

Biden GHG Cost Estimates Face Uncertain Fate In Court

By **Juan-Carlos Rodriguez**

Law360 (November 9, 2023, 7:20 PM EST) -- Fresh off a big victory at the Supreme Court, the Biden administration is pressing ahead with an effort to broaden the use of cost estimates for greenhouse gas emissions across the federal government, but experts said plenty of legal challenges await the little-tested metrics as they're implemented.

Social cost of greenhouse gas estimates are used to put a dollar value on how emissions of carbon dioxide, methane or nitrous oxide impact people and the environment, and can be used for developing regulations to control air pollution or improve appliances' energy efficiency, for example. Early in President Joe Biden's term, he issued an executive order that, among other things, instructed an interagency working group to reconvene and update use of the estimates.

As a direct result of that group's work, Trump-era estimates that were deemed to be too low were replaced with higher ones dating back to the Obama administration, and Biden recently directed executive branch agencies to rely on them in budgeting, procurement and permitting decisions.

And on Thursday, the White House Office of Information and Regulatory Affairs finalized updates to guidance, last updated in 2003, that instructs federal agencies on how to comply with former President Bill Clinton's 1993 executive order that formalized the regulatory review process. As part of the new changes, OIRA altered how costs and benefits are calculated in a couple of ways, and referenced the social cost of greenhouse gases several times throughout.

The resurgence of social cost of greenhouse gas estimates proved to be very unpopular with two groups of Republican-led states that sued to prevent their application. The state coalitions lost in Eighth Circuit and Fifth Circuit legal battles against the administration, and the U.S. Supreme Court last month declined to review the cases. The appellate rulings established that the interagency working group's estimates can't be challenged on their own, but rather when they're applied as part of formal rulemaking.

As the interagency working group continues to contemplate new estimates to replace the Obama-era ones, some agencies like the U.S. Environmental Protection Agency are going ahead with their own estimates, setting the stage for new legal challenges to rules that incorporate them.

But at this point, there's not much settled law for courts to use in those cases, said Douglas Hastings, a partner at Morgan Lewis & Bockius LLP.

"This hasn't been squarely addressed in a lot of different contexts," Hastings said. "But I wouldn't be surprised if it is more so going forward."

Aside from the recent Supreme Court case, there have been a few lower court decisions that have addressed the use of social cost of greenhouse gas estimates in one way or another.

The Seventh Circuit, in 2016's *Zero Zone v. U.S. Department of Energy*, upheld the agency's commercial refrigerator efficiency standards, in part finding that the Energy Policy and Conservation Act gives the DOE the authority to use social cost of carbon estimates.

In 2020, a California federal judge vacated the Trump administration's rescission of most of the Obama-era rule limiting natural gas methane emissions on federal and Native American lands, in part finding that the Bureau of Land Management had inappropriately opted not to consider global environmental cost estimates in its social cost of methane analysis.

And a Colorado federal judge in 2014 invalidated a large portion of a BLM and U.S. Forest Service plan to open wilderness areas to energy exploration, finding the government had failed to incorporate a study of greenhouse gas emissions costs into its analysis.

Hastings said that as the federal government expands its use of the estimates in different contexts, new avenues for legal challenges will open up.

"Because the Biden administration has an all-of-government approach to addressing climate change, the next litigation could be in the context of something the USDA is doing, or another agency that you wouldn't even necessarily associate with environmental regulation, that is using social cost of carbon in a way that somebody wants to challenge," he said.

While every challenge will depend on how the estimates were used in context with the rest of the facts of the case, Hastings said the U.S. Supreme Court has established that the major questions doctrine is a workable argument in rulemaking cases and that traditional judicial deference to agency legal interpretations could be less set in stone.

"Maybe this opens up a different world where, in lower courts that may have been more inclined to defer to the agency — particularly on a matter that gets technical like the social cost of carbon — there may be some degree of additional willingness of a court to wade into these issues," he said.

Max Sarinsky, a senior attorney at New York University School of Law's Institute for Policy Integrity, said there will be some factors on an agency's side as well during future litigation.

He said that for one thing, the estimates, which have already been used in many rules and other decisions, go through an extensive process before finalization that incorporates a public comment period, a peer review process and the best available science at the time.

"To win an argument that the standard is high, you have to show that it's arbitrary and capricious to use these numbers," Sarinsky said. "So to say that it's arbitrary and capricious to use Nobel Prize-winning work seems a little difficult to me."

And he said that in a lot of rules, agencies don't rely entirely on the estimates, but rather include them in a number of factors that support a rule or decision.

For example, in Biden administration rules that tackle large segments of the economy, like greenhouse gas emissions standards for power plants or automobiles, Sarinsky said challenges are less likely to focus their arguments on one component of the administrative record like the social cost estimates — and that's where the broader legal theories come into play.

Still, there's no getting around the fact that higher social cost of greenhouse gas estimates generally are going to be good for clean energy projects and bad for fossil fuel projects, which will make them a tempting legal target, said Michael Gerrard, a professor at Columbia Law School and director of the Sabin Center for Climate Change Law.

"I could certainly see [the estimates] be used for the construction of a dam or the demolition of a dam," Gerrard said. "For the construction of a dam, if it's going to generate electricity, will the electricity that the dam generates allow the displacement of fossil fuels? That could go into the calculation. Or are there concerns that new dam construction could lead to more methane releases, depending on the vegetation that is drowned? It could go in either direction."

Despite the full court press from the Biden administration on the social cost of greenhouse gases, agencies are moving at different speeds in putting them to use.

The EPA, for example, has already proposed its own, much more expensive social cost estimates that it released as part of methane regulations.

And the Federal Acquisition Regulatory Council has drafted a proposed rule aimed at minimizing the climate impact of major federal procurements, including by reducing greenhouse gas emissions by contractors. That proposal is currently at OIRA for review.

But the interagency working group, which had been thought to be on the road to producing updated social cost of greenhouse gas estimates, has not done so, so most agencies are looking to the Obama versions that are currently in use.

OIRA did not respond to a question about whether the interagency working group was still working on that or when new estimates might arrive.

A Biden administration official said there is some latitude for agencies to go their own way.

"Agencies will make decisions about how to best analyze the impacts of their regulatory actions in a manner that is most appropriate given the information about [social cost of greenhouse gas] estimates available to them and the particular context of their use case," the official said.

Hastings said federal agencies without much experience are going to be leaning on those like the EPA that are already proficient in the use of the estimates.

"It's going to require a lot of coordination with a variety of different agencies, consulting with EPA and consulting, potentially, with the White House," he said. "And, and to the extent agencies don't have the expertise specific to the [estimates], they will need to rely on the expertise of those who do."

--Additional reporting by Madeline Lyskawa and Daniel Wilson. Editing by Robert Rudinger.