

Big Boost For Renewables At Stake In Surprise Inflation Bill

By Juan Carlos Rodriguez

Law360 (July 28, 2022, 9:34 PM EDT) -- Surprise legislation tied to reducing inflation could be a boon for the domestic renewable energy industry, providing key tax credits and incentives that experts say would spark significant project development and manufacturing.

Sens. Joe Manchin, D-W.Va., and Chuck Schumer, D-N.Y., made a big splash Wednesday with an announcement that they'd drafted a budget reconciliation bill that resurrects climate change proposals that had previously fizzled out in Congress. If it passes, the Inflation Reduction Act would provide \$369 billion in spending, tax credits, incentives and grants for renewable energy projects, electric vehicles and environmental justice.

"This is a hugely significant bill," said Keith Martin, who co-heads Norton Rose Fulbright's U.S. projects practice and specializes in energy tax policy.

He noted that the proposed legislation would restore tax credits for renewable energy to their full rates for at least 10 years, which he said would provide "a very long runway" for companies to facilitate a more significant transition away from reliance on fossil fuel energy sources.

"It is a little like the American Recovery and Reinvestment Act in 2009, where there was a lot of wind in the sails of developers," Martin said. "For a period of time in 2009 into early 2010, it felt like everybody in the market was working overtime as if the treadmill had been turned up to warp speed. Here, we're in a market where there are labor shortages right and left, so there isn't a lot of spare capacity. But fortunately, there's a long enough runway here that even if people can't take advantage fully of the opportunity this year, there will be time for it to play out and have its intended effect."

The bill would tie economic assistance for renewable projects to continued fossil fuel development, which has green groups fuming but also accepting of the compromise that made the proposal possible.

The bill would also offer the renewables industry the freedom to sell tax credits for cash.

Democrats say the production tax credits — intended to accelerate U.S. manufacturing of solar panels, wind turbines, batteries and critical minerals processing — could be worth up to \$30 billion, and investment tax credits to build clean technology manufacturing facilities, such as those that make electric vehicles, wind turbines and solar panels, could be worth up to \$10 billion.

The bill also contains tax credits for carbon capture projects, which could extend the life of or even spur

new fossil fuel energy projects.

Earthjustice President Abigail Dillen on Thursday expressed clear support for the bill, saying in a statement that everything must be done to "get ambitious climate legislation over the finish line," but she lamented the legislation's fossil fuel components.

"We have to recognize the many provisions in this bill that hold back progress," Dillen said. "Tax credits that extend the life of dirty coal plants will make it harder to reach critical targets for clean power, and we are outraged that this deal would undermine historic investments in clean energy by holding wind and solar projects hostage to massive new oil and gas leasing off our coasts and on our public lands."

And she highlighted the fact that the reconciliation package is premised on the development of separate legislation aimed at reforming the federal permit approval process under the National Environmental Policy Act. She said her group would be ready to fight any weakening of environmental protections.

Other major environmental organizations, including The Sierra Club and the Natural Resources Defense Council, also have issued statements of support for the bill.

Carl Fleming, a partner at McDermott Will & Emery LLP, said the production and investment credits are key to the financing of any wind or solar project. He said the bill also contains, for the first time, tax credits for energy storage projects.

"The biggest thing going in our industry is storage," Fleming said. "Right now, everyone's putting storage onto projects or doing standalone storage. We see a lot of the market, and everyone has been asking for these credits for storage and in this draft, they're there. So that's huge."

The bill also contains \$500 million for heat pumps and critical minerals processing, which will help financing for domestic production of solar modules, which now are primarily produced in Asia. The legislation doesn't say exactly how the funds will be disbursed, but the fact that the money is there is a big deal, Fleming said.

To date, a lot of climate change initiatives have taken shape at the state level, and states are not likely to lose their position as the leaders in policy, said Patrick Ferguson, a partner at Davis Wright Tremaine LLP and co-chair of the firm's energy practice. But federal leadership and funding are essential to the large-scale changes the Biden administration and climate hawks are advocating for, he said.

"It conveys the seriousness of the issue and the intent of the federal government to tackle it," Ferguson said.

He said the tax credits will certainly help renewable projects overcome some financing hurdles that developers have been facing, primarily from COVID-related supply chain issues and solar tariff disputes with countries in Asia. But he noted there are other components to the proposed bill that show an understanding of the scope of action necessary to get at the various factors that exacerbate climate change.

"You see these earmarks for things like the U.S. Postal Service purchasing zero-emission vehicles. Those things make a big difference, and they do drive significant reductions in greenhouse gases," he said.

Electric vehicles are also targeted in other ways in the bill. In previous infrastructure legislation,

Congress appropriated billions of dollars to charging projects. In this one, Manchin and Schumer are building on that to offer new incentives to consumers who want to buy an EV, said Levi McAllister, a partner at Morgan Lewis & Bockius LLP and head of the firm's electric vehicles working group.

"When you look at any one piece of legislation in isolation, you think, 'Well, gee, that isn't going to address the entire problem, or the entire raft of criticisms that have been lodged against EV deployment,'" McAllister said. "But when you look at everything in the aggregate, it's a little bit easier to see that a lot of the challenges that have been encountered by entities or individuals looking to get into EV ownership or EV manufacturing or charging station development are being addressed by all of these pieces of legislation put together."

For example, he noted that the Inflation Reduction Act would adjust how tax credits for EVs are awarded, removing a numerical cap and instead basing eligibility for the credits on income and the price of the vehicle. That would allow manufacturers who have hit the credit cap to "get back in the game" and could spur continued growth of the industry.

The proposed legislation also contains a new tax credit of up to \$4,000 for purchases of used EVs, McAllister said, which is an attempt to get at criticism that EVs, which are more expensive, are only available to wealthier individuals in certain areas.

Along those lines, Democrats say there is more than \$60 billion in the bill that's intended to address environmental justice issues that plague communities that are overburdened with pollution or can't afford to transition to cleaner energy and transportation systems on their own. Some of the initiatives include \$3 billion to address disproportionate environmental and public health harms related to pollution and climate change, another \$3 billion to reconnect communities divided by existing infrastructure barriers and mitigate other negative impacts of transportation projects, and another \$3 billion to reduce air pollution at ports.

The Climate Justice Alliance, a coalition of more than 80 community groups, said the bill makes unacceptable compromises.

"Legislation that supports measures to address the health of polluted communities on one the hand, while ramping up projects that increase pollution and unsafe practices on the lands of other frontline communities on the other, such as carbon capture and storage, is wrong," Bineshi Albert, CJA's co-executive director, said in a statement Thursday. "This will only harm us in the future."

Conrad Bolston, counsel at Vinson & Elkins LLP, said it will be interesting to see how the grants could affect the real-world conditions in the communities facing environmental justice issues.

"I'm very interested to see whether this leads to things like monitoring that drives up enforcement or remediation that positively affects the community suffering from environmental justice issues," Bolston said.

--Additional reporting by David van den Berg, Stephen K. Cooper and Linda Chiem. Editing by Orlando Lorenzo.