



## Transcript of CleanLaw Episode 6: Joe Goffman with Cynthia Giles on EPA's oil and gas enforcement rollbacks, November 11, 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 Cynthia Giles, former Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance for the entire Obama presidency. As the head of enforcement she focused on tough civil and criminal enforcement for violations that threatened communities, and the environment, and also innovations to achieve greater compliance, and reduce pollution using advanced monitoring and information technologies.

**Robin Just:** Cynthia and Joe will be talking about the Trump EPA's enforcement policies including a recent initiative focusing on the oil and gas industry and the impact they have on air quality and public health. We hope you enjoy the podcast.

**Joe Goffman:** Good morning, Cynthia. Thank you very much for joining us. Let's focus, today, on EPA's enforcement and compliance policies and practices, in general, and then shift that focus to the oil and gas sector initiative that the agency launched several months ago.

**Cynthia Giles:** Well, thank you, Joe. I appreciate your inviting me to have this very important conversation. And, you mentioned the oil and gas New Owner Audit Program. And, I would say that one, in particular, is a great illustration of something that your program is drawing much needed attention to, how below the radar policy changes are pulling back important public health protections and undermining the rule of law. And so, I do think that one is a great illustration of something that is happening much more broadly across the agency. So, it is a useful one to focus on as an exemplar of many, many similar type things that are happening there.

**Cynthia Giles:** So, just a quick word about what's important to know about the oil and gas industry that helps inform this discussion about enforcement. One is that it's big. There's over a million active oil and gas wells in The United States and that is growing. This industry is so big you can see it from space. And, these wells, well over a million of them, are a large source of VOCs, which is pollution that contributes to ozone. So, ozone is a very well-known pollutant affecting public health in a very significant way. And, these wells are really close to where people live and ozone pollution is going up in many places with a lot of oil and gas



development. So, important to recognize it's really big and the pollution's going up.

Cynthia Giles: The other thing very relevant to know is that there are lots of violations and, unlawfully, are pollution from these oil and gas wells. Even in the policy that we're going to talk about here, the Trump EPA enforcement office admits that. Lots of violations. So, that's important context to understand how this policy, that they've issued, fits in and how sharp a turn this is away from the Obama EPA decision to make a national enforcement focus on oil and gas well air pollution.

Joe Goffman: Just to underline that we're not only talking about a large industry, but one that implicates very significant stakes for public health in terms of its air pollution footprint, if you will.

Cynthia Giles: Absolutely. And, it's getting worse.

Joe Goffman: Why don't we do this in two steps? Why don't we start with the baseline, which is what the level of compliance assurance and enforcement activity was during the Obama administration? And then, proceed to what happened after the Obama administration left office.

Cynthia Giles: Okay. Well, given the large number of sources, well over a million active wells, and the growing investment in the oil and gas industry and new wells, and the serious public health problem that you're referencing, this had been a major area of enforcement focus for the Obama EPA of going out into the field and figuring out where these very significant issues were occurring. And, taking large enforcement cases when we found very, very serious violations to send a very clear message to this industry that as domestic sources of energy are being developed we, certainly, expect that to be done responsibly and in compliance with the public health standards that are there to protect people.

Cynthia Giles: So, a number of large enforcement actions had been brought that were illustrating the problems that we were seeing across the industry, and this was a very deliberate and strategic approach on the part of the Obama EPA to make sure that the folks in this industry knew that we were expecting them to meet their obligations.

Joe Goffman: And, just to be clear, the EPA was not taking this initiative on just because it had an animus against the oil and gas industry. Rather, I assume we were taking the Willie Sutton approach in that we looked at the oil and gas industry, because that's where A, the large inventory of emissions was and is, and that's where there was evidence of significant violations of legal obligations to control and reduce those emissions.



Cynthia Giles: Absolutely. So, one of the things that EPA had looked at in figuring out where to devote its enforcement attention was where the pollution problem's significant. And, what we were seeing is, in these areas of significant growing oil and gas development, we are seeing increases in ozone levels, which is a dangerous pollutant from a public health perspective. And, in some places, those levels were going up quite significantly including in the wintertime, which is not normally when you see big increases in ozone pollution. So, it was the public health impact, and the existence of widespread violations that were contributing to that public health issue that caused us to focus on this industry.

Joe Goffman: When you did focus there you detected high enough levels of emissions to justify enforcement actions.

Cynthia Giles: That's right. So, one of the things that we observed in the field was a very widespread failure on the part of industry to design the pollution controls in a way that would allow to meet the standards. So, the pollution control equipment was underdesigned. So, making it nearly impossible for those facilities to meet the required standards. And, there were lots of times when we observed things like just open hatches that were causing the pollution to just vent out into the air.

Cynthia Giles: To give you an illustration of how big these violations were and how important they were for protecting public health the three biggest cases that EPA brought towards the end of the administration required, there are three different companies, required, collectively, that they had to spend over \$100 million to remedy the problems. And, there were over \$8 million in penalties. It's not those dollars, they're not the metric by which EPA judges whether it's doing a good job, but what those dollars tell you is there were very serious problems here and the companies had systemically failed to do the investment that was necessary to protect people and to comply with the law.

Joe Goffman: How did the companies respond? Did they resist? Did they defend themselves, put a premium on defending themselves at the expense of everything else, or was there a more public health-friendly outcome, ultimately?

Cynthia Giles: So, companies varied in their response, but I would say the response was fairly typical of what we often see for these very serious violations is that some companies recognize, "Okay, yes, we have a problem. We're violating the law, it's a serious issue. We see the public health concern." And, they come to the table and they work with EPA and the state, frequently, is also involved in these cases with EPA to work on what's an innovative way to solve this problem that's cost-effective from the industry perspective, does an adequate job of protecting the public, meeting the standards, and goes beyond that to make up for the fact that you've had years of these kinds of violations that were troubling from a public health point of view.



- Cynthia Giles: And, some companies stepped to the plate and they work with EPA to find solutions that will involve compliance, reduce the pollution, and will work as a long-term solution for the industry. So, we, certainly, did see some companies approaching it in that more collaborative way once they recognized, yes, that EPA had caught them violating and that they were going to be forced to do something about it if they didn't agree to do something.
- Joe Goffman: Is it fair to say that the effort that the EPA invested in these enforcement actions resulted in significant reductions in air pollution between the time that the initiative was launched and the end of the Obama administration?
- Cynthia Giles: Absolutely. So, not only from the actual companies that were defendants in enforcement actions where the pollution reductions were very significant, but also for the deterrent effect in the industry, in general, as a result of the enforcement cases. So, one of the things that EPA did, which EPA on the Obama team always tried hard to do was to think about how can we not only deal with these particular violators in an enforcement case, but send a message across the industry, so that people start doing a better job and that we get much more pollution reduction than we could get just doing enforcement cases one at a time.
- Cynthia Giles: So, EPA sent out what was called the Compliance Alert to the whole industry. Everybody who does these oil and gas wells then said, "Look, we've been out in the field. We've done inspections, we've talked to these companies. This is what we found. We found widespread violations, we found all this underdesigned pollution control equipment. You need to fix this. So, you better get out there and address these problems that exist at your wells before we come knocking on your door." And, that's how a few large and important enforcement cases can spread the impact and public health protection beyond just the individual cases themselves.
- Joe Goffman: So, enforcement is, it sounds like it's, that is to say, an enforcement action, or a select set of enforcement actions can prove to be a pretty significant leverage tool in changing behavior across a high-polluting industry. To what extent, as of 2016, or early 2017, was there still unfinished business in this sector?
- Cynthia Giles: Very much so. So, as I've said, it's a huge industry. So, there's well over a million active wells and there was a lot more that needed to be done. The violations are still very widespread, although I think a dent was made in that through the enforcement cases that occurred and a lot, lot more needed to be done. So, EPA was attempting to address that through some regulations as well as other agencies trying to address that through regulations about oil and gas activities on federal lands, and doing a better job about requiring monitoring and requiring better pollution control of these wells, because this was a known problem that



was contributing to increases in ozone pollution. And, it really needed national attention.

Joe Goffman: So, what happened next? And, by next I mean after the Obama administration left office.

Cynthia Giles: So, one thing that happened is there's been a big pull back on the rules that would've required the oil and gas companies to do a better job controlling and monitoring their pollution. But, totally apart from that, for all the existing rules that the companies were already obligated to be complying with what we've seen is a pullback from this being an area of national enforcement focus. The EPA enforcement office has already announced that. And then, we've seen this program that we're going to talk a little bit about here today, which they call the Oil and Gas New Owner Audit Program, which the stated purpose for the proposed program is saying to the companies that buy oil and gas wells, "Hey, you can volunteer to enter into an agreement with EPA in which you promise to take a look at compliance of air pollution standards and you fix the violations you find." So, that's sounds okay, right? That's sounds pretty good. But, actually, no.

Joe Goffman: It does sound okay. I can imagine that the argument on behalf of that approach would go something like this. "Well, the EPA brought a series of enforcement actions during the Obama administration. In response, a number of companies recognized that they had a problem and proceeded to address the problem. The agency put out compliance alerts industry wide. Now, everybody in the industry knows what each company and each operator has to do and, as the resolution of some of the enforcement cases demonstrated, the companies can be relied on to do what they need to do." I haven't heard that argument being made, but knowing some of the principles among current management at the agency I can hear them make that argument.

Cynthia Giles: Well, they make that argument and they make the argument that this policy encourages companies to take a look when they buy another company, or buy some wells, to take a look at the compliance picture and to fix the problems that they find. So, that sounds, superficially, that sounds like it's okay but, actually, the circumstances here, which we can talk about for a minute, then that effect, I think, is going to be less protection. So, why then?

Cynthia Giles: So, there's three really big problems with what they're proposing. So, here's the top line. It's part of a shift away from enforcement for oil and gas. And, for reasons that we have touched on, strong enforcement is an absolutely essential part of getting the pollution from these wells under control and this policy means less enforcement. And, the second is it redirects EPA's focus to the companies that raise their hand and away from where it should be, which is on the company that will never raise their hand and are likely to have the most pollution. And, the



third big problem with it is the approach that EPA has proposed puts way too much burden on EPA and not nearly enough on the oil and gas companies. So, the net effect of those three factors is, I think, a program that will result in less protection. And, I can explain a little bit more about each of those and why that's the case.

Joe Goffman: Sure, go ahead. I think it would be helpful.

Cynthia Giles: So, on the shift away from enforcement. So, we've seen, at the Trump EPA, a big decline in EPA enforcement overall. And, the New York Times and many other outlets have written in-depth about that. It's particularly a problem in the oil and gas industry and here's why. As I described, what EPA enforcement people found when they into the field is that the problems are rampant in the oil and gas world. The underdesigned equipment, the hatches left open, so the pollution just releases in air, lots of other violations. The challenge is it's hard to find those problems and the companies themselves were not monitoring, or tracking, most of the time. That's what some of these rules that have been pulled back we're looking to fix.

Cynthia Giles: This problem is many, many multiples harder, because there is more than a million wells. It is completely inconceivable to ensure compliance one well at a time. So, that's why EPA's strategy under the Obama administration depended heavily on deterrence. You can not be everywhere all the time with more than a million wells, so you've got to persuade the companies that it's in their interest to do the right thing for their neighbors, for their shareholders, and just comply. It's the same theory that the police use when they pull people over for speeding. Yes, okay, they stopped that one speeder but, more importantly, they remind everybody else, "Hey, slow down, or you could be next." And, that's an important function that these enforcement cases have. And, the Obama EPA, when we found a serious violator we insisted not only do they clean up their act for all the wells they have in the area, but on top of that that they make up for the illegal pollution, pay a big fine that reflects the money they saved by violating, which sends a clear message to other companies.

Cynthia Giles: If you've got a serious violation and we catch you you're going to end up spending a lot more to fix the problem than you would have if you just did it right the first time. That's the whole theory of general deterrence and the research shows that it works. And, this policy, the New Owner Audit Program, is a one-at-a-time strategy. You only get reductions from the companies you directly interact with. There's zero deterrence associated with it, which is a hopeless strategy for a sector with way over a million sources. Under no theory does two plus two equal a million no matter how you do the math.

Joe Goffman: So, in a way, deterrence is a force multiplier in terms of assuring compliance.



Cynthia Giles: Absolutely.

Joe Goffman: And, taking it away, basically, saying we're going to depend on, if you will, the good actors to act and we're going to focus all our resources and attention on them after they raise their hands leaving us with insufficient bandwidth to focus on others. It almost inverts the deterrence tool.

Cynthia Giles: Absolutely. And, it's like a teacher. So, should a teacher just pay attention to the kids raising their hands in the front row and ignore the ones hiding in the back, or should we be focusing on the folks who are not stepping forward to do the right thing? The EPA and the states have very, very limited resources and the more time EPA spends on the companies that demand attention the less time EPA has to go out and look for the companies that are breaking the rules. It, certainly, is right. Everyone is in agreement that it's a good thing if companies look into their own operations and take steps to fix the violations. EPA has always encouraged that. But, if any company can demand that EPA pay a lot of attention to them then the companies are driving EPA's priorities instead of public health.

Cynthia Giles: And, there's particular reasons in this industry why, and in this program, why this is a very serious problem and something to worry about. One is it applies to new owners and this is an industry where there's new owners all the time. Every well can have many owners over the course of its life. The wells are constantly changing hands. So, you have over a million wells and you've got a lot of new owners coming and going all the time. And, you couple that with the approach that EPA is proposing here is ridiculously time intensive for EPA. EPA chose to set this up so that the amount of effort required from EPA for each agreement is gigantic. Each one gets to be individually tailored, EPA has to review endless numbers of submissions and negotiate them, and everything is individually done. So, each one of these agreements is as much work as a big federal court enforcement action, just a ludicrous amount of work. So, it's all that effort without any of the deterrent effect that that level of effort would normally have.

Joe Goffman: It sounds like the agency is moving from a place of which it was focusing on an industry where there was a significant opportunity to improve public health by finding ways as efficiently and with as high leverage as possible to reduce pollution and turning it inside out by replacing the previous policy that is the Obama-era policy with a policy that is highly inefficient, is low-leverage, doesn't target the richest areas of opportunity to make progress and, essentially, it's almost as if, by design, the agency is draining its own enforcement resources, so that they operate at a much lower level of efficiency and as a much lower leverage tool.

Cynthia Giles: That is absolutely right. So, if you set out to tie EPA up in red tape this is the document you would write. And, if you multiply that by hundreds, or potentially



thousands of applications that can come in, you can see how EPA is easily overwhelmed and zero time left to do what it's supposed to do, which is to go find the companies that don't want to be found and insist that they comply and create incentives for all the others to comply too. And, I agree with you, it's the opposite of what you hope government will do. This policy would require governments to spend a lot more time for a worse result.

Joe Goffman: What you just said raises in my mind almost an editorial cartoon of the agency stepping forward with a roll of red tape offering it to a high-polluting industry and saying to the industry, "Please, take this red tape and tie our hands with it." The work we've been doing in the program looking at discreet changes in the way the agency is conducting enforcement and the way in which it's weakening the foundations of enforcement, which involve collecting information, say, through the regional and satellite offices, really sounds like it's of a piece with this policy change. And, it's tempting to say that this policy change not only is troubling on its own terms, but can almost be seen as emblematic of the broader approach to enforcement and compliance assurance. So, I'm wondering if this a good point to pivot and ask you if there are other highlights, if you will, of changes that the agency has made in terms of enforcement in the last 18 months, or so, that you see as particularly significant?

Cynthia Giles: Well, this policy, as you have mentioned, fits in and is completely of a piece with the general direction that the agency has been headed and the enforcement office, in particular, of pulling back on the protections and unilaterally withdrawing from the field where EPA can be making a big difference. So, another illustration of this that, again, has a little bit of a superficial, why it's not obvious on its face why it's a horrible thing, but when you dig into it and you understand how the world really works you see how negative the impact is going to be overall.

Cynthia Giles: Another illustration of that, that you made reference to, is a policy that the regions have to get approval in-advance from headquarters to send out requests for information to companies, which is a standard tool that the agency has used for decades and decades, and is in the statutes that authorize EPA's work that figure out who's complying and who isn't. It's a very basic tool that's an essential part of the arsenal of figuring out where the worst problems are and where EPA should be spending its time. Now that the regions have to get headquarters' sign-off there's a very clear message sent to the regions, "You should be doing fewer of these," because these kinds of institutional constraints communicate very clearly to the career folks that the message is we want you to do less of this. And, we have, certainly, seen in the enforcement results that are publicly available, we've, certainly, seen quite a stunning decline in the amount of enforcement work that agency is doing.



Joe Goffman: We, that is to say the Environmental & Energy Law Program, had flagged that several months ago as a change that was, potentially, very consequential in terms of, in effect, limiting the flow of information that the agency had, for years, counted on having access to by dint of its own ability to investigate. So, in a way, our concerns, or our fears, if you will, are being confirmed by your report that, in fact, based on your experience, there's a real significant practical impact.

Cynthia Giles: There definitely is. And, if I can give you another illustration of a facially neutral-type policy that has a dramatic effect on what the agency's able to do. So, another memo came out from the headquarters folks to the regions saying, essentially, we want the states to agree with not only bringing the cases that you bring, but the exact way in which you intend to resolve them. And, if any state doesn't agree this has to be appealed all the way up to the assistant administrator. And, effectively, what that memo is communicating is any state that doesn't want EPA in there taking a look at the oil and gas industry, just as an example, can create a lot of trouble for the region who might be thinking about pursuing an enforcement case, or might be saying, "Look, we've got to have a tough enforcement case if we want to make use of this deterrent message." So, the net effect of that is states that are not that interested in enforcements happening within their boundaries are emboldened to push back. And, it's obvious from looking at the numbers that that is what's happening.

Joe Goffman: So, essentially, what you're saying is, and this is conjecture on my part, but you may be in a position to either confirm it, or refute it, that if states are preoccupied, say, with the economic development of the oil and gas sector and less invested, say, in dealing with the pollution impact of the sector on their citizens they can, in effect, take the part of the company, or of the industry in engaging with the EPA rather than being partners as had been the case in the past with the EPA in pursuing an enforcement action. Is that a fair assessment, or is it an overstatement?

Cynthia Giles: I think it's fair. States have always varied in the degree to which they believe in the power of enforcement as a deterrent for improved behavior. And, one of the essential roles of EPA enforcement is part of the scheme of cooperative federalism that's been set up under the environmental laws, one EPA's essential functions was to do the very important cases that the states either can't, or won't do. Some of these cases require a good bit of resource and sophistication that not every state has available and sometimes, as you mentioned, the states don't want to go after noncompliance, even serious noncompliance that exists in some industries within their borders. And, EPA has had an essential function of creating a level playing field around the country of saying, "No, the citizens of every state are entitled to the public health protections of the laws under which we're all operating." And, one of the things that EPA does is to insist that that happens.



Cynthia Giles: And, yes, sometimes there's tension with the states. Many times the EPA and states are partners. Sometimes, there's tension, but EPA has an important role to play and it's important that EPA play it if we're going to see the kind of pollution reductions that our statutes laid out as a means of protecting people's health.

Joe Goffman: But, it sounds like the agency is significantly readjusting the balance of responsibility between itself and the states so that it's shuffling off what had been its mantle of responsibility in ensuring what you call the level playing field for citizens nationwide in terms of public health by rebalancing the power, or authority, or veto options, if you will, as between the EPA itself and states. Is that a fair characterization?

Cynthia Giles: I think it is. So, it's always the case that there's some tension between the federal and the state level governments about the best way to approach some of these problems. And, there's always been some tension there and that's a creative tension. That's the cooperative federalism structure that our forefathers created and that is enshrined in the environmental laws under which we operate. And, it has, for many years, served us well that states bring to the table local understanding and EPA brings to the table an insistence that the protections and the laws apply to everyone. And, we've made a lot of progress under that creative tension. But now, so many of the actions that are being taken are, essentially, abandoning the field from the federal level, which is not only is that going to lead to less protection for people, but it also makes the job of the states much harder, because a lot of these serious polluters dealt with the state, because they thought that was going to be easier for them than dealing with EPA. And, knowing that EPA was out there in the back and could step in if things didn't go well helped the state get the cooperation of the companies to meet their obligations under the law.

Cynthia Giles: If you pull back on that and you don't have that backdrop of the federal authority the companies are not going to be as eager to deal with the states as they used to be. So, the net effect of this, not only is it less protection for many communities around the country, but it's also a tougher job for the states that want to do that job on behalf of their citizens.

Joe Goffman: Cynthia, thank you. This has been a very useful and informative discussion, and I think a lot of people will get a lot out of it when they visit our site and listen to the podcast. But, where we've left it really doesn't present a very hopeful picture. Have you thought about any strategies, going forward, where we can try to get enforcement and compliance, particularly with the oil and gas sector, back on some kind of footing that approximates where we were during the Obama era?

Cynthia Giles: Well, I think that the current administration has no intention of going back in that direction but, having said that, one of the things I experienced when I was EPA



and when you read the papers you can see that the folks at EPA are experiencing this themselves, which is the public demand clean air and clean water and expects its government to deliver on that. And, some of the polls that you see taken, not so much for the midterms, but the polls, more generally, that have been taken over the years, protecting clean air and clean water is very, very high rated. It's bipartisan, huge amounts of support from the public that expects people to keep their drinking water clean, expects them to be able to go outside and play without a fear of public health challenges, or health issues created by that. And, when there's situations that occur that draw people's attention to the fact that the government is not producing for them they make their voices heard and, sometimes, very loudly.

Cynthia Giles: And, I think that, like every administration, this one is going to find that when you pull back and you create a problem where people feel that their health and the health of their kids is in jeopardy they speak up. And, I think it's that, the public speaking up and demanding that has more power than anything else to drive a policy in the right direction.

Joe Goffman: One more question and then we'll let you go. That very same public just sent to Washington, a Democratic majority in the House of Representatives, a lot of commenters expect that new majority to use its authority to do oversight. Do you see oversight of EPA's enforcement activity as an opportune area for focus?

Cynthia Giles: I, certainly, do, because it brings more light into things like the policies that we are talking about today that are not obvious on their face as to why they are undermining public health protection. It allows Congress to shine more light on that and help people understand the implications of it. I would also add, I just saw yesterday that the inspector general at EPA that they were going to do a review of what's happening in EPA's enforcement program, and what's going on there, and what's happening in the regions, and what's happening with the policies. So, the IG is also going to be taking a look at that and that's another pathway for bringing more light to the situation.

Joe Goffman: We'll end this on the note that the public's interest and, if you will, animation in this area has some connection to some tool, some recourse, some ability to hold the agency accountable for the dangerous change in direction that we've seen in the last two years.

Cynthia Giles: Absolutely.

Joe Goffman: Anyway. Well, thank you very much, Cynthia.

Cynthia Giles: Okay.



Joe Goffman: I think-

Cynthia Giles: Thanks, Joe. It was fun.

Joe Goffman: Yeah. And, I think you've really given us a lot of information that we can disseminate to the folks in the public and in the policy community who are following our investigation of what's going on in terms of how the agency is conducting its business.

Cynthia Giles: It's so great you're doing this. You're the only folks who are bearing down on this question. It's wonderful.

Joe Goffman: Well, we couldn't do it without you and people like you, Cynthia. So, thank you very much.

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