

The estimated harm done by a single ton of carbon in the atmosphere - the “social cost of carbon” — is a key factor in setting climate policy. The Trump Administration is trying to get its estimate as close to zero as possible. A key part of this effort is to exclude from consideration the impacts of climate change outside the United States. It seems unlikely that courts will impose a mandatory duty on EPA to consider these global impacts. But EPA does have discretion to do so and will need to provide a cogent explanation for ignoring these important effects.

It’s true that in many settings the cost-benefit analysis includes only the domestic effects of regulation. But there is certainly a legal basis taking international impacts into account. Here are three relevant statutory provisions.

First, the National Environmental Policy Act (NEPA). Section 102(2)(F) of NEPA provides that each agency of the federal government shall “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.” Note that this is in the same section of the statute that imposes the mandate for environmental impact statements, not in the policy provisions of the Act that the Supreme Court has found to be merely advisory.

Next, the Clean Air Act. Section 115 requires EPA to take action whenever it “has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country.” The Clean Air Act is the statute that gives EPA power to regulate greenhouse gases. Although EPA is yet to take action under the specific authority of section 115, this section is nevertheless significant. It indicates that global impacts were well within the scope of congressional concern. Moreover, action under section 115 is contingent on other countries showing reciprocity with the United States, again showing that Congress was aware of the need for international cooperation to deal with air pollution issues.

Finally, section 335 of the Defense Authorization Act of 2018 (HR 2810). This statute states that it is the sense of Congress that “climate change is a direct threat to the national security of the United States and is impacting stability in areas of the world both where the United States Armed Forces are operating today, and where strategic implications for future conflict exist.” It also says that sea level rise “will threaten the operations of more than 128 United States military sites, and it is possible that many of these at-risk bases could be submerged in the coming years.” And moreover, it says, “As global temperatures rise, droughts and famines can lead to more failed states, which are breeding grounds of

extremist and terrorist organizations.” Thus, Congress has clearly identified ways in which foreign impacts in turn impose domestic costs on the U.S., which a cost-benefit analysis should not ignore.

The language of these statutes stops well short of a clearcut mandate to consider global impacts. But they do provide a strong basis for concluding that EPA has the discretion to do so. In the context of administrative law, “discretion” is not a blank check. To the extent that costs and benefits are legally relevant to an agency decision, EPA or other agencies must provide a reasoned justification based on record evidence to support any decision to ignore global impacts.

The Obama Administration’s interagency working group on the social cost of carbon provided strong policy arguments for considering global costs, including the facts that most of the available models do so. Another reason for using a global figure is the need for other countries to take our interest into account when they implement their own climate policies. If the Trump Administration wants to do otherwise, it will need to come up with some very cogent counter-arguments.