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Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles

Agency: Environmental Protection Agency

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Landmark Legal Foundation ("Landmark") advocates for the immediate revocation of this Proposed Rule, **Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles** ("Proposed Rule").

There are three major shortcomings Landmark has identified with the Proposed Rule:

1. The Proposed Rule uses a metric established by an entity with no constitutional or statutory authority. The Interagency-Working Group ("IWG") is not vested with any statutory authority to act as an executive agency. Therefore, the President did not have the authority to implement the IWG in the first place.
2. The IWG nonetheless acts as an agency and is therefore subject to the Administrative Procedures Act ("APA").

3. The APA requires agencies to follow a proscribed rulemaking process that provides opportunities for the public to comment on agency actions. The IWG bypassed this process when it established new metrics for the Social Costs of Greenhouse Gas ("SC-GHG").

Introduction

When performing the legally required analysis to calculate the costs and benefits of the Proposed Rule, the Environmental Protection Agency ("EPA") uses a metric calculated by an entity with no statutory or constitutional authority. Costs and benefits in the Proposed Rule are calculated based on values called the "social cost" of carbon, methane, and nitrous oxide emissions, collectively known as Social Cost of Greenhouse Gases ("SC-GHGs"). These metrics measure the predicted cost of each ton of greenhouse gas released into the atmosphere. An SC-GHG valuation "in principle includes the value of all climate change impacts." 88 Fed. Reg. 29199n130 (May 5, 2023). The valuations generally are used to estimate the benefit of imposing policy that regulates sources of greenhouse gas production, or the climate cost of permitting projects that increase greenhouse gas emissions. Since 2008, the federal government has used Social Cost of Carbon valuations when considering regulatory actions. Jane A. Leggett, *Federal Citations to the Social Cost of Greenhouse Gases,* Congressional Research Service, March 21, 2017, available at https://sgp.fas.org/crs/misc/R44657.pdf (Accessed June 20, 2023). By 2017, there were at least 160 regulatory actions that cited SC-GHG valuations in their calculations. *Id*.

SC-GHG valuations, however, may be used to manipulate regulatory cost-benefit analyses to support otherwise unjustifiable proposed rules. For example, this Proposed Rule purports that its benefits come from the greenhouse gases it will prevent from being emitted.

According to the proposed rule and its SC-GHG estimates, the benefits of the new standards would equate to "$83 billion to $1.0 trillion across a range of discount rates and values for the social cost of carbon..." 88 Fed Reg 29344 (May 5, 2023).

As rosy as these outcomes appear, the Proposed Rule is illegitimate because its cost benefit analysis is based on improperly established SC-GHG valuation standards. Shortly after entering office, President Biden issued Executive Order 13990 ("EO 13990" or "the Order"), creating the IWG. The IWG was formed with the express purpose of issuing a monetary valuation to be used by every government agency in calculating the costs of emitting certain greenhouse gases. The SC-GHGs that underlie the justification for the proposed rule are based upon valuations promulgated by this group. The IWG, however, is not vested with any constitutional or statutory authority to institute such a policy. Thus, the creation of the IWG and the use of its published SC-GHG valuations violate the federal rulemaking process and the Constitution's separation of powers. For this reason, the proposed rule is unlawful.

1. **The IWG is not vested with any statutory authority to act as an agency. Lacking a clear statement of congressional intent, the President did not have the authority to implement the IWG in the first place.**

No statute vests the IWG with any authority and President Biden's Order establishing it does not cite any statutes. He claims that "the authority vested in [him] as President by the Constitution and the laws of the United States of America" allows him to issue the Order. Exec. Order 13990 (January 20, 2021). But this purported authority resides neither in the law nor in the Constitution.

The IWG provisions of EO 13990 differ significantly from other Executive Orders issued around the same time. For example, contrast the vague assertion of statutory authority in EO 13990 with the operative language in EO 14054. In EO 14054, President Biden states that his authority to terminate a declaration of an emergency comes from "the International Emergency Economic Powers Act....the National Emergencies Act.....section 212 (f) of the Immigration and Nationality Act of 1952...., and section 301 of title 3, United States Code." Exec. Order No. 14054 (Nov. 18, 2021). Similarly, Section 3 of EO 13990 specifically cites "the Antiquities Act, 54 U.S.C. 320301, *et seq*." to establish the statutory authority to direct the Secretary of the Interior to review monument boundaries and conditions. 86 Fed. Reg. 7039 (Jan. 25, 2021).

The Presidential power that underpins executive orders "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This requirement for clear statutory authorizations is essential to maintain the separation of powers and to prevent overreach of executive power. In this case, EO 13990 creates a body with quasi-legislative authority without a Congressional grant to do so. This EO therefore violates the Constitution.

For the IWG to legally behave like an agency, as it has by creating the SC-GHG rules, Congress must enact a statute granting that power. The President does not have, nor has he even claimed to have, specific statutory or constitutional authority to create such an agency. Only the legislature retains such privileges. And because the legislature has not exercised that power here, the President may not vest the IWG with the authority to issue regulatory actions carrying the full force of law.

Further exacerbating its affronts against the separation of powers, the Proposed Rule also violates the Major Questions Doctrine. According to the EPA's own projections, this regulation

could incur up to $565 billion in costs to industry. 88 Fed. Reg. 29,199n130 (see: Table 156) (May 5, 2023). This figure comes from the "present future value" of repair, maintenance, and refueling time costs that this regulation imposes.

In just the past two years, the U.S. Supreme Court struck down several economically overreaching agency actions. In 2021, the Justices upheld a stay on a nationwide eviction moratorium instituted by the HHS, concerned by economic costs that could be estimated at "nearly $50 billion." *Alabama Assoc. of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). Last year, the Court struck down an EPA program which would have raised nationwide electricity costs by "over $200 billion." *West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring). In both cases, the tremendous economic burden factored heavily into their rulings. A government program costing the public over $565 billion would fall well within the totals established by these earlier Major Questions Doctrine cases.

Levying such dramatic economic impacts via a federal regulation, and without a clear delegation from Congress, is not within the prerogatives of the executive branch. The government may not justify hundreds of billions in costs to the public by accounting for the "benefits" of reducing SC-GHGs, which totals themselves were estimated in a manner that lacked public comment. At best, to do so is a colossal regulatory mistake. At worst, it is an intentional deception of the American public.

2. The IWG acts as an agency and is therefore subject to the APA.

The President is within his power to create advisory boards to advise him on policy recommendations. Congress, however, "under its legislative power is given the establishment of

offices [read: agencies], the determination of their functions and jurisdiction..." *Myers v. United States*, 272 U.S. 52 (1926).

The IWG's role as a promulgator of binding SC-GHG valuations goes beyond a legal advisory role, and instead makes it an agency. In EO 13990 § 5(b)(ii), which describes the "Mission and Work" of the IWG, the Order charges the IWG with the duties of an agency. The Order states that the Working Group will publish their binding valuations of SC-GHGs "as appropriate and consistent with applicable law." 86 Fed. Reg. 7040 (Jan. 25, 2021). The Order also tasks the IWG to "publish an interim SCC, SCN, and SCM." 86 Fed. Reg. 7040 (Jan. 25, 2021). Moreover, the Order tasks the IWG with publishing a final valuation of SC-GHGs "by no later than January 2022." *Id.* Those numbers are what "agencies *shall* use when monetizing the value of changes in greenhouse gas emissions..." (emphasis added). *Id.* In other words, the valuations published by the IWG are binding to other government agencies and are not simply figures produced to advise the President on relevant climate issues. The SC-GHG valuations the working group produces therefore constitute technical guidelines that are implemented in further governmental policy and action.

Given these substantial agency activities, the IWG is subject to the requirements of the APA.

3. The APA dictates a stringent rulemaking process, which is essential for public input. Nonetheless, the IWG bypassed this process completely.

The APA defines a regulation as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or

policy." 5 U.S.C. § 551. According to this statue, the binding prescriptive and implementary nature of the valuations used in the Proposed Rule makes them regulations. Regulations encompassed by the APA, but which have not been implemented according to the APA rulemaking process, are built upon unauthorized and improper legal grounds. The Proposed Rule, derived from such unlawful regulations in EO 13990 and the subsequent IWG valuation, is also unauthorized and improper under the APA.

The APA requires that, for an agency to create a new rule, an agency must follow the steps of the rulemaking process, which consists of posting a proposed rule, receiving and responding to public comments, and then posting the final rule. This all takes place on the public Federal Register website, ensuring that the American public, and all other interested parties, can provide meaningful input before a rule takes on the full force and effect of law. EO 13990 circumvents this process by skipping notice and comment altogether and implementing the SC-GHG valuations directly. This end-run of the rulemaking process violates the APA.

The very purpose of the APA is to allow notice-and-comment, public discourse, open criticism, and abridgements to be part of the regulatory process. It is especially critical when certain regulations will have prominent effects on individual Americans or vast swaths of the American economy. The APA was not passed by Congress simply as a procedural formality, but rather as a direct response to the actions of President Roosevelt, who massively increased the size and centralization of the executive branch. Hall, D: *Administrative Law Bureaucracy in a Democracy 4th Ed.*, page 2. Pearson, 2009.

The APA is meant to protect the separation of powers in our government. It is unacceptable for the Biden administration to circumvent this check on power through the fiat of Executive Order. This intrusion must be rectified.

The federal rulemaking process is supposed to create regulations that allow federal agencies to effectively enforce *congressional* statutes. Without adherence to Notice and Comment, the administrative state could legislate on its own, without oversight from the public. Circumvention of Notice and Comment is antithetical to Article I, Section I of the US Constitution, which vests the legislative power solely in the people's immediate representatives.

With this EPA tailpipe regulation, based on the inclusion of unlawful SC-GHG metrics produced by the IWG, the public has not been afforded the proper Notice and Comment period. Since this method was created without going through the formal rulemaking process, the valuations are invalid, and the Proposed Rule itself is unlawful.

Conclusion

The Environmental Protection Agency should revoke the Proposed Rule immediately.

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