



Transcript of CleanLaw Episode 3: Joe Goffman and Janet McCabe on Modifying the Air Quality Standards Review Process, June 26, 2018

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- Robin Just: Welcome to this podcast from the Environmental & Energy Law Program at Harvard Law School. Today, Joe Goffman, our executive director, will be talking with Janet McCabe, who was EPA's acting assistant administrator for the Office of Air and Radiation between 2013 and 2017, and principal deputy assistant administrator prior to that. She is currently assistant director for Policy and Implementation at Indiana University's Environmental Resilience Institute, and professor at the McKinney School of Law. Earlier in her career held senior positions in Indiana Department of Environmental Management and in the Government of Massachusetts.
- Robin: Janet will be explaining the critical significance of a policy memorandum issued by Scott Pruitt on May 9th of this year that changes the way EPA sets health based air quality standards. We hope you enjoy the podcast.
- Joe Goffman: Hi, Janet.
- Janet McCabe: Hi, Joe.
- Joe: Thank you very much for joining us, or at least for joining us by phone. As most people know, Scott Pruitt has put a lot of resources of the EPA into either rolling back a host of specific regulations, weakening regulations and emissions and pollution standards, or finding ways to avoid moving forward with new pollution standards. Even though there continued to be air and water quality problems in a number of areas in the country. One of the other major endeavors that Pruitt is leading inside the EPA is taking actions that change a number of internal practices that the agency has historically relied on to do its work and to carry out its public health mission.
- Joe: Those changes have gotten some attention, but not nearly as much attention as his attack on regulation, and frankly, his personal scandals. What we're trying to do here at the Environmental & Energy Law Program is compile reporting on an analysis of those kinds of internal changes. Because I think as many practitioners in this field know, those changes could easily be of much greater impact over the long haul in terms of defeating the agency's ability to carry out its public health mission. We're here today to talk to you, Janet, about one of those internal practices.



Joe: Of course, the reason we're talking to you is that you are one of the, if not the pre-eminent practitioners in the field of air quality and air quality policy. Having served in senior positions at the EPA for seven and a half years during the Obama Administration. Also, having served in two different State governments doing this work. So, there really is probably no one better in the country to talk to us today about a memo that was released in early May that addresses a variety of changes in the way the agency will set air quality standards based on public health.

Joe: What I'm going to do now is ask you to just give us a thumbnail sketch of what's in the memo and why it's so troubling from the perspective of EPA's work to establish air quality, or improve air quality and protect public health.

Janet: Well, thanks, Joe, and thanks for having me on this podcast. I really appreciate the attention that your project is giving to these issues and appreciate the opportunity to talk about this particular memo. Before I do focus on the memo, I just want to pick up on something that you said a minute ago, that referred to how complicated these issues are and how, in some ways, under the radar some of these changes are that the EPA is now making. The decade's history of air quality control in this country was an incredible success story from a public health perspective, but it is complicated.

Janet: Most people in the country really would have no reason to understand all the decisions and processes, and analysis that go into keeping the air clean in this country. What they know about is whether the air is clean or not, whether their child is having an asthma attack on a hot day, or whether they have to wash off their lawn furniture because of the stuff that gets deposited on it. So, it is important for people to understand that there are things going on at this agency that might not appear very dramatic on the surface but could have a big, big impact on the way we protect public health in the country.

Joe: Exactly. It's almost as if the complexity of the processes that are being addressed by these changes and the complexity of the changes themselves are working to Pruitt's advantage. They're a kind of camouflage or even a dulling of the senses that many people experience when they try to look at these complex issues.

Janet: Well, that's right, and in some ways, it's a little bit like changes to tax code, it's so complicated that your eyes just glaze over, and you give up on understanding. But there are people in the country that are very smart and experienced on these issues and are paying attention, and so, that's a good thing. This particular memo which came out on May 9th is actually one in a series of memos that have come out or policy statements addressing specific legal regulatory processes under the Federal Clean Air Act.



- Janet: This one in particular deals with probably the most fundamental task that EPA has to do under the Clean Air Act, which is to establish the National Ambient Air Quality Standards. These are the levels that the EPA administrators set for a relatively small handful of pervasive air pollutants that are intended to protect the public health broadly. It is a process that's been going on for decades, and it's, of course, a process that has evolved over time, and nobody would say that the process is perfect. So, over the years, administrators have made this change, or that change, or the career staff at EPA have fine-tuned the process, has made it more efficient.
- Janet: This is the latest iteration. Unfortunately, there are number of things in this policy and the procedural changes that will be implemented through this policy that are very concerning from the perspective of a transparent, thorough, science-based process. That is what served the country so well in setting these standards.
- Joe: If people picture the air in Los Angeles in the 1970s, or quite frankly the air in Beijing, China right now, what in both cases we're talking about is the kind of health threatening air pollution that these standards were meant to solve, that here in the States, in the last several decades we've gone a long, long, long way to solving. So, this is the core of the core of EPA's public health mission.
- Janet: Yes, that's absolutely right, and we're a long way from LA in the 70s and we're a long way from Beijing, and that's a very, very good thing for public health care. Well, unfortunately, for your listeners, I think before I even give high level points, I need to take a minute and describe what these standards are, because the changes that are being proposed here are hard to understand if you don't have an appreciation for what the standards are. So, this is a measure of the National Ambient Air Quality Standards. Let's take ozone just as an example to talk about. Ozone is what we often think of as urban smog.
- Janet: It's the result of emissions from motor vehicles, factories, and many activities of daily life, that especially in hot sunny climates mix in the atmosphere near the ground. They get carried by the wind. They perform complicated chemical reactions over time and space, and they form ozone, which is a molecule that is dangerous to breathe. It is a lung irritant. Some have described it as giving your lungs a sunburn. So, we don't want it at ground level. We do want it up in the upper atmosphere to protect us from UV radiations. But on the ground, it is a lung irritant and dangerous for people.
- Janet: So, it has been ubiquitous across the country, especially in big metropolitan areas where there's a lot of human activity. But also, big sources of emissions like power plants and other big, big factories, even if they are located in remote locations, can contribute these pollutants that travel down wind and combined with other pollutants to create ozone. The point of the National Ambient Air Quality Standard



is to establish based on scientific evidence, studies, analysis, epidemiological studies over time, what level of ozone in the air is safe for public health. The Clean Air Act is very precise about this.

Janet: It says the administrator needs to set that standard to protect the public health with an adequate margin of safety. Now, that doesn't mean that there could be zero ozone in the air, and that the standard has never been set that way. But the administrator has to make a judgment about what's a safe level for the public health, not for every individual in the country, but for the public health generally, with an adequate margin of safety. That has been interpreted to mean taking into account people who are particularly sensitive to air pollution like asthmatics, people with pre-existing lung diseases, people with heart conditions, the elderly, the very young.

Janet: So, that is the protective standard that we have. Now, one way to think about this National Ambient Air Quality Standard is it's like the American Medical Association establishing what is a healthy blood pressure, or a healthy cholesterol level. It is a level that is set without regard to how do we actually achieve that level. Because what we want to know is what is clean and healthy air. Then, we'll go about the process of actually reducing emission to get there. But we don't want to compromise our decision about what is healthy air by injecting into it, "Oh, it's going to be very hard to get there, so we'll set the standard lower."

Janet: It would be like saying, "My ideal blood pressure is 120/80, but it's going to be really hard for me to get there, so we'll just say that my ideal blood pressure is 130/80." Well, that's not my ideal blood pressure. So, what we want is a standard that actually reflects that scientific based judgment about what's healthy. Okay, so what is the problem with this May 9th memo? In a nutshell, the biggest problem with it is that it starts to blur the scientific based decision making of what is the standard with considerations of other things that are relevant to how do we get there once we know where it is.

Janet: It does this by combining various processes that historically have been separated, that traditionally the EPA does a significant science review. Once that science review is done, then information is developed and analyzed to help decide what are the appropriate policy options for the administrator. It does that by compressing the various review steps into a single process in the interest of speeding things up. While it is certainly important that EPA do these reviews in a timely way, it should not be done in a way that sacrifices the time needed for scientists to do their work, and for the process to be transparent and open to the public.

Joe: So, basically, it sounds like if EPA is doomed to follow this new memo and adopt a new process, if and when it sets new health based air quality standards, what it is



a great risk of doing is simply deciding that a healthy blood pressure level is 130/80 as opposed to say 120/80. To fill in here a bit, it's because instead of just having science experts examine the latest research and in the company of other science experts answer the question about healthy levels of air quality or pollution, they will also have to account to say, economists, or lawyers, or interests from other disciplines who will have an interest in the answer being different, even if the different answer is not the right answer.

Janet: That's correct, Joe, and it is clear that that is not legal under the Clean Air Act. This is one of the biggest criticisms that has been put forward about this policy. The interest of various stakeholders in having economic consideration be part of the process to set this health standard. These are not new, so people have been raising these for years, and in fact have brought them in through legal challenges to standard. The Supreme Court of the United States has ruled on this question and has said, "No, this process is about establishing the appropriate health standards."

Janet: There's pages and pages in the Clean Air Act that talk about, once you know what that healthy level is, then, how do the States go about planning to achieve it? That process has actually worked pretty well over time as well, which is reflected in the fact that our air quality is so much cleaner than it was 40 years ago. The Supreme Court has recognized that those are very two distinct processes. People need to remember that a key part of the importance of these standards is notifying the public about whether the air quality is healthy or not.

Janet: I'm sure that people are familiar with ozone actions days, or the air quality index which is used broadly across the country by air quality agencies, weather forecasters and such to let people know tomorrow is going to be a moderate air quality day, or a good air quality day. That information is based directly on what this National Ambient Air Quality Standard is. That's the information that a mom or dad uses to know whether their son or daughter needs to have their inhaler with them, or maybe stay in from recess on a particularly bad air quality day, or make a decision about whether to go to band practice, or little league practice.

Janet: If that warning information is based on a decision that has been affected by, "Well, it's going to cost a lot of money or take a lot of time for us to achieve that level." That is not going to provide the kind of health protection that the Clean Air Act says people are entitled to.

Joe: So, essentially, if the problem that this memo is trying to solve is that some people think we can't afford the answer to the question, what does two plus two equal, we can't afford that answer to be four, then, let's make the answer one that we can afford, so that now two plus two could turn out to be five, or six, or seven.



Janet: Or a three, because it's cheaper.

Joe: Exactly. The problem is, two plus two equals four, and people need to know that sum. I think you also put your finger on something else, which is that this standard, given the way the Clean Air Act is meant to work and indeed how it has worked, is but the first in a series of steps that lead to actual reductions in pollution. That this is the pollution cutting engine that's at the heart of the Clean Air Act. If you tamper with it so that you're getting an answer different from four, when you ask the question two plus two, you're not only coming up with misleading information.

Joe: But you're only fouling the very mechanism that drives the air pollution reductions that we've seen over time and that have been instrumental to dramatic improvements in air quality.

Janet: Yeah, that's right. Let me mention two other aspects of this memo that I think are relevant and important here. One is that the memo reflects correctly that EPA has, in many cases, failed to meet its statutory deadline on reviewing these standards. The Clean Air Act is a remarkable document in one way because it requires EPA to review standards that it has set to see whether they need to be updated. Not just these standards but a lot of the air pollution standards that we have in this country, which is really, as I say, remarkable and so important.

Janet: So, if you set a standard in 1980 for a safe level of ozone in the air, then, there's a bunch of science that's done, research by various researchers that show that that standard doesn't actually protect the public health, we've learned more, and lower levels of ozone are actually dangerous to people. The Clean Air Act captures that and says, "Well, EPA needs to come back and take a look at that standard periodically and decide whether it's still protective." It says that EPA should do that every five years. There are six pervasive air pollutants for which EPA has set standards over time.

Janet: It is proven to be very challenging for EPA to meet that five-year review deadline for all six of those pollutants on an ongoing basis. That is true, and EPA should always strive to meet its statutory deadlines as much as it can. The longer you go, of course, between reviews, the more science you may accumulate, which makes it even harder to get the review done quickly. It sort of exacerbates the problem. In fact, there was a long period of time where EPA did not update these standards. So, when we came into the first term of the Obama administration, we had a number of these standards that were due to be reviewed.

Janet: So, I don't quibble with the desire on the part of this administration to have the process be as efficient as possible to make sure that EPA does in fact meet its deadline. However, it is proposing to do that by collapsing the science review and



the policy review together into a single document, which in the view of many, will really compromise EPA's ability to have a neutral and thorough science review done by career scientists. That then the policy analysts, and ultimately the administrator will be able to consider in a thoughtful way and in a way that allows for a proposal, an opportunity for public comment, and then, thoughtful consideration of those comments.

Janet: In particular, this is an era where EPA, the administrator and the administration are proposing to cut EPA's budget to reduce staff. It's going to be even harder for EPA to speed these processes up when they have fewer staff to accomplish the work.

Joe: What you're describing in the memo's alleged focus on meeting the statutory deadlines, you've described the situation where Pruitt is using the tail to wag the dog. The point of the periodic reviews that Congress built into the Clean Air Act is that science and knowledge continually advance. What was understood when a standard was set in 2008 or 2015, can easily be eclipsed by superior understanding that the science community has come to vis-à-vis a pollutant like ozone or another pollutant like fine particles.

Janet: Right.

Joe: That really what Congress intended was to put into law what is second nature to science, which is that you've got to do justice to learning analysis, understanding, and then applying all of that to decision-making.

Janet: Yes, if your goal is protecting public health-

Joe: Exactly.

Janet: ... which is what it is under the Clean Air Act.

Joe: The sword and the shield for protecting public health is health science.

Janet: Right, and it doesn't mean that this is a continual process to ensure that the standard gets higher over time. It all depends on what the science says.

Joe: Exactly.

Janet: So, there have been occasions where EPA has said, "The standards that we set five years ago, 10 years ago, is still good. There's no new science that suggests that's not sufficiently protected."



Joe: But to rush the process, to shortcut the process, just to make the deadline, actually, is turning the logic of the Clean Air Act, the logic that served the US so well, upside down.

Janet: That's right, that's right. Another interesting aspect of this, I think characterized as a way to save time, is that the memo specifically says that EPA should not reach out to other Federal agencies to consult with them as they're going through this process, which is an interesting step to leave out. I don't know why you would want to be explicit about excluding EPA's ability to reach out to other relevant experts across the Federal Government. Back in 2009, when Lisa Jackson was administrator, she also had issued a memo about the NAAQS process, in which she specifically encouraged the core staff to do that sort of consultation.

Janet: So, this seems to be perhaps a reaction to that statement by Lisa Jackson back in 2009. The fifth principle in this memo has to do with issuing timely implementation regulations and guidance. So, this goes to that part two that I described. Part one is, what is healthy air quality? Part two is, how do we get there? Under the Clean Air Act, much of the work of attaining the standards is done through individual State planning processes. There are, of course, Federal regulations like the Clean Car Standards and many other things that apply nationally, that help States improve their air quality.

Janet: But each State develops a plan for its areas that don't meet whatever the new standard is and figure out how best to get there. That is the Federal-State partnership at its best. The setting of the standard has traditionally happened. Then, after that, the EPA generally issues a series of implementation regulations to guide States in doing those planning processes. States and others have been frustrated at the amount of time that it has sometimes taken EPA to get those implementing regulations out. I spent time as an air director in the State of Indiana, and I likewise was frustrated at the length of time that it took EPA to get those regulations out.

Janet: Having spent seven and a half years at EPA now, I have a much better appreciation for why it takes a long time to do those regulations, but nevertheless, it is frustrating. So, there has been a call overtime from some, not everybody by any means, that EPA should issue its implementing regulations at the very same moment that it issues a revision to a National Ambient Air Quality Standard. In the abstract, that sounds great. States get the new standard, and they get their marching orders at the same time.

Janet: The problem with that is, and EPA has explained this every time this has come up, is in order to do that, EPA would essentially have to prejudge what the standard is at the very same time that it is going through a presumably legitimate public process to set that standard. So, how can EPA career staff be writing



implementation regulations for a standard that the administrator has not yet finalized? That would really make a mockery of the deliberative and public process that we use in this country to establish important things like air quality standards. Now, I will say that during the Obama Administration, we went through a very expensive process working directly with States to figure out how to streamline the process of getting guidance out to them promptly.

Janet: As promptly as possible, in a step-wise fashion. So, let's figure out, there are many steps in the implementation process. What's the guidance that the States needs first? EPA will prioritize that, and by when do they need it? EPA will strive to meet those deadlines. Then, what's the next thing they need, and what's the next thing they need. We came up with a pretty good mutual understanding between the States and EPA about the types of guidance that were needed and when. The other thing is that over time, it has gotten more streamlined for EPA to do this guidance because over the last eight years we did this a number of times.

Janet: So, it doesn't change all that much from time to time to time. So, States really do have a pretty good idea of the steps they're going to need to go through every time one of these standards comes out.

Joe: All right, so it's not as if the EPA or the States are starting from scratch at any given point. These are well-established practices mechanisms. Indeed, the EPA and the States themselves, over on the policy, or a program, or action's side have a wealth of knowledge that's already at their disposal. Essentially, what the implementation regulations do is provide an extension in improvement and refinement of that.

Janet: Right, right.

Joe: As I listened to you talk about the May 9th memo, I can't resist a metaphor, an analogy. It feels as if what Scott Pruitt has done here is bred a three-tailed dog. He's using each of the tails to wag the dog. The dog being health science-based air quality standards that then are used both to inform the public of true news as opposed to fake news about air quality. Then, simultaneously, to guide the EPA and the States through a new round or new programs to achieve pollution reduction. But instead, he's using the convenience of talking points about deadlines or processes to wag that dog and really turn things upside down.

Janet: As always, Joe, you're a master of metaphor. Can I mention one other issue about this?

Joe: Yes.



- Janet: So, you mentioned that the administration is putting out a number of proposals and policies to go to the very heart of how EPA does its business, which in most cases is founded on true and serious scientific work. One of those policies is turned into a regulatory proposal, it has to do with the kinds of science that EPA scientists will be able to use. In particular, this public debate about whether every last bit of personal data that may go into conducting one of this big health space studies should be available to the public, so that anybody in this country would be able to work with the data and replicate the studies.
- Janet: You probably have another podcast on that proposal specifically or perhaps will in the future, but there's a lot of controversy about that. The scientific community, I don't think I've ever seen such an outpouring of opposition and objection, perhaps the recent immigration issues are doing that. Certainly, they are, but this, for something as wonky as how you set air quality standards, this has been a tremendous outpouring of oppositions from scientific community across the country. That notion creeps into this memo as well, and it is really specifically mentioned in the section that establishes the standardized questions that EPA will post to its scientific advisory committee.
- Janet: There's specific question about, does the science need appropriate criteria to, the words are, ensure transparency in the evaluation, assessment, and characterization of key scientific evidence. That is a direct reference to this other process of screening or censoring the scientific studies that EPA scientists would be allowed to use. When you put that together with the changes that this administration has made, this EPA has made, about who they are putting onto their external expert advisory committees, that is a recipe for further compromising a process with scientific integrity.
- Joe: People listening to this podcast, Janet, will have found it on the part of our website that is looking at the whole breadth of these changes. Nearby on the website will be two short papers we've written about the changes in the agency's approach to science. Again, this seems to add up to a design such that if you really, really want the sum of two plus two to equal some number other than four, because you say you want to meet a deadline, or because you want to avoid imposing costs, real or imagined. Then, what is being engineered here is an ability to get the answer to two plus two to be something other than four.
- Janet: Right.
- Joe: Janet, you mentioned that the Supreme Court has already ruled that it's illegal under the Clean Air Act to take what from a science perspective is extraneous issues into consideration. I guess I have a reaction and a question. The reaction is this, it seems that one of the more insidious elements of this memo is that it may be an attempt to reintroduce into the EPA process a practice that's illegal, or has



been found out to be illegal by the Supreme Court, but that might still escape review by the courts the next time Ambient Air Quality Standard is issued.

Joe: I don't know if you have the same concern, but this is really a stealth amendment to the Clean Air Act taking place without either a Congressional vote, or a judicial review.

Janet: Well, I do have that concern and if there's one thing that's clear, it's that the Supreme Court has said, and then reiterated, and other courts have, too, multiple times that the agency may not consider the cost of implementation when reviewing and revising the standards. That's a decision that was made in 2001, in a case called *Whitman v. American Trucking Associations*. The decision was authored by Justice Scalia. So, it's very, very clear. Now, what the memo says here, and I should say that this policy direction to EPA does seem to introduce those issues, consideration of cost and implementation, and economic effects, and those sorts of extraneous factors back into this review.

Janet: In fact, it very clearly says, in principle two, that those are among the factors that the expert external advisory committee should be giving EPA advice on during the process of a particular standard review. Now, I think the way the administrator tries to insulate this memo from legal challenge is with phrases like, "Advice on some of these topics may not be directly relevant to EPA's process of setting primary standards." And caveat language like that. But I am confident that if a process of setting a standard, it reflects considerations of these kind of factors, that it will be legally challenged, and it will be found to be inconsistent with the ruling in *Whitman v. American Trucking Association*.

Joe: It sounds though that what we're seeing is despite the competence, and I think we both have that a fair-minded court would apply the Supreme Court precedent and find this approach illegal, it sounds like nevertheless Scott Pruitt, the author of this memo, is really trying to devise and apply a stealth strategy for directly subverting the current Supreme Court holding, which itself was based on a straightforward interpretation of the Clean Air Act itself.

Janet: Yeah, that's right. It's interesting how things take on for us, and it's almost as if there is a version of reality that EPA setting air quality standards is not for the purpose of protecting the public health, but for the purpose of making State and industry's lives difficult, and that's what EPA is motivated to do at every time. Of course, that's ridiculous, and that is not what Congress set up this process to do. Congress set up the process where EPA would make these decisions about what level of air quality we should have in this country, it should be uniform.

Janet: There should be a minimum expectation of healthy air quality all across the country so that a child in Florida, and a child in Oregon, and a child in Texas, and a



child in Indiana are entitled to the same level of healthy air. Then, we go about the business of getting there. Some areas in this country have more of a challenge than others. EPA just issued what are called designations identifying those areas of the country that don't meet the ozone standard that was set in 2015, and much of California has poor air quality. That's millions of Americans who are breathing air quality that isn't healthy for them.

Janet: That is what the work of the Clean Air Act is about. It is not some kind of a strategy to make life difficult for industry. In fact, a huge progress has been made over the years in ways that have created new technologies for air quality control, that American companies can use and American inventors can sell overseas. It's been a tremendous success story, both in terms of economics, vitality, and public health protection.

Joe: Yeah, as one person to another, both of whom have been privileged to work with the Clean Air Act, it seems as if what Congress did was harness public health protection to the progress of science, the progress of the economy, and the progress of technology. What this memo, along with many other steps that Scott Pruitt is trying to take, it seems to designed to do is to sever that harness, leaving public health behind even as science and technology, and the economy move forward. That really undercuts both the Clean Air Act itself and the public health mission that the public has counted on the agency to fulfill.

Janet: That's right, and I don't think that the American people will be happy with the result, where we go backwards on air quality protection. I'm relatively confident that ultimately that will not happen.

Joe: Well, Janet, I have to say, as somebody who had the extreme good luck of being your colleague at the EPA during the Obama Administration, I really enjoyed talking to you about what is your and my favorite subject. I really appreciate, what a wonderful job you did in explaining what we both acknowledged to be a complicated subject, but a subject where the public health stakes are so high.

Janet: Well, thank you, Joe. You as one who knows me knows that I could talk about the Clean Air Act all day long, and often do. So, I appreciate the opportunity to join you, and again, thanks for the work that you and your project are doing to explain these things.

Joe: Great. Thanks a lot.

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