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Supreme Court Halts Obama 'Clean Power Plan'



by Chaim Mandelbaum, Litigation Manager

On February 9th, 2016 the Supreme Court of the United States issued a stay halting implementation of the Environmental Protection Agency regulations that would lead to the end of coal plants in the United States. The Court in, a 5-4 decision, ordered the EPA rule "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" stayed while the legal case against it proceeds in the lower court. It was one of the final acts of Justice Antonin Scalia's long and distinguished career, as he died the following Saturday.

As we noted in the last edition of E&E Legal Letters, on October 29, 2015, The Energy & Environment Legal Institute (E&E Legal) filed petitions against this EPA regulation, and another regulation limiting new coal power, which together make up the Obama 'Clean Power Plan'.

E&E Legal acted to oppose these burdensome new restrictions alongside 27 states and 126 other petitioners from across the spectrum, including utilities, unions, and public policy groups. Those opposing the regulation asked the United States Court of Appeals for the District of Columbia to halt the implementation of the rule while the cases against it move forward in the Court. Such a halt was vital since the EPA had imposed swift deadlines on the states to begin coming up with plans for putting this rule into effect. Even though the EPA didn't finalize and publish the rule until October of 2015, it required states to begin submitting plans to it by September of 2016. States that failed to submit a plan, or didn't receive an extension approved by the EPA faced the risk that the EPA itself would impose a 'federal plan' upon the state, forcing energy producers in the state to conform to whatever rules EPA chooses to impose on them.

The challengers to the rule also asked the Court to grant us an expedited hearing on the rule. This meant that the timetable for filing briefs and arguments on the rule would be compressed so that a deci-

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Activists Aim to Silence Critics with Laws



E&E General Counsel David Schnare attended a conference where 'climate' activists laid out a strategy to use the legal system to silence those who dare to question their science or policies.

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Matt Hardin discusses an alarming trend he's seeing with agencies granting FOIA requests: delay, delay, delay. This goes against the law and certainly the spirit of transparency laws.

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Tanton Discusses Net Metering in AZ



E&E Legal's Tom Tanton, who has spent a career working in CA energy policy, discusses net metering proposals in AZ. Net metering costs should not be passed along to non-solar customers, he explains.

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Mader Joins E&E Legal Board



At its January Annual Meeting, the E&E Legal Board of Directors voted to add Kelly F. Mader to the Board. Mader is a former state representative and state senator from Wyoming, and brings a wealth of energy and environment experience to the organization.

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Combating Climate Change in the Courts

by David W. Schnare

E&E Legal General Counsel



On February 10th, the American Constitution Society for Law and Policy (“ACS”) hosted a panel discussion on legal approaches and activities associated with “combating” climate change through legal action. Topics covered were RICO prosecutions, climate torts and the Supreme Court’s stay of the Clean Power Plan. The session was organized and moderated by Lisa Heinzerling, the attorney who was brought into EPA to manage the legal analysis of how to extend the agency’s powers beyond the limits of the Clean Air Act in order to implement the environmental activists’ climate agenda, and who had previously won the Massachusetts v. EPA case enabling EPA to regulate carbon dioxide. The discussion panel consisted of Richard E. Ayres, Founding Partner, Ayres Law Group, LLP; Co-Founder, Natural Resources Defense Council; Sharon Eubanks, Partner, Bordas & Bordas, PLLC; lead counsel for the United States in United States v. Phillip Morris, et al. (the RICO tobacco case); Matthew F. Pawa, President, Pawa Law Group, P.C., who has failed repeatedly in his civil climate change tort claims against hydrocarbon companies; and the obligatory “other side of the argument” panelist, Roger R. Martella, Jr., Partner, Sidley Austin, LLP; former General Counsel, Environmental Protection Agency and representing parties opposing EPA’s Clean Power Plan. In addition, Senator Sheldon Whitehouse (D-RI) offered remarks.

The session was instructive, even if not in the manner intended by Heinzerling. Before getting to

specifics, however, it pays to understand the forum’s setting. The ACS is a very liberal association of legal progressives. It is a young group and its purposes are two-fold – to create the next generation of progressive attorneys and to create a national network useful in influencing judges nationwide. They sponsor over 1,000 sessions a year pushing their agenda. In their own words, they are “debunking conservative buzzwords such as “originalism” and “strict construction” that use neutral-sounding language but all too often lead to conservative policy outcomes.”

The audience was also equally progressive (like attracts like), consisting of about 60 folks, young and old, representing a diversity from the Union of Concerned Scientists to the Natural Resources Defense Council. The event was covered by Reuters and *InsideEPA*.

Although last to speak, the keynote message was offered by Senator Whitehouse. He supports a federal RICO investigation and prosecution of “deniers.” His was a political screed based exclusively on a presumption of a scientific consensus that humans are causing climate change through the use of hydrocarbons. He believes the tobacco RICO case is the “roadmap” for prosecuting deniers and looks forward to the day when the CEOs of the coal, petrochemical and electric power industry are marched before the Senate to confess their crimes. Notably, he took no questions, probably because there were some in the audience that had pushed back against the regular panel and he didn’t want to be confronted by them. The take-away from his comments is that he continues to tout the same broken record on climate and RICO, making him no more than a cheerleader without a portfolio to force any kind of litigation against “deniers.”

Sharon Eubanks was the first to speak and offered the most useful

content. She began with the unfounded assertion that RICO could be applied to hydrocarbon companies and anyone who received grant support from them, agreed with them on the issues, or denied anthropogenic climate change or anthropogenic global warming (“ACC” or “AGW”). She later admitted the facts necessary to bring a claim were not in hand and that the Department of Justice was unlikely to undertake a RICO investigation, something RICO authorizes DOJ to do before filing a complaint.

She laid out the essential requirements of a RICO case, and in that, she was instructive. First, she explained that any person, formal or informal association, corporation or the like that has a “pattern of conspiracy” shown to participate in “any association in fact” would be subject to a RICO prosecution. If an organization received funds from Exxon to examine and discuss climate change, everyone in that organization would be subject to RICO, as would the beer buddies who discussed the issue over lunch and later went on to offer their personal opinions on the subject that were “denier” in nature, even if the beer buddies didn’t receive any of the grant and were simply using their first amendment right to free speech. Sort of chilling, isn’t it.

Second, to prosecute a RICO claim, there has to be a predicate criminal act. In a civil RICO case, however, this act need not be proven beyond a reasonable doubt, but only by a fair preponderance of the evidence. The typical predicate criminal acts are mail fraud and wire fraud. The scheme to defraud must be shown, but can be as simple as a denial of ACC that allowed the company to make greater profits than if they had admitted their product would cause an end to civilization as we know it. Two or more emails that carry out that scheme are a sufficient pattern of conspiracy to support a RICO prosecution. Any email that

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Justice Delayed Is Justice Denied

by Matthew Hardin, FME Law Counsel



There's an old legal maxim that justice delayed is justice denied. In E&E Legal's recent efforts to promote transparency and accountability, we have found that maxim rings true in the context of the Freedom of Information Act, as politicians and bureaucrats delay releasing records to which the public is entitled. While federal law dictates that most FOIA requests must be fulfilled within twenty days, E&E Legal routinely encounters agencies that delay complying with the law for months - or even years - on end.

In ongoing litigation with the State Department regarding a FOIA request E&E Legal submitted in early 2015 (yes, the same agency that is dealing with former Secretary of State Hillary Clinton's e-mails), the government continues to release dozens of records on a monthly basis, with no end in sight. The request related to records generated by State Department employees in anticipation of the administration's involvement in the Paris climate talks late last year.

Remarkably, the State Department has not even estimated when it expects to complete production of the remaining records regarding an issue the same agency declares is the greatest threat facing the world today. While the State Department, like many other agencies, blames overwork and limited staff for the delay, the delay itself hampered the public's ability to participate meaningfully in the debate about climate change and the negotiations in Paris. If the delay continues, as seems likely, the administration may be able to ensure that the public remains in the dark about how it conducted its "climate diplomacy" until the next president takes office, which is precisely what their cynical strategy appears to be.

Unfortunately, the State

Department is not the only federal agency that delays in releasing records which shed light on the actions of the government. In July of 2014, E&E Legal submitted a request to the U.S. Geological survey, which related to records generated by their employees in correspondence carried on behind the scenes with various environmental groups. The Geological Survey didn't provide responsive documents until November of 2015, and even then, extensively redacted the records it provided. E&E Legal appealed these withholdings to the Solicitor General of the Department of the Interior, who has jurisdiction over the Geological Survey. Remarkably, as of this writing in February 2016, the Solicitor General still has not ruled on E&E Legal's appeal. E&E Legal continues to fight for these records nearly two years after initially requesting them.

At the state level, E&E Legal has noticed this same troubling trend. Wyoming is among the worst offenders: there, E&E Legal submitted a request for records under state law in June of 2015. As of this writing, Wyoming has yet to provide either the records we requested, or any estimate for when those records will become available. The records at issue in that request related to self-bonding requirements for various mining operations. Since the records request was filed, one mining operation has already been forced into bankruptcy, with media reports citing Wyoming's bonding requirements as among the causes.

Another example of delays at the state level frustrating the public's right to educate itself about the operations of government can be found in Illinois. There, E&E Legal filed a request for records held by the Governor's Office. After the Governor's Office denied the request in part, E&E Legal filed an administrative appeal with the Public Access Counselor. The Governor's Office missed its deadline to respond to E&E

Legal's appeal by several weeks, and E&E Legal still awaits a final decision regarding whether more records will be released.

In another disturbing trend, E&E Legal has noticed officials in at least two states failed to produce records under the relevant provisions of state sunshine laws, only later to provide records when E&E Legal produced a subpoena for those same records. While penalties for failure to comply with state open records laws are sometimes lax or difficult to enforce, subpoenas carry the full power of the court to compel compliance. In Kentucky, E&E Legal obtained several hundred pages of records after a subpoena was issued. E&E Legal recently obtained a similar result in ongoing litigation in Virginia, although those records remain sealed until a judge can review them for release to the public.

A disturbing trend in all of these cases is the willingness of bureaucrats to use delay to frustrate the law. While records will eventually be provided - often after E&E Legal and its team of attorneys has spent precious time on litigation, the records are provided too late to impact the public debate. Backed with substantial legal resources, many agencies appear to be thumbing their noses at legitimate records requests.

Records that the public could have used to decide whether this administration was protecting American interests in the Paris climate talks will now be released only months or even years after those talks have concluded. Records that Wyoming citizens could have used to decide whether the state was fairly enforcing its mining laws will now be released only after at least one company has been forced into bankruptcy, with hundreds of workers added to the unemployment rolls. If transparency laws are to be effective in empowering the public, government must release those records quickly enough for the public to have a say in crucial decisions, and not sit on them. □

E&E Legal Expert Recommends Net Metering Reform Tactics

Featuring Tom Tanton, E&E Legal's Director Of Science and Technology Assessment
As Appearing in the *Arizona Business Journal*



In the midst of the controversy over Arizona's net metering policy, one expert at the Energy and Environment Legal Institute (E&E

Legal) suggests several policy reform strategies.

"Costs that are incurred by the grid and (non-solar) customers due to net metering should not be passed on to non-solar customers," Tom Tanton, director of Science and Technology Assessment at E&E Legal, told *Arizona Business Daily* recently. "Those costs should, however, be netted out with any grid benefits — e.g. less distribution costs if they occur. In other words, neither group should subsidize the other."

Specifically, net metering allows solar customers to receive a "credit" for the electricity they send to the grid in excess of what they use. The electricity is measured by a meter installed at their homes.

Because solar customers are still using the grid that is maintained by the utilities, some stakeholders and industry watchers contend that net metering can distort balanced

markets because it is a "subsidy" paid to users of solar energy.

In turn, utilities — along with consumers and businesses — oppose footing the bill for their neighbors' use of the grid for their solar panels.

The Tucson Electric Power and Arizona Public Service Co. (APS) have proposed new ways to reimburse net metered customers that would see them collect more in fees from rooftop solar owners to compensate for grid expenses.

The utilities want to implement the changes without going through a full rate review. The Arizona Corporation Commission (ACC) is currently trying to work on a compromise between the solar industry and the utilities.

In fact, earlier this month ACC authorized APS to develop a pilot program to evaluate residential-level energy storage. APS also must propose a program for using energy storage.

The forthcoming study is aimed at exploring technologies that would aid in the management of customer demand, shift load and meeting system requirements, according to the ACC, which said that while data collection will continue through 2017, APS is slated to submit initial reports on benefits and costs by October.

Tanton, in the report "Reforming Net Metering: Providing a Bright

and Equitable Future," written for the American Legislative Exchange Council (ALEC), says that net metering forces utilities to buy a wholesale product at retail prices.

The problems aren't energy or distributed generation, but rather the cost shifting and subsidies.

"The major reform would be to price sale-back at the appropriate rate accounting for wholesale prices minus (transmission and distribution), but corrected for (transmission and distribution) benefits," Tanton said. "Time of use/generation pricing would provide for more accurate pricing and recognize the time-value of generation."

Further, he said that policies should recognize that both benefits and costs vary depending on aggregate amounts with early adopters providing a better net benefit, "albeit not necessarily positive."

Finally, "net metered customers should generally not be allowed to pancake financial incentives such as state and federal tax credits with net metering rates, as the social benefits would be paid for twice," Tanton said.

"Another thought is somehow there should be correction for the sometimes deceptive leasing practices of third parties, who end up with liens on peoples' homes, making it difficult to sell and relocate, especially for elderly," he said. □

Kelly Mader Joins the Board



At its Annual meeting in January, the E&E Legal Board of Directors voted Kelly F. Mader to the Board.

Mader has a long and distinguished energy and environment policy career, including serving as a Wyoming state senator from 1984-1991, and in the Wyoming State Legislature from 1982-1984. As a State Senator, Mader chaired the Senate

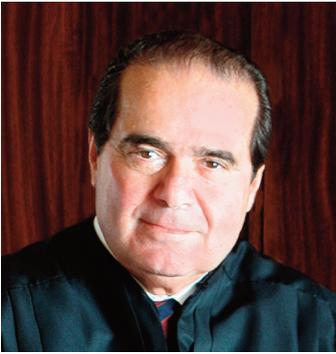
Appropriations Committee from 1989-1991.

Mader is currently the President of the Energy Policy Network (EPN), a 501 (c) (4) national advocacy organization that works with local, state, and national thought leaders to develop energy and environmental policies that balance environmental values, business needs, and consumer interest. Prior to joining EPN, Mader was Vice President of State Government Relations for Peabody Energy for more than a decade, General Manager for Government Affairs

for Rio Tinto/Kennecott Energy Company, and headed his own Denver-based energy and environment policy group.

In 2011, Mader chaired the Southern States Energy Council Associates Board, from 2004-2008 he chaired the American Legislative Exchange Council (ALEC) Natural Resources Task Force, and he chaired the NextGen Energy Council from 2007-2008. His educational affiliations include Texas A&M University, Bob Jones University, and American Institute in Jerusalem, Israel. □

Supreme Court Stay (Cont.)



sion could be reached more quickly. On January 21, 2016 the D.C. Circuit denied the request for the stay of the rule. It did, however, grant the expedited schedule for the case. The court ordered that oral argument are to be held on June 2nd, 2016.

The challengers to the rule recognized that without the stay, the EPA would continue to press states and utilities to implement this destructive rule at considerable cost. The development of electrical generation facilities and transmission infrastructure takes years of planning and billions of dollars. EPA wants to ensure that those involved committed now to the much more expensive type of plans it wanted to see. That way, no matter the eventual outcome of the case, many companies would be too deeply entrenched in the EPA plan to make any changes. Thus, the challengers chose to apply to the Supreme Court for a stay of the EPA rule.

Five different applications for a stay were sought, two by groups of states, and three by private parties, including one by E&E Legal alongside energy companies and trade associations. Many legal experts across the political spectrum considered the application to the Supreme Court a long-shot, as the D.C. Circuit had decided that the situation didn't meet the "stringent requirements for a stay pending court review."

Chief Justice Roberts, who oversees such applications when they come from the D.C. Circuit, received the stay applications. He gave the Federal Government a week to

respond to the requests. The requests explained why the stay was necessary, showed why the rule was faulty, and why the government was unlikely to prevail. The applications also showed the considerable harms the rule was already imposing, including money that would be wasted if the rule was struck down and the power plants that would have to be closed while the rule was in effect, and thus, might never be reopened even after the courts struck the rule down.

In considering such stay applications, the Court examines four factors. These 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. A high threshold to meet, which underscores the extraordinary action of the highest Court, as well as a recognition of the extensive damage the Clean Power Plan can do if it's allowed to proceed as the EPA desires.

The government claimed that such a stay while the rule was under review was virtually unprecedented and that the Court should not get involved. Yet, in the end, the Supreme Court disagreed. Chief Justice Roberts had the option of deciding the case for himself, or referring the case to the entire Court. He chose to allow the entire Court to weigh in, and ultimately the Court, in an Order, on which the four liberal justices dissented, backed the challengers and granted the stay. Indeed, the Court granted an extremely potent stay, one stronger than the typical stay of an administrative rule. A stay issued by a court usually lasts until a decision on the merits is reached. On the "Clean Power Plan" rule it is the D.C. Circuit which will first decide whether the EPA's rule is legal. Ordinarily the Circuit would either agree with chal-

lengers and strike down the rule, or else reject the challenge and uphold the rule. If it upheld the EPA's rule, then any stay of the rule would dissolve and the regulation would go into effect.

However that will not happen in this action. The Supreme Court went beyond the eventual decision of the D.C. Circuit. It ordered that the regulation be stayed until the D.C. Circuit issued a decision AND any appeal to the Supreme Court itself was dealt with. Thus, even if the rule is upheld by the D.C. Circuit, challengers including E&E Legal, will have the chance to appeal to the Supreme Court, knowing that the EPA cannot begin enforcing the regulation until the Court decides whether to accept the appeal, and if so, rules on it.

As the case against the EPA's plan moves forward, challengers have already filed their opening briefs with the D.C. Circuit. The EPA and those who side with it will have a chance to respond and challengers will be able to reply. Oral arguments will then occur in the beginning of June. A decision in the case isn't likely from the Circuit until the late summer of 2016 at the earliest. What follows from there will be an almost certain appeal to the Supreme Court. This case has been there already, and with 44 states and hundreds of companies involved in America's critical energy industry lined up on both sides, it is safe to guess that the case will conclude there as well.

This time, however, the Court will have a much different look. The passing of Justice Scalia - a constitutionist who sided with E&E Legal and the other petitioners for a stay - means the court has a vacancy, which has already become mired in politics. The Republicans with their majority in the U.S. Senate are insisting that they will not confirm an Obama appointee, arguing that his successor should have the opportunity given the fact the President is in his final year of office. Time will tell. □

Stifling Debate (Cont.)

supports that scheme (apparently regardless of free speech protections) may be used to include the author of any email as a defendant.

Finally, the remedies vary depending on where one sues. Suing in the United States District Court for the District of Columbia, one only gets injunctive relief in the form of an apology and promise to not do it again. Apparently, the massive cost of defending such a case is penalty enough for the D.C. Circuit. But, in other jurisdictions, RICO remedies are considered forward looking and the defendant may have to disgorge all profits associated with their denial. The money goes to the government. (Yes, this is a tax scheme, not really an effort to remedy environmental harm or corruption.)

After explaining the law, Ms. Eubanks offered a few words about how a prosecution would go forward. Absent clear evidence of fraud, there can be no case filed. DOJ can begin an investigation before filing, but a private citizen cannot. A state can conduct an investigation, and that is what will be done in this case; basically out of the New York AG's offices. That investigation, and case filing, would be followed by an extremely invasive discovery effort. In the tobacco case, the government demanded over 2 billion pages of discovery from the defendants. According to Ms. Eubanks, a single email from a junior employee stating that there is a consensus about AGW and the company is contributing to AGW is sufficient to prove a fraud in the event the company does not admit to causing AGW. This leads to a defense that a junior employee does not speak for the company, but Ms. Eubanks did not discuss that point.

Richard (I created NRDC and am now in private practice making tons of money) Ayres had a simple message. First, he admitted that NRDC and its contemporaries do not have the wherewithal to prosecute such a case. One look at NRDC,

EarthJustice or the Sierra Club's Form 990s shows they have, jointly, more than \$100 million a year in income. Thus, what he is saying is that they just don't want to take the case on. They want a consortium of states to do so. Second, he recognized that all they'd get from winning a RICO case is an order from the court telling deniers to quit denying. That, however, seems to be what he wants. Specifically, he says he wants to change the meme from "is the science in" to "who is telling the truth." He was challenged by the audience, one of whom suggested that to "tell the truth" one first needs to know what "the truth" is, which means that one is back to whether "the science is in." His response was a non-verbal wince.

Matt Pawa spoke to civil tort actions against companies under a negligence theory, "climate change harmed me." He admitted that they had been unsuccessful with these claims in federal court as the courts held that the Clean Air Act preempted the tort claims. He suggested that cases brought in state courts are the obvious next step, but he apparently doesn't realize that the states have their own air pollution statutes that also will preempt a state tort. When asked when the next case will be filed in a state court, and where (a Reuters question), he responded, "Any day now, probably after a hot day or when a tornado hits a town. It is going to happen any day now."

Roger Martella was eventually allowed to speak, and considering the audience, he took a very narrow line, suggesting that past litigation appears to reflect three principles. First, courts are happy to order a government to do something about climate change, but they are unwilling to be specific as to what that should be. This is true both in the U.S. and in Europe. Second, courts are not willing to order decarbonization or energy goals. That is a regulatory matter. They eschew tort claims, finding them preempted by the regulatory schemes. Third, courts don't

want to be triers of facts regarding whether the climate is changing beyond its normal variation or why.

With regard to the SCOTUS stay of the Clean Power Plan, everyone on the panel was surprised at the outcome. Ayers was asked to predict the outcome of the case and stated that the rule would be upheld. Martella, like any sane attorney, refused to predict what SCOTUS would do, but did indicate that obtaining the stay was more than just a surprise. To obtain a stay, the majority of the Court had to reach a conclusion that those opposing the Clean Power Plan would more likely than not prevail on the merits of their claim. That is the high bar the "deniers" had to clear and they did.

And, as a final note, the panel had suggested that there is no legitimate defense argument that climate change litigation is most properly considered a political question. Heinzerling was asked about this since the previous administration was unwilling to issue an endangerment finding and the next administration may well reconsider and reverse the Obama endangerment finding. Her response was that she was 100% certain that no administration would ever overturn the endangerment finding. Of course, she was equally certain SCOTUS would not issue a stay. □

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