



Bootleggers and Baptists . . . and Hucksterism

by Dr. David Schnare, General Counsel

Thirty-one years ago, Bruce Yandel coined the phrase "Bootleggers and Baptists" to describe how these strange bedfellows work together to corrupt the economy and the law. "Baptists" point to the moral high ground and give vital and vocal endorsement of laudable public benefits. Bootleggers are simply in it for the money. Today, Yandel's theory is in full bloom and there is no more prominent "baptist" than the Sierra Club and no more prominent bootleggers than anti-coal (renewable energy) businesses.

But, these bootleggers and baptists have taken a step too far. Despite their claims of moral superiority, the Sierra Club has become a huckster for the bootleggers and the Sierra Club Foundation has been infiltrated and controlled by the bootleggers themselves. In so doing, they have broken the law.

E&E Legal has attached a **report** to its formal Internal Revenue Service referral alleging the Sierra Club and the Sierra Club Foundation are in potential noncompliance with the tax law. Such referrals are not unusual. The IRS receives complaints from the general public, mem-

bers of Congress, federal and state government agencies, and internal sources every year and has established an office tasked exclusively to review these referrals.

The E&E Legal referral, however, is different from recent high-profile complaints to the IRS. For example, liberal watchdog groups have complained to the IRS that the conservative group Crossroads GPS violated the law by spending heavily on campaigns. The E&E Legal complaint is not about politics and political spending. We alert the IRS to two Sierra Club and Foundation practices that appear to violate the law on impermissible benefit to private interests and failure to pay taxes on unrelated business income.

The Sierra Club commits its most blatant violation by sending its members into communities to sell the products of a selected local solar panel company. They have done this in both Maryland and Utah and do it for one reason, money. As the Sierra Club's Chief of Staff Jesse Simons has stated, "This has been a great revenue-generating tool for the Sierra Club." The Sierra Club makes a \$750 profit from every sale in Maryland
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Illinois FOIA request faces Stonewalling

by Chaim Mandelbaum, FME Law



Recent transparency efforts by The Energy & Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FME Law) ran head first into the

anti-transparency culture and institutional wagon circling that seems to pervade state funded institutions of higher education these days.

The University of Illinois at Urbana-Champaign employs Dr. Donald J. Wuebbles, who is a well-known researcher in the field of climate studies and was a major chapter author for the Intergovernmental Panel on Climate Change (IPCC). The IPCC is the UN panel that deals with “climate change.” He is also a frequent speaker and lecturer on climate related issues, so it’s fair to say he is a major public figure. So E&E Legal and FME law submitted under Illinois Freedom of Information Act (FOIA), a routine request for some of Dr. Wuebbles work emails, and documents, which under law are public records. Instead of getting cooperation from a University eager to show off Dr. Wuebbles work, we got obstruction and stonewalling.

Illinois FOIA, 5 ILCS 140, was intended to give the public access to records created by public servants, including those working for universities. Of course there are reasonable exceptions to the Illinois FOIA, in order to protect things that should not be made public, and E&E Legal and FME Law fully expected reasonable withholdings as a result of these exceptions. What we didn’t expect however was the degree of resistance to transparency that we encountered.

The FOIA request asked for Dr. Wuebbles emails that deal with his work on the IPCC 5th Assessment report and his work with the Union

of Concerned Scientists. Both are groups outside the University where Dr. Wuebbles works, even while being paid for that work by the University and the taxpayers of Illinois. So we were curious about the nature of his work with these outside groups.

However instead of getting these records, or even being told they were being withheld because of specific statutory exceptions, we were informed that the request was “unduly burdensome” because there were approximately 3,000 records related to our request.

Illinois FOIA law does allow government agencies to refuse requests to meet the statutory standard of “unduly burdensome,” but it was intended to be used when agencies are asked for vast quantities of records, or for entire catalogs of records from lengthy periods. While we thought that the number of records here was perhaps not truly so burdensome for the University, we were willing to work with them to reduce our request. Illinois law allows for the requester and agency to work to focus the request so that it becomes more manageable.

So we narrowed our request. We asked for records that dealt with the IPCC 5th Assessment report and were created between January 2012 and May of 2013. We assumed this would sufficiently narrow the number of records. Instead however the University again claimed this request was “unduly burdensome,” saying there were now suddenly 10,000 records; too many to provide. Given the reduced focus of our request we were surprised that the number of responsive records had more than tripled, but we agreed to reduce our request again, asking them to exclude all the attachments and long reports and PowerPoint slides that might be part of the emails. We just wanted the text of the emails themselves.

Naturally of course the Uni-

versity came back on June 11th 2014 and told us this was still too burdensome. Because now it seemed there were “approximately 15,000 pages of potentially responsive email communications would still have to be searched, gathered and reviewed.” How the number of records kept increasing as the scope of our request decreased we were a little unsure. Still we persevered.

So we reduced the request again, this time to five months of emails, between November 2012 and March 2013. Once again the University decided it was too burdensome. This time they refrained from increasing the number of records they found, simply stating “even with this narrowed scope, your request for documents remains unduly burdensome for the University to process. [T]housands of pages of potentially responsive email communications would still have to be searched, gathered and reviewed.” So we narrowed again, down to just January to March of 2013.

The University responded with an identical reply, claiming it was too burdensome because “thousands” of records exist. At this point it became clear this was all a game. The University had started with 3,000 responsive records, which after five rounds of reducing and focusing the request had morphed into “thousands”. The size of our request wasn’t the problem. The University is simply unwilling to follow the law and to release any records at all.

It seems even a routine request for public records is too much for a University unwilling to permit even a hint of transparency when it comes to climate scientists. It is a textbook case of stonewalling. The University of Illinois would rather cling to a fig-leaf justification, no matter how ridiculous it proved to be, rather than provide records for public review. This opposition to transparency is sadly not just limited to the University of Illinois.

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Demanding Transparency: It's Not For Obama Haters

by Clifford Smith, FME Law Counsel



From the beginning of the Obama Presidency, the Administration has gone to great lengths to portray any investigation into its behavior as an ideological crusade against them. As the scandals mounted, the firing of several Inspectors General, the Fast and the Furious gun running scandal, the false-identity Richard Windsor EPA email scandal, the Benghazi scandal, the IRS scandal, etc. the Obama Administration and its allies have predictably responded by attacking the messenger. "This is just an ideological witch hunt, nothing to see here, move along." The fact that Inspectors General have been fired for no good reason, various Freedom of Information Act (FOIA) efforts from outside organizations fought every step of the way, and investigations on the Hill are systematically stymied, delayed and otherwise obstructed, are given very little media coverage.

This narrative has finally hit a brick wall. In a completely unprecedented move, 43 of 72 federal Inspectors General (IG's), statutorily created independent watchdogs, have written a letter to both Democratic and Republican Congressional oversight leaders, complaining of Administrative interference with their independent investigations. They complain of various efforts impeding their statutorily guaranteed ability to investigate freely, and almost beg Congress for help. Specifically, they cite unprecedented obstructions and delays at the Environmental Protection Agency (EPA), the Department

of Justice (DOJ), and the Peace Corps. Regarding the EPA, they cite an unprecedented claim of Attorney/Client privilege over documents sought by the IG, ignoring the fact that the IG is part of the same agency, the fact that giving documents to the IG in no way waives the Attorney/Client privilege, and the fact that, as the IG's point out, Section 6 of the IG Act gives IGs access to "all records, reports, audits, reviews, documents, papers, recommendations, or other material."

The letter is careful to point out that the incidents specifically cited are not exclusive. "Moreover, the issues facing the DOJ OIG, the EPA OIG, and the Peace Corps OIG are not unique. Other Inspectors General have, from time to time, faced similar obstacles to their work, whether on a claim that some other law or principle trumped the clear mandate of the IG Act or by the agency's imposition of unnecessarily burdensome administrative conditions on access." In other words, in the self-proclaimed "most transparent administration ever," the Administration's own IG's, most of whom were appointed by Obama himself, are being stonewalled whenever political leadership finds it useful to do so.

This should come as no great surprise to those who follow E&E Legal's efforts to hold the Administration accountable. As is documented in many reports, press releases, newsletters, columns and other public engagement efforts, the EPA and other agencies have stonewalled, illegally ignored statutory deadlines, withheld documents that should clearly have been produced, over-redacted documents that were belatedly released, and repeatedly attempted to charge exorbitant fees for the documents that should have been provided free to non-profits, amongst other things. Indeed, such behavior seems to be the norm.

What is surprising, however, is that the Administration's own IG's are willing to call them on it. EPA IG Arthur Elkins is one of the main signers of the letter. As E&E Legal pointed out in its own report recently, it has its share of differences with Elkins, who chose to "randomly" exclude most of the evidence which proved that the EPA had improperly denied fee waivers to ideologically incompatible groups like E&E Legal. What's more, documents obtained by E&E Legal strongly suggest that Elkins was handpicked for the job by former EPA Administrator Lisa Jackson and Assistant EPA Administrator Craig Hooks. This certainly provides reason to question his independence and impartiality. Yet even someone like Elkins cannot tolerate the Administration's increasingly aggressive behavior to block transparency.

The scariest part of these efforts to block transparency aren't the immediate effects, as bad as they are. E&E Legal, its partner organizations and allies for transparency are confident that they will eventually prevail in their efforts. However, the long-term effects of this sort of lawlessness and opaqueness will set a precedent for future administrations that want to block any investigation that might cause them political headaches. Statutes creating IG's and the FOIA process came about precisely because independent investigations may uncover the embarrassing and otherwise politically problematic facts that the public need to know about. It's because of this that those interested in transparency must redouble our efforts to hold the administration accountable and re-establish a transparent culture. We cannot leave the future to those special interests who would secretly game the system for their own benefit as this Administration has done at ever turn.

Questions remain about FERC's settlement with Constellation Energy

by Chaim Mandelbaum, FME Law



On March 8th 2012 the Constellation Energy Group agreed to a settlement with the Federal Energy Regulatory Commission (FERC).^[1] The \$245 million dollar settlement was a huge win for FERC's Office of Enforcement, which had opened the investigation into Constellation in January 2008, only to see it languish for four years. When Constellation and FERC agreed to the settlement, the case against Constellation had still not proceeded to a formal administrative hearing or been filed in court.

FERC's Office of Enforcement had opened its investigation into Constellation Energy with regard to its trading in the New York Independent System Operator energy market. The claim was that Constellation traders were engaged in "market manipulation" through making unprofitable trades to impact the market. Yet many experts agree that this sort of trading is entirely legal.^[2] Further there was mounting criticism directed at FERC's Office of Enforcement since the agency had begun to act more like a prosecutor than a regulator.^[3] This problem had become more pronounced after Norman Bay, a former federal prosecutor with little experience in the energy field, was named head of FERC's Enforcement division in 2009.^[4]

The timing of the settlement was especially noteworthy because the next day, on March 9th 2012, FERC approved the merger between Constellation and another energy company, Exelon Corporation. It had

been almost a year earlier, in May 2011 that Constellation and Exelon had sought FERC approval for their merger. The timing of the settlement and the approval for the merger raised a number of questions.

These questions intensified when it became clear the settlement agreement between FERC and Constellation contained express reference to Constellation's merger with Exelon, which was awaiting FERC approval. The settlement agreement called for Constellation to pay FERC \$135 million dollars in civil fines and to disgorge \$110 million dollars in profits, which at the time represented the largest settlement FERC had ever negotiated with regard to allegations of energy market manipulations.

However, the agreement between the parties included a term that delayed the effective date of when the agreement would go into effect, and when Constellation would have the obligation to actually pay the civil fines and the disgorgement. Paragraph 44 of the Stipulations and Consent Decree stated "The Effective Date of this Agreement shall be the later of the date on which: (a) the Commission issues an order approving this Agreement without material modification; or (b) the merger pursuant to the Agreement and Plan of Merger among Constellation Energy Group, Inc., Exelon Corporation, and Bolt Acquisition Corporation, dated April 28, 2011, is consummated." (emphasis added) Under the terms of this clause the settlement would not go into effect until the consummation of the merger between Constellation and Exelon occurred. Thus no money would be due until FERC approved the \$8.9 billion dollar merger between Constellation and Exelon. Yet the very next day FERC gave approval for the merger. FERC approval was the last thing needed for the merger to be complete, and the merger closed on March 12th

2012, three days later.^[5]

The timing of the settlement and merger raised questions about whether there had been some of quid pro quo between FERC and the energy companies, or whether FERC had tied approval of the merger to Constellation agreeing to settle. These questions persisted when Norman Bay, the Director of Enforcement, was nominated by the President to become a FERC Commissioner and the Chairman of FERC.

When Norman Bay went before the Senate Committee on Energy and Natural Resources during his confirmation process to become a FERC Commissioner he was specifically asked about the Constellation settlement. Alaskan Senator Lisa Murkowski, after noting the facts about the timing of the settlement and merger asked him whether he was concerned about any quid pro quo. He stated "I would be concerned about the appearance of a quid pro quo in a connection between merger reviews and enforcement." When asked to explain why there was express reference to the merger in the settlement he responded by saying "The Commission determined that accepting the settlement, including this provision, would be in the public interest." While Bay stated that generally he oversees and audits all reports on mergers in his role, that he nonetheless did not get involved in the Constellation-Exelon merger, claiming that "Moreover, the merger review was led by staff from the Commission's Offices of General Counsel and Energy Market Regulation while the investigation into Constellation Energy Commodities Group trading activities was conducted separately by staff from the Office of Enforcement."^[6] These answers were so evasive and unsatisfying that Senator Murkowski, speaking on the Senate floor about Norma Bay's nomination stated "To begin, there are questions about the fairness and transparency of the (continued on page 6)

Mischief Not Managed: The NRDC Gets Laughed Out of the Ninth Circuit Court of Appeals

by Clifford Smith, FME Law Counsel



What do you get when you put dozens of “green” lawyers together with nothing in particular to accomplish and more money

than they know what to do with?

Someone could be excused for thinking that this sounds like the start of a really bad lawyer joke. Unfortunately, it’s anything but. Lawyers for the Natural Resources Defense Council (NRDC) and their allies are actively testing this proposition. The result is a preposterous lawsuit against the railroad industry that clearly demonstrates the problem with the current state of the so-called “environmental justice” movement.

Let’s review the case: The NRDC and other local environmentalist groups sued the BNSF Railway Company and Union Pacific Railroad Company concerning their disposal of solid waste, which is regulated under the Resource Conservation and Recovery Act (RCRA). RCRA is aimed at ensuring safe disposal of solid waste. For example, it regulates things such as underground storage tanks for chemicals used in the agriculture, storage tanks for oil, and sludge from water filtration.

This seems like common sense, right? Clearly, nobody wants uncontrolled leaks of pesticides, oil, filtered sludge or other such hazardous material into the ground. And NRDC must have had a reason to suspect the railroad companies were recklessly flouting the law, right?

Well, actually, no. Instead, NRDC & Co. were suing the railroads under RCRA over the emissions of diesel-related particles into the air in their rail yards. Yes, you read that right. They think airborne emissions from diesel engines are

“disposing solid waste.” That’s a bit of a stretch, to put it mildly.

But wait, we have a Clean Air Act (CAA) that governs things like this, right? Yes, we do. Common sense would seem to suggest that, if the NRDC has a concern with diesel emissions, they should sue under the CAA. However, this presents a problem for the NRDC. The CAA only allows for so-called “citizen suits” pursuant to regulations the EPA has already passed, and the EPA specifically hadn’t regulated such emissions. Why haven’t they regulated such emissions? Because they represent very small amount of pollution that is unlikely to cause problems and is difficult to regulate effectively without imposing unacceptable costs.

Unlike CAA, RCRA allows for a wider breath for citizen suits. But understandably, a statute dealing with disposal of solid waste has no regulation concerning diesel emissions. However, RCRA allows for citizen suits against anyone who may present an “imminent danger” to the environment, even if the EPA hasn’t crafted a specific regulation. This vague standard let the NRDC get into court, even though the statutory language, legal reasoning, and simple common sense, would clearly indicate RCRA simply had nothing to do with diesel emissions.

This ridiculous lawsuit was dismissed at the trial court level, but was promptly appealed by NRDC. Luckily, even the activists on the Ninth Circuit Court of Appeals quickly agreed with the trial court and found that “defendants’ emission of diesel particulate matter did not constitute ‘disposal’ of solid waste,” under the RCRA. However, the issue remains, why was such a clearly frivolous lawsuit filed in the first place?

The chief problem is that the modern “green” movement is

extremely aggressive, well-funded, and almost totally detached to any real-world concern or balancing of any interest. They are monolithically concerned with a very narrow definition of environmentalism not as a means of “protecting the environment” but as a way to create raw power and wealth. As detailed by a recent report from the Senate Environment and Public Works Committee, there are a very few billionaires who have an overwhelmingly disproportionate influence in funding various left-wing environmentalist groups. These people generally benefit financially from overregulation, and cloak their profit-seeking behavior in nice-sounding but hollow promises of making things “green,” regardless of the societal costs associated with it or however remote or speculative the so-called environmental benefit may be.

With this kind of funding and narrow mission, green groups like the NRDC are free to cook up any crazy lawsuit they can come up with and ride it for all its worth. If it works, great! They get to claim a victory, and often get attorney fees and court costs at taxpayer expense, and continue pushing for whatever other regulations they desire. If it doesn’t work, so what? They have more than enough money to sit around and dream up a similar scheme. If you throw enough things against the wall, something will stick.

Nobody wants dangerous pollution, but everything has a cost, and both the benefits and costs should be considered concerning every regulatory action. Presidents, Congressman, and to some degree, even EPA officials deal with this reality all the time. However, groups like the NRDC are unencumbered by such real world concerns. Their only incentive is to push regulation to its most destructive extreme and laugh all the way to the bank. This is disastrous, not only for the economy, but in the long run, for public health and the environment as well.

Hucksterism (Cont.)

and has never paid taxes on that commercial enterprise. The Sierra Club markets the products of a single company in each jurisdiction, in direct competition to several other similar companies who cannot rely on the Sierra Club sales force. This violates the law.

A more perfidious problem is the Sierra Club's, and its money-raising Foundation's use of its "War on Coal" to not only produce profits, but to conspire with the companies that profit from that war. Eight of the Sierra Club Foundation's 18 directors

own or operate organizations that directly benefit from the War on Coal. These directors are the captains of the renewable energy industry. While these directors aren't paid by the Sierra Club Foundation, their companies directly profit from the Sierra Club Foundation's primary "program," the War on Coal. Beyond the illegal inurement to these directors' interests is the direct benefit to major donors. Natural gas producer Chesapeake Energy paid \$26 million to the Sierra Club for the express purpose of forcing coal-fired electricity companies to switch to natural gas. This was small potatoes compared to

David Gelbaum who, alone, donated more than \$100 million to the Club. Gelbaum controls more than 40 "clean tech" companies who directly benefit from forced shutdown of the coal-power industry. The Sierra Club Foundation wages a war on coal to line the pockets of its directors and top donors. This, too, is not lawful.

In its legal analysis of these "bootlegger" and "huckster" activities, E&E Legal suggests that both the Sierra Club and the Sierra Club Foundation have violated the tax laws and regulations, and brings these matters to the IRS for careful review and investigation.

FERC Questions (cont.)

functioning of the FERC Office of Enforcement during Bay's tenure there. Third are the answers that Bay provided to questions from those of us on the energy committee. At best, many were unclear and, at worst, his responses were simply evasive."^[7]

As a consequence of the questions raised by the Constellation settlement and the lack of transparency in explaining why the settlement and merger were linked, the Energy and Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FME Law) issued a Freedom of Information Act (FOIA) request to FERC on June 23rd 2014, seeking information on why the Constellation settlement decree refer-

enced the Constellation-Exelon merger and how what role Norman Bay as FERC's Director of Enforcement played in deciding these two issues.^[8] However thus far FERC has rejected all attempts to increase transparency and public understanding of this issue, instead claiming the right to fully withhold all documents under Exemptions 4, 5 and 6 of FOIA. E&E Legal and FME Law have appealed this decision in hopes that FERC will recognize its obligations under FOIA and the need to explain to the public why there was such a questionable relationship between the Constellation settlement and the merger. If FERC still refuses to cooperate, then E&E Legal and FME Law are ready to ask the Federal Courts to

force FERC properly obey FOIA and release public documents.

[1] Eileen O'Grady, [FERC settlement with Constellation largest since 2005](#), Reuters

[2] Julie Carey, Cliff Hamal, and Ben Ullman, [Trading Firms In Bullseye Amid Stepped Up Oversight Of Energy Markets](#), Forbes

[3] William Pentland, [Did Obama's New FERC Nominee 'Criminalize' Energy Regulation?](#), Forbes; see also [The compliance risk equation: Preparing for the "new" FERC](#), a joint publication of Deloitte and Ballard Spahr

[4] [FERC Appoints Former Prosecutor as Head of Enforcement Office, June 24, 2009](#), Energy Legal Blog

[5] [Exelon-Constellation Merger Closes, Creating Nation's No. 1 Competitive Energy Provider](#), March 12 2012

[6] [Testimony of Norman Bay to United States Senate Committee on Energy and Natural Resources](#), Responses to Questions for the Record posed by members of the Committee; Response to Question 5 from Ranking Sen. Lisa Murkowski, pp. 50-52.

[7] Congressional Record, Vol. 160, No. 110, page S4473, July 15, 2014.

[8] See FOIA FY14-93 issued by FERC August 5, 2014.

Illinois' Stonewalling (cont.)

Thanks to pressure organizations like The Climate Science Legal Defense Fund, which was created to "protect" climate scientists from things like transparency or public records law, Universities have been working to evade their states records law, and to avoid releasing to the public anything than might hint at cracks in the global warming movement's dire predictions. Sadly Universities across the nation, from Arizona to Illinois to Virginia have become bastions of this anti-transparency movement.



On July 24, Tom Tanton, E&E Legal's Director of Science and Technology Assessment testified before the U.S. House Energy & Commerce Subcommittee on Energy and Power at their hearing titled, "Laboratories of Democracy: The Economic Impacts of State Energy Policies." In his testimony, Tanton, a 40-year veteran of direct and responsible experience in energy technology and legislative interface, made several key points

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