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The IRA Turns 1, And Clean Energy Work Is Transformed

By **Keith Goldberg**

Law360 (August 11, 2023, 5:24 PM EDT) -- The Inflation Reduction Act turns 1 year old on Wednesday, and energy development attorneys say there is plenty to celebrate.

Attorneys on the front lines of clean energy development say the law has tangibly improved how projects are being developed and financed in the U.S., even as thorny questions remain about how key IRA tax credits will be implemented, and other policy headwinds persist.

"I've been doing this a long time," said Rob Freedman, who co-chairs Paul Hastings LLP's energy and infrastructure practice and works extensively on clean energy development and finance. "This is the busiest period for the market that I have really ever seen, and I really do believe that it's a direct result of the IRA."

And the law is still young.

"A year is actually not that long in the timeline of project execution," said Pillsbury Winthrop Shaw Pittman LLP energy development partner Alicia McKnight. "We'll see the impacts of the IRA more in the next 12 months compared to the last 12 months."

Here's how attorneys say the energy development landscape has shifted as the IRA approaches its first birthday.

Spreading the Tax Credit Wealth

While the IRA's extensions of the federal production and investment tax credits have definitely helped large-scale wind and solar development, it's the clean energy technologies the law made newly eligible for those credits that have seen the biggest boost in fortunes, attorneys say.

The most notable beneficiary has been energy storage, which before becoming eligible for investment tax credits had difficulty attracting tax equity financing because it had to be paired with a power generation project.

"Now it's very easy, causing many more energy storage projects to be developed and financed," said Eli Katz, a global vice chair of Latham & Watkins LLP's energy and infrastructure group. "And there's a much brisker mergers-and-acquisitions market around platforms of battery storage projects."

Another zero-carbon and low-carbon technology that has seen hundreds of millions of dollars in new investment following the IRA's enactment is hydrogen. Previous legislation that earmarked billions for hydrogen infrastructure development is important, but tax credit eligibility is crucial to driving down the price of hydrogen, which is too high at the moment for most potential customers to pay, said Elina Teplinsky, who leads Pillsbury's global energy industry group.

"The hydrogen [production tax credit] closes the delta on the price of hydrogen," Teplinsky said. "That fundamentally changed the interest of some companies interested in participating."

Tax Credit Transfer Deals Taking Flight

Attorneys say the most transformative part of the IRA for the clean energy industry is the provision that developers can transfer federal tax credits to others in exchange for cash. Transfer deals were being worked out before U.S. Department of Treasury and the IRS unveiled proposed guidance in June, but attorneys say dealmaking has really taken off since then.

Katz of Latham said that large developers in particular have an easier time raising debt, and sometimes equity, against their portfolio of assets now that transferability has effectively set a floor price for the value of their tax credits and eased lender concerns over whether they would be able to secure tax equity investment or whether credits would be phased out.

"People are able to raise significant bridge capital or development capital against assets that are perceived to be more valuable," Katz said.

Freedman of Paul Hastings said that thanks to transferability deals, parties are now able to work out in real time nitty-gritty issues like what deals should look like and how risk is shared.

"The deals that we are looking at, they're closing without a tax exit being there at closing, but with provisions that allow them to do transferability deals going forward," Freedman said. "As of even a year or two ago, the standard was, if you wanted to close a financing, you had to have the tax equity lined up at the same time."

Attorneys say nowhere has transferability been more of a game changer than for small-scale, distributed generation projects such as community and rooftop solar, which historically had difficulty tapping the traditional tax equity market.

"The ability to do that gives much more flexibility on the structuring side and makes distributed generation a lot easier to get financiers interested," McKnight of Pillsbury said.

A U.S. Energy Manufacturing Boom

With its manufacturing tax credits and bonuses for using U.S.-made components, and lavish loan commitments from the U.S. Department of Energy, the IRA has sparked the development of several facilities aimed at producing both clean energy project components and decarbonization technologies.

"If you look at how DOE has awarded its grant funding, and you look at the tax credits, it's clear that investing in new auto manufacturing and battery manufacturing capabilities in the U.S. is a strategic priority for this administration," said Crowell & Moring LLP partner Tyler O'Connor, who helped craft the IRA as the lead energy lawyer for the U.S. House Committee on Energy and Commerce.

O'Connor said the IRA is helping reorient the clean energy supply chain for developers and companies looking to directly cash in on the law's tax credits and grants, as well as their suppliers that may not even be eligible.

"Even companies that aren't sure whether they will apply for a significant grant or pursue a specific tax credit are still looking at the criteria identified in those credits," O'Connor said. "They are still looking at the labor standards, or the critical mineral sourcing requirements. They are in many instances, analyzing, and in some cases, adopting those standards as their own, even if the credits are not applicable to those companies."

It's a virtuous, albeit slow-moving cycle that's helping fulfill the Biden administration's goal to onshore more clean energy manufacturing, attorneys say.

"As that happens, one hopes that the trade barriers become less significant because you don't necessarily need to go to Southeast Asia anymore to get all of your components," Katz of Latham said.

Not a Policy Cure-All

Supply chain constraints were one of several headwinds buffeting clean energy developers when the IRA was enacted last year. Others included rising interest rates and electric grid bottlenecks jamming up the deployment of clean energy generation projects.

Those headwinds haven't gone away, but attorneys say the IRA's financial benefits have still tipped more projects over to the right side of economic viability and make developers more willing to power through.

"It masks some of those problems," Katz said. "It introduces an enormous tailwind through increased subsidies and more stable subsidies."

But the IRA can't, and wasn't designed to, eliminate problems like trade barriers and glacial electric transmission development. Attorneys say the IRA puts more pressure on policymakers to fix those problems, which is why recent moves — like the Federal Energy Regulatory Commission's recent revision of the interconnection policies that govern how new power projects connect to transmission lines — are so encouraging.

"In the absence of the IRA, it's conceivable that FERC could have helped reform the interconnection process anyway," O'Connor of Crowell & Moring said. "But I think [the law] created a greater sense of urgency for these types of reforms."

Unanswered Questions

Much of the IRA tax credit guidance rolled out by Treasury over the past year has yet to be finalized, and **there are some concerns** that the rules, as they're currently written, may prevent maximum monetization. Katz said that for one thing, the agency needs to clarify how the rules for sourcing U.S.-made materials work.

"It is almost impossible to know for sure how to qualify for the extra credits that you get from domestic content," Katz said. "Which means that the original equipment manufacturers are not getting the incentives that Congress intended, and project developers are uncertain as to whether they can pencil those benefits in."

But project development attorneys say the biggest tax-related question concerns guidance that Treasury hasn't put out yet: eligibility for the hydrogen production tax credit.

The guidance is expected sometime this fall, and there's a fierce debate about what will constitute "green hydrogen" that will be eligible for the maximum credit value of $3 per kilogram of hydrogen. The drop-off from that level is significant, and a strict green hydrogen definition from Treasury could make many potential projects uneconomical, attorneys say.

"It's a big guessing game as to where they come out," Katz said.

McKnight of Pillsbury said another major unanswered question is existential: Could the IRA survive a major shift in the national political landscape?

There's a presidential election next year, and many Republican politicians have vowed to unwind the law that is the legislative linchpin of President Joe Biden's climate change policy.

"That's the big question I'm hearing from clients," McKnight said.

--Additional reporting by Kat Lucero. Editing by Brian Baresch and Michael Watanabe.