

# Current Developments in Carbon & Climate Law

## United States

### Taking Stock of Joe Biden's Climate Agenda: Governance Approach and Areas for Transatlantic Climate Cooperation

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Upon entering office in 2021, Joe Biden declared climate policy to be the focal topic of his presidency. The U.S. subsequently set new ambitious impulses for climate protection and made a spirited return to international climate engagement. It rejoined the Paris Agreement, established new international dialogue formats, and once again participates in multilateral climate protection initiatives. The president demonstrated his willingness to pursue an ample range of policy and regulatory options to bring his country back on track towards achieving the Paris Agreement's goals.

This report aims at highlighting how the new U.S. climate governance approach combines climate and industrial policy elements to achieve climate goals while fostering green technologies that benefit *all of America*. The first part of this report examines some major elements of the Biden Administration's new climate policy approach. The second part provides a glimpse into what the potential of this approach is for transatlantic relations. The report is based on the

analysis of relevant legal documents as well as academic and gray literature. It aims at providing a qualitative case study and update on recent U.S. climate policy developments.

#### I. The New U.S. Climate Policy: A Focus on 'Green' Industrial Policy

President Biden's new climate ambitions represent a clear departure from the pathway chosen by Donald Trump. Trump had put a focus in his executive measures on rescinding the climate efforts of his predecessor Barack Obama. He focused his (de-)regulatory efforts on easing the regulatory burden for fossil fuel producers. For instance, he reversed the *Clean Power Plan*, a major Obama-era emission reduction program, he eased fuel efficiency standards for vehicles, and he abandoned methane regulation for the oil and gas sector.<sup>1</sup> Biden ordered all policies and regulations from the Trump Administration to be scrutinized for their compatibility with the nation's new climate goals.<sup>2</sup> His administration has been working on reversing Trump-era policies. The government installed, for example, stricter fuel efficiency standards for vehicles and proposed new regulation for methane emissions from the oil and gas sector, which has been backed up with a new **Methane Emission Reductions Plan**.<sup>3</sup>

For the implementation of his climate policy agenda, Biden has strengthened responsible governance structures such as the Environmental Protection Agency (EPA), established a National Climate Task Force,<sup>4</sup> and created new positions and offices such as the Special Envoy for Climate and the Office of Clean Energy Demonstrations.<sup>5</sup>

Overall, the new climate policy program is framed as an economic, labor market, and industrial policy.

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<sup>1</sup> Michael Mehling, 'A New Direction for US Climate Policy: Assessing the First 100 Days of Donald Trump's Presidency' (2017) 11 Carbon & Climate Law Review 1, 3-24; Magnus Abraham-Dukuma, 'Energy Trilemma: Climate Policy Pluralism in the United States - Domestic and International Implications' (2019) 13 Carbon & Climate Law Review 1, 63-76; see Brookings Interactive, 'Tracking regulatory changes in the Biden era' <<https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/>> accessed 11 March 2022.

<sup>2</sup> Executive Order 13990, 'Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis' of January 20 2021 (2021) 86 FR 7037.

<sup>3</sup> 'Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards' Protection Agency (2022) 86 FR

A frequently repeated objective is the creation of unionized, well-paid jobs, especially in clean energy sectors such as energy efficiency or zero-emission vehicle manufacturing to strengthen the middle class. U.S. climate policy has gained a more inclusive character: It is based on a *whole of government* approach, which requires climate protection to be considered in the policies of all government departments and agencies. Moreover, it aims at benefiting *all of America*, especially in disadvantaged communities.

## 1. New U.S. Climate Goals: Biden's Presidential Framework for Climate Action

In contrast to Germany or the European Union (EU), the U.S. continues to pursue climate mitigation activities without a climate law that enshrines climate targets permanently in the domestic legal order. Instead, President Biden has made executive commitments, which set the framework for climate action and has issued legally binding executive orders. Biden announced the new U.S. climate target of reducing greenhouse gas (GHG) emissions by 50-52 percent below 2005 levels by 2030 at the virtual international Leaders Summit on Climate in April of 2021.<sup>6</sup> The Administration formally communicated this target in its newly submitted *Nationally Determined Contribution* (NDC) under the Paris Agreement. The NDC also sets the goal of economy-wide net-zero emissions by no later than 2050 and a carbon pollution-free electricity supply by 2035. The Biden Administration issued a related long-term strategy document in November 2021.<sup>7</sup>

## 2. Bridging Climate and Industrial Policy: The Congressional Approach

To put its goals into practice, the Biden Administration has chosen a range of instruments. Biden originally sought to incorporate much of his climate protection agenda into bipartisan legislation. He introduced climate policy elements to his so-called *Build Back Better Agenda* in the first half of 2021. It consists of two parts: the successfully passed *Infrastructure Investment and Jobs Act*<sup>8</sup> (in the following: *Infrastructure Act*) and the yet unsuccessful *Build Back Better Act*.

The \$1 trillion *Infrastructure Act* passed Congress with broad majorities in both chambers in November 2021. It includes various infrastructure modernization measures with important climate policy implications. They range from the installation of high-speed internet to investments in public transit, high-speed rail and streets and bridges.<sup>9</sup> However, fierce opposition from the Republican party and conservative Democrats in the U.S. Senate forced Biden to make extensive concessions to pass this Act. Many of the explicit climate protection measures were dropped, among them the *Clean Electricity Program*, a mandatory measure for utilities to rapidly increase the share of renewable energy in the U.S. electricity mix. Decarbonizing the U.S. electricity mix is, however, a crucial requirement, if Biden's plans to electrify transportation in the U.S. are to help achieve his climate protection goals. Currently, coal and natural gas combined still have a share of almost 60 percent in the electricity mix.<sup>10</sup> A step in the direction of decarbonization in the *Infrastructure Act* is considerable funding for Carbon Capture and Storage (CCS) technologies for industrial and power sector applications. Some \$8 billion are earmarked for capture tech-

74434; Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review', A Proposed Rule by the Environmental Protection Agency on November 15 2021 (2021) 86 FR 63110; The White House, 'U.S. Methane Emissions Reduction Action Plan' (November 2021) <<https://www.whitehouse.gov/wp-content/uploads/2021/11/US-Methane-Emissions-Reduction-Action-Plan-1.pdf>> accessed 14 March 2022.

- 4 The White House, 'National Climate Task Force' <<https://www.whitehouse.gov/climate/>> accessed 03/15/2022
- 5 Department of Energy, 'The Infrastructure Investment and Jobs Act: Opportunities to Accelerate Deployment in Fossil Energy and Carbon Management Activities' <<https://www.energy.gov/sites/default/files/2021-12/FECM%20Infrastructure%20Factsheet.pdf>> accessed 15 March 2022.
- 6 The White House, 'Fact Sheet: President Biden's Leaders Summit on Climate Change' <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/>> accessed 14 March 2022.
- 7 UNFCCC, 'The United States of America Nationally Determined Contribution' <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%202021%20Final.pdf>> accessed 4 March 2022; The White House, 'US Long-Term-Strategy' <<https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf>> accessed 14 March 2022.
- 8 H.R. 3684 (ENR) - Infrastructure Investment and Jobs Act (December 2021).
- 9 ibid.
- 10 U.S. Energy Information Administration, 'Electricity Explained' <<https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php>> accessed 14 March 2022.

nologies, carbon transport infrastructure and storage facilities as well as hydrogen hubs.<sup>11</sup>

Electric vehicle (EV) promotion is a particularly telling example of how the *Infrastructure Act* combines climate protection with infrastructure modernization and a larger industrial policy strategy: The act invests \$7.5 billion in a nation-wide electric vehicle charging infrastructure. The stated goals of this investment are increased adoption of EVs, GHG and air pollution reduction, and the creation of jobs.<sup>12</sup> Beyond this, the Biden Administration frames it as a means to promote the U.S. EV market in order to catch up with China, which so far holds the largest market share in EVs. In this context, the *Infrastructure Act* also establishes a grant program to promote battery manufacturing and recycling in the U.S. to ensure domestic manufacturing capabilities and sustainable supply chains. In line with its *all of America* approach, the government prioritizes projects that rely mostly on materials supplied from within the U.S. and that create jobs for low-income or rural communities or communities in which jobs in the production of fossil fuels have been lost.<sup>13</sup>

The draft of the second bill in the *Build Back Better Agenda*, the *Build Back Better Act*, contains many climate measures which Biden was not able to incorporate into the *Infrastructure Act*. It is a budget reconciliation bill which would only require a simple majority to pass the Senate - a unique opportunity which has, however, been blocked mainly by the opposition of two Senators: West Virginia Democrat Joe Manchin and Arizona Democrat Kyrsten Sinema. Given this opposition to climate measures in Congress, Biden is forced to increasingly focus his efforts on executive measures.

<sup>11</sup> Department of Energy, 'Infrastructure Fact Sheet' <<https://www.energy.gov/sites/default/files/2021-12/FECM%20Infrastructure%20FactSheet.pdf>> accessed 14 March 2022.

<sup>12</sup> The White House, 'President Biden's Bipartisan Infrastructure Law' <<https://www.whitehouse.gov/bipartisan-infrastructure-law/#electricvehicle>> accessed 14 March 2022.

<sup>13</sup> Public Law No: 117-58 (November 15 2021).

<sup>14</sup> Executive Order 14057, 'Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability' of 13 December 2021 (2021) 86 FR 70935; The White House, 'Federal Sustainability Plan' (December 2021) <<https://www.sustainability.gov/pdfs/federal-sustainability-plan.pdf>> accessed 14 March 2022.

<sup>15</sup> Ibid. Federal Sustainability Plan.

<sup>16</sup> Anna Phillips, Jacob Bogage, 'Biden officials push to hold up \$11.3 billion USPS truck contract, citing climate damage' <<https://www.washingtonpost.com/climate-environment/2022/02/02/usps-trucks-epa-climate-change>> accessed 21 March 2022.

### 3. Bridging Climate and Industrial Policy: The Executive Approach

To bring his climate agenda, and particularly also his electricity decarbonization strategy, to fruition, Biden has implemented a wide array of executive measures. They encompass executive orders and regulatory measures, for instance through the EPA and the Department of Energy (DOE). Returning to the example of EV promotion, the Executive Order *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability* and the accompanying *Comprehensive Sustainability Plan for the Federal Government*, issued in December 2021, are of particular interest.<sup>14</sup> Both include goals and measures to make the federal government climate neutral by 2050. They further articulate the federal government's contribution to, among other things, a zero-emission transport and electricity sector. By 2035, all newly acquired vehicles of the Federal Government are to be carbon emission-free. Moreover, U.S. government agencies and departments are required to obtain 100 percent of their electricity from clean (carbon pollution free) sources by 2030. This is particularly relevant as the U.S. government is the biggest energy consumer and employer.<sup>15</sup> The Biden Administration thus seeks to use the instrument of public procurement to contribute to the nation's climate goals, to spur private sector investment in clean technologies and products as well as to enhance the market for clean electricity and EVs. However, the implementation of these new procurement practices comes with obstacles: The U.S. Postal Service (USPS), which holds a third of the government vehicle fleet, issued a plan to purchase 165,000 new delivery trucks over the next decade, starting in 2023. Only 10 percent of the new vehicles will be EVs. The gas-powered vehicles USPS plans to purchase, moreover, do not meet the highest available efficiency standards. Postmaster General Louis DeJoy, in office since the Trump Administration, cites the large debt of USPS as the reasoning for this decision. As an independent institution, it is within the USPS jurisdiction to implement this type of purchase.<sup>16</sup>

To ensure that this climate-friendly public procurement practice benefits the American labor force, and in particular marginalized, disadvantaged groups, Biden has issued environmental justice and enhanced '*Made in America*' provisions: Under the executive order *Tackling the Climate Crisis at Home*

*and Abroad*, Biden set the goal that 40 percent of federal climate-related investments should benefit disadvantaged communities.<sup>17</sup> In his executive order on *Ensuring the Future is Made in All of America by All of America's Workers*<sup>18</sup>, as well as in a March 2022 final rule updating the *Buy American Act* requirements,<sup>19</sup> the Biden Administration is gradually raising the *Made in America* requirements for products purchased by the federal government from the current 55 percent to 75 percent by 2029. With this update, the Administration seeks to create new business opportunities for small and medium sized manufacturers from parts of the U.S. that are so far disadvantaged.

Nevertheless, the Biden Administration is not completely independent of Congress for these executive measures. Congress would have to approve any costs incurred by Biden's climate agenda not covered by the Bipartisan *Infrastructure Act* separately in its annual budget process. Due to the political polarization of Congress, this can be a different challenge.

## II. The Transatlantic Perspective

The year 2021 brought about a new atmosphere of global climate cooperation, but also geopolitical challenges and conflicts. The U.S. and the EU started to intensify bilateral relations. The motivation behind this is, on the one hand, the desire to counterbalance China, for instance with respect to its market leadership in low-carbon technologies. In addition, the EU seeks to reduce its dependence on Russia in the energy sector, while the U.S. seeks to rebuild international relations after having them severed under the Trump Administration. On the other hand, U.S.-EU relations can now build on very similar general objectives, such as a focus on decarbonization and greening the industrial sector. Both must cope with the required massive transformation of their economies and societal structures and are faced with the challenges of creating jobs, economic growth, prosperity, and an overall just transition.

Climate protection is establishing itself as a common political cross-cutting issue. This opens opportunities to cooperate in many areas, including research and innovation on green technologies, improved green trade relations, the establishment of a clean hydrogen infrastructure, the development of a sustainable financial system, the reduction of

methane emissions and the spread and deployment of carbon capture, storage and utilization (CCSU) technologies. The following subsections discuss a selection of these opportunities.

### 1. Green Trade Relations

The EU and the U.S. have both communicated an increased interest in green trade relations. The Biden Administration plans to align trade policy decisions with its climate policy targets. The European Commission proposed the establishment of a *Transatlantic Green Trade Agenda* in December 2020.<sup>20</sup> A stated aim of this agenda is to initiate a trade and climate initiative within the framework of the World Trade Organization (WTO) and to jointly take measures against the problem of carbon leakage, the migration of companies to countries with lower climate standards.

A key transatlantic task is to remove barriers to the introduction of clean technologies and to create incentives and framework conditions for investments in clean and green projects. A large majority of clean-tech companies today are located in the transatlantic region, so the topic has great transatlantic relevance, and cooperation in this field has already been further strengthened with the newly established *EU-U.S. Trade and Technology Council* (TTC). The TTC is intended to deepen transatlantic trade and economic relations, for example through joint action on export controls. One of the working groups of the TTC will be dedicated to the topic of climate and clean technology.<sup>21</sup> In parallel, the EU and the U.S. have established a Joint Technology Competition Policy Dialogue to strengthen transat-

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17 Executive Order 14008, 'Tackling the Climate Crisis at Home and Abroad' of 1 February 2021 (2021) 86 FR 7619.

18 Executive Order 14005, 'Ensuring the Future Is Made in All of America by All of America's Workers' of 25 January 2021 (2021) 86 FR 7475.

19 'Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements' (7 March 2022) 87 FR 12780.

20 European Commission, 'EU-US: A new transatlantic agenda for global change' <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2279](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2279)> accessed 14 March 2022.

21 Moritz Koch, 'Trotz U-Boot-Streit: Transatlantische Tech-Allianz kann starten' <<https://www.handelsblatt.com/politik/international/verhaeltnis-eu-usa-trotz-u-boot-streit-transatlantische-tech-allianz-kann-starten/27642954.html?ticket=ST-2165524-4Tu7PHdMw5iXPVfXV5PD-cas01.example.org>> accessed 14 March 2022.

lantic cooperation on policies regarding competition in the technology sector.

## 2. A Clean Hydrogen Economy

Clean hydrogen is becoming a central part of decarbonization plans in the EU and the U.S. and offers ample possibilities for transatlantic cooperation. The hydrogen strategy of the EU aims to establish a leading role in green hydrogen.<sup>22</sup> Many EU members will have to import green hydrogen or renewable electricity due to a lack of renewable energy capacity. The U.S. *Infrastructure Act* requires the Secretary of Energy to develop a national clean hydrogen strategy and it includes additional funding for research and development for blue, green, and nuclear-derived pink hydrogen. Additionally, it supports programs such as the U.S. Department of Energy's so-called *Hydrogen Shot*, which aims to significantly reduce the cost of clean hydrogen.<sup>23</sup>

As part of Mission Innovation 2.0, the EU and the U.S. have already been working internationally with other partners since 2021 to increase research and development in the field of clean hydrogen. The technology could play an important role in a deepened climate dialogue between the EU and the U.S., as the mutual goal is to make it available in large amounts as cheaply as possible by 2030. Intensified cooperation could include the development of international sustainability standards for hydrogen, the measurement and certification of the greenhouse gas intensity of hydrogen supplies, research and development, a joint transport infrastructure development, and the development of international hydrogen supply chains. The U.S. is also of great importance to the EU as a potential exporter of green hydrogen.

<sup>22</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A hydrogen strategy for a climate-neutral Europe' (7 August 2020), <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0301>> accessed 14 March 2022.

<sup>23</sup> Department of Energy, 'Hydrogen Shot', <<https://www.energy.gov/eere/fuelcells/hydrogen-shot>> accessed 14 March 2022.

<sup>24</sup> European Commission, 'Methane emissions' <[https://energy.ec.europa.eu/topics/oil-gas-and-coal/methane-emissions\\_en](https://energy.ec.europa.eu/topics/oil-gas-and-coal/methane-emissions_en)> accessed 14 March 2022 and see footnote 3.

<sup>25</sup> Federal Government of Germany, 'Federal Chancellor Scholz addresses the virtual meeting of the World Economic Forum' (19 January 2022), <<https://www.bundesregierung.de/breg-en/search/scholz-wef-2022-1999390>> accessed 14 March 2022.

## 3. Further Areas to Deepen Transatlantic Cooperation

An international regulatory framework for sustainable finance is a further topic that could benefit greatly from joint transatlantic impulses. This includes the redirection of capital flows away from fossil fuel investments, the integration of sustainability into risk management and the promotion of transparency and long-term objectives in financial and economic activity. A foundation for this is, for instance, the work of the G20 Sustainable Finance Working Group.

Another topic with high potential for transatlantic approaches is the reduction of methane emissions. With its extreme warming potential, methane is both a highly relevant and highly neglected climate policy topic. Its political relevance is increasing, for instance because of its importance in the context of blue, natural gas-based hydrogen production. Both the U.S. and the EU have issued policies on methane recently.<sup>24</sup> At COP 26 in Glasgow, they played a leading role in launching a global pledge on reducing methane emissions. Measurement and control of methane are a good starting point for transatlantic technical cooperation.

These topics could become interesting in the context of a potential international climate club, as well. Originally proposed in 2021, the German government is pursuing the idea of an international climate club with the G7 at its core under its G7 presidency in 2022.<sup>25</sup> The club should, accordingly, unite countries committed to the 1.5°C target and climate neutrality by 2050. The German government envisions the introduction of a common minimum CO<sub>2</sub> price as one element of the club. This is challenging, as there are no plans for a carbon price in the U.S. However, club members could work together on finding common metrics and increasing comparability of climate measures, as well as agreeing on a framework for common standards in areas such as the measurement of methane emissions and sustainable finance criteria.

## III. Conclusion

The brief examination of the status of Joe Biden's climate governance approach shows that the U.S. is back as an important international player. Biden is pursuing an inclusive *whole of government* approach that benefits *all of America* and overcomes political polar-

ization. The latter has proven a considerable obstacle to Biden's climate ambitions. Like the Obama Administration, he is now focusing on executive orders and regulation as climate governance tools and is actively engaged in international climate cooperation. His ability to achieve his domestic climate targets hinges on whether the *Build Back Better Act* is adopted before the midterm elections in November 2022.

Despite this significant recent increase in ambition, Biden's approach is not without challenges for the EU. The recently enhanced *Made in America* provisions for public procurement, for instance, continue a protectionist trend that set in under the Trump Administration. These provisions may pose trade barriers for EU companies. Without carbon pricing as part of Biden's climate agenda, the EU's current plans to implement a Carbon Border Tax Adjustment Mechanism further pose a potential area of conflict.

Overall, the EU and the U.S. are both faced with the mammoth task of implementing their goals and putting their respective climate policy plans into practice with the greatest possible ambition. This is critical, since not only is much more global climate ambition required, but there is also still a significant mismatch between ambition and action. Policies and financial commitments in both regions are considered insufficient to meet their respective climate objectives.<sup>26</sup> Ultimately, the U.S. closing ranks with the EU yields important symbolic power: It can push the momentum for global climate action and can create followers in implementing more ambitious climate policies.

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26 Climate Action Tracker, 'Country Factsheets' <<https://climateactiontracker.org/countries/usa/>> and <<https://climateactiontracker.org/countries/eu/>> accessed 14 March 2022.