



Winter 2014

IN THIS ISSUE

## EPA's NSPS is Unconstitutional: Regulatory Comment

by Dr. David Schnare, General Counsel

The Energy & Environment Legal Institute (E&E Legal), on behalf of its members, comments that EPA's proposed rule to control greenhouse gases under the Clean Air Act's New Source Performance Standards is unconstitutional as a substantive due process violation of the Fifth Amendment because it constitutes a naked transfer of wealth from one sector of the electric generation industry to other electric generation entities of that industry. Further, the proposed rule is unconstitutional as a due process violation of the Fifth Amendment, in the form of a violation of equal protection, because the rule is intended to increase the cost of electricity to those least able to pay that cost, because EPA knows of this inequality, because EPA knows the targets of that inequality are protected minorities, and because the value of carbon to the society is greater than the cost to the society; and thus, EPA acts with the intent to injure protected minorities.

The proposed rule constitutes both a facial violation and an as-applied vio-

lation of the due process clause of the Fifth Amendment. Based on EPA's own description of its rule, there are no circumstances where the rule is valid, and thus is a facial violation of due process. Also, the rule deprives specific individuals of their constitutional rights. This rule doesn't withstand a substantive due process challenge because there is no legitimate state interest that the court could rationally conclude is served by the rule. EPA can't defend against a substantive due process challenge because it has no plausible governmental interest sufficient to pass constitutional muster. Through this comment we warn EPA that a rational basis review isn't toothless and the Agency's failure to proffer reasons for its regulation that are not rational condemns the proposed rule to its unconstitutional status.

The sole rationale for EPA's rule is the intent to protect the public from the effects of catastrophic climate change which EPA asserts will arise from increases of carbon dioxide. EPA offers no more than its reliance on the work of others, committing *(continued on page 5)*



### Texas A&M and the Texas Public Information Act

In recent years there's been resistance to the idea that taxpayer paid programs should be open to inspection. This resistance occurs in state universities, including Texas A&M, where professors have sought to avoid disclosing public records in their possession.

Page 2



### Obama's EPA: Bankrupting Coal for Fun and Profit

While ending coal is the stated goal of The Sierra Club and their "Beyond Coal" campaign, it is shocking that President Obama's Administration have join forces and seek to bankrupt an industry that supplies about 40% of America's energy.

Page 3

### Legal Roundup

Page 4

## Texas A&M and the Texas Public Information Act

by Chaim Mandelbaum, FME Law Counsel



In 1966, the federal government passed the Freedom of Information Act (FOIA), in order to give people greater insight into the operations of the government, and to allow them oversight on how the government spends their money. States soon followed suit and passed their own versions. Texas passed the Public Information Act, under which state agencies put records management systems into place and preserved public records so they could be provided upon request.

In recent years there has been resistance to the idea that programs paid for by taxpayer dollars should be open to inspection. This resistance has occurred in state universities, where professors have sought to avoid disclosing public records in their possession. Organizations made up of university professors, such as the Climate Scientist Defense Fund, have been created and have held conferences designed to discuss how best to defeat requests for information. (See "[Defense Fund Helps Scientists Targeted by Lawsuits](#)")

There are exemptions under all the various public disclosure laws ensuring that information not related to taxpayer funded work is released. Unfortunately these exemptions are not considered to be enough by those who oppose making information available to the public. A recent case involves a professor at Texas A&M

University, Andrew Dessler. Texas A&M is a publicly funded university covered by Texas's Public Information Act, and it has a detailed records management system in place. Professor Dessler, speaking at a workshop, explained that after dealing with a public records request, he decided to destroy all his emails so they would no longer be available for public scrutiny. He explained that "he deletes most of his emails after reading them" so they cannot be re-requested. (See "[Climate scientists, facing skeptics' demands for personal emails, learn how to cope](#)")

When the staff of the Free Market Environmental Law Clinic, and their client, The Energy and Environment Legal Institute, saw this statement we became concerned. Texas A&M University has in place a records management system designed to ensure that emails which are public records are preserved. Under the records management system many emails can be deleted because they are considered "transitory emails." However, emails which document university business have to be preserved for two years under the records retention schedule. Thus Professor Dessler isn't allowed to simply delete emails if they "pertain to the formulation, planning, implementation, interpretation, modification, or redefinition of the programs, services, or projects" which the university undertakes and which its employees', like Professor Dessler, carry out.

Nevertheless, Professor Dessler's statements were not taken at face value. Instead two public records requests were submitted to Texas A&M University. One asked for all the emails sent to or from Professor Dessler which were properly archived as public records. The second asked for any requests made by Professor Dessler to the University's Records Retention Office for permis-

sion to delete records. Records, even those that document the activities of the university, can be deleted if they are unnecessary, as long as the Records Retention Office gives approval. However it was discovered that there were no preserved records. Texas A&M responded that "The College of Geosciences conducted a search and found no information that is responsive to your request." Further, the university informed us that no requests were made for permission to delete public records.

The lack of any preserved emails is alarming. While many emails can be deleted, it is expected that at least some would deal with the projects and activities the Professor engages on behalf of the university and, ultimately, the taxpayers of Texas. For there to be none indicates that public records which should have been preserved were intentionally being destroyed. Such destruction not only goes against the notion of public disclosure on which the Texas Information Act was based, it is also a criminal act. Texas Government Code § 552.351 makes it a crime if a person "willfully destroys, mutilates, removes without permission as provided by this chapter, or alters public information."

The staff of the Free Market Environment Legal Clinic on behalf of The Energy and Environment Legal Institute plans to bring these Texas Information Act violations to the attention of those able to prevent any future destruction of Texas's public records.

### E&E Legal's New Logo!

E&E Legal commissioned several designers to submit logo options for the name change. Below is the logo selected.



## Bankrupting Coal for Fun and Profit – The Obama EPA

by Clifford Smith, FME Law Counsel



(photo courtesy of humanevents.com)

In 2008, Candidate Obama said that his energy policy would allow someone to make a new coal plant, but “If someone wants to build a new coal-fired power plant they can, but it will bankrupt them because they will be charged a huge sum for all the greenhouse gas that’s being emitted.”

While ending coal is the stated goal of The Sierra Club and their “Beyond Coal” campaign, this was a startling statement for a major national political figure to make. Proposing totally “bankrupting” an industry that is in abundant supply and provides about 40% of America’s energy seemed to be extreme. So of course, Candidate Obama backtracked almost immediately, and the Obama Administration’s stated stance on coal has been that they want to make it cleaner of course, but not “bankrupt” the industry. The “War on Coal” is a myth, they claim.

However, recent emails uncovered by FOIA requests with the help of the efforts of the Free Market Environmental Law Clinic on behalf of their client, The Energy and Environmental Law Institute show that, in spite of supposedly softening their position, ever since the failure of the so-called “Cap and Trade” bill, the EPA worked explicitly to “Bankrupt” the coal industry, all while denying that is what they are doing.

The Obama Administration’s claim to have switched stances has always strained credulity. Leadership at the

EPA is almost exclusively made up of former employees of environmental pressure groups and some career bureaucrats. There isn’t a single business leader, union leader, or even former elected official, in any significant position of leadership at EPA. The emails show what could be suspected: people who spend years or decades trying to do something as activists don’t suddenly change their mind when they get a high-level political appointment.

The most “entertaining” email of the batch is one from Sierra Club “Beyond Coal” leader John Coequyt, to the Associate EPA Administrator Michael Goo and Senior EPA Advisor Alex Barron. The email is only one sentence long, along with a forwarded article entitled “Coal to Remain Viable, Says EPA’s McCarthy at COAL-GEN Keynote.”

“Pants on Fire,” says Coequyt.

In other words, we know she’s lying for us, keep up the good work. It seems that Mr. Coequyt shares the opinion of House Energy and Commerce Committee Chair Fred Upton, who had recently scolded head EPA officials in his committee, saying “The EPA is holding the coal industry to impossible standards. But Mr. Coequyt seems to think the fact that McCarthy is lying to industry and the public about it is funny. It might be worth noting, at this point, that the regulations must be technologically and economically viable under the law. Oops.

How did Mr. Coequyt know that senior EPA officials were “in” on McCarthy’s lie? Easy, he’d been working with them for years to end the coal industry. He wasn’t shy about it, according to the emails. In one particular email, entitled “Zombies,” Coequyt frets that it might be possible to have a new coal plant

under proposed regulations, and wants to make sure that isn’t so. “Attached is a list of plants that the companies said were shelved because of uncertainty around GHG regulations. If a standard is set that these plants could meet, there is not a small chance that they company could decide to revive the proposal.” Instead of EPA officials telling Coequyt that, of course, some “clean” plants would be allowed, and the rule wasn’t being written to end coal, Coequyt’s email is forwarded around to various EPA officials in an effort to ensure his fears don’t come true and the plants remain closed. Coequyt later sends around a “score sheet” to senior EPA officials in which he tracks how many coal power plants have been shuttered, and encourages the EPA to send it around “for internal use only” you understand. Wouldn’t want it to get out in public what we’re really doing. The EPA has gone at lengths to hide this story, and it took the threat of being dragged into court on violations of the Freedom of Information Act for them to start coughing up documents related to their relationship with the Sierra Club. But it seems even then, the EPA is still hiding things. Another odd email exchange is a forward of a news article entitled “Will EPA’s Greenhouse Gas Regs Wipe Out Coal?” between Barron and Goo. Implausibly, Barron’s final response to the question is redacted in total. It’s too cute by half.

I could name numerous other examples of egregious behavior and dishonest deeds. Some of the best include the long chain of emails between various EPA officials to discuss where to get friendly audiences for public comments, some conducted, illegally, on private email. Others discuss “Sue and Settle” collusions between The Sierra Club and the EPA in which they hold one position publicly, but then collude with The Sierra Club when sued to get a desired

(continued on page 4)

## Bankrupting Coal (Cont.)

result in the “settlement,” so they can plausibly say “We had to comply with the law,” as if they were innocent bystanders. But the bottom line is pretty simple; the “War on Coal” isn’t a figment of anyone’s imagination. It’s a daily reality at the EPA. Candidate Obama’s is the “real” stance of the Obama Administration, not their more tame statements they’ve made since.

The consequences of a “War on Coal” are multifold. If successful, the price of energy would “necessarily skyrocket” as Candidate Obama once said, which would also raise the price

of virtually everything else indirectly, since virtually everything relies on energy in some form or another. The cost to the gross domestic product is more than \$2 trillion dollars over a 10 year period, according to a study by The Heritage Foundation. It would also make certain people, namely those in the natural gas and wind/solar industries, which are comparatively small parts of the market, extremely wealthy. Not surprisingly, they’ve been very friendly to Obama with their campaign contributions and votes.

But ending coal as an industry is not some mundane discussion of num-

bers, the gross domestic product, or industry battles, but something that affects the lives of real people. As The National Rural Electric Cooperative Association pointed out in their testimony to the EPA, opposing its latest attempt to shut down all coal, the peaks and valleys in the price of natural gas would make for a horribly unstable life for rural Americans and virtually eliminate many of their access to affordable energy. We cannot expect to artificially end a source of 40% of our electricity and not expect it to have massive human costs. The casualty of the war on coal, ultimately, won’t be coal, but people, their jobs, and their ways of life.

## Legal Roundup



### UVA/Mann Supreme Court Case

On January 9, 2014, E&E Legal General Counsel David Schnare appeared before the Virginia Supreme Court to present oral arguments in our suit against the University of Virginia and former Professor Michael Mann regarding their refusal to turnover FOIA’d e-mails related to Mann’s “hockey stick” research. We are awaiting the decisions of the Commonwealth’s highest court, and will post is as soon as it is available. Based on the comments and questions raised by the Court, it is likely the case will be sent back to the trial court to address whether the freedom of information act restricts speech protected by the constitution - in simpler terms, whether the constitution’s right to free speech in a public forum also creates a right to secrecy (as opposed to silence) in a public forum.

### EPA Suit for Failure to Release FOIA’d Documents

E&E Legal brought suit against the EPA about a year ago for their unwillingness to turn over FOIA’d documents. They have agreed to release certain documents and have begun to do so. In January, we released publicly a number e-mails we received as part of our FOIA between EPA officials, the Sierra Club, and other environmental leftist groups showing collusion between the agency and the groups in an attempt to kill the Keystone XL Pipeline. We received significant press coverage with the document release, and Congress is keeping a close eye on what appears to be an ongoing pattern of collusion between the EPA and groups like the Sierra Club.

Currently, we are negotiating with EPA over FOIA fee waivers and they have offered to settle two of the cases and have a face-to-face discussion between E&E Legal and senior managers in the Office of General Counsel on the disparate treatment EPA has given groups who challenge their policies, unlike the favorable treatment they give groups who endorse EPA policies.

### Colorado Renewable Energy Mandate Suit

The Colorado RPS case has gone to a Federal District Court judge in Denver, and all further work on moving toward trial has been stayed until all motions are fully resolved, matters that will likely end up with the U.S. Court of Appeals for the 10th circuit before anything goes to trial. If a similar case in California makes it way up to the U.S. Court of Appeals, it is possible these cases together may end up at the U.S. Supreme Court.

### Suit Against the University of Arizona

E&E Legal brought suit against the University of Arizona for their failure to release of documents similar to our University of Virginia case. UofA’s behavior is a blatant attempt to suppress the release of documents to protect themselves and their professors. The University of Arizona case is before the Court on procedural matters that will set the case up as one dealt with through legal argument, including whether state freedom of information laws improperly impinge on academic freedom.

## NSPS Comment (cont.)

multiple logical fallacies. These include, appeal to authority, appeal to belief, appeal to consequences of a belief, and ignoring a common cause.

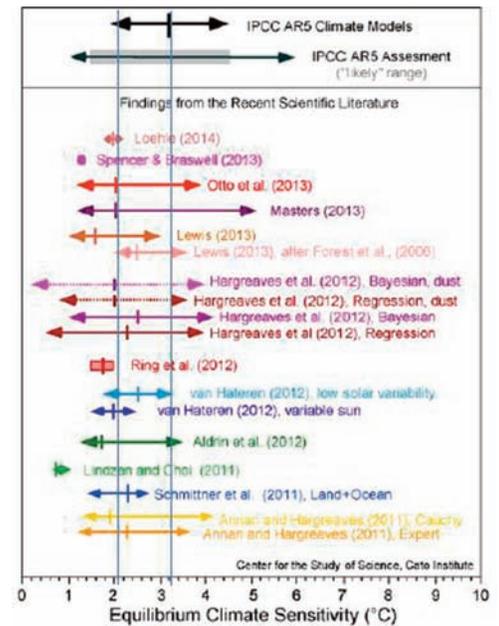
Ultimately, EPA bases its illogics on computer output from models that assume a significant relationship between carbon dioxide and global temperature. In so doing, it alleges several events it claims the rule will help prevent. These include the prediction that seas will rise faster, that this sea rise will cause “geopolitical hotspots,” including mass migrations (presumably of people) and the need to increase security in the Arctic, apparently of the northern coast of Alaska where there is no significant economic activity and no projections of any. And the prediction that warming cold lead to increases in heavy rainfall and decreases in crop yields – a prediction that fails to take account of the positive value of carbon dioxide on crop growth and the benefit of more rain, especially in the arid west and southwest of the U.S. EPA also accepts the prediction that increased temperatures, but not increased rainfall, will cause more wildfires, and eventually cause the mass extinction of the human race. EPA doesn’t ignore the rest of the animal world, relying on the alarmism of predictions that the oceans will further acidify, despite that the oceans are not acidic in the first place and that there is no evidence that they ever will be acidic. In simpler terms, EPA relies on predictions that increased carbon dioxide in the atmosphere will increase global temperatures in a manner that endangers human health and the environment.

EPA claims it has taken into account recent scientific advances and that none of them undermine their 2009 Endangerment Finding. They have not, and this is especially true for the most important single assumption they have made – that carbon dioxide

will significantly increase global temperature, the sole driving force behind the predictions of the parade of horrors upon which EPA relies. Note especially, EPA did not conduct any original analysis. It simply relied upon others and their predictive models. What EPA has not taken into consideration is the fast moving advances in understanding the low climate sensitivity to carbon dioxide, generally defined as the earth’s average surface temperature from a doubling of the atmospheric carbon dioxide content.

Specifically, EPA has not incorporated information from: Loehle, C., 2014, “A minimal model for estimating climate sensitivity,” *Ecological Modelling*, 276, 80-84; or, Spencer, R.W., and W. D. Braswell, 2013. “The role of ENSO in global ocean temperature changes during 1955-2011 simulated with a 1D climate model,” *Asia-Pacific Journal of Atmospheric Sciences*, doi:10.1007/s13143-014-0011-z. Nor has EPA assessed the emerging facts that show their reliance on the IPCC AR5 climate models’ climate sensitivity is grossly in error as documented in 18 peer-reviewed studies. The upper 95% confidence interval of eight of the studies is at or below the climate sensitivity assumed in the IPCC AR5 models. Twelve of the studies estimate the climate sensitivity below the lower 95% confidence interval of the IPCC AR5 models, and all 18 studies estimate climate sensitivity significantly below the mean value used by the IPCC AR5 models.

Any model is an abstraction from and simplification of the real world. Whenever the methodology is challenged, however, the agency must explain the assumptions and methodology used in preparing the model and provide a complete analytic defense. This EPA has not done and cannot do, much less in a manner that would satisfy the scientific and analytical principles of the Data



Quality Act and its implementing guidances. Nor may EPA rely on an appeal to authority or any other logical fallacy it has otherwise used.

EPA’s reliance on the models of the IPCC AR5 report also impeaches all its alarmist conclusions because the lynchpin of them all are the IPCC AR5 assumptions of climate sensitivity. That failure to use and apply current scientific knowledge, and EPA’s refusal to eliminate reliance on the IPCC AR5 models is a fatal error that destroys the sole underlying basis for its regulatory proposal. This failure places the basis for the regulatory action outside the zone of reasonableness necessary to justify the regulation. When examining the mischief against which the regulation is aimed, where there is no mischief of the kind EPA assumes, EPA cannot reasonably or rationally intend to address the mischief at which the Clean Air Act or the proposed regulations are aimed.

Based on its own statements, EPA does not actually intend to control the mischief of climate change through its proposed rules. EPA admits the regulatory effort is entirely nugatory, stating “even in the absence of this rule, (i) existing and anticipated economic conditions  
(continued on page 6)

## NSPS Comment (cont.)

mean that few, if any, solid fossil fuel-fired EGUs will be built in the foreseeable future; and (ii) electricity generators are expected to choose new generation technologies (primarily natural gas combined cycle) that would meet the proposed standards. Therefore, based on the analysis presented in Chapter 5 of the RIA, the EPA projects that this proposed rule will result in negligible CO<sub>2</sub> emission changes, quantified benefits, and costs by 2022." Thus, the proposed rule is unnecessary to prevent any assumed climate change calamities, and therefore, EPA cannot have the intent to do so. If EPA promulgates the rule, it must be on the basis of some other intent and the other intentions fall afoul of the Constitution.

EPA's presumption is that electricity generators will "primarily" choose to use electricity generation based on natural gas, but this presumption ignores the 30 states that have renewable energy mandates that require non-hydrocarbon generation (see, E&E Legal's "[Interactive RPS Profile Map](#)" and included into this regulatory record by reference); and, EPA ignores the fact that those mandates cost more (see, e.g., "[The Hidden Cost of Wind Energy](#)", E&E Legal Institute 2012; and "[The High Cost of Renewable-Electricity Mandates](#)" Manhattan Institute 2012, and the extensive bibliography in the Manhattan Institute report, both reports and all bibliographic entries included into this regulatory record by reference.) This comment places EPA on record as knowing both.

EPA also ignores the requirement for diversity in generation that all state public utility commissions demand for base-load electricity generation. This need for diversity has recently been seen as essential in Texas when cold weather forced the loss of natural gas generation, causing significant loss of power across the state. Be-

cause coal is significantly less expensive than other (non-natural gas) alternatives, it remains a valuable generation source for decades to come.

Estimates of the social cost of carbon that take negative values (i.e., because on net carbon creates more benefits than costs) document the relative value of using coal to generate electricity and demonstrate that the benefits of coal outweigh any reasonably estimated harm to public health and the environment, as discussed above. See also, Idso, Craig, "[The Positive Externalities of Carbon Dioxide](#)", Center for the Study of Carbon Dioxide and Global Change (2013), and see, Patrick Michaels and Chip Knappenberger (Center for the Study of Science, Cato Institute), "[Comment on 'Technical Support Document, Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866'](#)", January 27, 2014.

Further, EPA fully recognizes that increased regulatory costs fall more heavily on minorities, on women and especially mothers who are single parents, and on the elderly, and if they did not before receiving this comment, they do now. See, e.g. Joe R. Feagin and Clarence B. Feagin, *Discrimination American Style: Institutional Racism and Sexism*. Malabar, FL: Robert E. Krieger (1986); and Christopher Bates Doob, *Racism: An American Cauldron*. New York: Harper Collins, 1993 (included in the record through this comment and by reference). EPA acknowledges its responsibilities with regard to equal protection of citizens. See, Vermont Law School Professor Tseming Yang's "The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation," *Boston College Environmental Law Review* (Feb. 2001).

Because EPA admits it does not and

cannot intend to reduce carbon dioxide emissions and admits its regulations impose greater harm on minorities, women and the elderly through the economic impacts of higher cost electricity and the loss of benefits associated with carbon use, this proposal can only exhibit an intent to harm minorities, women and the elderly, there being no other intent manifest from the rule.

The proposed rule is a naked preference for non-coal electricity generation, a naked transfer of wealth from the coal industry to natural gas and renewable energy generators, and one lacking in a rational basis and outside the zone of reasonableness. Both the irrationality of the proposal and the intent to limit equal protection to minorities, women and the elderly constitute substantive are both facially and as-applied violation of the due process clause of the Fifth Amendment, harming the society at large and members of the Energy & Environment Legal Institute, the proposed rule is unconstitutional.

*E&E Legal Letter is a quarterly publication of the Energy and Environment Legal Institute (E&E Legal). The publication is widely disseminated to our key stakeholders, such as our members, website inquiries, energy, environment, and legal industry representatives, the media, congressional, legislative, and regulatory contacts, the judiciary, and donors.*

## We've Moved!

Energy and Environment Legal Institute  
(E&E Legal)  
722 12th St., NW, Fourth Floor  
Washington, D.C. 20006  
(202)-758-8301  
[Richardson@eelegal.org](mailto:Richardson@eelegal.org)  
[www.eelegal.org](http://www.eelegal.org)