

August 1, 2022

Via Regulations.gov

Kelly J. Speakes-Backman
Principal Deputy Assistant Secretary
for Energy Efficiency and Renewable Energy
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy
1000 Independence Avenue SW
Washington, DC 20585

Re: Proposed Rulemaking, Office of Energy Efficiency and Renewable Energy, Department of Energy, Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment; 87 Fed. Reg. 43226, Docket No. EERE-2021-BT-STD-0027, RIN 1904-AD34

Dear Principal Deputy Assistant Secretary Speakes-Backman:

We, the undersigned Associations, submit the following comments in response to the proposed rule Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment, 87 Fed. Reg. 30610 (May 19, 2022) (“Proposed Rule”). These comments center on the Proposed Rule’s use of the social cost of greenhouse gas (“SC-GHG”) estimates.¹ The Associations appreciate the opportunity to share our feedback and extend an offer to engage with the Department of Energy (“Department”) in addressing these comments.

Combating climate change requires citizens, governments, and businesses to work together. The Associations continue to leverage the innovation and the strength of American business to find durable solutions that improve our environment, grow our economy, and leave the world better for generations to come. We offer these comments to respectfully raise vulnerabilities in the Proposed Rule associated with the use of the SC-GHG estimates along with actionable suggestions for the Department.

The SC-GHG estimates have been applied to multiple federal regulations, among other actions, that amount to hundreds of billions of dollars in reported climate benefits, along with significant costs, including to companies represented by the Associations. For this reason, we have a direct and substantial interest in ensuring that any SC-GHG estimates that are used in agency rulemakings, including the rulemaking process for the Proposed Rule, are the product of a sound, transparent, and inclusive process. In the Proposed Rule, the Department estimates

¹ The SC-GHG estimates, which include social cost estimates for carbon dioxide (“SCC”), methane (“SCM”) and nitrous oxide (“SCN”), reflect the economic impact of emitting a ton of the particular GHG in a given year. For purposes of these comments, the SC-GHG estimates refer to the interim SC-GHG estimates released in February 2021. See U.S. Gov’t Interagency Working Grp. on Soc. Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane and Nitrous Oxide Interim Estimates under Executive Order 13990* (Feb. 2021) (“2021 TSD”). The principles advanced in these comments would extend to any future SC-GHG estimates applied under any Final Rule with shortcomings similar to those of the interim SC-GHG estimates.

the climate benefits to be \$1.96 billion by applying the SC-GHG estimates in the agency's cost-benefit analysis.

The Associations support appropriate consideration of GHG emissions as part of cost-benefit analyses under the Executive Order 12866 process, where permissible under an agency's statutory authority. Our comments complement, and incorporate by reference, the attached comments that many of the Associations submitted in June 2021 in response to a May 2021 notice by the Interagency Working Group on the SC-GHG ("IWG"), which centered on the need for a robust and transparent IWG process.²

Since the IWG issued the 2021 estimates, the federal government has acknowledged that a more complete and open process is required before the IWG issues any final SC-GHG estimates. Thus, we are encouraged by planned updates to the IWG process, including additional public comment and peer review on the estimates, while also reserving judgment on the approach of such peer review to be led by the U.S. Environmental Protection Agency ("EPA") until further details are provided.³ In addition, in February 2022, a federal district court issued a preliminary injunction (now on appeal) that forbade use of the interim SC-GHG estimates, relying in part on a number of concerns regarding the IWG process.⁴ However, that injunction has since been stayed pending appeal by the Fifth Circuit.⁵ These developments only serve to underscore the need for the Department to reconsider its application of the estimates to the Proposed Rule.

The Associations urge the Department to reconsider the use of the SC-GHG estimates in this rulemaking based on three core concerns. Before the Department considers applying the SC-GHG estimates to the Proposed Rule, the SC-GHG estimates should be subject to a proper administrative process, including a full and fair public comment process, as well as a robust independent peer review (and, likewise, to any final rule resulting from this rulemaking). There are statutory limitations on using the SC-GHG estimates, and we urge the Department to fully consider the applicable limits before applying the estimates. We urge the Department to

² Comments by the Aluminum Association, American Chemistry Council, American Exploration & Petroleum Council, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Gas Association, American Highway Users Alliance, American Iron and Steel Institute, American Petroleum Institute, American Public Gas Association, American Public Power Association, Associated Builders and Contractors, Associated General Contractors of America, Council of Industrial Boiler Owners, The Fertilizer Institute, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Lime Association, National Mining Association, National Rural Electric Cooperative Association, Portland Cement Association, and the U.S. Chamber of Commerce, to the Office of Mgmt. & Budget, RE: Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021) ("June 2021 Coalition Comments").

³ Defs.' Suppl. Brief at 23, *Louisiana v. Biden*, No. 2:21-cv-01074-JDC-KK (W.D. La. Jan. 21, 2022), ECF No. 90 (The IWG "intends to publish its proposed final estimates within the next two months. Upon publication of the proposed final estimates, there will be an additional comment period, as well as a scientific peer-review process. Based on the public comments and the results of peer review, the [IWG] then intends to publish Final Estimates later in 2022."); see also 87 Fed. Reg. 3,801 (Jan. 25, 2022).

⁴ Memorandum Ruling, *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La. Feb. 11, 2022), ECF No. 98.

⁵ *Louisiana v. Biden*, No. 22-30087 (5th Cir. Mar. 16, 2022) (per curiam) (staying district court's decision pending appeal). An application to vacate the stay was filed before the U.S. Supreme Court. *Louisiana v. Biden*, No. 21A658 (U.S. Apr. 28, 2022). The Court denied the stay application on May 26, 2022.

consider whether the “major questions” doctrine precludes the application of the SC-GHG estimates in the Proposed Rule given the political and economic significance of the estimates.

I. THE DEPARTMENT SHOULD ENSURE THAT THE SC-GHG ESTIMATES FOLLOW RELEVANT ADMINISTRATIVE PROCESS REQUIREMENTS AND OFFICE OF MANAGEMENT AND BUDGET GUIDANCE PRIOR TO USE IN THIS RULEMAKING.

As further explained herein, the Department should not rely on the SC-GHG estimates in any decision-making related to the Proposed Rule because the IWG process for developing the estimates was not the product of a full and legally adequate administrative process. Any estimates of the SC-GHG need to be developed through a process consistent with the Administrative Procedure Act (“APA”), must be the product of a robust and independent peer review, must reflect the best available science and economics, and must conform to relevant guidance on information quality and regulatory analyses. However, the SC-GHG estimates in the Proposed Rule do not meet these requirements and thus suffer from material procedural defects contrary to the APA and basic principles of due process.⁶ The Associations urge the Department to ensure that these procedural shortcomings are addressed fully before applying any SC-GHG estimates in a final rule.

First, the Department should not rely on the SC-GHG estimates in any decision-making related to the Proposed Rule, because the IWG released the SC-GHG estimates, without any prior notice and comment. The Associations appreciate the comment period provided on behalf of the IWG in May 2021; however, the IWG has yet to respond to those public comments submitted on the notice.⁷ It is inappropriate to rely on and apply these SC-GHG estimates in any decision-making related to the Proposed Rule while this public process for considering relevant input and information is yet ongoing. Moreover, the IWG process lacked full transparency, which impaired the public’s ability to comment meaningfully on the SC-GHG estimates. This lack of transparency extends to this comment period. The Department has provided no further record in this rulemaking regarding the IWG process, and thus the agency has not effectively communicated with the public on its work. Nor can the IWG’s proposed *future* public comment or peer review process for final SC-GHG estimates remedy the error of applying the estimates in this rulemaking. Absent a clear understanding of the IWG process, decisions it has made, and greater transparency, the public’s ability to provide meaningful comments on the estimates in this rulemaking is impaired.

The limited process afforded to the public to comment on earlier SC-GHG estimates does not and cannot serve as an adequate substitute for the need to provide a full opportunity

⁶ See 5 U.S.C. § 706(2)(A) (provides that reviewing courts shall hold unlawful and set aside agency decisions where they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

⁷ Off. of Mgmt. & Budget, Notice of Availability and Request for Comment on the “Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990,” 86 Fed. Reg. 24,669 (May 7, 2021). The APA requires agencies to “consider and respond to significant comments received during the period for public comment.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015).

for public input on the current estimates in the Proposed Rule.⁸ The comment period on the 2013 social cost of carbon (SCC) did not reflect a meaningful opportunity for public comment at the time, was not accompanied by peer review, and did not provide public access to information underpinning the models' estimates.⁹ That comment period also predated the IWG's release of the social cost of methane ("SCM") and the social cost of nitrous oxide ("SCN") estimates, which were not independently subject to public input.¹⁰ Comment periods on rules using previous estimates were similarly inadequate on a legal and policy basis, and should not be used as a model by the Department here when responding to these and other comments on the estimates used in the Proposed Rule.¹¹

Second, the Department should refrain from relying on the SC-GHG estimates in any decision-making related to the Proposed Rule because the IWG has thus far failed to consider fully the recommendations of the National Academies of Sciences, Engineering, and Medicine ("NAS") regarding the IWG's process and methodology for developing a SCC for use in rulemakings. Five years ago, the NAS completed its review and issued recommendations, calling for a new framework for developing the estimates and multiple changes to the methodologies for calculating the SCC estimates.¹² Consideration of the recommendations of the NAS is critical for any robust social cost analysis – and is in fact mandated by President Biden's executive order that directed the IWG to develop revised SC-GHG estimates, E.O. 13990.¹³ Yet, while the IWG has stated its intent to consider the recommendations of NAS, the NAS recommendations have not yet been incorporated into the estimates that the Department has applied to the Proposed Rule. Moreover, the precise way in which the NAS recommendations may (or may not) be followed in the future cannot form the basis for relying on the estimates in any decision-making related to the Proposed Rule. For the Department to proceed to apply the SC-GHG estimates without incorporating the recommendations of the NAS is a major deficiency in the Proposed Rule that must be addressed before concluding this rulemaking.

Third, the SC-GHG estimates also conflict, without appropriate explanation, with longstanding Office of Management and Budget ("OMB") guidance on information quality and economic analyses; consequently, the Department's reliance on the estimates in this rulemaking may be considered arbitrary and capricious.¹⁴ The estimates fail to follow OMB's

⁸ June 2021 Coalition Comments, 10-13 & n.27 ("The Associations caution against reliance on comment periods dating back several years. An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Normally, an agency rule would be arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency. This means that an agency cannot ignore new and better data." (cleaned up) (citations omitted)); *see also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion").

⁹ 78 Fed. Reg. 70,586 (Nov. 26, 2013).

¹⁰ June 2021 Coalition Comments, 11-12.

¹¹ *Id.*

¹² National Academies of Sciences, Engineering, and Medicine. 2017. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*. Washington, DC: The National Academies Press.

¹³ Exec. Ord. 13990 of Jan. 20, 2021, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037, 7041 (Jan. 25, 2021) (Sec. 5 (iii) Methodology states: "In carrying out its activities, the Working Group shall consider the recommendations of the National Academies of Science, Engineering, and Medicine as reported in *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017)."

¹⁴ *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (agency's failure to follow its own guidance documents is arbitrary and capricious).

“Final Information Quality Bulletin for Peer Review,” which requires “influential scientific information,” such as the modeling inputs and assumptions underlying the estimates, to be subject to rigorous peer review.¹⁵ Further, the lack of a formal uncertainty analysis and the improper characterization of uncertainty with the SC-GHG estimates deviate from OMB’s final “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” pursuant to the Information Quality Act.¹⁶ Such analysis is necessary to inform a full and adequate peer review and to enable rational agency decision-making concerning the potential use of the SC-GHG estimates.¹⁷ As noted, the EPA, on behalf of the IWG, has announced a contractor-led peer review of the SC-GHG estimates. However, while the Associations applaud a peer review, there are questions as to how robust and independent that review may be as limited information has been made publicly available on the process and EPA’s particular role.¹⁸

Lastly, the IWG’s selected discount rates and presentation of global estimates for the SC-GHGs diverge from OMB’s Circular A-4.¹⁹ For instance, the IWG based the SC-GHGs solely on global effects of emissions, while Circular A-4 directs agencies to “focus on benefits and costs that accrue to citizens and residents of the United States” and, where appropriate, separately report global effects of a regulation.²⁰ Consistent with the direction in Circular A-4, tabulating both the domestic and global SC-GHGs would provide additional information on the effectiveness of agencies’ GHG-related actions with regard to the U.S. population and further context for decision making. Circular A-4 remains the governing guidance for any government regulatory cost-benefit analysis. Although the Administration has announced a review of and potential revisions to Circular A-4, it still presently reflects active guidance for the IWG, and the Department, when conducting regulatory cost-benefit analyses.²¹ Circular A-4 also directs agencies to apply 3 percent and 7 percent discount rates to future benefits and costs calculations in agency cost-benefit analysis; however, the Department applies just the 3 percent discount rate from the SC-GHG estimates creating inconsistent application of discounting. Accordingly, we urge the Department to reconsider its reliance on the SC-GHG estimates in the Proposed Rule and ensure that the rule comports with Circular A-4 in all relevant respects.

¹⁵ Off. of Mgmt. & Budget, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2,664 (Jan. 14, 2005).

¹⁶ Off. of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Feb. 22, 2002); Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554.

¹⁷ 5 U.S.C. § 706.

¹⁸ 87 Fed. Reg. 3,801 (Jan. 25, 2022).

¹⁹ See Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003) (“OMB Circular A-4”), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf (providing OMB’s guidance to federal agencies on the development of regulatory analysis as required under E.O. 12866); see also, <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>.

²⁰ OMB Circular A-4 at 15.

²¹ Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 (Jan. 26, 2021) (The Director of OMB “should provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations” and “recommendations should include proposals that will ensure regulatory review serves as a tool to affirmatively promote regulations that advance these values.”).

We understand that the IWG is in the process of revising the estimates. For this rulemaking, the Department should await these revisions, instead of relying on the flawed SC-GHG estimates for any decision-making related to the Proposed Rule. Moreover, before the Department considers applying any revised estimates, whether in a proposed or final rulemaking, the Department should ensure that the procedural shortcomings and basic principles of due process discussed above have been addressed. If the IWG were to issue corrections or final SC-GHG estimates prior to the Department issuing the final rulemaking, then the Department should issue a notice for this rulemaking that incorporates the updated estimates prior to issuing the final rulemaking to allow for public comment. The Associations stand ready to engage with the IWG and the Department and support necessary improvements to the SC-GHG estimates.

II. THE DEPARTMENT SHOULD ACKNOWLEDGE STATUTORY LIMITS TO ITS RELIANCE ON THE SC-GHG ESTIMATES.

Aside from the procedural considerations discussed above, the Associations urge the Department to acknowledge the statutory limits to its reliance on the SC-GHG estimates in this rulemaking. Notwithstanding calls to expand the use of the SC-GHG estimates, the estimates were originally designed for use in regulatory impact analyses under E.O. 12866 and are not appropriate for use in other contexts.²² An in-depth discussion of the appropriate parameters for the application of the SC-GHG estimates is included in the Associations' June 2021 comments to the IWG. For purposes of these comments, the Associations focus on those limitations to an agency's consideration of the SC-GHG within the rulemaking context.

The Associations support the appropriate consideration of GHG emissions in regulatory cost-benefit analyses under E.O. 12866, but such consideration, to the extent it affects agency decision making, must be statutorily authorized and, moreover, must never exceed the boundaries of all relevant statutory authorizations and other provisions. Agencies cannot add new factors in a rulemaking, such as reliance on the SC-GHG estimates, in instances that Congress has not authorized the Agency to consider.²³

Generally, federal agencies conduct cost-benefit analyses for "economically significant" regulatory actions pursuant to E.O. 12866.²⁴ While the Associations support the principles of

²² U.S. Gov't Interagency Working Grp. on Soc. Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866*, at 1 (Feb. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf> ("The purpose of the 'social cost of carbon' (SCC) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide (CO2) emissions into cost-benefit analyses of regulatory actions...."); see June 2021 Coalition Comments, 23-26. See also e.g., U.S. Chamber of Commerce, *Comments regarding Notice of Availability and Request for Comment on the "Federal Acquisition Regulation (FAR) – Minimizing the Risk of Climate Change in Federal Acquisitions;" 86 FR 57404 (Oct. 15, 2021) and 86 FR 69218 (Dec. 7, 2021)* (Jan. 13, 2022), <https://www.uschamber.com/environment/notice-of-availability-and-request-for-comment-on-the-federal-acquisition-regulation-far-minimizing-the-risk-of-climate-change-in-federal-acquisitions>.

²³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider....").

²⁴ Exec. Ord. 12866 of Sept. 30, 1993, Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993) (Sec. 3(f)(1) defines "significant regulatory action" as a rule likely to result in "an annual effect on the economy of \$100 million or more or

E.O. 12866 and cost-benefit analyses for regulatory actions, the application of the SC-GHG estimates in any agency decision making ultimately hinges on the nature and scope (if any) of the agency's statutory authority to consider GHG emissions. Moreover, given broad assumptions underpinning the SC-GHGs (e.g., assumptions regarding the global socio-economic impacts projected through 2300), the SC-GHGs may not provide a useful tool for use in every regulatory impact analysis even if they are revised and improved as suggested herein.

We recognize that certain statutes have been interpreted to require or allow an agency to consider the effect of GHG emissions in rulemakings.²⁵ However, absent a clearly articulated statutory basis for an agency's application of the SC-GHG estimates, and absent a consistent, predictable rationale to govern future agency decisions relating to such applications, that agency's decision-making may be considered arbitrary and capricious. Thus, to the extent that the SC-GHG estimates are affecting the Department's decision in this rulemaking, we recommend the Department not only make clear its independent statutory authority for applying the SC-GHG estimates in the rulemaking, but articulate the principles that will allow private parties to predict future applications of such estimates in domains governed by the particular statutory provisions that are at issue here.

III. THE AGENCY SHOULD CONSIDER WHETHER THE "MAJOR QUESTIONS" DOCTRINE PRECLUDES ITS APPLICATION OF THE SC-GHG ESTIMATES TO THE PROPOSED RULE.

One final factor the Department should consider relates to the "major questions" doctrine and whether, because the SC-GHG estimates are of such major economic and political significance, the Department should await direction from Congress before proceeding with its application of the estimates in this rulemaking. Indeed, many members of the Associations have supported legislation aimed at advancing innovative technologies and solutions needed to effectively reduce GHG emissions. However, at the same time, the Administration should not embark on efforts to expand the application and treatment of the SC-GHG estimates to effectively serve as a uniform price or fee on global GHG emissions ahead of Congress.

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.").

²⁵ See e.g., *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) (holding that NHTSA had to consider monetized effects of GHG emissions in fuel economy standards). We further note that in *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016) the Court upheld the Department's use of the SCC to calculate environmental benefits in setting energy efficiency standards for commercial refrigeration equipment. However, neither the court nor the Department explained why estimation of environmental benefits was germane to the Department's evaluation of whether *energy* conservation efforts were cost justified. Indeed, the Energy Policy Conservation Act (EPCA) sets forth specific factors the Department must evaluate as part of its determination that the Proposed Rule is economically justified. 42 U.S.C. § 6295(o)(2)(B)(i). None of those factors reference environmental benefits, emissions reductions, or the SC-GHG estimates. We recognize that the Proposed Rule suggests in some places that the Department did not factor the SC-GHG estimates into its analysis of whether the proposed standards are economically justified under EPCA, *see, a.g.*, 87 Fed. Reg. 30,626, 30,713, and the Department may contend that its evaluation of the SC-GHG estimates is limited to the Executive Order 12866 review process. However, the SC-GHG estimates are inseparable from other environmental benefits that the Department does consider part of its EPCA evaluation. The Department prominently discusses the SC-GHG estimates and associated climate benefits through the preamble including in the "Synopsis of the Proposed Rule," "Economic Justification and Energy Savings," and "Conclusion" sections of the preamble confirming that they remain influential to the Department's tentative conclusion that the Proposed Rule would be cost justified under EPCA.

Through the “major questions” doctrine, the Supreme Court has established guardrails on any administrative action that has sweeping implications across our country and economy.²⁶ This doctrine is clear: the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast ‘economic and political significance.’”²⁷

Here, notwithstanding support by many of the Associations for different forms of GHG pricing, the fact remains that there is currently no U.S. federal law authorizing a GHG tax or emissions fee. A potential U.S. carbon pricing scheme has been subject to much debate in Congress for more than a decade and continues to this day. Yet, the SC-GHG estimates have been used to monetize the effects of global climate change as a way to justify GHG emissions reductions rules, which can be seen similar to a tax or fee on GHGs. In this context, the SC-GHG estimates are certainly of vast economic significance. Indeed, rulemakings in which the SC-GHG estimates have been applied reportedly amount to hundreds of billions of dollars in monetized global climate change impacts.²⁸ These rules affect numerous sectors of the U.S. economy, including companies represented by the Associations. The list of affected sectors likely will grow, as the IWG has signaled plans to expand the use of the estimates.

Similarly, the estimates are of vast political significance. In the first instance, the SC-GHG Technical Support Document states that the estimates include “the value of all climate change impacts” across the globe.²⁹ Taking on a measure of “all” the impacts of global climate change is incredibly significant for agencies, including those on the international level. The political significance is more acute, considering that President Biden has characterized global climate change as an “existential threat” and called for a “whole-of-government” approach to addressing the issue.³⁰

At the same time, as the U.S. has rejoined the Paris Climate Agreement—a decision many of the Associations here support—global leaders have engaged in discussions regarding a potential carbon border adjustment mechanism, which is another form of carbon pricing, to reduce global emissions. For such a mechanism to be applied in the U.S., Congress would need to enact appropriate legislation.

On the domestic front, after years of inaction on carbon pricing, Congress has considered multiple bills that would price carbon into the economy for various sectors. This suggests Congress is considering whether to exercise its authority in this space and, notably,

²⁶ *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

²⁷ *Id.* at 2605.

²⁸ *See e.g.*, Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards, 86 Fed. Reg. 74,434, 74,498 (Dec. 30, 2021) (“EPA estimates the monetized benefit of these GHG reductions through 2050 at \$31 billion to \$390 billion across a range of discount rates and values for the social cost of greenhouse gases....”).

²⁹ 2021 TSD at 2.

³⁰ The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

with the Administration's endorsement. That should be the principal forum for determining policy of this magnitude.

Lastly, as discussed in the Associations' June 2021 comments, the SC-GHG estimates reflect a series of subjective choices about potential impacts of GHG emissions well into the future that are used to inform the inputs and assumptions into the models that calculate the SC-GHG estimates. While limited information is publicly known about the deliberations of the IWG, the variation in the estimates across administrations indicate these choices may involve policy judgments that require an express delegation from Congress.³¹

Even the most modest change in certain choices, such as whether to account for domestic or global emissions or the appropriate discount rate to apply when considering impacts on future generations, can lead to dramatically different results with the ultimate estimate,³² which underscores the importance of these decisions and what should be considered a "legislative choice," instead of one made by the IWG or the Department with this rulemaking.

Collectively, congressional and international actions and deliberations on GHG pricing reinforce the political and economic significance associated with the SC-GHG estimates and foreshadow potential challenges to the estimates under the "major questions" doctrine. In view of this, the Associations caution against the Department's use of the SC-GHG estimates for justifying actions to address global climate change absent congressional direction and recommend that the Department consider how its use of the SC-GHG estimates may implicate the "major questions" doctrine given these issues of political and economic significance.

CONCLUSION

We strongly urge that the Department ensure the recommendations we have provided are addressed before proceeding with the application of the SC-GHG estimates in a potential Final Rule.

We hope the Department finds these comments useful for its decision-making process in this rulemaking. Thank you for your consideration of these comments. We further extend our offer to assist the Department in this effort.

Sincerely,

The Aluminum Association
American Coke and Coal Chemicals Institute

³¹ See *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.").

³² The SCC under the Trump Administration was an average of \$7 per ton, while the interim SC-GHG is an average of \$51 per ton. Compare U.S. Gov't Accountability Off., *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis*, GAO-20-254 (June 2020), <https://www.gao.gov/assets/gao-20-254.pdf>, with 2021 TSD at 5.

American Farm Bureau Federation
American Gas Association
American Public Gas Association
Council of Industrial Boiler Owners
Independent Petroleum Association of America
National Mining Association
U.S. Chamber of Commerce