



Transcript of CleanLaw 41: Caitlin McCoy and Bethany Davis Noll Talk about the Safer Affordable Fuel Efficient Vehicles Rule, May 1, 2020

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Caitlin McCoy: Hello and welcome to another episode of CleanLaw. This is Caitlin McCoy and I'm a staff attorney at the environmental and energy law program at Harvard Law School. Today I am thrilled to have a guest, Bethany Davis Noll and we will be discussing the safer affordable fuel-efficient vehicles rule. So hello Bethany, thanks for joining us.

Bethany Davis Noll: Hi, thanks for having me.

Caitlin: So let me give you all a little introduction into Bethany and her background. Bethany Davis Noll is the Litigation Director at the Institute for Policy Integrity at New York University Law School and she serves as an adjunct professor at NYU. She previously worked as Assistant Solicitor General in the New York State Attorney General's office and at Debevoise and Plimpton. At Policy Integrity she writes Amicus briefs, academic articles and files comments. All of them are focused on regulatory rollbacks like the one that we are going to talk about today.

Caitlin: You may have guessed but we are recording this episode remotely. So I'm here in Boston and Bethany is joining me by phone and we are recording this, I also want to note, on May 1st. That's because as we'll get to in the episode, a window has opened when challenges will be filed against this rule that we're talking about today. So just in case you think we might have missed a challenge, we're recording this on May 1st and so far there's only one challenge on the record, but we will get to that eventually.

Caitlin: Like us here at EELP, Policy Integrity has been closely following this rule and the broader saga of the rollback of the clean car standards. They've been producing insightful analysis of the administration's actions and so it's really great that Bethany and I can have this conversation today about the latest final rule because there's two of them and this latest one was just released on March 31st. So thanks again Bethany for joining me and for indulging me as I'm about to continue talking.

Bethany: Great. Go for it.

Caitlin: Okay. I want to begin this episode with a quick summary of where we are and how we got here, so after that we can turn to discussing what we think are the most important aspects of the final rule. New cars and trucks here in the US and I



should be specific, light trucks operate under two simultaneous sets of nationwide performance standards. One of them sets limits for greenhouse gas emissions and the other one regulates fuel economy.

Caitlin: Even though greenhouse gas emission limits and fuel economy rules have been created and issued together two times already, once in 2010 and again in 2012, they're actually distinct in terms of the agencies that create the standards, their purposes and the statutes that the agencies are acting under. First, the corporate average fuel economy standards, also known as CAFE Standards are issued by the National Highway Traffic Safety Administration, also known as NHTSA, which is part of the Department of Transportation.

Caitlin: CAFE standards regulate fuel economy and they're expressed in miles per gallon and NHTSA is authorized to create these standards by the Energy Policy and Conservation Act. The purpose of these fuel economy standards, unsurprisingly is to conserve energy. Our other standards, the greenhouse gas emissions standards, these were first set by EPA in 2010 and they regulate the amount of CO2 that's emitted from the tailpipe of a vehicle and they're expressed in grams per mile. EPA is authorized to create these standards by the Clean Air Act and the purpose of them is to protect public health and welfare and prevent pollution.

Caitlin: So in 2012 the Obama Administration reached a historic agreement with the auto industry and the state of California, which can seek a waiver under section 209 of the Clean Air Act for its very own greenhouse gas standards. The standards that EPA adopted at that time for greenhouse gases extended out from 2017 to 2025 but the CAFE Standards that they adopted at that time can only be set out in five year cycles. So the CAFE standards were set for 2017 through 2021 but they also adopted a second set calling them AGRO standards that would go from 2022 to 2025. The agency set up a process where EPA would check in and confirm with those greenhouse gas standards, even though they were finalized out to 2025 and NHTSA would check in and set the next round of CAFE standards.

Caitlin: So both of these sets of standards featured an average annual increase in efficiency of about 5% to reach a fleet wide average of 46.7 miles per gallon for vehicles by 2025. As you all may be aware, the Trump administration came into power and proposed different standards in August of 2018. The agencies at that time actually proposed freezing the standards at 2020 levels from 2021 to 2026. They also made some legal changes. So one of them was they proposed preempting and also withdrawing California's waiver under the Clean Air Act for its greenhouse gas standards and removing the ability of other states to follow California standards. I think there's about 13 states that follow along with the standards that California adopts.



Caitlin: In September of 2019, agencies finalized the Safer Affordable Fuel Efficient Vehicles Rule Part One: One National Program. It's quite a mouthful, but essentially it's about finalizing the agency's legal interpretations of the Clean Air Act and the Energy Policy and Conservation Act. I did an episode with Joe Goffman, our Executive Director here at EELP, discussing this first rule and all of the moving parts and how it goes about preempting and revoking California's waiver and standards and a variety of other things.

Caitlin: But the key thing is that it did not change the standards themselves that what needed to be done in a second rulemaking. So on March 31st, 2020 EPA and NHTSA released another final rule, the Safer Affordable Fuel Efficient vehicles rule, and this one contains the revised fuel economy and greenhouse gas emissions standards for model years 2021 to 2026 for passenger cars and light trucks, and we will note that the revised standards only require an increase in fuel economy of 1.5% annually. So if you'll remember, that's down from about 5% under the previous standards and a big update is that the rule was published in the Federal Register today. I think technically it's dated April 30th and so that means that now as I said, the 60-day window has opened and challengers can file a lawsuit challenging this rule.

Caitlin: Okay. With all of that said, let's move on to some of the issues in this rule. There is a lot going on in this rule. The final rule package was almost 2000 pages. So Bethany and I are going to try to just give you the highlights reel here and talk about why some of the things that we identify are important and try to give you a little peek into some of the upcoming litigation as well. So Bethany, what jumped out at you when you first started looking over the final rule?

Bethany: Thanks. Well, what jumped out at me first and foremost is that this is a rule that the agencies admit themselves, which is going to cause net costs. So that means they've looked at the cost and benefits of this rule and under the 3% discount rate, it is net costly to the American people. Both of these agencies NHTSA and EPA have long cited the costs and benefits of their proposed standards to help justify those standards and back in 2018 the agencies proposed this rule with a cost benefit analysis that they claimed showed that the rule was cost benefit justified.

Bethany: The problem was that proposal was based on analysis and math that was so flawed, they had to give that up and now instead of being able to rely on a balanced look at the cost and benefits they've chosen to finalize a rule that shows net costs, net harm to the American people, instead of saying that this rule is justified by the cost and benefits, they're saying it's justified by their concerns about the upfront cost to industry of increasing fuel efficiency and lowering emissions, but that's not what agencies are meant to do. Congress sets up agencies to regulate with an eye towards what society needs, not with an eye



towards one of the particular part of society needs, what a particular industry needs.

Bethany: That's why we have Congress legislating because we understand the industry is going to think about it from their perspective and we need a broader perspective in order to make sure that the cost and benefits that affect all of us are taken into account. So what the agency's own analysis here shows is that, that this is a lopsided rule that will cause enormous harm from the climate perspective and from the perspective of fuel costs that will be felt by you and me and society at large.

Caitlin: And I think it's really important that we have that framing as we start to try to move into some of the more granular aspects of the rule. The agencies were supposed to grapple with the tension that Bethany's talking about, the tension that always exists when taking a regulatory action, the tension between costs and benefits, and trying to find a reasonable path that conserves energy and protects public health because those are the mandates from the statutes that the agencies are supposed to be acting under.

Caitlin: So let's keep all of that in mind as we start to walk through some of the key statistics from the agency's analysis. So first I'd like to turn to the climate impacts and the fuel impacts. So we have right away in the agency's analysis a statement that the final standards have been estimated, that they will result in the consumption of an additional two billion barrels of fuel, which breaks down to consumption of an additional half a million barrels of oil a day.

Caitlin: In terms of what that means for people individually, consumers will spend an additional \$1,110 to \$1,461 on gasoline over the life of each vehicle they purchase and so that range depends on the discount rate used, which we will discuss later. But this increase in fuel use, not only does it affect what people are paying at the pump of course, but it translates into an increase in CO2 emissions. So the final standards are estimated to result in between 867 to 923 additional million metric tons of CO2. If that sounds like a lot of additional CO2 being released into the atmosphere, that's because it is. However, the agencies try to downplay that. So when they present this number right away they're quick to say, well we can translate that into what it will look like in terms of how it will affect the climate globally, which is really odd.

Caitlin: But they go ahead and they say, we've crunched the numbers and that 900-ish additional million metric tons of CO2 will only translate into 0.003 degrees celsius of additional temperature increase when we compare to the prior standards. And that struck me as really odd because I think it's a pretty clear way that the agency is trying to downplay the impact of the rule and it makes it seem like adding 900-ish additional million metric tons of CO2 to that atmosphere isn't a big deal, but



it's really not the right way to look at the effect of adding that much carbon into our atmosphere.

Caitlin: So Bethany, I'm going to pose a hard question to you since you work more closely with economists, I understand there are other ways of course of looking at these impacts. So I was curious if you could share another perspective.

Bethany: Yeah. What you quoted from the agency's rule really does inappropriately minimize what's really happening here. What economist tell us to do is to look at the incremental damage from each additional ton of carbon dioxide emissions and they have developed over a number of years a tool that we can use to calculate those damages from each incremental ton. We had a huge group of federal agencies and the White House worked together with economists and outside experts in developing this tool, it's called the social cost of carbon.

Bethany: That tool has been vetted, consistently vetted through public comments as agencies used it on numerous occasions. What it tells us here is that you can calculate the damages that we as society will incur for each additional ton of carbon dioxide emissions that is emitted because of this rule and that you can calculate it using dollar figures. It's really convenient because we can all sort of understand using this common metric of money that impact. So you can use that tool here to calculate the impact of these additional tons and just doing a back of the envelope calculation that I had my colleagues at Policy Integrity help me with, Eliana Paul and Peter Howard, it is in the trillions for carbon dioxide and in the quadrillions if you include the impact of the additional methane and other emissions that are going to be caused by this rule, trillions and quadrillions of dollars worth of damages are going to be caused by this rule.

Caitlin: Right, and I think that that's what's important because when you read the agency's analysis here and you see, oh well it's only going to increase global temperatures 0.003 degrees celsius, makes it seem like it's not that big of a deal. But in reality every million metric ton ends up compounding and costing us a tremendous amount in what we are going to have to pay and go through in the future to adapt and eventually try to do more to mitigate climate change. So I think that, that's really important to keep in mind that there are other tools than what the agency is presenting us that I think are helpful for us thinking about what these impacts actually mean.

Caitlin: So as you mentioned at the beginning, Bethany, this rule is lopsided and it really focuses on cutting costs to the industry and ultimately has these fairly steep climate impacts, and we'll get to some of the other impacts as well. But I just wanted to pause and say why is that important? Couldn't it be okay theoretically for an agency to just say, "Listen, we have to do what we have to do and in this situation, I mean as the agencies say throughout this rule, the 2012 standards



were just not feasible and so this is how we have decided to balance things now." And I understand that you've looked into some of the case law around this, so I was wondering if you would share.

Bethany: As you said, what the agencies are claiming here is that the cost of this rule are "Too high" or not feasible and it's really not possible to make that judgment unless you weigh the costs and benefits of the action. And how do you know if something's too high unless you know what's on the other side of the equation. So what the agency's own analysis here shows is that these costs are not too high, that's why they came out with a rule that's net costly in fact. The cost of complying with the standards that were put in place under Obama are reasonable and are achievable and are not too high and that the agency's own analysis here confirms that.

Bethany: But they've instead decided to focus on one part of the equation, which is these upfront costs to industry and that is, as Caitlin said, lopsided. Looking at only one portion of your analysis is kind of myopic, and so the reason it's really significant here especially is because NHTSA itself has lost cases in court before where they looked at the cost and benefits in an irrational manner. As I mentioned before, NHTSA has long used a cost benefit analysis to justify its standards and in a 2008 case in the ninth circuit, the court reviewed NHTSA's standards for light trucks, SUVs and minivans for example, and found in that case that it was okay for NHTSA to use a cost benefit analysis to determine what was the maximum feasible fuel economy standard, but told the agency that it is not permitted to "Put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards." And that is what the agency has chosen to do here again, and it's in the face of previous losses, which I think is quite significant.

Caitlin: Yeah, I think that's what's really striking about this. As you said, NHTSA's going ahead, EPA is going ahead with this rulemaking in the face of cases that say they shouldn't create such lopsided equations for themselves and downplay benefits and inflate costs, or at least just put the costs on the scale as being more important than some of the benefits. So what makes that even more shocking is to look at the actual numbers of the benefits.

Caitlin: So for CAFE, NHTSA has gone ahead and calculated what are the net benefits when we compare the cost and the benefits and that they vary from negative \$13.1 billion at a 3% discount rate up to 16.1 billion at a 7% discount rate. So as you can see, we only get into the positives if we're at a 7% discount rate, and for CO2 the same is true, the overall fleet wide societal net benefits vary from a negative \$220 billion at a 3% discount rate and only reach a net benefit level in the positives at \$6.4 billion at a 7% rate.



Caitlin: So that's what's really striking about this. If you just look at the 3% discount rate, what we're dealing with is a rule that actually costs 13.1 billion for the CAFE standards and 22 billion for the CO2 standards. So I'm wondering, Bethany, is there a reason why it might be more compelling to actually look at the 3% rate versus the 7% rate? Is there any merit to that 7% rate that gets the agencies into that positive net benefits realm?

Bethany: Yeah, I mean in this context it's pretty problematic to rely on a 7% discount rate. So a discount rate is how we calculate the value of money that we spend today over time. So imagine you have \$100 today, if you find a really good investment opportunity that \$100 you don't spend it could be worth like \$105 next year, so it's the same sort of calculation that you have to do if you're thinking about damages that you're going to suffer in the future. Let's say you're going to suffer some harm next year, you need to discount that to current dollars to understand how much avoiding that damage is worth right now.

Bethany: So what we're talking about here are harms that will be sort of felt over the course of a human life and the 7% discount rate sort of is a much less accurate way of estimating net benefits when you're talking about something like that. The 7% discount rate is based on analysis of the private sector rate of return on capital, but when you're talking about harm that will be caused over the course of a human life, a discount rate that's based on the return for capital in the private markets isn't appropriate.

Bethany: Instead, it's more appropriate to rely on a lower discount rate and that's according to pretty long standing White House economic guidance and EPA's own guidelines. Let's say the private rate of return was even relevant, the 7% estimate is outdated. I mean, when was the last time you saw interest rates that were that high? Right now the best CDs are up to 2%, the Federal Fund Rate is between zero and 0.25%. So the council of economic advisors has recommended that we update those rates to reflect the general reduction in interest rates that we've been experiencing.

Bethany: Just to bring home how significant this is. The 7% discount rate has a real impact on their results. So imagine you have a discount rate of 1%, if you use that \$1 million, 300 years from now will be worth over 50,000 today, that's with a 1% discount rate. But if you change it to 5%, one million dollars 300 years from now will be less than 50 cents, it will be worth less than 50 cents. So it really does significantly change how much you value that future harm. With a 7% discount rate you see a great reduction in the value of those damages even over the course of 50 years. So what you're doing is you're saying that even the harms that like our children and grandchildren will experience are worth very little to us right now.



- Caitlin: Yeah, that's what's so troubling about that, and I think when you initially look at the rule package, the agency presents this continuum and it's between the 3% discount rate and the 7% discount rate. Obviously, it's really jarring because one is at these major, major negative amounts and one is actually in the positives. So it just leads you to wonder why did they choose these rates and what do they actually mean? So I'm really glad you cleared that up.
- Caitlin: So next we're going to turn to a quick discussion about co-benefits just as a framing for our discussion about benefits more broadly. So as we move into thinking about the benefits of these rules, after talking about the costs, how the benefits associated with regulations are calculated has been a really hot topic under the Trump Administration. That's because when the administration repealed the Clean Power Plan, part of their argument for doing so was that the regulation couldn't be justified because it considered the benefits of reducing pollutants other than CO2 alone.
- Caitlin: So EPA said that when the cost benefit analysis was done for the Clean Power Plan, it should have just focused on the benefits of CO2 and not all of the benefits that you get from reducing CO2 as well. The same thing happened in EPA's recent move to withdraw its prior finding that it's appropriate and necessary to regulate mercury pollution from power plants. They use the same reasoning that agencies need to just focus solely on the benefits that come from reducing the one pollutant targeted by a regulation.
- Caitlin: But the reality is that when you set out to reduce CO2, you reduce other pollutants of course. So you reduce particulates, sulfur dioxide, nitrogen oxide, just to name a few, and all of those have public health benefits that go along with them. So here, oddly enough, EPA and NHTSA actually embrace co-benefits and indeed most of the benefits that they discuss are co-benefits and they don't distinguish at all between the benefits of reducing other pollutants besides CO2 and they even say that explicitly, "This analysis does not explicitly identify co-benefits as such a concept would include all benefits other than the cost savings to vehicle buyers."
- Caitlin: So they admit that upfront. In other words, they're saying that all the benefits in their analysis are co-benefits except the upfront cost savings of buying a new vehicle for a consumer. So that was something that really stood out to me because it just shows the lack of internal consistency in the way that EPA is taking these rules one by one and kind of doing what they need to do to make it make sense for the regulatory action that they want to take. In this case, they want to reduce the fuel economy of these vehicles and so unfortunately this means that there are going to be some impacts to public health because of this unsurprisingly.



- Caitlin: But the agencies also show that there will be some benefits by reducing fatalities in car accidents. So according to the theory that having heavier vehicles, you will make crashes less deadly. They say the revised standards will prevent around 233 fatalities in car accidents. Then they have another theory for one of their benefits which is, because the new cars will be less expensive because the manufacturers will need to make less of an investment in fuel economy, the sticker price of new cars will be cheaper. People will be more willing to buy them, upgrading older cars and when they get in an accident, they will be in that newer car, which is safer than the older car that they used to drive.
- Caitlin: So on that theory, the agencies estimate the standards will lead to 724 to up to 3,330 fewer crash fatalities. The reason why there's a really big gap, I mean 700 to 3000 is because of this thing called the rebound effect. Now I'm going to try not to go into this because I feel a little out of my depth. This is a very complex economic topic, but basically the rebound effect is essentially that when you have better fuel economy, people might be induced to drive more because it's cheaper, because you're going to be paying less at the pump for gas and so you won't think much of driving extra, and so when you do drive extra, you increase the chance that you might get into an accident.
- Caitlin: So there is some controversy that you can dig into out there if this is a topic of interest for you because the agencies used rebound effect of 20% but other people have suggested it should be much lower than that, maybe even down to 8% and I think in 2012 the agencies used 10%, so I think that that's important to keep in mind some of that controversy because the rebound effect is what contributes to that really high end of the fewer crash fatalities.
- Caitlin: On the flip side, unfortunately the agencies estimate that there are going to be increases in premature deaths because of increased air pollution from these standards. So even though, as I just said, we'll potentially be saving quite a few lives due to some of the benefits around people driving newer cars, the agency's estimate that 444 to 1000 people will die prematurely because of the total air pollution increases. So this includes pollutants like nitrogen oxide, sulfur dioxide and fine particulates.
- Caitlin: There are also going to be a lot of other negative health outcomes like increased acute bronchitis, respiratory symptoms, asthma exacerbation, non-fatal heart attacks, increased hospital admissions and emergency room visits for both cardiovascular and respiratory issues. That's something that's on all of our minds at the moment is thinking about the relationship between air pollution and our health, and so it's really troubling to see that when the agency breaks some of those numbers down they're in the thousands. They estimate respiratory symptoms increasing by 22,000 cases, asthma being worsened by 16,000 cases. So



it's a pretty shocking amount of health impacts that we're going to face because of the increased burning of fossil fuels from our cars.

Caitlin: Unfortunately, the agencies acknowledge that and say that they understand that the revised standards will have a negative impact on air quality health outcomes and EPA even says, "EPA recognizes the final standards are projected to increase CO2 emissions compared to the previous EPA standards." They try to justify that by saying that section 202 of the Clean Air Act that they're working under does not require EPA to set standards which result in, "The greatest degree of emission reduction achievable." Then they end it with something that really sort of hurts me to read, but they say, "EPA has not chosen the standard that has the highest estimated net social benefits."

Caitlin: So I think really that's what you need to know here. Of course, as EPA says, it's not that EPA had to do everything in its power, right? To minimize health impacts to people because I suppose in fact the most extreme thing that they could do to try to achieve that would be like to ban cars. But it goes back to what we've been saying, which is EPA could have done more, I think to grapple with this tension between costs and benefits and find a reasonable path forward like it did in those 2012 standards, which it went ahead and confirmed as still being reasonable in early 2017 in the final days of the Obama Administration.

Caitlin: So as we've also mentioned, new car prices will drop. That's one of the things I was just saying about how they estimate that will get more people into newer cars. The agencies estimate that new car prices will drop by \$977 to \$1083 relative to the previous rules. But unfortunately when we look at that upfront savings compared to how much consumers are going to spend on gasoline over the life of that vehicle, it's an additional 1,110 to \$1,461, and again, that depends on the discount rate that we use.

Caitlin: So you can see pretty clearly that even when we use the lowest estimate for increased fuel costs, that outweighs the best case scenario for that lower upfront vehicle cost. If we actually take the extremes, like the lowest possible decrease in vehicle costs with the highest possible fuel increase, it looks even worse. We're looking at about \$1,000 compared to about \$1,500. So the agencies also acknowledged this. They say that EPA is placing a greater weight on the cost to industry and the upfront vehicle costs to consumers. EPA is clear that, that's where it is putting its emphasis and it says that it believes the cost to industry and automotive consumers would have been too high and that by lowering these costs, they will enhance the ability of fleet turnover. So as we mentioned that there's a lot of emphasis on this idea of trying to get everybody to go out and buy new cars.



- Caitlin: Bethany, EPA seems really concerned about these costs to industry and it's getting sort of confusing because we started the beginning of the episode saying that under the Clean Air Act, EPA's mandate is to protect public health and welfare and so they're really worried about costs, but they also found under the previous standards that those costs and benefits passed muster. Has something changed? I'm curious if you can tell us a little more about how manufacturers manage these complaints costs.
- Bethany: Even under the numbers you just told us, this impact on new car prices is outweighed by the amount that consumers will save at the pump. That was a really important thing that the Obama Administration used to analyze the impact of the standards and this agency is deciding to go forward with this rule anyway, despite the fuel savings that will be lost. The bottom line is here, even according to the agency's own analysis, the numbers look bad, but their numbers are also inflated. They've come up with these estimates for how much consumers will spend on new cars and how much manufacturers will pass through and how much this whole impact car prices.
- Bethany: But it's not a realistic scenario. I mean, we know that manufacturers regularly, they have methods for reducing the cost and minimizing the impact of the cost of any fuel efficiency or emission standard. What they do is they will shift the costs of any improvements to the vehicles that can sort of handle it. So in other words, what they do is they adjust the prices across their fleets so that they'll attract customers to their more fuel efficient vehicles and help them meet the standards.
- Bethany: Then they'll shift the expense of the improvements to the more high end luxury vehicles where it won't have that much of an impact on the cost of the vehicle, and it won't have that much of an impact on the customer either because it's a smaller fraction of the total. That is how manufacturers just traditionally have and always have to help make these standards cheaper. So I just think the bottom line is that we already know that this decision by these agencies is poor based on their own math, but that math is inflated as well.
- Caitlin: Wow. Yeah. I think, reading the rule, I wouldn't have picked up on any of that at all because there's just so much intensity and focus on the idea of the cost to industry and cost of consumers and it really makes it seem like there's no other way but to reduce these fuel economy standards. So it's great that you filled in that gap, some of the inside baseball into how the industry actually works. So let's go ahead and conclude this deep dive.
- Caitlin: I have one last thing that I want to mention and then we'll turn to a discussion of why all of this is important. So my last bit is that I feel like it's important to mention the effect on jobs for this rule. That's because environmental regulations are often characterized as somehow reducing jobs by increasing the cost of doing



business. We also have had repeated promises from the president to save and even increase jobs in the auto industry in the United States.

Caitlin: He's even made some of these statements in relation to rolling back these standards, saying that taking these actions will save jobs in the auto industry. But unfortunately when we look at the numbers, that's just not the case. The Atlantic has crunched the numbers and has found a loss of 13,474 jobs as a result of these new regulations. That's quite a significant amount. But the way that the agency goes about calculating this, if you want to go digging into the final rule yourself is what they call person year hours and these hours of labor, that will be cost.

Caitlin: This will happen because increasing fuel efficiency is actually somewhat labor intensive process. You have to do a certain amount of research and development, figuring out new ways that you can shave off some of those miles per gallon, some of those grams per mile of CO2. So a lot of people commented on the 2018 proposal of these standards expressing concern about America losing this sort of development leadership that it has in the world of fuel saving technologies and investments into this world.

Caitlin: So we had mayors from a lot of cities in Ohio that build a lot of light duty vehicles in those cities and in neighboring geographies saying that workers that design and produce fuel economy equipment make an average salary of around \$61,500 a year. So for them, these are good paying jobs in their communities that could be cost if the standards are lowered. The BlueGreen Alliance also pointed out something similar that manufacturers have invested billions into these technologies and if the standards don't continue a required amount of strong investment, they see that as really problematic.

Caitlin: The agency addressed these comments in the final rule and said, "When the economy's at full employment, fuel economy regulation is unlikely to have much impact on net overall US employment, instead labor would primarily be shifted from one sector to another." However, we no longer have an economy that's at full employment, and the agencies also mentioned, "On the other hand, if a regulation comes into effect during a period of less than full employment, a change in labor demand due to the regulation would affect net overall US employment because the labor market's not in equilibrium." So right there in the preamble to the rule itself, the agencies admit that there are going to be some job losses and perhaps some significant job losses as a result of these regulations.

Caitlin: So we have finally reached the end of our deep dive into all of these different elements inside of the final rule and now we've come to the point where we can ask ourselves, why are all of these things important? Why are all these different issues with the cost benefit analysis important? So I will pose that to you, Bethany.



Bethany: Well, I mean the big picture is, the reason it's important is because it shows us that these rules are unjustified, but more importantly for the agencies, they are likely to be sued, and under the Administrative Procedure Act, the agencies have to prove that they provided a reasoned explanation for this decision to roll back these standards. And what courts have told us is that it is arbitrary and capricious not to look at a balanced assessment of the costs and benefits.

Bethany: Another thing that courts have told us is that it's the agency's statutory purpose and sort of statutory mission is important, and we've got two agencies here that are choosing to do basically the opposite of what their statutes tell them to do. We've got EPA choosing to raise the emissions and cause more instances of asthma and premature death from these increased emissions, and we've got NHTSA choosing to allow more energy usage and fuel costs to go up for people, and there are two statutes tell them to do the opposite. So I think, well, I'm pretty sure there has been several groups that have already vowed to sue and under the Administrative Procedure Act, they'll bring all these arguments in and a court will be asked whether these rules can stand up to challenges.

Caitlin: I think just as you mentioned the Attorney General of California, Attorney General Becerra has said at least on Twitter so far that California will fight to save clean cars and that the New York Attorney General James has also vowed to say that she will continue to work with attorneys general from across the country to fight this Administration's reckless action. So they both seem committed to continuing to lead this big coalition that they've put together to try to challenge the administration on these decisions.

Caitlin: Actually we already have a challenge against these rules that came in, I mean, seemingly simultaneously with the rule being published in the Federal Register. So the Competitive Enterprise Institute is sort of the winner in terms of the first challenger and they are actually challenging the rule for not going far enough in rolling back the standards. They think a less stringent standard would be more appropriate and that it would actually reflect more benefits than costs compared to what NHTSA chose to do. So that's from one of their attorneys and they went ahead and filed that petition yesterday. So it's already underway.

Caitlin: As you said, I think we're going to see the states and surely we will see environmental advocacy groups and public health advocacy groups get involved and raise some of the concerns that we have just raised over the last a little bit here that EPA and NHTSA have these mandates and they are not upholding them according to their own calculations.

Bethany: Another really important reason why this matters is that the auto industry really needs certainty and stability. They plan out their car designs really far in advance. The statute requires the agency to give automakers at least 18 months notice. But



really automakers are planning out their future alliance years before the model year when the car comes out, and it is very disruptive to have an agency doing things like this that are unsupported and legally risky. Then to have a lawsuit, like just the lawsuit itself already causes uncertainty for automakers and then to have a lawsuit actually strike these rules will cause massive shifts in what automakers need to do and that is one of the things that is most harmful for these companies.

Caitlin: So just as the agencies are saying, we need to prioritize costs to the industry and costs upfront to consumers over the things that were statutorily mandated to consider. You're right, we do have this tremendous amount of uncertainty that's been created and that's been really a hallmark of this whole saga and the reason why some automakers have actually sided with the State of California and said we will comply with a sort of modified version of the standards that were set up back in 2012 and stick to a more ambitious level of reductions in CO2 and increases in fuel efficiency instead of going with the Trump Administration on this ride with these federal standards that are kind of squeaking in just at the last moment. I think April 1st was their deadline to get them finished for the sake of that 18-month timeline and that could be subject to change in the future as you note.

Caitlin: We're talking about litigation starting up here in the near future, but we actually have two cases that are already going, so let's pause and talk about those briefly before we wrap up here. So, as I mentioned at the beginning, there was a rule that was released this fall, the One National Program rule, the rule that contained the legal interpretations and changes to EPAs waiver. Now, California and a coalition of 22 states, New York City, Los Angeles and Washington DC all banded together and they filed a case against NHTSA in the DC District Court and they asserted that the final rule exceeds and it says, "Authority that goes against congressional intent, it's arbitrary and capricious. It also didn't analyze its changes under the National Environmental Policy Act."

Caitlin: So Joe and I covered a lot of elements of that rule in our podcast this fall. But obviously the litigation is underway now and we are starting to get a better idea into what they are arguing and what they might argue. So Bethany, do you want to unpack some of their arguments a bit here?

Bethany: Yeah, I mean this is just the preliminary stages of the litigation. It'll be interesting to see how the arguments play out, but basically on the NHTSA front, NHTSA found that California having its own standards was preempted. It's not really NHTSA's job to say that California is preempted, it's actually a court's job to say that, so that's one of the primary arguments that you'll see in this case. In addition, one of the other arguments is that California's standards are preempted because they're actually fuel economy standards or related to fuel economy standards. But as the plaintiffs argue, California standards are related to emissions. They're not fuel economy standards, they're emission standards.



- Bethany: And NHTSA's argument here that California's emission standards are preempted, contradicts its previous own findings, contradicts several court decisions that have already come out on this question, and the plaintiff's argue contradicts what the statute says. One important thing about California is that California was the pioneer here. California's tailpipe standards were the first standards that we had in this country that would reduce emissions that were causing smog. It was a California scientist who discovered that these car emissions, the emissions that are coming out of the tailpipe were interacting with sunlight and interacting with other pollutants out there to cause smog. California was the first to start regulating it.
- Bethany: So under Supreme Court doctrine when a state has had a long standing traditional role in regulating something, you need very specific congressional language preempting that agency and kicking them out of that area. Here what we have instead is Congress saying we want California to be able to continue to be a leader on this front. So NHTSA's preemption finding that California isn't allowed to do anything stricter from what the federal government does violates all of those principles.
- Caitlin: Wow. Yeah, it's definitely going to be one to watch alongside another case. California in the same coalition of states and cities have also filed a case against EPA and this case is in the DC Circuit Court of Appeals, and they're challenging EPA's findings and actions in that final One National Program rule. So the case against EPA as you've now realized is separate and different from the case against NHTSA even though they worked on those rules together and released them jointly.
- Caitlin: EPA made certain findings on its own and in particular it advanced new interpretations of the Clean Air Act to support its decision to withdraw California's waiver. And so EPA said that California having greenhouse gas standards was inappropriate because the section of the Clean Air Act that allows California to have a waiver for its own standards section 209 according to EPA now really only contemplates local pollution issues, and so they created this idea of this local geographic nexus where you have to have localized pollution issues and a connection to extremely local issues in California in order to try to get a waiver under section 209.
- Caitlin: So they set up this new system and sure enough California fails it in their analysis and they say, "Oh well, it looks like by trying to regulate greenhouse gases, California is regulating something that goes way up in the atmosphere and distributes all around the world. It's not a localized pollution issue." And yes, California is going to face tremendous climate change impacts and it has made a pretty good case for why those impacts are unique. But you know what, a lot of other states are going to have climate impacts too and they will have climate



impacts like the ones that California is saying they're going to have. So they don't have the extraordinary and compelling conditions needed to have a waiver.

Caitlin: And so that is just really an interesting take on things. And I'm really curious to see what the DC Circuit is going to say about that, particularly because we do have some language from Massachusetts for a CPA that talks about how EPA and NHTSA each have different statutory duties. So this kind of goes to what Bethany was talking about, some of the things that NHTSA argued that California standards sort of inappropriately overlap into its realm. Let's remember that in Massachusetts for a CPA, the Supreme Court said EPA standards can harmoniously coexist with NHTSA standards, and specifically they said, "EPA has been charged with protecting the public's health and welfare, a statutory obligation, wholly independent of DOTs mandate to promote energy efficiency."

Caitlin: So arguably this same idea extends to California who's setting standards similar to EPA standards to address public health in the state in light of their compelling and extraordinary conditions. We'll see what the court says, but I think there's a very good argument that there's no reason why these standards can't all coexist harmoniously.

Caitlin: So one last important thing to note is that on February 11th, 2020 the DC District Court issued a stay which pauses the case against NHTSA. So what they're going to do is go ahead and let the case against EPA in the DC Circuit Court go forward and wait until that's resolved until they continue considering the case against NHTSA, and that's really significant. It's important that those cases are not happening at the same time in case you get divergent results. But also important because NHTSA tried to have their case moved out of the district court to join the EPA case in the DC Circuit and the judge denied that request. So they're stuck on sort of a different track and so it's going to take some time until everything gets resolved. So I think that, that was it in terms of future litigation. Bethany, did I miss anything?

Bethany: I don't think so. That was a lot.

Caitlin: I hope that we've done a really comprehensive job, at least in terms of the highlights. Goodness knows it'd be practically impossible to give you all a comprehensive overview of all 2000 pages. But we have tried to use our expertise to shortcut things for you and just get you the most top line items.

Bethany: Let's not forget that there are thousands more pages in their economic analysis.

Caitlin: That's true. That's true. I admittedly have yet to dig into the final regulatory impact analysis, but it's there waiting for us.



Bethany: Good times!

Caitlin: Well, Bethany, thank you again for joining me. It was a pleasure talking with you and having you here to share so much valuable information with us.

Bethany: Thank you so much for having me, it was great to be here.

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