Washington and Lee Journal of Energy, Climate, and the Environment

Volume 1 | Issue 1 Article 6

Spring 3-1-2010

Climbing Mount Mitigation: A Proposal for Legislative Suspension of Climate Change "Mitigation Litigation"

J. B. Ruhl

Climbing Mount Mitigation: A Proposal for Legislative Suspension of Climate Change "Mitigation Litigation"

J.B. Ruhl*

Because it's there.[1]

To me, the only way you achieve a summit is to come back alive. The job is half done if you don't get down again.[2]

Table of Contents

---

* Matthews & Hawkins Professor of Property, The Florida State University College of Law, Tallahassee, Florida. I am thankful to the Washington & Lee Journal of Energy, Climate, and the Environment for inviting me to participate in Symposium 2009: Climate Policy Advice for the Obama Administration at the Washington & Lee School of Law, to participants at the conference for direct feedback on my presentation of the concepts outlined herein, and to Robin Kundis Craig, David Markell, and Jim Salzman for helpful comments on early draft manuscripts. Please direct any questions or comments to jruhl@law.fsu.edu.

1. In March 1923, in an interview with *The New York Times*, the British mountaineer George Leigh Mallory gave this response when asked why he wanted to climb Mount Everest, which no person had successfully accomplished. The answer became famous, particularly after Mallory and his fellow climber Andrew Irvine were lost on Everest in the following year. It was unclear whether they perished on the way up to or down from the summit. *See* Interview, *Climbing Mount Everest is Work for Supermen*, N.Y. TIMES, March 18, 1923, at X11, *available at* http://www.askoxford.com/worldofwords/quotations/quotefrom/mallory?view=uk (last visited November 5, 2009).

2. In May 1999, Mallory's body was found on Everest, reigniting the question of whether or not he or Irvine had reached the summit 29 years before Sir Edmund Hillary's successful climb. Mallory's son, John Mallory, offered this objective view of the implications of the finding of his father's body. *See* AskOxford.com, A Quote from George Leigh Mallory, http://www.askoxford.com/worldofwords/quotations/quotefrom/ mallory/?view=uk (last visited November 5, 2009).

I. Introduction

What is the United States' climate change policy? Nobody knows. To be sure, there is plenty of talk and even some action, the latter mostly by states with the federal government moving slowly behind,[3] but there could be no plausible claim that the United States, and by this I mean federal, state, local, tribal, and private actors from top to bottom—has formulated anything approaching a coherent, integrated, multi-scalar national climate change policy.[4]

Formulating such a policy, even with what appears to be new-found political will at all governance levels, will be no mean feat. Critical and as yet unanswered questions are most pressing at the federal scale: How will U.S. policy interface with international and other national regimes? What form should comprehensive federal legislation take—cap and trade, carbon taxes, regulation, subsidies, something else? Should federal initiatives promote or preempt state and local climate change policies? All these questions, however, focus on federal policy initiatives taken through *new* laws and *new* regulations implementing them.

This Article focuses on a different but related fundamental policy design question: How should federal agencies implement *existing* statutory authorities to contribute to a coherent national climate change policy? One might ask why we should be concerned with how existing laws can be employed given reasonable expectations that the Obama Administration and Congress are

3. *See* Patrick A. Parenteau, Lead Follow or Get Out of the Way: The States Tackle Climate Change with Little Help from Washington, (July 23, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/abstract=1438180 (surveying the efforts of various states on climate change).

4. *See* Geoffrey Clemm & Mark Griffin Smith, *Emerging U.S. Climate Change Policy: Where We are and How We Got Here*, (April 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1440339 (surveying the history and current landscape of national climate change policy).

poised to make gains on new federal initiatives. For several reasons, however, it is unlikely that even bold new federal legislation—a comprehensive carbon tax on all fossil fuel consumption or a cap-and-trade program broadly encompassing major emission sources—will obviate the need to solve the puzzle of how to integrate existing laws into the picture. First, it is unlikely that new federal legislation aimed at reducing national greenhouse gas emissions will alone allow us to meet our nation's appropriate share (whatever that is) of global reductions necessary to wrestle climate change under control (whatever that level is). Second, regardless of how aggressively the federal government regulates greenhouse gas emissions through some new legislative program, the global climate system will face a period of "committed warming" resulting from the buildup of past emissions in the troposphere.[5] In short, something more than new federal emission reduction programs will be needed to reduce emissions (known as *mitigation*), and something entirely different from emission reduction programs will be needed to respond to the climate change we inevitably will experience regardless of mitigation success (known as *adaptation*).[6]

As we look around for that something more, new state and local policy initiatives surely come to mind as ways to fill the gap, but why not also turn to existing federal environmental and other legislation? Of course, for close to a

---

5. *See* V. Ramanathan & Y. Feng, *On Avoiding Dangerous Anthropogenic Interference with the Climate System: Formidable Challenges Ahead*, 105 PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES 105, 14245 (2008) (estimating committed warming of 2.4oC even if greenhouse gas concentrations are held to 2005 levels); Susan Solomon et al., *Irreversible Climate Change due to Carbon Dioxide Emissions*, 106 PROC. OF THE NAT'L ACAD. OF SCI. 1704 (2009) (estimating a 1000-year committed warming effect); *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, at 19, Cambridge University Press, (April 2–5, 2007); *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf ("Past emissions are estimated to involve some unavoidable warming . . . even if atmospheric greenhouse gas concentrations remain at 2000 levels."); Professor Eric Biber has provided an in-depth examination of this lag effect and the resistance it is likely to generate against costly policy measures that may take decades to produce results. See Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295 (2009) ().

6. Broadly speaking, in the language of climate change policy *mitigation* means polices designed to arrest climate change and *adaptation* means policies designed to deal with the climate change we either do not or cannot mitigate. See generally, Robin Kundis Craig, *Climate Change Comes to the Clean Water Act: Now What?* (discussing the terms mitigation and adaptation in terms of the distinct policy needs and approaches of each); see also Robin Kundis Craig, "*Stationarity Is Dead" – Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/=1357766 (outlining general guidelines for formulating adaptation strategies).

decade some federal agencies, many interest groups, and a growing number of legal academics have been doing just that, but not in any systematic way. Our federal "policy" for how to employ existing legislative authorities such as the Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act to combat and respond to climate change has been shaped primarily by ad hoc agency policy studies, scatter-shot interest group litigation aimed at forcing agencies to do something or to prevent them from doing anything, and all variety of proposals in legal scholarship, which is to say there is no policy at all. It is thus little surprise that the EPA Office of Inspector General recently found that "EPA does not have an overall plan to ensure developing consistent, compatible climate change strategies across the Agency."[7] I leave it to others to assign blame for that lack of cohesive federal policy initiatives on climate change to date. The Obama Administration presents opportunities for a fresh start, and my aim here is to put existing federal regulatory programs at the heart of any effort the Administration activates to forge a comprehensive national climate change policy.

Three overarching concerns strike me as complicating and constraining the role of existing authorities in that regard. First, at least for the foreseeable future agencies most likely will have to rely on existing legislation as currently in place to define the scope of authority. Congress is unlikely soon in any systematic and comprehensive way to "update" existing legislation to take climate change mitigation and adaptation goals into account. For one thing, the political game in Congress on climate change for now, if there is one, is about enacting new comprehensive emission reduction legislation. But even with that task eventually behind it, Congress is likely to take up the Supreme Court's suggestion in *Massachusetts v. EPA*[8] that existing legislation can be sufficiently

---

7. U.S. ENVTL. PROT. AGENCY, OFFICE OF INSPECTOR GENERAL, REP. NO. 09-P-0089, EPA NEEDS A COMPREHENSIVE RESEARCH PLAN AND POLICIES TO FULFILL ITS EMERGING CLIMATE CHANGE ROLE, AT A GLANCE (2009*), available at* http://www.epa.gov/oig/reports/2009/20090202-09-P-0089.pdf.

8. Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007) (holding that the Environmental Protection Agency (EPA) had erred in denying a citizen rulemaking petition to regulate greenhouse gas emissions from motor vehicles as an air pollutant under the Clean Air Act). *See* Clean Air Act, 42 U.S.C. § 7602(g) (2000) (defining "air pollutant" in sweeping terms to include "any air pollution agent . . . including any physical, chemical [or] biological . . . substance or matter which is emitted into or otherwise enters the ambient air."). The EPA dismissed the petition on the broad basis that global climate change is so complicated either Congress did not provide for greenhouse gas emissions to be subject matter for the Clean Air Act or, if Congress did so provide, the agency properly identified conflicting policy concerns as a basis for deciding not to regulate emissions. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52929–31 (Sept. 8, 2003). The Court rejected those rationales as outside the scope of the statute and found that "greenhouse gasses fit well within [the] capacious definition" of air pollutant. 549 U.S. at 500. For concise yet

flexible to accommodate development of climate change mitigation and adaptation policy through administrative reform initiatives.[9] Why would Congress expend the political capital necessary to update the laws if agencies can accomplish the same through administrative interpretation and implementation of existing laws?

Leaving matters to agencies, however, raises the two additional concerns: What is the scope of agency discretion under existing laws to formulate mitigation and adaptation policies, and how aggressively should any such authority be exercised? Appallingly, these two root questions are being addressed only through piecemeal interest group litigation and disjointed agency policy initiatives. The time, thus, is ripe for the Obama Administration to conduct a systematic, government-wide assessment of the climate change policy discretion inherent in existing federal legislation and to develop a coordinated plan for exercising it.

This Article highlights the need for such an initiative and proposes a framework for carrying it out. Part I focuses on the dysfunctional effects litigation designed to force agencies into regulating greenhouse gas emissions under existing laws, what I call "mitigation litigation," is likely to have on agency policy development. As strong proponents of mitigation litigation have described their agenda, it is simply that "we must launch a thousand arrows immediately."[10] And they have been launched. For example, with over $6 million of funding already committed, the Center for Biological Diversity recently formed the Climate Law Institute to, among other things, "establish legal precedents requiring existing environmental laws such as the Clean Air Act, Endangered Species Act, National Environmental Policy Act, Clean Water Act, and the California Environmental Quality Act to be fully implemented to regulate greenhouse gas emissions."[11] Even disregarding the inherently poor

---

thorough summaries of the rulemaking petition, the EPA's decision, lower court proceedings, the Supreme Court's majority and dissenting opinions, and the likely impact of the case, see Arnold W. Reitze Jr., *Controlling Greenhouse Gas Emissions From Mobile Sources* – Massachusetts v. EPA, 37 Envtl. L. Rep. (Envtl. Law Inst.) 10535 (2007); see also Michael Sugar, *Case Comment, Massachusetts v. Environmental Protection Agency*, 31 HARV. ENVTL. L. REV. 531 (2007).

9. *See* 549 U.S. at 532 ("While the Congresses that drafted [Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language . . . reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.")

10 Anna T. Moritz et al., *Biodiversity Baking and Boiling: Endangered Species Act Turning Down the Heat*, 44 TULSA L. REV. 205, 230 (2008).

11. Center for Biological Diversity, Press Release, Center for Biological Diversity Announces Climate Law Institute, Dedicates $17 Million to Combat Global Warming (Feb. 12,

attributes of litigation for making national policy in general—i.e., that it is not transparent, it limits public participation, it is piecemeal, it can lead to inconsistent results, it takes a long time to reach conclusion, etc.—mitigation litigation is an especially awful platform for developing national climate change policy. Using the Endangered Species Act as a case study, I argue that, while it has pushed a few agencies into examining the role of existing authorities, mitigation litigation in the long run will lead to an uncoordinated and ineffective climate change policy. Existing legislation, if creatively applied within the bounds of permissible agency statutory interpretation, offers many opportunities for agencies to pursue mitigation and adaptation policies, but not all such opportunities necessarily should be employed to the maximum an agency's policy discretion might allow. The pursuit of mitigation litigation against federal agencies has been designed to push them into emissions mitigation regulation "because it's there," with no clear vision of how to do so at the agency level and no plan for how to coordinate a government-wide climate change policy initiative that includes both mitigation and adaptation.

Targeting agencies with this kind of mitigation litigation forces the federal government to build a mitigation policy through ad hoc, agency-by-agency litigation. To be sure, in the George W. Bush Administration, mitigation litigation under existing laws moved some agencies off center and in the direction of formulating climate change policies. Indeed, *Massachusetts v. EPA* may in retrospect be seen as the jolt needed to put existing laws in play in the climate change policy dialogue. But continuing down the mitigation litigation path will not bring about a coherent, integrated, multi-scalar national climate change policy.

Part II of the Essay suggests a way out of this trap. I propose federal legislation that would suspend for two years all causes of action against agencies designed to force them to develop climate change policies under existing legislation. During this period agencies would conduct coordinated statutory and policy studies, develop and finalize regulatory proposals, and suggest legislative amendments, after which any litigation about the final regulations would be channeled through a prescribed judicial review forum. Necessary interim agency decisions, such as preparation of environmental impact statements and issuance of permits, would to the maximum extent practicable and permitted by law be made contingent on the outcome of the rule promulgations. This process would allow agencies to get out from under the

---

2009), http://www.biologicaldiversity.org/news/press_releases/2009/climate-law-institute-02-12-2009.html. One of the co-authors of Moritz et al. is the Director of the Center's Climate Law Institute, and another co-author is a staff member of the Center. *See* Moritz et al., *supra* note 10, at 205 n.n.aa1—aaa1.

perverse mitigation litigation cloud while formulating climate change policy in a coordinated government-wide process.

Our nation needs to climb Mount Mitigation, but it also needs to come back down intact. A national climate change policy "map" is desperately needed. It must chart paths for mitigation and adaptation. It must locate new and existing authorities at all levels of government. Existing federal laws will play a large role in charting overall mitigation and adaptation objectives, but not if we stumble along step-by-step guided by piecemeal, ad hoc mitigation litigation. As important as citizen suit and Administrative Procedure Act litigation has been to the development of environmental policy over time, it is far too costly, time-consuming, disjointed, and contentious a manner to formulate the kind of mitigation policy the nation should expect our government to produce in the time frame needed. Rather, the political stars seem aligned such that, if given the chance, federal administrative agencies could pull off a coordinated and probing examination of how best to use existing authorities toward that end. My mitigation litigation suspension proposal is designed to give them that opportunity

II. Mitigation Litigation – Pursuing Mitigation Because It's There

I define mitigation litigation as any litigation effort designed to force an agency to employ, or to not employ, existing regulatory authority to regulate greenhouse gas emissions or limit a regulated action on the basis of its greenhouse gas emissions.[12] As the Climate Law Institute's mission statement suggests, the primary fronts for the initiative have been the Clean Air Act, Endangered Species Act, and National Environmental Policy Act. Thus far, however, the first wave of mitigation litigation has produced very little mitigation regulation policy. To be sure, courts have interpreted existing statutes to require agencies to integrate climate change into decision making, but they have imposed no particular outcome. For example, the Supreme Court in *Massachusetts v. EPA* pushed the agency toward regulating greenhouse gas

12. There is, of course, a much broader range of climate change litigation. A useful depiction of the breadth and depth of climate change litigation can be found at a chart lawyers at the law firm of Arnold & Porter has prepared. *See* Michael B. Gerrard and J. Cullen Howe, *Climate Change Litigation in the U.S.*, 2009, http://www.climatecasechart.com. The chart divides climate change into three primary categories: statutory claims; common law claims; and public international claims. Within the statutory claims category are claims to force the government to act, claims to stop government action, and claims to regulate private conduct. My mitigation litigation category corresponds most closely to the chart's claims to force government to act category.

automobile emissions under the Clean Air Act, but observed that "EPA no doubt has significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies."[13] Clearly, the Climate Law Institute effort is designed to focus the next litigation thrust on shaping the policies the EPA and other agencies develop now that they know they cannot so easily avoid making decisions about how to address climate change under their authorizing statutes. As valuable as the first wave of mitigation litigation was for putting existing laws on the climate change policy playing board, however, the launching of the second wave portends only folly.

Nowhere is the potential fallout from this single-minded litigation-led quest for the mitigation peak more evident than in the debate over how to integrate the Endangered Species Act (ESA) into climate change policy. I previously have outlined the scope of discretion agencies have under the existing ESA to engage in climate change mitigation and adaptation measures.[14] Like the Clean Air Act and most other existing environmental laws, the ESA does not mention climate change but is riddled with provisions that offer varying ranges of discretion to agencies to formulate climate change mitigation and adaptation policies, making it a sitting duck for mitigation litigation. In particular, Section 7(a)(2) of the ESA provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (…"action agency") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical . . . .[15]

The statute and implementing regulations build an elaborate procedure for carrying out these consultations under which the agency proposing the action (known as the "action agency") must consult with, depending on the species, either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) through a series of steps designed to predict the impact of the action on listed species, with the ultimate product being a "biological opinion" from the FWS or NMFS "setting forth the [agency's] opinion, and a summary

---

13. 549 U.S. at 533.

14. *See* J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1 (2008).

15. 16 U.S.C. § 1536(a)(2) (2006). The provision also requires that "[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." *Id.*

of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat."[16]

The substantive content for conducting the consultation analysis is defined primarily in joint FWS/NMFS regulations. "Jeopardize" is defined there as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[17] "Action" is defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas."[18] "Effects of the action" include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline."[19] The "indirect effects" are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur."[20]

On the one hand, greenhouse gas emissions and their climate change consequences arguably can be plausibly fit into this framework. Greenhouse gas emissions from actions carried out, funded, or authorized by federal agencies contribute to tropospheric warming, the indirect effects of which could at some later time adversely affect a protected species. Although determining whether these effects actually occur may be difficult to do reliably in particular scenarios, the point is that they could occur.

On the other hand, there are considerable legal, scientific, and practical difficulties with fitting climate change into the consultation framework at the level of detail necessary to evaluate particular federal agency actions, even relatively large or programmatic actions. Consider, for example, a proposed coal-fired power plant in Florida and its effects on the polar bear in the Arctic. The argument for applying the ESA goes as follows: the power plant emits greenhouse gases (a direct effect of the action), greenhouse gases are reasonably certain to warm the troposphere (an indirect effect of the action), a warming troposphere is reasonably certain to adversely alter ecological conditions for the polar bear, and it is reasonably expected that such ecological changes will bring an end to the polar bear as a species.

---

16. 16 U.S.C. § 1536(b)(3)(A).
17. 50 C.F.R. § 402.02 (2008).
18. *Id.*
19. *Id.*
20. *Id.*

While that chain of events makes for an easy connect-the-dots story, in fact any effort to link the individual plant's emissions as the jeopardizing agent for the polar bear species would meet obvious objections stemming from the fact that *all* greenhouse gas emissions worldwide are subject to the same causal analysis. Acting through an incredibly complex temporal and spatial causal chain beginning over a century ago, all greenhouse gas molecules are equally to blame for whatever impact climate change has on a species. It is not possible, therefore, to "upscale" current emissions from a particular source and "downscale" them in real time to a particular impact on the ground, which is precisely what the Section 7 consultation process would require the FWS and NMFS to do for every action funded, carried out, or authorized by federal agencies.[21] As a federal court recently explained in deciding the causation requirement of Article III standing had not been met in a claim that current greenhouse gas emissions are causing a public nuisance:

> The undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time . . . makes clear that there is no realistic probability of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time . . . . [T]he genesis of global warming is attributable to numerous entities which individually and cumulatively over the span of centuries created the effects . . . . [I]t Is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—"caused . . . alleged global warming related injuries.[22]

---

21. Moritz et al. argue that "[j]ust as there is no requirement to link the thinning of any particular bald eagle egg to any particular molecule of DDT to demonstrate that authorization of the use of DDT may result in a taking of bald eagles, there is no requirement to link any particular molecule of carbon dioxide or other greenhouse pollutant to the death of an individual bear." Moritz et al, *supra* note 10, at 226. The difference, of course, is that DDT is ingested by and toxic to bald eagles, whereas carbon dioxide is not the lethal agent in the case of the polar bear. A complex spatially and temporally attenuated causal chain involving the planet's vast physical system exists between the emission of a molecule of a greenhouse gas and its climate change effect on a polar bear. *See* U.S. GEOLOGICAL SURVEY, THE CHALLENGES OF LINKING CARBON EMISSIONS, ATMOSPHERIC GREENHOUSE GAS EMISSIONS, GLOBAL WARMING, AND CONSEQUENTIAL IMPACTS, (2008), http://www.fws.gov/home/feature/2008/ polarbear012308/pdf/Memo_to_FWS-Polar_Bears.PDF.

22. Native Village of Kivalina v. ExxonMobil Corp, No. C 08-1138 SBA, slip op. at 13 (N.D. Cal. Sept. 30, 2009). The Fifth Circuit recently criticized this reasoning as improperly conflating the merits of the nuisance claim with the causation requirement of standing, in that the standing requirement "need not be as close as the proximate causation needed to succeed on the merits of a tort claim." Comer v. Murphy Oil USA, No. 07-60756, slip op. at 5 (5th Cir. Oct. 16, 2009). No court has yet reached the merits of such a claim.

Every source of greenhouse gas emissions funded, carried out, or authorized by a federal agency, therefore, is on the same footing with respect to causation of jeopardy for a climate-threatened species. In other words, going down the mitigation road with Section 7 would subject a vast segment of our nation's economy to greenhouse gas regulation under the ESA, with no principled way of distinguishing between emission sources for purposes of assigning "jeopardizing" causal status. Either all federal actions would trigger jeopardy status and be subject to regulation by the FWS and NMFS,[23] or the FWS and NMFS would have to adopt arbitrary thresholds for assigning jeopardy status (e.g., quantity or efficiency of emissions) that would face difficult legal challenges.

Indeed, the suggestion that Section 7 could, in Clean Air Act like fashion, arbitrarily apply only to "major" greenhouse gas emission sources but lay off the small ones fundamentally misses the basic theme of the jeopardy prohibition. Moritz et al. argue, for example, that the FWS and NMFS "could set a threshold level for consultation, as long as it was reasonable and sufficiently protective of listed species."[24] But they do not point to authority in Section 7 or elsewhere in the ESA for differentiating between sources in terms of *legal* status if there is no scientific basis for differentiating the sources' *causal* status. The regulatory definition of jeopardy, they point out, is "to reduce *appreciably* the likelihood of both the survival and recovery of a listed species in the wild,"[25] which they suggest opens the door to an emissions level threshold. But consider how "appreciably" would be measured once a species is in jeopardy of not surviving and recovering. Jeopardy itself can be thought of as a threshold the ESA prohibits federal agencies from crossing based on the status of the species in question. After a species is listed, it is not the case that no further degradation of the species' condition or its habitat is permitted. Rather, the "incidental take authorization" procedures of Sections 7 and 10 allow public and private actions to cause harm and even death to individuals of the species with FWS and NMFS approval, with the jeopardy prohibition of Section 7 acting as a threshold of maximum tolerance.[26] Hence, in reality there

---

23. Regulation by the FWS and NMFS comes in the form of the agencies specifying "reasonable and prudent" alternatives to the action as proposed. *See* 16 U.S.C. § 1536(b)(3)(A). Presumably, in the climate change mitigation context this would mean placing caps on emission levels. Proponents of this use of the ESA have yet to explain how the FWS and NMFS would establish such caps for different sources.

24. Moritz et al., *supra* note 10, at 228.

25. 50 C.F.R. § 402.02 (emphasis added).

26. Section 9 of the ESA requires that all persons, including all private and public entities subject to federal jurisdiction, avoid committing "take" of listed species of fish and wildlife.16 U.S.C. § 1538(a)(1). For a description of the cases developing the legal standards for what

is an increment of "likelihood of survival and recovery" that additional federal and nonfederal actions erode through these incidental take authorizations. At some point, that increment is sufficiently eroded that the next action requiring incidental take authorization would trigger a jeopardy finding regardless of its "size." In the polar bear's case, in other words, conditions could reach the point that the species can tolerate no additional net increase in emissions of greenhouse gases without moving the likelihood of survival and recovery dangerously close to zero. At that point, if we want to entertain this causal story at the micro scale of discrete land uses, *zero* additional emissions of greenhouse gases from *any* source could escape a jeopardy finding.

Moreover, the idea that the ESA can differentiate between "major" and "minor" sources, regulating the former and leaving the latter outside the scope of consultation, turns the "cumulative effects" problem on its head in violation of Section 7. If Moritz et al. believe establishing causation is not a problem for applying Section 7 to emissions from "major" sources, then it follows that it also is not a problem for applying Section 7 to the cumulative effects of "minor" sources. Rarely does one hear environmental protection interest groups lobby in favor of an exemption from Section 7 for projects destroying under 20 acres of forest habitat of an endangered bird, or for projects diverting under 10 acre feet of water for an endangered fish, or for projects releasing under 10 pounds of pesticides for an endangered reptile. I wouldn't either. Why, then, would anyone be comfortable regulating only "major" sources of greenhouse gas emissions under the ESA, other than as an expedient to regulate major sources of greenhouse gas emissions and avoid the political and legal complications of regulating all causal sources? Why would greenhouse gas emissions from, say, hundreds of thousands of farms receiving federal subsidies not cross the jeopardy threshold but emissions from a single large power plant would?

Moritz et al. overlook that Section 7 regulations specifically prohibit this distortion by requiring that cumulative impacts be considered. The precise question under review in a Section 7 consultation is whether "the action, *taken*

---

constitutes "take," see Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001) Steven P. Quarles & Thomas R. Lundquist, *When Do Land Use Activities "Take" Listed Wildlife Under ESA Section 9 and the "Harm" Regulation?*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 207 (Donald C. Baur & Wm. Robert Irvin eds., 2002). Sections 7 (for federal agency actions) and 10 (for actions not subject to Section 7) establish a procedure and criteria for FWS to approve "incidental take" of listed species. 16 U.S.C. §§ 1536(b)(4) and 1539(a)(1). "Incidental take," although not explicitly defined in a specific statutory provision, is described in section 10 of the statute as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id*. § 1539(a)(1)(B).

together with cumulative effects, is likely to jeopardize the continued existence of listed species."[27] Cumulative effects are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation,"[28] and the action area includes "all areas to be affected directly or indirectly by the Federal action and not just the immediate area involved in the action."[29] This means that for greenhouse gas emission sources, if Section 7 is applied to them, the action area is the entire planet and thus *all* greenhouse emissions from *all* sources subject to United States jurisdiction anywhere in the world would have to be included in the cumulative effects component of the consultation.[30] Rather obviously, no source, no matter how small, could escape a jeopardy finding under this causal reasoning once the cumulative effects sources are factored into the consultation. In short, there is no way under Section 7 to have your cake and eat it too; if one believes greenhouse gas emissions can be regulated under Section 7 notwithstanding the tenuous causal theory supporting that view, every source of greenhouse gas emissions the federal government carries out, funds, or authorizes will, because of how cumulative effects and the action area are defined, be found to reduce appreciably the likelihood of both the survival and recovery of all climate-threatened listed species in the world.

My suggestion that this application of Section 7 is not a practical use of the ESA and should be avoided to the extent permitted under the agencies' discretion has been met with accusations that I am "rationaliz[ing] for a preferred policy approach rather than a meritorious legal argument."[31] This critique seems out of place with the recognition, endorsed by a long list of environmental law professors, that "there is a legitimate debate to be had over how well the current structure of the ESA serves to address climate change in general, or climate change impacts on listed species in particular," and that "it is unclear whether consultation would halt…power plants, require significant changes to the projects, or have no impact at all."[32] Other legal commentary recognizes the difficulties of establishing the necessary causation under the ESA and suggests that either my or the Moritz et al. perspective finds plausible

---

27. 50 C.F.R. § 402.14(g)(4). A consultation thus must "evaluate the effects of the action and cumulative effects on the listed species." 50 C.F.R. § 402.14(g)(3). Id. § 402.02.

28. 50 C.F.R. § 402.02.

29. *Id.*

30. The ESA applies broadly to all federal, state, local, tribal, and private entities, including individuals, "subject to the jurisdiction of the United States." 16 U.S.C. § 1532(13).

31. Moritz et al., *supra* note 10 at 227.

32. Eric Biber & Cynthia Drew, *Stopping the Conversation: Amended ESA Section 7 Regulations Put Species At Risk*, 36 ECOLOGY L. CURRENTS 139, 147 (2009)

support in ESA law.[33] Proponents of using the ESA as the lynchpin of our nation's greenhouse gas regulation regime thus seem no less susceptible to the charge of preferring a policy outcome than am I. Moritz et al. suggest, for example, that "[o]nly by fully implementing the ESA to help avoid rapid and catastrophic climate change can we keep it the strongest and most relevant biodiversity protection statute that the world has ever seen,"[34] and that "[t]here is absolutely no reason why we should not require these agencies to adopt all feasible measures to reduce emissions immediately through the Section 7 process,"[35] but that is just their "preferred policy approach."

I make no bones about my "preferred policy approach;"it is to promote the ESA as one of the nation's focused climate change *adaptation* statutes, for which I argue the ESA is especially well designed, and leave greenhouse gas emission regulation to agencies that are better equipped at pollution control science and technology, such as the EPA.[36] The question boils down to whether my "preferred policy approach" fits within the range of discretion the FWS and the NMFS enjoy under Section 7; that is, whether courts would find the agencies' position that causation cannot be established within the meaning of Section 7 is a reasonable interpretation of the statute entitled to judicial

---

33. *See* ROBERT MELTZ, CONGRESSIONAL RESEARCH SERV., USE OF THE POLAR BEAR LISTING TO FORCE REDUCTION OF GREENHOUSE GAS EMISSIONS: THE LEGAL ARGUMENTS 3–5 (2008) (laying out the legal basis for both positions); Matthew Gerhart, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L.Q. 167, 171–82 (2009) (detailing the causation obstacles to using section 7 to regulate greenhouse gas emissions). *But see* Ari N. Sommer, Note, *Taking the Pit Bull Off the Leash: Siccing the Endangered Species Act on Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 273, 303–04, 307–08 (2009) (arguing in the extreme that there is no significant obstacle to proving causation in a claim that greenhouse gas emissions cause take of an identifiable member of a species in violation of section 9).

34. Moritz et al., *supra* note 10 at 230.

35. *Id*. at 225.

36. Finding the "assertion that scientists and managers within the Services do not have the expertise to analyze greenhouse gas emission in section 7 consultations particularly puzzling," Moritz et al. presumably believe that the FWS and NMFS either already have or should be empowered with the pollution modeling and control technology design expertise needed to regulate the nation's sources of greenhouse gas pollutants. *Id*. at 227. While I agree that, with sufficient time and funding, the FWS and the NMFS could duplicate EPA's pollution regulation expertise, I am suggesting that it makes no practical sense to do so as a means of engaging the ESA in the nation's climate change policy strategy when so much more can be done using the agencies' existing capacities toward assisting species in adapting to climate change. In any event, the fact of the matter is that, at present, neither the FWS nor the NMFS purports to have or exercise the expertise needed to regulate greenhouse gas emissions from the industrial and agricultural complex of the entire United States, which is what going down the path Moritz et al. propose would require.

deference. I believe a "meritorious legal argument" can be made that they would.

To be sure, under my approach the FWS and NMFS would have no room to dodge the ESA's mandate at least to consider the *effects* of climate change on actions and species as part of the environmental baseline required to be accounted for in all consultations under Section 7.[37] That is, after all, a necessary ingredient of using the ESA to assist species adaptation. The mitigation litigation cause wants much more, however, and the reaction by the Bush Administration was to launch a counter-offensive that sent the question of the ESA and climate policy spiraling out of control.

The pushback began in full force in May 2008, when the FWS promulgated a final rule listing the polar bear as threatened based on factors that included the impacts of climate change on Arctic sea ice.[38] Secretary of the Interior Dirk Kempthorne stressed at the time that the listing would not provide a basis for using the ESA to regulate greenhouse gas (GHG) emission sources.[39] The FWS also issued interim and final section 4(d) rules for the polar bear, exempting from section 9 take prohibitions any activity already exempt or authorized under the Marine Mammal Protection Act and, for any activity outside of Alaska, also exempting all takes incidental to a lawful purpose.[40] The unspoken purpose of the latter approach undoubtedly was to cut off claims that GHG emissions sources outside of Alaska are causing unauthorized take of the polar bear. In tandem with that, the Department of the Interior also issued a memorandum explaining it will not consider GHG emissions in consultations about the polar bear or other species listed due to

---

37. *See* Nat. Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 368-70 (E.D. Cal. 2007) (The FWS must consider the effects of climate change on actions regulated under the ESA). The environmental baseline in section 7 consultations refers to "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone…consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *See* 50 C.F.R. § 402.02. It is against this baseline that the action under review is evaluated to determine its incremental effect. The impacts of climate change attributable to those other actions, therefore, should be included in that baseline. The baseline analysis operates at a macro level—i.e., all that matters is that the baseline takes climate change impacts into account, not that it assign responsibility to specific sources.

38. *See* 73 Fed. Reg. 28212 (May 15, 2008).

39. News Release, U.S. Dept. of Interior, Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act (May 14, 2008).

40. *See* 73 Fed. Reg. 28306 (May 15, 2008) (interim rule); 73 Fed. Reg. 76249 (Dec. 16, 2008) (final rule).

climate threats because tracing causation is, according to the highly respected United States Geological Survey, scientifically impossible.[41]

The FWS and NMFS later followed up on that position by promulgating new section 7(a)(2) consultation regulations designed to, among other things, preclude consideration of greenhouse emissions in consultations. Culminating one of the most controversial rulemakings in the history of ESA implementation, in December 2008, the FWS and NMFS promulgated final rules revising various features of the Section 7 consultation regulations. The changes, too extensive to cover and assess in detail here, fell into three categories: (1) revised and new definitions for the causation and effects analyses; (2) revisions to applicability designed to preclude consideration of GHG emissions in consultations; and (3) streamlined consultations through a shift in decision authority to action agencies. Some of the changes merely codified existing conditions, such as a new provision limiting consultations to discretionary actions. But some had the potential to radically alter consultation practice. Some significant changes included: indirect effects are limited to those effects that occur later in time for which the proposed action is an "essential cause;"[42]if an effect will occur whether or not the proposed action takes place, it is not an indirect effect.;[43] indirect effects must be reasonably likely to occur based on "clear and substantial information;"[44]for actions not anticipated to cause take, no consultation is necessary if the effects are manifested through "global processes" that cannot be reliably predicted or measured, have an insignificant impact, or pose only a remote risk;[45]for actions not anticipated to cause take, no consultation is necessary if the effects are not capable of being measured in a way that permits "meaningful evaluation;"[46] and action agencies will determine for themselves whether, under these new standards, formal consultation is necessary.

The rule attracted considerable controversy: tens of thousands of comments were filed on the proposed rule, and litigation was filed immediately

---

41. *See* Solicitor's Opinion, U.S. Dept. of the Interior, Office of the Solicitor, Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases (Oct. 3, 2008); Memorandum from the Department of the Interior, U.S. Geological Survey, The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Emissions, Global Warming, and Consequential Impacts (May 14, 2008). The Department in the Obama Administration has not rescinded that guidance.

42. 73 Fed. Reg. 76249, 76287 (Dec. 16, 2008).

43. *Id.*

44. *Id.*

45. *Id.* § 402.03(b)(2).

46. *Id.* § 402.03(b)(3)(i).

to challenge the final rule. Many environmental strategists outlined ways the Obama Administration could, through executive action or in concert with Congress, swiftly nullify the rule. In March 2009 President Obama ordered FWS and NMFS to review the rules and authorized other federal agencies "to follow the prior longstanding consultation and concurrence practices."[47] Soon thereafter Congress passed legislation allowing the agencies to withdraw the polar bear section 4(d) rule and the consultation rule with no notice and comment procedures,[48] which the agencies did for the consultation rule effective May 4, 2009.[49] Other than raise a fuss about the Bush Administration consultation rule, however, neither Congress nor the Obama Administration has shown any interest in dragging the ESA into the war on greenhouse gas emissions. Nothing in the legislation allowing the agencies to overturn the rules or in the agencies' statement accompanying the decision to overturn the consultation rule so much as mentions using the ESA to regulate greenhouse gas emissions. Indeed, all indications thus far suggest that interest groups pursuing mitigation litigation under the ESA will not like the Obama Administration's position much more than they did the Bush Administration's: Deputy Secretary of the Department of the Interior David Hayes told senators during his confirmation hearing that the endangered species law is ill-suited for addressing greenhouse gas emissions; Tom Strickland, the Assistant Secretary for Fish, Wildlife and Parks overseeing the ESA, said the same at his hearing; and, more directly to the point, FWS spokesman Josh Winchell said in February 2009 that "we have zero legislative authority to regulate carbon emissions. That is just not what we do. With the polar bear, the science definitely pointed to climate change, but that does not all of a sudden give us the authority to address the underlying cause, which is carbon emissions."[50] Putting those words into action, on May 8, 2009, Interior Secretary Salazar announced the agency's decision *not* to rescind the polar section bear section 4(d) rule, proclaiming that "the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions."[51]

---

47. *See* Office of the Press Secretary, The White House, Memorandum for the Heads of Executive Departments and Agencies Re: The Endangered Species Act (Mar. 3, 2009).

48. 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, div. E, tit. IV, § 429, 123 Stat. 544, 749.

49. *See* 74 Fed. Reg. 20421 (May 4, 2009)

50. Greenwire, *Endangered Species: Some See EPA's Climate Proposal Prodding Interior on ESA* (Apr. 23, 2009), *available at* http://www.eenews.net/public/Greenwire/print/2009/04/23/4; *see also* Alan Kovski, I*nterior Nominee Agrees Climate Change Fits Poorly in Endangered Species Rules*, 40 Env't Rep. (Bureau of National Affairs, Arlington, VA) 605, 622 (Mar. 20, 2009).

51. U.S. Fish & Wildlife Service, News Release, Salazar Retains Conservation Rule for

The point of recounting this history and the complexities of applying the ESA to greenhouse gas emissions is that there has to be a better way of going about integrating existing laws into a national climate change policy than having interest groups and federal agencies flail about in piecemeal litigation and defensive rulemakings. Federal agencies must act, but they ought to be able to act at least initially without the specter of mitigation litigation looming. A coordinated, multi-scalar national climate change policy is too important to have in place, and soon, to allow it to be forged by courts interpreting existing laws through ad hoc litigation around the nation. In the next section, I propose a legislative suspension of mitigation litigation to facilitate development of such a policy.

III. Designing a Systematic Climate Change Policy Development Process

President Obama's appointment of Carol Browner as White House Coordinator of Energy and Climate Policy is an important first step in forging a *coordinated* national climate change policy, but neither President Obama nor Ms. Browner can do much to stem mitigation litigation while she works toward that end. Congress must step in for that part. As unlikely as it is that Congress would choose to offend the lawyers and interest groups pursuing mitigation litigation or to appear to be limiting public participation, the following proposal outlines what I believe is a sensible approach to suspending mitigation litigation while federal agencies are required to develop coordinated rulemakings for activating existing laws to contribute to climate change mitigation and litigation.

A. Suspending Climate Change Litigation Causes of Action

Step one of my proposal is for Congress and President Obama to enact legislation suspending mitigation litigation for two years. This can be accomplished one of two ways. One is to enact an omnibus provision preventing any new or continued litigation using citizen suit or Administrative Procedure Act causes of action to pursue mitigation litigation claims, that is to force any federal agency to regulate or not to regulate greenhouse gas emissions or to develop or revise policies with respect to whether and how to regulate

---

Polar Bears, Underlines Need for Comprehensive Energy and Climate Legislation (May 8, 2009), *available at* http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=20FB90B6-A188-DB01-04788E0892D91701.

greenhouse gas emissions. A more aggressive approach would be, in addition, to suspend federal judicial jurisdiction over all such claims and remedies, so as to prevent other types of litigation (e.g., common law claims) from somehow leading to judicial orders violating the intent of the suspension. Alternatively, or in tandem, the legislation could direct federal agencies not to develop or revise climate change policies until they have completed the policy development process outlined below.

B. Defining Climate Change Statutory Discretion Under Existing Laws

At the commencement of the suspension period, every federal agency would have six months to produce for Congress and the President a report (a) examining all potential authorities in existing laws it administers that could support climate change mitigation and adaptation measures and the extent of discretion available to the agency under each provision, (b) detailing the agency's decisions about how to exercise those authorities within its range of discretion, (c) developing, through an advanced notice of proposed rulemaking, draft regulations for implementing the agency's vision, and (d) recommending statutory amendments where necessary to provide more definitive or necessary support for policies the agency believes should be pursued but for which existing law does not provide authority.

C. Coordinated Climate Change Mitigation and Adaptation Rule Promulgation

In the next six months of the suspension period, a task force appointed pursuant to the terms of the legislation (e.g., relevant Department and agency heads) and chaired by the White House Coordinator will use the reports compiled by each agency and comments on the advanced notices of rulemakings to develop a coordinated national policy for existing laws and will evaluate each agency's draft regulations to recommend any changes necessary to allow the agency most usefully to contribute to the policy. During the second year of the suspension period each agency then will propose regulations and complete promulgation by the end of the two-year suspension period using standard APA rule promulgation procedures. During the second year the task force will also evaluate the statutory amendment recommendations of each agency and report on them to Congress, and it will also outline policies for integrating state, local, and tribal policy initiatives.

D. Interim Decisions

During the suspension period, agencies of course will need to implement existing laws, such as by issuing or denying permits, preparing environmental impact statements, and carrying out, funding, and authorizing other actions. To the extent permissible by law, all such actions will be contingent on the rules adopted from the process, with provisions made for modification of permits, funding conditions, and project design to bring all actions into compliance with the new regulations as soon as practical. Federal agencies and non-federal actors receiving federal funding or authorization may during this interim period design actions to be consistent with what the federal agency believes is likely to comply with its regulations. For any project that cannot legally include this contingency and which is not voluntarily designed to anticipate compliance requirements, the duration or magnitude of the agency action (e,g., the permit period or funding level) will be the lowest allowed by applicable law so as to ensure that the new rules, once in effect, can be applied to the next discretionary decision whether to renew or revise the action.

E. Judicial Review

To ensure uniformity of judicial treatment of the rules produced from the process and all decisions made during the suspension period that trigger the interim contingency condition, judicial review of all rules promulgated through the process and any claims collaterally challenging the new rules (e.g., a permit challenge contesting the scope of the new rules) will be conducted directly in the D.C. Circuit. The review standard for agency interpretations of the existing statutory authorities on which the new rules are based will require the court to apply the *Chevron* standard in all cases.

IV. Conclusion

I agree with the perspective that climate change requires that we will likely need to "launch a thousand arrows," but I do not agree that we must or should do so "immediately." Better, I believe, to take aim first, pull on the bow with deliberation, and hit the target. To use another metaphor, better to draw up a good map before climbing up Mount Mitigation. Yet the unchecked continuation of mitigation litigation involves using no map at all. It was by all accounts necessary to engage in mitigation litigation to push the Bush Administration into acknowledging the need to integrate existing laws into

climate change policy, but the operating assumption ought to be that this catalyst function is no longer necessary in the Obama Administration working in unison with Congress in its current political composition. Yet this is not necessarily an unlimited window either politically or physically—action is needed, and it is time to force agencies to act. But that force ought not come by way of ad hoc litigation. Rather, Congress and President Obama should take the bull by the horns by stopping mitigation litigation and requiring federal agencies to get their heads out of the sand. One measure without the other will produce a far less coherent national climate change policy, but putting both in place will allow us to climb Mount Mitigation with a map to get us up and back down with a purpose, not just because it's there.