



## Fox Rothschild Podcast

### ESG Essentials: What You Need to Know Now

#### Episode 19: Power Struggles: Federal vs. State Authority in Energy Law

*Featuring David Colvin and Karen Davis of Fox Rothschild*

**David:** Welcome back, everybody, to another episode of Fox Rothschild's podcast, "ESG Essentials: What You Need to Know Now." I'm your co-host, David Colvin, Co-Chair of Fox's ESG Practice Group, and with me is my co-host and Co-Chair of Fox's ESG Practice Group, Karen Davis. And as many of you know, this podcast covers core ESG concepts and explores important and evolving issues for businesses, both public and private, that are concerned with developing and deploying an ESG profile, or simply responding to increased scrutiny from regulators, investors and consumers-- and not necessarily in that order-- regarding their perceived environmental and social impact. And of course, all businesses, public and private, are interested in minimizing any reputational risk that can arise and often be associated with ESG.

In today's episode, Karen and I will be talking about some of the Trump administration's executive orders aimed at environmental and energy matters, including recent Executive Order 14260, which was on April 8 of this year and is entitled, "Protecting American Energy from State Overreach." And so with that brief introduction, Karen, welcome back to the podcast.

**Karen:** Hi David. It's great to be back.

**David:** Isn't it? It really is. So, of the Trump administration's executive orders-- and for today's discussion, we're really only looking at those focused on environmental and energy matters. Approximately 130 executive orders have been implemented by the administration to date and many of those deal specifically with environmental and energy issues. And so, do you see an overall theme in terms of the executive orders that specifically relate to environmental and energy matters?

**Karen:** I do. I think there are a few themes, but one of the central themes is the objective to unleash domestic energy production, primarily by fossil fuels, and to eliminate things that are considered to be obstacles to that objective. By way of example, the executive order that you mentioned, "Protecting American Energy From State Overreach," that was issued earlier this month was issued along with a few other executive orders that were basically trying to support the U.S. coal industry.

And the executive order about "Protecting American Energy From State Overreach" asserts that there are state and local laws and programs that address aspects of energy policy-- particularly those related to climate change --that are undermining American energy dominance, and then by extension, national security. And the executive order calls for sweeping action by the federal government to combat those localized efforts.



One of the laws that is called out in that executive order is a topic that we addressed in an earlier podcast, the New York and Vermont Climate Superfund Laws, which, as we mentioned in that podcast are already the subject of challenges in court. But this executive order by the Trump administration specifically identifies them as problematic and interfering with the ability of U.S. energy companies to develop and increase energy production.

**David:** And so, Karen, let me just interrupt you because-- just to the extent that some of our listeners may not be familiar with the New York and Vermont laws, or may not have caught our last podcast on that subject-- is it fair to say that, in broad strokes, that the New York and Vermont laws are aiming to retroactively fine or penalize companies engaged in the business of either extracting fossil fuels or refining crude oil, and that where those companies have had what the laws describe as an outsized impact on climate change in this particular state, in this case New York or Vermont?

**Karen:** That is correct. They're basically looking to shift the cost that's incurred in the state to address impacts from climate change --or what they assert or impacts from climate change-- to the energy producers who are often located outside of the state.

**David:** Right. And not necessarily, or not at all, operating within the state.

**Karen:** That's right. And the legal challenges that have been made against those laws include the claim of preemption, that the federal government is regulating in this area and that preempts the state from acting. And that seems to be a central theme in this executive order. So, it'll be interesting to see if the federal government joins in the pending litigation or how this executive order plays out in general.

**David:** Right. And really whether the executive order itself will be evidence of the fact that what the states are attempting to do is in fact preempted by the federal government and federal policy when it comes to energy matters just simply by virtue of this order itself, right? Which comes post-facto, right? After the state laws have been put in place but certainly is attempting to stake ground by way of federal policy with respect to these issues. So those litigation matters will be certainly something we follow.

How do you really see this particular executive order itself playing out? Do you expect there to be significant challenge, particularly from the states that it ostensibly is targeting --New York and California come to mind-- and just what do you see going forward?

**Karen:** So it really remains to be seen how this executive order will be implemented. The federal government can't intervene directly in the lawmaking and regulatory agenda of a state. So how the federal government will achieve its goals under this executive order remains to be seen.

As I mentioned, the Department of Justice may intervene in some of the pending cases. There's various litigation against energy companies on the assertion that climate change has resulted in damages. It'll be interesting to see what the federal government does to achieve its objectives. And we have already heard from a number of the states that are identified in the executive order indicating that they are prepared to push back. That they are committed to implementing their



climate change programs, laws and regulations. And they will defend those in court if they need to. We're setting up a battle between the state and federal government.

**David:** Sure. And I think that suggestion that litigation is likely to be the end result here, while seemingly obvious in the sense that's typically the route that gets taken when there's an opposition to any particular statute. I think it's even further demonstrated by the fact that, for example, in the executive order we're talking about, which is attempting to protect American energy from state overreach. The order itself really instructs the Attorney General and the Department of Justice to take steps to report back to the White House with respect to laws that they identify that are seemingly inconsistent with federal policy. As opposed to, for example, the Department of Energy, where one might expect these types of requests to be directed. So I think that just underscores where things are headed. And we'll just have to wait and see.

**Karen:** Right. And there are already 203 cases pending where challenges have been filed against the Trump executive orders and other administrative actions. I think it is likely that this executive order may lead to some additional litigation.

**David:** Alright. So, Karen we talked a little bit about how this particular executive order regarding the protection of American energy from state overreach is a demonstration of a federal policy or a statement on a federal policy. I'm curious how, if at all, this particular order and what it attempts to do aligns with, for example current EPA policy that may overlap in some respect with this particular order.

**Karen:** This executive order aligns very closely with EPA Administrator Zeldina's deregulation agenda, which he announced last month. That deregulation agenda specifically identifies potential regulatory changes related to greenhouse gas emissions, again, stated as one of its objectives, unleashing domestic energy production.

So there is close alignment between the EPA stated priorities and this executive order.

**David:** Understood, understood. Well, listen, thank you for taking the time to talk with me today and to talk with our listeners about, just one of the 130 executive orders that have come out. But I think this is a good exemplar of how the administration is putting out federal policy through the use of executive orders and what its potential impacts may be as it relates to states that are attempting, for better or worse, to legislate around energy and environmental matters. So thank you very much, Karen for taking the time.

**Karen:** Happy to do it.

**David:** And for our listeners, please check back for updates from the podcast and from the Fox ESG Practice Group. We'll be back to you with a new episode soon. We appreciate you listening. Thank you.