Transcript of CleanLaw Episode 38: Joe Goffman and Laura Bloomer Talk about Restricting EPA's Authority, March 9, 2020

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Robin Just: Welcome to Clean Law from the Environmental and Energy Law Program at Harvard Law School. In this episode, our EELP fellow Laura Bloomer speaks with our Executive Director Joe Goffman about how the Trump administration is using regulatory rollbacks to advance new interpretations of the Clean Air Act that restrict EPA's authority to address climate change and threaten the agency's long term ability to deliver needed reductions in air pollution. We hope you enjoy this podcast.

Laura Bloomer: Hi, Joe.

Joe Goffman: Hi, Laura.

Laura: I'm excited to talk to you today. It's been such a great opportunity co-authoring a law review article with you. And I'm glad we're now getting the chance to share some of our research with a broader audience.

Joe: Well, I'm also glad to talk to you and after our co-author experience, I'm glad we're still talking to each other.

Laura: I know it's really a feat. So just to give some context for our listeners, the Case Western Reserve Law Review invited you to participate in their symposium on the 50th Anniversary of EPA, which took place in October of last year. And is kind of how this whole law review article came to be.

Joe: Well, I think what Case Western Law School did was really cool because they essentially got a jump on everybody by doing an EPA at 50 Symposium a year before EPA turns 50. But it was actually quite a good symposium. They had some really great people there who presented some really interesting scholarship.

Laura: Yeah, and I know that for you, naturally, you chose to focus on the Clean Air Act. And I've heard you talk a lot about how in your opinion, the Clean Air Act is really the cornerstone of EPA's mission and of its growth over the past 50 years. And how it's primarily through the Clean Air Act that EPA continues to provide increased environmental and public health protection. And so you want to take this opportunity to really dig into how the Clean Air Act and EPA have progressed together by going back a bit into history, and then to focus on how

the Trump administration is attempting to change the Act and the agency's path.

Joe: Yeah, the couple things about the EPA that people should know, because there's going to be a lot of discussion about the EPA this year, because it turns 50. It wasn't created by a single statute creating the EPA. It was created by an executive order. And it turned out that EPA got built piece by piece as Congress passed laws like the Clean Air Act and gave the EPA tasks under the Clean Air Act. And EPA built up the capacity to do these tasks. And it was that that really formed the character of the agency. That's why I think we're saying that the Clean Air Act, which also was enacted in 1970 in its first modern form and the EPA sort of grew up together.

Laura: That's right, joint birthdays. I forgot. So, we're going to focus on how the Trump administration is really changing course on its new spin on the Clean Air Act. But before we do that, can you set the scene for us a little bit by talking about the first half of our paper on the historic trajectory of EPA and Clean Air Act?

Joe: Well, Congress wrote the Clean Air Act to really tie EPA's jobs to the progress of science and the progress of technology. It actually says in explicit language in the Act that EPA should study continuously air quality and public health science and every five years, examine air quality standards to see if they're still up to date relative to the latest up-to-date science. If the agency determines that these standards need to be tightened because that's what new science is saying, then the agency has an obligation to tighten those standards. Then what happens is once the standards are tightened, there's a cascading set of requirements that fall upon the EPA itself, the states, and ultimately sources of pollution.

Joe: So, the Clean Air Act is kind of like a perpetual motion machine. And the fuel or the energy is the progress of science, but the Act doesn't stop there. Congress also knew that technological innovation would continue. And so, the EPA is also charged with reviewing continuously developments in pollution control technology, and every eight years determining whether those developments justify tightening standards, air pollution standards based on technological innovation.

Laura: So basically the progress that we've made in reducing air pollution over time and so you could say the goals of the Clean Air Act are really tied to these advances in science and in technology that compel further action under EPA's authority.

Joe: That's right. And every time the EPA sets a new standard, whether it's a technology standard or an air quality standard, it puts in motion a lot of

obligations and authorities and actions. That when taken together, deal with the particular problem of air pollution comprehensively. An example is EPA has the authority to set standards for different sectors of the economy. And the authority is triggered when the EPA finds that total pollution from the sector presents a threat to public health and the environment. So, there's this kind of commonsense comprehensiveness that's laced throughout the Clean Air Act, in addition to this progressive, progressive in the sense that science and technology make progress, progressive dynamic or this, again, kind of perpetual engine.

Laura: Yeah. And so, we promise that there are plenty of pages about this in our paper if folks are interested in more of a historic look at the Clean Air Act and really some of the seminal cases by the Supreme Court defining more of the obligations under the Act. But for the sake of time, I think we should probably jump to the Trump administration's actions if that's okay.

Joe: Yeah, absolutely. But I'm going to underscore that to really see how dramatic what the Trump administration is doing with its legal strategies, which we talked about in the second half of the paper, it's worth, anyone who's interested, sort of skimming through the first half. A lot of what the Trump administration is doing is reactive to and in effect purposely targets what the EPA had been doing and how it had been interpreting the Clean Air Act . So, there's a baseline.

Laura: Right, exactly. So today, we're going to focus on basically four case studies. And those are two final rules and two proposed rules that really demonstrate the Trump administration's new legal strategy to kind of deconstruct the EPA's authority to act under the Clean Air Act. And so, I'm going to go through the four that we'll talk about and then maybe Joe, you can give a quick overview of what that legal strategy is before we really dive into the rules. Okay, so the four that we're going to talk about today are the two final. The first one is the repeal of the Clean Power Plan and its replacement with the Affordable Clean Energy rule. The second is the revocation of California's preemption waiver for its greenhouse gas tailpipe emission standards and the zero-emissions vehicle program.

Laura: And then the two proposed rules, we have the proposed withdrawal and replacement of the appropriate and necessary finding that underpins the Mercury and Air Toxics Standards. And then the proposed rescission of methane regulations for the oil and natural gas sector. Of course, that's a lot. We're going to dive into them one by one. But first, I think it's helpful just to give a quick overview of the pattern that we notice in this four and, why we're choosing to talk about them now, and why they're so important to this administration's efforts to really not only deconstruct EPA's authority, but also the administrative state in general.

Joe: The pattern, and I think that's the right word to use as you used it, the pattern that emerges if you lay these two proposals, and two final rules side by side is that it feels like the agency is trying to amend the Clean Air Act by other means. If we're right, that historically, the Clean Air Act has functioned as something that gives EPA pretty expansive powers, although those powers are very closely tied to what science says and technological advancement, gives the EPA's fairly expansive power to address pollution problems as they emerge. Then what these four rules each do is target some key aspect of EPA's power, that is to say some key aspect of EPA's legal authority, and shrink it.

Joe: And I think the reason you and I thought that the pattern was so distinctive, is these rules by and large don't really affect emissions. They're either of no emissions consequence or if they do have an emissions consequence, it's to actually increase emissions. So, this seems outside of the mission of what EPA is supposed to do. And these rules all pivot on legal interpretations that drive towards the conclusion that EPA is a less empowered government agency with more limited authority. And as we'll get into, at least in a couple of cases, the legal interpretations end up with pretty perverse conclusions.

Joe: So, it seems with all that the purpose of these rulemakings is not to reduce emissions further, and not to address an environmental problem, but just to change the law itself, so that the agency ends up weaker.

Laura: Yeah, exactly. I think that's the key point, is that even though these rulemakings are all based in different provisions of the Clean Air Act, it's just another way in which the agency can try to limit its own authority. And what's striking is that each action replaces a rule that interpreted the same provisions in exactly the opposite way. And so, when we talk about each of these, we'll go briefly through how it was previously interpreted and then the Trump administration's change in that interpretation. So, I think if it's okay with you, let's dive in.

Joe: Absolutely.

Laura: The first rule that we're going to talk about is the repeal of the Clean Power Plan and its replacement with the Affordable Clean Energy rule, which is commonly called ACE. So, these rules address carbon dioxide emissions from coal and natural gas fired power plants. The Clean Air Act provision in question requires that EPA determine the "best system of emissions reduction" for power plants. And so, as you know, in the past, EPA had read the same Clean Air Act language as authorizing the agency to take a broad approach to emissions reductions. So, case in point, the George W. Bush administration proposed cap and trade programs between sources.

Laura: And then under Obama in 2015, EPA published the Clean Power Plan. And since I know the Clean Power Plan is very important to you and you've done a lot of work on it as well as research on it after the fact, can you talk a little bit about how the Clean Power Plan came to define the best system of emissions reductions?

Joe: Well, if there was a motto that captured the Clean Power Plan, the motto was something like, well, it's just common sense. That term best system of emission reduction, which is spelled out in the statute, basically tells the EPA to go out and figure out what the best system of emission reduction is. And that's not something that you can infer from what's written in the statute. That's something that you have to investigate in the real world. When I worked at the EPA, I worked under two different administrators, Administrator Jackson and Administrator McCarthy. And you'd be hard pressed to find a public statement or a press release about any given rule that either administrator signed, that didn't have the term common sense in it, because both of them were trying to take actions that reflected common sense.

Joe: And that's what the best system emission reduction is. What's the commonsense way to reduce pollution from a particular group of sources? EPA went out and looked for that answer by talking to everybody we could identify that had something to do with the power sector. And one of the things that emerged that everybody agreed with is that power plants don't operate in isolation. Whether they're trying to reduce pollution or not just to generate electrons, they don't operate in isolation. They operate on a grid.

Joe: So, the commonsense way to reduce emissions from the power sector is to move generation of electrons from high-emitting sources to low-emitting sources. It's just common sense. And the answer to the question, "What's the best system admission reduction?" was the commonsense answer. Just move generation.

Laura: Right. So, generation shifting.

Joe: Exactly.

Laura: But now you have the Trump administration coming in and reinterpreting that same phrase in a very narrow way. And so, Joe, can you talk about the Trump administration's new interpretation?

Joe: What the Trump administration says is that if you look at other language in the same part of the Clean Air Act, that language trumps the best system emission reduction. In other words, EPA has to ignore the way power plants operate. The EPA can only look at an individual power plant, as if it operated all by itself on an

island. And look at only those measures that can be taken at the power plant site in order to answer the question, "What's the best system of emission reduction?" And it does it by insisting that a specific set of words in the statute can only be interpreted one way. That they have a plain meaning and the plain meaning says, "You can only look at powerplants individually."

Joe: Well, that defies common sense. And what's interesting about that is that the new rule that flows from that interpretation really doesn't achieve any emissions reductions. So, the question is, why bother? And the answer seems to be not to achieve emissions reduction, but to tightly constrain EPA's legal authority. So that it can only answer the best system of emission reduction question in a very narrow way.

Laura: Yeah. And so, what you're saying in the beginning, the fact that they've put out this rule that doesn't achieve emissions reductions really, it's negligible. And that limits how EPA can interpret or how EPA is choosing to interpret this phrase, would be interesting in and of itself. That's already a weird action by an agency geared at protecting public health and the environment. But what made it important enough to include as kind of the centerpiece of this paper is that this word you said earlier that they're saying it's a plain meaning, they're actually saying that it's the only meaning.

Joe: That's right.

Laura: And so, describe to us why that's so important from a legal standpoint?

Joe: Well, the rule was finalized, and it's now being challenged in the DC Circuit. And if the DC Circuit or later on in the process, the Supreme Court agrees with the agency that this is the only meaning that the words in the statute can have, then if the EPA were ever to go back to trying to get more reductions in CO2 from power plants, it would only be able to look at a very limited menu of actions in answering the question, "What's the best system of emission reduction?" It would not if this interpretation is adopted by the courts, as well as the EPA, a future EPA would not be able to look at generation shifting.

Joe: In other words, wouldn't be able to look at how the power sector actually operates and wouldn't be able to look at what are the best opportunities for achieving the most emissions reductions. So when it comes to power plants' CO2 emissions, it all but takes it this particular authority off the table. That kind of reads this once high-leverage rather powerful authority out of the Act.

Laura: Which is incredibly significant, especially if you look at how far reaching the Clean Power Plan could have been for reducing CO2 emissions.

Joe: That's right. And the two things that really sort of compound the irony, the agency itself explains how much progress the power sector is continuing to make in overall moving from high-emitting sources of generation to low-emitting sources of generation. And so whether they mean to or not, the story they tell is that there's still a lot of progress to be made in this sector, provided that you can take a common sense approach and capture all that progress as we move forward to try to achieve more emissions reductions. But again, the agency says, "All that may be true, but we don't have the legal authority to recognize it. And if we win in court, our successors won't have the legal authority to recognize it either."

Laura: Exactly. So, I think that probably summarizes the Affordable Clean Energy Rule and the Trump administration's strategy on that front pretty well. And so, let's move to the next rule, which has also been finalized, which is the revocation of the waiver EPA granted to California in 2013 for its greenhouse gas tailpipe emission standards and its zero-emissions vehicle program.

Joe: The State of California plays a really important role in the whole architecture and logic of the Clean Air Act. Starting with the fact that California is actually historically and up until the present, the pioneering player here. In fact, California initiated its own Clean Car Program in the 1960s before the 1970 Clean Air Act was adopted. But Congress recognized that in order to really be effective dealing with air pollution, the EPA and Clean Air Act needed to be pulled along by the progress of science and pulled along by the progress of technology. It kind of put into law this pioneering role for California itself. Expecting California to continue to be one of the big drivers, no pun intended, of technological innovation in terms of reducing tailpipe pollution.

Joe: So, Congress basically said, "Even though other states don't have the authority to set their own pollution standards, or at least set requirements for automobiles, that's got to be a federal action that is implemented on a national basis, we're going to create what amounts to an entitlement for California. If California - because of its specific acute air pollution problems - continues to identify new technology standards to put in place on cars sold in California, California will be able to continue to do that if it comes to EPA and requests a waiver." And the way that Clean Air Act is written is California is going to get that waiver-

Laura: And sorry, just to clarify. I'm not sure we previously said that this waiver is because the Clean Air Act in creating a national program actually preempted states from passing their own state-specific tailpipe emission standards.

Joe: Yeah, that's exactly right. Basically, Clean Air Act says, "In EPAs job to set tailpipe emissions requirements for the whole country. That's not a role for states to

play. But given California's role as a pioneer and a leader in this area, and given California's especially acute air pollution problems, and given California started this, and in a way was one of the main feeders into what became the Clean Air Act. We're going to keep California in that role. Keep it outside that ban on state action."

Laura: By allowing it to ask for a waiver from the preemption.

Joe: Exactly. That's exactly right. But the neat thing from California's point of view is they don't have to come in and prove they need waiver. The only way they don't get the waiver is if EPA finds a specific reason not to give it to them. And EPA can't even just pick any old reason. The statute says EPA can deny a waiver for one of only three reasons. But what happened here is that the EPA really acted out this kind of disempowering of itself in taking away waiver that had been granted to California in 2013. In other words, and this is another unusual thing, California didn't come in, and ask for a new waiver, and suffer it being denied. The EPA had given California waiver in 2013 and this was an action to take it away. But EPA started its explanation by essentially saying, "We don't even have the power to do this."

Joe: The agency in effect stepped aside for a different agency, NHTSA or the National Highway Traffic Safety Administration, which sets fuel economy standards. And under the statute that NHTSA uses, the states are preempted from setting fuel economy standards. And NHTSA reasoned that because California's standards targeted greenhouse gas emissions and because the way the automobile companies complied with those standards was by increasing their fuel efficiency or fuel economy; by extension, California's standards were preempted by the fuel economy statute. And EPA basically said, "Because of that interpretation by NHTSA, the previous waiver that EPA issued is null and void."

Joe: And in fact, California is authority to set greenhouse gas tailpipe standards is null and void. And of course, our authority under the Clean Air Act to grant a waiver for those standards is null and void.

Laura: Right. And so, what I'm hearing right now is that we just gave this long introduction to how tailpipe emissions standards are set. We gave a long introduction to the history of the Clean Air Act and how this has always worked between EPA and the states. And yet here we have a completely different agency with no Clean Air Act authority, basically telling EPA, "Never mind, you can't even consider the statute." And EPA saying, "Okay, great, we won't. We're just going to believe your reasoning. And we're going to go with that and use it to revoke a previously granted waiver."

Joe: That's exactly right. You could argue that there's a kind of limitation here on EPA's action because we're talking about greenhouse gas emissions and not about other tailpipe pollutants. But NHTSA pulled another little move here, because it said that the fuel economy statute also preempted the zero-emitting vehicle program. I won't go into how they made the argument. But the zero-emitting vehicle program, which is something that California has had in place since 1990, doesn't just address greenhouse gas emissions. It addresses all pollution or all pollutants from automobiles.

Joe: So essentially the sweep of disempowerment that EPA has embraced goes beyond greenhouse gases in terms of its effect. And this is really a very stark tell about how hostile this agency is to its own authority under a statute like the Clean Air Act.

Laura: So that's EPA's primary, I think, argument for revoking the preemption waiver, is just allowing NHTSA to have the authority over fuel economy standards. But then, just in case EPA also advances what seems to be more of a secondary approach. That actually does look at the Clean Air Act and the criteria for denying a waiver that you mentioned previously. So, do you want to tell us a bit about that approach?

Joe: Well, one of the three reasons that the Clean Air Act allows the agency to give for not granting a waiver is that California is not experiencing special or acute circumstances, which its standards purport to address. And the agency makes an argument that since climate change and the effects of climate change aren't unique to California, it doesn't have special circumstances. The problem with that argument is that California has demonstrably special stakes in climate change. The wildfires have not only caused untold amounts of economic destruction, but they've actually cost people's lives. And they've created significant and acute air quality problems throughout the state.

Joe: And they almost in the last several years have become a regular feature of life. And we know that climate change increases the likelihood of those kinds of events. So, California clearly has exactly the kind of special stake in advancing solutions to climate change that Congress seemed to contemplate. And remember, we're having this discussion, because the Supreme Court ruled in 2007 greenhouse gases met the definition of air pollutant under the Clean Air Act. And then making that ruling, the Supreme Court specifically said that Congress meant for the Clean Air Act never to become obsolete. That it meant for the EPA to interpret the Clean Air Act to keep pace with new scientific discoveries, and new scientific developments.

Joe: And climate change and what California is experiencing is an example of exactly the kind of response that the Supreme Court said the Clean Air Act authorized or even obligated EPA to pursue and to support.

Laura: That's a really important point that EPA's regulating greenhouse gases comes from the Supreme Court and comes from a very important decision by them.

Joe: Yeah, comes from a... Justice Stevens basically saying, the inherent dynamism of science and technology was baked into the Clean Air Act itself.

Laura: Now you have EPA interpreting this part of the statute that relates to emissions from tailpipes. And having them say that never mind, this doesn't apply to greenhouse gases. And it's also worth noting that this isn't just about the waiver granted to California. EPA went so far in this final rule to say that they're going to interpret the part of the statute that allows other states to go ahead and adopt California's more stringent standards, as also not applying to greenhouse gases. So that in the future, if California were to figure out a way to regulate climate pollutants or greenhouse gases from tailpipe emissions, other states wouldn't be able to; because EPA says, no, that provision only applies to conventional pollutants like sulfur dioxide.

Joe: That's right. And it's really hard to overstate how invested in technological innovation Congress was in the way it constructed the Clean Air Act. And one of the properties of the Clean Air Act's two-step, giving California the authority to set its own tailpipe standards, and then giving states the option of adopting for themselves the same standards. That's a way to kind of help disseminate new pollution control technology. And with respect to greenhouse gas emissions, that's being wiped out by EPA's final rule here. That is being wiped out by first, the revocation and the waiver and then by extension, the canceling of other states' authority to adopt the same standards.

Laura: Exactly. And so, if a new administration were to come in in the future, how would this affect their ability to handle tailpipe emissions?

Joe: I think in the first instance, it would depend on where the courts end up on that. EPA's preferred position, which is that the statute NHTSA is implementing essentially negates EPA's authority and California's authority with respect to greenhouse gas emissions. If the court ratifies that interpretation, then there's no going back. And that always seems to be the theme here, which is the agency is making legal arguments. Not just to justify the specific action and to defend it, they're making legal arguments that if they're ultimately vindicated by the courts mean that future EPAs won't be able to take action.

Laura: All right, well, on that note, I think we should turn to the two proposed rules. First up is that EPA is proposing to withdraw the appropriate and necessary finding for the Mercury and Air Toxics Standards. That's a lot but the easier part is that EPA promulgated the Mercury and Air Toxics Standards, also known as MATS, in 2012. As the name suggests, they're very important. These are standards for reducing really harmful emissions from power plants. And because of MATS and the fact that power plant operators have complied with MATS, we've actually seen a huge decline in emissions since they were put into place. So that's the good news. That's the first half.

Laura: But then now the Trump EPA isn't directly proposing to repeal those standards. Instead, EPA is attacking the appropriate and necessary finding, which is the foundational study that underpins MATS. So of course, to understand this, we have to go back a few decades in history where conveniently, Joe, you were helping write the Clean Air Act Amendments of 1990. And so, can you talk about why there is this appropriate and necessary finding that's required before EPA can regulate mercury and air toxic pollution from power plants?

Joe: Well, if I could sing, I would break out into a rendition of The Room Where It Happened, but I can't. But I was.

Laura: But you can provide us good legal analysis.

Joe: I can provide what happened in that room. I was a lawyer on the Senate Environment and Public Works Committee in 1990. And I was intimately involved in writing one aspect of the part of the Act that authorized this rule. And I was super heavily involved in writing the acid rain title. And back then, the utilities were staunchly opposed to the acid rain provisions and staunchly opposed to having to reduce their toxic air pollutants. And so, they made this argument. They basically said, we're going to have to spend a lot of money and build a lot of technology to get rid of acid rain pollution. And we're pretty sure that once we do that, what will also be removed from our smokestacks are mercury and air toxic admissions. So, you'll get acid rain pollution gone, you get mercury gone, you got air toxics gone.

Joe: So, there won't really be any need to regulate us any further. What Congress said is, okay, we will take that bet, but we're going to hedge it. And we're going to tell EPA that after the acid rain pollution provisions are implemented, EPA should go out and do a study. And see if remaining levels of mercury and air toxic emissions are still so high as to threaten public health. And when EPA completes that study, they should then make a determination whether it's appropriate and necessary to do further regulation." So, EPA went and did this study and in 2000, determined that mercury emissions and other toxic

emissions were at a level that threatened public health in the environment. And set the predicate for the EPA eventually setting standards in the form of MATS.

Laura: And so, EPA made the appropriate and necessary determination in 2012.

Joe: Yes, it re-upped the one that was initially made in 2000.

Laura: So, EPA re-upped this determination in 2012 and promulgated MATS, which unfortunately was immediately challenged. And the case eventually made it to the Supreme Court in 2015 in a case called Michigan v. EPA. And so there, the Supreme Court invalidated the appropriate and necessary finding, because EPA hadn't considered costs. But importantly, although the court held that the agency had to consider cost when deciding whether it was appropriate to regulate, it did not tell the agency how to do that.

Joe: Yeah, I mean, because Supreme Court decision was really kind of laser focused on one issue. Every last aspect of MATS was challenged - the standards themselves, the compliance requirements, the way the powerplant sector was categorized. Every single one of the many moving parts of MATS was challenged. And the Supreme Court took cert that is to say, addressed only one of the small moving parts, which was should the EPA have considered cost when it made the appropriate necessary finding. And EPA's position going in, which was essentially ratified in the dissent by Justice Kagan, was that Congress constructed this thing so that once we saw that mercury levels were still so high as to threaten public health, we didn't have any choice but to go ahead and regulate. It was the unhealthful levels of mercury emissions that really triggered the appropriate and necessary finding. So, in a way, cost wasn't relevant. What the court said was, you just can't look at the words "appropriate necessary" and not see them to cover cost. But at the same time, Justice Scalia who wrote the majority took real pains to stop at a certain point, and say, we're not going to tell you how to consider cost. And he certainly didn't say, if you find that the cost is too high, you have to find that you can't regulate.

Joe: So, what the agency went back after that and in 2016, did a supplemental finding, explained how it considered cost. And in that explanation, said, even if we do a sort of classic cost-benefit analysis, it's standard practice, and has been for a long time to look at all of the pollution that's reduced by these rules. And a lot of the pollution that's reduced by these rules is fine particle pollution, which is extremely deadly. So, the benefits vastly outweigh the costs.

Joe: So even if you take, if you will, the most conservative approach to cost-benefit analysis. It's a very clear-cut decision, but that was a sort of secondary argument. The primary argument was we can't read the statute in any way that

gives us the option not to regulate; because it's long since been established that mercury emissions are high enough to threaten public health.

Laura: But now it seems like we have an agency that is reading the statute in a way that allows it not to regulate. So, talk to us about how EPA is reinterpreting the Supreme Court's decision or reintegrating it, I guess, in the appropriate necessary finding?

Joe: Well, we're talking about rules that seemed to be driven by their ulterior motives. That's really what's behind this pattern we think we're seeing here. And it looks like the ulterior motive here is to change the way cost-benefit analysis is done. So that what the agency calls benefits coming from the targeted pollutant, in this case mercury, versus benefits coming from other pollution reductions that occur are treated differently as if they occurred in two different universes.

Joe: So, what the agency seems to be going here is for the authority to say, we will consider co-benefits if we feel like it. And if we don't feel like it, we won't. They almost say that in as many words in the proposal, but in order to get to that they have to, in effect, reinterpret the statute and reinterpret the Supreme Court decision. To say it's within the realm possibility that we could find that the costs so outweigh the benefits that we can opt not to regulate. And-

Laura: Despite finding that there are harms to health.

Joe: Despite the studies showing that there are harms to health. It’s as if they're creating of whole cloth via this interpretation, a loophole in the relevant provision of the Clean Air Act. Now, the proposal kind of takes a no harm, no foul position by saying, even though we're proposing to take this finding away, we're not going to change the MATS standards. But then they turn around and ask for comment on whether maybe they have to take the standards away if they take the finding away. And of course, no matter what they do, if they take the finding away, they're inviting litigation from the coal industry attacking the standards.

Joe: So, it looks like they have created a legal interpretation that allows them to stage this attack on cost-benefit analysis in particular on what they call co-benefits. And the way they've done it is by creating a kind of a reading in the act that just isn't there. Unlike the other proposal and final rules, the legacy they're leaving behind might not be so much a legal one as an equally crippling one to a future administrator, which is trying to divide up into parts the benefits of reducing air pollution.

Laura: Right. And that's actually a great segue to our final proposed rule, because you have EPA looking at this cost-benefit analysis from a lens that isn't comprehensive. That says, "We're only going to focus on this one pollutant or whatever number of targeted pollutants." Which defies the logic of how an agency would want to regulate air pollution, right? The idea is to decrease all of it and if you have one program that decreases other types of pollutants, then great, better for it. But it takes this approach to disaggregating or dividing up pollutants as well as sectors in the final proposed rule, too. The final proposed rule we discussed in the paper and that we'll discuss today is the proposed rescission of methane standards for new sources in the oil and natural gas sector.

Laura: And so, like we said this was interesting because it really highlights how part of the administration's strategy is to defeat the comprehensive nature of the Clean Air Act. And so, this proposal arbitrarily separates the oil and natural gas sector into discrete parts, and then proposes to also separate the sectors emissions into discrete parts or into discrete pollutants. And so, to understand why this is kind of a backwards approach and why it's so significant. Let's, again, look at the rules that EPA is proposing to rescind here.

Joe: In 2016, the EPA issued standards for methane emissions from the oil and gas sector. And the oil and gas sector is constituted of four segments - the production segment, the storage segment, the processing segment, and transmission segment. They all leak and/or have pieces of equipment that operate in ways that allow the releases of methane. So, the agency, following well-established practices said, we've already determined that the oil and gas sectors total pollution burden is such as to make it a threat to public health and the environment. And within the family of pollutants that this sector emits is methane, which is a very significant climate change pollutant. So, we're going to set standards for methane.

Joe: And these four segments actually don't operate discreetly, they operate in concert to get the product from the ground to the marketplace. In isolation, it wouldn't make sense for them to operate. They necessarily operate in concert. And since we're asking the sector to make a new round of investments in controlling methane, it makes sense to do it all at once. Now, nothing I said is novel or revolutionary. That's just the way the Clean Air Act works and it's the way the EPA has been implementing it for decades.

Joe: So, the EPA issued methane standards for this big chunk of the oil and gas sector for equipment that was either new or being changed out. And in doing so, it also created the legal predicate for writing parallel guidelines producing methane from existing sources in the oil and gas sector. And took the first step in the process of running those guidelines all in 2016.

Laura: Yeah, and so that's a really important point. That these regulations or standards for new sources is the prerequisite for EPA to act on the older existing facilities.

Joe: Right. And that's where most of the methane we're worried about is coming from and is continuing to come from.

Laura: Yeah, exactly. And so, I want to get to that. But before we do, can you just talk about the Trump administration's proposal and its legal justification for proposing to rescind these rules?

Joe: What they're proposing to do is to take away the methane standards altogether from all four segments. And the argument is that the methane standards were also coupled with VOC Standards, the equipment being used to remove VOCS is also going to capture methane. So, the methane standards are redundant. And as you just explained, they're not redundant if you understand that the real problem that has to be solved is existing sources. And they're not redundant because they set the legal predicate for that. Then the agency said, while we're at it, instead of having VOC standards for all four segments, we're only going to do VOC standards for two of the four segments.

Joe: And I'm not sure I can repeat the agency's justification for doing that and keep a straight face. Because they basically say, well, the composition of the gas changes as it moves through the four segments and therefore, they have to be treated separately. Which again, it's an argument that's essentially totally unresponsive to the commonsense reality. Which is these four segments and the equipment in these four segments all operate in concert to achieve one commercial objective. That leaves us with no methane standards at all.

Joe: And VOC standards for only, if you will, half of the sector. What's left behind, if and when a successor comes into office and wants to put together a comprehensive solution to the methane emissions problem is a bunch of hoops and booby traps that that successor will have to either jump through or somehow avoid getting caught in.

Laura: And it's worth noting that there's even a third that they're proposing. That they might impose on a successor, which is the idea that EPA would need to find that methane specifically from the oil and natural gas sector is contributing significantly to air pollution, and not just rely on its finding that emissions as a whole from the sector are contributing and thus EPA should also try to curb methane emissions.

Joe: Right. It's well established that this sector creates a high enough pollution burden to warrent action. And now the agency in an innovative but perverse way is saying, "Well, let's try to divide that pollution burden up into individual

pollutants. So, test for comment on whether it needs to make a separate finding." Now, by dividing the sector into these segments and treating one pair differently from another. They're also necessitating a future administrator finding that pollution from each of the segments represents a large enough public health burden as to justify action.

Joe: And because the segments may incrementally add less pollution, this is where the booby trap is laid. Which is it might be harder if you look at an individual pollutant from an individual segment to make the kind of demonstration that normally the EPA makes when it looks at the entire pollution burden from an entire sector.

Laura: Right, despite the common sense and all the studies, we're seeing about the really harmful emissions that are coming from the sector and coming from methane emissions specifically.

Joe: That's right. It's a little hard to project whether the agency is going to try to get all the way to a final rule and then a litigation outcome, where a future EPA is comprehensively stopped by a fixed and irreversible legal interpretation. This may be a case where they're simply using legal interpretation to try create as many obstacles as possible. I think the pattern is pretty clear, which is, in the same way that the agency's rolling back rules, in the same way that the agency is crippling its own ability to do science, which again, is central to the Clean Air Act. It's now looking at legal interpretation as a way to either find limitations in the Clean Air Act or erect barriers to regulation.

Laura: Yeah, exactly. I think we're really seeing this as just the latest trend we've noted and just basically a third strategy to the administration's deregulatory efforts. Like you just alluded to, they have these massive environmental and energy rollbacks. I think the New York Times has it somewhere near 100 at this point of rules and actions that they've rolled back from previous administrations. So that seems to be the first and most evident effort. And then you have this other effort to really undermine its own capacity to act, which we've seen in the way it's attacking science, and the way it's loosening its ability to be held accountable by the public, or making its compliance and enforcement methods less effective.

Laura: And you see this taken together as kind of the second strategy to really undermine its own ability to carry out its mission. And then now we have this third legal interpretation strategy that's mixed in with the rollbacks, but it's separate because it really is this more longer-term effort to really hamstring future administrations. And I think something that we've been trying to point out in the paper is that in some ways, this effort and these legal theories or legal

strategies might be harder for future administrations to get around or to rebuild.

Joe: Yes, I mean, think of it this way, at the end of a term or an administration, administrators like to look back and think about how much pollution has been reduced as a result of actions that the agency has taken under their watch. That's not what this administration is going to do. Instead, it's almost as if it's going to say, "Look at how much legal authority we've taken away from the agency under our watch." And it seems to be the diminishing of legal authority that's the real metric that the current leadership is aiming for.

Laura: Yeah, that certainly appears to be the scorecard, which is not the best note to end on. So maybe we can make it a little more upbeat by thanking the students at Case Western Reserve Law Review.

Joe: Yes, absolutely. We're thanking them for giving us the opportunity. And we're thanking them in advance for the adventures in editing that we expect they will have, and for the improved quality of our piece as a result of that editing that's, I think, going on even as we record this interview. But thank you, Laura. It was really fulfilling to sort of partner on this paper with you and to do this interview.

Laura: Yeah, thank you, Joe. This was great.

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