



THE RONALD REAGAN LEGAL CENTER

3100 Broadway • Suite 1210 • Kansas City, Missouri 64111

New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule

Agency: Environmental Protection Agency

Comment Period Opens: May 23, 2023

Comment Period Closes: August 8, 2023

Comment Submitted: August 8, 2023

Landmark Legal Foundation (“Landmark”) advocates for the immediate revocation of this Proposed Rule, **New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule** (“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. This so-called 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 prescribed 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 Gases (“SC-GHGs”).

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. A Social Cost of Carbon (“SC-CO₂” or “SC-carbon”) valuation, which is the most thoroughly studied subset of the SC-GHG values, is said to evaluate the “net harm to society associated with a marginal increase in CO₂ emissions.” 88 Fed. Reg. 33411 (May 23, 2023). The valuations are generally 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 tens of billions of dollars in climate and health benefits over several years. 88
Fed Reg 33416 (See: Table 10) (May 23, 2023).

As rosy as the predicted outcomes appear, the Proposed Rule is illegitimate because its cost benefit analysis is based on improperly established SC-GHG valuation standards. Just hours after entering office, President Biden issued Executive Order 13990 (“EO 13990” or “the Order”) and created an Interagency Working Group (“IWG” or “Working Group”). 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 greenhouse gases. The SC-GHGs that underlie the justification for the proposed rule are based upon valuations promulgated by the Working Group. The IWG, however, is not vested with any constitutional or statutory authority to institute such a policy. The creation of the IWG and the use of its published SC-GHG valuations thus 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, either. 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 that Order, President Biden claims 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, in Section 3 of EO 13990, the document 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 issuing a new SC-GHG valuation, Congress must enact a statute granting that authority. The President does not have, nor has he even claimed to have, specific statutory or constitutional authority to create such an agency. Only Congress retains such privileges. And because Congress has not exercised that power here, the President may not empower the IWG to issue regulatory actions with the full force of law.

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 it functions as 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). Finally, 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 Administrative Procedures Act.

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

The Administrative Procedure Act 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 statute, 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 promulgated according to the APA rulemaking process, are built upon unauthorized and improper legal grounds. Use of SC-GHG valuations in the Proposed Rule, derived from the unlawful EO 13990 and the subsequent IWG valuation, is therefore unauthorized and improper under the APA.

The APA requires that, for an agency to create a new rule, an agency must follow the prescribed rulemaking process, which consists of posting a proposed rule, receiving and responding to public comments, and then posting the final rule. This all occurs 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 Administrative Procedures Act 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 powerplant regulation, based on the inclusion of unlawful SC-GHG metrics produced by the IWG, the public has not been afforded the opportunity to comment on the efficacy of the SC-GHGs. 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.

LANDMARK LEGAL FOUNDATION

Davis Kampschorr

Liam Addy

Matthew Forys Jr.

Michael J. O'Neill