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Hari M. Osofsky

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Introduction: Climate Policy for the Obama Administration

Hari M. Osofsky*

This inaugural volume of Washington and Lee University School of Law's *Journal of Energy, Climate, and Environment* emerged from its first annual symposium, which was held exactly one month after the Obama administration took office. That interdisciplinary symposium brought together leading experts, both in-person and virtually, to assess the administration's initial steps on climate change and reflect upon the road ahead. Our goals for both that discussion and this volume include not only providing interesting academic discussion, but also producing a policy assessment which might be useful to those advising President Obama.

Much has ensued in the months following that conversation in spring 2009, and these written submissions reflect that evolution. The articles in this volume cover a wide range of law and policy topics—from green building to clean water to endangered species to trade—that relate to the cross-cutting problem of climate change. They also consider many different types of legal and institutional approaches to addressing the problem, including the use of existing environmental statutes, litigation, and creating new substantive law and governance structures. As a whole, the volume mirrors the complexity that the Obama administration faces in attempting to regulate climate change effectively. This problem cuts across many substantive areas of law and governmental entities, and strategies for mitigation and adaptation often will need to look quite different.

The five articles which comprise this volume provide a helpful exploration of some of the critical issues that the Obama administration must grapple with in each of these areas. Professor Robin Kundis Craig's *Climate Change Comes to the Clean Water Act: Now What?* analyzes the way in which the Clean Water Act as currently constructed and through potential amendment could most

* Associate Professor, Washington and Lee University School of Law. I would like to thank the students from the *Journal of Energy, Climate, and the Environment* and from the Environmental Law Society for their hard work putting this inaugural symposium event and volume together, and the participants for their excellent contributions to the dialogue. This volume has contributions from four of the presenters from the symposium, as well as an article from Alexandra Khrebtukova which complements and builds upon that discussion.

appropriately address climate change.¹ In *Greening the Economy Sustainably*, Professor David Markell situates climate change in the broader context of sustainable development and argues that effective policy in this area requires thorough comparative assessment of potential solutions and rethinking of governance structures.² The article *Climbing Mount Mitigation: A Proposal for Legislative Suspension of Climate Change "Mitigation Litigation"* by Professor J.B. Ruhl uses the Endangered Species Act (ESA) context as an example to argue against "mitigation litigation" that focuses on forcing federal agencies to regulate greenhouse gas emissions under existing laws and to propose a two year suspension of mitigation litigation during which federal agencies would rethink their approach to climate change.³ Professor Nathan Sayre's *Climate Change, Scale, and Devaluation: The Challenge of Our Built Environment* explores the complex issues of scale that plague efforts to address climate change and recommends redesigning and rebuilding the built environment through taking advantage of natural turnover.⁴ Finally, in *Using National Border Climate Adjustment Scheme to Facilitate Global Greenhouse Gas Management in Industrial Production*, Ms. Alexandra Khrebtukova considers the value of well-designed border climate adjustment schemes—which help to set the price of imported products based on their impact on the global climate—implemented in conjunction with potential cap-and-trade legislation and discusses the trade implications of such an approach.⁵

1. Robin Kundis Craig, *Climate Change Comes to the Clean Water Act: Now What?*, 1 WASH & LEE J. ENERGY, CLIMATE, & ENV'T 7 (2010), available at <https://law.wlu.edu/jece/page.asp?pageid=1082> (follow "Climate Change Comes to the Clean Water Act: Now What?" hyperlink).

2. David L. Markell, *Greening the Economy Sustainably*, 1 WASH & LEE J. ENERGY, CLIMATE, & ENV'T 43 (2010), available at <https://law.wlu.edu/jece/page.asp?pageid=1082> (follow "Greening the Economy Sustainably" hyperlink).

3. J.B. Ruhl, *Climbing Mount Mitigation: A Proposal for Legislative Suspension of Climate Change "Mitigation Litigation"*, 1 WASH & LEE J. ENERGY, CLIMATE, & ENV'T 64 (2010), available at <https://law.wlu.edu/jece/page.asp?pageid=1082> (follow "Climbing Mount Mitigation: A Proposal for Legislative Suspension of Climate Change 'Mitigation Litigation'" hyperlink).

4. Nathan F. Sayre, *Climate Change, Scale, and Devaluation: The Challenge of Our Built Environment*, 1 WASH & LEE J. ENERGY, CLIMATE, & ENV'T 83 (2010), available at <https://law.wlu.edu/jece/page.asp?pageid=1082> (follow "Climate Change, Scale, and Devaluation: The Challenge of Our Built Environment" hyperlink).

5. Alexandra Khrebtukova, *Using National Border Climate Adjustment Schemes to Facilitate Global Greenhouse Gas Management in Industrial Production*, 1 WASH & LEE J. ENERGY, CLIMATE, & ENV'T 95 (2010), available at <https://law.wlu.edu/jece/page.asp?pageid=1082> (follow "Using National Border Climate Adjustment Schemes to Facilitate Global Greenhouse Gas Management in Industrial Production" hyperlink).

Four themes emerge from the analyses in this volume. First, an effective approach to climate change needs to be grounded in an understanding of its intertwinement with a wide range of legal, economic, cultural, social, and policy choices. Markell's article provides the broadest consideration of some of these interconnections through its exploration of climate change and sustainability, and the complexities of policy choices and institutional design.⁶ However, all of the other articles also engage the cross-cutting nature of the problem in their assessments of specific policy areas. Craig's article grounds its discussion of the Clean Water Act in the human-ecosystem interactions that cause climate change to impact water quality.⁷ Ruhl's concerns about litigation in an Endangered Species Act context stem in part from the "incredibly complex temporal and spatial causal chain" involved.⁸ In his analysis of the built environment, Sayre highlights the financial institutions and interactions which determine how infrastructure is constructed and evolves.⁹ Khrebtukova's article explores the interaction of transnational markets and law with the problem of climate change.¹⁰

Second, while an overall policy approach to climate change requires this holistic understanding of the problem, meaningful progress rests in the details. Those details vary across substantive areas and statutory frameworks. Craig's article on the Clean Water Act, for example, argues that this statute—especially if modified as she suggests—could serve an important role in adaptation to climate change, but has more limited value as tool in mitigation.¹¹ Ruhl's concerns about litigation in an ESA context are based not only in general concerns about litigation as a tool in this context, but also specific interpretive questions about Section 7 of the Act.¹² Sayre's article arguing for the importance of rethinking our built environment engages the nuances of scale and devaluation that occur in this context.¹³ Khrebtukova's article argues that the specifics of how border climate adjustment schemes are structured impact their policy viability and likelihood of violating the

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6. See Markell, *supra* note 2.
 7. See Craig, *supra* note 1.
 8. Ruhl, *supra* note 3, at 72.
 9. See Sayre, *supra* note 4.
 10. See Khrebtukova, *supra* note 5.
 11. See Craig, *supra* note 1.
 12. See Ruhl, *supra* note 3.
 13. See Sayre, *supra* note 4.

WTO, and compares its proposed schemes with ones recently before Congress.¹⁴

Third, an important part of addressing those details involves not only the nuances of different substantive areas, but also reconceptualizing governance structures. Markell's analysis reinforces that the unique character of climate change requires the Obama administration to envision many of the traditional ways in which governance is structured in this area. In particular, he recommends a revisiting of whether our current legal structure is adequate, how our administrative agencies are structured, the role of regional governance, the organizational structure of states, the ways in which state and local government relate, current approaches to cooperative federalism, and the relevant relationships among the wide range of governmental and nongovernmental entities and individuals.¹⁵ Ruhl's call for a two year litigation pause and rethinking of administrative approaches similarly stems out of the difficulties of addressing the problem fully through our current strategies.¹⁶

Many of the governance challenges stem out of the multiscalar nature of the climate change and of the interactions among various entities at different levels of government that intersect with the problem.

Sayre's article explores why climate change provides a unique scalar challenge, explaining that "[t]he processes that link GHG emissions to climate change combine extremely fine grains and extremely large extents, both spatially and temporally."¹⁷ Sayre argues that this structure makes it difficult to address climate change the way we would other environmental problems and requires us to set a limit on the total amount of carbon we can release into the atmosphere.¹⁸

Finally, the Obama administration is making its legal and policy choices at a moment in which significant reconceptualization is possible and it should take advantage of that opportunity. Although the administration confronts this issue against a challenging backdrop of a major recession, competing policy priorities, and most recently, a massive, uncontrolled oil spill, this backdrop also prevents an opportunity for reframing old debates and innovating. The articles in

14. See Khrebtukova, *supra* note 5.

15. See Markell, *supra* note 2.

16. See Ruhl, *supra* note 3.

17. Sayre, *supra* note 4, at 86.

18. *Id.*

this volume represent such new ideas in their reassessment of many different ways of addressing climate change and proposals for reform. Whether or not one agrees with each proposal—I, for example, have long advocated for the important regulatory role of litigation¹⁹ and so would argue against a two-year pause—the Volume provides a wealth of new and interesting ideas to assist the Obama administration as it moves forward. Exploring these ideas provides the basis for more effective, cross-cutting climate change law and policy.

In so doing, this inaugural volume exemplifies the value of interdisciplinary thinking that treats energy, climate change, and the environment as posing interwoven issues that should be treated together.

This journal, as it moves forward, contributes to academic and policy discourse not only through its individual volumes and the articles within them, but also through modeling the breaking down of artificial divisions that prevent holistic treatment of this complex area (as the symposia that inspire its initial issues model low carbon conferencing through virtual participation). Such intersectional thinking is critical because as Justice Roberts acknowledged in the opening lines of dissent in *Massachusetts v. EPA*, "[g]lobal warming may be a 'crisis,' even 'the most pressing environmental problem of our time.'"²⁰ This volume's engagement of the broad contours and important details of this intersection provides a promising initial contribution of this journal to the conversation.

19. See, e.g., Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, __ CLIMATE LAW __ (forthcoming 2010).

20. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

