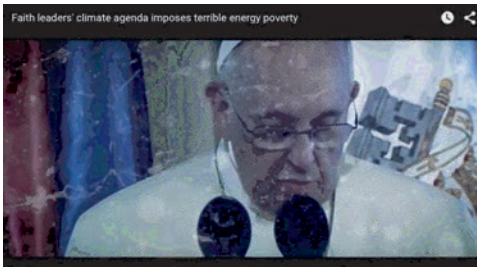
E&E LEGAL
Energy & Environment Legal Institute

Letters

Fall 2015

E&E Legal Releases 'Energy Poverty' Video for Papal Visit



Pope Francis and other faith leaders have made addressing 'climate change' one of most important 'moral' issues of our time. During his historic visit to the United States in September, the Pope in an address to a joint session of Congress said, "I call for a courageous and responsible effort to 'redirect our steps' and to avert the most serious effects of the environmental deterioration caused by human activity. I am convinced that we can make a difference, and I have no doubt that the United States — and this Congress — have an important role to play."

E&E Legal firmly believes that humanity has a moral obligation to protect and preserve the environment. However, the Pope's strategy to address 'climate change' - which is shared by many other faith leaders, extremists in the United Nations, and socialistic governments across Europe and the rest of the world - will only bring skyrocketing energy prices that have already devastated and killed the most vulnerable in those countries who have employed such policies.

To raise awareness of these failed and dangerous 'climate' policies, E&E Legal released a revised version of an earlier video prior to the Papal visit. As the video illustratress, these policies demanded in the name of climate change — which policies no one claims will detectably impact the climate, and so which are now offered in the name of protecting the most vulnerable — are in fact already killing the most vulnerable, by the tens of thousands.

Headlines used in the video come from Europe, where President Obama used to tell Americans to look if they want to see how these policies will work yet whose experiences, curiously, he no longer wants us to examine. Yet we echo Mr. Obama's now-abandoned call: look to Europe if you want to see the U.S.'s future should EPA's "global warming" rules be allowed to go into effect. Close examination reveals ugly truths.

This campaign to promote the environmentalists' energy agenda

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E&E Legal Petitions Supreme Court Re: CO RES Case

On October 9th, The Energy & Environment Legal Institute (E&E Legal) filed a Petition for Certiorari with the United States Supreme Court regarding the suit E&E Legal brought against the State of Colorado concerning the constitutionality of its Renewable Energy Standards (RES). E&E Legal has now asked the U.S. Supreme Court to review this case and explain once and for all when and why extraterritorial regulation is unconstitutional The case is titled Energy & Environment Legal Institute, et al. v. Joshua Epel.

In April, 2011, E&E Legal sued the State of Colorado due to the unconstitutionality of the state's renewable energy standard. As the case was working its way through the 10th Circuit, the Colorado legislature rushed to amend the law in an attempt to fix the most blatant unconstitutional provisions. They did not, however, cure all the problems.

Dr. David W. Schnare, lead attorney and E&E Legal's General Counsel, noted at the time the Colorado legislature attempted to correct the RES, "This bill appears to remove some but not all of the unconstitutional elements of the statute. However, it also mandates new unconstitutional requirements by increasing the renewables standard to levels that, that like the current statute, cannot be justified when balanced against the harm they cause to interstate commerce."

Specifically, the Legislature kept the sections that authorized Colorado to tell electric generating companies what means they had to use to sell "renewable" energy into Colorado, including companies that operated in other states and in some cases where the electricity they made did not and could not even reach Colorado. This is known as "extraterritorial regulation" and is prohibited under the Constitution.

Colorado is not alone in its efforts to tell other states how to regulate. California has the hubris to tell egg producers in Iowa what size chicken pens have to be. They have also told Canada how to make goose liver. Indeed, there is a growing effort for states to try to export their regulations onto other states.

As Schnare explained, "A state may not project its legislation into other states and may not control conduct beyond the boundaries of the State."

While this is the apparent law of the land, the U.S. Court of Appeals for the Tenth Circuit has attempted to restrict this law only to state statutes that control prices or require out-of-state businesses to affirm what their prices will be.

Added Schnare, "There's a split in the Circuit Courts of Appeal. Some, like the 9th and 10th circuits, apply the law narrowly. Others, like the 2nd, 4th, 6th and 7th don't restrict the law only to price control cases."

The major mistake the 10th circuit made was to presume the extraterritorial regulation issue is one rising exclusively out of the Commerce Clause. It is not. The fundamental structure of the Constitution as well as the Full Faith and Credit, the Due process and the Commerce clauses all play a part in prohibiting extraterritorial regulation. E&E Legal is asking the Supreme Court to take this case to clarify this fundamental aspect of our union of states.

E&E Legal has been informed that it can expect several organizations to file amicus briefs in their support.

Colorado's renewable RES is extremely vulnerable to legal challenge. In 2001 the National Association of Utility Regulatory Commissioners produced a report that stated, "Some states have limited renewable resource eligibility to production from generation facilities located within the state. Absent a significant change in Supreme Court application of the Commerce Clause of the U.S. Constitution, the restriction to instate generation will, if challenged, be found unconstitutional… The exclusion of out-of-state generation is sufficiently similar to court precedents to expect invalidation. . ."

When the suit was brought in Colorado, its legislature took up a bill that sought – unsuccessfully – to alter their original RES to address some of the constitutional concerns raised by E&E Legal suit. This attempted "fix" is a clear admission by the state that their RES is unconstitutional, and they are telling all states that have similar statutes that they are vulnerable to legal challenge, and will have to change their laws to remove preferences for in-state producers.

If the Supreme Court finds in favor of E&E Legal, this will have a tremendous impact on the other 29 states with similar RES laws. States will then be required to reopen their RES policies, and provide an opportunity to rewrite the law in a way that make sound environmental, economic, and energy sense. Ultimately, prevailing in this case will force states to convert their laws into voluntary programs and otherwise force consideration of renewable energy mandates be taken up only by the Federal legislature.

The renewable energy standards are part of a larger war on fossil fuels, putting the interests of the natural gas industry at the center of this litigation. E&E Legal is taking this action because the facts show that reliance on fossil fuels not only offers the lowest cost, highest quality power, but actually produces less air pollution because when wind is on the grid, coal and natural gas plants must operate in an inefficient way causing them to generate more emissions than otherwise. ❐

Reforming Virginia's Freedom of Information Act

by Matthew Hardin, FME Law Counsel

In 2014, the United States Supreme Court held that Virginia's Freedom of Information Act - which applies to all state and local government agencies in the Commonwealth of Virginia - could exclude non-citizens of Virginia without violating the federal Constitution. Thus, Americans who do not reside in Virginia have no access to Virginia's public records at all.

In 2015 the Virginia Supreme Court struck another blow to transparency in the Commonwealth, holding in Department of Corrections v. Surovell that there is no duty under Virginia law to produce redacted records to the citizenry when only part of a document is exempt from production under the law. Thus, even Virginians will now be denied access to public records if even one word of those records is protected by any of the law's dozens of exemptions. If a one-hundred page document has one sentence with allegedly private information in it, a Virginia agency can now withhold the entire record, rather than releasing the nonexempt pages.

Even worse, agencies in Virginia have engaged in a routine practice of demanding fees before even attempting to search for responsive records under Virginia's Freedom of Information Act. Time and time again, E&E Legal and other requesters have been told that they must pay hundreds or even thousands of dollars before a Virginia agency or government official will determine whether or how many records they hold, let alone produce those records.

In an environment where the state and federal courts, as well as politicians and bureaucrats at all levels of state government have consistently erected barriers to transparency, it has become clear that the time for reform has come. Virginia has one of the country's most dysfunctional open records laws, and change is very clearly in order. Luckily, the losing requester in the Surovell case was also a delegate in the Virginia General Assembly, so many observers are optimistic the Virginia legislature will finally pass a comprehensive reform bill.

Where should the legislature begin? Luckily, we now have several examples of what works and what doesn't, both in other states and at the federal level.

Numerous states have open records laws that allow "any person" or even "any requester" to look at government records. Under these laws, E&E has been able to gather information in Kentucky, Arizona, New York, and California. Not only do laws that allow anybody to take a look at public records benefit the cause of transparency in general, and allow a robust discussion of policy alternatives, but such laws also benefit the citizenry in the individual states. Groups like E&E are able to publicize records on a much larger scale than many individual citizens can, and can ensure that more members of the public see those records than otherwise would. The time is right for Virginia to amend its Freedom of Information Act to ensure any individual, or even any non-profit group, may request and receive records in the Commonwealth.

Other states, as well as the federal government, also routinely redact records which contain both exempt and non-exempt information. In fact, that majority of the litigation under the federal Freedom of Information Act revolves around whether redactions have been properly done, maximizing the public's access to its own records. This was even fairly common practice in Virginia prior to the Surovell decision, and was what the trial court in the Surovell case had ordered prior to being overturned on appeal. While Virginia's Freedom of Information Act was passed after the federal FOIA law, and was clearly modeled upon it, the courts have interpreted the Virginia law much more narrowly, throwing up one barrier after another to citizens who only want access to the records their tax dollars have created. The Virginia legislature must make clear in any serious reform bill that exemptions are not blank checks to withhold documents, but rather narrow exceptions to transparency which can be applied only when other vital interests are at stake. If personal privacy rights must be protected, records should be redacted, not withheld wholesale.

Finally, the legislature must make clear what fees requesters can be charged for access to records under Virginia law. Right now, Virginia law allows agencies to charge a "reasonable" fee for records, but does not define what "reasonable" is, leaving politicians and bureaucrats ample room to abuse the statute. The legislature can fix this by creating fee waiver provisions for non-profits, such as those that already exist under federal law and in a handful of other states. The legislature can also create a fixed fee schedule for copying records.

States across America allow agencies to collect a fixed fee ranging from ten to twenty-five cents per page to copy government records. While far from ideal, a fixed fee schedule eliminates the ability of politicians to arbitrarily decide how rich a citizen must be to access public records. ❐

Energy & Environment Legal Institute asks D.C. Circuit to strike down EPA's "Clean Power Plan"

by Chaim Mandelbaum, FME Law Counsel

On October 29, The Energy & Environment Legal Institute filed two petitions in the D.C. U.S. Court of Appeals. These petitions asked the court to review the two key prongs of EPA's "Clean Power Plan (CPP)", a plan which will do little if anything to help the environment, but will do a great deal to harm the American economy and its workers.

On August 3rd, EPA issued its CPP, which imposed an emissions reduction goal for each state. EPA has forced each state to develop their plan to get emissions carbon reductions to 32% below 2005 levels by 2030 or else face the prospect of the EPA imposing its own draconian plan on them. States have only until September 2016 to submit initial plans to EPA and September 2018 to have them finalized and approved by the agency.

Despite these early deadlines, EPA held off publishing the rule in the Federal Register, as it is required to do under the Clean Air Act, until October 23, 2015. Publication in the Federal Register opened the period when groups like E&E Legal could seek court review of these rules. As published in the Federal Register the CPP has two major prongs.

The first deals with existing power plans called the "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule." It was published in the Federal Register at 80 Fed. Reg. 64661 (10/23/15). The second addresses any new power plants that are to be built. Called "Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources — Electric Utility Generating Units," it was published in the Federal Register at 80 Fed. Reg. 64509 (10/23/15).

Once these rules were finally published, many parties rushed to challenge the EPA's plan. The Clean Air Act creates a 60 day window during which the D.C. Circuit Court may be petitioned to review a new rule promulgated under the Act. On the first day this period opened, more than 18 petitions, representing over 100 petitioners, including 24 state governments, were filed against the first prong of the EPA's plan, which deals with existing power plans. In addition to states, these rules were challenged by industry, utilities that would have to operate under these rules, unions whose workers would be harmed by these rules, and non-profits.

As the number of challengers grew to 26 states and over 126 petitioners in 25 petitions for review filed with the Court, the Circuit moved to consolidate the petitions. This unified all petitioners into a single case, making it easier for the Court to manage, and to allow petitioners to work together to avoid duplication of work. E&E Legal, whose petition was filed in Energy and Environment Legal Institute v. Environmental Protection Agency, No. 15-1398 was consolidated with other petitioners under the first case filed, State of West Virginia v. U.S. EPA, No. 15-1363.

One of the first things the petitioners did was ask the Court to issue an injunction to stay the rule from taking effect. Nine motions for a stay were filed, while E&E Legal filed a Response in Support of the Stay Motions. The D.C. Circuit considers four factors when considering whether to grant a stay of an agency's rule, which are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Court grants the stay; and (4) the public interest in granting the stay. E&E Legal's filing focused on the likelihood that those seeking to have the Court reject the rule would prevail by the end of the case.

The different petitioners raised several arguments as to why the stay should be granted, which foreshadow the legal arguments that will be made throughout the case and include:

- *EPA exceed its power under Section 111(d) of the Clean Air Act by going beyond improving efficiency at individual existing power plants to attempting to regulate each State's energy generation mix;*
- *EPA isn't permitted to impose standards more stringent on existing power plants than it is attempting to impose on new plants;*
- *EPA cannot promulgate rules under Section 111(d) of the Clean Air Act on power plants which are already regulated under Section 112 of the Act, which coal power plants are;*
- *EPA is seeking to invade areas which are traditionally and constitutionally left to the authority of the states;*
- *EPA, when calculating the best system of emissions reduction, can't include facilities or activities that go beyond the fence line of the actual source of the emissions; and*
- *The rule engages in unconstitutional "commandeering " of state officials and state policy in order to carry out federal objectives and thus violates the Tenth Amendment.*

E&E Legal's Response in Support of the Stay Motions focused on a different issue. As a result of the FOIA litigation E&E Legal has engaged in with the EPA and other federal agencies, it has obtained numerous documents showing the development of the CPP. In particular, these documents show a heavy role outside green groups played in crafting a rule that was designed to kill existing coal plants and prevent new ones from being built.

These emails were never publicly revealed nor were they placed in the administrative record when the EPA opened the rule for public comments. Yet these ex parte contacts between EPA officials, many of whom used to work for green groups, and these activists, changed the rules nature and resulted in the rule that was issued. As E&E Legal explained in its filing, the failure of the agency to proper docket its outside contacts and the failure to properly place so many critical documents in the administrative record violates the Administrative Procedures Act which governs agency rulemaking. At a minimum the EPA should have to withdraw the rule and reopen it for public comments, with the public able to see the full scope of how the rule came into being given how tainted the rule has become.

These cases are at the beginning of a very long process. EPA, and the Respondent-Intervenors, which include 18 states, some cities and industry groups that support the rule, will have a chance to respond to the motions for the stay. The Circuit Court will order more expansive briefings on the various legal and factual issues in contest in the case. The D.C. Circuit is unlikely to resolve this until late 2016 or even 2017, after the next U.S. elections. And of course whatever the outcome there, it seems likely that a case that has pitted 44 states against each other and deals with one of the most contentious issues of the day will end up before the Supreme Court. ❐

Energy Poverty Video (Cont.)

turns morality on its head, and the public needs to know what, it seems, many advisers are apparently unwilling to let on. The evidence is clear and continued ignorance of the truth should no longer be tolerated, whether by the faithful being exhorted to lend their churches to this cause, or those who are moved by emotional, yet unsupportable appeals to change the climate or help the poor.

E&E Legal Senior Fellow Chris Horner notes, "In no rational world does social justice mean killing seniors and the poor in the name of a political cause; it is only worse that this cause is in the name of 'climate' when there is an actual consensus that these policies will have no impact on the climate. However, it is truly offensive to promote it in the name of the most vulnerable, who are the policies' principal victims."

Headlines in newspapers of all stripes, left-wing groups and social service organizations cry out about the "scandal" of these many premature deaths. Unlike computer-prophesied scenarios of the future, these deaths are real, they are occurring now and they are dramatically increasing. They are a direct, disgraceful result of government policies in the name of a fashionable cause that we know cannot rationally be what it purports to be, given these policies have no projected climate impact.

We do know these policies and EPA's imminent contribution will kill more of those in whose name the rules are now promoted. These terrible costs must spread no further, and instead it is time to roll the cruel ideological agenda back. Telling the truth about this agenda's impacts is an overdue, important first step.

E&E Legal has also made versions of its videos available for Poles, whose government has indicated it can no longer bear these all-pain, no-gain policies, and the French. In December, France will host the talks at which President Obama will agree to a new treaty — which he once again insists is not a treaty, to avoid the Senate having its say — replacing the failed Kyoto Protocol. Kyoto, of course, went nowhere in the U.S. given that President Clinton acknowledged it was a treaty. As with Iran, Mr. Obama is taking no such chances. This does not mean the public and their elected representatives are without a voice in these maters. Congress must block EPA's rules and demand a Senate vote on the upcoming Paris treaty.

E&E Legal Executive Director Craig Richardson, who authored an article in June responding to the release of Pope Francis' 'climate change' encyclical, concludes, "As a practicing Catholic, I find it impossible to reconcile the policies advocated by Pope Francis in *Laudato Si*, which have had such a devastating impact on Europe's most vulnerable, and he and the Catholic Church's longstanding commitment to the world's poor and most marginalized. It is my hope that Pope Francis and other religious leaders will rethink their approach, recognize that providing affordable, reliable energy sources is the most effective way of lifting the poor out of poverty, and understand that these failed 'climate' policies they espouse are clearly not the answer, in fact they're the problem." ❐

E&E Legal Hosts First Annual Gala

Neil Chatterjee, U.S. Senate Majority Leader Mitch McConnell's senior energy aid, updates participants on key issues expected before Congress adjourns for the year.

On the evening of October 27, sixty friends and associates gathered at the Reserve Officers Association, which is located directly across the street from the U.S. Senate office buildings for E&E Legal's First Annual Gala. The event, which was emceed by Craig Richardson, E&E Legal's Executive Director, served as an opportunity to showcase the work the group has done as well as to raise money for the organization.

Neil Chatterjee, Majority Leader Mitch McConnell's point person on energy issues, provided an overview of the state of affairs in energy and environment issues. He reiterated Senator McConnell's steadfast opposition to the clean power plan, and the attempt by the Left in this country to destroy coal as an industry, which has ravished his home state of Kentucky.

Using documents obtained through FOIA requests, E&E Legal's Senior Legal Fellow Chris Horner walked participants through the blatant and overt collusion that has occurred between the Leftist green groups and senior EPA officials to write some of the most draconian regulations ever formulated at the federal level. E&E Legal's General Counsel, David Schnare, gave an update on the group's petition litigation activities. This includes E&E Legal's Colorado suit against their Renewable Energy Standard (RES), which has now reached the U.S. Supreme Court, and could significantly impact the 29 other states who have similar RES legislation as Colorado.

E&E Legal's General Counsel David Schare provides an overview on petition litigation successes.

E&E Legal Joins Others Seeking a Stay of EPA's GHG

On November 5th, The Energy & Environment Legal Institute (E&E Legal), joined numerous other petitioners – including 26 states, the Chamber of Commerce, the National Rural Electric Cooperative Association, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, and utilities – in support of a stay of EPA's rules regulating greenhouse gases (GHG).

The petition, which was filed in the U.S. Court of Appeals for the D.C. Circuit, argues EPA's "transformative" greenhouse gas (GHG) regulations" warrant a stay to mitigate the harms they are already causing. Litigation under the Freedom of Information Act (FOIA) has revealed more damning and highly relevant facts regarding the rules' harms and also their unlawful promulgation.

"These new facts are strikingly similar to, yet more egregious and extend to higher levels within the Agency than, the corruption in EPA's veto of the Pebble Mine permit detailed in recent months by the Wall Street Journal," said Chris Horner, lead attorney and E&E Legal's Senior Legal Fellow. "Collusion with green groups is the hallmark of this EPA; here it affirms these rules were plainly created clearly outside of the law, and warrant an immediate stay."

EPA's GHG rules, of course, are in fulfillment of then-candidate Obama's vow to "bankrupt" anyone who builds a coal-fired power plant. These rules have already caused numerous plants to be shelved, which plans could be revived if EPA failed to craft a sufficiently strict rule. This is according to an email and XLS spreadsheet attachment sent by Sierra Club lobbyist John Coequyt to a senior EPA official and former Natural Resources Defense Council (NRDC) lawyer, Michael Goo. Specifically, this e-mail from Coequyt, whose subject line says, "Zombies," states: "Attached is a list of plants which the companies said which were shelved because of uncertainity around GHG regulations. If a standard is set that these plants could meet, there is no small chance that the company could decide to revive the proposal."

Reminiscent of the Pebble scandal, Michael Goo — cited by the New York Times as among the "NRDC mafia" which made its way into government — was tasked with drafting EPA's Options Memo.

Also reminiscent of the Pebble scandal, the green group lobbyists and EPA official in question used the official's non-official email account for their most damning correspondence in developing EPA's rules.

In the internal Sierra spreadsheet's "comments: for review and deletion" section, the group privately acknowledges that the prospect of these rules had already led to the shelving of 16 advanced coal-fired plants in 13 states, although "there is not a small chance that they [sic] company could decide to revive the proposal" if the rules were not sufficiently tight. In turn, and again recalling the Pebble Mine scandal, Goo turned to his private Yahoo email account to send draft "new source" Options language to Coequyt. All during the time that this was supposedly a purely internal EPA process.

As with former Secretary of State Clinton, Mr. Goo kept these emails hidden on his private account for nearly two and a half years, and they only came to light thanks to a FOIA suit. Among the correspondence is an email from Coequyt stating, "Attached is a memo that I didn't want to send in public" (hence Yahoo). That memo created a map regarding existing sources, explaining the mechanics and concluding, "EPA can therefore establish a performance standard for existing plants that is not achievable." EPA has done just that.

Also at key moments in the rules' timeline, NRDC officials David Hawkins and Dan Lashof (the latter now working for Tom Steyer's climate advocacy empire) used Goo's Yahoo account to provide internal NRDC analyses regarding what standards EPA might impose.

These documents show the harms that EPA's rules are already causing despite public claims to the contrary; indeed, some of the emails discuss and show implementation of the joint strategy advancing these public denials. Of course, they also show the rules were developed unlawfully, further increasing the chance for success in court, a key factor in determining whether to grant a stay. EPA's rules should be stopped in their tracks until the D.C. Circuit rules on such merits.

"This pattern of conducting official business in secret and outside of the legal parameters is unfortunately a hallmark of this Administration," said E&E Legal Executive Director Craig Richardson. "Green groups led by the Sierra Club and NRDC set up shop at the EPA, even before Obama took office, with a plan to eliminate the U.S.'s most abundant source of electricity, coal-fired power plants." ❐

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.

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