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# The Social Cost of Carbon Gets its (Preliminary) Day in Court

by Jim Wedeking

A February 11, 2022 district court decision preliminarily enjoined federal agencies from using the Social Cost of Carbon ("SCC") estimates in rulemakings or National Environmental Policy Act ("NEPA") environmental reviews. The defendants, consisting of several federal agencies and officers, quickly appealed. Litigation on the preliminary injunction, and subsequent litigation on the merits and inevitable appeal, will touch on the limits of federal executive power, the definition of an "agency action" under the Administrative Procedure Act, and climate change policies that are wrapped into hundreds of federal agency actions.

**Background**

The SCC estimates the "social cost" of a federal agency action that emits greenhouse gases, or allows others to do so through regulations or permits. In response to a Ninth Circuit decision holding that "the value of carbon emissions reduction" to society "is certainly not zero,"[1] a group drawn from various federal agencies and supervised by the White House Office of Management and Budget ("OMB") called the interagency working group ("IWG") began meeting in 2009.[2] The following year, it published the "SC-$CO_2$," or Social Cost of Carbon, used to provide a price on carbon dioxide emissions for regulatory cost-benefit analyses.[3] The IWG updated the SCC values in 2013 and released the "SC-$CH_4$," the Social Cost of Methane, and the "SC-$N_2O$," the Social Cost of Nitrogen Dioxide, in 2016.[4]

Industry criticisms of the SCC and its methodology were numerous, fundamental, highly technical, and beyond the scope of a blog post. The gist of those criticisms, however, is that the SCC lacked any realistic basis and was rigged to ensure that the benefits of reducing greenhouse gases would always outweigh the costs of new industry regulations. Or, on the flip side, that the costs of emitting greenhouse gases would always outweigh the benefits of new industrial activities.[5] President Trump's Executive Order 13,783 effectively suspended agencies' use of the SCC by requiring them to use OMB Circular A-4, a 2003 guidance document that set out rules for agency cost-benefit analyses, in estimating the costs of

[1] *Center for Biol. Div. v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (invalidating average fuel economy standards for light trucks, model years 2008-2011).
[2] 86 Fed. Reg. 24,669 (May 7, 2021).
[3] *Id.*
[4] *Id.*
[5] For instance, using the SCC, the U.S. Bureau of Land Management estimated that the benefits of its Waste Prevention Rule, regulating the venting and flaring of natural gas on federal lands, would achieve annual benefits ranging between $189 million and $247 million, outweighing the estimated cost of between $46 million and $204 million per year. *California v. Bernhardt*, 472 F. Supp. 3d 573, 609 (N.D. Cal. 2020). Without the SCC, the rule would have imposed far more costs than benefits, making the regulations difficult to justify. *Id.* at 609-10.

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adding greenhouse gases or the benefits of reducing them.[6] This dramatically reduced the calculated benefits of rulemakings requiring greenhouse gas reductions.[7] This change was relatively short-lived, however, as President Biden restored the SCC on his inauguration day through Executive Order 13,990.[8] By February 2021, the IWG released its updated SCC estimates, sending the calculated social costs of emitting greenhouse gases back into the stratosphere.[9]

Two groups of State attorneys general sued, alleging that the SCC, the manner in which it was implemented, and its use without public notice and comment, was illegal. The first group, led by Missouri, had their case dismissed for lack of standing.[10] The second group, led by Louisiana (the "Louisiana Group"), was more successful. Despite facing the same standing arguments from the government, the Louisiana Group not only persuaded a district court judge they had standing, but that they were likely enough to win on the merits to earn a preliminary injunction.

**The Louisiana Group's Challenge to the Revived SCC**

The Louisiana Group faced two preliminary issues before they could even reach the merits of their suit: whether they had standing to sue and whether the SCC was a final agency action subject to judicial review. Where the *Missouri* decision found that potential injuries from future regulations using the SCC was not enough for standing, the Louisiana Group identified actual regulations issued during the Biden Administration that incorporated the SCC in cost-benefit analyses. These regulations, the Louisiana Group alleged, increased costs on state industries, reduced royalty revenues to the States through diminished energy production, increased the cost of energy that the States purchased, and delayed projects that would provide tax revenues.[11] Further, the States alleged that they are required to use the SCC when participating in National Environmental Policy Act reviews[12] and in cooperative federalism programs, such as State Implementation Plans, or face EPA disapproval and have a Federal Implementation Plan using the SCC imposed upon them.[13] The court held that these are both cognizable injuries and would be redressed by enjoining federal agencies from using the SCC, requiring to return to the cost-benefit methodology in OMB Circular A-4.[14]

By naming specific regulations, the Louisiana Group got farther than the *Missouri* plaintiffs, but that only advanced them to the next hurdle: is the SCC, a technical guidance document created by an *ad hoc* working group under the auspices of OMB, a final agency action reviewable by the court under the Administrative Procedure Act? The court found that the IWG is an agency and that the SCC is a final agency action. The IWG, the court held, was reconstituted by Executive Order 13,990 and given independent authority to create SCC estimates that bound all other executive agencies.[15] Further, the court rejected the government's argument that the SCC was merely an "interim" policy subject to

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[6] Exec. Order 13,783 § 5, 82 Fed. Reg. 16,093, 16,095-96 (Mar. 28, 2017).
[7] *Bernhardt*, 472 F. Supp. 3d at 609 (benefits of foregone methane emissions reduced from between $1.6 billion and $1.9 billion under the SCC to between $66 million and $259 million using OMB Circular A-4).
[8] 86 Fed. Reg. 7,037 (Jan. 20, 2021).
[9] *See* Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990 (Feb. 2021), Table ES-1 (one metric ton of carbon dioxide for the year 2020 will cost between $14 under a 5% discount rate (which is disfavored by federal agencies) or $76 per ton under a 2.5% discount rate (the favored agency discount rate)).
[10] *Missouri v. Biden*, Case No. 21-cv-00287 (Aug. 31, 2021), *appeal docketed*, Case No. 21-3013 (8th Cir.).
[11] *Louisiana v. Biden*, Case No. 21-cv-01074, ECF No. 98 (Feb. 11, 2022) ("Slip Op.") at 13-16, 20.
[12] *Id.* at 19.
[13] *Id.* at 20 (citing 86 Fed. Reg. 23,054, 23,153-55 (Apr. 30, 2021) (Revised Cross-State Air Pollution Rule Update for the 2008 Ozone National Ambient Air Quality Standards incorporating the SCC to measure health benefits and global climate benefits in justifying a more stringent standard).
[14] Memorandum from Office of Management & Budget to the Heads of Executive Agencies and Establishments, Re: Regulatory Analysis (Sept. 17, 2003).
[15] Slip Op. at 39.

revision later this year.[16] The SCC estimates are currently being used, and are required to be used, in federal rulemakings.[17]

The court continued on, finding that the Louisiana group was likely to succeed on the merits of their challenge for several reasons. First, it found "that the Executive Branch does not have the authority to issue Executive Order 13990" because it enacts a major change to regulatory authority without clear congressional authorization.[18] Thus, the court invoked the controversial "major questions" doctrine, relying on recent cases invalidating COVID-19 mandates, and holding that Executive Order 13990 and the SCC raised major questions reserved for Congress because they imposed approximately half a trillion dollars in new regulatory mandates.[19]

Second, the court found that Executive Order 13990's requirement for the SCC to incorporate global benefits from greenhouse gas reductions, while only considering domestic regulatory costs, to contravene several statutes. It called out six energy-related statutes, including the Mineral Lands Act, the Clean Air Act, and the Outer Continental Shelf Lands Act, that included Congressional statements of policy outlining that the statutes are to be administered for the nation's welfare.[20] From these policy statements, the court reasoned that imposing domestic costs in the name of global benefits contradicted the will of Congress and that agency regulations implementing these statutes considered a factor (global benefits) that Congress did not authorize.[21]

Third, the SCC effectively repealed OMB Circular A-4—the prior methodology for conducting cost-benefit analyses—and NEPA regulations directing that agencies are not required to consider environmental effects "that 'are remote in time, geographically remote, or the product of a lengthy causal chain'" without public notice or comment.[22]

Other aspects of the court's merits ruling are unclear. For instance, the court offers a long list of bullet points summarizing the Louisiana group's arguments of why the SCC is arbitrary and capricious but neither discusses the government's opposing arguments nor states whether it is crediting one or all of the Plaintiffs' arguments.[23] Nevertheless, holding that the Louisiana Group was likely to prevail on the merits for multiple reasons, the court quickly determined that the Plaintiffs and their citizens are suffering irreparable economic harms from the government's use of the SCC.[24] It also determined, after a very brief analysis, that the government could not be harmed through an injunction against implementing an unlawful regulation.[25] Thus, the court preliminarily enjoined both the SCC and Executive Order 13,990, at least with respect to its command that agencies must use the SCC.

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[16] The decision is a jumble to some degree. In reviewing the Plaintiffs' likelihood of success on the merits, the court noted that Executive Order 13,990 and the SCC eliminated agency discretion in how they perform cost-benefit analyses. *Id.* at 33. The prior methodologies in Executive Order 12,866 and OMB Circular A-4 were neutral while the SCC was designed to require the use of specific social cost metrics. *Id.* These are really holdings that the SCC is a binding legislative rule, not a mere guidance document with no legally binding obligations.

[17] *Id.* at 42 ("The [Executive Order] is not a recommendation, nor is it guidance; EO 13990 directs that agencies 'shall use' the SC-GHG Estimates 'when monetizing the value of changes in greenhouse gas emission resulting from regulations and other relevant agency actions.'") (quoting Executive Order 13,990 § 5).

[18] *Id.* at 28 (citing *Utility Air Regulatory Group*, 573 U.S. 302, 324 (2014)).

[19] *Id.* at 30-31 (citing *NFIB v. OSHA*, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022); *BST Holdings, LLC, v OSHA*, 17 F.4th 604, 617 (5th Cir. 2021)). In fact, the court held that the vaccine mandates involved "less costly and far-reaching regulations" than the SCC. *Id.* at 31.

[20] *Id.* at 37-38.

[21] *Id.* at 37.

[22] *Id.* at 35 (quoting 85 Fed. Reg. 43,304, 43,375 (July 16, 2020)). The SCC attempts to estimate costs and benefits out to the year 2050. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990 (Feb. 2021) at 4.

[23] Slip Op. at 36-37.

[24] *Id.* at 40-44.

[25] *Id.* at 44.

**The Aftermath (for Now)**

The government quickly appealed to the U.S. Court of Appeals for the Fifth Circuit and moved the district court for a stay pending appeal.[26] What is most notable about the motion for a stay, which largely restated the government's opposition to the Louisiana Group's motion for an injunction, is the assertions of harm to the government, and by extension to industry, if the court does not reverse course. Some of the claimed repercussions seem to be unnecessary exaggerations. For instance, the government pleaded that the injunction bars agency personnel from discussing the IWG or its work in "internal deliberations," bans meetings about subjects "that bore some relation to the social cost of greenhouse gases"—including meetings on agency budgets, prohibits staff training sessions, "force[s] federal scientists to violate various scientific integrity policies," and even stops the President from meeting with foreign heads of state.[27]

But what is more meaningful is that "a significant number of agency and rules and actions" that "would need to be postponed or reworked as a result of the Preliminary Injunction."[28] This would include 21 Department of Energy rulemakings, nine Department of Transportation rules and 60 records of decision or NEPA analyses, 3 Department of Interior rules and 27 NEPA analyses, and 5 U.S. Environmental Protection Agency rulemakings.[29] A declaration in support of the motion asserted that the preliminary injunction significantly complicates compliance with various other court orders involving timelines for issuing regulations and NEPA analyses.[30] Most important to industry, however, is that the government claimed it must stop holding oil and gas lease sales and issuing drilling permits on federal lands.[31] According to the government, any permit or other action that is plausibly tied to the SCC would grind to a halt.

The district court was unmoved as it denied the request for a stay on March 9, 2022.[32] In fact, the government may not have accurately represented how much the preliminary injunction would hamper its operations. "This Court believes without doubt that the [SCC] Estimates were being used and are *currently being used, despite this Court['s] injunction*," citing a March 1, 2022 Department of Energy proposed standard for air conditions and heat pumps that expressly relied on the SCC.[33] Nor did the court miss the inconsistency in the government's briefing. "The Court finds it interesting that the Defendants argued in their opposition to Plaintiff States' Motion for Preliminary Injunction that the SC-GHG Estimates were of no moment because they were not being utilized, nor do they have a major impact on Executive Branch decisionmaking, yet, now complaint that the preliminary injunction … will wholesale prevent the Executive Branch from functioning."[34] The court's denial of the government's motion for stay leaves the fate of the SCC to the U.S. Courts of Appeals.

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[26] *Dep't of Interior v. Louisiana*, Case No. 22-30087 (5th Cir.); Motion to Stay Order on Motion for Preliminary Injunction, ECF # 102 (Feb. 19, 2022) ("Motion to Stay").
[27] *Id.* ¶¶ 27-34.
[28] *Id.* ¶ 17. Of course, while the government intends to convey that the preliminary injunction works a significant administrative hardship, it also conveys how frequently the SCC has been used in rulemakings and other agency actions.
[29] *Id.* ¶ 18.
[30] *Id.* ¶¶ 19-21, 25.
[31] *Id.* ¶¶ 21-22. Another example of disruption is the Federal Transportation Administration's Capital Investment Grant program. *Id.* ¶ 23. The declaration states that the Federal Transportation Administration has been requiring grant applicants—mostly States—to use the SCC in environmental analyses to receive grant funding. *Id.* This contradicts the government's position that the SCC has no effect on State programs.
[32] Memorandum Order, ECF # 111 (Mar. 9, 2022) ("Order").
[33] Order (emphasis added) (citing Proposed Rule, Energy Conservation Program: Energy Conservation Standards for Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps, 87 Fed. Reg. 11,335, 11,348 (Mar. 1, 2022)).
[34] *Id.* at 4.