Clean Law 44: Joe Goffman Speaks with Cynthia Giles About EPA's Covid-19 Enforcement Discretion Policy, May 7, 2020

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Robin Just: Welcome to Clean Law from the Environmental & Energy Law Program at Harvard Law School. In this episode, which we recorded on May 7th, Joe Goffman speaks with Cynthia Giles, former assistant administrator for EPA's Office of Enforcement and Compliance Assurance about EPA's rollback of environmental enforcement, and a COVID-19 enforcement discretion policy issued at the end of March, 2020. This issue is still playing out. Three lawsuits are pending about the March enforcement policy, and EPA has given some additional guidance on this subject. We hope you enjoy this podcast.

Joe Goffman: Hi Cynthia. Thank you for joining us again on the Clean Law podcast.

Cynthia Giles: Thanks Joe.

Joe: The last time we talked, which was sometime about a year ago, we talked about something that the Office of Enforcement and Compliance Assurance at EPA had done ostensibly to streamline compliance requirements. And I put streamline in scare quotes in the oil and gas sector. And we're here today to talk about something that the same office did on March 26th in issuing under cover of the COVID-19 pandemic, something called a no action assurance vis-a-vis compliance. And we're hoping that we can talk about that today and what it is. What its significance is, what no action assurance letters are generally, and how they've been used in the past. And Cynthia, you're the perfect person to talk to because between 2009 and 2017, you were the assistant administrator for the Office of Enforcement and Compliance Assurance. And you were also before that a senior official in state government focusing on enforcement.

Joe: And since then, one of the things you've done is serve as a guest fellow here at the Environmental & Energy Law Program. And you have published a beginnings of a series of pieces on next generation compliance, examining the way in which environmental regulation has in many instances failed to deliver the outcomes we want. And also proposing a sophisticated strategy for designing compliance into environmental rules and regulations. And I'm hoping that sometime in the near future, we get you back on again as a guest to talk about that work. But let's focus today on what exactly happened on March 26th.

Cynthia: Thank you, Joe. Always a pleasure to talk to you. So glad to be here today and happy to engage further in the future. The March 26th policy from EPA that has led to so much public uproar essentially says that EPA does not intend to pursue enforcement for a host of violations of environmental laws if the companies claim that the violations were caused by COVID-19. It's a really sweeping policy. Covers all environmental laws, all companies nationwide, for the indefinite future.

Joe: It's so sweeping that it's almost hard to get one's mind around it. So basically, can you imagine any violations that wouldn't fall under the March 26th directive the way it's drafted?

Cynthia: Well, they say it doesn't cover criminal. That's about the only narrowing feature. So basically addresses all civil violations of federal environmental laws.

Joe: What justification, if any, was offered either by the agency, by supporters of this directive?

Cynthia: Well the justification actually was quite thin, which is one of the many problems that I have with this, and has caused so many people to object to it. It might help for me explaining what those failures are in this policy. If I take a quick step back and explain what the guidelines are for EPA in addressing this kind of a problem.

Cynthia: I would note that EPA of course always has discretion about what enforcement cases to take. It looks at the facts and decides whether or not to take an action for a violation. So no policy's needed to confirm that. That's always true. EPA always has discretion.

Cynthia: What EPA did here is not that. What it did here is commit in advance to how it will exercise its enforcement discretion. Sometimes, companies come the EPA seeking agreement that EPA won't enforce the law against them. They admit that they intend to violate the environmental rules, but they are asking EPA to commit to taking no action. Hence the name as you referenced. A no action assurance, sometimes also called a statement of enforcement discretion. EPA has and has had since 1984, a written policy about this. And the policy is called the policy against no action assurances. That 1984 policy's on the web, on EPA's website. It was confirmed again in 1995 and again in 2014, but it's been the same policy in effect for the last 35 years.

Joe: So let's just be clear. It was first adopted you said in 1984?

Cynthia: The first formal written statement of the policy. It was in general practice prior to that time. But that was the first written policy.

Joe: So it's been on the books and writing since the second term, actually the end of the first term of the Reagan administration through both Bush administrations, the Clinton administration, and the Obama administration.

Cynthia: Yep. That's right. So the reason for the policy against providing no action assurances is that there are profound public policy reasons against committing not to enforce. The environmental rules are there to protect the public. They reduce exposure to pollution. They mandate the company's monitor so that risky situations can be immediately noticed and corrected. They require public disclosure so the public knows what companies in their own backyard are doing. And they level the playing field so that all companies have to play by the same rules.

Cynthia: So agreeing in advance that companies can breach those standards without consequence runs counter to all of those foundational principles. And that's why the default setting if you will of EPA is that they do not agree to these no action assurances. So that's the policy.

Cynthia: But, there are two very narrow exceptions to that. One is where it's expressly provided in statute. And there's a couple instances that there's very few of those. Fuel waivers is one example. And the second is what the policy describes as extremely unusual circumstances when clearly necessary to serve the public interest, and no other mechanism can address it adequately. So it's under that second exception that this conversation about what EPA is doing is occurring.

Joe: Well, that raises at least two questions. I think to most of the public, the assumption is that most companies with pollution control obligations, their default setting is to meet those obligations. And that even with the grant of leniency if you will, that no action assurance directive like this would confer, companies will still continue to monitor their emissions, monitor their compliance, and comply with their obligations. The work you've done as part of the Next Generation Compliance project shows that that's not necessarily the default setting. So I think if I understand correctly, it's important for people listening and the public in general, to realize that compliance is not an automatic thing that can necessarily count on.

Joe: The other question would be helpful for you to discuss is a couple of examples of when say during your tenure, the agency did apply, or grant, or issue a no action assurance for the benefit of a company. Maybe we can start with the second question first.

Cynthia: Sure. So the most common situation when EPA would entertain a request for a no action assurance. Most commonly, those have occurred around natural disaster

type situations like a hurricane. And let me give you an illustration that was in the Bush administration after hurricanes Katrina and Rita.

Cynthia: So after a hurricane with devastating force and consequent flooding and other problems, it often happened that buildings were damaged. And the damage was so severe, that they were at imminent risk of collapsing, posing a significant public safety threat. The normal environmental rules say that before you demolish a building that might have asbestos in it, that you're supposed to go in there and test and find out if you have asbestos or not. So that when you do the demolition, you do so in a way that is safe, both for the workers and for the public in the vicinity of the building.

Cynthia: When buildings after those hurricanes were at imminent risk of collapse, the public interest demanded that that demolition happened quickly so that people could be protected. And companies were asking and governments were asking for relief from the sometimes time consuming obligations to test for asbestos. In those cases, a no action assurance was issued that said, "All right, if your building," only buildings that were substantially damaged by the hurricane. No other buildings, just those buildings. If you need to demolish them, you can without doing the testing. But you must treat that demolition and the subsequent waste as containing asbestos. You have to keep it wet so that people are not exposed during the demolition. And you have to dispose of it in a way that will protect people from exposure to asbestos. So there was relief given to deal with the public necessity of demolishing these buildings quickly, but there were also protections built in to that no action assurance to make sure that the underlying purpose of the environmental laws was still achieved.

Joe: Great example, and a vivid one too. Because two of the things it highlights are first, that we're talking about an acute and immediate trade off between implementing the rule on the books in this case, asbestos cleanup. And if you will, as superseding, urgent, public safety problem. If we're talking about buildings that are at risk of imminent collapse.

Joe: But the other interesting feature about the example is that the no action assurance policy in that instance mitigated the trade off. The government didn't take the position, "Well, for the sake of quickly and safely demolishing the buildings, we're just going to accept that we're putting the public at risk of avoidable exposure to asbestos." There was still an element of the example you cited where the policy continued, albeit by other means, to assure the public that it was going to be protect against avoidable exposure to asbestos.

Cynthia: That's absolutely right. What you're pulling out of that example is one of the central features of the ways that EPA's practice about considering these no action assurances is designed to minimize the harm and maximize protection. So the key

things that EPA has always considered in deciding whether to do a no action assurance are, is it in the public interest? Complying with environmental rules is in the public interest. Is there an equally compelling public interest that supports the request for no action assurance? Harm to a private interest isn't sufficient. There has to be a public interest. Does it substantiate why the specific relief is needed? What exactly is the public threat, and what specific actions are necessary to address that public threat?

Cynthia: How can EPA protect the public interest through enforceable conditions? That's what you're referring to. So you don't just say sure, whatever. Do whatever you want. You say we're going to grant this very narrow approval. But we're going to impose enforceable, mandatory conditions to protect the public.

Cynthia: And then finally, a specific end date, the shortest possible time. It might be possible to extend that date. Is the date certain? Like April 30, a date. You might be able to extend that if the facts support it. But at that time, you have to re-justify it based on the facts at that time. So those are the four key things that EPA has traditionally looked at. And as we can talk about next, and with respect to the March 26th policy, it doesn't observe those.

Joe: So in the case of the Bush administration actions in the wake of the hurricanes. If I'm down wind of an old building that contains a lot of asbestos and is in risk of collapsing, what I could have counted on in that circumstance is that the building would come down safely before it collapsed. And also, that I wouldn't be downwind of a significant release of asbestos. I'm going to guess we have in the March 26th version of all this is if I'm living downwind of a polluting facility, I have no such assurance that in the wake of the March 26th directive, the agency having given the operator facility relief, has done anything to address the possibility that the pollution control measures that the facility had previously been required to implement will still be in place.

Cynthia: That's right. And that's one of the most troubling things about this March 26th policy. It essentially says that EPA expects that many companies will not be able to comply with the monitoring, and the reporting, and other requirements. And says that if compliances air quotes here not practical, whatever that means. Because of coronavirus, the company should, not must, should document the violations and make that information available when EPA asks them for it. Monitoring, sampling, reporting are specifically mentioned as things that EPA expects the company won't be able to do.

Cynthia: So the four key things that I mentioned that EPA has always considered in looking at no action assurances are not addressed here. It doesn't explain why allowing companies to stop monitoring and reporting is in the public interest. It doesn't provide evidence that companies nationwide are unable to meet their

environmental obligations, and allows them to decide what caused by COVID-19 an impractical mean.

Cynthia: If a company wants to save money by laying off compliance staff, are violations that result excused? The policy doesn't say. It doesn't impose enforceable conditions, and there's no deadline. It applies for the indefinite future. It's retroactive for two weeks. And it even commits to giving companies seven days notice before the no action assurance will end.

Joe: Based on your experience and recently on your research, what do you kind of visualize happening as a result of this March 26th directive?

Cynthia: Well, lots of companies one assumes are going to look at this and interpret what is caused by COVID-19 and what is practical for them to do in wildly varying ways. EPA gives practically no direction about what that means.

Cynthia: And here's why that's so alarming. EPA in this policy somewhat dismissively refers to monitoring and reporting as routine obligations. Like they don't matter, it's routine. That is completely off-base. Monitoring and reporting are the foundation of environmental programs. That's how the companies know and how government knows how much pollution there is. Reporting is how the government can inform the public.

Cynthia: So air pollution from chemical plants and refineries, water pollution from sewage treatment plants and industrial sources. Safety of our drinking water, all of these depend on the foundation of those programs, is keeping an eye on pollution and contamination through monitoring and reporting. So if companies stop monitoring, no one's going to know what the pollution situation is. No one's going to know if it alarmingly is higher or not. There's no way to know without the monitoring.

Joe: I'm going to lay something out, Cynthia. And you can either confirm it or correct it. But one of the things that you have done in the papers that you've published with ELP is you've looked at the extent to which the expectation of pervasive compliance with pollution control obligations, which include not only the actions to reduce emissions or discharge, but also the monitoring of the facility's performance, that our expectation that the default mode is to be in compliance, has actually not been borne out in practice. And given that background, given that the sort of default setting for many, many companies is to be either derelict with respect their compliance obligations, or careless, or negligent. It seems to me that against that backdrop, issuing this kind of directive only amplifies or aggravates that set of problems. Whereas the average member of the public assumes that if companies continue to bring employees on site to operate their facilities, they'll continue to be in compliance with their environmental

obligations. That expectation has already been if you will pre-refuted by past experience. And certainly is not something that people can count on in the wake of this directive. Am I being excessively alarmist?

Cynthia: No, I think you're right unfortunately Joe. I think people have been much too optimistic about what the compliance status is with the existing federal environmental programs. And one of the things my research has revealed is that violations, including serious violations with real impacts to people's health are far too widespread. So I think the hope, and really that's all it is. The hope that companies will be responsible and will continue, or in some cases start doing what's necessary to comply. I think that the evidence just doesn't bear that out. I think that if we see such widespread violations with programs where we are looking closely and where state and federal attention has been focused for years and years, and we're still seeing such widespread violations. The fear is that by taking eyes off of these companies, becoming completely blind to what is going on there, which what this policy that allows discontinuing monitoring and reporting does. That I think that it's reasonable to think that the results could be scary for communities that are downwind and downstream of these facilities. But we probably will never know. Because the absence of monitoring means that we are flying blind, and we do not know where serious problems may be occurring.

Joe: Let me do a maneuver that probably falls in the vein of devil's advocate. A great many facilities are operating in jurisdictions where there are fairly significant shutdown or quarantine orders in place. That means that let's say for a hypothetical facility whose workforce is considered essential, a good strategy might be to bring in some, but not all of the facility's employees so that the facility can continue its basic operations with minimal staff.

Joe: What about the argument that environmental compliance employees, to the extent that they're a different part of the workforce, should be encouraged or incentivized to be kept at home in order to minimize the population that's potentially exposed to infection? Why isn't that if you will, a compelling reason in and of itself to avoid incentivizing or to give companies a safe card or if they want to reduce their onsite workforce?

Cynthia: I think it certainly is true that the COVID-19 pandemic presents the kind of national emergency that would support some no action assurance authority, where there's a demonstrated public benefit from doing so. And the actions are justified, and they are constrained to protect public interests to the maximum extent possible. And I would say EPA itself has demonstrated that it knows how to do that when it put out a parallel guidance just about a week after the March 26th policy for what should happen under COVID-19 for cleanup compliance. That guidance document the EPA put out shows that EPA does know how to produce a thoughtful and a considered strategy for compliance during the pandemic.

Cynthia: And what that policy said is that the cleanup program must continue where the cleanup obligations are necessary to protect the public. Like there's contamination moving towards a drinking water source. Okay. That would be a catastrophe if that contamination gets there. That is in public health imperative work that must continue despite the pandemic.

Cynthia: But if the risks of COVID are high and local directions, like you're saying for social distancing and other things, would argue in favor of deferring some work. And postponing won't create a public health threat, then it is appropriate to delay.

Cynthia: So for example, as EPA said in the cleanup guidance. If some of the work that needs to be done towards a cleanup is to go into the homes of people around the site. Okay, you shouldn't be doing that. That's not a safe thing to be doing in the pandemic. So those are appropriate to consider delaying.

Cynthia: And, the cleanup guidance said all work from remote workstations most continue, and the public must be informed. There's certainly a lot of work in cleanup, but it's also true in environmental compliance. A lot of work can be done remotely. Sometimes monitoring is done remotely. Reporting certainly is usually done remotely. So all of that work can and should continue despite the pandemic.

Cynthia: This is why I'm saying it required a more nuanced, thoughtful approach of how to address the legitimate problems that arise from the pandemic. No question, legitimate things are there that do require some flexibility from EPA. Not the blunderbuss, all companies nationwide all laws approach. And EPA shows that it knows how to do that more nuanced, careful weighing of competing public health priorities. It proved it knows how to do that in the cleanup guidance, it just didn't do that in the March 26th policy.

Joe: With the example you just cited, the cleanup guidance and the earlier examples of the post-Katrina post-Rita no action assurance directives. You've distilled the key template, which is actually quite obvious. Which is EPA up until this point, up until the March 26th directive did not assume that public had to make an exclusive choice between different forms of risks and health threats. As you just described the cleanup directive and as you described the post hurricane directives, the public could count on the EPA figuring out how to deliver protections for multiple threats. That that's the template. If there's a risk, ongoing or imminent risk to safety from say building collapse, that risk could needed to be addressed while also still addressing, albeit through an alternative pathway, the risk of avoidable asbestos disclosure.

Joe: Same thing with the directive you just described vis-a-vis cleanup. We're not in a situation under that directive where communities at risk from discharge or pollution have to, if you will, accept that risk for the sake of minimizing the

COVID-19 risk. That EPA in the three cases understood that its obligation was to continue to maximize protection of public health. And if you will, minimize the trade offs. What it sounds to me that makes this March 26 document so unusual, if not unique, is that the EPA went hard over to one side in saying one risk, we will ostensibly protect the public from. And here I'm maybe being a little bit charitable, is COVID-19 exposure. And all other risks, including from knowable pollution threats while the public is on its own. Maybe I'm exaggerating that last point. But I think that that template of maximizing multiple facets of risk protection, which previous no action assurance directives observed, is really what's being violated here by the March 26th directive. Does that do it justice?

Cynthia: I do agree with that. And I think that what you're saying ties into what I think that EPA needs to do now to try to remedy the situation that they have created by such a broad and sweeping national policy that lets the companies decide if they're going to do the monitoring or reporting based on whether they think it is or isn't practical to do under the present circumstance.

Cynthia: So the main thing that EPA can do now to try to ameliorate some of the harm and risk, and blindness to the facts that EPA has created with this policy is by requiring the companies to disclose, to tell EPA if they are going to stop monitoring or stop reporting. If they're going to decide to do that claiming that it's appropriate to do so under the policy EPA's issued, they should tell EPA that. Say, "We're going to stop monitoring at the flare at our refinery. And here's the reason that we feel we need to do that." And tell EPA that real time and have EPA post that. Doing that wouldn't solve this problem, but it would go a long way towards addressing two key things that are missing from this policy to the great risk of the public.

Cynthia: One is having the states and EPA know what choices the companies are making, which they presently don't know that. The companies are not obligated to tell EPA or the states that. To allow EPA and these states to know what choices the companies are making, and to intervene if those choices appear unwarranted.

Cynthia: And the other thing equally important is that the companies know that their choices are going to face public scrutiny. That is a key role of reporting in regular times, not just now. Always, that's a key role for reporting. It motivates better behavior through the power of public accountability. The research shows that works. Letting those choices occur entirely behind closed doors, it provides lots of room for the private interest in reducing costs to trump the public interest in compliance.

Joe: Let me change course here with a couple of sort of more pointed questions. You and Gina McCarthy were pretty vocal after this March 26th directive was issued, in your criticism. And apparently, the current administrator of the EPA took issue with your criticisms and responded by claiming that what he and the current AA

for Enforcement and Compliance Assurance had done was not different from what you yourself had done when you were in that position. And I think he cited a couple of examples that he claimed were the same or ample precedent for this. I think I know the answer, but you might as well say it. Why was he wrong?

Cynthia: Well, there's so many ways. But I think that argument doesn't even stand up to superficial scrutiny. The main illustration that was cited to back up that in my view ridiculous claim was a no action assurance that we agreed to after Hurricane Sandy. And that was a no action assurance focused on emergency backup generators for public service facilities like hospitals, and wastewater treatment plants, to allow those backup generators to run so that those facilities like hospitals could have power. Even if the generators could not obtain the lower shelf for fuel, that the regulations required them to burn. Because those fuels were not available after the supply chain was interrupted by that hurricane.

Cynthia: So what we agreed to was that they could use other fuel for emergency backup generators for public service facilities only. Only for emergencies, and with other constraints to protect the public like not co-mingling the fuel and some other things like that. And continuing their obligations to report and be publicly accountable. And it had a date certain endpoint. Not just the date certain, but a time. 11:59 PM on a particular date. And I think that comparing what they've done here with that really just confirms the point about how unprecedented this current action by EPA is.

Joe: Now, the umbrage that Administrator Wheeler is particularly rich given that prior to March 26th, he and his predecessor has missed not a single opportunity to relax, roll back, or otherwise deregulate environmental rules and standards. So it would be almost impossible to miss that this blanket no action assurance would be more or readily understandable as of a piece with the previous three years of deregulatory action. But one of the features of the sequence of days and events leading up to March 26th was a letter that the American Petroleum Institute wrote and that became public at least shortly before March 26th. Which if I recall correctly enumerated all manner of regulatory relaxation, or as they would put it relief. Do you have any sense as to whether or not there was a pointed or a significant industry push behind this no action assurance directive? Or is it more likely the case that the agency, which has never stopped shopping for deregulatory opportunities, was just poised and ready to take in another such opportunity when the pandemic broke out.

Cynthia: Well, you're certainly right that the American Petroleum Institute, just a few days before the March 26th policy, sent a request for enforcement discretion to EPA. Including almost the entire list of statutes and regulations to which the oil and gas industry is subject. It was an amazingly, wildly, an unsupported overbroad request. Includes lots of specific things that they want relief from. When I saw

that request, I thought it was alarming that they thought that this kind of ridiculously overbroad request could receive a favorable audience at EPA. But little did I know that EPA would basically agree to it and give the same relief to all companies nationwide.

Cynthia: I would add that the EPA March 26th policy includes quite a few, a long list of specific examples of kinds of monitoring, and reporting, and training, and other things that EPA expects companies will be unable to do. And that tracks pretty closely to the specifics in API's requests.

Joe: Well, your profession of shock or expectation that the agency wouldn't respond means that you are still not as cynical as I am Cynthia for somebody who has spent her life in enforcement and played a pivotal role in the Volkswagen enforcement, just to cite one example. I'm surprised that you haven't caught up yet. I think of the API EPA no action assurance two-step. And I think to myself, this is the only form of over compliance that the administration believes in. Which is over complying with the requests of industry. In any event, is there anything else we should be talking about before we sign off?

Cynthia: Well one other thing to add, because it's the main thing EPA has been saying in response to the outpouring of criticism that this policy has created. What they're saying is, "We've not decided yet what enforcement cases we're going to take. We're going to decide later if the violations were justified by COVID-19 or not, and make our enforcement choices then." And the reason I raise that is to illustrate how completely EPA has missed the point. The harm from the March 26th policy comes from its overall message. Instead of the usual expectation that everyone's supposed to comply with the monitoring and reporting obligations designed to protect the public. The expectation is that they won't. It's that shift in policy today, not whether EPA takes enforcement cases months or years from now. It's the change in policy today that creates the risk of immediate harm to the public. It throws open the doors to widespread violations with the real possibility no one will ever know how bad they were.

Cynthia: Serious pollution could be happening today, and the companies violating their pollution limits. But the government won't know that if they're not monitoring. So the issue is not whether EPA will or won't take enforcement actions in the years in the future. The issue is, are the companies stopping compliance today? And what is the harm that people could be experiencing from that?

Joe: That's such an important point. Because no matter how rigorous you might think an enforcement regime is it's all post hoc, it's all after the damage. Indeed irreversible or irretrievable damage of excess pollution or discharge has occurred. And it sounds like what you're saying is that the real threat if you will, of the March 26th no action insurance directive is not that at some point later in the

future, EPA may have more difficulty enforcing violations. It's the fact that in real time, the public is being exposed to a heightened level of avoidable risk as a result of this action.

Cynthia: One of the reasons enforcement works, one of the reasons enforcement and tough enforcement is important is that it deters other violations. So because the companies don't know whether they will be the subject of strict enforcement, it inspires them to do a better job complying. What this March 26th policy does is it removes that. It removes the deterrent fear. The companies are no longer worried that EPA might enforce against them. And the untold damage that removing that deterrence creates is the biggest concern.

Joe: Well, that unfortunately is an excellent summary of everything you've been explaining in this interview. And unless there's something more grim or maybe hopeful to add, let's leave it there.

Cynthia: Okay. Thank you, Joe.

Joe: All right. Thank you, Cynthia. Frankly, thank you for your lifetime commitment to public service. And it's really I think a real privilege for the Environmental & Energy Law Program to have you as a part of our network and partnership. So thank you. Thanks for talking to us, and thank you for all the great work you're still doing.

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