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Assessing Climate Costs in Policy Decisions

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Right out of the box, the Biden Administration took a decisive stance on the importance of climate costs in agency decision making, returning to Obama-era metrics and values. On his first day in office, President Biden issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” (Order). EO 13990 declares that capturing the full cost of greenhouse gas (GHG) emissions, including global damages, is “essential” to facilitate sound federal agency decision making. The measure of those damages, according to the Order, can be accounted for by estimating the “social cost” of carbon, nitrous oxide, and methane (SCC, SCN, and SCM, respectively), dollar figures intended to measure the future changes in agricultural productivity, human health, property damage from increased flood risk, and the ecosystem services of GHG emissions. The Order reconstituted an Interagency Working Group, disbanded under President Trump, to publish an interim SCC, SCN, and SCM within 30 days, followed by final values in January 2022.

On Friday, February 28, 2021, the Interagency Working Group applied an Obama-era formula, updated for inflation, to arrive at an interim SCC value of about \$51 per ton with a discount value of 3%. For comparison, the SCC value under the Trump Administration fell to approximately \$8 per ton by focusing solely on domestic effects like flooding and drought, and not including global effects of climate change. The final SCC value to be set by the Interagency Working Group in January 2022 is anticipated to be even higher, with a lower discount rate that puts greater emphasis on the future costs and benefits of rulemakings and projects as opposed to present-day implications.

While the measure of SCC may appear to be an abstract scientific or mathematical exercise, the purpose is to put climate change implications front and center in agency rulemaking and project-level decisions. Placing greater emphasis and higher costs on these effects requires process changes and may lead to real world differences in agency decisions. This article addresses how an SCC mandate and the increasing values applied in the formula may affect federal agency decision making, and those affected by or seeking to influence those decisions, under the Clean Air Act (CAA), National Environmental Policy Act (NEPA), and Endangered Species Act (ESA).

CAA Implications

The Clean Air Act has been the focus of climate change regulatory efforts during the nearly 15 years since the Supreme Court decided *Massachusetts v. EPA*, holding that EPA may regulate greenhouse gas emissions under the CAA. The increase in the SCC valuation will have a direct, substantial impact on several CAA rulemakings affecting



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greenhouse gas emissions, including Biden's likely replacement to the Clean Power Plan.

Certain health-based standards such as the National Ambient Air Quality Standards do not consider cost during the standard-setting process. But cost-benefit analysis does play an important role in justifying many of the CAA standards and is still required for all economically significant regulations. During the Obama Administration, for instance, the social cost of carbon provided support for a number of major CAA rulemakings, including the Clean Power Plan and an increase in fuel economy standards for motor vehicles, with those regulations providing up to a calculated \$61 billion and \$53 billion in benefits, respectively.

Conversely, the use of a lower SCC value by the Trump Administration changed substantially the estimated benefit of each of these regulations. That Administration used the recalculated cost-benefit analysis to justify the rollback of several environmental regulations. A similar dynamic occurred with different valuations for the social cost of methane. When the Obama Administration promulgated new source performance standards for the oil and gas sector in 2016, EPA calculated the benefits of methane reduction at up to \$1.8 billion dollars. In 2020, when the Trump Administration rescinded certain requirements, as well as removed sources from the source category, EPA valued the foregone benefits of methane reduction at as little as \$17 million dollars.

The revised SCC valuation by the Biden Administration shows its shift to a renewed emphasis on climate change considerations, even going beyond earlier Obama Administration efforts. This renewed focus includes utilizing the CAA to address climate change. A higher SCC value will be a critical tool as the Administration attempts to document a basis for and the benefits of more aggressive regulation and reductions in greenhouse gas emissions. A higher SCC value means that regulatory calculations will show greater benefits for each unit reduction in greenhouse gas emissions. Whether a higher SCC will be the sole determining factor in justifying the benefits of an otherwise costly rule remains to be seen and is likely to be the focus of future litigation. For instance, a 2014 study by the Brookings Institute found little to no evidence that using the social cost of carbon fundamentally altered the cost-benefit analysis of any significant rulemakings between 2008 and 2013. In most cases, the net benefits of the rule exceeded the costs, with or without inclusion of carbon benefits. As the Biden Administration pushes for more aggressive action to address climate change, the revised SCC value might tip the balance in regulatory cost-benefit analyses.

NEPA Implications

The debate on accounting for climate change in NEPA documents is long and winding, with dueling Council on Environmental Quality guidance documents and legal precedent. There is little argument that agency rulemaking for or authorization of actions emitting GHGs require consideration of climate change as an indirect effect—i.e., an effect later in time and farther removed in distance—of those emissions. But whether that means the agency must merely acknowledge climate change effects

generally, must quantify downstream emissions, or must even attribute a dollar figure to the “social cost” of those calculated emissions has been far less certain as a matter of NEPA law and litigation.

The Biden Administration's new directives aim to end that debate, at least for now. The Order provides that agencies “shall use [the SCC, SCN, and SCM] when monetizing the value of changes in greenhouse gas emission resulting from regulations and other relevant agency actions.” EO 13990, Sec. 5(b)(ii) (emphasis added). And the Interagency Working Group's interim numbers provide the necessary figures. The Trump Administration eschewed the SCC metric, citing its variability and uncertainties (and was largely successful in defending in court its decision not to incorporate SCC into NEPA review). The Biden Administration, as a matter of policy, will require that agencies calculate the SCC and most likely include it in their NEPA documentation for both proposed rules and project-specific authorizations.

What is the practical effect of including the SCC calculation in an Environmental Impact Statement or Environmental Assessment? Perhaps very little. Recall that NEPA is a procedural statute, not a substantive one. NEPA does not mandate a particular outcome, but only requires that the agency disclose the impacts of its decision. Applying the math to convert GHG emissions to “social costs” is a paperwork exercise, unless the calculation ultimately influences the agency's decision among alternatives. Under the Biden Administration, the calculation may affect decisions, if the agencies point to high social costs to justify implementing new environmental controls, scrapping projects, or requiring substantial modifications to proposed actions. These agencies' decisions would, however, continue to be tempered by decades-old statutes that seek to promote multiple uses of public resources and domestic energy supply and independence.

Arguably, including the SCC calculation in NEPA documents will remove an issue from the NGOs' litigation arsenal. Or it may portend a tactical shift where NGOs move away from challenging the failure to include the SCC calculation at all to alleging the agency has understated the costs or failed to adhere to the Interagency Working Group guidelines. Challengers may also allege that agency actions that once may have qualified for approval under an Environmental Assessment now have “significant” impacts when viewed in light of mounting social costs. The goal would be to thrust the action into the more time- and process-intensive Environmental Impact Statement. Whether these litigation tactics will successfully stall or halt GHG emitting projects is uncertain, but the push to evaluate “social costs” as part of the NEPA calculus has most definitely gained a boost under the new administration.

ESA Implications

To date, the Endangered Species Act generally was not viewed as an appropriate mechanism for addressing or regulating greenhouse gas emissions. Nonetheless, climate change factors still became required considerations for the Services' (the U.S. Fish and Wildlife Service and the National Marine Fisheries Service) ESA decision making. Species listing

decisions, for instance, increasingly are based on a consideration of climate change effects on species and species' habitat, projected into the "foreseeable future," which in some instances may be as long as 100 years or more. Similarly, for critical habitat designation decisions, the courts have identified future climate change effect as an appropriate consideration in designating critical habitat.

Climate change considerations can also affect a project consultation under ESA Section 7 in two principal ways. The Services must consider, under the existing case law and agency practice and guidance, (1) the effect of climate change on a project or the effects of the project; and (2) the effect of a project itself on climate change, i.e. the project's potential contributions to overall factors contributing to climate change, but limited by the ESA causation principles as outlined in the initial polar bear rulemaking and otherwise.

But these prior ESA decision-making frameworks did not explicitly include the use of the social cost of carbon or other greenhouse gas emissions valuation methods in ESA actions—likely because economic considerations are prohibited from inclusion in most ESA determinations. The designation of critical habitat, however, is one notable exception. The consideration of economic impacts is expressly required by the statute. The Services must "take into consideration" economic and other impacts before designating critical habitat. When evaluating whether to exclude an area from a larger critical habitat designation, the Services' regulations allow it to "assign the weight given to any benefits relevant to the designation of critical habitat." Where designation of critical habitat can be expected to reduce or even prevent the increase of greenhouse gas emissions, the Biden Administration may choose to include that analysis to quantify the benefits of designating the habitat.

Also, in the 2019 revisions to the species listing requirements rulemaking, the Services stated that the ESA "does not prohibit the Services from compiling economic information or presenting that information to the public, as long as such information does not influence the listing determination." Similarly, the Services noted, Congress in the ESA "did not demonstrate an intention to prohibit the Services from compiling information about economic impacts." Thus, in the revised species listing regulations, the Services removed the phrasing that the listing decision had to be made "without reference to possible economic or other impacts of such determination," while also restating that listing determinations must be made "solely on the basis of the best scientific and commercial data available" concerning a species' status. Given these changes, and despite numerous environmental groups' opposition to the changes, the Services could now present information about the SCC aspects or valuation of a species listing decision, or SCC costs if a species were not listed, to accompany the proposed listing decision on an informational basis. This is another way that the SCC considerations could begin to influence and be presented as part of ESA decisions in the Biden Administration, even though in the species listing context the ultimate decision must be based "solely" on the statutory listing factors that do not incorporate economic considerations or proxy values such as the SCC measures.

Next, in the incidental take permit/habitat conservation plan (ITP/HCP) provisions of ESA Section 10, the Services may permit the otherwise prohibited taking of a listed species if such taking is incidental to an otherwise lawful activity by a state or local government or private party. The HCP approval/ITP issuance requires a NEPA analysis. To the extent that NEPA review must then incorporate the new SCC measures and valuation, the NEPA analysis—including for instance for the social cost of carbon from increased vehicle trips or energy production required for residential, commercial, or other property developments not otherwise the subject of a federal action and Section 7 consultation—will also include SCC information and disclosure.

Overall, the Biden Administration's revised social cost of carbon measures may not significantly alter the established view that the ESA is not an appropriate mechanism for directly addressing greenhouse gas emissions or the causes of climate change. However, these SCC developments and revised values do signal how this Administration is likely to place an increased emphasis on using ESA decisions and procedures to both consider and achieve climate change mitigation and adaptation goals. It also shows how in some contexts—including critical habitat determinations, species listing decisions, and Section 10 HCP approvals—the SCC measures and valuations may either accompany those decisions or become part of the considerations before the Services, either directly in ESA considerations (as in critical habitat designations) or as accompanying information (in the species listing context) or analyses (such as the NEPA analysis for an ESA Section 10 habitat conservation plan approval).

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