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## SPOTLIGHT September 2021

# The Biden administration's approach to climate and infrastructure: the 'DC two step'

BY ANDREW SHAW AND JENNIFER MORRISSEY

It is apparent that the Biden administration is viewing infrastructure through a climate lens. President Biden has called climate change one of four historic crises facing the US, and there is growing recognition of the need for a confluence of action to tackle both the climate and infrastructure exigencies presently facing the nation.

A host of events in just the first seven months of 2021 have underscored the urgency of bold action on climate change as extreme weather has wreaked havoc from coast to coast. The deep south experienced historic low temperatures this past winter, bringing a frozen Texas to a complete halt for many days, and the Pacific Northwest dealt with unprecedented

heat over the summer. The far west remains stricken by drought, with reservoirs and groundwater depleted and millions of acres scorched by wildfire. Meanwhile, many parts of the country are feeling the brunt of inadequacies in the nation's physical infrastructure, including rolling blackouts and fuel shortages caused by inadequate physical infrastructure and cyber mischief, as exemplified by the May cyber attack that hit the Colonial Pipeline, forcing the nation's fourth largest oil pipeline offline for a week and causing gasoline prices to soar.

Amid these crises, and as the country struggles to emerge from the global health pandemic and economic shutdown, the essential tool to manage each of the

challenges is resilience. It is evident that the country cannot achieve the necessary level of resilience or advance at the pace needed without transformative investment in infrastructure. Against this backdrop, the White House and Congressional Democrats are pursuing dual tracks to promote a climate and clean energy agenda. However, even with the current strong support among Democrats for bold action, the path forward will not be easy and the policy and politics get more complicated as lawmakers debate actual legislation.

The White House is attempting to advance a two-prong legislative pathway on a bipartisan infrastructure bill and a broader budget reconciliation package, which incorporates president Biden's

more ambitious climate change and clean energy proposals, along with investments in human infrastructure. It remains to be seen whether president Biden and Congressional Democrats can balance this complicated and difficult legislative strategy. Progressive Democrats are threatening to oppose a bipartisan infrastructure bill unless the Senate also moves a budget resolution (which serves as the legislative prerequisite to Congress considering a budget reconciliation package that can pass on a majority vote in the Senate). At the same time, Senate Republicans and Democrats are still working to reach an agreement on a bipartisan infrastructure bill, with some Republicans threatening to walk away if president Biden and the Democrats move forward with the reconciliation package.

President Biden's legislative agenda, if passed, would provide historic policies to transition the US energy sector to a zero-carbon future. Even the bipartisan infrastructure bill, which is focused on traditional infrastructure, such as roads, bridges, ports and waterways, includes significant investments in clean energy, including tens of billions of dollars to modernise the US electricity grid.

Regardless of which bill advances, the real transformational policies would be included in a budget reconciliation package, which can pass through the Senate on an 'up or down' vote rather than needing the 60 votes necessary to overcome a filibuster. Many Democrats, environmental groups and some corporations have aligned behind making a Clean Energy Standard (CES) their top legislative priority in a budget reconciliation package.

Tina Smith, a Democratic senator and author of the CES legislation, is working on modified legislation on a standard that is consistent with budget reconciliation rules, which, among other restrictions, prohibit measures that do not have an impact on federal revenue. For instance, Democrats failed earlier this year to advance a proposal under budget reconciliation rules that would have established a federal minimum wage. As such, the modified CES bill is expected to include incentives for electric utility companies that meet gradually increasing targets for 'clean energy', along

with penalties for those that fail to meet such requirements. Under these proposals, renewables, including hydropower, nuclear energy and sources employing carbon capture would be considered 'clean'. This is significant because many of these energy sources have been excluded from the definition of 'clean energy' in other contexts, such as some state CES or renewable energy portfolio requirements.

Budget reconciliation rules prohibit policies that exceed a 10-year timespan, and thus, senator Smith's modified CES bill would require that utilities generate 80 percent of their electricity needs from 'clean' sources by 2030. President Biden and other Congressional Democrats have previously called for utilities to meet a 100 percent clean mandate by 2035. Despite growing support, moderate Democrats, such as Joe Manchin, chairman of the Senate Energy and Natural Resources Committee, are expressing scepticism regarding a CES. In an evenly divided chamber, senator Manchin – as the '50th' Democratic vote – yields significant power and could sink a CES proposal.

A budget reconciliation package could also provide long-term certainty as to clean energy tax credits. Earlier this year, the Senate Finance Committee advanced legislation that would overhaul the existing clean energy tax credit and streamline them into technology-neutral credits for clean electricity, fuels and efficiency. President Biden and the House Democrats are taking a different approach and are proposing expanding existing clean energy tax credits, such as the Production Tax Credit (PTC) for wind and the Investment Tax Credit (ITC) for solar. While it remains to be seen how Democrats resolve these different approaches, we expect lawmakers will deliver long-term extensions of these credits, sending a powerful signal to the market on the value of clean energy. In addition, Congress is likely to expand the ITC to include energy storage and new transmission, and as president Biden works to support the widespread deployment of electric vehicles (EV), lawmakers may lift the current manufacturer cap for the EV tax credit.

Resiliency in the face of cyber attacks and extreme weather is at the centre of many of these discussions. Congress is expected to require that projects receiving funding pursuant to the infrastructure bill develop and implement plans to mitigate cyber attacks. In addition, the bipartisan infrastructure framework includes \$47bn for resiliency, although it remains to be seen exactly what types of measures this funding would support.

President Biden is attempting to enact durable, sweeping climate policy through this 'DC two step'. As demonstrated during the Obama administration, executive actions, including regulations, are vulnerable to legal challenges, along with the whims of the next administration. Given that experience, this two-prong legislative strategy, and in particular, a budget reconciliation package, is critical to long-term efforts to reduce greenhouse gas emissions while modernising and building essential resilience into critical infrastructure throughout the country. The passage of such legislation is important, not only to reducing US emissions, but also to helping the Biden administration marshal increased global support for more ambitious climate action ahead of this November's UN climate negotiations. The legislative process is never elegant and rarely fast-paced. Yet, president Biden – with nearly 50 years of experience in Washington, DC, with this kind of 'two step' – knows how to leverage the legislative process to advance his transformational agenda. ■

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