

Biden's green America. Towards a new US environmental policy

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Abstract: L'America "verde" di Biden. Verso una nuova politica ambientale statunitense. - Joe Biden's victory is in some ways the victory of the environment. Since the presidential campaign, Biden has introduced a program based on actions aimed at protecting the environment and finding a solution to the problem of climate change. The Biden-Harris administration has set itself the goal of strengthening environmental protection both through acts that represent an attempt to reform and overturn Trump's decisions, or even to restore tout-court the decisions taken by his Democratic predecessors, in Mr. Obama in particular, and through brand-new measures that put at the forefront the protection of environmental justice, the containment of climate change, the promotion of alternative energy sources and their infrastructures.

Keywords: Environment; Justice; EPA; civil rights; Biden/Trump's policy

1. Introduction

Joe Biden's victory is in some ways the victory of the environment. Indeed, Biden has put the environment at the center, considering it one of the most crucial points of his presidency.

Since its first year, the Biden-Harris administration has prioritized climate and environmental justice initiatives through executive actions, legislation-including the \$1.2 trillion Infrastructure investment and Jobs Act-and international agreement at the 2021 Conference of the Parties in Glasgow.

In particular, - as we will see - one of the first actions carried out by the Biden Adm. is the restoration of the federal regulations that require a rigorous environmental review of major infrastructure projects such as highways, pipelines and oil wells, including the likely impacts on climate change and neighbouring communities. Environmental impact reviews have been cut back by the Trump administration in an effort to accelerate projects and create jobs.

The White House promised, in particular, to restore key provisions of the National Environmental Policy Act, a fundamental environmental law designed to safeguard the community during reviews of a wide range of federal proposals, including roads, bridges and Energy

The new rule, which took effect in late May, should resolve challenges created by the Trump-era policy and restore public confidence during

environmental reviews. «Restoring these basic community safeguards will provide regulatory certainty, reduce conflict and help ensure that projects get built right the first time», said CEQ Chair Brenda Mallory,¹ and «patching these holes in the environmental review process will help projects get built faster, be more resilient and provide greater benefits to people who live nearby»

A part of the activities carried out under the Biden-Harris administration for environmental protection consists of an attempt at reforming and reversing choices made by the Trump administration, and, at the same time, an effort to follow in his Democratic predecessors' footsteps, Mr. Obama in particular.

Even in the election campaign there was a sidereal distance between Trump and Biden: the two candidates could not have seemed more far away in the actions and projects for the environment presented!

As Craig Welch and Sarah Gibbens in a recent study² observed, voters in the United States faced starkly different choices for President in 2020, especially when it came to the candidates' positions on energy and environmental issues.

Former President Donald Trump, in fact, revised environmental reviews in 2020 in an effort to accelerate projects that he believed would boost the economy and provide jobs.

On his first day as President of the United States, Joe Biden signed 17 executive orders, marking the first, profound difference with Trump on two strategic issues: environmental policy and health. Among others, the newly elected President of the United States has, in fact, signed the reintegration of the United States into the Paris climate agreement - which the Trump administration officially exited on November 4, 2020 - and the World Health Organization.

After all, Biden went to the polls with a plan for a clean energy revolution and environmental justice, first of all in the interest of national health and at the same time for the environment, which contains precise indications, starting with the commitment of invest \$ 1.7 trillion in green infrastructure.

Trump made cutting government regulations a hallmark of his presidency. He and his administration have often expressed frustration at the rules that they believe have unnecessarily slowed approval for interstate oil and gas pipelines and other major projects. The rule change enforced in 2020 limited the timeframe for environmental reviews and public comment and allowed federal officials to ignore a project's role in cumulative effects, such as climate change.

Under the Biden administration, the obligation to submit an in-depth environmental impact assessment for major infrastructure works in the United States has gone back. The White House has fully restored key regulations from the National Environmental Policy Act (NEPA) that had

¹ See, *CEQ Restores Three Key Community Safeguards during Federal Environmental Reviews*, White House Press Release, April 19, 2022, in www.whitehouse.gov/.

² C. Welch, S. Gibbens, *Trump vs. Biden on the environment—here's where they stand*, in *National Geographic*, 19 October 2020.

been rendered useless by Trump in 2020.³ What projects are we talking about? The legislation concerns works such as the motorway network, but also infrastructures related to fossil energies such as gas and oil pipelines. From now on, each new project will have to submit an assessment that takes into account all possible types of impacts: direct, indirect and cumulative. Including the possible impacts on climate change and any additional pollution to the detriment of local communities.

President Donald J. Trump defined climate change “a hoax” and he took steps to remove the U.S. from the 2015 Paris climate agreement, in which 195 signatories set voluntary limits on greenhouse gas emissions. The Trump administration, in the deadly embrace with the lobbies of energy producers, defined the limitations created by environmental protection as “burdensome regulations”.

Joe Biden, already when he held the role of Vice President Joe Biden, considered climate change an emergency and promised to re-join the Paris Agreement. He also planned to convene a global climate summit to persuade leaders to set more ambitious and enforceable targets for reducing greenhouse gas emissions.

Even in the election campaign, Trump always said he wanted to promote the opening of the Arctic National Wildlife Refuge (ANWR) to oil exploration. On the contrary, Biden has moved in a different direction, arguing for the permanent need for protect ANWR from energy development. From fuel efficiency standards for cars and trucks to building new oil gas pipelines for the regulation of mercury and carbon pollution from coal power plants, the two Presidents also during the election campaign showed their willingness to take diametrically opposed choices from each other.

On the other hand, since his establishment, Trump did not hide his will to pursue a policy based on a very aggressive attempt to rewrite laws and reinterpret the meaning of environmental protections. Over four years, the Trump administration, in fact, dismantled major climate policies and rolled back many more rules governing clean air, water, wildlife and toxic

³ On August 15, 2017, President Trump issued the Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, directing, in part, White House Council on Environmental Quality (CEQ) to establish and lead an interagency working group to identify and propose changes to the NEPA regulations. On July 16, 2020, CEQ issued a rule which marks the first comprehensive update to NEPA regulations in more than 40 years, implements sweeping changes to the environmental review process for federal projects and projects requiring federal permits and approvals, including energy and infrastructure projects. More precisely, the new rules exclude the obligation to study the cumulative or indirect environmental effects of a project; exclude many projects from NEPA review; and shorten the time and page limits for NEPA documents.

President Biden, later, on 21 January, 2021, with the Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, revoked Trump’s order and restored the guidance under NEPA which recommends that agencies quantify a proposed action’s projected direct and indirect GHG emissions and use those projected emissions, including carbon dioxide sequestration implications, as a proxy for assessing potential climate change effects. See, for further information, *National Environmental Policy Act Implementing Regulations Revisions*, in <https://www.federalregister.gov/>.

chemicals.⁴ Trump's policy focused on protecting the environment only when it doesn't hinder human activities, therefore applying a cost-benefit approach to anything environmental.⁵ And this led the doctrine to argue that there was a strong link between Trump's presidency and Anthropocene catastrophism.⁶

More specifically, it was observed⁷ that while "Trumpism" more aptly referred to a cult of personality than a principled ideology, "environmental Trumpism" was, at least in scope and scale, a revolutionary agenda—one designed to free profit-seeking industries from unprofitable regulations that were crafted to prevent them from internalizing enormous private benefits while externalizing irreversible environmental costs. In response, Biden's desire to overcome "environmental Trumpism" has been seen since his first months of operation, with the aggressively deploying of all the means available to restore many of the environmental guardrails present during the Obama era.

To tell the truth, the environmental policy choices made by Biden are not only in contrast with those of Trump but appear to be an overcoming in general of certain useful ideologies that we can already find with the Reagan administration. For long time the environment has been protected only when and to the extent that it is probably cost-beneficial to do so, but in this way the environment risks being more of a victim than a beneficiary of US environmental law.⁸

⁴ N. Popovich, L. Albeck-Ripka, K. Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, 20 January 2021, www.nytimes.com.

⁵ F. Guliyev, *Trump's "America first" energy policy, contingency and the reconfiguration of the global energy order*, in *Energy Policy*, online, 2020, talks about Trump's neomercantilist and unilateralist economic policies and points out how Trump pushed an ambitious "America first" agenda aimed at transforming the US into a global energy superpower that negatively impacted the environment.

⁶ A. Rose, *Mining Memories with Donald Trump in the Anthropocene*, in 64 *MFS Modern Fiction Studies* 4, 701-722 (2018); R. Meyer, *Donald Trump Is the First Demagogue of the Anthropocene*, in *The Atlantic*, 19 October 2016.

Anthropocene is a new geological epoch that follows the Holocene epoch and identifies a «period of unprecedented human impacts on Earth's environmental systems» (D.R. Butler, *The Anthropocene: A Special Issue*, in *Annals of the American Association of Geographers*, 633-637 (2021)). The Anthropocene also describes «the new context in which we are going to have to consider how we should deal with the effects of global anthropogenic ecological change, including how we think about natural resources and energy security» (L.J. Kotzé, *Rethinking Global Environmental Law and Governance in the Anthropocene*, in *Journal of Energy & Natural Resources Law* 2, 121-156 (2014)).

⁷ J. Lambert, H.M. Hurd, *Will the Biden administration continue to protect the environment only when it is profitable to do so?*, in *U. Ill. L. Rev. Online*, 140 (2021).

⁸ According to *Ibidem*, 141, «The seeds of Environmental Trumpism were planted by President Ronald Reagan's seminal executive order on federal regulation in 1981 which required all executive branch agencies to tabulate the costs and benefits of proposed regulations and to promulgate rules only when their benefits outweighed their costs. Successive executive orders recapitulated and lent muscle to this requirement by requiring agencies to submit their cost-benefit analyses for review by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB)»; for R. MacNeil, M. Paterson, *Trump, US climate politics, and the evolving pattern of global climate governance*, in *Global*

Fortunately, the Biden administration is showing glimpses of this recognition and this bodes well that it will be able to overturn not only the last four years of environmental Trumpism, but the last forty years of environmental decisions, ensuring a protection of the environment in and of itself, even if this involves actions that do not support a cost-benefit logic. Crucial to appreciating the Biden administration's work in environmental matters will be verifying, over the long term, whether it actually prioritizes the protection of rights when rights are at stake, and takes into account the costs and benefits that fall on all those who are benefited or burdened by the environmental regulations (non-Americans and Americans, non-humans and humans, future generations as well as present ones).

2. Biden and the overturning of Trump's environmental rules

Environmental legislation should respond to the need to live in a non-degraded environment which belongs to all living beings, including animals and plants. As has been observed,⁹ «contrary to the past forty years of practice, environmental regulators should thus refuse to define the costs and benefits of environmentally impactful activities in purely anthropocentric terms»,¹⁰ that say considering nature as a mere instrument to achieve human well-being.¹¹

With particular reference to the policies of the Trump administration that preceded Biden's, it can be observed how, rejecting a vision of the environment which takes into account the fact that all forms of life present on earth are interconnected and interdependent on each other, it has been characterized by a clear devaluation of the interests of other living beings. Trump's environmental policy was founded on the belief that species have morally important interests in the conditions that ensure their continued survival. Trump's Department of the Interior, for example, issued numerous rules that reflected the view that a species should be considered endangered and its habitat protected, only if failure to comply with this precaution would endanger fruitful human efforts.

Change, Peace and Security, 1-18 (2019), argue: «The Trump administration's position on climate change should be understood more in terms of continuity than disjuncture».

⁹ J. Lambert, H. M. Hurd, *Will the Biden administration continue to protect the environment only when it is profitable to do so?*, quoted, 143.

¹⁰ M. El-Kamel Bakari, *Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: the Good, the Bad, and the Ambivalent*, in *17 Consilience: The Journal of Sustainable Development* 1, 1-32 (2017), but especially, 26, observes that Ronald Reagan, for example, was so committed to a combination of "neo-liberal capitalism" and 'anthropocentrism' that he used his executive power to implement this agenda. President Reagan made good use of his appointment power, but only to obstruct and reverse major federal environmental policies in America, thus going beyond the conventional principles of "anthropocentrism" to represent the early stages of "corporatism".

¹¹ Anthropocentrism is a belief which postulates that «human beings are superior to all other beings and forms of life on Earth, thus meriting a moral standing denied everything nonhuman», D. Skrbina, *Introduction*, in Id., *Panpsychism in the West*, Cambridge (MA), 2017.

As an example, while it has long been thought that the question of whether a species should be designated as threatened (in order to activate the protections of the Endangered Species Act (ESA)) ruled out consideration of the cost of such designation, the Trump administration has allowed considerations to enter the record as “background information” in ways that would invite regulators to prefer the potential extinction of a species to loss of profits. Under Trump, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the “Services”) made numerous changes to the regulations implementing § 4 of the ESA, specifically pertaining to the listing species and the designating critical habitat, such as the removing of the phrase “without reference to possible economic or other impacts of such determination” from the factors to consider for listing, delisting, or reclassifying species.

Or still, for example, reinterpreting in full the Migratory Bird Treaty Act, the Trump administration removed long-standing protections for many species of waterfowl, raptors and songbirds establishing that the law would apply only to the relative few who intentionally kill such protected birds, and not to the many who engage in an activity responsible for “accidental” killing them.

Aware of the fact that human activity is responsible for the increase in the extinction rate of species up to 1,000 times the background rate, the Biden administration, already in the electoral campaign, has announced its intention to change course with respect to the previous administration, promising to review of the amendments previously made to the rules on the protection of endangered and threatened species. On Oct. 4, 2021, for example, the US Fish and Wildlife Service (FWS) published a final rule and issued a director’s order formally restoring protections for migratory birds that were loosened under President Trump. The Biden Adm. also issued executive orders to reinstate the safeguard¹² on more than one million acres of Bears Ears and Grand Staircase-Escalante National Monuments,¹³ removing a previous decision taken by Trump which had converted vast tracts of precious natural habitat of these two sprawling national

¹² President Biden gave priority to both monuments in an Executive Order issued on Jan. 20, 2021, establishing a policy to «restore and expand our national treasures and monuments», and specifically recommending the Secretary of the Interior to determine whether to restore the boundaries of Bears Ears and Grand Staircase-Escalante to their pre-January 20, 2017 boundaries within 60 days. On October 9, 2021, Biden signed a series of executive orders restoring the boundaries of Bears Ears and Grand Staircase-Escalante. On June 18, 2022, the administration signed a cooperative management agreement for Bears Ears with five tribes that have inhabited land surrounding the monument, the Hopi Tribe, the Navajo Nation, the Ute Mountain Ute Tribe, the Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni.

¹³ The U.S. government controls vast amounts of public land in the West, including roughly two-thirds of all the land in Utah. President Clinton created Grand Staircase in 1996 and President Obama established Bears Ears, a controversial 1.3 million-acre designation, shortly before he left office.

monuments in Utah into private treasures to earmark for extractive uses including logging, mining, and hunting.¹⁴

Of the same content is also the President Biden's decision to reverse the Trump administration executive order on fishing in the Northeast Canyons and Seamounts, the monument which includes a group of underwater canyons and seamounts and the exceptionally diverse ocean ecosystems within and around them. This biodiversity hot spot offers food, shelter and nursery habitat to a wide range of marine life, including puffins, whales, sea turtles, and numerous species of rare cold-water deep-sea coral. President Obama established the monument in 2016 to protect these ecosystems from damage from commercial fishing and other extractive activities, keeping them intact for future generations. On the contrary, Trump on June 5, 2020 (with Proclamation 10049 *Modifying the Northeast Canyons and Seamounts Marine National Monument*) decided to open Northeast Canyons and Seamounts Marine National Monument to industrial commercial fishing.

The President Biden's protection of all these national monuments represents a concrete proof of this administration's will of making efforts to better protect, conserve, and restore the lands and waters that sustain the health of communities and power our economy. More in particular, the aforementioned decisions also show a clear desire to protect lands and waters which are sacred to Tribal Nations, highlighting how in these cases the protection of some natural resources also intersects the question concerning the respect and the defense of indigenous minorities. Native Americans have had an immediate relationship with their physical environments. The restore of the borders of two national monuments in Utah, the Bears Ears and Grand Staircase-Escalante culturally and spiritually important to several tribal nations allocated in that region demonstrates the Biden Adm.'s will to operate at 360 degrees on the environment, also passing through the protection of indigenous minorities, those same minorities that, as has been observed,¹⁵ did not adapt passively to the environment «but responded in diverse ways as individuals and groups to refashion environments to meet their cultural landscape». And this confirms the fact that environmental protection does not only concern the legal formant but also, for example, the cultural one. In this regard and confirming the intertwining of the environmental issue with that of the protection of Indian minorities, it should be noted the memorandum of November 15, 2021, in which Biden undertook to promote tribal consultation, to incorporate indigenous knowledge and develop government wide guidance.

On this occasion, the Biden administration pointed out the necessity «to recognize Indigenous Traditional Ecological Knowledge (ITEK)—a form of Indigenous Knowledge—as one of the many important bodies of knowledge that contributes to the scientific, technical, social, and economic

¹⁴ See, for this topic, R.H. Seamon, *Dismantling Monuments*, in *Florida L. Rev.* 3, 553 (2019); T. Shattuck, *Ending the Monuments Men: Should Congress Restrict Presidential Discretion Under the Antiquities Act?*, in 59 *Hous. L. Rev.*, 199 (2021).

¹⁵ D.R. Lewis, *Native Americans and the Environment: A Survey of Twentieth-Century Issues*, in *American Indian Quarterly* 3, 423-450 (1995).

advancements of the United States and to our collective understanding of the natural world». In this sense, ITEK - as stated in the memorandum – becomes «a body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems». Moreover, Indigenous Traditional Ecological Knowledge has been evolving over millennia, and continues to evolve, including insights based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. ITEK owns by Indigenous people—including, but not limited to, Tribal Nations, Native Americans, Alaska Natives, and Native Hawaiians.

Confirming the fact that environmental protection is a global issue that affects and involves (better, it must involve) everyone, Biden pointed out the importance of ITEK Application and the need to ensure a strict and fruitful collaboration between native communities and the federal government. In the memorandum, it is specified that «should Tribal Nations and Native communities decide to share ITEK and otherwise collaborate with the Federal Government, the Federal Government should ensure that the application of that knowledge and complementary collaborative efforts benefit Tribal Nations, Native communities, the United States, and our planet». In this context, the White House Office of Science and Technology Policy (OSTP) and the White House Council on Environmental Quality (CEQ) should start a process to develop government-wide guidance for Federal agencies on ITEK, with Tribal consultation and drawing on the important work that has already occurred at a number of agencies and within Tribal Nations and Native communities. This memorandum represents, in other word, the first step in this process, which will be attended by tribal nations, holders and professionals from ITEK, the federal agency.

3. Environmental justice: a priority for the Biden administration

As we have just highlighted, the first day of its assignment the Biden administration is stood out for its significant rulemaking efforts to reverse or reform many of the actions of its predecessor based on a utilitarian management of the environmental question. In substance, Trump policy legitimized a regulating environmentally impactful activities only when it was probably cost-beneficial to do so.

But – as it has been observed¹⁶ – cost-benefit calculations are, by definition, unable to account for or accommodate entitlements. To have a right means to have an affirmation that cannot be sacrificed in the name of satisfying the preferences of others. Maximizing the preferences of the majority cannot be considered a justification for admitting the violation of the rights of a minority. This way, if the citizens of Flint, in Michigan, had a right to pristine drinking water, then the pollution of their drinking water could not be justified by the fact that many others would benefit from its

¹⁶ J. Lambert, H.M. Hurd, *Will the Biden Administration continue to protect the environment only when it is profitable to do so?*, quoted, 147.

contamination.¹⁷ Similarly, the Rosebud Sioux was entitled against the desecration of remains of ancient burial places; the fact that many more people would benefit from Keystone XL's placement among these rare archaeological treasures cannot legitimize such a choice.

In sum, if a people «have rights to—as opposed to mere preferences concerning at least some environmental protections (as non-utilitarians like us believe they do), then those rights cannot and will not be protected by cost-benefit calculations that treat such rights as if they were themselves mere preferences that can be traded away whenever so doing will maximize preferences summed across all».¹⁸ And Biden knows it very well! The new administration seems, in fact, aware that the focus of the previous environmental administration was the maximization of profit, and with a clear U-turn recognizes that people have rights that cannot be sacrificed simply to increase others' wealth and intervenes to remedy the violation of those rights by the Trump administration.

Regarding Michigan's water crisis, since the first days, President Biden has pledged to resolve the infrastructure issues that have long been responsible for this crisis and many others. President Biden and Vice President Harris supported, in particular, the Senate's passage of the Infrastructure Investment and Jobs Act, the largest long-term investment in USA infrastructure and competitiveness in nearly a century. The Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Bill, is a United States federal statute enacted by the 117th United States Congress and signed into law by President Joe Biden on November 15, 2021.

For the citizens of Flint, the need for action has been clear since the beginning, and recently released state-level data has demonstrated that the Infrastructure Investment and Jobs Act has delivered for Michigan.¹⁹ Biden, in fact, proposed to replace leaded drinking water service lines across America as part of his massive infrastructure plan and in September 2022 the City of Flint and the Michigan Department of Environment, Great Lakes, and Energy (EGLE) was finally able to announce that the city has reached a major milestone of 95 percent of lead service lines replaced, capping off a multi-million-dollar residential lead line replacement program and water system infrastructure modernization effort.

We can therefore say that the Infrastructure Investment and Jobs Act has been a historic investment that will progressively modernize Michigan roads, bridges, transit, rail, ports, airports, broadband, and drinking water and wastewater infrastructure. In the light of this provision initiatives have in fact been taken to: 1) repair and rebuild our roads and bridges with a focus on climate change mitigation, resilience, equity, and safety for all users, including cyclists and pedestrians; 2) improve healthy, sustainable transportation options for millions of Americans; 3) build a network of electric vehicle (EV) chargers to facilitate long-distance travel and provide

¹⁷ The Flint Water Crisis is an environmental disaster caused by lead contamination of the Flint River waters that began in April 2014.

¹⁸ So literally, J. Lambert, H. M. Hurd, *Will the Biden Administration continue to protect the environment only when it is profitable to do so?*, quoted.

¹⁹ See, e.g., M. Husain, M.K. Scanlan, *Disadvantaged Communities, Water Justice & The Promise of The Infrastructure Investment and Jobs Act*, in *Seton Hall L. Rev.* 5, 1513 (2022).

convenient charging options; 4) help connect every American to reliable high-speed internet; 5) prepare more of our infrastructure for the impacts of climate change, cyber-attacks, and extreme weather events; 6) deliver clean drinking water to every American and eliminate the nation's lead service lines and pipes; 7) improve nation's airports.

Even with reference to the other case in point, namely the one concerning the building of the Keystone KL pipeline, Biden has paid particular attention to the possible impact that the project could have on the health and welfare of the tribes present in the area, in particular with respect to the pollution of groundwater. In this occasion too, President Biden refused to allow significant private benefits to justify the sacrifice of a minority's rights when he revoked the permit authorized by the Trump administration for the Keystone XL oil pipeline. This certainly does not reduce American dependence on fossil fuels, but such a decision, if it fails any standard cost-benefit test, nonetheless visibly respects the rights of American First Nations to exercise sovereignty over their lands, to protect against the interruption of sacred ancestral sites and to protect themselves from pollutants from pipelines.

More than 2 thousand km long, the pipeline was to connect the Alberta tar sands deposits (tar sands, among others most polluting hydrocarbons in existence.) in Canada, with export terminals situation on the Gulf of Mexico. The Keystone XL tar sands pipeline is an export pipeline through the United States, designed to increase the tar sands industry's access to the international market. Until 2021 it was the epicentre of an enormous environmental, public health, and civil rights battle because tar sands extraction is accused to emit up to three times more global warming pollution than does producing the same quantity of conventional crude. Through developing oil sands, fossil fuels would be, in fact, readily available and the warming trend of the atmosphere would not be curbed.

In November 2015, the Obama administration vetoed the pipeline recognizing of its pervasive threats to climate, ecosystems, fresh water sources and public health. Nevertheless, soon after taking office, President Donald Trump revived the controversial project, along with the legal battles against it. By the time President Biden took office in 2021, ready to deliver on his campaign promise to revoke the cross-border permit, the dirty pipeline, after over a decade of grassroots opposition and legal hurdles, finally met its demise.

The link between civil rights and environmentalism has therefore also been recognized in the case of the pipeline. The Keystone XL affair represents in fact another case of "environmental justice",²⁰ another case, that is, in which an attempt was made to ensure a fair sharing of environmental benefits and burdens. Indeed, as can be read from the official EPA website,²¹ environmental justice refers to the equal treatment and meaningful involvement of all people regardless of race, color, national

²⁰ J.A. Mueller, T. Lilley, *Forty Years of Environmental Justice: Where is the Justice?*, in 25 *Rich. Pub. Int. L. Rev.*, 75 (2022); M.K. Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, in 127 *Yale L.J.F.*, 667 (2018).

²¹ www.epa.gov

origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

«We've put environmental justice at the center of what we do, addressing the disproportionate health, environmental, and economic impacts that have been borne primarily by communities of color — places too often left behind» Biden affirmed on 22 April 2022, celebrating the Earth day.

The chapter on environmental justice, a topic very dear to the most radical wing of the Democratic party, hinged on Biden's original program, in the electoral campaign, by Sanders and Ocasio-Cortez; already during his first week in office, President Biden on 27 January 2021 signed Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad, launching the most ambitious environmental justice agenda ever undertaken by the Federal Government. Executive Order 14008 establishes in particular that «we must deliver environmental justice in communities all across America» and recognizes that all the Americans deserve to live in healthy, thriving communities, but, in fact, too many people lack access to safe places to live, work, play, grow, and learn. Relying on the foundational efforts of Executive Order 12898 (of February 11, 1994) on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 14008 established several brand-new environmental justice initiatives mainly aimed «to secure an equitable economic future» where the environmental and economic justice are key considerations in how govern: «That means investing and building a clean energy economy that creates well-paying union jobs, turning disadvantaged communities — historically marginalized and overburdened — into healthy, thriving communities, and undertaking robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas».

In particular, as it can be read from the White House official website, the Executive order signed in 2021 introduced:

1.«The White House Environmental Justice Interagency Council (IAC), an inter-governmental body comprised of the heads of key Federal agencies that seeks to advance environmental justice across the Biden-Harris administration and is developing strategies to address current and historic environmental injustice.

2.The first-ever White House Environmental Justice Advisory Council (WHEJAC), an advisory committee comprised of environmental justice leaders and experts, which advises the IAC and the Chair of the Council on Environmental Quality (CEQ) on ways to increase the Federal Government's efforts on environmental justice.

3.The government-wide Justice40 Initiative, which aims to provide 40 percent of the overall benefits of Federal investments relating to climate change, clean energy, and other areas to disadvantaged communities who are marginalized, underserved, and overburdened by pollution.

4.The development of a Climate and Economic Justice Screening Tool, which seeks to help agencies identify disadvantaged communities for the purposes of the Justice40 Initiative and thereby inform equitable decision-making across the Federal Government.

5. The establishment of an Environmental Justice Scorecard, which will track Federal agency performance on environmental justice, including on the Justice40 Initiative». ²²

In order to the office placed inside the White House, the (IAC) it should be emphasized that it is specifically aimed at the environmental justice issues, given that its main task is to monitor any impacts on low-income communities and minorities. Indeed, these segments of the population tend to be disproportionately affected by air and water pollution, as well as being penalized if the choice of where to locate sensitive sites such as landfills or incinerators directly concerns them. On the other hand, as noted above, when we speak of environmental justice we refer to the need to protect everyone, regardless of socio-economic status, race, gender, age and sexual orientation, the right to a healthy environment. Environmental justice it can therefore be defined as «the marriage between environmentalism and justice social». ²³

To complete the framework of Biden's decisions aimed at strengthening the defense of environmental justice, civil rights, and equity across the government, EPA, recently (last September) launched a new national office dedicated to advancing environmental justice and civil rights (OEJECR).

The new office will employ more than 200 EPA employees in EPA headquarters and across 10 regions to address environmental challenges in communities that have been neglected for too long. Engaged staff will engage with communities to understand their needs, as well as tribal, state and local partners; manage and deliver historical levels of grants and technical assistance; work with other EPA offices to embed environmental justice into agency programs, policies, and processes, as permitted by law; and ensure that recipients of EPA funding comply with applicable civil rights laws. The office will be headed by an assistant administrator confirmed by the US Senate, to be announced at a later date.

4. The “awakening” of the EPA in the Biden era: the new Office of Environmental Justice And External Civil Rights and the restoring of scientific integrity matters.

Similarly to the other decisions mentioned above, also for the EPA office dedicated to environmental justice it can be affirmed that its creation is the result of a decision with which President Biden wanted to reverse the choice previously made by Trump to eliminate the Office of Environmental Justice. ²⁴ This office was created in 1993 and further developed by Obama,

²² See website address: <https://www.whitehouse.gov/environmentaljustice/>.

²³ R.R. Kuehn, *A Taxonomy of Environmental Justice*, in *30 Environmental Law Reporter News & Analysis* 9, 10681–10703 (2000).

²⁴ L. Dillon, C. Sellers, V. Underhill, N. Shapiro, J.L. Ohayon, M. Sullivan, P. Brown, J. Harrison, S. Wylie, *EPA Under Siege, Writing Group. The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture*, in *Am J Public Health*, 89-94 (2018), notice that «The Trump administration has explicitly sought to reorient the EPA toward industrial and industry-friendly interests, often with little or no acknowledgment of the agency's health and environmental missions»; for H. Pearls,

who authorized the use of the Environmental Justice Mapping and Screening Tool (EJSCREEN), a public online mapping tool to identify communities that bear a disproportionate pollution burden.²⁵

In September 7, 2017 Trump officials moved the Environmental Justice Office out of the Office of Enforcement and Compliance Assurance to the Office of Policy, saying that the move would have improved efficiency. A decision that demonstrates even more how the Trump administration has completely changed course on environmental justice in ways that profoundly impact diverse communities, such as the Standing Rock Sioux Tribe.²⁶

Coherently with the objective that he set out during the electoral campaign of reducing inequities and injustices, Biden, as we have seen, recovers the idea of an office dedicated to environmental justice through the creation of a new OEJECR which incorporates the former Office of Environmental Justice, the External Civil Rights Compliance Office, and the Conflict Prevention and Resolution Center, allowing them to work alongside each other to protect public health and the environment for all communities.

By way of example, its competences will focus on:

1. Directing grant funds to communities that need them most, including more than \$50 million in grants during fiscal year 2022, and provide technical assistance to communities in need;

2. Promoting awareness of the need to ensure equity, environmental justice, and civil rights in EPA policies and programs in order to «integrate environmental justice and civil rights into – in the Administrator's words – the Agency's DNA»;

3. Ensuring full compliance with and enforcement of federal civil rights laws that prohibit discrimination between applicants and recipients of federal financial assistance from EPA;

4. Promoting sharing among people on environmental issues by providing services and expertise in alternative dispute resolution.

In this way, not only did Biden undo Trump's decision to remove an office created by Clinton and carry forward Obama's decision to help support disadvantaged communities, but he also chose to go beyond expectations, merging three existing Environmental Protection Agency (EPA) programs.

Always in order to pay particular attention to the underserved communities who frequently are disproportionately impacted by environmental issues, EPA, under the Biden Administration, has already

Deconstructing environmental deregulation under the Trump Administration in *Vermont L. Rev.*, 591-639 (2021), the Trump administration adopted novel, unfounded statutory interpretations in order to permanently diminish agencies' regulatory authority and set up real strategies that «collectively represent the Trump administration's environmental deregulation toolbox».

²⁵ For a detailed reconstruction of the path towards the establishment of an office for environmental justice, see, H. Pearls, *EPA Undermines its Own Environmental Justice Programs*, 11-11-2020, in <https://eelp.law.harvard.edu/>.

²⁶ See also for a historical reconstruction of environmental justice, U. Outka, E. Kronk Warner, *Reversing Course on Environmental Justice under the Trump Administration*, in 54 *Wake Forest L. Rev.*, 101-131 (2019), who point out that «Environmental justice is [...] a crucial, if less recognized, aspect of the Trump administration's "war on diversity"».

taken numerous specific actions implemented to protect the health and well-being of vulnerable communities, such as for example the decision to revoke the usage of chlorpyrifos, a pesticide that has negative health impacts on farmworkers and children, and targeted measures to combat polyfluoroalkyl substances, a dangerous “forever chemical” linked to certain cancers, weakened immunity, thyroid disease, and other adverse health effects.

Finally, it should also be noted that the imprint that Biden wanted to give to the EPA and to its role also as guardian against environmental injustices emerges clearly already from the appointment of its administrator. Biden, on January 2021, nominated Michel Regan who formerly served as the secretary of North Carolina's Department of Environmental Quality where he handled, among the others, the Duke Energy case.²⁷ Before Regan, the EPA was headed by Scott Pruitt and Andrew Wheeler: both of them were nominated by Trump and both pushed forward a dangerous proposal to restrict the types of science that can be used in policymaking, making the EPA unable to rely on scientific research that is underpinned by confidential medical and industry data.²⁸ For decades the EPA relied on scientific research rooted in confidential medical and industry data as a basis for its air, water and chemicals rules, but with the so called “censored science rule” (*Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information*” rule, effective on January 6, 2021)²⁹ Wheeler limited the Agency's discretion to freely rely on the best scientific evidence of the damage to human health caused by pollution, including epidemiological studies demonstrating the link between exposure to air pollution and lung disease, hospital admissions and even early deaths.

Biden reversed the “censored science rule” recognizing the need to restore trust in Government through scientific integrity and evidence-based policymaking³⁰ and, once again in perfect keeping with his environmental policy, as above mentioned, placing Regan as head of the EPA. On the other hand, Biden had already promised in his electoral program to make decisions

²⁷ The energy giant had to take on the largest coal ash cleanup operation in State history. Under a settlement agreement (entered into on December 31st, 2019) with community and environmental groups and Duke Energy that settles the appeals litigation, Duke Energy pledged to move forward with excavation plans at many sites, moving the coal ash to landfills. The story can be consulted on the official website of the North Carolina Department of Environmental Quality (DEQ): <https://deq.nc.gov/>.

²⁸ See, for e.g., L. Logan, *Wheeler Expected To Push Ahead With Pruitt's Deregulatory Agenda*, in *27 EPA's Water Policy Report* 14, 8-10 (2018).

²⁹ About the Trump administration's efforts to undermine science R.M. Webb, L. Kurtz, *Politics v. science: How President Trump's war on science impacted public health and environmental regulation*, in *Prog Mol Biol Transl Sci.*, 65–80 (2022).

³⁰ See the Memorandum of January 27, 2021, in <https://www.whitehouse.gov/>. It should be noticed that on the same day that President Biden issued this memorandum where said that it will be the «policy of my administration to make evidence-based decisions guided by the best available science and data», a federal district court (the U.S. District Court for the District of Montana) established that the Trump administration was wrong to issue its Censored Science Rule without following proper procedures, and said that its decision also «casts into significant doubt» whether the rule has any legal basis at all.

guided by data and science. In his early days in office, President Biden said that evidence-based policy and decisions, informed by sound science and unhampered by political interference, are a key pillar of his administration. A strong democracy requires a common source of reliable information and scientific and technological information, data, and evidence are critical to the health, safety, and prosperity of the American public, and to the development, evaluation, and equitable delivery of federal programs and services.

5. Conclusions

If a part of Biden's work, since his inauguration, has clearly intended to “remedy” the damage caused by the previous management, another part appears oriented towards proposing ambitious objectives to be achieved. In this “environmental” project it is placed, for example, the Environmental Protection Agency's proposed rule focuses on Section 401 of the Clean Water Act, a long-standing provision that gives States more authority to certify or deny federal permits needed for certain projects, including oil and gas pipelines.

It should also be emphasized another aspect that configures Biden's environmental strategy as “new” in the history of the White House: this is the involvement of the entire government. Especially with regard to climate change and environmental justice, Biden Adm. has stated a “whole-of-government” approach, which enlists not only agencies with traditional environmental oversight duties, like the EPA and the Interior Department, but every agency, such as the Defense Department, the Treasury, the Justice Department and the Agriculture Department, to consider how their operations may impact climate change and what can be done within their powers to fight environmental pollution.

The “whole-of-government” (or also called “joined up government”) approach is a concept first introduced in the UK in the late 1990s by Tony Blair government to emphasize the importance of collaboration and coordination between different public entities within a government in the pursuit of government policy goals. According to it, government agencies work together across borders to share the organization's portfolio of actions to resolve specific issues.³¹ Areas covered can be related to policy development, public project management or public services. By choosing an inclusive and empowering “whole government” approach to environmental issues, Biden has therefore essentially decided to drive decision-making across different agencies and sectors,³² promoting and

³¹ The concept of whole-of-government has been portrayed as an umbrella term describing a group of responses to the problem of increased fragmentation of the public sector and public services and a wish to increase integration, coordination and capacity. See, for more information, J. Halligan, F. Buick, J. O'Flynn, *Experiments with joined-up, horizontal and whole-of-government in Anglophone countries*, in A. Massey (Ed.), *International Handbook on Civil Service Systems*, Cheltenham, 2011, 77-99.

³² See, V. Winship, *Financial Regulation and the Climate - A Case Study of the "Whole-of-Government" Approach*, in *U. Ill. L. Rev. Online*, 158-162 (2021), who observes that January 27, 2021 Executive Order not only reiterated that climate change was a priority, but also outlined how the administration was going to structure its response.

incentivizing coordination and collaboration across institutions at all levels. In other words, Biden has essentially appointed to overcome structural devolution, disaggregation and single purpose organizations to embrace a more integrated approach to the environmental problems.

In sum, Trump administration left a wake of rolled back protections, weakened environmental statutes, and broken regulatory systems, and Biden, inheriting all of this, has tried since day one to make a clear and profound change in US environmental policy: the rejection of nationalism in favor of a globalist ethic is, in cast, what distinguishes the policy of the new administration, which, for example, appears fully aware of the fact that climate change is a global challenge which requires decisive action by all the countries of the world. In this regard, it should be recalled that, with a symbolic gesture, at the COP27 climate conference of the United Nations in Egypt (November 11, 2022), Biden formally apologized to world leaders for Trump's exit from the Paris agreements, recalling that he had proceeded to return to the Paris Agreement on climate change, with an executive order signed on January 20, 2021.

That said, and in conclusion, it should be noticed that while the intent and drive behind Biden's actions are clear, how likely he is to reach his goals in the next two years remains to be discovered. To some extent, it is not implausible to imagine that his ambitious plan might be hindered by a House of Representatives controlled by the Grand Old Party's slight yet present majority, and let's not forget that there already seem to have been a few bumps along the road, as was with the case of the Supreme Court's ruling³³ concerning the competencies of the EPA. In late June, as we remember, the Supreme Court issued a ruling stating that the Environmental Protection Agency cannot put state-level caps on carbon emissions under the 1970 Clean Air Act. The U.S. Supreme Court limited, in other words, the Environmental Protection Agency's authority to set standards on climate-changing greenhouse gas emissions for existing power plants, establishing that only Congress has the competence to create this broad system of cap-and-trade regulations aimed at guaranteeing the transition from coal to renewable energy sources. This is a case whose implications could extend even beyond the issue of climate change and affect environmental policies in general, and probably also those concerning other sectors as well. The New York Times indeed wrote that this decision: « also signals that the court's newly expanded conservative majority is deeply skeptical of the power of

It announced the administration's "whole-of-government" approach that "organize[d] and deploy[ed] the full capacity of its agencies to combat the climate crisis." Climate might have once seemed irrelevant to some agencies because it was viewed as a specialized, cabined concern. But no longer. Breadth and coordination became key.

³³ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022). This ruling does not overturn the previous one *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), which recognized greenhouse gases as "air pollutants" under the Clean Air Act and that states can sue EPA if it fails to regulate them (for a comment or a comment it is permissible to refer to C. Sartoretti, *Il protocollo di Kyoto all'esame della Corte Suprema USA: dalla Commerce Clause all'implementazione dei poteri degli Stati dell'Unione*, in *Diritto Pubblico comparato ed europeo*, n. 3/2007, 1479-1484). Nevertheless, *West Virginia* takes off the table one regulatory option for EPA: the power to determine under Section 111(d) of the Clean Air Act that the best system of emission reduction is for coal-fired plants to either reduce production or shift to renewable generation sources.

administrative agencies to address major issues facing the nation and the planet». ³⁴ In other words, the case, to what extent the Environmental Protection Agency can regulate greenhouse gas emissions from power plants, may even go as far as to cover how the entire government makes rules and regulations. ³⁵

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³⁴ A. Liptak, *Supreme Court Strips Federal Government of Crucial Tool to Control Pollution*, in *The New York Times*, June 30, 2022.

³⁵ See, e.g., S. Dvoretzky, E.J. Kennedy, E.A. Malone, *West Virginia v. EPA: Implications for Climate Change and Beyond*, September 21, 2022, in www.skadden.com.

