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Energy Blog

Fifth Circuit Panel Sides with Biden Administration in Ongoing Fight with Certain States Over the Use of "Social Cost of Carbon" in Regulatory Decision-Making

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On March 16, 2022, a three judge panel of Fifth Circuit judges unanimously stayed a recent U.S. district court ruling that had temporarily enjoined the Biden administration from basing regulatory decisions on the Social Cost of Carbon ("SCC") estimate generated by the International Working Group ("IWG"), accepting the administration's arguments that the district court decision was likely to complicate and delay federal environmental rulemaking.[1] This means that federal policy-makers can continue to use the IWG's SCC estimate (which estimate considers global effects of emissions), while the underlying litigation continues.

On April 22, 2021, Louisiana and nine other states filed suit against numerous federal agencies, seeking the injunction. In response to the district court ruling, the Biden administration filed a request to stay the injunction pending appeal in both the district court and in the U.S. Court of Appeals for the Fifth Circuit.

Below, we summarize the procedural history of the case, and the context in which the issue arose, as well as implications going forward.

Background on "Social Cost of Carbon"

The SCC refers to a dollar-value figure meant to estimate the present-value, monetized cost of one additional ton of carbon dioxide into the atmosphere. In other words, the SCC is meant to estimate, in monetized terms, how much it is worth today to avoid the damage projected for the future, such as changes in agricultural productivity, sea level

rise, and the decline in human health and labor productivity. Policymakers use the SCC to quantify the additional costs flowing from carbon emissions that are not automatically reflected in market prices. SCC estimates are a key figure used by federal agencies to consider whether a proposed rule or action is expected to exacerbate climate impacts through increased emissions, which is of particular relevance in evaluating oil and gas and other energy-related policy actions.

On his first day in office, President Biden issued Executive Order 13990 ("Climate Order") that laid out his framework for addressing the impacts of climate change.[2] Among other actions, the Climate Order reinstated the IWG to develop SCC values used to inform regulatory decision-making, including project-level determinations under the National Environmental Policy Act.[3] The IWG first introduced the estimated SCC in 2010[4] and released updated estimates in 2013[5] and 2016, with the 2016 estimate being $42 per ton.[6]

On February 26, 2021, the IWG announced an interim SCC estimate of $51 per ton of carbon.[7] The IWG's interim estimate is identical to the Obama administration's 2016 estimate but adjusted for inflation. However, the IWG's interim estimate from 2021 is significantly higher than the Trump administration's estimate of $3–$5 a ton.[8] The Trump administration's estimate did not consider global impacts and used higher discount rates than the IWG estimate.[9]

States' Lawsuit Against Federal Agencies

On April 22, 2021, Louisiana and nine other states (the "States")[10] filed suit against numerous federal agencies, including the Department of Energy, Department of Agriculture, Department of the Interior, and the Environmental Protection Agency, in the U.S. District Court for the Western District of Louisiana, seeking to enjoin the Biden administration from implementing the IWG's SCC estimate in regulatory decision-making.[11] The States first asserted that the SCC estimate violates the procedural requirements of the Administrative Procedure Act ("APA"), as a substantive rule that did not undergo the requisite public notice-and-comment process.[12] Second, the States claimed that President Biden, through the Climate Order, and the IWG lack authority to enforce the SCC estimate because it is substantively unlawful under the APA and contravenes existing law.[13] Third, the States maintained that the Biden administration acted beyond its Congressionally-delegated authority by basing regulatory policy upon global considerations rather than solely domestic effects.

Federal District Court in Louisiana Sided with the States

On February 11, 2022, the district court granted the States' motion and enjoined the Biden administration from implementing the SCC portion of the Climate Order or adopting any estimate of the social costs of greenhouse gas emissions that is based on global effects.[14] The district court also ordered federal agencies to cease all work that relies upon the IWG's work product.[15]

After finding that the States had standing to pursue their claims, the district court agreed that the Biden administration lacks authority to enforce the use of the SCC estimate in regulatory decision-making. The district court explained that because the IWG's SCC estimate considers global effects, the directive requiring federal agencies to utilize the SCC value implicates matters of vast economic and political significance. The district court also found that the Climate Order exceeded President Biden's authority to implement policy changes without going through the public notice and comment process and was not clearly authorized by Congress, thus violating the "major questions" doctrine.[16]

District Court Ruling Stayed Pending Appeal

In response to the ruling, on February 19, 2022, the Biden administration appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit and simultaneously sought to stay the decision.[17] In its request for a stay, the Biden administration argued that the district court lacks subject matter jurisdiction because the IWG's estimate does not impose any regulatory obligation on the States and because the IWG is not an administrative agency subject to the laws governing federal agency rulemaking.[18] The Biden administration also argued that the IWG's interim estimate is an important tool for addressing climate effects of greenhouse gas emissions — a matter of urgent public concern, according to the administration.[19] On March 9, 2022, the district court denied the Biden administration's request for a stay and held that the federal government failed to show irreparable injury because President Biden had no authority to issue the Climate Order in the first place.[20] However, on March 16, 2022, a three judge panel of Fifth Circuit judges unanimously sided with the Biden administration, finding that any regulatory burdens that may result from considering the SCC estimate are speculative and hypothetical at this point, and the States lacked standing to sue.[21] Further, the Fifth Circuit panel found that the States' claims amounted to merely a "generalized grievance" against the Biden Administration's approach to the SCC estimate, and allowing the district court's stay to remain in effect would instead harm the federal government.[22]

Potential Outcomes

Due to the Fifth Circuit panel's decision, the Biden administration will be able to utilize the SCC estimate while the underlying litigation regarding the merits of the SCC estimate is pending. Future litigation could impact any rules or regulations implemented while the current SCC estimate is being utilized. If the SCC estimate were ultimately to be struck down, federal agencies may have to redirect resources to revise already drafted proposed rules and revise their regulatory impact analyses, to the extent relying on the IWG's SCC estimate. This could have "dramatic" implications for federal environmental policymaking going forward, according to the federal government's arguments.[23] However, for now, the administration's use of the SCC estimate in agency decision-making is permitted.

We will continue to closely monitor the actions by the courts and the Biden administration on these matters.

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1. *Louisiana v. Biden*, No. 2:21-CV-01074 (W.D. La. Apr. 22, 2021).↩

2. Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021), available at https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/. Section 1 of Executive Order 13990 states that the Administration's policy regarding climate change is "to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals."↩

3. *Id.* at Section 5.↩

4. Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis — Under Executive Order 12866 (February 2010), available at https://www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf.↩

5. Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis — Under Executive Order 12866 (Nov. 2013), available at

https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf.↩

6. Technical Support Document - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis — Under Executive Order 12866 (Aug. 2016), available at https://www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.↩

7. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 (Feb. 26, 2021), available at https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.↩

8. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).↩

9. U.S. Gov't Accountability Off., GAO-20-254, Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis 16 (2020) ("GAO Social Cost of Carbon Report"), https://www.gao.gov/assets/710/707776.pdf.↩

10. The other Plaintiff States are Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia and Wyoming.↩

11. *Louisiana v. Biden*, No. 2:21-CV-01074 (W.D. La. Apr. 22, 2021).↩

12. *See* 5 U.S.C. § 553.↩

13. *See Id.* §§ 706(2)(A)–(C).↩

14. *Louisiana v. Biden*, No. 2:21-CV-01074 (W.D. La. Feb. 11, 2022).↩

15. *Id.*↩

16. *Id.* at 33-34. The major questions doctrine provides that for major policy questions of great economic or political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority to both decide the major policy question and to regulate and enforce.↩

17. *Louisiana v. Biden*, No. 2:21-CV-01074 (W.D. La. Feb. 19, 2022) (hereinafter "DOJ Filing").↩

18. *Id.* at 7-20.↩

19. *Id.* at 21-23 ("The climate effects of greenhouse gas emissions are a matter of urgent public concern, and the government's ability to estimate those effects in keeping with the most up-to-date understandings of relevant

science and economics is important to a variety of Presidential and agency activities.").↩

20. *Louisiana v. Biden*, No. 2:21-CV-01074 (W.D. La. March 9, 2022).↩

21. *Louisiana v. Biden*, No. 22-30087 (5th Cir. 2022).↩

22. *Id.*↩

23. DOJ Filing at 2.↩

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