KIRKLAND & ELLIS

Kirkland Alert

The Inflation Reduction Act is Signed into Law by President Biden: Key Energy and Infrastructure Provisions

16 August 2022

Last week, both houses of Congress passed the Inflation Reduction Act of 2022 (the "IRA"), and today President Biden signed it into law. The IRA is historic climate and energy legislation.

We analyzed the key environmental provisions of the draft bill, including provisions related to renewable energy, lower-carbon technologies, methane emissions reduction, and carbon capture and storage in a previous *Alert*, and its tax provisions, including the extension of a number of tax credits for the development of renewable energy resources, in a previous *Alert*. This alert supplements our previous analysis by highlighting some additional provisions as well as certain material changes included in the final IRA passed by the Senate and the House of Representatives.

Methane Emissions Reduction Program and Environmental Justice Programs

The IRA, passed by both houses of Congress, did not contain many substantive changes to the Methane Emissions Reduction Program or environmental justice programs. The only two changes are highlighted below.

- **EPA Authority to Issue Methane Guidance Reduced.** Earlier versions of the IRA's Methane Emissions Reduction Program included an "Implementation" subsection, which explicitly reserved the EPA Administrator's ability to issue guidance or regulations as necessary to carry out the program. The inclusion of this provision was an attempt to clarify the EPA's authority in the wake of the Supreme Court's decision in *West Virginia v. EPA*, which found that EPA lacked the authority to issue generation-shifting mandates under the Clean Power Plan's section 111 absent express Congressional authorization. This reservation of authority was removed from the version passed by both houses of Congress, which could prompt future litigation challenging EPA's rulemaking authority under the "major questions" doctrine.[1] For more on our analysis of the recent Supreme Court decision and its implications on future EPA rulemaking, see our previous *Alert*.

- **Definition of Greenhouse Gas.** The IRA passed by both houses of Congress includes a specific definition of "greenhouse gas," as it relates to the proposed Methane Emissions Reduction Program and the IRA's environmental justice and electric vehicle provisions. For those sections, "greenhouse gas" is now defined to mean "the air pollutants carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride."[2] This definition is largely consistent with EPA's definition of Greenhouse Gases but omits nitrogen trifluoride, a synthetic greenhouse gas used in the manufacturing of flat-panel displays, photovoltaics and LEDs.

Environmental Reviews

The IRA passed by both houses of Congress includes several changes to the amounts appropriated to facilitate agency environmental reviews.

- **Department of Energy.** The initially released version of the IRA provided $125 million to the Department of Energy, available through 2031, "for the hiring and training of personnel, the development of programmatic environmental documents, the procurement of technical or scientific services for environmental reviews, the development of environmental data or information systems, stakeholder and community engagement, and the purchase of new equipment for environmental analysis to facilitate timely and efficient environmental reviews and authorizations." The IRA passed by both houses of Congress, however, provides for a reduced amount — $115 million — for these objectives.[3]
- **Environmental Review Improvement Fund.** Prior draft legislation provided $70 million per year for the next five fiscal years to the Federal Permitting Improvement Steering Council's Environmental Review Improvement Fund. The IRA passed by both houses of Congress provides the same total sum ($350 million), but makes it available through 2031.[4]

Electric Vehicle Tax Credits

The IRA passed by both houses of Congress also makes notable changes to the federal tax credit program for the purchase of electric vehicles ("EVs").[5] These changes include:

- The lifting of the cap on the total number of tax credits available to each automaker[6]
- Broadening eligibility beyond "plug-in" vehicles to include fuel-cell vehicles,[7] and
- A tax credit of up to $40,000 for the purchase of heavy-duty EVs.[8]

However, eligibility for these tax credits will be greatly limited, beginning in 2023, due to what are described as stringent sourcing requirements for key components, including batteries. Automakers warn that this may limit the number of eligible vehicles so severely in the short term that it may lead to a reduction in demand for EVs more broadly.

Oil and Gas Leasing and Development on Federal Lands and Waters and Related Provisions

The IRA passed by both houses of Congress includes meaningful changes to the federal onshore and offshore oil and gas leasing and development program. It mandates certain offshore lease sales in the Gulf of Mexico and Alaska and includes mandates for federal onshore and offshore oil and gas leases as a prerequisite to onshore and offshore renewable energy development on federal lands. The final IRA also includes many of the changes previously included in the Build Back Better legislation (Proposed Build Back Better Legislation Includes Important Changes for Oil and Gas), such as increases to the royalty and rental rates. The material changes included in the IRA are summarized below:

Elimination of Non-Competitive Leasing

- The IRA passed by both houses of Congress eliminates the ability for non-competitive leasing if leases fail at auction to receive competitive bids.

Rate and Fee Increases

- **Offshore Royalty Rate.** Increased from a 1/8th royalty to not less than 1/6th, but not more than 3/16ths, during the 10-year period beginning on the date of enactment of the Bill, and not less than 1/6th thereafter.
- **Offshore Royalty Rate.** Increased from a 1/8th royalty to a 1/6th royalty.
- **Minimum Bid Rates.** Increased the minimum bid rate from $2 per acre to $10 per acre.
- **Rental Rates.** Increased from $1.50 per acre for the first five years and $2 per year for each year thereafter to $3 per acre per year during the first two years of the lease, $5 per acre per year the following six years, and not less than $15 per acre per year thereafter. The rental rates for reinstated leases are increased from $10 to $20.
- **New Fees for Expressions of Interest.** Added a fee of $5 per acre for operators to informally nominate desired lease tracts of federally owned lands for inclusion in a competitive oil and gas lease sale.

Federal Oil and Gas, Solar, and Wind Leasing and Right-of-Way Sale Requirements

The IRA passed by both houses of Congress requires that certain previously announced offshore lease sales in the Gulf of Mexico and Alaska be held during the next two years. The U.S. Department of the Interior (Interior) must award leases to the highest bidders in Lease Sale 257[9] held in November 2021, but later vacated after a federal district court found that Interior's environmental review failed to adequately consider certain greenhouse gas emissions. It also requires Interior to move forward with Lease Sale 258 in Alaska Region's Cook Inlet by December 31, 2022,[10] and two additional Gulf of Mexico Lease sales, Lease Sales 259 and 261, by March 2023 and September 2023, respectively.[11]

As part of the compromise to pass the IRA, federal solar and wind development is tied to future federal lease sales for oil and gas for a period of ten years. The final IRA provides that the Secretary of the Interior must hold an offshore oil and gas lease sale during the 120-day period prior to issuing a right-of-way for wind or solar energy development on federal lands, and must hold an offshore oil and gas lease sale within one year prior to issuing a lease for offshore wind development on the outer continental shelf.[12] Given the Biden administration’s ambitious renewable energy agenda, this provision is expected to have the effect of ensuring that the Biden administration resumes oil and gas lease sales on federal lands and waters, which have been consistently canceled since the President took office in 2021.

Electric Transmission Development

The IRA includes about $2.9 billion in funding aimed at incentivizing increased electric transmission development across the U.S.

- $2 billion for direct loans for certain transmission projects located in a National Interest Electric Transmission Corridor ("NIETC").[13] It is possible this funding could end up supporting overall transmission project costs of at least $20–40 billion, depending on OMB's loan cost calculation.[14] However, accessing this funding may be challenging. DOE has had the authority to designate NIETCs since 2005, but faced significant backlash by states and in the courts and none have been designated to date. Although the recently passed Infrastructure Investment and Jobs Act clarified DOE's role regarding NIETCs, we are still waiting to see how DOE will use its authority.
- $760 million for grants to siting authorities to facilitate the siting of certain transmission line projects, so long as the siting authority agrees to make a final decision on the transmission project within two years of receiving the grant.[15]
- $100 million to convene stakeholders and conduct analyses relating to interregional transmission development and the development of transmission for offshore wind energy.[16]

Electric transmission development also will be impacted substantially by actions at Federal Energy Regulatory Commission ("FERC") such as its: proposed rule in April 2022 (Docket No. RM21-17) relating to cost allocation and generator interconnections; and its March 2020 proposed rule, as supplemented in April 2021 (Docket No. RM20-10) relating to financial incentives for new transmission projects. Electric transmission policy development continues to evolve as stakeholders and regulators grapple with challenges associated with weather extremes, reliability concerns and increasing electricity costs.

Senator Manchin's Permitting Wish List

As the initial IRA language was announced, Senator Joe Manchin's office issued a list of environmental permitting changes that Senate Majority Leader Chuck Schumer, House Speaker Nancy Pelosi and President Biden have reportedly promised to support before the end of the fiscal year. The working list includes:

- a two-year limit on environmental reviews for major projects,
- requiring a single interagency environmental review document and concurrent agency review processes,

- limits on judicial review of final agency project approvals and a 180-day deadline for agency action on remanded federal permitting decisions,
- time limits and other changes to states' authorities and permitting approval process under Section 401 of the Clean Water Act,
- expanding the categories of projects eligible for streamlined review by the Federal Permitting Improvement Steering Council to include mining and smaller energy projects,
- enhancing the federal government's authorities related to interstate electric transmission facilities deemed by the Secretary of Energy to be "in the national interest,"
- clarifying FERC's role in the regulation of interstate hydrogen pipeline, storage, import and export facilities; and
- identifying and prioritizing the reviews of 25 high-priority energy infrastructure projects of strategic national importance — including projects related to the development of critical minerals, nuclear, hydrogen, fossil fuels, electric transmission, renewables, and carbon capture, sequestration, storage, and removal.

These provisions are expected to be part of a separate piece of legislation to be proposed in the fall. Depending on this final set of proposals, the impact of this permitting legislation could range from expanding and codifying existing permitting processes, including under the FAST-41 Act and its implementing guidance, and more fundamental changes to agency and state permitting processes that have been met by criticism from key Democrats as attempts to "gut" the environmental review process. We will continue to monitor these developments and provide a more detailed update as appropriate.

---

1. Inflation Reduction Act, Section 60113. ↩

2. Bill Sections 60101, 60103, 60105, 60107, 60108, 60110, 60113, 60114, 60116,60201, and 60503. ↩

3. Bill Section 50301. ↩

4. Bill Section 70007. ↩

5. Bill Section 13401. ↩

6. https://www.reuters.com/business/autos-transportation/automakers-scramble-decode-new-us-ev-tax-credits-2022-08-12/; https://www.forbes.com/wheels/news/new-clean-vehicles-tax-credit-evs-qualify/; https://insideevs.com/news/603087/us-senate-passes-bill-ev-tax-credit/; https://theconversation.com/climate-bill-passes-it-could-short-circuit-ev-tax-credits-making-qualifying-for-them-nearly-impossible-188282. ↩

7. *Id.* ↩

8. *Id.* ↩

9. Bill Section 50264(b). ↩

10. Bill Section 50264(c)___. ↩

11. Bill Section 50264(d) and (e)_____ ↩

12. Bill Section 50265. ↩

13. Bill Section 50151. ↩

14. S&P Global Inc., Inside FERC, Aug. 12, 2022. ↩

15. Bill Section 50152. ↩

16. Bill Section 50153. ↩

Authors

James Dolphin, III

Partner / Houston

Robert S. Fleishman

Partner / Washington, D.C.

Brian C. Greene, P.C.

Partner / Washington, D.C.

Chris Heasley

Partner / Austin / Houston

Jonathan E. Kidwell

Partner / Dallas

Emily Tabak

Partner / Salt Lake City

Raya B. Treiser

Partner / Washington, D.C.

Andrew A. Eberle

Associate / Bay Area – San Francisco

Jarrod H. Gamble

Associate / Houston

Diane B. Tran

Associate / Austin

Related Services

Practices

- Energy Regulatory
- Environmental
- ESG & Impact
- Transactional

Suggested Reading

- 16 November 2022 - 17 November 2022 Sponsored Event PEI Responsible Investment Forum Europe

- 15 November 2022 – 16 November 2022 Sponsored Event PERE America Summit 2022
- 06 October 2022 – 01 November 2022 Kirkland Seminar 2022 Registered Adviser Seminar & CCO Summit