

Ethan Allen Institute

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Commentary: Reining in WOTUS

By John McClaughry

John Poszgai, a Hungarian truck mechanic, was conscripted into the Soviet Army in the 1950s. When Hungarians rebelled against Soviet tanks in 1956, he fought for his country's freedom. When the Red Army suppressed that gallant uprising, he escaped to the land of freedom and opportunity, America.

He found work as a mechanic for International Harvester in Morristown, Pennsylvania, and proudly became an American citizen. He opened a truck repair service, bought a home, and in due course bought a 14 acre parcel across the street.

Thirty years earlier the municipality had dug a ditch diagonally across the property to drain off stormwater from the city street. Over the years other parties illegally used the lot to dump commercial scrap, and filled the drainage ditch with seven thousand old tires.

The blocked ditch caused stormwater to back up on Poszgai's repair shop. He decided to buy the lot, remove the junk and tires, and put up a new truck repair building on the property. That decision ruined his life.

The Army Corps of Engineers, charged with regulating discharges into navigable waterways, found out that Poszgai had removed the thousands of tires from the drainage ditch and had brought in fill to make the lot useable for building. It sprang into action, and brought along the Environmental Protection Agency and the Department of Justice. EPA charged Poszgai with 41 counts of violating the 1977 Clean Water Act.

What then ensued is a long and shocking story. In 1991 freedom fighter John Poszgai was convicted of environmental felonies and sentenced to three years in prison and a fine of \$202,000. He lost his business, filed for bankruptcy, and his daughter lost her job as a local reporter because her name was Poszgai. He served a year and a half in prison, but a judge, highly skeptical of the government's assault, reduced the fine to \$5,000.

The point of this narrative is that for decades the Army Corps of Engineers and the Environmental Protection Agency have stretched beyond all recognition their constitutional power to "regulate discharges into navigable waters of the United States."

The prosecution of John Poszgai was one of the most shocking examples, but there are hundreds more – not enforcements against big polluting industries, but against ordinary citizens who innocently filled in tiny ditches or soggy depressions to improve their properties. Despite a string of Federal court cases slapping down the EPA's overreach, the assault has gone on unabated, regardless of who is in the White House.

This issue is highly relevant now, because on June 29 the Obama EPA finalized a rule called WOTUS - Waters Of The United States. EPA argues that the new rule clears up uncertainties and complies with adverse court decisions. Critics say it codifies every

imaginable Federal regulatory overreach.

M. Reed Hopper, the Pacific Legal Foundation's chief lawyer opposing the WOTUS rule, says "The new WOTUS definition...defines the waters of the United States so generally that federal regulators will have power over almost all of the nation's waters and much of the nation's land around those waters. 'Navigable waters' and the lands associated with those waters will now fall under EPA regulatory control and will include all 'tributaries' (no matter how small and remote), 'adjacent water bodies', 100-year floodplains, and, on a case by case basis, any water within 4,000 feet of a 'tributary' or other covered water."

Hopper points out that the expressed intent of Congress in passing the Clean Water Act was "to recognize, preserve and protect the primary responsibilities and rights of States" to control local land and water use. The CWA was enacted to allow the Federal government to regulate discharges into navigable interstate waterways, plus by extension marshes and wetlands adjacent and connected to such waterways. It was not enacted to put EPA in charge of drainage ditches, farm ponds, and (in Vermont) "vernal pools".

On October 9 the 6th Circuit Court of Appeals acted favorably on a petition from 31 states and state agencies (of course not including Vermont), asking that the WOTUS rule be suspended until a full trial on its constitutionality.

Long ago Thomas Jefferson presciently observed, "As government advances, freedom gives way." That maxim was never more evident than in the persecution and jailing of John Poszgai and the many other victims of federal environmental regulators and prosecutors eager to rack up criminal convictions against legally outmanned defendants.

If the courts and/or Congress can defeat this latest Obama regulatory power grab, over the well-funded howls of the entire "environmental movement", Americans will have won a major victory over a powerful and perennial threat to their rights, liberties, and peaceful use of their property.

- John McClaughry is the founder and vice president of the Ethan Allen Institute (www.ethanallen.org).

Commentary: "Blindsided" Legislators Should Fix Act 46

By Rob Roper

A recent article about the new school district consolidation law, Act 46, quoted a state legislator whose reaction seems to be representative of many parents, local school board members, students, and law makers who value and hope to preserve Vermont's 150-year-old school choice tuitioning system:

"I don't think we can still have choice the way the bill is," said Rep. Linda Martin (D-Wolcott), who voted for Act 46 amid assurances that choice had been protected but now fears it hasn't. "I kind of feel like I was blind-sided," she said. (Seven Days, 10/14/15)

Those assurances were widespread throughout the State House in the weeks and months leading up to the passage of Act 46. School choice in Vermont's 93 tuitioning towns absolutely would be protected, which many legislators took to mean that they

would be allowed to merge with non-choice “operating” districts and still maintain their historic choice status.

Many still believe that language in Act 46, Section 4, does, in fact, allow towns to keep their choice and merge with operating districts, despite a ruling by the State Board of Education (SBE) stating that school choice towns would be prohibited from keeping choice if they decided to merge with operating districts.

But, if preserving school choice really was the intent of Rep. Martin and her colleagues when they voted for the bill, the first thing they should do when they come back in January is pass clarifying language to reflect exactly this position, blocking any possible ruling by the State Board of Education or a future court that would prevent such mergers.

There is precedent for such legislation in regard to the town of Vernon, Vermont. Vernon has maintained both full school choice and a public Union high school since the 1950’s. The legislature revisited this unique, successful and popular arrangement in 2006, confirming its legal viability.

Act 182 of 2006 Sec 28 states:

Notwithstanding the restrictions of 16 VSA 822(c), a town school district which is a member of a union school district and which has historically paid tuition for resident grade 7-12 students attending public and independent schools outside the union high school district... may continue to do so.... It is the intent of the general assembly to authorize a town school district which has historically both belonged to a union school and provided for the education of tis students by paying tuition to continue the practice....

There is no reason that the legislature in 2016 could not pass a legislative fix along the lines of allowing a town school district that has historically paid tuition for resident students attending public and independent schools may to continue doing so after merging into larger, consolidated districts containing public schools. If the legislature lets Vernon do it, they can certainly let everybody else.

Baring legislative action, there is also a local avenue districts have to preserve choice when considering consolidation, avoiding both the legislature and the SBE. Title 16, Chapter 21, § 822 states.

(c)(1) A school district may both maintain a high school and furnish high school education by paying tuition: (A) to a public school ... or (B) to an approved independent school or an independent school meeting school quality standards if the school board judges that a student has unique educational needs that cannot be served within the district or at a nearby public school. (2) The judgment of the [local] board shall be final....

Given that every child is unique, a merging district could formulate articles of agreement binding board members to approve any request for tuition by any student who asks for it under this authority creating de facto school choice.

Precedent for this comes from the towns of Concord and Strafford. For example, Concord High School existed in the close orbit of St. Johnsbury Academy where many local residents preferred to send their children. Rather than face school closure at the hands of the voters, Concord agreed to grant tuition to any student who asked for it. For three years Concord essentially operated a public school while offering full school choice. This ended when the school board decided it would no longer honor this arrangement, and the voters promptly shut the place down, thus preserving their school choice.

Several school choice towns are currently contemplating abandoning the rare gift of school choice forever in hopes of collecting some very temporary (and questionable) relief from high property taxes. Before they give up choice in a merger, they really should be aware of all the options available. Don't give up choice if you don't have to. And, it looks like you may not have to.

- Rob Roper is president of the Ethan Allen Institute (www.ethanallen.org). He lives in Stowe.

Commentary: Tuitioning Towns Do Not Need To Give Up Choice In Mergers

By Deb Bucknam

Act 46, the new state law which provides for mergers of school districts into larger districts, protects forever all school districts' present systems whether the district tuitions its students or operates its own school, or a combination of both. The State Board of Education has interpreted Act 46 to mean just the opposite. It has stated: "There is no authority in Act 46 that authorizes a newly formed district/preferred model, to both operate and pay tuition, for the same grade level." The board is wrong. Not only does Act 46 allow school districts to retain their present systems, the act prohibits the board from disapproving a merger plan because each member district keeps its present system of educating its children.

Act 46 is crystal clear: It protects a school district which tuitions its students even if that district merges with a district which operates its own schools. School districts cannot be forced to change their system when they merge with other districts. The act is mandatory. It states that any merger "shall preserve the ability of a district" to retain its present system and "shall not require the district to limit the options available to students if it ceases to exist as a discrete entity and realigns into a supervisory district or union school district."

Every lawyer knows the word "shall" is mandatory. The act did not provide any leeway for the State Board of Education. Indeed, the drafters of the act wanted to make sure their requirements were clear, because they reinforced the act's mandates by stating: "Nothing in this act shall be construed to restrict or repeal, or to authorize, encourage, or contemplate the restriction or repeal of, the ability of a school district ..." to continue to operate its present organizational structure.

Therefore, when the districts merge, the old member districts have an absolute right to keep their present governance, and the new mega district cannot change, by majority vote, the member districts' present system of educating their children. The State Board of Education's advisory appears to be based on a legal analysis of Act 46 by Legislative Council. That analysis is seriously flawed and would not meet even the basic standard of a first year law school brief.

The State Board of Education's advisory appears to be based on a legal analysis of Act 46 by Legislative Council. That analysis is seriously flawed and would not meet

even the basic standard of a first year law school brief. It should not be the basis for a wholesale change in our 150-year-old system of educating Vermont's children.

School districts are being advised by the State Board of Education that they cannot operate schools and pay tuition for the same grade level. The practical effect, which is already happening, is that the smaller districts presently enjoying choice are being advised that they must give up their historic right to educate their students as they see fit, and to conform to the educational structure of the larger, more powerful districts. The fact is, they should be advised that if they currently have school choice, they shall be able to retain school choice. Act 46 blocked this kind of power grab.

Westford and Elmore, currently going through the process with larger communities and expected to vote in November, are being misinformed. They should be able to take advantage of the financial benefits of their respective mergers, but also to retain their school choice option. Voting yes on the ballot with the wording that is in place now will throw away school choice that they are entitled to have. It is recognized that two groups of hard-working citizens followed a process and came up with ballot items. However, there is too much misinformation from the State Board for voters to make an informed vote without knowing all options, including retaining choice. The State Board of Education is attempting to rewrite the law to force these small districts to give up their historic rights. It has no authority to do so under the law.

- Deb Bucknam is an attorney based in St. Johnsbury. She serves on the board of directors for the Thaddeus Stephens School.

Act 46 analysis Deborah Bucknam

Events

EAI Advisory Council Member David Hale Dies Suddenly at 63

David Hale, a longtime member of the Institute's Advisory Council, died October 19 in Chicago at age 63.

"David fit every description of a prodigy. His quick and inquiring mind distinguished him at St. Johnsbury Academy, Georgetown University, and the London School of Economics. His gift as an economist was to spot interconnections between economic and financial policies, global markets, and the geopolitical realities that many academic economists do not discern."

"During his career David was chief economist for Kemper Financial Services and global chief economist for Zurich Financial Services. In 1990 the New York chapter of the National Association of Business Economists conferred upon David the William F. Butler Award, an award give also to such famous names as Alan Greenspan, Paul Volcker and Paul Krugman."

"David was an early and faithful supporter of the Ethan Allen Institute, and EAI was proud to feature him as a speaker seven times over the years, most often to Burlington banking and finance leaders. They came to hear him because of his vast knowledge of the personalities and perspectives of finance ministers, prime ministers, parliamentarians and leading economists he met and knew in dozens of countries around

the world.”

“Vermont, the nation, and the Institute are by far the poorer for his passing.”
- John McClaughry, EAI Founder

Make a Contribution to EAI today.

Thanks to all who have already made a donation to our 2015 campaign! For those who haven't yet, please help us fight all the potential taxes mentioned above and other encroachments on our liberty. Be generous. We're only as strong as you make us. Thanks!

Ethan Allen Intsitute
P.O. Box 543
Montpelier, VT 05601

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News & Views

Vermont Chamber of Commerce Says Taxes Hurting Businesses. “Increased state spending, [Chamber President Betsy Bishop] argued, is taking a toll on Vermont’s businesses – both large and small. Bishop produced a pie chart detailing more than \$52 million in new taxes, fees and mandates approved by the Legislature in 2015. The biggest chunks are \$22.9 million in income tax changes, \$7.9 million from a new soft-drink tax and \$7.5 million in fees to support expanded clean water efforts.... Looking ahead to the next legislative session, Bishop detailed the Chamber’s policy concerns including: a Sales tax expansion...Increasing the rooms and meals tax...Instituting a carbon tax.” (VT Digger, 10/18/15)

Energizer to Cut Jobs in Bennington. The battery manufacturer announced this month that it will cut an unspecified number of jobs from its Bennington facility. This, following the decision by Plasan to close its remaining Bennington manufacturing plant earlier this year, is another blow to the region.

Why Are So Many Healthy Young Vermonters on Disability? UVM Economist Art Woolf pointed out a bizarre inconsistency. While Vermont is consistently listed as the “healthiest” state, we have a strangely high number of citizens collecting disability payment, including 2,000 under the age of 35 receiving SSDI benefits, the second highest percentage in the nation. ([High rate of Vermonters on disability, 10/8/15](#))

Act 46 Will Grow a New Bureaucracy. Act 46, the school district consolidation bill, is supposed to save property taxpayer money, right? Well, in order to implement the new

law the State Board of Education is requesting funds to hire three staff members. The cost of this bureaucratic growth: \$200,000 annually. Until now the SBE has not had paid staff of any kind. This is the acorn that will become a bureaucratic oak, consolidating more power over education in Montpelier. ([Source: VPR](#))

Medicaid Is Sick. Vermont's portion of Medicaid for 2017 is projected to be \$60 to \$70 million over budget, according to the Joint Fiscal Office. This will push the overall budget gap over \$100 million. This is on top of a \$30 million gap for the 2016 fiscal year, which will have to be dealt with during the budget adjustment process in January, 2016. (Source: VT Digger, 10/14/15)

Vermont Worst State for Retirees. Kiplinger.com has named Vermont as the #1 least friendly tax state for retirees. "The Green Mountain State doesn't coddle retirees. It has a steep top income tax rate, and most retirement income is taxed." Read more at <http://www.kiplinger.com/slideshow/retirement/T055-S001-top-10-least-tax-friendly-states-for-retirees/index.html#CRcmWbTfqrXkokqB.99>

Another VT Official Admits Energy Policy Not About Global Warming. Following Asa Hopkin's recent admission that all the solar panels and wind towers popping up all over Vermont will have no impact on Global Warming, or influence on other states/nations, VT Watchdog followed up with Chris Recchia, commissioner of the Public Service Department, who confirmed, "I disagree with the characterization that the reason we're doing this is to try and improve global warming," ([Watchdog, 10/23/15](#))

Renowned Climate Scientist Says Obama (and a lot of others) Wrong on Climate Science. [Breitbart News reported](#) on comments made by Princeton's Dr. Freeman Dyson, "The climate models used by alarmist scientists to predict global warming are getting worse, not better; carbon dioxide does far more good than harm; and President Obama has backed the 'wrong side' in the war on "climate change."

Great Summary of the Democratic Presidential Debate. "They contended socialism is mostly about standing up to the richest one percent and promoting entrepreneurs and small business; climate change is the biggest national security threat facing the nation; college educations should be free for everyone; all lives don't matter, black lives do; Obama is simultaneously an enormously successful president in managing the economy and the middle class is collapsing and there's a need for a "New New Deal" which is in fact an Old Old Idea." Jim Geraghty, [National Review, 10/13/15](#))

Climate Change Wealth Transfer. "In a world in which malnourishment continues to claim at least 1.4 million children's lives each year, 1.2 billion people live in extreme poverty, and 2.6 billion lack clean drinking water and sanitation, this growing emphasis on climate aid is immoral," writes Bjorn Lomborg in the October 22 Wall Street Journal.

Carbon Tax A Tax on Workers. "I strongly disagree with this legislation. Let's call it what it really is: A giant pay cut on working Vermonters. It is unrealistic to expect people to drop everything, pull their kids out of school and move elsewhere to cut down the commute. Usually, two people have to work in a household just to get by. One household often has two workers employed in different towns. Vermont is not Fairfield County

Connecticut. Folks can't ride the rail into the city. Seriously folks, this would hurt workers." - Dave Bellini (President, Vermont State Employees Association)(VTDigger 10/25/15)

Carbon Tax Purpose. "At every green event in the last year (VCRD, REV, VPIRG, DPS CEP plan hearings) the carbon tax is the top talking point. VPIRG now has 16 people on staff and a budget of \$2.2 million. The reason for the carbon tax is to come up with a funding mechanism to replace the Investment Tax Credit for solar which is going from 30% to 10% at the end of 2016. This was reported as the reason for the carbon tax at the VCRD February conference, said by James Moore of SunCommon." – Annette Smith, Vermonters for a Clean Environment (VTDigger 10/26/15)

Learn About Climate Science. Sen. Ted Cruz quizzed Sierra Club president Aaron Mair on the reason for the 18 year "pause" in global temperatures. See his ridiculous responses at <https://www.youtube.com/watch?t=207&v=SI9-tY1oZNw>

Basic Gun Crime Facts. "In 2014, according to the FBI, less than 3 percent of the roughly 12,000 murders in the U.S. were carried out with rifles of any sort, ranging from wooden-stock .22 squirrel plunkers to AR-15s, the civilian equivalents to the weapons used by U.S. troops in Afghanistan. Americans killed each other far more often with knives (13 percent) and hands and feet (6 percent) than they did with semiautomatic rifles." (Business Week, 10/15/15)

Jefferson on the Proper Role of Government. "A noiseless course, not meddling in the affairs of others, unattractive to notice, is a mark that society is going on in happiness. If we can prevent the government from wasting the labors of the people, under the pretext of taking care of them, they must be happy." (To Thomas Cooper, November 29, 1802.)

Book of the Month

Smaller Faster Lighter Denser Cheaper

How Innovation Keeps Proving the Catastrophists Wrong

By Robert Bryce

New York: Public Affairs, 2014, pp 278

In his 2010 book *Power Hungry*, energy expert Robert Bryce of the Manhattan Institute exploded the myths of "green" energy and convincingly identified the real fuels of the future. This new book explains how innovation in a free economy steadily improves the human condition by making things "smaller faster denser lighter cheaper".

For example, Bryce describes how the transistor displaced the vacuum tube, the Haber-Bosch process displaced bird guano (fertilizer), and the roller cone drill bit displaced the fishtail bit. In a recent advance, the cyberspace "cloud" completed the transition from the ENIAC computer of the 1940s. Bryce's conclusion: "never have so many lived so well."

An especially interesting feature of Bryce's writing is his use of sidebars to provide illustrations of the five adjectives in his book's title. Of particular interest to

Vermonters is his sidebar on “Bill McKibben’s Energy Starvation Plan”, and his “Debunking the Big Fibs About Wind and Solar”. “The fundamental problem with both wind and biofuels [corn ethanol] is that they are not dense. Producing significant quantities of energy from either wind or biomass simply requires too much land. The problem is not one of religious belief, it’s one of simple math and basic physics.”

Bryce forces himself to be neutral on the dangers of Al Gore’s heat death, but he is very clear about the best way to meet our energy needs of the future. He says “we will need vastly more energy in the decades ahead in order to raise the living standards of the more than two billion people who are still living in abject poverty.” The only viable solution: N2N.

“Natural gas to Nuclear provides the best no-regrets energy policy because those fuels can provide significant environmental benefits with relatively low economic costs... Both sources have high power densities, require relatively little land, and can be scaled up enough to meet a significant portion of the continuing growth in electric demand...” He describes the coming wave of small modular nuclear reactors – molten salt LFTRs, integral fast reactors, travelling wave reactors, and the like – all of which will solve humanity’s energy problems thanks to “the inexorable human desire for Smaller Faster Lighter Denser Cheaper.”

As an introduction to the astounding success of innovation in advancing human wellbeing, Bryce’s book is well informed, well written, rich with fascinating examples, and really interesting. It is a powerful antidote to the flood of corporate welfare propaganda from the renewable industrial complex and the “Degrowthers” of all stripes.

- Review by John McClaughry, founder and vice president of the Ethan Allen Institute.

<http://www.amazon.com/Smaller-Faster-Lighter-Denser-Cheaper/dp/1610392051>

The Final Word

November Survey:

Should the Vermont Legislature repeal Act 56, which mandates the eight-fold expansion of renewable energy development by 2032?

Make Your Voice Heard! Take the survey at:

<https://www.surveymonkey.com/r/MZSJ3F9>

October Survey Results:

Should the legislature repeal act 46, the school district merger bill?

YES. 94.74%

NO. 5.26%

Don't Know. 0%