



Transcript of CleanLaw: Joe Goffman and Caitlin McCoy Talk about the Clean Power Plan and Affordable Clean Energy Rule, November 19, 2019

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Robin Just: Welcome to this episode of CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode, Caitlin McCoy and Joe Goffman talk about their white paper on the repeal of the Clean Power Plan and the Affordable Clean Energy rule. They discuss the litigation challenging the repeal and new rule and the potential impact of changes to New Source Review, which has been proposed but not yet finalized. We hope you enjoy this podcast.

Joe Goffman: We're here to talk today about a paper that Caitlin and I put together a month or so ago about the repeal of the Clean Power Plan and the Affordable Clean Energy Rule. A bit of background that goes all the way back to 2014 or 2015 when the Obama administration or the EPA under the Obama administration promulgated the Clean Power Plan. Clean Power Plan addressed CO2 emissions from coal and natural gas fired power plants, it operated by using EPA's authority under section 111(d). If it had been fully implemented, it was projected to achieve 32% reductions in CO2 emissions levels from 2005 levels by 2030.

Joe: The EPA's approach under the Clean Power Plan was to view the electricity sector as a network or a grid that operated in a way to bring into the scope of the rule a large number of emission reduction options. Not confined to actions that could only take place in an individual power plant. In February of 2016, the Supreme Court stayed the rule that it stayed the Clean Power Plan pending resolution of the litigation challenging the Clean Power Plan. In 2017, well before the litigation was resolved, the Trump administration asked the DC Circuit Court of Appeals that had heard oral argument on the Clean Power Plan to stay or put in abeyance its action.

Joe: The agency then proposed and then finalized a repeal of the Clean Power Plan and replacement called the Affordable Clean Energy Rule. The main difference between the Clean Power Plan and the Affordable Clean Energy Rule is twofold. First, the agency argued or claimed that its authority under section 111(d) was constrained or confined to looking only at those measures that could be applied at an individual power plant that is within the fence line and thus it rejected the previous interpretation that the agency could consider emissions reductions options that could be applied on a network or grid wide basis. That is to say



replacing higher levels of emissions generation with lower levels of emissions generation.

Joe: The other difference is that whereas the Clean Power Plan was projected to achieve a 32% reduction, the Affordable Clean Energy Rule is projected to achieve less than a 1% reduction in CO2 emissions.

Caitlin McCoy: And I suppose one other important difference is that the Affordable Clean Energy Rule targets only coal fired power plants and does not seek to address emissions from natural gas fired power plants.

Joe: That's correct and with that, let's talk about the analysis that you and I tried to put forward in our paper. I think most of the people listening to this podcast or readers of the paper might notice that before I was here at the Environmental and Energy Law Program, I worked in the Environmental Protection Agency. First under Lisa Jackson and then under Gina McCarthy, and a good deal of my time was spent working on the Clean Power Plan, which this final action repeals and replaces.

Joe: So that's why I'm starting off and giving myself license to share an anecdote. During Administrator Jackson's tenure and then during Administrator McCarthy's tenure you would be hard-pressed to find a press release or communications document that didn't include the term common sense. In fact, under both administrators we all were obsessed with conveying to the public and to stakeholders that the rule makings that we did were informed by common sense. That's why it was particularly striking to me when I read the agency's final repeal of the Clean Power Plan and final Affordable Clean Energy Rule, they seemed to land on a position that Congress intended the agency not to see what was in front of its eyes or another way of putting it, not to use plain old common sense in deciding how to put together carbon dioxide emissions standards for the power sector.

Joe: In fact, what was really striking about the repeal and the ACE Rule itself was the agency's clear determination not to engage with the factual record, not to see what was in front of its eyes, which is that there are a number of ways that the power sector can reduce CO2 emissions. And instead to see essentially an exercise in analyzing the grammar and syntax of the Clean Air Act in order to preclude or exclude consideration of what was in the record. And I guess, that was the jumping off point of our paper. That and your background, Caitlin as someone who's taught statutory interpretation, particularly the Chevron rule and your familiarity with a working paper by Professors Hemel and Nielson in which they coined the term and identified the concept of Chevron Step 1.5.



Joe: So really that was the genesis of the paper and that concept of Chevron Step 1.5 really was what we used to organize our analysis. So that's my confessional as to what I brought to our work doing this paper.

Caitlin: From the beginning when we saw the proposed rule, we had wondered how the agency might go about moving in a completely different direction and so of course, the agency in repealing the Clean Power Plan and replacing it needed to explain its departure from the positions that it had taken in the Clean Power Plan and advance a new reading of the Clean Air Act that could support its new shift. But I think perhaps what I hadn't anticipated when I saw the proposed rule and the final rule as well is just how far the agency went in not only seeking to relax the requirements for coal fired power plants, but to actually go about this larger project which is cutting off its own authority under section 111(d) of the Clean Air Act.

Caitlin: And these maneuvers that it's taken mostly in the final rule about how it interprets that language to limit the way that the agency can actually regulate these facilities. So this whole thing has been really quite a puzzle to look at how they've gone about this and that's why we decided to write this paper that we released about a month ago, I guess.

Joe: Let's start by actually recapping the paper and I'm going to suggest that I'll give a kind of overview and you can fill in a lot of the details, particularly since among other things, Caitlin, you brought as I said a particular expertise in statutory interpretation doctrines and introduced me to the work of Professors Hemel and Nielson on the Chevron Step 1.5 phenomenon which is specific to the DC Circuit Court of Appeals where these challenges are going to be heard. I think what we've been doing here at EELP is observing and documenting the different ways that the EPA has been working towards a larger deregulation project. Not just in terms of individual rules or rule rollbacks, but in its approach to cost benefit analysis in its approach to information gathering and in its multifaceted approach to science, which I think can fairly be described as trying to curtail and truncate and narrow the whole enterprise of science by way of limiting the reach of its regulatory authority.

Joe: And now we're looking at a rule making that really as you said a minute ago, not only changes a previously promulgated rule, but really changes the way the agency views the scope of its own regulatory authority. And as the paper hypothesized that was seemingly the goal of repealing the Clean Power Plan and putting out an Affordable Clean Energy Rule that was so modest that it really doesn't look like it's going to get any CO2 emissions reductions at all when it's all said and done. That may have explained the agency's motivation, but as the paper tried to explain, it doesn't really explain the agency's legal strategy because the agency could have made an argument that fell in two parts.



Joe: One is it could've argued that the statutory language was absolutely plain on its face, that there was no question as to what Congress intended, which was to set CO2 emissions standards solely by looking at actions or measures or technologies that could be applied within the fence line of coal fired power plants. Then it could have also argued that even if the interpretation it claimed was the sole interpretation turned out to be one of several possible interpretations it could've argued that its interpretation was at least reasonable. Doesn't necessarily have to be the most reasonable, but it was at least reasonable. And under fairly well settled case law had it made the second argument that the court, the DC Circuit would have deferred to the agency.

Joe: Even if the court disagreed with the first argument, the EPA would've been entitled to and the court would've granted it deference for its reasonableness argument. But the agency didn't do that. They simply argued that there was only one interpretation of the statute and left it at that. And I think you and I were not alone in finding that to be peculiar. What we argued in the paper was that the agency simply couldn't make a reasonableness argument because in order to do so it would've had to direct the court's attention to the record of comments, arguments, and analysis that a wide range of stakeholders submitted showing that the best way to reduce CO2 emissions at power plants was to look not just at what individual power plants could do, but to look at what the entire electricity system operating on a network grid could do.

Joe: And the agency in effect said, "We refuse to do that." And I think we concluded that the reason that the agency took that position and in effect refused to do that was that it couldn't, that in the face of the record that was actually before it, in the face of all this information showing that individual power plants don't operate within a fence line, but actually operate across a network, and in the face of evidence that other pollution control programs have operated by power plants shifting generation from higher emitters to lower emitters, the agency would have lost the argument that it's interpretation was reasonable.

Joe: And here's the irony, by not taking on the record, by not trying to explain that its approach is reasonable and instead saying that Congress meant it to take this approach, it's essentially ascribing to Congress the intent of having the agency not use common sense, not look at the record, and ultimately not prescribe standards that result in emissions reductions. The other wrinkle I think is the one you discovered, Caitlin, which is that the DC Circuit is particularly inhospitable when a federal agency comes in and makes only the argument that it's following a single mandated interpretation and doesn't also offer the court any kind of justification along the lines that its interpretation is also reasonable. And with that I'm going to turn it over to you as the Chevron expert to lay that out a little bit more.



Caitlin: That's right. In pursuing this strategy EPA is taking a high risk and from their perspective hopefully a high reward approach here and that's because these different ways of approaching the legal support and advancing the legal arguments behind its new rule will actually potentially dictate some of the outcome in how the court can or will approach upholding or vacating or striking down this rule.

Caitlin: And so all of this gets to what Joe was just sort of describing, more specifically what we're talking about is a case called Chevron versus Natural Resources Defense Council from 1984, which is a Supreme Court case, it's also a Clean Air Act case. It dealt with the bubble concept for those Clean Air Act works out there that might be listening and remembering that. But the case is famous for its doctrine of deference to agencies. Essentially the Court established this two step process by which when there was a gap of some kind of ambiguity inside of a statute where you had an agency take that ambiguous provision and interpret it in a reasonable manner in a document that has the force of law, most commonly a rule or regulation and the agency is doing this interpretation on a statute that it administers, so it has a certain amount of expertise and responsibility for this statute.

Caitlin: The Court said that if you meet these two steps first that you have this statute that is ambiguous and the conditions of the force of law and the statute being one that the agency administers are also met, then we can go forth to step two, which is, is the agency's interpretation then of this statute reasonable? And the court explained that agencies could be entitled to deference in this context because they were using their expertise to interpret the statute and that the court saw Congress in drafting statutes as leaving these little gaps and ambiguous bits here and there and understanding that the agencies that eventually administer these statutes would need to step in and make things work for them within their realm of regulations.

Caitlin: And so that's essentially the doctrine and what Professors Hemel and Nielson identified through a line of cases that followed a case called Prill in the DC Circuit is that the DC Circuit in engaging in this Chevron analysis has an intermediate step between step one and two and that's because the DC Circuit deals with so many challenges to agency action. And so they have identified this point at which okay, we say that this statute is ambiguous and then we go forward and ask for the court to uphold the agencies interpretation as reasonable, well, in the middle of that, the agency needs to explicitly at some point inside of the rule admit that they are working with an ambiguous provision.

Caitlin: That they are interpreting it and thus they're asking for the court's deference. And so this doctrine has been long standing and though there have been some



case where some judges have kind of cast some doubt on this over the years, the line of cases has held steady and we have a couple of recent decisions from the court where they have adhered to it and mentioned that they continue to uphold it. So that's why it's particularly interesting to look at the ACE Rule and actually see inside of the ACE Rule.

Caitlin: A quote from the agency where they say, We recognize, I'm paraphrasing here of course, that we could go ahead and try to make a Chevron Step Two argument, but we're not. We believe that we're not even really in Chevron territory here, we're dealing with an unambiguous statute. We have a statute that reads plain on its face that says that section 111(d) can not involve measures like generation shifting, that it is limited explicitly to measures that can be undertaken inside the walls of the facility aka inside the fence line. And so that's their approach and they explicitly say that's what we're doing here.

Caitlin: We are not going to be asking for Chevron deference, which is really interesting and like Joe just said, part of it is because they realize they can't defend a step two reasonableness argument because the record is not in their favor, but the other aspect of it is potentially that they're going for this high risk, high reward in hoping that they can get the DC Circuit and maybe and eventually the Supreme Court to agree with them that when you read the language of the Clean Air Act, section 111(d), only allows EPA to require facilities to make changes that are solely within the facility.

Caitlin: And they don't allow this more expansive holistic view of the electric system that Joe was just describing and that was taken in the Clean Power Plan. So that's where we're at.

Joe: So essentially, what as acolytes of Professors Hemel and Nielson, what we were observing is that the agency was making in effect an all or nothing bet, that it was betting that the court would agree that the language was unambiguous, period, full stop, end of story, followed by victory lap along the lines of binding not only this EPA, but any sort of successor administrator who might want to use this provision again to do something more expansive.

Joe: But the nothing aspect of this all or nothing bet is that if the DC Circuit disagrees with the proposition that this is unambiguous language that is before it in the section 111 of the Clean Air Act, the agency forfeited a fallback opportunity. It's simply forfeited the prospect of the Court looking at a reasonableness argument and saying well, we're actually going to defer to you as most courts do under Chevron Step Two and accept that your interpretation or accept that your explanation of why your interpretation is reasonable is one we should defer to. Except the agency didn't offer an explanation as to why its interpretation was



reasonable and unlike other circuit courts, the DC Circuit will not do the agency's homework for it.

Joe: So if the court disagrees with the one and only proposition that the agency has offered and if the court continues to follow the Prill line of cases, which is a long and time honored line at this point, then we would expect the court to send the rule back to the agency and have to do another rule making at least in terms of justifying its repeal of the Clean Power Plan. And then justifying why it's only looking inside the fence line for emission reduction measures. I think a lot of people would read the repeal of the Clean Power Plan and content themselves with the conclusion that you've already explained which is that it really fits the broader agenda of the agency's current leadership and indeed the Trump administration to establish legal precedent that's conclusively binding on successor EPAs.

Joe: But I guess you and I went a bit further and said the agency not only chose to forfeit the opportunity to engage with the record and explain why the interpretation was reasonable, but I think you and I are hypothesizing that it didn't do that because it couldn't and in trying and failing, it would only throw a spotlight on the fact that its preferred position put Congress in a ridiculous position. Put Congress in a position of having authored statutory authority that precludes the agency from looking at the full facts in the record.

Joe: Anyway, that's as far as you and I got as of a month or so ago. But now we have at least one petition for reconsideration that the agency's considering, and a whole host of parties having filed petitions for review in the DC Circuit. So we might as well take a look at where apart from our speculation, this action now is in terms of its legal journey.

Caitlin: Well, I'll just add before we jump in to all of the most recent developments on the litigation side that having the ACE Rule remanded to the agency is probably not the worse thing in terms of the agency's mind and their goals because ultimately the stakes are low. They have completed the repeal of the Clean Power Plan and so the question then remains is just getting their rule on the books in terms of keeping it alive and not having it vacated. And so again, this is a rule that will achieve .7% reduction in CO2 by 2030 under all of their sort of rosier number crunching.

Caitlin: So at the end of the day, delaying implementation of the rule because they have to reconfigure their explanation for it and send it back to the DC Circuit is probably not such a bad thing in their minds. So I guess I'll just add that also sadly the stakes are low here because ultimately the administration is aligned with a priority which is not reducing CO2 from power plants. And so holding off on this rule and any kind of requirements that could be made or heat rate



improvements at coal fired power plants is probably not the worst thing in their minds.

Joe: The real luxury that the EPA now has, at least the current leadership now has, is that the Clean Power Plan was stayed by the Supreme Court in February of 2016, so there's no particular clock other than possibly the reelection clock that they're racing against.

Caitlin: Right, and the litigation that remained in the DC Circuit with that Supreme Court stay was also dismissed as moot on September 17 of this year. So there's no longer an active case in the eyes of the Court because the Clean Power Plan was officially repealed and so because the repeal went into effect on September 6th, I believe it was-

Joe: That's right.

Caitlin: ... the court issued that dismissal a few days later. So anyway, on to the actual challenges to the repeal and the ACE Rule themselves. We had two public health organizations, The American Lung Association and American Public Health Association filed a petition challenging ACE pretty much immediately July 8th, the day that it was published in the federal register. And then August 13th, 22 states in seven cities. And August 14th, 10 environmental organizations all filed a petition.

Caitlin: Since then all of this has been consolidated into one big massive case at the DC Circuit. Interestingly enough, there was also a petition from three industry groups who were actually challenging EPA's authority altogether to regulate carbon dioxide emissions. So saying that even those minuscule reductions that the ACE Rule itself will achieve is an overstep of EPA's authority. And the EPA shouldn't even be regulating carbon dioxide at all. And interestingly a coalition of 30 states and cities led by New York intervened in that challenge on the side of the agency to support the agency's authority to regulate CO2.

Caitlin: But now all of these petitions have been wrapped up into one huge case and consolidated and the latest over there is that on September 20th, in this big massive case now, the environmental organizations made a request that the ACE Rule be held in abeyance until the agency completes changes that it originally proposed when it proposed the ACE Rule to the New Source Review Program, but changes that did not become finalized in the final rule that was released this summer. So the environmental organizations were later joined the coalition of states and cities also filed similar motion, but essentially what they're saying now is hey, you proposed this idea of making changes to the New Source Review Program, which I guess I should explain briefly what that is.



Caitlin: Which is essentially when a plant needs to update its emissions control technology if it undergoes a major modification or if you're building a new plant. So there are rules around what might trigger you to upgrade the technology at your facility. The ACE Rule when it was proposed relied somewhat heavily on these changes to the New Source Review Program because they were going to help make it possible to make these heat rate improvement measures without triggering a massive upgrade at these facilities of a lot of different components beyond just these measures in the ACE Rule.

Caitlin: So now that we saw those teased in the proposed rule, but they didn't come to be in the final rule, and the agency has said, oh well, we're still working on that proposal and it should be out sometime this winter. The petitioners are saying, well you can't do that. Essentially, what you've given us is an incomplete rule and so they are asking the court to essentially pause the litigation while EPA finalizes that New Source Review process.

Joe: Those petitioners I think are on to something. I'm not predicting what the court will do, but this is something that our podcast itself has gotten a bead on thanks to a guest we spoke to a few months ago, Kathy Fallon Lambert, she talked to us about analysis that she and a group of coauthors had done about this very issue. When ACE was proposed in the summer of 2018, the agency argued in effect that it wanted to promote the uptake of heat rate improvements in order to reduce the carbon intensity of coal fired power plants.

Joe: And it wanted to encourage that uptake by making sure that in improving operating efficiency those same power plants wouldn't also trigger the need to make reductions in SO₂ and NO_x as they might well be required to do under the New Source Review Program. As a result, our colleague and podcast guest, Kathy Fallon Lambert explained the level of uptake of these efficiency improvements would be higher and there would be potentially significant increases in the SO_x and NO_x emissions. Along comes the final ACE Rule and all it contains is a promise to do the New Source Review change later.

Joe: The final analysis of ACE showed a smaller uptake of the heat rate improvements and arguably a smaller impact in terms of SO_x and NO_x emissions increases. What these petitioners are calling attention to is the fact that if the agency fulfills its current promise to finalize the change in NSR, then we'll be back in the world that we were in when ACE was proposed, but which the agency has now not copping to by having separated the finalization of ACE and the finalization of NSR.

Joe: And from the point-of-view at least of transparency to the public and providing a complete understanding of what the actual policy here is, what these petitioners have done is call attention to a very important development. I think



we can expect that the agency will ignore any petition for reconsideration that's submitted to the agency. But I think it'll be a very interesting question for the Court to contemplate as to whether or not to have the ACE litigation go forward knowing that the agency's position is that it's also going to do these NSR reforms that will have easily predictable feedback into how ACE is implemented.

Caitlin: Right, and I think if I'm remembering correctly in the final regulatory impact analysis for ACE, they didn't even analyze two of the four candidate technologies that they were proposing as part of ACE because they said that those two wouldn't be used without the NSR reform. And so since they had not finalized the New Source Review reform piece of the proposed package, that they didn't even really need to analyze those two pieces, which I think gets to what you were just saying about... I don't want to say hiding some of the impacts, but let's just say making the numbers look better in that final regulatory impact analysis than they otherwise would.

Joe: And that was Kathy's presentation really, what she and her coauthors saw in the final ACE analysis was something of a struggle to demonstrate that ACE produced net benefits and that positing that there be a smaller uptake of heat rate improvement changes because current NSR was in effect turned out to be really convenient to the ultimate conclusion that the agency was trying to put across that ACE produced a net benefit when looking at overall emissions reductions across several pollutants.

Joe: But really as we talk about it here and as we look at the motion that was filed, the agency's talking out of both sides of its mouth. It's basically saying look here at ACE under current law and ignore the fact that we have stated as part of the final ACE preamble our intention to make another change that by our own analysis of a year ago and indeed by our own analysis now, will directly alter how this program is actually implemented or how it's actually complied with and directly change the level of SOx and NOx emissions that result from the implementation of the CO2 standards.

Joe: And again, I don't think you and I are in a position to guess what the court will do, but I think these petitioners have done the public a great service by bringing this to the surface.

Caitlin: And so briefing was concluded on these motions by both the petitioners, the parties that filed these motions and by EPA on October 11th. So just about a month ago, so the court has these things and is considering them and whether or not they will allow this case to move forward the way that it is now or whether they'll wait for this New Source Review reform to be finalized. And I should also mention that right away at the beginning of September, the agency had filed a motion to expedite the case before the DC Circuit which is to say that



they wanted to have the case move as quickly as possible so that they could try to get resolution of the case and seek to implement ACE quickly.

Caitlin: So these two things are obviously intention. We have the environmental organizations and the coalition of states and cities who are requesting that the litigation be paused, be held in abeyance and then we also have the agency asking that the litigation be sped up. So the court is weighing all of these requests and I think we should see a decision sometime soon.

Joe: A decision on this motion, correct?

Caitlin: Exactly.

Joe: In terms of the courts schedule. Look, I think it's perfectly within bounds to stipulate that the agency is keen to get a resolution particularly if it wins on the proposition that the agency's authority is limited, it's keen to get that resolution before the election in case a new administration comes in in 2021. And it's equally within bounds to speculate or stipulate that the opponents would like to see the resolution deferred until after the election, but what's really interesting about this is that it seems that these movants that the motion to hold the case in advance until the world sees what the agency's going to do with New Source Review and sees a, let's say a more accurate or I hate to put it like this, honest analysis of what the impact is, that that's really the first time it's appropriate for the Court to do this.

Joe: And I guess this does beg the question that I don't know we have enough to really answer, which is what's the petition that's been filed with the agency to reconsider and to in effect re-propose ACE with NSR having been finalized, what kind of response the agency's going to give and whether that ultimate response will open up another avenue of litigation? But I think it's fair to say that the agency is trying to thread more than one needle here in its almost obsessive focus with getting the proposition established that the Clean Air Act gives the agency only very limited authority to address CO2 at least from power plants.

Caitlin: And so if you as the listeners want to read our full paper, I suppose I should plug the name of it here before we wrap up, which is EPA's House of Cards, The Affordable Clean Energy Rule. And as we're talking it also occurs to me that at the time the ACE Rule was proposed back when it had the NSR component, our colleague here, Hana Vizcarra, wrote a memo on exactly the details of the proposed changes to New Source Review. And so perhaps we should put that in the show notes for our podcast as well as our link to this paper so that all of you can sort of see what was proposed back in 2018 and wrap your minds around having a sense of what the final changes might look like later this winter.



Joe: Yeah, I think that makes sense and we might as well add to the show notes a link to our interview with Kathy Fallon Lambert.

Caitlin: Indeed.

Joe: Who anticipated this part of the discussion with the working papers she and her colleagues did. While we're composing our show notes on tape, EELP also published a multi-coauthor paper on all of the changes including the one we just talked about to the New Source Review and permitting programs that the agency has been making or trying to make over the last several years. I think we've basically brought this entire discussion up-to-date and the next thing we're waiting for is how the Court responds to these motions and what the agency signals if anything about its response to the petition for reconsideration.

Caitlin: Exactly, well, I know I'll be watching. I've got my updates to the docket synced to my email, so the second that something is filed, I will get an email and you can I suppose follow along on Twitter. We'll be, I'm sure tweeting about anything that happens that's significant over the course of the litigation.

Joe: And we will certainly add items to our rule rollback tracker as these items develop.

Caitlin: Indeed, yeah, we're tracking all the litigation on our regulatory rollback tracker.

Joe: Thank you, Caitlin, for this conversation. I should say not only was it a pleasure as always to talk to you with a microphone in front of us or not, but it was also for me a really enjoyable to coauthor a paper with you.

Caitlin: Thank you, Joe. I'm happy to have this paper out there now for everyone to read and I hope that people find it interesting and helpful for their own framing and understanding of these latest maneuvers here.

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