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

by Wm. Robert Irvin

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With one of the more memorable opening lines in the annals of legal scholarship,[1] J.B. Ruhl has skillfully set forth the promise and perils of addressing global warming's impact on imperiled species under the Endangered Species Act (ESA).[2] But while the pika may indeed be toast, other species affected by climate change have a better chance of survival and, as Ruhl notes, the ESA can play a critical role in ensuring it.

A recent study has found that the effects of climate change already underway will be with us for a millennium or longer.[3] With this grim forecast, the need to reduce greenhouse gas emissions, known as mitigation, is even more acute, in order to stave off even worse irreversible impacts of climate change. At the same time, the need to focus additional attention on adaptation—taking measures to assist wildlife survival in the face of climate change—is also greater, since the effects of climate change will be with us much longer than previously thought.

The ESA can be usefully employed to address both mitigation and adaptation. Starting with the determination whether to list a species as threatened or endangered, the ESA can generate and focus attention on the impacts of climate change on wildlife. While the pika may not garner much public attention, the prospect of polar bears becoming extinct due to melting of their sea ice habitat has brought widespread attention to the impacts of climate change and the need to reduce greenhouse gas pollution. As the list of species threatened by climate change inevitably grows, the imperative to address the causes of climate change, as well as to implement measures to help threatened wildlife survive, will grow concomitantly.

In addition to focusing attention on the problem of climate change, the ESA can also address climate change impacts on species and habitats. Ruhl argues, correctly, that the ESA can be usefully employed to address other threats to species imperiled by climate change. This principle, building resilience by reducing other stressors, is one of the key steps in helping wildlife survive climate change,[4] or, as Ruhl puts it, to help wildlife successfully cross the bridge to the no-analog future, a world in which ecosystems have been reshuffled as a result of climate change. For example, using the ESA's prohibition of take under §9[5] or interagency consultation provisions under §7[6] to limit habitat destruction from causes other than climate change, particularly in areas that may be necessary for species migration in response to climate change, might be a key strategy for assisting wildlife adaptation to climate change.

Although Ruhl counsels against doing so, the ESA can also be used to address the impacts of new sources of greenhouse gas pollution. While there may be political or prudential concerns with using the ESA this way, there is no statutory bar to such considerations. Indeed, the absence of any such statutory limits led the Bush Administration, on its way out of office, to promulgate regulations pursuant to §4(d) of the ESA[7] excluding emitters of greenhouse gas pollution outside the current range of polar bears from being considered as causing prohibited take of polar bears.[8] Similarly, the Bush Administration promulgated regulations largely

1. J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 39 ELR (Envtl. L. & Pol'y Ann. Rev.) 10735 (Aug. 2009) (a longer version of this Article was originally published at 88 B.U. L. Rev. 1 (2008)).
2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
3. Susan Solomon et al., *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 Proc. Nat'l Acad. Sci. 1704, 1704-05 (Feb. 10, 2009), *available at* http://www.pnas.org/content/106/6/1704.full.pdf+html (last visited May 18, 2009).
4. Lara J. Hansen & Jennifer L. Biringer, *Building Resistance and Resilience to Climate Change*, *in* Buying Time: A User's Manual for Building Resistance and Resilience to Climate Change in Natural Systems 9-13 (Lara J. Hansen et al., eds., WWF 2003) *available at* http://assets.panda.org/downloads/buyingtime_unfe.pdf (last visited May 18, 2009).
5. 16 U.S.C. §1538(a)(1), ELR Stat. ESA §9(a)(1).
6. *Id.* §1536(a)(2).
7. *Id.* §1533(d).
8. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear, 73 Fed. Reg. 76249 (Dec. 16, 2008). President Obama's Interior Secretary, Ken Salazar, subsequently announced he was retaining this rule. *See* News Release, U.S. Department of the Interior, Salazar Retains Conservation Rule for Polar Bears (May 8, 2009) *available at* http://www.doi.gov/news/09_News_Releases/050809b.html.

barring consideration of greenhouse gas pollution through §7 consultation.[9]

Ruhl's admonition that the ESA may not be able to bear the political weight of being used to regulate greenhouse gas pollution should not be ignored. As so often happens, the ESA is in the position of being the final safety net, the law to be employed when all others have failed. If, for example, we had taken action sooner under the Clean Air Act[10] to regulate greenhouse gas pollution, we may have mitigated the severity of climate change and reduced the likelihood that species would be listed and the ESA brought into play. Regrettably, that did not happen and once again the ESA is poised to be the scapegoat for other failures of political will.

While there is political risk to the ESA itself in using it to address greenhouse gas pollution, that alone should not preclude its use for that purpose. Though often characterized as a giant red light that halts development, the ESA is better described as a yellow caution light, compelling us to think about the consequences of our actions for imperiled species before proceeding. As such, the ESA can often lead to creative solutions that allow a project to go forward while also protecting species and habitat. To arbitrarily decide that the ESA should not be used to consider the impacts of greenhouse gas pollution on polar bears or other species imperiled by climate change is to ignore the law's potential to stimulate creative solutions to seemingly intractable problems. Moreover, just because today we may lack the scientific precision to identify a particular source of greenhouse gas pollution as jeopardizing the continued existence of a particular species, that may not be the case in the future. Accordingly, the ESA should be employed, albeit prudently, to address the causes and impacts of climate change. For example, barring its use for these purposes, as the Bush Administration regulations attempted to do, is to deprive ourselves of a valuable tool in the all-out effort needed to deal with climate change.

Striking one other note of caution, Ruhl suggests that scarce agency resources should not be wasted on developing recovery plans for species, like the pika, that are doomed by climate change. Similarly, he argues that extraordinary measures, such as assisted migration, for such species should be sparingly used, if at all. Clearly, if the ESA is an emergency room for imperiled species, a system of triage is necessary. Not every species can be saved. But the determination of which species are in fact doomed may change over time, as our knowledge of their needs and our efforts to address the threats to the species expand. Thus, in addition to Ruhl's admonition that we should not do anything to accelerate the decline of species, we should not be too quick to write off species as hopeless cases.

Ruhl is correct to argue that the ESA be used to identify the threat of climate change to species and habitats and to concentrate its resources on those species that can best be helped, in order to assist as many species as possible to pass through the long bottleneck of imperilment from climate change. His call for judicious use of the ESA should not, however, be misconstrued as an excuse for inaction. To the contrary, Ruhl has recognized the important role the ESA can and should play in addressing the greatest threat yet to biological diversity. Using the ESA to combat climate change certainly poses some risk to the continued viability of the ESA itself, but failing to use the ESA in this manner, when every tool available is needed to combat climate change, carries an even greater risk to the viability of our planet.

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9. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008). Defenders of Wildlife and other conservation organizations sued to overturn this regulation and the polar bear regulation noted above. *Cf.* Press Release, Defenders of Wildlife, Bush Administration Takes Parting Shot at Endangered Wildlife (Dec. 11, 2008) *available at* http://www.defenders.org/newsroom/press_releases_folder/2008/12_11_2008_bush_administration_takes_parting_shot_at_endangered_wildlife.php (describing Bush Administration ESA regulations and Defenders of Wildlife's intent to take legal action against the regulations). The Obama Administration withdrew the Bush Administration's §7 regulations. *See* Interagency Cooperation Under the Endangered Species Act, 74 Fed. Reg. 20421 (May 4, 2009).
10. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.