

Peterson, Thomas D., McKinstry, Robert B. Jr. and Dernbach, John C.  
*Developing a Comprehensive Approach to Climate Change Policy in the United States  
that Fully Integrates Levels of Government and Economic Sectors*  
26 VA. ENVTL. L.J. 227

Reviewed by Christina England

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In the aftermath of *EPA v. Massachusetts*, the authors argue for a new approach to address climate change, using existing state and federal laws in conjunction with a “portfolio” of legal and policy measures. They propose that a national program should be designed based on results achieved by favorable state programs. They also advocate for an expansion of the Clean Air Act to integrate economic concerns with environmental goals and state-implemented creative solutions.

Though the United States is trailing behind internationally in terms of programs to reduce greenhouse gas emissions, some states have been very successful at closing the emissions gap. A common approach has been to implement a reciprocal program whereby certain geographic regions can swap credits and reach overall emissions standards in individual states. However, the wide disparity in state emission standards calls for national oversight if the United States is ever going to deal effectively with climate change. The authors propose using the Clean Air Act in light of *Massachusetts* to create a federal framework that would combine successful state climate change plans and actions and provide uniform standards and oversight. This would allow long term evolution toward new approaches without sacrificing the necessities of action in the short term. The authors discuss steps in achieving a coherent, federal system by establishing national ambient air quality standards, instituting technological limits and cap-and-trade programs, and directly implementing on the national level those state-implementation plans that were successful on the state level at reducing greenhouse gas emissions.

All three criteria are met because this article deals with climate change, a hot topic for ELPAR, and primarily offers a new legal and policy-based proposal to reduce greenhouse gas emissions. The article will be especially useful for Congress and agencies since it addresses the various shortcomings of proposed bills and also offers more feasible alternatives. The authors offer a step-by-step approach and thoroughly discuss different policy-makers’ roles in implementing this new comprehensive approach to deal with climate change. It discusses short term action and also long term benefits of their new approach, especially increasing the United States’ status and how we are viewed by the rest of the world with regard to environmental regulation.

Ruhl, J.B.

*Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*

88 B.U. L. REV. 1

Reviewed by Daniel Lanigan

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This article examines the challenges global climate change presents for the Endangered Species Act and its primary administrative agency, the U.S. Fish and Wildlife Service, presenting a policy proposal not to simply regulate greenhouse gas emissions but to establish protective measures for species that have a chance of surviving the climate change transition and establishing a viable population in the future climate regime.

The ESA is credited with preventing the ultimate extinction of the vast majority of protected species and The United States Fish & Wildlife Service (FWS) administers the ESA for terrestrial and freshwater species. This article analyzes how the ESA should handle climate change, working from four assumptions: (1) even with swift and effective adoption of global-wide greenhouse gas emission mitigation measures, some residual climate change will continue to occur over the next fifty years; (2) realistically, global-wide mitigation measures will not entirely reverse greenhouse gas emissions to 1990 levels; but (3) mitigation measures will stabilize emissions at a level which will allow global climate regimes to eventually settle into a “natural” pattern of variation; and (4) some species will not survive the transition from the present to that future no matter what actions the FWS takes under the ESA, but others can make it if we help them through the transition. The author argues that the FWS should not attempt to use the ESA to combat greenhouse gas emissions or save all species threatened by climate change, but rather should use it as the bridge for those species that can benefit from the ESA's helping hand.

The policy solution sets specific steps for how the FWS can address this problem. First, it should identify climate-threatened species. The agency's objective should be to use the ESA to define and monitor the ecological reshuffling effects of climate change, aggressively identifying species threatened by climate change. Second, the FWS should not attempt to use its regulatory programs to regulate greenhouse gas emissions because that would be a waste of its efforts - partially due to the difficulty of meeting the burden of proof required. Third, the agency should regulate non-climate effects to protect climate-threatened species, i.e. where a species weakened by climate change is also threatened by other anthropogenic sources, such as loss of habitat. Fourth, the agency should design conservation and recovery initiatives. The agency's objective should be to get as many species with a long-term chance at survival and recovery through the transition to the other side of climate change as is realistically possible. Fifth, the agency should address species trade-off – when helping one may harm another – and adopt an ecosystem-based management approach modeled on promoting long-term species diversity and ecosystem multi-functionality. Sixth, the agency should avoid accelerating the decline of species that stand no chance of surviving climate change.

These six, developed steps address a major issue of global environmental importance – climate change – within a very important environmental agency. Out of the

several articles I read touching on ESA this one was more compelling, interesting, creative, and well-developed than most of the others. It would also provide much food for commentators' thoughts. It deserves consideration for ELPAR.

Stavins, Robert N.

*A Meaningful U.S. Cap-and-Trade System to Address Climate Change*

32 HARV. ENVTL. L. REV. 293

Reviewed by Christina England

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This article presents a “cap-and-trade” systematic policy approach to regulate greenhouse gas emissions in response to climate change. Taking into account past limitations of the approach, Stavins proposes a modified “cap-and-trade” system that relies on an upstream cap on CO<sub>2</sub> emissions with gradual inclusion of other greenhouse gases, sets a gradual trajectory of emissions ceilings over time, and utilizes mechanisms for protection against cost uncertainty. The overall impact, according to Stavins, would offer greater certainty in terms of costs and results than other proposals (such as a carbon tax, a credit-based program, or command-and-control standards), while preserving the inherent flexibility and competition in the market.

Stavins presents a detailed analysis of cap-and-trade, emphasizing the importance of designing the policy instrument appropriately at the beginning to target climate change effectively. He opens with a discussion of why cap-and-trade is the best approach—in comparison to other alternatives such as a carbon tax, a credit-based program, and command-and-control standards. Creating a calculable market cost for greenhouse gas emissions also supplies quantifiable data to be considered in the free market. This data provides important price signals that create incentives for companies and firms to invest in low or non-emitting technologies. Over the long term, new technologies will decrease costs because companies/firms will have fewer emissions and thus pay fewer fees under cap-and-trade. Stavins supports his arguments with numerous examples of cap-and-trade programs used all over the United States and across the world.

Stavins’ proposal is unique in that it seeks to cap fossil fuels at their source rather than later downstream in the trading market, as implemented in the Regional Greenhouse Gas Initiative. Stavins advocates regulating emissions where fossil fuels are pumped/created according to carbon content. Then, fossil fuels would be distributed and auctioned off in credits. The cap is placed only on aggregate emissions and therefore imposes no particular limits on emissions from any given source. The result is an overall decrease in credits available for distribution and redistribution. Stavins argues that fewer available credits would increase the certainty of nationwide compliance in reducing greenhouse gas emissions because there would be less to trade. Stavins also calls for supplementary policies to increase government funding and “investment in research, development, and deployment of new technologies that could reduce future emissions reduction costs.” (299).

Stavins sets up three criteria to assess a design structure’s success: (1) environmental effectiveness or the feasibility of a policy instrument in reaching given targets, (2) cost-effectiveness which considers a policy’s relative cost of achieving emission targets as compared with alternative policy designs, and (3) distributional equity to make sure no particular business/geographical area of the United States is at an economic disadvantage. He concludes that his proposed version of a cap-and-trade system in the United States is “scientifically sound, economically rational, and politically

feasible.” (293, 305, 358). To further demonstrate the feasibility of his approach, Stavins provides a detailed cost-benefit analysis and addresses anticipated objections to his proposal.

This article seems as if it was written with the ELPAR criteria in hand. It is a hot topic and presents a policy proposal that addresses nearly all possible objections. It also appears feasible due to the author’s structured, clear, and detailed analysis. It is easy to read and understand, despite the somewhat complicated topic area. The only limiting factor to this paragraph is its length. It needs substantial editing before inclusion on ELPAR with great care not to lose the rich analysis.

Vladeck, David

*Harnessing the Power of Information for the Next Generation of Environmental Law: Information Access- Surveying the Current Legal Landscape of Federal Right-to-Know Laws*

86 TEX. L. REV. 1787

Reviewed by Patrick Lynch

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This article argues that current access-to-information laws for retrieving environmental data are grossly inadequate in producing meaningful and timely public access to data, and argues for three major changes: 1) replacing the requester-driven nature of these statutes— through legislative amendments— with an affirmative duty on agencies to publish information; 2) alter agency procedures to place the burden of proof on companies seeking to withhold information, coupled with increased funding to investigate corporate exemption claims and penalties when exemptions are found to be misused; and 3) sending a Congressional signal to the judiciary—through memoranda or other means— that agencies seeking to withhold information should not be given deference from the courts unless they can show identifiable and significant harms that outweigh public interests in disclosure.

The author introduces three proposals for reform, all of which focus on limiting broad exemptions used by agencies and corporations to withhold environmental information. The article focuses on the Freedom of Information Act (FOIA) and other right-to-know laws, noting that the laws as written seem to require full disclosure and transparency, but that in practice they are superseded by corporate and government secrecy exemptions, lack of adequate agency funding to investigate and challenge corporate exemptions, and political memoranda encouraging agency secrecy. Even when information is not entirely or partially withheld from the public, its usefulness is typically limited by requiring members of the public to request information before it is made available. Overbroad exemption claims by the government in recent cases suggest agencies can get away with refusing FOIA requests wherever possible. The author notes that, policies encouraging secrecy notwithstanding, agency motives are often linked to issues such as a lack of staffing and limited funding.

The first proposed reform is to place an affirmative duty on agencies to regularly make certain categories of information available online, by adapting existing models for publishing records to address a greater swath of information. One way this could be accomplished would be if Congress amended the Paperwork Reduction Act (PRA) to alter reporting requirements for the OMB. The second reform would be to require more explanation from companies claiming confidentiality in requests for environmental information. This could be achieved through a number of methods: passing legislation requiring senior corporate officials to sign documents under penalty of perjury stating justification for why documents are commercially sensitive; punishing unsubstantiated claims of confidentiality; and increasing funding so that agencies can afford to review exemption claims and defend their decisions in challenges by companies. The third reform would be to amend FOIA to require a showing by agencies that withheld information would cause demonstrable harm if disclosed, and to add a provision

encouraging courts to balance private secrecy interests with public benefits derived from disclosure. All of these reforms would aim to raise standards for withholding information to the actual letter of existing laws by establishing a combination of carrots and sticks for members of the public, agencies and corporate officials.

This article highlights an issue of major ongoing importance in promoting transparency both in government and corporate recordkeeping, and one that encourages people to become more engaged in seeking environmental information about government and corporate activities that may be affecting their health and surroundings. The author's push for a number of procedural reforms also seems grounded in practical considerations and likely to garner the public support needed to implement them, though it will also likely be met with criticism from proponents of less government regulation (and in particular industry executives). It may be worthwhile to have a discussion about the likely litigation that would follow such legislative amendments, which the author does not address in this article.

Wagner, Wendy

*Using Competition-Based Data to Bridge the Toxics Data Gap*

83 IND. L. J. 629

Reviewed by Julia Hanks

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The article addresses chemical and toxic substance regulation in the United States, arguing that the current system is inadequate to protect environmental and human health. The author suggests an alternative regulatory regime in which manufacturers of similar products would compete for EPA endorsement. Through this competitive approach, the author argues, manufacturers would be motivated by the market to improve the safety of their products.

The author begins with a description of the current toxics regulatory regime under the Toxic Substances Control Act (TSCA), to which the author refers as the “cops and robbers” approach. Under the “cops and robbers” model, a product is presumed innocent until EPA establishes that the product may pose “unreasonable risk” to human or environmental health. As currently implemented, however, TSCA does not afford EPA the authority, and EPA does not have the resources, to determine the level of risk associated with the thousands of types of chemicals in daily use. Manufacturers of potentially harmful substances, who could provide EPA with all the necessary information, avoid regulation by failing to disclose such information. Moreover, the author argues, the “cops and robbers” approach does nothing to reward manufacturers of safe products. The author suggests a shift away from the “cops and robbers” approach to a competition-based approach, wherein manufacturers would compete against one another for EPA approval. Under the proposed program, EPA would provide a venue for manufacturers to claim the environmental superiority of their product over that of their competitors. EPA would act as the adjudicator of these claims, rewarding the “winner” with certification of superiority and, potentially, punishing the “loser” with consequences such as restrictions on usage. Under this approach, the author argues, the private sector is encouraged not only to invest in research but to make such research available to the public through the adjudicative process. The proposal would require several significant changes to EPA’s current implementation of TSCA; however, the author argues that the plan can be implemented without additional legislative authority. While the author acknowledges several faults with the proposed solution, including the expense of the adjudicative process, she argues persuasively that the competition-based approach would provide greater regulation of harmful chemicals than does the current regime.

The article provides a truly different approach to a serious problem. Despite its potential weaknesses, the proposed approach could, at the very least, provide the basis for discussion on regulatory approaches. As the article notes, the approach could be extended to other areas of regulation as well. The article is well-organized and thoroughly explains both the present and the proposed regimes.