take the first stab at that one?

Katie Schroder 38:53

Well, I think what, so really, there's one thing has to happen, which is we actually have to get out of the legal issues of just trying to undo what the last administration did. And so that's not quite answering your question of is everybody going to sort everything out. **But regardless, we have to clear that hurdle really, and put some of these other efforts undoing these other efforts behind us to focus on new regulatory rulemakings, right, because that's where the money is.** We can BLM can do policies, the administration can do as much guidance and executive orders and Secretarial orders as it wants, but the real win is to get some regulatory changes in place. And I'll let one of these, I'm just out in Denver. So obviously, I just don't have a window into DC. And I'll let one of these guys say whether they think that like that we get that there's enough energy and drive I guess at main interior to do some of these rulemakings that are needed.

Mark Barron 39:51

I'll evade that questions. But here's why. This is my the point I started about how politics affects litigation strategy, and like the merits of these cases, is that it should already the cases that that exist Now, it should already be affecting strategy, what they don't tell you in law schools, how much time you spend in a in a lawsuit actually arguing about like the schedule, when briefs are going to be do when things happen. **And I can tell you that in, you know, end of 2015, when we got an injunction in Wyoming against hydraulic fracturing after that, every time we had to talk about breaking schedule, or any sort of scheduling, we were slow footing that case to try to get it through the end of 2016. I think now, cases that are pending, we want decisions before that election.** And so to the extent it affects ongoing litigation, strategy, pacing, our pacing decisions are totally different. Because as I said, **even if we lose, particularly on the NEPA cases, if we can get if we can get in the loss, the roadmap to correcting the deficiencies, and we can give the agencies enough time to actually execute that, you know, complete that roadmap before the election. I think that's actually it's a it's a, it's an industry win so it does affect pacing at this point.** It was our agency by agency, whether or not they've established the competencies to do anything different. Now,

Wayne D'angelo 41:11

I agree, I mean, more time, the agencies can go back and correct things where they've gotten it wrong, and spend more time with rulemaking they can to a greater extent ensure that they are going to be the same folks that are defending the agency action, but I'm going to say that even the second illustration is still gonna be nonsense, right? We were all the same age. So from an environmental standpoint, we haven't really worked on anything that has been, you know, a new environmental law hasn't happened, right. Clean Air Act of 1990 was one of the, except for Tosca, was the last major environmental change left on Congress active I was in high school. I wasn't even driving yet. So our entire careers is just regulatory actions, one agency interpretive one way, and another agency or administration interpreting it the other way. It is. And those interpretations are not just four square on what the you know, really dutifully trying to figure out what Congress intended, it's to reflect policy changes, and the pendulum is going to swing, it's going to whip shaw back and forth until Congress steps up and starts passing some environmental laws and amending back statute. So even more time, you know, there's nothing that can be done by administration that can't be undone by a subsequent administration.

Unknown Speaker 42:30

this will be quick Mallory just for the sake of variety. I would like disrespectfully to agree with Marc.

Unknown Speaker 42:42

So, Mark, so Carlsbad RMP right now, so you would say that we should just go ahead and let it, let BLM issue it, get it out for the challenge, and then correct the deficiencies is that a legal strategy.

Mark Barron 42:59

So this is something I know that they're wrestling with internally. But you may recall when they when the comment period closed last fall, that, originally what they were what we were hearing from the administration is they wanted to have the final version internally completed in like, four weeks, because they wanted the Martinez administration to do the state collaboration review. And we suggested to them that that was probably a bad strategy. And fortunately, they didn't they didn't do that. I think if they're if they're getting close to ready, I don't think it's a bad idea for them to to try and finish. I don't.

Unknown Speaker 43:45

followup question, should we be asking BLM to do social cost of carbon. Social cost of methane?

Mark Barron 43:53

I just I just I just won on this issue in Colorado like six weeks ago. So I say no, there's no there is a no case law that says social costs of carbon is essential to a climate change analysis.

Katie Schroder 44:05

Yeah, I can agree with that. I mean, the social cost of carbon methane issue is like the one issue that the administration has been eeking out a win on in the climate change front.

Unknown Speaker 44:22

I'm wondering if you guys had a chance to review the CEQ guidance on the green house gas analysis that came out on Friday?

Unknown Speaker 44:28

Sthats what we did all weekend,

Katie Schroder 44:33

took about 15 minutes to read it at home.

Mark Barron 44:37

I didn't read it. So

Katie Schroder 44:40

it's very, very general. And **it's not helpful in the sense of what the agency needs to know, when it does its climate change analysis is literally what do I do? What steps do I follow? What boxes do I fill out? What do I multiply? And it really all the guidance does is just codified the existing law on NEPA. And so is it legally correct? Probably, but does it actually provide useful information to the agency that will help it reach a decision faster? And really, this is what my fear is that where the agency that BLM because it does all these climate change analyses at the state office level, Is it going to are they going to do their analysis slightly differently? And then, you know, Wild Earth Guardians will say, well, you made this assumption in New Mexico and this is a different assumption and Wyoming and therefore it's arbitrary, you know, it doesn't provide kind of a good framework** for agencies to make decisions. And I don't mean to come in here on a sour note, because I really was hoping that that climate change analysis would be useful. It would be something that me as a lawyer, or any of us, as lawyers could point to and say, Look, the agency decision was correct, because it follows the CEQ guidance, and it just doesn't have enough teeth.

Unknown Speaker 45:53

Just a followup, I think they denonstrated demonstrate in the DC circuit,, my concern is are indirect emissions, on a DC time frame, you're never going to be right. And so they're going tocontinue to venue shop and find activist Judges that are not going to be happy, you know, with that. Because at the Leasing stage, you don't know what leases are going to sell, you don't know what products or anything, you got no idea the end use.

Mark Barron 46:17

here's what I say about that vulnerability is that, you know, the thing, the issue that that we've we've been losing on is this idea of the quantification of downstream combustion. And so your point is well taken at the leasing stage. How do you calculate that? The I think there's two complex issues here, like First of all, the I don't think industry has briefed the issue well, yet that there are lots of different types of downstream combustion calculation. So some of the first two or three cases to address this issue were coal were coal cases, where all of the coal was taken from the same location and was going to be burning the same power plant by on a on a, on a regular predictable pace. And so it was easy to calculate where as example, In a lease sale a, the production number itself is, is hard to to calculate and then B, where's that actually going to get burned? I mean, is it in the in the back of your pickup truck? Or is it some some powerplant somewhere so the combustion numbers are much more difficult to calculate. But here's the thing that you have to remember, the judges who are handling these cases are not oil and gas specialists. And they'll say, okay, so you can't calculate it with precision. But every federal one, environmental analysis has estimated production in the socio economic part of the NEPA review. So we're saying oh, it can't be calculated, but then we like turn our face. And we say, actually, but here's how much we're going to produce and how great it is for the community and how many jobs are going to be there. And there is tension there that we have to reconcile in, in our in our advocacy.

old man 47:55

What what you said about 42 and younger, I don't know what to think about it. Do I assume that you are 42 and you are brainwashed, I mean is doesn't make any difference, or you were born into a religion. Because when it comes to catastrophic climate change, there are a range of issues, economic, scientific issues that have to be reconciled and, unfortunately, this is an issue thats gone from theory to policy without ever getting the data to reinforce or negate the original theory. Now we're getting data. You know, catastrophic climate change models don't work. And to think the industry would sit back and say nothing about that is just, incredible. except we have you 42 year olds to contend with.

Mark Barron 49:17

Let me let me clarify, because my statement is not that the science is settled or that it's even somebody somebody who was, you know, if I was smart, I wouldn't have gone to law school and probably do something, you know, valuable to society. I'm not an engineer. I can't count anything. So the the the, the point is not, we have to accept this as settled science. The point is, we have to understand the political reality that the majority of people out there, consider this is settled science, the overwhelming majority of the electorate believes this issue was resolved. And if if you're if, if you're making political decisions, without that understanding, I think that is that's got blinders on. So your point is well taken, and I'm not a climate side climate scientist. This is just from a political reality have to understand what the electorate things,

Wayne D'angelo 50:08

and I would add to that as the grey hair up here and 44 years old. I would respectfully disagree with the whippersnapper over here. So, it is not the case in a policy standpoint, except for like, you know, MSNBC versus Fox News like that. It's a question of is it climate change happening or not? Anthropogenic or not. Like the policy decisions? I think it's a far more nuanced discussion. that plays out at the agencies and plays out in courts. And it's not just stepping aside whether it's happening or not, can you monetize it down to \$1, 100 years in the future? That's social cost carbon, right. What a carbon emission will be. For NEPA, right. I mean, basically, the case law out there is a invitation of speculate, even though that's okay. And because there's the, you know, those folks out there with, you know, remarkable alacrity, and precision will be able to say, down to the dollar precisely what these impacts are, and down to the ton, but climate change, has all sorts of different app impacts. And they, impact Some are easier predict than others, some predicted on scales and others. And we're supposed to be making we as we the government, that those that are involved in policy making decisions based on that more granular information. And there's plenty of basis for for disagreement there. **Like Yes, it's happening, it's happening.** But doesn't mean you can predict its impacts down to this level on these time frames, and on this sub continental level. And but it's decisions like that, based on some pretty generous evidentiary standards, errands and statutes that allow this gross speculation that goes into these things and just pull the ones back a little bit with respect to NEPA. NEPA it's a smart statute. Look before you leap, don't do something that's going to have an adverse impact that you can't fix until you thought about it first. what's the impact on for these discrete decisions on overall climate change, a global phenomenon, with trillions and trillions and trillions of different impacts on it. To say you can predict anything in that paradigm is just pure Hocus Pocus. But here we are using the NEPA for that wherein into a really an empty paperwork exercise when it was really supposed to inform and make the decision making it. It's, you know, I think it's improper. And I think there's plenty of room for making those fights, you know, not necessarily directly without directly attacking climate change, but like, let's have a sense of humility about what we can predict and at what scale.

Katie Schroder 52:45

well, and to that point. So I respectfully agree with everything Wayne said. But I'm going to say something more controversial than perhaps anything about climate change, which is that I actually feel sorry for BLM. And and I feel sorry for like the guy who's a GS 11, trying to figure out how to quantify the impacts of leasing or development on global, climate change, because BLM is not EPA, it's not this, it does not figure out what its decisions are on a global phenomenon. And that's what is being asked of it. And so I mean, I think one thing that I wonder about is how are we going to get like, this climate change issue is a deep dark rabbit hole that we are going to fall down on. And it's always going to be the analysis is always going to be not quite enough, it's not going to be quite right. And how does how do not just the industry, but the industry help the agency come out of the rabbit hole? I don't know the answer to that. But I think it requires policy or regulatory change.

Unknown Speaker 53:47

Add to that what you just said I know it may sound like i'm getting in to the weeds, but as an example. A 20 something year old biologists with the US Army Corps of Engineers, that's that's making calls, on locations, wetlands non wetlands, you can you can do this is getting in the weeds. Now stepping into agriculture issues, private landowners that have owned land, for hundred 150 years. Now that's overstepping into - it's impacting private land owners, which you can and can't do with your, your own surface. So your know, field crops agriculture, commercial development. So I'm not blaming young folks, Now you see you got a nickle holding up a dollar.

Mallory IPAA 54:56

We appreciate that, we got Trip over here

Unknown Speaker 55:03

Especially mark who's a former DOJ attorney. What's your assessment of the legal advice the regulatory agencies are getting from career DOJ attorneys in the various litigation suits out there? And how if at all does that change the role that trades play, both in the litigation and at the advocacy level, when you're talking about maybe experienced bureaucrats, who 're trying to put the rules in place?

Mark Barron 55:29

The fundamental difference, I think, in the title, this is why I said we have to be involved from industry perspective on you know, sort of the technical issues are the arguments they won't make. And it really comes down to I think, training, my experience in the environment division at justice was that the lawyers who are there are environmental lawyers, not energy lawyers. And environmental law is a component of energy law. But it's there are significant differences. And you're never going to get it's going to be rare that you're going to find a DOJ lawyer who's going to write a good section and a brief about the adequacy of a mechanical integrity test. we're comparing sort of the traditional casing pressure test on under onshore order number one, with what the 2015 fracking rules, and they just the people who are interested in that job and you migrate into that role, it's very rare. First of all, almost all of them are sort of Northeast, elite kind of university graduates. There are very few folks from the from the patch, and they're just not energy lawyers, even the ones who are good at their job.

Unknown Speaker 56:33

The rest of them are in Boulder

Mark Barron 56:37

I wouldn't know I never go to Boulder. It's only 20 miles away, the guards will let me enter the gate. So

Unknown Speaker 56:43

so far, Association for thought for statement today. What we're about with it and hear about it unfortunately, it appears that that needs to be ratcheted up pretty quickly.

Wayne D'angelo 57:22

I think this visit this organization has an excellent, nuanced and intelligent position and Mallory and Dan can share that.

Mallory IPAA 57:30

Yeah, we were actually going to be touching on this issue in our last session today, when we talk about our Capitol Hill outreach, so stick around. Brian.

Unknown Speaker 57:41

Yeah. So Senator, Senator Elizabeth Warren, among other Democratic candidates says they would sign an executive order placing a total moratorium on federal oil and gas leases on their first day of President all the while they want to focus on building new renewable energy projects on public lands. How do we reconcile that with MLA or FLPMA or with that, how do we as industry or for businesses plan for such threats?

Katie Schroder 58:08

I think the three of us are going to pay for rock scissors for who's going to be able to take that lawsuit, because it's a pretty easy win. I mean, you can't reconcile it with the MLA. I mean, is that fair? I mean, we can all agree on that.

Mark Barron 58:20

You know, it's interesting, the, if you look at the MLA in the US code, it's pretty innocuous without sort of the purpose. But if you actually look at the text from 1920, the actual law that was passed the very first line, and I'm paraphrase, but the very first line describes it as, as an act to promote extraction of oil and gas, coal, sodium phosphate and other stuff from from federal lands. The purpose is. I would argue that you can even go beyond those statutes. I'd say, how do you reconcile that with the Fifth Amendment? Supreme Court is recognized federal oil and gas leases as a compensable property, right. And they are free to take them back. But they should have to pay you guys for that.

Mallory IPAA 59:00

Spencer, I'll let you go. And then we're out of time. So last question.

Unknown Speaker 59:04

Maybe back to your comment about being unable to really events or whatever the analysis is a programmatic EIS where we're headed. And I asked that given that NEPA from at least in EA, where is it a federal judge who decides whether that's good or not? And you know, what, what's our remedy? Because that, whether it's good or not, it's already starting to trickle down into project level EAs. And even

APDs. So, how do we reconcile that with what the federal judge is looking at or trying to do.

Katie Schroder 59:42

So I, I'm cautiously optimistic that judgment, tourists would find what BLM did to be adequate? Because I think there he saw lack of analysis, and he did CHF have really good justification for it, or what in his mind was a good reason for it for all the reasons that mark talked when we quantify all these other things. And so he says, Well, I want to see something now that the agency did something I don't know, I don't I don't get the sense. He wants to pick that apart. So but that doesn't mean another judge couldn't, right. Another judge in a different case, where the this is it's fascinating because of case laws and evolution. Right. So right now, that might be okay, under the case law today, but in two years, that may not be. So it's whether that I don't and I don't know if a court could order a programmatic EIS because I mean, that went up to the Supreme Court in the coal contracts. And the Supreme Court said, well, you don't have to that's not a program. You don't have to do that. But I wonder if that because of the the fact that the mentor leasing act doesn't allow doesn't prohibit doesn't allow a moratorium on all development. That could be a PEIS could be something that another administration could use as a tool to really slow down and hinder Lease sales and development authorizations on public lands, while kind of, you know, well we're not you know, you know, flying in the face of the MLA, we're really just trying to card loop under NEPA. So it could be a way of kind of, you know, this and out of this analysis by paralysis type approach might be a tool that another administration could use.

Unknown Speaker 1:01:18

Well, we have about a 10 minute break and we'll be back here at 315 years, a channel So thank you to our panel.