



# Letters

Summer 2016

## State Attorneys General Attempt to Hide their Corrupt Crusade

by David McLaughlin, Research Supervisor



Last March, through numerous state open records requests, E&E Legal uncovered emails showing that New York Attorney General Eric Schneiderman formed a secret coalition of several other states' attorneys general (AGs) and prominent green activists to use the criminal justice system to target organizations that question the climate change agenda under fraud and racketeering laws.

As reported in E&E Legal's Spring Letters, the plan to investigate ExxonMobil and other fossil fuel companies for not publicly acknowledging climate change, an attack on the First Amendment by the very people who are supposed to uphold the Constitution, was devised at secret Rockefeller funded meetings stretching back to

2012. The First Amendment of the Constitution guarantees individuals and organizations the right to free speech, regardless of how unpopular that speech may be. This egregious abuse of prosecutorial power to trample the individual liberty of political opponents is not only unprecedented, but unconstitutional.

The Schneiderman-led group of state attorneys general are now attempting to hide behind a contract with one another in an effort to avoid releasing proof of their scheme, according to responses from state open records requests to E&E Legal and the Free Market Environmental Law Clinic (FME Law). After intense litigation with the District of Columbia, E&E Legal obtained a copy of a Common Interest Agreement (CIA) signed by seventeen activist AGs and several climate alarmist groups to keep public records that reveal their targeting of political opponents out of the public eye. Signers of the CIA include attorneys general from the states of: California, Connecticut, District of Columbia, Washington State, Massachusetts, Illinois, Maryland, Maine

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## Oral Arguments Looms for Clean Power Plan

by Chaim Mandelbaum, FME Counsel



On September 27, 2016, the entire United States District Court for the District of Columbia heard oral arguments in *West Virginia, et al. v. EPA*, to which E&E Legal is party, challenging 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 (CAA) over the Environmental Protection Agency's (EPA) regulation that will cripple, and in many cases, shut down coal-fired power plants.

The hearing came after the surprise decision in May to take the case from the three judge panel to which it was originally assigned and have it heard en banc by the full Circuit Court. Initially, two judges, Judge Garland and Judge Pillard, recused themselves, leaving only nine active judges of the Court to hear the case. However, only days before the hearing, Judge Pillard, an Obama appointee, reversed her recusal and decided to hear to matter, one more difficult and contentious than most. Although the three judge panel originally denied a stay of the EPA's regulation, the United States Supreme Court overruled the Circuit panel, granting the stay.

Recognizing the size and magnitude of the case, the Circuit Court issued an order scheduling a lengthy oral argument, totaling three hours and thirty-eight minutes. Prior to the order, the two sides had aggressively wrangled over the length and format of the oral arguments. EPA argued for shorter oral arguments, while those challenging the rule sought over two

days of oral arguments to give the issues the attention they deserved. In setting the schedule as it did, the Circuit Court arranged an exceptionally long day of arguments. Typically, oral arguments at the DC Circuit run less than an hour, while even extremely complex cases rarely run over two hours.

A key focus during the oral arguments was the clear statement rule, and whether the Clean Air Act (CAA) affords the EPA the authority to promulgate a regulation as harsh and sweeping as the one it had issued. Normally, regulations under the CAA require that an individual plant be improved within the levels of technology while not requiring that entire states alter the nature of their power grids and the mix of their power production. The challengers argued that the EPA exceeded the historical mandate of its power and that the rule goes beyond what the law allows. They buttressed their position on the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, which held that the EPA could not exercise major, transformative power without a clear statement of approval from Congress. Throughout the oral arguments, there was substantial debate over how transformative the rule was and whether the Clean Air Act provides the EPA sufficient authority.

The oral arguments also focused heavily on the issue of preclusion by the EPA regarding the regulation of carbon dioxide under Section 111(d) of the CAA. Since carbon dioxide is already regulated under Section 112 of the CAA, the challengers argued that the law does not permit EPA to simultaneously regulate the same substance twice under two different sections.

Constitutional issues also took center stage in the oral arguments. Two key questions arose. First, whether the rule imposes too heavily on the states, violating their sovereign authority by compelling them to take steps to make the rule a reality. The

Supreme Court has long held that the federal government is limited in its ability to coerce the states into taking actions. This issue is known as commandeering, and the Supreme Court has repeatedly made clear that the Federal government is limited in its right to commandeer state authority or resources. As David Rivkin Jr. of BakerHostetler noted while arguing for the challengers, the rule would give states "no choice but to implement federal policy of generation-shifting" and would "commandeers thousands of state workers and hours."

The second issue was whether those being effected by this rule received adequate notice of its potential consequences, as the EPA had significantly changed the rule between the time it showed the public its plans and when it finally issued the regulation. The constitutional requirement for due process necessitates adequate notice when the government intends to issue a new rule or law that will significantly harm individuals or groups, something challengers argued did not occur here.

Finally, the challengers argued that EPA failed to show that the plan was actually achievable for most states. They explained that in many cases, the EPA had set targets that were either unrealistic or impossible for most states to meet. The EPA countered that it was too early for such challenges, and that if their targets proved unreasonable, it would be possible for states to later request that they be revised. Arguing for the EPA, an attorney for the Natural Resources Defense Fund warned the Court that further challenges were likely if the rule was upheld, and that states demanding adjustments would likely sue if denied.

While oral arguments signaled the end to this case before the D.C. Circuit, it is unlikely the Court will get the final word on the CPP. Regardless of who prevails before the Circuit Court, it is expected that this case will end up being appealed, once again, to the U.S. Supreme Court. □

## E&E Legal Forced to Sue Stonewalling AG's

by Matt Hardin, FME Counsel



When Attorneys General from seventeen states chose to band together in a political crusade to “investigate” and threaten to prosecute those who disagree with their climate change agenda, E&E Legal decided to pull back the curtains to expose what the states were really looking for, and what might have spurred these investigations, which trample the First Amendment rights of dissenting scientists and policy researchers. We submitted requests under various transparency laws in dozens of states, seeking correspondence between the involved states, as well as certain activist groups like the Democratic Attorneys General Association.

Remarkably, many states denied our requests for correspondence with other states. Citing attorney-client privilege or the similar attorney work-product doctrine, states like Iowa, New York, Vermont, and Virginia all denied E&E Legal access to public records they had shared with each other. While it is doubtful that their political undertaking to investigate dissent is a legitimate use of law enforcement resources, it is only the tip of the illegality of these states’ cavalier actions. Because each state has its own, unique constitution, a state attorney general may only act on matters pertaining to his own state. Thus, each state’s attorney general cannot represent another state’s attorney general, and such correspondence is not protected by attorney-client privilege or related doctrines. Appallingly, states across the country are essentially breaking their own transparency and open records

laws, laws which Attorneys General are sworn to enforce and protect.

To expose the efforts of Democratic Attorneys General to use law enforcement resources to prosecute political opponents, and in the face of massive stonewalling and improper denials of our open records requests, E&E Legal has been forced to turn to the courts. We currently have lawsuits pending in New York, Rhode Island, and Vermont. Undoubtedly, more suits will follow in other states that continue to hide public records that E&E Legal and the general public are entitled.

In New York, E&E Legal has been forced to file two separate lawsuits against the New York Attorney General’s Office, while a coalition of citizens’ groups has filed a third suit. In the first suit, E&E Legal requested records shared outside the New York Office of the Attorney General with seven private lawyers, donors, and activists. When the Attorney General denied access to the records and following an administrative appeal, E&E Legal filed suit in the Supreme Court for New York County (Manhattan). At the hearing, presently scheduled for November 29th, we will urge the Court to order the immediate release of these records, which will likely show the relationship of New York’s politicized Attorney General with the outside green activists who encouraged him to abuse his law enforcement powers in the first place.

However, after E&E Legal filed its first open records suit against the New York Attorney General, the office doubled down on its refusal to produce records. Since the New York Attorney General subsequently refused to produce records it shared with outside attorneys and activists whose records were responsive to another of E&E Legal’s requests, a second suit was filed. A few days later, a third suit was filed after the New York Attorney General refused to produce records to a coalition of New York citizens’ groups, whose re-

ords those citizens believed would shed light on whether the New York Attorney General was influenced by wind-power lobbyists in crafting its agenda. Nevertheless, New York’s Attorney General’s Office has made it abundantly clear that only litigation will pry loose the public records it generates.

In Rhode Island, E&E requested records shared between the Rhode Island Attorney General and others outside his office. While no hearing is currently scheduled, E&E Legal hopes the Court will soon hear our arguments, and allow access to documents that likely reveal the use of state resources by politicians who desire to persecute political opponents.

In Vermont, E&E requested records shared between the New York Attorney General and the Vermont Attorney General’s Office. After Vermont declined to even begin processing our first request without seeking fees exponentially higher than permitted under state law, E&E Legal was forced to sue in Washington County Superior Court. E&E prevailed in an initial hearing on September 15th, at which the Court ruled that the Vermont Attorney General had failed to comply with the Vermont Public Records Act, and ordered a schedule for production of records. That same day, September 15th, E&E Legal was forced to file a second suit against the Vermont Attorney General after records were wrongfully withheld in another request filed by E&E Legal. Vermont’s Attorney General has thus made it clear that it will not comply with its own state open records laws unless forced to do so by E&E Legal and the courts.

While politicians seeking to use state resources to silence dissent prefer to keep their activities hidden from the American people, E&E Legal will not back down. Our attorneys will travel the country for the remainder of the fall and into the winter to urge courts to enforce the very state laws that state officials themselves refuse to enforce or abide by. □

# Billionaire Steyer Cashes In On His Investments

by David McLaughlin, Research Supervisor



In July, E&E Legal issued an extensive report, *Buying the Democrat Party Lock, Stock, and Barrel*, that shows, among other things, that activist billionaire Tom Steyer is using the Democratic Party to push his self-serving carbon-free energy agenda in the political arena. A short video accompanied the report.

Although Steyer is the number one donor to the Democratic Party, spending \$74 million to help elect Democratic candidates during the 2014 election cycle, and is the party's leading donor in the current cycle, he cares about one issue and one issue only: climate change.

Steyer funnels nearly all of his donations through NextGen Climate, an organization he founded and bankrolls to advance his renewable energy plan. Revealingly, his initiative, outlined in NexGen's November 2015 report: "Fact Sheet: Powering America With More an 50 Percent Clean Energy by 2030," along with an email uncovered from Steyer's surrogates by E&E Legal through public records requests, has been adopted, almost verbatim, as the 2016 Democratic Party's climate change plank. Embracing Steyer's renewable energy agenda makes perfect sense for the Democrats, as they want to keep their main benefactor happy.

The following chart shows the striking similarities between Steyer's efforts to rid America of carbon and the 2016 proposed DNC platform on climate change.

Tom Steyer is also secretly colluding with the Democratic Governors

only political issue Tom Steyer ad-

vocates for? Could it be because he has major financial interests in renewable energy? Ironically, Steyer made his billions as a hedge fund manager, founding and operating Farallon Capital Management through 2012, which

NextGen's Climate Change Goals <sup>a</sup>	2016 Democratic National Convention's Climate Change Platform Draft <sup>b</sup>
Calls on candidates to produce a plan to power America with more than 50 percent carbon free energy by 2030 and 100 percent carbon free energy by 2050.	Goal is to power America with 50 percent clean energy sources in the next decade, and believes America must be running entirely on clean energy by mid-century.
Email uncovered by E&E Legal by NextGen surrogates encouraging governors to hold 'climate deniers' "accountable." Steyer is publicly encouraging states to join in prosecuting Exxon Mobil over its disagreement with climate change.	Corporations who fail to notify their shareholders of the risk of climate change should be held "accountable" through fraud investigations conducted by the Department of Justice.
The transition to a clean energy economy will create over a million jobs by 2030 and up to two million by 2050.	A transition to a clean energy economy will create millions of middle class jobs.
A clean energy economy will reduce electric bills for American families.	Clean energy will save families money on their energy bills.
The Clean Power Plan must be implemented.	The Clean Power Plan must be implemented.
Climate change aggravates poverty.	Climate change disproportionately affects low income communities.
The United States is expected to install enough solar panels to power 4 million American homes in the next two years.	Goal to install half a billion solar jobs in the next four years.

Association (DGA) to recruit governors to join his crusade to hold 'climate denier' organizations and companies "accountable" through criminal prosecutions under fraud and RICO statutes. E&E Legal, through open records inquiries, recently uncovered an email from Kwame Boadi, Policy Director of DGA, to Sam Ricketts, an advisor to Washington governor Jay Inslee. The email outlines Steyer's effort to encourage governors to join his "accountability" campaign to not only promote his 50 percent carbon-free initiative, but punish 'climate deniers' through the criminal justice system.

Steyer doesn't keep his desire to trample the First Amendment a secret. As noted in our report, he revealed his disdain for organizations opposing climate change, telling *The Guardian*, "Anybody who puts out intentionally misleading information I think should be answering to us." Currently, Steyer is publicly lobbying state attorneys general to join the coalition of seventeen already investigating ExxonMobil, numerous individual scientists, and non-profit groups. Last April, NextGen hosted and funded a rally in New Hampshire to encourage the state's Attorney General, Joseph Foster, to join the legal probe of Exxon.

Why is climate change the

has pumped hundreds of millions of dollars into companies operating coal mines and coal-fired power plants from Indonesia to China over the past fifteen years, and will continue to generate millions of tons of carbon pollution for years to come.

In 2013, while Steyer was still the Senior Managing Partner at Farallon Capital Management, the firm owned \$440 million worth of stock in oil and gas companies, about 10 percent of the business' publicly disclosed equity portfolio. Even after his well-publicized departure from the hedge fund, Steyer continued to endorse Farallon's traditional funds, which still include several fossil-fuel companies. In his "goodbye" note, he encouraged investors to keep their money with Farallon, stressing that his exit would not change the firm's "mode of operation." Although Steyer sold his ownership stake in Farallon in 2012, according to his aides in 2014, he remained a passive investor. However, they refused to disclose the size of his investment.

Tom Steyer has good reason to attack fossil fuels, as he is heavily invested in renewable energy, particularly solar. With hundreds of millions at stake in solar companies such as

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Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, US Virgin Islands, and Vermont.

All parties to the Eric Schneiderman-drafted agreement promised to alert each other of all public requests for information regarding their 'climate denier' witch hunt, forcing requesting parties to jump through the extra hurdle of filing law suits when attempting to obtain public records of their plot.

Chris Horner, E&E Legal's Senior Legal Fellow noted, "In short, these activist AGs are trying to write themselves out from freedom of information laws their legislatures have written them into." Horner continued, "they are hiding behavior that seems to be precisely the sort of abuse lawmakers sought to expose to sunlight when decid-

ing to cover their states' chief law enforcement officers under FOIA laws, particularly their use of nearly limitless powers to chill opposition and damage political opponents."

Clearly drafted to obstruct public records requests while simultaneously trampling their respective states' open records laws, the AGs did everything in their power to keep the Common Interest Agreement a secret. A CIA is legitimate when: 1) litigation, or the reasonable anticipation of litigation; 2) that the parties share a similar interest; and that 3) there be a clearly defined scope to the agreement. The Common Interest Agreement signed by the attorneys general does not meet this criteria.

Instead of claiming privilege for documents with the shared reasonable anticipation of litigation, the AGs claimed it in anticipation of open records requests. Also, since it is not tailored to cover specific legal actions, the agreement is overly broad, covering numerous topics, from defending federal programs that limit greenhouse gases to actions to preventing delays in implementing renewable energy technologies. Therefore, this pact

runs contrary to common interest doctrine, as well as open records laws, which state legislators passed to keep AGs accountable. Since this Common Interest Agreement would be deemed illegitimate by your average first year law student, it is obvious that this pact was created for the sole purpose of avoiding public scrutiny.

Why, exactly, are these attorneys general so afraid of the public learning about their investigations? The simple answer: the fear of embarrassment if the citizenry discovers what they are up to, and, more importantly, potential civil rights lawsuits by those they have targeted. Their trepidation is already proving true. After E&E Legal began publicizing their scheme, it appears most of the AGs are getting cold feet, as they are now denying any interest in using the criminal justice system against opponents of the climate agenda. In response to their rapid about-face, E&E Legal is seeking all withdrawals from the Common Interest Agreement, as provided for in the document. If an AG's office has not withdrawn, the American people should demand an explanation. □

### Billionaire Steyer (Cont.)



Kilowatt Financial, Sungevity, and BrightPath Capital Partners, Steyer's motives are transparent. His vast giving to the Democratic Party is not

about investing in candidates, for the good of the Party itself, or even 'saving the world from man-made climate change.' Instead, Steyer is using the Democrats to push laws favorable to the renewable energy industry so he can line his own pockets.

"The fact that Tom Steyer not only seeks to buy elections for his personal gain but is actually trying to bankroll efforts to attack freedom of speech is beyond reprehensible, it's un-American," said

David Schnare, E&E Legal's General Counsel.

Over the course of the next year, E&E Legal will continue its aggressive transparency efforts to expose more governors and state attorney generals involved in the Steyer-led attack on the unalienable rights of the American people. He has deep pockets, and a lot invested in 'green' technology, so he's not going anywhere. In fact, he's rumored to be looking at running for Governor in California. Buckle up! □

## Agencies Say They're Working for Int'l. Groups to Hide Records

by Chris Horner, Senior Legal Fellow



Another day, another federal agency whose bureaucrats, working on the taxpayer's time and dime, using taxpayer computers and other resources, claim that certain of their work must be kept secret from the public because they're really working for an international body (also funded by US taxpayers).

This time, it is the National Toxicology Program (NTP), an agency of the Department of Health and Human Services, making that plea to keep the records of one of its career employees — part of whose job is to collaborate with US-taxpayer funded bodies — secret, even though they are on the HHS computer system, relating to her work.

Why, imagine a Secretary of State's aides claiming they were really working for a private foundation when engaged in certain work-day activities. Ok, right, somebody actually is making that claim. Which we know, because those emails were turned over. But not this time, not HHS when it comes to its own environmental bureaucracy (this particular FOIA request, by FME Law, amid evidence of government participation in yet another ideological push against abundance and all that makes it possible).

This should sound familiar, particularly to observers of the federal environmental bureaucracy. I dedicated the better part of a chapter in my book, "The Liberal War on Transparency," to a high-profile example of this behavior, one which prompted congressional oversight and was ultimately

smacked down by an Inspector General.

At that time, Susan Solomon, a climate activist working at the National Oceanic and Atmospheric Administration (NOAA), declined to produce her emails for possible release under several FOIA requests, having rationalized that she was really working for the UN's Intergovernmental Panel on Climate Change (IPCC). So, NOAA repeatedly claimed 'no records,' until one day after informing me on the phone that a delay in responding to my request was due to deliberating over what were agency records and what were IPCC records. Wait, what?

In short, we see on occasion how taxpayer-funded activists simply pretend that, when they were busy on taxpayer time in taxpayer-funded offices on taxpayer-funded computers, doing a job related to, and sometimes even specifically tasked to them as part of their taxpayer-funded position, why they really weren't working for the U.S. taxpayer at all. No, they were really working for the United Nations, World Health Organization, you name it. Show me the pay stub.

It was precisely that issue that put a halt to NOAA's game. In the end, NOAA dropped its ruse, eventually searching Dr. Solomon's home computer and non-official accounts to comply with the public records law. Still, that didn't end the affair: the Department of Commerce's IG entered the picture. The investigators' summary of their findings is too exhaustive to replicate here, though you can read for yourself (Department of Commerce Inspector General, "Examination of issues related to internet posting of emails from Climatic Research Unit," alternately styled "Response to Sen. James Inhofe's Request to OIG to Examine Issues Related to Internet Posting of Email Exchanges

Taken from the Climatic Research Unit of the University of East Anglia, UK," February 18, 2011, PDF p. 18, doc page numbers 13-16).

But, so the routine goes, usually, until we sue to overturn the claim that these documents aren't government records, but UN et al. records free from FOIA. That is just wishful make-believe to avoid producing documentation of how public positions and resources are being used, that they'd rather keep private from the people paying for those resources and positions.

Incidentally, this same move was tried by George Mason University — a move that was ultimately smacked down by the Virginia courts — regarding their faculty's advocacy of using RICO laws against those who oppose their political agenda. In that case, I reminded the school of how this turned out when NOAA tried it, to no avail; so we sued, and won release of what are plainly public records.

NTP/HHS FOIA officers either haven't learned history, or prefer the delay the consequences of it repeating itself. □

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