



## The Big Green Bust of 2014

by Clifford Smith, FME Law Counsel

When someone has a lucky streak in Las Vegas, there comes a moment where some will decide to throw caution to the wind and put all their chips on the table. This past election cycle, the radical environmentalist crowd did just that. Typical of a manic gambler on a risky binge, instead of increasing their winnings, they threw it all in and lost nearly everything.

Billionaire “green” financier Tom Steyer and his NextGen Super PAC reportedly spent approximately \$60 million in the past mid-terms. Other groups, such as the League of Conservation Voters (LCV), reportedly spent another \$25 million. In a memo circulated by LCV, they reported that climate groups, which also includes Sierra Club, the Natural Resources Defense Council, and the Environmental Defense Action Fund, were, “(P)oised to execute the last phase of our biggest and most sophisticated electoral effort ever.” This included spending a record \$85 million. The real number is likely much higher, as much of the spending intended to influence politics are made under the guise of “education” and are exempt from disclosure.

What did they get for it? Not much. They spent heavily in six senate races in Alaska, Colorado, Iowa, Michigan, North Carolina and New Hampshire, losing 4 out of 6. Since the Michigan Senate race was never truly competitive, in reality, they went 1 for 5. This is particularly stunning considering that the green-backed candidates in Colorado, Iowa and North Carolina were heavily favored to win at the start of the year.

North Carolina Senator Kay Hagan, for example, was favored to win up until election day, but she still lost to State House Speaker Thom Tillis, who was brutally attacked by “greens.” They claimed he protected polluters who had contaminated drinking water in a tragic coal ash accident, despite the fact that Tillis had passed several bills to address the cleanup and Hagan had supported legislation that exempted Duke Energy, the company responsible for the accident, from environmental regulations that may have prevented the spill.

In House Races, the “greens” were roundly rejected. In Maine’s 2nd congressional district, green-endorsed State Senator Emily Cain

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Emboldened by their successes at the polls, the GOP returned to Washington to address significant problems in transparency as it relates to the Federal government and in particular the EPA. The U.S. Senate’s Judiciary Committee passed a bill with a series of reforms to the FOIA, and the U.S. House passed two bills aimed at addressing how the EPA uses “science” to justify its regulations.

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## The Fight to Curb Eminent Domain Abuse in Virginia

by Chaim Mandelbaum, FME Law Counsel



Eminent domain, the process by which a government “takes” an individual’s land or property for “public use,” has long been abused. This is especially true today in Virginia. Too many landowners in the

Commonwealth are facing an impossible to win situation when Cities and Counties come calling. Some localities in the state are now finding new ways to abuse this long time doctrine.

For an eminent domain action to be proper, two conditions must be met. First, the land the government is taking must be in the “public interest,” such as for a hospital, road, or a school. Unfortunately, the U.S. Supreme Court in 2005 ruled that governments could seize land using eminent domain in order to transfer it to a new private owner to further economic development.<sup>1</sup>

Fortunately, this sort of abuse has been curbed in Virginia, where this type of eminent domain has been banned. First in 2007 the state legislature passed a law limiting eminent domain where the primary purpose was to transfer the land to a new private owner. Next, in 2012, the citizens of Virginia voted by a 3 to 1 margin for an amendment to the state constitution that further limited the use of eminent domain to exclude situations where the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development.<sup>2</sup>

The Second condition is that just compensation has to be paid. Unfortunately, it is this obligation to pay just compensation that has become an issue in Virginia. Defining just compensation has always been difficult in eminent domain cases. While the free market allows for property to be easily valued, eminent domain requires that the court decide the value of a property. Courts do this by using expert testimony of property

appraisers to determine the theoretical market value of the property.

Unfortunately, what local governments have taken to doing is low-balling landowners by having property appraisers who work for a local government develop an appraisal value often far lower than what the property is worth. The government then makes the landowner an offer to buy the property, an offer higher than the very low appraisal, but still below what the landowner believes the property is worth. If the landowner refuses this offer, the government then seeks to condemn the property using eminent domain at the low appraisal value. When the landowner attempts to claim that the government offered him far more, the government claims this information cannot be used in court, as it is a settlement offer, and settlement offers are confidential in Virginia.<sup>3</sup> This allows the government to hide from the court and from a jury the real amount it offered for the property.

This is only one of the underhanded tactics local governments use. The second is to try and dry up the pool of available expert witnesses for landowners. Courts require expert witnesses to try and determine the value of a property. The local government will get experts in the form of trained and licensed property appraisers, and landowners have to do the same. Unlike landowners, local governments work constantly with property appraisers, and these professionals often depend on local governments for a substantial source of their income. So local governments cut off from government work appraisers who side with landowners in eminent domain disputes. Those few expert appraisers who do testify for landowners become the target of the Cities and Counties attorneys, who collude to try and find ways to undermine such appraisers.

It was because of such tactics by local governments that the Virginia Institute of Public Policy (VIPP) became involved in a case against

multiple municipalities in Virginia. VIPP learned that one appraiser, who often testified on behalf of landowners, had become the target of substantial shared communications between different cities and counties on how to undermine his testimony. So VIPP sent requests for information about this appraiser to various local governments in Virginia, under the Virginia Freedom of Information Act. This act requires the governments to turn over public documents, such as emails. Instead however local governments worked to stymie the Institutes efforts to bring transparency to such practices, hiding communications under claims of privilege. What has been learned however is illuminating. The City of Chesapeake was forced to admit in court that it shared information about this appraiser with many other cities and counties around the state, even though Chesapeake was not involved with these other municipalities’ cases. Likewise the County of Henrico acknowledged that it shared emails about the appraiser with cities and counties around Virginia. While the Free Market Environmental Law Clinic, working on behalf of VIPP, has not been successful at obtaining these documents yet, it is clear from the fight to obtain them that the counties do not want what they have been doing to appraisers who represent private citizens to be made public.

The result paints a grim picture for landowners. Their ability to fight against condemnation actions is limited by rules that allow local governments to hide the real amounts they offer for property. And the local governments scare off most experts who could testify for landowners and collude to demonize those few that will stand with the property owner. Eminent domain requires that the government pay “just compensation” but there is little justice in the tactics of various Virginia local governments, who are working hard to seize private property and underpay for it.

1. *Kelo v. City of New London*, 545 U.S. 469 (2005)

2. Proposed Constitutional Amendment

3. [Rule 2:408, Virginia Rules of Evidence](#)

## Internal Affairs and Undue Influence at the EPA

by Clifford Smith, FME Law Counsel



In the blockbuster film “The Dark Knight,” Gotham City’s heroic District Attorney, Harvey Dent, first made his name as the head of the Office of Internal Affairs in the notoriously corrupt Gotham Police Department. In that position, he investigated corrupt payoffs and crooked cops, which made him a lot of enemies and some friends. In Dent’s case, his determination to fight wrongdoing earned him notoriety and respect, later propelling him to the DA’s office.

Two organizations whose mission it is to fight for transparency, the Energy and Environmental Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FMELC), are hoping to get the same kind of determination from EPA Inspector General Arthur Elkins investigating undue influence and conflicts of interest. E&E Legal and FMELC have written a letter to IG Elkins requesting that he investigate improper influence between various “green” lobby groups and EPA regulations concerning climate change.

This request comes on the heels of two separate events, one, an in-depth report by E&E Legal, the result of numerous Freedom of Information Act (FOIA) requests, that went into great detail concerning conflicts of interests, inappropriate collusion, and otherwise improper influence on important EPA regulations from outside “green” lobby groups. Second, it comes after a different outside group, the Citizens for Responsibility and Ethics in Washington (CREW), sent IG Elkins a letter

requesting that he investigate the influence of other outside groups, namely the Carlyle Group and Delta Airlines, on the EPA’s Renewable Fuel Standards regulations.

While E&E Legal and FMELC have different opinions than CREW on some issues, they agree that transparency and openness are the hallmarks of good government. Transparency is the best tool for smoking out undue influence and improper collusion, be it from corporations or politically connected activist lobbyists. E&E Legal and FMELC further agree with CREW that IG Elkins, the watchdog statutorily charged to oversee the EPA, ought to investigate potential conflicts of interests and undue influence on important regulations.

Why are independent, outside organizations who do investigations professionally looking for help from an insider investigator like Elkins? Well, federal offices of inspectors general, similar to offices of internal affairs in police departments, are legally part of the organization they investigate. This means, unlike outside investigations using FOIA or other law enforcement agencies using discovery, these offices have access to all available information, including confidential memos, documents protected by attorney client privilege, and easier access to witnesses. Also, while they are part of the organizations they investigate, they are legally independent, and are not under the direct thumb of administrators that may have other agendas, and are free to investigate whatever they want, whenever they want. This gives them advantages no other investigators have.

Understandably, this position puts internal investigators like Dent and Elkins in a difficult spot. Our fictional hero Dent, as we well know, was labeled “Two-Face” for his work in Internal Affairs by Gotham Cops. Insiders are afraid of getting caught

up in the investigation, while outsiders often wonder if the internal investigator is truly independent or part of the corrupt machine. So are internal investigators sufficiently independent? It’s a fair question, one that isn’t always easy to answer. Even the most hardened investigators could become biased when they are investigating the same people they work with day in and day out. In Elkins case, he was also a longtime EPA employee before he got the IG job. Emails obtained by FMELC also suggest that Elkins was recommended for the position by former EPA Administrator Lisa Jackson. It is fair to question Elkins ability to be truly independent. Also, E&E Legal has not always been a fan of the IG’s investigative methods in other cases.

Yet, as we have seen, internal investigators have special advantages. This is especially important for the EPA IG, as the EPA has been the picture-perfect example of how not to be a transparent organization. While FOIA does indeed have various exceptions that allow agencies to withhold some documents that clearly should be withheld, such as documents that have sensitive personal or corporate information, other exemptions are more broad and difficult to define, like documents deemed “deliberative,” i.e. documents discussing agency policy before it is made final. This vague standard is prone to abuse, and EPA abuses it to the hilt, withholding massive amounts of information that should rightly be available to the public through FOIA. Additionally, since much of EPA’s work is done by lawyers, much is withheld under attorney client privilege. Internal investigators are not hamstrung by these restrictions, although the EPA is so resistant to transparency, they have attempted to obstruct them anyway. Cracking through this opaqueness will the tools of an

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## E&E Legal, FME Law Forced to Again File Suit Against FERC to Compel them to Release FOIA'd Documents

by Craig Richardson, E&E Legal Executive Director



On October 21, E&E Legal and FME Law once again sued the Federal

Energy Regulatory Commission (FERC) under FOIA to compel production of key federal records. The records relate to FERC having conditioned its stalled approval of Constellation Energy's merger with Exelon Corporation upon payment of a then-record settlement to resolve a FERC enforcement action. The issue is of significant interest since the merger formed one of the largest electric utilities in the world, but also on its face raises alarm about FERC's operations.

The tying of the merger approval to settling the enforcement action was also the focus of U.S. Senate questioning of Norman Bay during his nomination process to be FERC Chair. Recently, Senators Susan Collins and John Barraso requested FERC's Inspector General to look into the matter. This is the second time the groups have had to sue FERC, over related records; Friday's suit has substantial overlap with an E&E Legal case filed in March of this year.

Chris Horner, counsel for E&E Legal and FME Law, said "It's unfortunate that we have once again had to drag FERC to court to obtain public records. This is part of a pattern with FERC giving the impression the Commission is protecting the man expected to be named FERC's Chairman next year."

In the suit, we note that this pattern of behavior began after FME Law obtained e-mails under FOIA that complicated former nominee Ron Binz's approval; Binz ultimately withdrew his nomination. In this most recent suit, E&E Legal details

how FERC continues to withhold most responsive records in full, including basic factual information, despite the legal obligation to segregate, redact, and produce responsive non-exempt information, including factual content ("who", "what", "where", "when").

This issue is of great importance to the public due to the problematic nature of the apparent quid pro quo involving the merger. In addition, during his confirmation to chair FERC Mr. Bay assured the Energy Committee that he was peripheral to the matter despite at the time being FERC's Director of Enforcement.

Emails which FERC released to E&E Legal, after E&E Legal filed an earlier lawsuit, cast serious doubt on Mr. Bay's claim. Specifically, they show James Pederson, chief of staff to FERC's then-Chairman, arguing that "the Constellation settlement" was indeed a major qualification of Mr. Bay for a senior FERC position. This was because of the settlement's "game changing role for the Commission," all of which was a result of "the complete overhaul of [Office of Enforcement] that has occurred under Norman" Bay. Mr. Pederson wrote this in an email, into which he also typed "Copying the Chairman", to FERC's Chief Human Capital Officer Eduardo Ribas asking Mr. Ribas to emphasize this qualification to the White House.

Bay presently serves on the Commission in an unprecedented apprenticeship until April 2015. The complaint notes that FERC's continued withholding serves an important political purpose just as previous delays did to obtain Senate approval of Mr. Bay's "apprenticeship". It also details FERC's practice of broad overwithholding of records relating to Mr. Bay, only to later release improperly withhold portions once certain political events have passed.

This unique political apprenticeship arrangement arose after the Senate Energy Committee, concerned about Bay's fitness to chair FERC in part due to the Constellation quid pro quo and the fulsomeness of his responses to related questions, instead approved him to serve as a regular Commission member in with an eye toward possible elevation to Chair in 2015. The Senate narrowly approved this arrangement on July 14, 2014, by a vote of 52-47, at the same time it approved another FERC Commissioner, Cheryl LaFleur by a vote of 90-7.

For months members of the Senate have sought information shedding further light on this matter, including asking very specific questions, but eliciting only vague responses. FERC released the Pederson-Ribas email to E&E Legal several hours after the Energy Committee's business meeting concluded on Bay's nomination to serve as FERC Chairman. FERC thereby denied the Committee the opportunity to consider these records when evaluating Mr. Bay's responses to specific questions, including his assertion that he was tangential to the controversial Constellation matter. These revelations led E&E Legal to file the FOIA request at issue in this suit.

If it were not for E&E Legal FOIA pursuits to obtain critical information, the public would not know of the disconnect between FERC's privately stated position and Mr. Bay's publicly stated position on this matter of profound importance in regards to a major and important domestic industry, by an agency with substantial regulatory, policy and enforcement powers.

Horner concluded, "Our mission as a watchdog group is to secure information that informs the public and their representatives prior to, not hours after, important votes for a position of significant public trust. This is precisely the sort of information for which FOIA exists. □

## Green Bust (Cont.)

stunningly lost to former State Treasurer Bruce Poliquin. In Texas's 23rd congressional district, green-endorsed Rep. Pete Gallego lost unexpectedly to former CIA officer Will Hurd. Very few "green" endorsed candidates won competitive races. Of the candidates backed by "green" groups that were in the most competitive races, 28 lost, only seven won.

The "greens" also did poorly in Governors races. While "green" endorsed candidate Tom Wolf beat Pennsylvania Gov. Tom Corbett, this was expected, and Corbett actually lost by less than anticipated. Also, Florida Governor Rick Scott, considered enemy #1 by numerous green groups and NextGen Climate in particular, unexpectedly edged former Governor Charlie Crist. Enemy #2, Maine Governor Paul LePage, also easily won re-election.

While ostensibly non-partisan, these "green" organizations didn't back a single Republican in any competitive federal race. Of their seventy 2014 cycle endorsements, LVC backed only 2 Republicans, neither were in a competitive race. They endorsed no Republican for Governor. It's clear that they're not interested in moderate, non-partisan environmental policy. Only those who toe their radical line are sufficient, others need not apply.

Perhaps their most spectacular loss was in Washington State, a state traditionally friendly to environmental causes. Washington Governor Jay Inslee, elected in 2012, is a hardcore supporter of the radical "green" climate agenda. Yet after he was elected, even some in his own party found his agenda too out there. Two moderate Democratic State Senators caucused with Republicans, throwing control of the chamber to the "Majority Coalition Caucus." This coalition blocked Inslee's efforts to impose onerous regulations similar to cap-and-trade, and stopped him from imposing a California-like

renewable fuel standards that greatly increased the price at the pump.

After moderate Senate Democrat Rodney Tom, Majority Leader, decided to retire, Steyer smelled blood. He spent more than \$2 million during the past election cycle to attempt to wrestle control of the State Senate from the Majority Coalition Caucus. This is a staggering sum for state legislative races in Washington State, where a successful candidate usually raises low six-figures in campaign cash.

While Steyer's group did manage to win the seat left vacant by Tom, they failed to flip the chamber. Instead, maverick moderate Democrat Tim Sheldon trounced Steyer-backed liberal Democrat Irene Bowling by nearly 10 points. In another race, Steyer's #1 target, Mark Miloscia, a former moderate Democrat who switched parties to become a Republican, easily won the seat of retiring Democratic State Senator Tracey Eide, winning by 12 points. This in spite of the fact that Miloscia, a serious Catholic, was the victim of vicious anti-Catholic propaganda that shocked even the notoriously left-wing Seattle Post-Intelligencer. There is no proof that these bigoted attacks were funded by Steyer, although since his money was funneled through multiple political committees, it is difficult to know. All other members of the Majority Coalition Caucus that the greens targeted for defeat won anyway, most weren't particularly close.

Most of the "green" movement knows full well they lost big. "We lost far too many races yesterday. There's no way, or no desire, on any of our parts, to spin this, to try to throw some sunshine into a story that has some pretty disturbing elements," said Sierra Club's Michael Brune. They seem puzzled as to why they lost, however.

The reason is obvious, however. As philosopher Eric Hoffer famously said, "Every great cause begins as a movement, becomes a

business, and eventually degenerates into a racket." The modern "green" movement has degenerated into a racket, and voters smell it.

The modern "green" movement is increasingly detached from real world concerns of citizens. They are no longer concerned with common-sense conservation efforts, sensible pollution controls, or reasonable resource management. Instead, they are increasingly obsessed with "fundamentally transforming" America into some green utopia where disfavored industries are banished and opportunity and prosperity are sacrificed in the name of saving the world from "climate change." This in spite of the fact that, as John Kerry recently said, "Even if every single American biked to work or carpooled to school or used only solar panels to power their homes – if we reduced our emissions to zero... That still wouldn't be enough to counteract the carbon pollution coming from China and the rest of the world."

The so-called "green" movement has been on a high ever since the 2008 wave ushered President Obama into office. While Obama's victory had little to do with extreme environmentalism, it had much more to do with war weariness and the financial crisis, Obama's top appointees at the EPA wasted little time, in the words of their senior leadership, imposing "progressive national policy" on the country. Americans, who are highly skeptical of scare mongering and utopian schemes, aren't buying this agenda.

The lesson that ought to be learned by the "green" movement going bust this cycle is that they should refocus on common sense environmentalism and conservationism that affects average Americans everyday lives instead of trying to impose utopian solutions that won't work on a skeptical public. The fact that they won't just proves what a racket the modern environmental movement has become. □

## Congressional Update



The 2014 midterm elections brought sweeping changes to Washington with the U.S. Senate switching parties, and the GOP expanding their majority in the U.S. House. Big changes on the energy and environment front were seen immediately as the lame duck session returned to the nation's capital to attempt to finish up some old business. The Keystone XL Pipeline was the most visible of the energy issues, although other important legislation also saw significant congressional action, including the following:

### FOIA Bill Clears Senate Committee

Congress is again contemplating serious revisions to FOIA. The week of November 17, the Senate Judiciary Committee approved a bill by a voice vote that would enshrine the "presumption of openness" into law, create a new federal FOIA Council, and put into place a more liberal scheme for fee waivers. While there is broad support for the bill in the Senate, final passage seems unlikely in

the lame duck session. Although E&E is always happy to see Congress consider ways to make the Freedom of Information Act work better for the public and increase access to government records, we were disappointed that this bill did not include some of the best elements found in state open records laws. In Virginia, requesters have a right to a hearing within seven days of filing an open records lawsuit. By contrast, federal litigation often takes months or years. We hope the next Congress will consider lessons learned by state government in deliberating future FOIA revisions.

### The U.S. House Zeros in on How the EPA Conducts Business

On November 19, the GOP-led U.S. House passed the "Secret Science Reform Act of 2014" primarily along party lines, a measure that would prohibit the EPA from finalizing rules that are not "transparent or reproducible." U.S. Representative Lamar Smith (R-TX), Chair of the Committee that passed out the legislation earlier this year, explained in a press release the need for such legislation:

*The EPA's regulatory process is both hidden and flawed. It hides the data and then handpicks scientists to review it. The American people foot the bill for the EPA's billion dollar regulations and they have the right to see the underlying data. If the EPA has nothing to hide, and if their data really justifies their regulations, why not make the information public? Data sharing is*

*becoming increasingly common across scientific disciplines. The legislation requires that EPA science be available for validation and replication. Americans impacted by EPA regulations have a right to see the data and determine for themselves if the agency's actions are based on sound science or a partisan agenda. This bill ensures transparency and accountability. The American people deserve the facts. And so does good policy.*

Congressman Paul Gosar (R-Ariz.) proposed an amendment to the bill that would require EPA to post all scientific and technical information online and available to the public. The amendment passed successfully.

On November 18, the House passed another bill, H.R. 1422, the EPA Science Advisory Board Reform Act of 2013. As explained by the U.S. Chamber of Commerce in a letter supporting the measure, H.R. 1422 "would help ensure that the Science Advisory Board (SAB), which directly counsels the U.S. Environmental Protection Agency (EPA) on scientific and technical issues, is unbiased and transparent in performing its duties. The bill would establish requirements that SAB members are qualified experts, that conflicts of interest and sources of bias are disclosed, that the views of members—including dissenting members—are available to the public, and that the public has the opportunity to participate in the advisory activities of the Board and view EPA's responses."

### EPA's Undo Influence (Cont.)

an aggressive, independent IG conducting a fair, unbiased investigation.

Like Dent in "The Dark Knight," Elkins has a choice. He can choose to be blind to the problems around him so as not to rock the boat, or he can choose to use the tools at his disposal to challenge the people he works with every day to live up to a higher standard, the one the law demands. He has the ability, the question is, does he have the will and the courage? E&E Legal, FMELC and

even CREW hope that he does. The EPA's relentless resistance to transparency, and all of the negative implications that it brings about, require a thorough, unbiased, and independent investigation, and IG Elkins is the man statutorily charged to conduct it. Ultimately, such an investigation is good not only for the country, but for the EPA itself. □

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