
WILL THE BIDEN ADMINISTRATION CONTINUE TO PROTECT THE ENVIRONMENT ONLY WHEN IT IS PROFITABLE TO DO SO?

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While “Trumpism” more aptly refers 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. While it would have taken another four years for the Trump Administration to fully dismantle America’s environmental edifice, the damage done within a single presidential term to America’s capabilities to live within its environmental means was substantial and sobering.¹ Happily, its first 100 days suggest both that the Biden Administration recognizes the enormity of the task required to trump Environmental Trumpism and that it is aggressively deploying all available means to restore many of the environmental guard-rails present during the Obama-era. If turning back the hands of time constituted the most ambitious environmental goal we could reasonably set for the new administration, we would be cautiously optimistic that history would reward President Biden for his progress at the 100 day benchmarking moment.²

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1. Juliet Eilperin, Brady Dennis, & John Muyskens, *Tracking Biden’s Environmental Actions*, WASH. POST (April 6, 2021, 6:34 PM), <https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/> [https://perma.cc/83KZ-EKSY]:

Trump worked to scale back or abolish more than 200 environmental protections ... completing more than 170 of them. Biden can overturn some of them with a stroke of a pen. Others will take years to undo, and some may never be reversed. Four Obama-era regulations were nullified under the Congressional Review Act, which prevents the introduction of a new rule that is “substantially the same” as what had been replaced, making Trump’s actions particularly hard to reverse.

2. This early milestone was made famous by President Franklin Roosevelt’s effort to summarize his first 100 days of successes during a 1933 fireside chat that was designed to give hope to a nation that feared cataclysms of analogous global proportions to many we face today.

It is our view, however, that Environmental Trumpism was not *sui generis*; that it did not represent the importation of an exogenous ideology that was altogether foreign to pre-existing American environmental law and the regulatory apparatus that had developed in its service during previous decades. Indeed, it is our view that Environmental Trumpism functioned as the *reductio ad absurdum* of the strategy, explicitly mandated since the Reagan Administration, to regulate environmentally impactful activities when, but only when, a cost-benefit calculus favors their regulation. The Trump Administration's crass willingness to trade off public goods for private gains, its disdain for protecting natural capital that could not be readily quantified when the bounty from its exploitation could be taken to the bank, and its refusal to be slowed, let alone stopped, by claims of right on the part of genuine rights-holders, laid bare an ugly underside of American environmental policy that had been there all along. Unless the Biden Administration tempers the crude utilitarianism that has for decades infected America's environmental policymaking, we will find ourselves on the opposite side of history, unable to cheer as loudly as we would like for the success with which the Administration extinguishes the regulatory wildfire ignited by Environmental Trumpism. For so long as the environment is protected only when and to the extent that it is provably cost-beneficial to do so, the environment will be more a casualty than a beneficiary of American environmental law. Fortunately, the Biden Administration evidences glimmers of this recognition, and we are thus hopeful that it will not rest content at simply reversing the last four years of Environmental Trumpism, but will, instead, reverse the last forty years of American environmental decision making.

The seeds of Environmental Trumpism were planted by President Ronald Reagan's seminal executive order on federal regulation in 1981,³ 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).⁴

If environmental regulators were morally akin to corporate officers within capitalist markets, the demand that they act only when it is cost-beneficial (i.e.,

3. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

4. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (ordering not only that OIRA undertake a regulatory review function, but also that "(e)ach agency shall tailor its regulations to impose the least burden on society, including individuals [and] businesses of differing sizes . . . taking into account . . . the costs of cumulative regulations."); Exec. Order No. 13,272, 3 C.F.R. § 247 (2003) (authorizing, among other things, the Chief Counsel for Advocacy to "provide comment on draft rules" to agencies as well as to the OIRA and the OMB); Exec. Order No. 13,563, 3 C.F.R. § 215 (2012) (reaffirming the Administration's commitment to cost-benefit analyses); and Exec. Order No. 13,771, 3 C.F.R. § 284 (2018) (specifying that the "total incremental cost of all new regulations, including repealed regulations . . . shall be no greater than zero"). *But see* Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021) (rescinding Exec. Order No. 13,771); *Memorandum on Modernizing Regulatory Review*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/> [<https://perma.cc/UE5W-CHHK>] (ordering an examination of current cost-benefit analyses to review accuracy of models).

profitable) to do so would make perfect sense. After all, the value of capitalism lies in its ability to advance the satisfaction of human preferences—a goal that is worthy on any moral theory. In a reasonably perfect market well-regulated by non-market players, the prices of products reflect their costs of production and implicitly invite consumers to express their views regarding whether the benefits of those products are worth those costs. When their costs exceed the prices consumers are willing to pay, products are quickly driven from the market, so sound business decisions necessarily proceed in accordance with cost-benefit analyses.

Utilitarians, of course, would have all of us—including private citizens and public servants—make decisions in ways that mimic the reasoning of corporate officers within capitalist markets. For utilitarians, what is good is defined as that which produces utility (conceived of by modern welfare economists as the satisfaction of human preferences). Right action thus consists of minimizing costs (where costs are reductions in human satisfaction) and maximizing benefits (where benefits are improvements in human satisfaction). It was precisely because Reagan embraced the utilitarian notion that government officials ought to imitate the preference-maximizing decisions of individuals and businesses that he demanded that “the potential benefits to society [from] . . . regulation outweigh the potential costs to society.”⁵

It should thus have come as no surprise that the Trump Administration found it as easy as it did to co-opt regulatory decision making to the advantage of private corporate interests, since the regulatory apparatus had already been hijacked by the mandate to regulate profit-seeking only when it was profitable to do so! However, we should never have needed the marriage of the methods of the Trump Organization with Washington politics to prove the folly of asking public servants to mimic private profiteers. For the extent of environmental degradation licensed over the past decades by regulators who were unable to prove the profitability of environmental protections is itself tragically provable.⁶

But perhaps it took the vicious excesses of Environmental Trumpism to reveal three features that make an explicitly utilitarian regulatory agenda morally bankrupt. As Environmental Trumpism laid bare, regulating environmentally-impactful activities only when it is provably cost-beneficial to do so (1) dismisses environmental costs and benefits that are not visited upon humans; (2) ignores costs and benefits that resist easy quantification in ways that guarantee that the strategy will fail by its own terms; and most troublingly, (3) permits the violation of basic rights—rights of Americans, of citizens of other nations, and of future generations. In our view, while the market exists to satisfy human preferences, government serves its function only if it protects rights and safeguards goods that, by their very nature, resist commodification. To require public servants to

5. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

6. For a powerful indictment of the “narcissistic utilitarianism” that characterizes corporate decision making and a vivid accounting of the extensive chemical pollution that is its legacy, see Amber Polk, *President Biden’s Executive Orders on the Environment: Praiseworthy Policy, Political Red Herring, or . . . Both?*, 2021 U. ILL. L. REV. ONLINE: BIDEN 100 DAYS 152 (Apr. 30, 2021), <https://www.illinoislawreview.org/symposium/first-100-days-biden/president-bidens-executive-orders-on-the-environment>.

impersonate private profiteers is to demand that they abdicate these fundamental obligations. The question for us, then, is whether the Biden Administration is prioritizing the protection of rights when rights are at stake, and is taking into account costs and benefits that befall all those who are benefitted or burdened by environmental regulations (non-Americans as well as Americans, non-humans as well as humans, future generations as well as present ones).

I. CONSIDERING NON-ANTHROPOCENTRIC COSTS AND BENEFITS

It is our view both that environmental regulation should be responsive to the interests of all those who have interests and that many living things (including animals and plant communities) have interests, even if they do not have rights. 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. Environmental Trumpism was characterized by a particularly pronounced disdain for the notion that species have morally weighty interests in the conditions that ensure their continued survival. Trump's Department of the Interior thus issued numerous rules that reflected the view that a species should be considered endangered, and its habitat should be protected, only if a failure to do so will endanger profitable human endeavors.

Consider just a few examples. First, while the question of whether a species should be designated as endangered (for purposes of triggering the protections of the Endangered Species Act (ESA)) had long been thought to exclude considerations of the costs of such a designation, the Trump Administration allowed economic considerations to enter the record as "background information" in ways that invited regulators to prefer a species' potential extinction to the loss of profits.⁷ Second, the Trump Administration then delisted the gray wolf, despite abundant evidence that without protection, this keystone species will be driven to rapid extinction by hunters seeking the thrill of the kill, ranchers jealous of their livestock interests, and developers anxious to encroach upon vital habitat.⁸ Third, the Trump Administration excluded from ESA's definition of "habitat"

7. See, e.g., Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,024 (Aug. 27, 2019) (removing "without reference to possible economic or other impacts of such determination" in decisions under the ESA; arguing that the statute did not "prohibit the [agencies] from compiling economic information altogether," while also stating that the agencies would not consider anything other than "the best scientific and commercial data available" when making such determinations); 50 C.F.R. § 424.11 (2019).

8. See Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69,778 (Nov. 3, 2020) (to be codified at 50 C.F.R. pt. 17); 50 C.F.R. § 17.11 (2021). See also H.R. 238, 66th Leg., Reg. Sess. (Idaho 2021) (authorizing the "taking" of wolves from ATVs, snowmobiles or a "powered parachute" until such time as the state determines that there are only 50 packs "consisting of at least five hundred (500) wolves or less.") (emphasis added); Keith Ridler, *Bill to Kill 90% of Idaho Wolves Heads to the Governor*, REUTERS (April 28, 2021), <https://apnews.com/article/bills-idaho-wolves-environment-and-nature-lifestyle-7e18d06ccff0705ca4282e2b097040a9> [<https://perma.cc/VG78-LSA3>]; Maria Cramer, *Wisconsin Hunters Kill Over 200 Wolves in Less Than 3 Days*, N.Y. TIMES, March 3, 2021, at A16, <https://www.nytimes.com/2021/03/03/us/wisconsin-wolves-killings.html> [<https://perma.cc/C2DS-Q568>]; Complaint at ¶¶ 22–25 and ¶¶ 61–66, *Defenders of Wildlife, et al. v. U.S. Fish and Wildlife Service*, No. 4:21-cv-344 (N.D. Cal. Jan. 14, 2021).

those lands to which such species are expected to migrate in their efforts to adapt to climate change, thus denying numerous species a place to go when their present circumstances spell their extinction.⁹ Fourth, radically reinterpreting the Migratory Bird Treaty Act, the Trump Administration eliminated longstanding protections for more than 1,000 species of waterfowl, raptors and songbirds, declaring that the Act would be enforced only against the relative few who kill such protected birds purposefully, and not against the many whose activities result in “incidental” takings.¹⁰ And finally, in its last week, Trump’s Fish and Wildlife Service caved to the demands of the timber industry by eliminating 3.4 million acres of habitat for the northern spotted owl in Washington, Oregon, and California.¹¹ Amounting to the elimination of 42% of its critical habitat, this rule practically ensures the extinction of the northern spotted owl within the United States.

Recognizing that human activity has increased the species extinction rate by as much as 1,000 times the background rate and that it currently threatens the extinction of one-third of the mammal, bird, amphibian, and wild plant populations of the globe, the Biden Administration launched its first term by announcing that it would review these and many other rollbacks to the protections previously accorded endangered and threatened species.¹² It further demanded a review of the Trump Administration’s manifestly illegal removal of protections on more than a million acres of the Bears Ears and Grand Staircase-Escalante National Monuments that effectively converted vast tracts of valuable natural habitat into private treasure troves.¹³ And it signaled the likely reversal of the Trump Administration’s decision to open Northeast Canyons and Seamounts Marine National Monument to industrial commercial fishing.¹⁴ We are cautiously optimistic that the thousands of species of plants and animals whose survival hangs in the balance will find that what is in their interests will not only count, but will be deemed dispositive of the limits on human greed that the Biden Administration reimposes.

II. PRICING WHAT IS PRICELESS

The purported benefit of imposing regulations only when they are cost-justified is that an administration will thereby likely do more good than harm. However, if cost-benefit assessments selectively include only costs and benefits that can be given present market values, then much that is of environmental value is sure to go unvalued. For even if environmental economists can employ proxies

9. Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 55,398 (Sep. 8, 2020) (to be codified at 50 C.F.R. pt. 17); 50 C.F.R. § 17.90 (2021).

10. Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1,134 (Jan. 7, 2021) (to be codified at 50 C.F.R. pt. 10); 50 C.F.R. § 10.14 (2021).

11. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl, 86 Fed. Reg. 4,820 (Jan. 15, 2021) (to be codified at 50 C.F.R. pt. 17); 50 C.F.R. § 17.95 (2021).

12. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

13. *Id.* at 7,039.

14. *Id.*

that allow them to put crude prices on polluted air, poisoned water, and degraded soils, it is hard to argue that “willingness to pay” polls truly capture what is lost when environmental ills are visited disproportionately on poor communities of color or when species go extinct, beauty is desecrated, silence is unknown, the stars are obliterated by city lights, and plastic refuse adorns miles of western barbed wire fences and clogs the intestines of vast numbers of seabirds, fish, and marine mammals. And, if already impoverished cost-benefit assessments are susceptible to manipulative strategies that magnify the short-term economic benefits of environmental exploitation while minimizing the long-term losses to all those who have something to lose, then they are sure to permit irreparable harms.

Environmental Trumpism certainly made a virtue of manipulating the variables that determined the outcome of regulatory cost-benefit assessments. In 2017, for example, the Trump Administration disbanded an Obama-era inter-agency working group that had fixed the social cost of carbon at \$45 per ton, and substituted a per-ton value as low as \$1.¹⁵ Trump’s White House Council on Environmental Quality published draft guidance in 2019 significantly reducing the scope and scale of how the climate changing impacts of infrastructure projects ought to be weighed under the National Environmental Policy Act (NEPA).¹⁶ In 2020, the Trump Administration finalized rules that relieved oil and gas companies from the burden of monitoring facilities for methane leaks.¹⁷ (After all, if environmental costs go unrecorded, it is hard to justify regulations that would prevent them!) And allegiance to Environmental Trumpism motivated both the Department of the Interior and the Environmental Protection Agency (EPA) to adopt so-called “open science” requirements that actually precluded regulators from relying upon consequential, peer-reviewed studies that rested upon confidential medical records and other sensitive or propriety information protected by rules of privacy.¹⁸ By so doing the Trump Administration immunized its decisions from important scientific findings, thus paving the way for the return to market of pesticides and other toxic chemicals that have deadly track records.

We are at least encouraged by the Biden Administration’s recognition that much has been missing from the calculations of regulators, and much has been

15. In 2020, an independent team of scientists concluded that the social cost of carbon should start at between \$100 to \$200 per ton of carbon dioxide pollution in 2020, increasing to nearly \$600 by 2100. Martin C. Hänsel et al., *Climate Economics Support for the UN Climate Targets*, 10 NATURE: CLIMATE CHANGE 781, 784–87 (2020), <https://doi.org/10.1038/s41558-020-0833-x> [<https://perma.cc/CC8A-UZ78>].

16. EPA, REGULATORY IMPACT ANALYSIS FOR THE REVIEW OF THE CLEAN POWER PLAN: PROPOSAL 44 (2017), https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf [<https://perma.cc/5G6N-4X4Z>]. See also Press Release, EPA Administrator Pruitt Proposes Cost-benefit Analysis Reform (June 7, 2018), <https://archive.epa.gov/epa/newsreleases/epa-administrator-pruitt-proposes-cost-benefit-analysis-reform.html> [<https://perma.cc/982J-FB63>]; Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 3 C.F.R. § 314 (March 28, 2017) (rescinded by Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021)).

17. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sep. 14, 2020) (to be codified at 40 C.F.R. pt. 60); 40 C.F.R. § 60.5400a (2020).

18. Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30); Dept. of the Interior, Promoting Open Science, Order No. 3369 (Sep. 28, 2018). *But see* Dept. of the Interior, Rescission of Secretary’s Order 3369 and 3369 Amendment A1, In Order to Promote Scientific Integrity, 2021 WL 922234 (March 3, 2021) (rescinding SO 3,369).

craftily hidden from their view. President Biden's early days in office were marked by commitments to make environmental justice a top priority. Demonstrating a concern for the value of equality in the distribution of environmental benefits and burdens—a value which is itself incalculable and which is not itself a product of any cost-benefit calculus—President Biden issued an executive order to establish a White House interagency council on environmental justice, an office of health and climate equity at the Health and Human Services Department, and a separate environmental justice office at the Justice Department.¹⁹ Vowing to rest regulatory decisions on the best science available, Biden's Interior Department scrapped the Trump Administration's controversial "open science" requirement that willfully blinded regulators to research important to fixing the costs and benefits of environmental policy decisions,²⁰ and at the request of the Biden Administration, the U.S. District Court for the District of Montana vacated the rule that similarly limited the science that could be used to craft EPA regulations.²¹

Most significantly, President Biden quickly raised the social cost of carbon to \$51 per ton while appointing an interagency working group to do a comprehensive reassessment of the appropriate prices that ought to be employed when calculating the climate changing impacts of regulatory decision making.²² First incorporated in the cost-benefit assessments of climate-related regulations in 2010, the social cost of carbon factors in requirements for the fuel economy of cars and trucks, the levels of air pollution from power plants, and the energy efficiency of consumer appliances. In a further effort to fend off the disastrous consequences about which the United Nations Intergovernmental Panel on Climate Change warned,²³ President Biden's White House Council on Environmental Quality (CEQ) announced that it was restoring the 2016 guidance²⁴ under NEPA. This guidance recommends that agencies quantify a proposed action's projected direct *and indirect* GHGs and use those projected emissions, including carbon dioxide sequestration implications, as a proxy for assessing potential climate change effects.²⁵ It also recommended that, when projected emissions

19. Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021).

20. See Rescission of Secretary's Order, *supra* note 18.

21. *Env't Def. Fund v. EPA*, 4:21-cv-00003-BMM, 2021 WL 402824 (D. Mont. Feb. 1, 2021) (order granting defendants' unopposed motion for vacatur and remand).

22. See, Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10,252 (Feb. 19, 2021). See also Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

23. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5

are too difficult to quantify, agencies explain why and analyze estimated emissions qualitatively instead.²⁶

While it is surely impossible to commodify all that is environmentally valuable to us and to the 10+ million species that are forced to compete with us for the Earth's shrinking resources, we are heartened both by the Biden Administration's recognition of that fact, and by its serious efforts to do a better job of quantifying what is quantifiable and of incorporating into its decisions considerations of values that resist price tags.

III. PROTECTING RIGHTS

Cost-benefit calculations are, by definition, unable to account for, or accommodate, rights. This is because what it means to have a right is to have a claim that cannot be sacrificed in the name of satisfying others' preferences. If the citizens of Flint, Michigan, had a right to uncontaminated drinking water, then the pollution of their drinking water could not be made right by the fact that a great many others would benefit from its contamination. If the Rosebud Sioux had a right against the desecration of remaining ancient burial sites, then the fact that a great many more people would benefit from running the Keystone XL pipeline across these rare archeological treasures is neither here nor there, because maximizing the majority's preferences could not make right the violation of a minority's rights.

If Americans 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. Similarly, if those in other nations have rights against—as opposed to mere preferences concerning—harms caused by the pursuits of Americans (as globalists like us believe they do), then those rights will not be appropriately honored unless they are thought to police the legitimate boundaries of the cost-benefit trade-offs made by American regulators. And finally, if future generations of Americans and foreign citizens have rights to environmental conditions that will allow them not just to survive, but to thrive, then, once more, cost-benefit calculations that trade off those rights for the satisfaction of present-day preferences are morally indefensible.

The Biden Administration appears to appreciate that at the core of Environmental Trumpism was an aggressive determination to elevate the profit-seeking interests of extractive industries above the rights of numerous constituents, both foreign and domestic, both present and future. Consider four examples of early actions by the Biden Administration that suggest both a recognition that people

26. Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (guidance reinstated by Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10,252 (Feb. 19, 2021)).

have rights that cannot be sacrificed simply to increase others' wealth and a willingness to remedy the violation of those rights by the Trump Administration.

First, by midnight on his first day, President Biden had instructed the Department of the Interior to impose a moratorium on providing leases to oil and gas companies that had been eager to exploit the fragile coastal plain of the Arctic National Wildlife Refuge.²⁷ The nation's largest wildlife refuge,²⁸ this has been the sacred land of the Gwich'in people and the home to the great herds of caribou with which the Gwich'in people's lives are intimately linked—both of which will be imperiled by oil and gas exploration and extraction. However, because the Trump Administration spent its last full day auctioning off drilling rights to the Refuge as the nation's attention was riveted by the siege of the U.S. Capitol, the Biden Administration will honor the rights of the Gwich'in people and ensure that the Refuge remains true to its name for the 300 species that depend upon its intact habitat only if it is prepared, not just to make its moratorium on further leasing permanent, but to take on the legal battles required to cancel already-sold leases.

Relatedly, 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.²⁹ Were this designed to reduce America's fossil fuel dependency, it would surely be a pyrrhic victory for its champions. But while the effort fails any standard cost-benefit test, it visibly honors the rights of America's First Nations to exercise sovereignty over their own lands, to protect against the disruption of sacred ancestral sites, and to guard against pipeline pollutants.

Third, while climate change is already visiting enormous losses on Americans through an increased number and intensity of hurricanes, tornadoes, wildfires, droughts, and floods, its catastrophic effects will fall most heavily on those within the world's poorest nations who have done the least to cause the world's warming. Because nationalism, rather than globalism, was an ideological cornerstone of Environmental Trumpism, the Trump Administration both withdrew the United States from the Paris Accord and excluded from its computations of the social cost of carbon the tragic impacts of American-made climate change on non-Americans.³⁰ It then delightedly found that the social cost of carbon was a mere \$1-\$7 per ton, while the social cost of methane was only \$55 per ton.³¹

27. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

28. "Arctic Refuge is home to some of the most diverse and spectacular wildlife in the arctic. The Refuge's rich pageant of wildlife includes 42 fish species, 37 land mammals, eight marine mammals, and more than 200 migratory and resident bird species." *Wildlife & Habitat*, U.S. FISH & WILDLIFE SERV. (Nov. 5, 2013), https://www.fws.gov/refuge/arctic/wildlife_habitat.html [<https://perma.cc/CG9J-GQYS>].

29. Exec. Order No. 13,990, 86 Fed. Reg. 7,037, 7,041 (Jan. 20, 2021).

30. See Letter from Nikki R. Haley, U.S. Ambassador to the United Nations, to António Guterres, Sec'y Gen., United Nations (Aug. 4, 2017), <https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf> [<https://perma.cc/8S6M-HV2E>] (announcing the intention of the United States to withdraw from the Paris Agreement). See also Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 3 C.F.R. § 340 (April 28, 2017); Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,099 (June 26, 2019).

31. REGULATORY IMPACT ANALYSIS, *supra* note 16.

These bargain basement figures were then used to rationalize the Administration's championship of the doomed coal industry, to complete a rollback of U.S. vehicle emissions standards so as to require 1.5% annual increases in efficiency through 2026,³² rather than the previous the 5% increases mandated by Obama-era rules, and to justify stunting the growth of renewable energy by imposing tariffs and opposing tax credits.

The Biden Administration's rejection of nationalism in favor of a globalist ethic is made manifest by the robust plan that President Biden has laid out to combat climate change. As a condition of rejoining the landmark Paris Agreement, President Biden initially committed the United States to reduce GHGs by 26%-28% below 2005 levels by 2025.³³ However, this commitment, when combined with the pledges of other parties to the Agreement, failed to ensure that the Earth's climate would not warm by more than 2 degrees Celsius. Knowing this, President Biden beat the 100 day mark with an Earth Day announcement of a "nationally determined contribution" that will reduce America's net GHGs to a level 50%-52% below that of 2005 by 2030.³⁴ By pursuing this more ambitious target, President Biden has brought real muscle to his pledge to set the nation on a path to net-zero emissions by 2050. And he has buttressed the moral authority that America needs when pressuring other nations to protect the rights of the global community through similarly aggressive measures.³⁵

The Biden Administration's interim return to the Obama-era formula to fix the social costs of GHGs further reflects its globalist commitments. Embodying the view that foreign citizens have the same rights that Americans have to be unharmed by climate-altering pursuits, the new figures appropriately incorporate the impacts of GHGs on the citizens of other nations. Since methane and nitrous

32. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,175 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86 and 600 and 49 C.F.R. pts. 523, 531, 533, and 537).

33. Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (confirming that the Administration was rejoining the Paris Agreement, which itself contained the existing 2015 nationally determined contribution (NDC) that would result in a reduction of GHG emissions by 26-28% by 2025, while further promising under § 102(e) that the Biden Administration would create a new NDC with greater reduction targets). *See also*, Will Wade, *Why the World Awaits Biden's Pledge on Climate Change*, WASH. POST (April 7, 2021, 10:12 AM), https://www.washingtonpost.com/business/energy/why-the-world-awaits-bidens-pledge-on-climate-change/2021/04/06/03655060-9695-11eb-8f0a-3384cf4fb399_story.html [<https://perma.cc/ES78-64V8>] (explaining that rejoining the Paris Agreement would recommit the United States to the 2015 NDC). *But see Live Updates: Biden, Kicking Off Summit, Says U.S. 'Has Resolved to Take Action' on Climate Change*, N.Y. TIMES (April 22, 2021), <https://www.nytimes.com/live/2021/04/22/us/biden-earth-day-climate-summit/biden-commits-the-us-to-cutting-greenhouse-gas-emissions-in-half-by-2030> [<https://perma.cc/E9Z3-VZAJ>] (announcing the new NDC targets promised at § 102(e) of Exec. Order No. 14,008).

34. Valerie Volcovici & Jeff Mason, *U.S. Deepens Emissions Target at Climate Summit, Goal Called 'Game Changing'*, REUTERS (April 22, 2021, 8:40 AM), <https://www.reuters.com/business/environment/us-pledges-halve-its-emissions-by-2030-renewed-climate-fight-2021-04-22/> [<https://perma.cc/6L84-4DHU>]. This more aggressive goal is thought to be fully compatible with an ambitious economic agenda. *See, e.g.*, Nat Keohane, *What the Next 5 Years Hold for the Paris Agreement*, ENV'T DEF. FUND: CLIMATE 411 (Dec. 16, 2020), <http://blogs.edf.org/climate411/2020/12/16/what-the-next-5-years-hold-for-the-paris-agreement/> [<https://perma.cc/LQ5T-ZJ4R>].

35. Of course, the history of American GHGE-reducing promises is riddled with retractions, so we should not blame the global community if it is slow to rely on this latest commitment. *See* Polk, *supra* note 6.

oxide emissions pack a more powerful punch to the climate than do CO₂ emissions, pricing them to include their costs to foreign citizens (at \$1,500 a ton and \$18,000 a ton, respectively) explains one of President Biden's most important out-of-the-gate measures to curb climate change: his order to suspend, revise, or rescind the Trump Administration's roll-back of regulations on methane emissions.³⁶ Those rollbacks were of course designed to free the oil and gas industry from unprofitable anti-pollution regulations that included strict methane emission standards for new oil and gas developments, demands to monitor methane and volatile organic compound emissions by the midstream segment, and regulations on methane venting, flaring and leaking from existing oil and gas facilities on federal lands. Inasmuch as methane emissions have driven one-quarter of anthropogenic climate change, and inasmuch as the United States now holds the dubious honor of being the second most prolific methane emitter after Russia, the Biden Administration has a promising opportunity to reverse the priority that Environmental Trumpism accorded the profits of the oil and gas sector over the rights of the global community to climate stability.

Revising the social cost of carbon also makes it compulsory for the new administration to reverse the Trump Administration's fuel economy targets and set aggressive new standards to cut carbon pollution from vehicles that together account for more than one-quarter of the United States' carbon emissions.³⁷ And it makes it imperative to clean up dirty power sources that account for a third of the American carbon footprint.³⁸ It is because the Biden Administration philosophically recognizes the weight that must be accorded not just to the rights of Americans, but to the rights of those outside of America, that we are optimistic that it will invest in energy efficiency, encourage the development of electric vehicles, and expand the clean and renewable energy sector.

Fourth and finally, the Biden Administration flagged its appreciation of the risk that the policies it pursues today might violate the rights of generations of people who will not live to complain until tomorrow. Such rights violations will be all the more likely if the Biden Administration persists with the standard practice of running regulatory cost-benefit analyses by applying discounts to the future harms of others as if they were akin to the opportunity costs of present investors. While it is perfectly moral for present-day individuals and businesses to discount their own future losses, it is morally indefensible to discount future losses to not-yet-living others, at least when those are losses of goods to which such future people have rights. By discounting harms to future generations when running cost-benefit assessments, environmental regulators violate the rights of future generations to goods that ought to be thought to be in trust for them.

36. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

37. EPA, FAST FACTS: U.S. TRANSPORTATION SECTOR GREENHOUSE GAS EMISSIONS 1990-2018 (2020), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100ZK4P.pdf> [<https://perma.cc/YM2F-DKJN>] (illustrating that the transportation sector as a whole generates approximately 28% of all GHG emissions, with CO₂ and HFC pollution comprising 1,869.8 teragrams of 1883.9 teragrams total GHG emissions in the sector, or 99.25%).

38. EPA, DATA HIGHLIGHTS: INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2019 (2021), <https://www.epa.gov/sites/production/files/2021-04/documents/us-ghg-inventory-1990-2019-data-highlights.pdf> [<https://perma.cc/F94U-5F4E>].

Manifesting its appreciation of this injustice, the Biden Administration plans to reconsider the federal government's two-decades-old benchmark for how it weighs expenditures today against the value of avoiding future human suffering and environmental damage. The lower the discount rate that is used in computations of the social cost of GHGs, for example, the higher the price of those emissions, because less of a premium is placed on avoiding spending in the near term for benefits that will be realized in the future. While the discount rate has long been pegged to Treasury bond yields (for reasons we find morally indefensible), the Biden Administration has hinted that its interagency working group on the social cost of carbon may go beyond this metric to take account of other factors that are relevant to valuing the avoidance of climate damage, including environmental justice and intergenerational equity.³⁹ We are buoyed by the prospect that the weight accorded possible rights violations in the future may be untethered from the valuation of future lost profits, because the rights of future generations ought not to be so crassly priced.

CONCLUSION

So long as environmental regulations are thought to be legitimate only if they rest on cost-benefit analyses that demonstrate their "profitability," they will risk violating rights that cannot be priced or traded. And they will almost surely thwart the interests of those whose interests cannot be commodified, and whose moral worth will thus be given no weight. The Biden Administration is a long way from reversing Reagan's fateful order to subject environmental regulations to utilitarian cost-benefit analyses, but we are relieved that in an Inauguration Day executive order, the new president directed the OMB to review how it conducts regulatory oversight, including how it employs cost-benefit analyses.⁴⁰ We can only hope that as that process unfolds, it will become more apparent that the market-mimicking methods of Reagonomics ought to join Environmental Trumpism in the dustbin of regulatory history. After all, the question of whether to prevent profit-seeking that comes at the expense of the environment ought not to turn on whether it is profitable.

39. *A Return to Science: Evidence-Based Estimates of the Benefits of Reducing Climate Pollution*, THE WHITE HOUSE (Feb. 26, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/> [https://perma.cc/3STP-Z5G4].

40. *Memorandum on Modernizing Regulatory Review*, *supra* note 4.