



E&E Legal Letter

September 2013

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Introducing The Energy and Environment Legal Institute (E&E Legal)

In September 2013, the Board of Directors voted to change the name of the American Tradition Institute (ATI) to the **Energy and Environment Legal Institute (E&E Legal)**, effectively immediately.

While ATI, a 501 (c) (3) organization founded in 2009, enjoyed tremendous success for a small organization. The group, however, needed to make significant changes to its brand, narrow its focus, and institute other changes that will enable it to reach the next level.

ATI is dedicated to free market environmentalism. To achieve its objectives, the group employed a three-pronged strategy to advance responsible, economically sustainable environmental policy: research, investigative journalism,

and strategic litigation through its Environmental Law Center.

An organization's name should reflect the group's mission and focus. It became clear that the name "American Tradition Institute" did not connote what it actually does in practice.

In addition, experience showed that the group's most effective weapon - and most attractive to the press, donors, and general public - is its strategic litigation. Environmental zealots like the Natural Resources Defense Council have been highly successful for years in using the court system to enact policy, affect change, and generate significant exposure for their cause. The organization has discovered the same thing despite being
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E&E Legal Board Member Greg Walcher Releases A New Book

In July, Greg Walcher, a nationally recognized and respected leader in natural resources policy, released: *Smoking Them Out: The Theft of the Environment and How to Take it Back*.

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FOIA and the Marketplace of Ideas

Freedom of Information requests can collide with the creative academic process. E&E Legal offers a way to meet the requirements of each.

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overmatched in terms of resources in many of its legal efforts.

Since 2009, the group emerged as the national leader in strategic free market environmental litigation. Its published treatises on and filed landmark cases under the 10th Amendment, protecting the prerogatives of state and local government. Its established and prosecuted precedential dormant commerce clause litigation attacking state climate change legislation that mandates high-cost, low value renewable energy in place of low-cost, high value natural gas and coal-based energy.

The organization holds governments accountable when they violate their own rules.

Central to this strategy is a petition-litigation practice that requires courts to reevaluate prior decisions, hold rogue agencies and government employees accountable, and puts false science on trial.

In addition, it has established a significant “paper case” practice through its Freedom of Information Act (FOIA) request program. Documents produced under FOIA are instrumental in exposing to the public errors, omissions, unethical behavior, intimidation, and outright fraud on the part of government agencies and their employees.

In light of these various successes, E&E Legal is will narrow its focus to more exclusively strategic litigation. It will still rely on its stable of professional and well-

regarded senior fellows to conduct policy research, and generate reports. However, their role will now focus on bolstering litigation efforts (e.g., expert witness testimony, policy papers supporting a particular case that can be turned into articles, and other public relations tools, etc.).

Dr. David Schnare, General Counsel, who has 33 years of Environmental Protection Agency experience, and Senior Fellow Chris Horner, a national leader in transparency cases, will lead E&E Legal’s strategic litigation efforts. Tom Tanton, with 40 years of energy technology and legislative experience, will serve as Director of Science & Technology, and Washington communications veteran, Craig Richardson, will serve as Executive Director.

Greg Walcher Releases Book



Greg Walcher has spent a lifetime working to conserve the environment while providing the resources needed to sustain a prosperous economy. His new book, *Smoking Them Out: The Theft of the Environment and How to Take it Back*, is an Olympic-level reality check to out-of-control policies that are destroying the economy,

costing jobs, and doing little to help the environment.

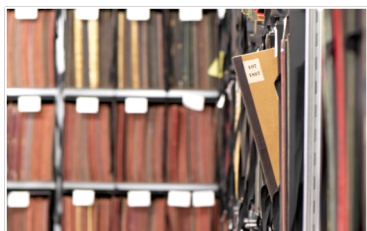
“The U.S. is becoming the first country in the history of the world to adopt policies designed to ensure its own decline,” writes Walcher. “Every day we see the growing use of environmental laws not for the environment but against people. It is palpable across a wide array of issues – endangered species, public land management, clean air, wetlands, energy production, and the regulation of water.”

Smoking Them Out is not just another doom and gloom look at overregulation in America’s environmental policies. Walcher also provides hard-hitting

strategies and practical approaches for taking action before it’s too late. He explains how leaders can recapture the high ground from the government – and its allies: the gigantic environmental “industry” whose reliance on legislation and litigation has inflicted unintended consequences on both the economy and the environment. A new “us-against-them” mentality has replaced America’s near universal support for environmental protection with contention, antagonism, confrontation, and litigation.

Based on 30 years of work in Colorado and Washington, *(continued on page 4)*

FOIA and the Market Place of Ideas



by Dr. David Schnare, General Counsel

When citizens seek public records of state university professors, Freedom of Information rights can collide with the creative academic process. A Justice of the Virginia Supreme Court posed the question as to how to ensure the former while protecting the latter. This is an issue of first impression across this nation and it deserves a utilitarian answer.

We can begin with first principles. In *Abrams v. United States*, 250 U.S. 616, 630 (1919), Justice Holmes explained: “the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” He speaks of the marketplace of ideas and free trade in ideas is no less important than free trade in the marketplace of commerce. But, ideas do not spring forth whole and complete and the process of shaping them into cogent reason demands their protection until they are mature and offered in the marketplace.

The Federal Freedom of Information Act does not protect nascent academic ideas. (See, *Washington Research Project, Inc. v. Department of Health, Education & Welfare*, 504 F.2d 238, 244-245

(D.C. Cir. 1974) (requiring release of proposed research designs because “it defies common sense to pretend that the scientist is engaged in trade or commerce.”). In order to protect an academic’s legitimate interest in professional recognition and reward, we must look to state statutes and we believe courts should interpret them in a manner that recognizes the citizens’ right to know how state university employees do their jobs while providing those academics the freedom to pursue research without threat of others stealing the grist of their research.

The Virginia FOIA attempts to protect these interests by allowing a state university to exempt public records that are “of a proprietary nature.” The act, however, offers no definition of this term. The Arizona act provides no specific protection for academia at all. E&E Legal will argue in both states that the academic endeavor should be protected from citizens’ requests until the research is complete; as those nascent ideas are the “competitive advantage” academics need to compete with other academic institutions. This is the same level of protection offered in the commercial marketplace. We will also argue, however, that faculty exhaust this competitive advantage when they publish their research. At that time, ideas and all that brought them to maturity must be open to competition in the marketplace of ideas and inspection of that work by the citizens who paid for it.

Legal Roundup



Colorado Renewable Energy Standard Mandate Suit

On April 4, 2011, E&E Legal, under the name ATI, and one other plaintiff sued the Colorado and several officials over the constitutionality of the state’s Renewable Energy Standard (RES) mandate. The RES requires the state’s major utilities obtain 30 percent of their power generation from “renewable” sources by the year 2020.

ATI has filed a motion for summary judgment based that may resolve the entire case, arguing the statute creates economic preferences for its own businesses and that Colorado has imposed its regulations on other states, both of which are unconstitutional acts which the court must strike. One immediate outcome of ATI’s Colorado suit is that the Colorado legislature took up a bill that seeks – unsuccessfully – to alter their original RES to address some of the constitutional concerns raised by the suit, a clear admission by the state that their RES is unconstitutional.

There are 30 states, including Colorado, with similar RES laws. If E&E Legal prevails, and
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Legal Roundup (cont.)

Colorado's mandates are found unconstitutional, it will have tremendous repercussions not only for that state but the other 29 with similar standards. This will require these states to reopen their RES policies, and provide an opportunity to rewrite the law in a way that makes sound environmental, economic, and energy sense.

Active Year for FOIAs

One of the hallmarks of E&E Legal is the filing of Freedom of Information requests; know as FOIAs or paper cases. Led by E&E Legal Senior Fellow, Chris Horner, the FOIA efforts have had tremendous impact.

E&E Legal FOIA requests, filed under ATI, resulted in significant

press, including the *Wall Street Journal*, *Washington Examiner*, *Daily Caller*, and Fox News.

Information obtained through Horner's FOIAs have had a significant bearing on the proposed nomination of Ron Binz as the next FERC Chair, a nomination that is in serious doubt at the time of this publication. A FOIA request submitted to the University of Arizona continues to bring much needed light to the "Hockey Stick" global warming research scandal, continuing to call into question much of the "science" used to promote the radical agenda of the Left.

Several FOIA requests were submitted to the EPA that discloses the continued effort by the Administration to wage war

on coal. Also apparent in the FOIA'd documents is that the EPA, and other agencies', continual "cozy" relationship with the Environmental Left, and their crusade against anyone who disagrees with them, particularly free-market groups like E&E Legal.

Chris Horner, who filed the original FOIA exposing former EPA Administrator Lisa Jackson's alias identity, Richard Windsor, continues to unveil a culture of corruption at the agency through additional document requests. His landmark FOIA requests seeking text messages of and other electronic correspondence of current EPA Administrator Gina McCarthy, and others, has had significant impact on how the agency conducts business.

Walcher Book (cont.)

Walcher shows how states, local governments, businesses, and private individuals can take control of conservation issues, improve the environment without the help of federal agencies or environmentalists, and smoke out those with another agenda.

"[S]ignificant shifts in public opinion from previous years...illustrate that the time is right for a new approach to environmental issues in general," writes Walcher. "But no approach can win the hearts and minds of the American public unless it is perceived to be pro-environment."

Walcher was raised around the peach orchards of Western Colorado and is a nationally recognized and respected leader in natural resources policy. He is currently president of the Natural Resources Group, a consulting firm specializing in energy, water, public lands, forestry, and wildlife. He served in the Governor's Cabinet as head of the Colorado Department of Natural Resources, and as president of the national organization of natural resources cabinet secretaries. Previously he spent a decade working in the U.S. Senate, and another ten years as President of Club 20, an association of business and local government leaders in Western Colorado.

Walcher is also a Board member and senior fellow with E&E Law, which published *Smoking Them Out* (under its old name, ATI). For more information about *Smoking Them Out: The Theft of the Environment and How to Take it Back*, please visit: <http://www.smokingthemout.com>

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