

APRIL 2021

VOL. 21-4

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: A FOCUS ON CLIMATE CHANGE

Victoria Prussen Spears

BIDEN'S CLIMATE BLITZ

Sheila McCafferty Harvey, Elizabeth Vella Moeller, Meghan Claire Hammond, and Sid Fowler

THE U.S. FINANCIAL SYSTEM AND CLIMATE RISK: PUTTING THE REPORT OF THE CFTC'S CLIMATE-RELATED MARKET RISK SUBCOMMITTEE IN CONTEXT

Amy L. Edwards, Dianne R. Phillips, and Kara M. Ward

RECLAIMING A FEDERAL LEAD ON THE SOCIAL COST OF CARBON

Saqib Z. Hossain and Beth A. Viola

WIND IN THE SAILS FOR CLIMATE-TECH AND CLEANTECH STARTUPS

Louis Lehot

OHIO SUPREME COURT CONFIRMS MARKETABLE TITLE ACT EXTINGUISHES OIL AND GAS INTERESTS

Brian M. John and Lauren M. Oelrich

BANKRUPTCY COURTS CONTEMPLATE DEBTORS' REJECTION OF REAL PROPERTY COVENANTS IN MIDSTREAM CONTRACTS

Joseph M. Esmont, Mark L. Jones, Kristin D. Kluding, and Scott E. Prince

Pratt's Energy Law Report

VOLUME 21

NUMBER 4

April 2021

Editor's Note: A Focus on Climate Change

Victoria Prussen Spears

109

Biden's Climate Blitz

Sheila McCafferty Harvey, Elizabeth Vella Moeller, Meghan Claire Hammond,
and Sid Fowler

111

**The U.S. Financial System and Climate Risk: Putting the Report of the
CFTC's Climate-Related Market Risk Subcommittee in Context**

Amy L. Edwards, Dianne R. Phillips, and Kara M. Ward

117

Reclaiming a Federal Lead on the Social Cost of Carbon

Saqib Z. Hossain and Beth A. Viola

125

Wind in the Sails for Climate-Tech and Cleantech Startups

Louis Lehot

128

**Ohio Supreme Court Confirms Marketable Title Act Extinguishes
Oil and Gas Interests**

Brian M. John and Lauren M. Oelrich

132

**Bankruptcy Courts Contemplate Debtors' Rejection of Real Property
Covenants in Midstream Contracts**

Joseph M. Esmont, Mark L. Jones, Kristin D. Kluding, and Scott E. Prince

138

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Reclaiming a Federal Lead on the Social Cost of Carbon

*By Saqib Z. Hossain and Beth A. Viola**

The authors of this article discuss the regulatory history of the social cost of carbon and President Biden's action in this realm since taking office.

The social cost of carbon (“SCC”) has a checkered regulatory history spanning nearly 40 years, but it now has been thrust back onto the federal stage, front and center.

Among President Joe Biden's first acts in office was a directive to publish interim social costs for carbon, nitrous oxide, and methane within 30 days of his executive order,¹ “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” along with the final social costs by January 2022.

BACKGROUND

The executive order reassembles the Interagency Working Group on the Social Cost of Greenhouse Gases (“Working Group”)—the regulatory apparatus first established by the Obama administration in 2009 for the purpose of standardizing a valuation of the monetized damages associated with incremental increases in greenhouse gas emissions. A single methodology for determining the dollar figure for the SCC enables federal agencies to fulfill part of their obligations under President Ronald Reagan's Executive Order 12291 of 1981 by incorporating that amount in the cost-benefit analyses of their intended regulations.

The Trump administration disbanded the Working Group in March 2017 through Executive Order 13783, thus scrapping a government-wide estimate for SCC and instead allowing federal agencies to independently calculate the SCC. At that time, despite the discontinuance of federal climate change policies, the states, led by New York and California, were ramping up their

* Saqib Z. Hossain, an associate at Holland & Knight LLP and a member of the firm's Public Policy & Regulation Group, focuses his practice on a variety of transactional and regulatory matters in the energy space, with a concentration on renewable energy projects. Beth A. Viola is a senior policy advisor at the firm, where she is among the leadership team for the firm's Energy and Natural Resources Industry Sector Group. The authors may be reached saqib.hossain@hkllaw.com and beth.viola@hkllaw.com, respectively.

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

efforts. And the rollback of a SCC standard would likely lead to federal agencies headed by former President Donald Trump appointees using a lower figure.²

As expected, within months after Executive Order 13783 was issued, the U.S. Environmental Protection Agency (“EPA”) substantially reduced the SCC figure from \$52 per ton of carbon dioxide to between \$1 and \$7.³ In turn, the U.S. Government Accountability Office (“GAO”) was tasked with examining the EPA’s methodology, and the GAO published its report June 2020.⁴

The GAO concluded that the EPA changed two key assumptions from President Barack Obama’s SCC methodology. The EPA accounted only for domestic (rather than global) economic impacts from climate damage, and also used a higher range of discount rates of three percent to seven percent (rather than 2.5 percent to five percent) to convert future damages into present dollars.

PRESIDENT BIDEN’S ORDER

President Biden’s executive order clearly signals his intention to reinstate at least one of the methodologies used by the Obama administration, as it emphasized the importance of factoring global damages: “It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues.”

The executive order also requires the Working Group to recommend a process to ensure that social cost calculations of greenhouse gas emissions are updated based on the best available economics and science, and adequately factor climate risk, environmental justice, and intergenerational equity.

Notably, the executive order specifically instructs the Working Group to consider the recommendations of the National Academies of Science, Engineering and Medicine (“National Academies”) as reported in *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017). This report was prepared for the benefit of the Obama administration Working Group, but the recommendations from the National Academies were never realized as President Trump disbanded the Working Group shortly thereafter.

² See “In Trump Era, States Take Lead on Social Cost of Carbon,” *Law360*, May 8, 2017.

³ See *Updating the United States Government’s Social Cost of Carbon*, University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2021-04, Tamma Carleton and Michael Greenstone, Jan. 14, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764255.

⁴ See *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies’ Recommendations Could Strengthen Regulatory Analysis*, U.S. Government Accountability Office, June 2020, <https://www.gao.gov/assets/710/707776.pdf>.

Among other things, the National Academies recommends moving away from the fixed discount rate model as utilized by both of the preceding administrations. A variable discount rate, according to the National Academies, will help account for the relationship between economic growth and discounting rates over time.⁵ Alternatively, economic experts have also argued that if a fixed discount rate is used, it should not exceed two percent.⁶

CONCLUSION

Although it remains to be seen how precisely President Biden will determine and implement federal SCC policies, the end result will almost certainly differ from the Trump era.

Indeed, this administration may ultimately depart from certain methodologies established by President Obama.

Either way, the current executive order has laid a foundation for reshaping SCC policies of years past.

⁵ See Report Recommends New Framework for Estimating the Social Cost of Carbon, the National Academies of Sciences, Engineering and Medicine, Jan. 11, 2017, <https://www.nationalacademies.org/news/2017/01/report-recommends-new-framework-for-estimating-the-social-cost-of-carbon>.

⁶ See Updating the United States Government's Social Cost of Carbon, Carleton and Greenstone, Jan. 14, 2021.