



IN THIS ISSUE

E&E Legal Sues EPA for Deck Stacking



On May 13, E&E Legal sued the U.S. Environmental Protection Agency (EPA) for illegal formation of a key science advisory committee. The committee at issue is the EPA's Clean Air Scientific Advisory Committee Particulate Matter Review Panel for 2015-2018.

Page 2

DC Circuit Court Reviews CPP



Chaim Mandelbaum examines the recent D.C. Circuit surprise decision regarding one piece of the 'Obama Clean Power Plan', ordering that the full Circuit Court would hear the case, instead of the three judge panel to which it was originally assigned.

Page 3

GMU Stonewalls CEI for RICO Records



Matt Hardin discusses how E&E Legal isn't the only organization that faces stonewalling when it files Virginia Freedom of Information Act Requests. Recently, our friends at the Competitive Enterprise Institute (CEI) faced the same problems.

Page 4

Grimes Finally Gets Press Credentials



It took E&E Legal Senior Media Fellow Katy Grimes several years, a few FOIA requests, and the engagement of an attorney to finally get her California Capital press credentials.

Page 6

Vermont Records Request Blows AGs Scandal Wide Open

by Craig Richardson, Executive Director



On April 15, E&E Legal publicly released e-mails obtained through a public records request to the Attorney General of Vermont. The e-mails showed that the offices of New York Attorney General Eric Schneiderman (D), and other politically-aligned AGs, secretly teamed up with anti-fossil fuel activists in their investigations against groups whose political speech challenged the global warming policy agenda.

E&E Legal released these emails on the heels of a Wall Street Journal report about a January meeting, in which groups funded by the anti-fossil fuel Rockefeller interests met to urge just this sort of government investigation and litigation against their political opponents. After the Competitive Enterprise Institute (CEI) criticized these AGs' intimidation campaign, the U.S. Virgin Islands' Claude Earl Walker — one of the AGs working with Schnei-

derman — subpoenaed ten years of CEI records relating to the global warming issue.

The e-mail correspondence between Schneiderman's staff, the offices of several state attorneys general, and activists was obtained under Vermont's Public Records Law, and also show Schneiderman's office tried to obscure the involvement of outside activists. His top environmental lawyer encouraged one green group lawyer who briefed the AGs before their March 29 "publicity stunt" press conference with former U.S. Vice President Al Gore not to tell the press about the coordination. At that event the AGs announced they were teaming up to target opponents of the global warming agenda.

David Schnare, E&E Legal's General Counsel, noted, "These emails show Schneiderman's office suggested their outside-activist green allies deceive the press; meanwhile, AGs in his coalition have subpoenaed at least one policy group's correspondence with the media. We call on these AGs to immediately halt their investigation and lay out for the public the full extent of this collusion,

(continued on page 5)

E&E Legal Sues EPA for Stacking 'Independent' Science Panel

by Steve Milloy
Senior Policy Fellow



On May 13, The Energy & Environment Legal Institute (E&E Legal) sued the U.S. Environmental Protection Agency (EPA) for illegal formation of a key science advisory committee. The committee at issue is the EPA's Clean Air Scientific Advisory Committee Particulate Matter Review Panel for 2015-2018 (CASAC PM Panel). E&E Legal filed the lawsuit in the U.S. District Court for the District of Columbia on behalf of its members who include the Western States Trucking Association and Dr. James Enstrom, a Research Fellow and epidemiologist retired from the University of California, Los Angeles.

EPA has stacked the panel, which is required by law to be independent and unbiased, with researchers who have received over \$190 million in discretionary EPA grants. This clearly violates the law and makes a mockery of the notion of 'independent' scientific review.

We are asking the court to prevent the EPA from convening the panel until the panel can be formed in a balanced manner in compliance with applicable laws," said Dr. David Schnare, E&E Legal's General Counsel and a 33-year veteran of the EPA.

The EPA's regulation of ambient airborne fine particulate matter, soot or dust in outdoor air also called "PM2.5" (pronounced Pee-Em-Two-Point-Five"), has been scientifically controversial since the EPA began the process of regulating it in the early 1990s. The EPA claims that any inhalation of PM2.5 can cause death within hours and that PM2.5 in outdoor air kills hundreds of thousands

of Americans every year. Not only has the EPA hidden from public scrutiny for over 20 years key scientific data that its PM2.5 regulation relies on, but also the agency stacks the legally required CASAC panel with EPA-paid researchers.

EPA's claims about the lethality of PM2.5 have been a primary basis for the agency's justification of its air quality standards for particulate matter and ozone, as well as regulations key to the Obama administration's so-called "war on coal", including the: Cross-State Air Pollution Rule, Mercury Air Transport Standard and Clean Power Plan. State implementation of EPA's PM2.5 standards is also quite costly as evidenced by E&E Legal member Western States Trucking Association, whose own members are forced to spend tens of thousands of dollars retrofitting truck engines to comply with California state PM2.5 emissions requirements as mandated by the EPA.

Not only does the EPA pay researchers to produce controversial research that advances its PM2.5 regulatory agenda, but the agency pays the very same researchers to review their own controversial work. Of the 26 members the EPA selected to be on the CASAC PM Panel, 24 of them have been paid or are currently being paid by the EPA a total sum in excess of \$190 million. The EPA's supposedly 'independent' review process is entirely rigged to advance EPA's agenda.

"Both the Clean Air Act and the Federal Advisory Committee Act require that the CASAC PM Panel be independent and unbiased," Schnare said. "We are asking the court to determine that an EPA advisory panel that operates on a consensus basis but that is 90 percent comprised of highly-paid EPA cronies does not meet the requirements of the law," Schnare added.

The EPA process for commissioning and evaluating PM2.5 research has been so rigged and so

biased for so long that many scientists don't even try to get nominated for CASAC panels any more. They've simply given up. A case study of this is E&E Legal member and PM2.5 researcher Jim Enstrom who, in questioning EPA's PM2.5 science, has lost professional opportunities because of the extreme biases of the EPA, CASAC and current and former CASAC panel members. CASAC is a cabal, not an independent committee.

"As the EPA is at the very beginning a new round of review of PM2.5 regulation, as required by the Clean Air Act, our lawsuit is intended to make sure that process is conducted in an independent and unbiased manner as required by the law and expected by the public and Congress," Schnare said.

Joe Rajkovic, with the Western States Trucking Association, noted in a Truck.com article, that it's important to have an impartial committee review the EPA's findings because of the negative financial impact the agency's rulings could have on small-business truckers. "Federal law requires the EPA to run all of its rule-makings through an advisory committee, who is supposed to be an independent committee that weighs the science they are basing their rule-makings on," he said. "What kind of science do you think we will get if most of the independent researchers' financial well-being is dependent on grant money from the EPA?"

Also according to Truck.com, "James E. Enstrom, a retired UCLA epidemiologist, also is a plaintiff in the lawsuit. He published a critical analysis in the peer-reviewed medical journal *Inhalation Toxicology* that failed to support a relationship between PM2.5 and premature deaths in California."

Subsequently, E&E Legal has filed a petition for a temporary restraining order to prevent any action by the panel until the suit is heard. □

Full DC Circuit to Review Obama Power Plan

by Chaim Mandelbaum
FME Law Counsel



On May 16th, 2016, the D.C. Circuit issued a surprise decision in the case regarding one piece of the ‘Obama Clean Power Plan’, ordering that the full Circuit Court would hear the case, instead of the three judge panel to which it was originally assigned to. The case, *West Virginia, et al. v EPA*, of which E&E Legal is a part, challenges the EPA’s “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” rule under section 111(d) of the Clean Air Act, which will decimate coal fired power plants in the US if it goes into effect.

Both sides in the case have already filed briefs, and the oral arguments had been scheduled for June. Now however, oral arguments will occur in late September, 2016. Ordinarily the review of a rule by an executive agency like EPA would be heard by a three judge panel first, and that panel would initially decide the case. The losing party would have the right to appeal, asking the full Circuit Court to have all the active judges hear the case, in what is known as en banc review.

For the Circuit Court to have decided that this case should no longer be reviewed by the panel of judges to which it was assigned, and go straight to the full Circuit instead, is extremely rare. The last time the Circuit issued such an order was in *United States v. Microsoft* which dealt with antitrust allegations made against the technology company. In that case the decision to move directly to en banc review was made more out of practical necessity. Only seven judges were available to hear

to the Microsoft case, due to recusals. The Circuit has eleven active judges, but in that case, four felt they could not participate. Thus it was likely that the decision there to go directly to the full Circuit was made due to how few judges would be available to participate in any full review yet not have been part of the original panel.

No such consideration exists in this case. Of the eleven judges on the Circuit, nine participated in the decision to take the case from the three judge panel and move to the full Court. Two chose to recuse themselves. Judge Garland, who has been nominated for the Supreme Court, has recused himself from all cases this term. In addition Judge Pillard, who was appointed by Obama in 2013, also chose not to take part in the decision. This makes it likely, although not a guarantee, that she will not take part in the actual review of the EPA’s rule. Of the nine judges who will certainly take part in the full Circuit Court’s review of the rule, five were appointed by Democrats while four were appointed by Republican Presidents.

The rarity of such an action by the DC Circuit, combined with the timing, coming only a few weeks before oral arguments were set to take place, suggests that the Circuit has decided this is no ordinary case, despite repeated protestations by EPA that this rule is a “garden-variety administrative law case” that can be dealt with under ordinary administrative law precedents such as the Chevron doctrine, which gives agencies like EPA maximum deference. Instead it is clear the Circuit considers this rule, and the legal questions raised by the unprecedented number of challengers to it, which include 27 states and 126 other petitioners from across the spectrum including utilities, unions, and public policy groups, to be of grave importance.

The move by the DC Circuit will also heighten the chances for the rule to be quickly reviewed by the

Supreme Court. Ordinarily, the losing party in such a case could seek en banc review, and then appeal the decision to the Supreme Court. In this case however, the only step after the Circuit reaches its decision will be review by the highest court in the land. Given that 44 states have become involved on opposing sides of an issue that threatens to transform the entire energy sector of the country, that is likely this case’s final destination.

EPA Denies Petitions for Reconsideration

On May 2nd, 2015 the EPA acted to deny petitions for reconsideration filed by five parties on another part of the ‘Obama Clean Power Plan.’ E&E Legal and others had asked the EPA to reconsider the Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources—Electric Utility Generating Units rule which functionally prevents any new coal-fired power plants from being built. E&E Legal was among the five parties whose petition for reconsideration was denied, alongside the State of Wisconsin, several energy companies, and the Utility Air Regulatory Group.

E&E Legal had petitioned EPA to reconsider this rule in light of the many emails that FOIA requests had uncovered showing improperly close cooperation on the rule between the agency personnel drafting it and outside green groups, especially since none of these emails or any evidence of this close relationship were put into the public record when EPA asked for public comments on the rule. Most of this evidence was buried until after the rule was finalized.

E&E Legal and the other petitioners had filed these petitions for reconsideration at the end of 2015, with E&E Legal’s being filed December 22, 2015. EPA often doesn’t answer such petitions for months or years after they are submitted, making it very unusual that these five

(continued on page 6)

George Mason Stonewalls CEI for Records Re: RICO Efforts

by Matthew Hardin, FME Law Counsel



E&E Legal isn't the only organization that faces stonewalling when it files Virginia Freedom of Information Act Requests. Recently, our friends at the Competitive Enterprise Institute (CEI) faced the same problems.

Back in September 2015, CEI and Chris Horner, senior fellow for both organizations, filed a Virginia Freedom of Information Act request seeking documents at George Mason University (GMU). Specifically, CEI sought records relating to a call by GMU faculty for the Obama administration to prosecute climate "skeptics" under federal racketeering laws.

While GMU claimed it had no records, CEI thereafter received emails sent to and from GMU faculty in response to requests filed in Washington State and Florida. In November, CEI filed suit in Richmond Circuit Court, seeking an order for GMU to conduct a new search and release records generated by its faculty in this campaign to punish climate dissenters. During the legal discovery process, subpoenas served on GMU uncovered thousands of pages of emails relating to the GMU faculty's campaign to seek racketeering charges against those who deviate from the preferred line on climate change.

Remarkably, after these records were uncovered, GMU insisted that they did not relate to the "transaction of public business", and so were not covered by Virginia's open records law. The records were filed with the court under seal, so that a judge could evaluate GMU's claims.

On April 22, Judge Melvin Hughes of the Richmond Circuit Court ruled in CEI's favor on all

counts. The judge ruled that GMU had not conducted an adequate search for records when it first received the request filed by Horner and CEI. He further ruled the records were covered by the Virginia Freedom of Information Act, and should be released to the requesters. Lastly, he ruled that CEI was entitled to recover its attorneys' fees under Virginia law.

Rather than release the emails pursuant to the judge's April 22 order, however, George Mason chose to appeal his decision to the Virginia Supreme Court. What's more, GMU sought a stay that would prevent release of the records for months as the appellate process went on.

CEI prevailed again, with the judge ordering the immediate release of the records on May 13. Some of those records are now posted for the public to review on E&E Legal's website, and show the inner workings of a campaign by state employees to punish those who disagree with them on climate change.

Unfortunately, GMU is currently refusing to release the remaining records, even though two court orders call for them to do so immediately. And, GMU is not alone in its bid to keep the public from seeing government records. After GMU was defeated in its latest attempt to keep the records sealed on May 13, the Climate Science Legal Defense fund moved to intervene in the case, and hopes to stay the release of the remaining records even longer. While CEI continues to fight to enforce the rule of law, and the court's orders, the battle is far from over. The records of those who would prosecute climate skeptics public detail the genesis of the campaign, and how taxpayer dollars were spent in an effort to stifle political dissent. CEI will not rest until those records are made available for the public to see.

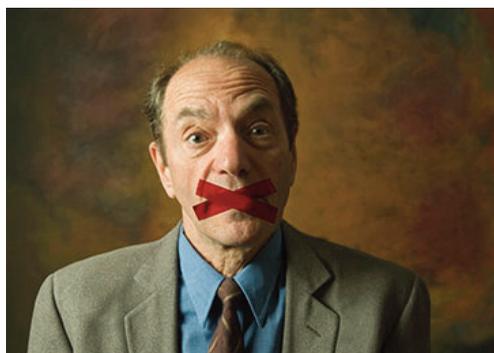
While CEI's recent victory encourages us that transparency laws

can be used to highlight improper practices in state universities, it is worth remembering just how rare such victories are. In 2014, the Virginia Supreme Court held that emails and other records generated by Professor Michael Mann at the University of Virginia were exempt under the law's "research" exemption. And, almost immediately after CEI's victory in the recent case against George Mason, detractors on the left began decrying decision as a departure from the 2014 precedent. Moreover, it now appears that even when the citizenry does strike a blow for transparency, those victories may be illusory if court orders are disobeyed.

Detractors of transparency badly misunderstand the law, however. For example, Lauren Kurtz of the Climate Science Legal Defense Fund gave a statement to E&E News indicating that professors' emails should be kept private unless they relate to research. However, the 2014 Virginia Supreme Court decision explicitly says that records related to research are exempt from production under the law. If the leftist opponents of transparency have their way, all records generated by activists in state-funded posts would be forever shielded from public scrutiny, no matter what those records reveal. If the left has its way, it's a case of "heads we win, tails you lose" for citizens who want access to the records their tax dollars paid to generate.

Thankfully, the tide seems to be turning. After a string of court decisions that narrowed Virginia's Freedom of Information Act in the past couple of years, we now see opportunities to turn the tide. Better still, the Virginia legislature has shown promising signs that it understands the need to clarify and improve the law's requirements relating to searches for records. E&E Legal, and counsel at FME Law, will continue the fight to increase transparency in Virginia, and hold activists in government accountable for their actions. □

'Green' AGs Scandal (Cont.)



producing all records or information provided them in briefings or other work with the outside activists, including those they are trying to keep secret through a Common Interest Agreement.”

The latter point references the New York and Vermont AGs trying to claim privilege for discussions and emails even with outside groups in this effort to go after shared political opponents, including each state that receives an open records request immediately alerting the rest to that fact. In that case, according to the Schneiderman office’s draft, every state was to immediately return any records to New York. To its credit Vermont objected to that as, naturally, being against state laws.

The documents cover the weeks leading up to that aforementioned press conference with numerous AGs, led by Schneiderman and Gore. They show communication and coordination between:

- Lem Srolovic, chief of the New York Attorney General’s Environmental Protection Bureau
- Scot Kline, a Vermont assistant attorney general;
- Matt Pawa, an environmental lawyer who works with the Climate Accountability Institute and the Global Warming Legal Action Project of the Civil Society Institute;
- Peter Frumhoff, director of science and policy for the Union of Concerned Scientists;

- Pawa and Frumhoff have been pushing for this investigation for years, at least since a 2012 workshop titled “Establishing Accountability for Climate Change Denial,” a brainstorming session in California for activists on convincing attorneys general to investigate “deniers” through the Racketeer Influenced and Corrupt Organizations Act (RICO).

“These emails strongly suggest the financial motive for AGs to pursue their political opponents, not content with merely silencing and scaring away support for those who dare disagree with their extreme global warming agenda,” said Craig Richardson, E&E Legal’s Executive Director. “Alarming, government officials are actively trying to cover up their coordination by using a Common Interest Agreement, even to claw back records already circulated, which another attorney general properly objected to as violating state law.”

Emails recently obtained by CEI also show academics aspiring to “convince state AGs to file suit” under RICO laws, also plainly with an eye toward obtaining a massive settlement to underwrite the global warming campaign. CEI awaits a ruling by a Virginia court on other related correspondence that should prove highly relevant to these AGs’ campaign.

As the Vermont and New York correspondence show, Pawa and Frumhoff were invited to secretly brief the state attorneys general. They each received 45 minutes to provide arguments on “climate change litigation” and “the imperative of taking action now” immediately prior to the AGs’ press conference, according to schedules prepared by Schneiderman’s office.

The next day, March 30, Pawa wrote to Srolovic of New York and Kline seeking help. A Wall Street Journal reporter wanted to talk to

Pawa, and he asked the two officials: “What should I say if she asks if I attended?”

Srolovic of the New York State Attorney General’s office replied: “My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event.”

The documents obtained by E&E Legal also include responses to a questionnaire sent to the state attorneys general by the New York AG’s office. The US Virgin Islands Attorney General noted he had just completed an \$800 million settlement from Hess Oil company — used to create an “environmental response trust” and promote solar power — and was interested in using this coalition to identify “other potential litigation targets” and ways to “increase our leverage.”

AGs across the country have criticized these investigations, calling them efforts to “silence critics”

Attorneys General across the country have come out strongly against these investigations. West Virginia AG Patrick Morrissey said, “You cannot use the power of the office of the Attorney General to silence your critics.” Oklahoma AG Scott Pruitt and Alabama AG Luther Strange issued a joint press release stating, “It is inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time.” AG Jeff Landry of Louisiana said, “It is one thing to use the legal system to pursue public policy outcomes; but it is quite another to use prosecutorial weapons to intimidate critics, silence free speech, or chill the robust exchange of ideas.”

Since the release of E&E Legal’s e-mails, and the ensuing media storm into this scandal, leaders in the U.S. House, as well as state-level elected officials are calling for investigations into the actions of these colluding attorneys general. □

Court Reviews CPP (Cont.)

were denied so quickly. Indeed E&E Legal submitted another petition for reconsideration, on another part of the EPA rule, on the very same day, which EPA has not answered. At the same time petitions on older EPA rules, submitted years ago are still sitting at the agency, awaiting a decision.

In denying E&E Legal's petition, EPA made several curious claims. EPA claimed it had the right to engage in 'ex parte' contacts with outside groups, a fact E&E Legal never denied. Yet EPA never

responded to the crux of the argument, which is that EPA had a duty to disclose these contacts when it asked the public to comment on the rule. E&E Legal never questioned whether outside groups had a First Amendment right to offer their views to the agency; it merely noted the need for transparency. Indeed the very case EPA cited in denying E&E Legal's petition noted that "The court notes that the Act does not prohibit ex parte contacts during rulemaking but instead requires that written communications and transcripts of oral communications be entered in the

record." *Sierra Club v Costle* 657 F. 2d 298, 400-402 (D.C. Cir. 1981).

However the reality remains that EPA did deny the petition for reconsideration, and published this denial in the Federal Register on May 5th, 2016. Thus E&E Legal and other interested parties have the right to file suit and seek Court review of the decision by EPA to issue this denial. Under the Clean Air Act, challengers of this decision have 60 days from the date of publication in the Federal Register to file a challenge, and E&E Legal intends to do so. □

Grimes Wins Press Credential Appeal Against CA Capitol Media and Legislature

by Katie Grimes, Senior Media Fellow



Freedom of the press protects the right to obtain and publish information or opinions without government censorship or fear of punishment, whether or not

government finds the material offensive, or disagrees with it.

Free speech enables people to obtain information from a diversity of sources, make decisions, and communicate those decisions to the government. Recently I wrote about having my press credential renewal denied by the Capitol Correspondents Association of California, appointed as an arm of the California Legislature's Joint Rules Committee, which has the final say in press credentialing Capitol media.

What began as a witch-hunt several years ago by the totalitarian bullies who make up the righteous Capitol media cartel, who assumed the role as arbiters of fairness and free speech, turned into a valuable schooling in First Amendment rights.

Following a Legislative Open Records Act request submitted by the Pacific Legal Foundation, my attor-

ney Paul Beard, with ALSTON & BIRD LLP, filed an administrative appeal, which we just won. I picked up my Capitol Press Credential a few days ago.

The ensuing process exposed the air of supremacy and inability for self-reflection among California's liberal media and mainstream journalists, who view themselves as unimpeachable and above reproach.

"A diverse and critical press corps is a linchpin of a free society," Mr. Beard said. "We are pleased that Ms. Grimes has been given the access to the halls of our state government that she deserves—and is entitled to under our Constitution." The Capitol Correspondents Association of California said it based its decision to deny my press credential renewal on CCAC bylaws which "prohibit the credentialing of any applicant employed by or receiving any compensation, directly or indirectly, from any lobbyist or lobbying association, any state office holder or candidate for state office." Because I publish many of my articles at The Flash Report, a news aggregation website, and listed publisher Jon Fleischman as my editor/producer, the CCAC denied my credential because Mr. Fleischman also has a consulting business. "We let Ms. Grimes know

of our concerns after receiving her application," the CCAC posted on its website. "Ultimately, the board felt those payments [to Fleischman] violated the above provision of CCAC bylaws, which are part of the Joint Rules of the Legislature."

As attorney Paul Beard explained in the appeal, "The only grounds for refusing to credential Ms. Grimes are her political views as expressed in the articles she writes about developments at the Capitol. The denial violates Ms. Grimes' press rights on the basis of the content of what she writes. As a consequence, the Association's decision cannot withstand First Amendment scrutiny." □

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