

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, MAJORITY STAFF DIRECTOR
ZAK BAIG, REPUBLICAN STAFF DIRECTOR

January 14, 2014

Howard A. Shelanski
Administrator
Office of Information and Regulatory Affairs
725 17th Street NW
Washington, DC 20503

Dear Administrator Shelanski:

As we have expressed on previous occasions, the social cost of carbon (“SCC”) estimates produced by the Interagency Working Group (IWG)¹ require a thorough and transparent review process. On November 1, 2013, you announced that the Office of Information and Regulatory Affairs (OIRA) would provide the opportunity for public comment on the updated SCC estimates and would notice the comment period in the Federal Register.² On November 26, 2013, the notice of availability and request for comments on the updated SCC estimates was published in the Federal Register.³ While we appreciate your efforts to bring transparency and public participation to the SCC estimates, we want to ensure the effectiveness of this process in serving such interests and that it is conducted in accordance with the principles of administrative law.

The Environmental Protection Agency (EPA) describes the SCC as a “comprehensive estimate of climate change damages” and notes that “EPA has used the SCC to analyze the carbon dioxide impacts of various rulemaking since the interagency group first published SCC estimates in 2010.”⁴ Such EPA rulemakings include corporate fuel economy standards for cars and trucks and regulations for future power plants that may “indirectly affect carbon dioxide emissions.”⁵ Moreover, President Obama’s regulatory agenda, which circumvents Congress in

¹ Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Exec. Order 12866*, U.S. GOV’T (Nov. 2013), <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf>; Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Exec. Order 12866*, U.S. GOV’T (May 2013), http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

² Howard Shelanski, *Refining Estimates of the Social Cost of Carbon*, OFFICE OF MGMT & BUDGET (Nov. 1, 2013), <http://www.whitehouse.gov/blog/2013/11/01/refining-estimates-social-cost-carbon>.

³ Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Exec. Order No. 12866, 78 Fed. Reg. 70586 (Nov. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-26/pdf/2013-28242.pdf>.

⁴ U.S. Env’tl. Prot. Agency, *Fact Sheet: Social Cost of Carbon* (July 2013), <http://www.epa.gov/climatechange/Downloads/EPAactivities/scc-fact-sheet.pdf>.

⁵ *Id.*

order to unilaterally and aggressively regulate carbon dioxide through unelected federal agencies, only escalates the importance of the SCC's thorough review.

The significance of the SCC – which will be used by multiple federal agencies to justify rules – stands in stark contrast to the non-transparent process by which the SCC was formulated. Rather than being a product of academic debate and public participation, the SCC was quietly unveiled to the public in a Department of Energy rulemaking involving energy use by microwave ovens.⁶ The SCC was never subjected to public notice and comment procedure, and is built upon analytical models that are neither fully available to the public nor peer-reviewed for the purpose for which they are being utilized.

The regulatory uncertainty surrounding the SCC remains alarming, as highlighted by your office's recent revisions to the SCC based on newly found deficiencies in the models. Given the integral role of the estimates in existing, pending, and future regulations that could impose trillions of dollars in costs on our economy, it is imperative that the Administration address these concerns. Accordingly, we respectfully request that OIRA immediately take the following actions:

1. Provide a robust, transparent, and thorough notice and comment process.

In the November 26, 2013, Federal Register entry, OIRA provided only a 60-day comment period for the updated SCC estimates.⁷ Providing a comment period of 60 days, spanning several federal holidays, is insufficient to address the substantive and procedural concerns surrounding the SCC.

According to the Office of the Federal Register, "For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more."⁸ Thus, in accordance with President Obama's Executive Order 13563, which directs each agency to provide the public a "meaningful opportunity" to comment,⁹ we request that the comment period be extended an additional 60 days to ensure that the public is afforded a sufficient comment period on the November 2013 SCC estimates.

Further, OIRA should provide publication of the final SCC estimates that includes a discussion of the submitted comments and an opportunity to comment on the final SCC estimates.¹⁰ This would begin to build fairness in the process and comply with

⁶ Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens, 78 Fed. Reg. 36316 (June 17, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-06-17/html/2013-13535.htm>.

⁷ Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Exec. Order No. 12866, 78 Fed. Reg. 70586 (Nov. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-26/pdf/2013-28242.pdf>.

⁸ *A Guide to the Rulemaking Process*, Office of the Fed. Register, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last accessed Nov. 21, 2013).

⁹ Exec. Order No. 13563, §2(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

¹⁰ The Administrative Procedure Act, 5 U.S.C. § 500 *et seq* (1946).

OIRA's Information Quality Act guidelines that call for information disseminated by OIRA to meet high standards of objectivity, utility, and integrity.¹¹

2. Notify agencies that the SCC cannot be used until finalized.

Until the SCC is revised to reflect consideration of public comments, use of the SCC is inappropriate and counter to law. Given that three different versions of the SCC are being utilized in recent rulemakings,¹² the likelihood of failing to comport with statutory requirements, increasing regulatory confusion and error are maximized. Pursuant to the Administrative Procedure Act's public notice and comment procedures, courts have held that a final rule must be a "logical outgrowth" of the proposed rule.¹³ Therefore, when an agency decides to make major changes – such as using a different SCC estimate¹⁴ – before finalizing a rule, they are instructed to publish a supplemental proposed rule.¹⁵

3. Include any revised SCC estimates in the Unified Agenda.

OIRA should include any revised SCC estimates in the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda) to provide the public ample notice of upcoming changes to the SCC. As you are aware, the Unified Agenda is issued in the spring and fall of each calendar year to inform Congress and the public of anticipated regulatory actions.¹⁶ In fact, the Office of Management and Budget has consistently

¹¹ OFFICE OF MGMT & BUDGET, *Office of Management and Budget Information Quality Guidelines* (Oct. 1, 2002), available at http://www.whitehouse.gov/omb/info_quality_iqg_oct2002/.

¹² For example, on June 7, 2013, Env'tl. Prot. Agency proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category (78 Fed. Reg. 34431), which used the 2010 SCC estimates; on June 17, 2013, Dep't of Energy finalized Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens (78 Fed. Reg. 36315), which used the May 2013 SCC estimates; and on Dec. 6, 2013, Dep't of Energy proposed Energy Conservation Standards for Commercial and Industrial Electric Motors (78 Fed. Reg. 73590), which used the Nov. 2013 SCC estimates.

¹³ *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525 (D.C. Cir. 1982).

¹⁴ In one example, a petition was filed against the Department of Energy's final rule for microwave ovens. According to the petition, DOE may have violated the APA because the proposed microwave oven rule submitted for public comments used the IWG's 2010 SCC estimates, but the final rule used the IWG's updated 2013 SCC estimates – absent any notice or public input. Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Petition for Reconsideration, 78 Fed. Reg. 49975 (Aug. 16, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-16/html/2013-19950.htm>. While DOE denied the petition on December 24, 2013, arguing that the updated SCC estimates were not "critical" to the final rule, the Agency simultaneously filed a Notice of Data Availability (NODA), which altered the SCC estimates to several proposed rules to reflect the updated SCC estimates. Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Petition for Reconsideration; Notice of Denial, 78 Fed. Reg. 79643 (Dec. 31, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-31/pdf/2013-31273.pdf>; Energy Conservation Program for Consumer Products and Commercial and Industrial Equipment: Effect of Revised Estimates of the Social Cost of Carbon; Notice of Data Availability, 78 Fed. Reg. 79419 (Dec. 30, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-30/pdf/2013-31270.pdf>.

¹⁵ *A Guide to the Rulemaking Process*, http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last accessed Nov. 21, 2013).

¹⁶ See Exec. Order No. 12866, §4(b), 58 Fed. Reg. 51735 (Oct. 4, 1993).

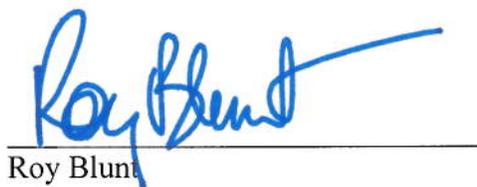
included circulars, guidance documents, policy letters, and other regulatory actions in the Unified Agenda.¹⁷ However, the Technical Support Document for the February 2010 and May 2013 SCC estimates were excluded from the Unified Agenda and released without any notice to the public.

We request that you advise us of the steps to be taken with regard to these requested actions not later than January 24, 2014. If you have any questions, please contact the Committee on Environment and Public Works Republican staff at (202) 224-6176.

Sincerely,



David Vitter
Ranking Member



Roy Blunt



Jeff Sessions



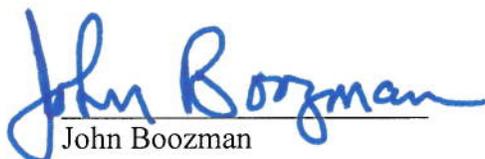
John Barrasso



James M. Inhofe



Roger Wicker



John Boozman

¹⁷ See OFFICE OF MGMT & BUDGET, *Federal Regulations; OMB Circulars, OFPP Policy Letters, and CASB Cost Accounting Standards Included in the Semiannual Agenda of Federal Activities*, http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201304/Preamble_0348.html (last accessed Nov. 22, 2013).