Despite Carbon Cost Win, Biden Climate Plans Still At Risk

By **Peggy Otum, Davina Pujari and Chaz Kelsh** (June 10, 2022)

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On May 26, the U.S. Supreme Court ruled to allow the Biden administration to continue using the social cost of carbon estimates in its regulatory analyses, developed pursuant to an executive order from President Joe Biden.

In Louisiana v. Biden, 10 states had won an injunction barring the administration's use of the social cost of carbon from the U.S. District Court for the Western District of Louisiana, which the U.S. Court of Appeals for the Fifth Circuit then stayed. The Supreme Court's order leaves the stay in place, while the government appeals the district court's decision.

On Jan. 20, 2021, Biden issued Executive Order No. 13990, requiring federal agencies to use the social cost of carbon to quantify the social benefits of reducing greenhouse gas emissions, thus giving it a prominent role in his administration's regulatory agenda.

In February 2021, the Interagency Working Group on the Social Cost of Greenhouse Gases, or IWG, a Biden administration task force created to assess the social cost of greenhouse gases, published an interim report estimating the "cost" of carbon at approximately $51 per ton.

This figure was aligned with the Obama administration's estimates, but significantly increased from the negligible cost of carbon estimated by the Trump administration.[1] Executive Order 13990 requires agencies to use the task force's figure in their regulatory analyses.

In April 2021, Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia and Wyoming sued to prevent the federal government from using the social cost of carbon figure in its regulatory analyses. On Feb. 11 of this year, the Western District of Louisiana granted the states' request for an injunction.[2]

On March 16, the Fifth Circuit stayed the district court's order. It held that the states' alleged injury from agencies' use of the social cost of carbon was "merely hypothetical," because the task force's initial figures "on their own do nothing to" the states.[3] As a result, the court explained, the states likely lacked standing to bring their claim.[4]

The Supreme Court's order leaving the stay in place noted no dissents among the justices — likely because allowing the states' challenge to the administration's use of the social cost of carbon before any agency relied on the IWG's estimates would have upended basic principles of administrative law.

But the court is still considering a challenge to the U.S. Environmental Protection Agency's authority to regulate greenhouse gas emissions from power plants under the Clean Air Act. And the states' initial success in the district court suggests that the Biden administration's climate agenda faces, at best, a bumpy road.

Background

For four decades, the White House has required agencies to analyze proposed regulations to ensure their projected benefits exceed their estimated costs. In an effort to standardize cost-benefit analysis in the realm of climate change policy, the social cost of carbon, or SCC, is intended to represent a holistic calculation of the costs of carbon dioxide and other greenhouse gas emissions on a rate-per-ton basis.[5]

The Biden administration is the fourth administration to use the social cost of carbon as part of its regulatory analysis. For example, the Clean Power Plan — the Obama-era EPA's rule intended to reduce greenhouse gas emissions from the power sector — used an SCC of about $45 per ton in the cost-benefit analysis supporting the rule.[6]

That approach changed dramatically in the Trump administration, which in March 2017 disbanded the IWG and revoked the governmentwide SCC, instead directing agencies to determine an SCC through their normal regulatory analysis, "including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates."[7]

When the Trump administration issued the Affordable Clean Energy Rule as its replacement for the Clean Power Plan, that rule put the SCC at between $1 and $6 per ton. The Affordable Clean Energy Rule also used a much higher discount rate, reducing the assumed present cost of future effects of carbon emissions.[8]

These changes to the SCC value supported the Trump administration's regulatory changes. For example, the Trump administration claimed that its proposed fuel economy standards resulted in $17 billion of net benefits, but the same analysis using the Obama administration SCC would have found $15 billion of net costs.[9]

The Biden administration quickly returned to the Obama administration's approach to the SCC, reflecting its own policy preferences. On Biden's first day in office, he issued Executive Order 13990, reestablishing the IWG, and requiring it to publish interim SCC estimates within 30 days, and final SCC estimates by January of this year.

The order also required federal agencies to use the IWG's interim values "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions." The IWG released the interim estimates on Feb. 26, 2021, pricing carbon at $51 per ton.[10]

The States' Lawsuit

The 10 states brought suit in April 2021, alleging that the Biden administration would use the SCC figure to "assign massive — even existential — costs to every regulatory action … thereby fundamentally transforming the way States conduct business and Americans live."[11]

It argued that the requirement that agencies use the SCC figure would "remake our federalism balance of power, American life, and the American economy" and "ensure the most pervasive regulation in American history."[12]

The lawsuit included four causes of action, alleging the SCC figures were issued without notice and opportunity for comment, that they were arbitrary and capricious, that agencies lack the legal authority to consider the SCC when drafting regulations, and that the president does not have the legal authority to require agencies to use a governmentwide

SCC in their regulatory analyses.[13]

The District Court's Opinion

On Feb. 11, the district court issued an order and opinion, entering a preliminary injunction forbidding federal agencies from using the SCC estimate in their regulatory analyses and for other purposes.[14] The court adopted wholesale the states' legal arguments, holding that the president and IWG lack legal authority to issue the SCC figures, the figures were promulgated without required notice and comment procedures, and the figures were arbitrary and capricious.[15]

Significantly, the court held that Executive Order 13990 violated the so-called major questions doctrine by "bring[ing] about an enormous and transformative expansion in … regulatory authority without clear congressional authorization."[16] In particular, the court based this finding on the executive order's requirement that the SCC include the global effects of greenhouse gas emissions, rather than only domestic effects.[17]

The major questions doctrine, as the Supreme Court expressed it in its 2014 decision in Utility Air Regulatory Group v. EPA, holds that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[18]

The doctrine has been applied in only a handful of cases. Most notably, in U.S. Food and Drug Administration v. Brown & Williamson Tobacco Corp., the Supreme Court relied in 2000 on the doctrine to hold that the FDA's authority to regulate drugs does not include the authority to regulate tobacco products.[19]

More recently, in National Federation of Independent Business v. Department of Labor, three justices cited the doctrine in holding earlier this year that the Occupational Safety and Health Administration's emergency temporary standard for COVID-19 vaccination and testing exceeded the agency's authority.[20]

The Higher Courts' Orders

The Fifth Circuit's unsigned order granting a stay during appeal, issued by a unanimous three-judge panel, rejected the district court's reasoning. The court held that the states' claims failed out of the box, because the states did not have standing.

Noting that "presidential oversight of regulatory action through a systematic review process began as early as the Nixon administration," and that the states did "not challenge any specific regulation or other agency action," the court held that the states' "claimed injury [of] 'increased regulatory burdens' that may result from the consideration of" the SCC "hardly meets the standards for Article III standing."[21]

The court reasoned that the states' claim "amount[ed] to a generalized grievance of how the current administration is considering" the SCC, pointing to precedent requiring a challenge to agency action to specify a particularized injury.[22]

It also held that, while the government would be irreparably harmed without a stay, the states would suffer "minimal injury" because no agency had taken action in reliance on the SCC estimates, and any such "forthcoming, speculative, and unknown" action could be challenged individually if and when it took place.[23]

On April 27, the states asked the Supreme Court for an emergency order vacating the stay.

As is typical, the court's one-sentence order denying the states' request did not explain its reasoning.

Conclusion and Implications

The Fifth Circuit's stay order, which repudiated the district court's reasoning, signaled that the states' lawsuit had likely failed. The Supreme Court's order, with its lack of dissent, all but confirms that the states' challenge is over.

Although states will likely challenge specific regulations whose justifications involve the SCC, those actions, even if successful, would at most affect the challenged regulation. They would not keep the government from using the SCC entirely, as the district court's injunction did here.

Yet, despite the Supreme Court's order, the district court's decision is consistent with the recent willingness of courts — including the Supreme Court — to relax traditional standards of justiciability to hear cases in procedural postures typically disallowed.

For example, two major cases currently before the Supreme Court involve challenges to environmental regulations the Biden administration has yet to finalize, even though courts would typically steer clear of reviewing a rule not yet on the books.

The first is West Virginia v. EPA. This case is an appeal from the U.S. Court of Appeals for the D.C. Circuit's vacatur of the Trump administration's rule that scrapped the Obama administration's Clean Power Plan.

Although the EPA has announced it will write a new rule, mooting the challenge, the Supreme Court took up the case even so, and is likely to rule on the extent to which the Clean Air Act gives the EPA the authority to regulate greenhouse gas emissions from power plants. A decision in West Virginia is expected by late June.

The second case, Sackett v. EPA, is likely to decide the reach of the Clean Water Act by revising the test for whether wetlands are "waters of the United States" and thus subject to federal regulation. The Supreme Court took the case even though the Biden administration has yet to issue a rule to define the scope of that regulation.

Despite these headwinds, federal agencies are now free — and indeed, are required by Executive Order 13990 — to return to using the Biden SCC estimates in their regulatory actions. For example, the SCC could help support new rules from agencies such as the EPA and the National Highway Traffic Safety Administration requiring new vehicles to be more fuel-efficient.

Even so, the litigation over the SCC's use in the regulatory agenda reflects the difficult reception the Biden administration's environmental agenda may face in the courts in the coming years.

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[1] Interagency Working Group on the Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 (February 2021) ("Interim Report"), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[2] Louisiana v. Biden, No. 2:21-cv-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022).

[3] Louisiana v. Biden, No. 22-30087, 2022 WL 866282 at *2 (5th Cir. March 16, 2022).

[4] Id. at *1.

[5] Rachel Jacobson, Shannon Morrissey and Chaz Kelsh, "Higher Social Cost of Carbon Will Support Biden Enviro Push," Law360 (March 17, 2021), https://www.law360.com/articles/1364562/higher-social-cost-of-carbon-will-support-biden-enviro-push.

[6] Environmental Protection Agency, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (August 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.

[7] Donald J. Trump, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (March 31, 2017).

[8] Washington Post, New EPA document reveals sharply lower estimate of the cost of climate change (Oct. 11, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/11/new-epa-document-reveals-sharply-lower-estimate-of-the-cost-of-climate-change/.

[9] Tamma Carleton and Michael Greenstone, Updating the United States Government's Social Cost of Carbon (January 2021), https://bfi.uchicago.edu/wp-content/uploads/2021/01/BFI_WP_202104.pdf.

[10] Interim Report, supra note 2.

[11] Complaint ¶6.

[12] Complaint ¶9.

[13] Complaint ¶¶137-155.

[14] Louisiana v. Biden, No. 2:21-cv-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022).

[15] Id. at *14.

[16] Id. (quoting Util. Air Regul. Grp. v. EPA, 572 U.S. 302, 324 (2014)).
[17] Id. at *15.

[18] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (internal quotation omitted).

[19] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[20] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

[21] Louisiana v. Biden, No. 22-30087, 2022 WL 866282 at *1-2 (5th Cir. March 16, 2022).

[22] Id. at *2.

[23] Id. at *3.