House Committee on Energy and Technology
April 9, 2018
Testimony of John Echeverria on H. 175

Thank you for the opportunity to testify. I am a citizen of Vermont and a resident of Strafford. I am a member of the faculty of Vermont Law School where I teach property and a variety of courses on environmental protection and natural resource management, including climate change. I also am the Strafford representative on the board of directors of the Two Rivers-Ottauquechee Regional Commission. However, I am appearing today purely in my personal capacity.

Climate change represents an existential threat to our state, the nation and the world. I applaud the committee for holding this hearing on this important subject and encourage the committee and the legislature as a whole to move forward with common sense legislation to ensure that Vermont does its part to control greenhouse gas emissions and avert a climate change disaster.

My testimony today is narrowly focused on H. 175. I recognize and applaud the goal of this proposed legislation to limit future fossil fuel infrastructure in the state and thereby help limit greenhouse gas emissions caused by development and consumption of energy in Vermont. However, I am skeptical that H. 175 pursues this goal in a productive fashion. As demonstrated by the several others bills that have been introduced in this session to tackle climate change (e.g. H. 51 and H. 214), there are other, better ways to approach the climate issue.

Defending eminent domain is akin to defending death or taxes. I have never encountered an individual who welcomed having his or her property seized through the eminent domain process. But eminent domain – the governmental power to take private property to advance some public purpose in exchange for payment of just compensation – is well established. The eminent power is recognized in both the U.S. Constitution (Fifth Amendment) and the Vermont Constitution (Ch. 1, Art 2), and has been repeatedly upheld by the U.S. Supreme Court and the Vermont Supreme Court.

The basic justification for eminent domain is that it permits the government (the representative of the people as a whole) to overcome the so-called holdout problem, the ability of a single landowner who refuses to sell property at a reasonable price to block, or at least make more difficult and expensive, the assembly of sites for important development projects.

The eminent domain power has been used to site important public buildings (e.g., Lincoln Center in New York City), and schools and post offices. The eminent domain power is especially important for successfully creating lengthy linear corridors, such as for highways (e.g., I-89 and I-91), electric transmission lines, and pipelines.

Understandably, many landowners are not satisfied with receipt of the just compensation they are due upon the compelled sale of their property to the government (or a private company acting with government authority) under the eminent domain power. But the risk that a citizen bears of having his or her property taken for a valid public purpose through eminent domain (in exchange for just compensation) is one of the burdens of citizenship, akin to the duty to pay taxes, to comply with zoning regulations (where applicable) and, in an earlier era, to respond to the call for national military service.

I have no doubt that the Vermont legislature has the authority to prohibit, as a matter of policy, the use of the state's eminent domain power for fossil fuel infrastructure. For an exercise of eminent domain to be lawful, it must both serve a valid public purpose within the meaning of the constitution and be authorized by statute. The legislature can choose to modify the state's statutes to prohibit the use of eminent domain for fossil fuel development.

But the larger issue, in my mind, is whether this step would represent sound public policy. For several reasons, I think it would not be a sound approach, especially given the availability of different, better options for tackling the climate problem.

First, H. 175, by blocking the use of eminent domain for fossil fuel development, approaches the climate issue through indirection. Rather than directly controlling the construction of facilities in the state that will increase greenhouse gas emissions or greenhouse gas levels in the atmosphere, the bill seeks to curtail the use of a particular governmental power that can facilitate fossil fuel development. But, as a matter of climate change policy, it ultimately does not matter whether a fossil fuel facility is built with the aid of the eminent domain power or not; what matters is whether the facility is build, period. Everything else being equal, the legislature should address problems directly rather than through indirection.

Second, while H. 175 would likely deter the development of fossil fuel infrastructure in the state, it would not necessarily be completely effective. H. 175, if enacted, would force developers to negotiate the purchase of sites and rights of ways through conversations with willing sellers. In some cases, the lack of the eminent domain power might defeat a particular project, and it would almost certainly make development more difficult and time-consuming, and therefore less likely to occur. But fossil fuel development would not be blocked if developers can overcome this barrier, which is entirely possible in some circumstances.

Third, it is far from clear that addressing the climate issue by curtailing the eminent domain power would necessarily be less vulnerable to federal constitutional challenge than other legislative approaches. A fundamental legal issue facing Vermont and other states seeking to address the problem of climate change in this era of gross federal government neglect is whether state climate measures will run into federal constitutional problems, particularly under the Supremacy Clause or the so-called dormant Commerce Clause. Depending on how it is drafted, eminent domain legislation could potentially be as vulnerable to constitutional challenge as more direct state restrictions on fossil fuel development.

Fourth, it would be problematic for the legislature to target the use of eminent in connection with energy development because eminent domain may well turn out to be an important tool for creating a new, climate-friendly energy system for Vermont. Many policy makers advocate electrification of the Vermont energy system in order to reduce adverse climate impacts. Pursuing that agenda will require developing new sources of electric power as well as building new transmission capacity to bring green electricity to market. Eminent domain power may be very useful in creating this new infrastructure. Legislation targeting the use of eminent domain in one context could engender counter-produtive opposition to the use of eminent domain in other contexts.

Finally, on a more philosophical level, bolstering abstract claims to private rights seems the wrong way to go if we are going to successfully address the climate challenge. Controlling carbon emissions will require robust regulation of the use of private property assets, including as Bill McKibben has written, making sure that petroleum assets of great economic value "remain in the ground." These efforts will require recognition that government has broad latitude to regulate the use private property to safeguard the planet, both as matter of law and basic morality. Efforts to address climate change by enhancing private property rights, no matter how well intentioned, would push us in the wrong general direction.

While I believe H. 175 is not a sound proposal, happily the legislature has before it several proposals, including H. 51 and H. 214, which embrace a better general approach and certainly provide the foundation for the enactment of valuable legislation.

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