

Updates

August 19, 2022

The Inflation Reduction Act's Impact on Offshore Wind Leasing

The \$437 billion Inflation Reduction Act, H.R. 5376 (IRA), signed into law on August 16, 2022, by President Biden, makes historic investments in clean energy. The IRA allocates \$369 billion toward energy security, carbon emissions reduction, and climate resilience. The legislation includes significant provisions affecting offshore wind, including expanded leasing, investments in transmission planning, and expanded offshore wind tax credits. Given the Biden administration's goal of bringing online 30 gigawatts of offshore wind energy by 2030, the offshore wind leasing provisions in the IRA should represent a significant, tangible opportunity for the offshore wind industry. However, as discussed below, the extent of the opportunity is unclear, in large part because the new legislation ties federal seabed leasing for offshore wind development to oil and gas leasing offshore. This Update focuses on the legislation's provisions related to offshore wind leasing.

Changes to the Offshore Wind Leasing Process

The IRA (§ 50265) places new limits on the U.S. Department of the Interior's (DOI) authority to issue offshore wind leases. These restrictions could have significant impacts on the upcoming offshore wind lease sales. During the 10-year period following the IRA's enactment, this provision prohibits the Bureau of Ocean Energy Management (BOEM) from issuing an offshore wind lease under 43 U.S.C. § 1337(p)(1)(C), unless BOEM has both offered at least 60 million acres on the outer continental shelf for oil and gas leasing and executed an oil and gas lease in that offshore lease sale^[1] in the previous year.

The IRA's provisions tying offshore wind lease sales to oil and gas sales will have an impact on all future offshore wind lease auctions, but most immediately on the California auction, expected in the last quarter of 2022, which may support development of over 4.5 gigawatts of offshore wind generation.^[2] As discussed below, if BOEM wants to meet its goal of holding the California lease sale this year, it must first issue and execute the leases for Lease Sale 257, held on November 17, 2021. Alternatively, it may decide to delay the California offshore wind auction (or issuance of leases sold in the auction) until it holds a later offshore oil and gas lease sale of at least 60 million acres, the first of which—Lease Sale 259—must be held on or before March 31, 2023 (§ 50264(e)).

In November 2021, BOEM leased 80.8 million acres of the outer continental shelf in the Gulf of Mexico for offshore oil and gas development in Lease Sale 257. That lease sale was challenged by environmental organizations alleging violations of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). The U.S. District Court for the District of Columbia held in favor of the plaintiffs, vacated the Record of Decision, and remanded it to BOEM in late January 2022. *Friends of the Earth v. Haaland*, CV 21-2317 (RC), 2022 WL 254526 (D.D.C. Jan. 27, 2022).

The IRA (§ 50264(b)) requires DOI to reinstate Lease Sale 257 and to award the leases to the highest bidders within 30 days after its enactment. This provision of the new law appears intended to override the district court's vacatur of the sale's Record of Decision. If so, and if BOEM executes and issues at least one of the oil and gas leases from Lease Sale 257 by November 17, 2022, it will be possible for BOEM to issue the California offshore wind leases on schedule this year. To hit that date, however, BOEM would need to rapidly review public comments on its Proposed Sale Notice (PSN), which includes [novel bidding credits and lease stipulations](#), issue a Final Sale Notice (FSN) by mid-September of 2022, hold the auction by early November, and then execute the leases by November 17, 2022, following an accelerated U.S. Department of Justice (DOJ) review.

Alternatively, BOEM could decide to hold the 2022 California offshore wind auction in Q4 as planned but to delay *issuance* of the offshore wind leases until a later lease sale. For example, the IRA (§ 50264 (c)-(e)) requires BOEM to hold Lease Sale 259 for the Gulf of Mexico by March 31, 2023, and Lease Sale 261 for the Gulf of Mexico by September 30, 2023. Both lease sales are expected to exceed the IRA's 60 million acre threshold. The earliest opportunity to issue offshore wind leases would be following the execution of at least one lease from Lease Sale 259, which must be held no later than March 31, 2023.

Whatever approach BOEM uses, there is a risk that future oil and gas leases may not qualify as "offshore lease sales" under the IRA's definition, which requires not only offering of leases but also the execution of a lease. If these lease sales are successfully challenged to enjoin lease issuance, as with Lease Sale 257, the litigation could prevent issuance of the leases, putting on hold BOEM's authority to conduct any offshore wind lease sale.

Leasing in Southeast Planning Area and Eastern Gulf of Mexico

The IRA (§ 50251(a)) authorizes DOI to issue renewable energy leases, easements, and rights of way in federal waters in the eastern Gulf of Mexico and the Atlantic off the coast of North Carolina, South Carolina, Georgia, and Florida, areas of the seabed previously off limits to leasing under a Trump administration moratorium.^[3]

It is noteworthy that the IRA, while lifting the prior administration's restrictions, is much less prescriptive than the language proposed in the Build Back Better legislation, in many respects the precursor draft bill that became the IRA. That earlier bill had required DOI to grant leases, easements, and rights-of-way in the previously withdrawn areas.^[4] Instead, the IRA merely allows DOI to grant leases and related use rights if it so chooses.

Offshore Wind for Territories

The IRA also explicitly revises the Outer Continental Shelf Lands Act (OCSLA) to allow for offshore wind leasing in the waters adjacent to the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands and to expand oil and gas leasing to territorial waters. Specifically, the IRA (§ 50251(b)) revises the definition of "Outer Continental Shelf" in 43 U.S.C. § 1331(a) to include all submerged lands "within the exclusive economic zone of the United States and adjacent to any territory of the United States." Areas conveyed by Congress to a territorial government for administration are exempt from the definition of "Outer Continental Shelf." Amending the definition of the outer continental shelf to include areas within "the exclusive economic zone of the United States and adjacent to any territory of the United States" essentially fills a gap in prior law by giving BOEM clear authority to issue offshore wind leases in offshore territorial waters pursuant to 43 U.S.C. § 1337(p)(1)(C).

The IRA directs how BOEM is to implement its new authority. Under Section 50251(b)(2), DOI must issue calls for information and nominations for proposed wind lease areas off the U.S. territories not later than September 30, 2025. DOI can conduct wind lease sales in those areas that meet each of the following criteria:

- The Secretary has concluded that a wind lease sale in the area is feasible;
- The Secretary has determined that there is sufficient interest in leasing the area;
- The Secretary has consulted with the Governor of the territory regarding the suitability of the area for wind energy development; and
- BOEM has offered at least 60 million acres of the outer continental shelf for oil and gas leasing and has executed at least one such lease from that sale in the year prior to execution of an offshore wind lease in the territories.

The IRA now defines "State" under section 1331 of the OCSLA to include the territories, allowing them to receive the revenue from any offshore wind projects from projects that "are located wholly or partially within the area extending three nautical miles seaward of State submerged lands." (§ 50251(b)(1)(A)). The IRA is silent, however, as to the roles, prerogatives, expectations, or capabilities of the territorial governments. In effect, the bill confers to BOEM authority over offshore wind development in locations where Interior's role is not as well established or accepted as it is in the waters off the U.S. mainland and where local governments may have different expectations and ambitions for development of territorial waters.

Conclusion

The IRA contains significant investment and policy changes aimed at facilitating development of critical clean energy infrastructure. Congress' decision to link wind leasing to oil and gas leasing may represent an impediment in light of the considerable history of environmental litigation against offshore oil and gas development. If BOEM wants to advance the administration's 2030 goals in the near term and meet its leasing schedule for 2022, it must move promptly to issue the FSN for the California lease sale, hold the auction, and execute leases before November 17, 2022.

Endnotes

[1] Section 50265(a)(2) defines "offshore lease sale" as requiring issuance of a lease.

[2] Pacific Wind Lease Sale 1 (PACW-1) for Commercial Leasing for Wind Power on the Outer Continental Shelf in California—Proposed Sale Notice, 87 Fed Reg. 32,443 (May 31, 2022), available at: <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/california/2022-11537.pdf>

[3] Administration of Donald J. Trump, Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition (September 8, 2020), available at <https://www.govinfo.gov/content/pkg/DCPD-202000659/pdf/DCPD-202000659.pdf>; Presidential Determination on the Withdrawal of Certain Areas of the United States outer Continental Shelf from Leasing Disposition (September 25, 2020), available at <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-determination-withdrawal-certain-areas-united-states-outer-continental-shelf-leasing-disposition>.

[4] Compare HR 5376, Section 71001 (updated November 3, 2021) with H.R.5376 Enrolled Bill, Section 50251(a).

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