

Social Cost of Carbon Is a Case Study on Courts, Executive Orders

The Biden administration's use of executive orders to make policy and direct agencies has already come under attack. A coalition of attorneys general has sued the Biden administration for its executive order setting up an interagency working group to provide guidance on how to estimate the damage of greenhouse gas emissions. And another lawsuit challenges the executive order revoking the Keystone XL Pipeline's permit.

Presidents have long used executive orders to make policy. At a talk he gave at the American Enterprise Institute last year, former EPA Administrator Andrew Wheeler explained that executive orders were necessary at the beginning of the Trump administration to direct staff before the political leadership was in place.

And the Trump administration used executive orders to do cross-cutting policy, directing agencies to repeal two regulations for every one that they issued. The lawsuit over the Biden administration's Social Cost of Carbon actions thus provides a good chance to shine a light on the use of executive orders and the legal status of the Social Cost of Carbon — the “most important number you've never heard of,” as Michael Greenstone, a University of Chicago economics professor, recently put it.

The Biden administration announced in Executive Order 13990 that it is the policy of the administration to “listen to the science.” In line with that new policy, the administration reconstituted the Interagency Working Group on Social Cost of Greenhouse Gases and rescinded the Trump-era estimates. The working group published new interim estimates for the damage

from greenhouse gas emissions.

The new numbers are based on the estimates developed under the Obama administration, adjusted for inflation, and they will be used until a further comprehensive review can be finalized in line with EO 13990. Those Obama-era numbers were subject to significant and thorough vetting, review, and updates. And an agency's use of those numbers was upheld as reasonable in a 2016 case out of the U.S. Court of Appeals for the Seventh Circuit.

But one of the lawsuits against the Biden actions alleges that the executive branch has “arrogated” to itself the “unilateral power” to dictate the social cost of greenhouse gases.

Directing agencies to apply consistent analytical procedures through executive orders dates back to the 1980s, when President Reagan issued EO 12291, requiring

agencies to choose the regulatory scheme that maximizes “net benefits to society.”

And absent the working group's numbers, agencies face some jeopardy in court. In a 2008 case about fuel economy standards, a federal appeals court held that a National Highway Traffic Safety Administration decision to place zero monetary value on greenhouse gas emissions was arbitrary and capricious, and remanded the rule to the agency, instructing it to promulgate new standards that were more reasonable.

In leasing decisions, where an agency has considered and relied on the monetary benefits of the lease, at least a few federal courts have said that it is arbitrary and capricious not to monetize the climate damages caused by those decisions. At a recent argument at the D.C. Circuit, the panel hearing argument over a Ten-



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nessee Gas Pipeline Co. LLC project questioned the Federal Energy Regulatory Commission's failure to consider downstream greenhouse gas emissions in its pipeline decisions. (The agency recently acknowledged that it should do so for the first time, in a pipeline decision involving Northern Natural Gas Company.) In a case going the other way, a U.S. district court in Montana upheld a Trump agency's decision not to rely on the Social Cost of Carbon. But that case is on appeal.

In addition, agencies face legal jeopardy if they rely on estimates that do not have the support of a robust analysis. Last year, a U.S. district court in California struck down the Trump administration's attempt to use its own vastly depressed estimate for the damages from greenhouse gas emissions, holding that the administration had ignored the best available science.

Presidential policymaking by executive order is likely here to stay. Indeed, the president has long had the authority to instruct agencies to work together to produce reasonable and vetted analyses. Using those executive powers to constitute an interagency working group that provides guidance to agencies on how to value things like the climate damages from greenhouse gas emissions — in the face of likely litigation risks when that valuation is missing — seems like a useful approach.

**Trump used them.
Now Biden is being
challenged in court
for the same tactics**

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