

GOVERNMENTAL AFFAIRS REPORT

Highlights At-A-Glance

FEDERAL – Legislative

H.R. 5376 – The Inflation Reduction Act of 2022.

On August 16, President Joe Biden signed the \$739 billion reconciliation budget bill, known as the Inflation Reduction Act of 2022 (IRA), into law quickly after being adopted in the U.S. Senate and House of Representatives in a surprise move following months of stalled negotiations among Democrat lawmakers. No committee hearings were held prior to passage and no opportunity was provided for public input given that the bill passed the Senate at breakneck speed in the wee hours of a weekend vote without due notice. Just days later, the bill was hurriedly approved by the House of Representatives in a rare August recess vote. The 730-page IRA, [H.R. 5376](#), passed along strictly partisan lines with no Republicans voting in favor of the measure as they objected to most of the taxing and spending provisions. Described as the climate, health care and tax package, the IRA contains numerous provisions impacting traditional energy as well as renewables development. While some oil and gas industry stakeholders opposed the bill others supported it because it revives stalled federal onshore and offshore leasing, provides various tax breaks, carbon sequestration benefits and other incentives for oil and gas producers. The bill also provides a broad-based network of provisions to help fund the energy transition towards renewable and “clean” energy sources. The legislation, however, increases federal oil and gas royalties, rents, minimum bids for operations on federal lands, and reimposes the long dormant Hazardous Substance Superfund financing rate tax on crude oil and oil product imports. Additionally, a first ever “waste emissions charge” for methane emissions from oil and gas production and onshore gas pipelines and gas storage will be imposed. Royalties will also be imposed on all extracted natural gas, including gas vented, flared,

or leaked, with exceptions for safety. To review a comprehensive AAPL Governmental Affairs bill analysis and fact sheet, [Read more here](#).

S. 4768 – Taxing Big Oil Profiteers Act. On August 19, official bill text was made available for [S. 4768](#), known as the Taxing Big Oil Profiteers Act. Sponsored by Sen. Ron Wyden (D-OR), the bill would amend the Internal Revenue Code “to tax excess profits of large oil and gas companies, to impose a tax on the repurchase of stock by large oil and gas companies, [and] to end the use of the [certain methods] of accounting by large oil and gas trades or businesses.” According to *The Hill*, the bill “would impose a 21 percent tax on the excess profits of oil and gas companies making more than \$1 billion annually. Excess profits are determined by current profits minus a normal 10 percent return on investment.” The measure “would also impose a 25 percent excise tax on oil and gas corporation stock repurchased by the company.” Unlike the Inflation Reduction Act (above), this bill would require 60 votes to advance – thus requiring unlikely support from at least 10 Republican senators – and is not expected to advance prior to the midterm elections. [Read more](#).

S. 4733 – Use it or Lose it Act. On August 9, official bill text was made available for [S.4733](#), known as the Use it or Lose it Act. Sponsored by Sen. Catherine Cortez Masto (D-NM), the bill would “amend the Mineral Leasing Act to provide for certain reforms to the process relating to applications for permits to drill and the eligibility requirements for prospective bidders in lease sales.” Specifically, the bill requires federal leases be utilized in order to participate in lease sales; sets forth that priority will be given for applications for permits to drill that commit to “climate mitigation” and other forms of environmental mitigation including those related to plugging wells; provides that an application

for a permit to drill that is approved shall expire on the date that is one year after the date of the approval of the application for a permit to drill if unused; and an applicant for a permit to drill that has a higher than average number of unused approved applications for permits to drill will not be eligible for a new application for a permit to drill. [Read more.](#)

FEDERAL – Regulatory

BLM Environmental Impact Statement – Alaska.

On August 18, the Bureau of Land Management (BLM) published a *Notice of Intent To Prepare an Environmental Impact Statement To Consider the Impacts of Opening Lands Subject to ANCSA 17(d)(1) Withdrawals, Including Lands Within the Bay, Bering Sea-Western Interior, East Alaska, Kobuk-Seward Peninsula, and Ring of Fire Planning Areas; Alaska (87 Fed. Reg. 50875)* to consider the effects of opening certain lands subject to withdrawals and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues. According to reporting from *E&E News*, “The Biden administration plans to conduct an in-depth analysis of a series of public land orders issued in the final weeks of the Trump administration that sought to open 28 million acres of federal lands in Alaska to oil and gas development and mining activity.” This will begin the process of “studying so-called legal deficiencies in five public land orders signed in January 2021 by then-Interior Secretary David Bernhardt.” The public comment period is open through October 17, 2022. [Read more.](#)

New Director of U.S. Geological Survey. On August 15, the Interior Department announced David Applegate was sworn in as the new Director of the U.S. Geological Survey (USGS). As reported by the American Exploration & Production Council, “In this role, Applegate will be responsible for all activities of the USGS, including oversight of the occurrence and distribution of national and global geologic resources including a wide range of current and future energy and mineral resources; the potential environmental and socioeconomic effects associated with geologic resource occurrence and use; and the global supply and flow of nonfuel mineral commodities.” [Read more.](#)

FEDERAL – Judicial

Federal Leasing – 5th Circuit (Louisiana). On August 17, in the ongoing case, [Louisiana v. Biden](#) (Case No. 21-30505), the U.S. Court of Appeals for the Fifth Circuit, on appeal from the U.S. District Court for the Western District of Louisiana, reversed the lower court ruling which issued a nationwide preliminary injunction enjoining President Biden and various Department of Interior officials from pausing federal oil and gas lease sales. This temporary win for the Biden administration providing permission to once again pause energy leasing on federal lands and waters was short-lived when the very next day the district court issued a permanent injunction against the moratorium on new oil and gas leasing. The district court ruled the prior ruling allowing the pause “was in violation of the Mineral Leasing Act (MLA) and Outer Continental Shelf Lands Act (OCSLA), saying it took steps reserved for Congress.” [Read more.](#) The latest ruling comes amidst “a dispute between the administration and 13 energy-producing states led by Louisiana that sued to force Biden to resume leasing he paused a week after taking office. After the lower court last year issued its preliminary injunction against the leasing moratorium, the government appealed.” Although with the passage of the Inflation Reduction Act, which requires the restart of federal leasing, the case may ultimately be deemed moot as a matter of law. [Read more.](#)

Overriding Royalties; Post-Production Costs – North Dakota. On August 3, in [Highline Exploration, Inc. v. QEP Energy Co.](#) (Case No. 21-3662), the U.S. Court of Appeals for the Eighth Circuit, on appeal from the U.S. District Court for the District of North Dakota, addressed a case in which the plaintiffs alleged QEP breached overriding royalty interest assignments held by them because QEP deducted post-production costs from royalties it paid. The district court ruled in favor of QEP and here the appellate court affirmed. In the case, “the overriding royalty owners claimed that their interests outlined in the lease assignments provided that payment would be ‘free and clear of all costs and expenses’ for development and operation, exempted them from bearing any costs for gathering, processing,

or transporting oil and natural gas downstream. The producer denied that its deductions were improper, arguing that the terms 'development' and 'operation' commonly were understood to reference on-lease production costs, and did not extend to services performed downstream. The producer relied on the generally accepted rule that, absent express language to the contrary, overriding royalty interests must bear their proportionate share of post-production costs." While this case was pending, the North Dakota Supreme Court issued its opinion in [*Blasi v. Bruin E&P Partners, LLC*](#) (Case No. 2021 ND 86), a similar inquiry in which the court held that "as a matter of law, lessees may deduct transportation costs from royalties on the production of oil to be paid 'free of cost' into a pipeline." The *Blasi* court "interpreted the parties' lease based on its plain language; interpretations of that language by other jurisdictions and treatises; and, most importantly, in the context of commercial realities that seek to avoid uncertainty over where royalties traditionally are valued." The Eighth Circuit relied upon the *Blasi* opinion, in addition to others, in analyzing the case before it. Here, in affirming summary judgment in favor of the producer, "the Eighth Circuit held that overriding royalty interests that are 'free and clear' of development and operation costs do not exempt the interests from costs incurred to gather, process, or transport oil and natural gas. Rather, the Court explained that the 'free and clear' clause in the lease assignments clarified *which* costs were deductible from the overriding royalty interests. Accordingly, the Court recognized that, under North Dakota law, overriding royalty interests are subject to post-production costs unless the parties expressly agree otherwise. The Court also considered the scope of 'operation' costs, concluding that an overriding royalty interest's exemption from such costs does not extend to post-production costs." As noted by law firm, Holland & Hart, "the Eighth Circuit underscored that its interpretation of royalty instruments under North Dakota law is aligned with the laws and common industry understanding of other oil and gas producing jurisdictions." [Read more.](#)

STATE – Regulatory

Offshore Wind Energy Development – California.

On August 10, the California Energy Commission adopted "the country's most ambitious offshore wind development targets — the latest move in a statewide drive to accelerate the clean electricity transition. The targets involve the deployment of 3 gigawatts to 5 gigawatts of offshore wind by 2030 and 25 gigawatts by 2045." [Read the complete Commission Planning Report here.](#) Commission Chair David Hochschild said, "These ambitious yet achievable goals are an important signal of how committed California is to bringing the offshore wind industry to our state. This remarkable resource will generate clean electricity around the clock and help us transition away from fossil fuel-based energy as quickly as possible while ensuring grid reliability." [Read more.](#)

Governor Sets Climate and Energy Goals –

California. Governor Gavin Newsom (D-CA) has issued a [five-point legislative plan](#) to achieve proposed climate and energy goals. As reported by the *Los Angeles Times*, "The proposal calls for lawmakers to enact more aggressive targets on state laws that reduce greenhouse gases and increase the use of renewable energy." The proposal includes a call to codify statewide carbon neutrality goals; more ambitious greenhouse gas emissions goals; establish a pathway to 100% clean electricity to retail customers; increase well setbacks; and establish a clear regulatory framework for carbon removal and carbon capture, utilization and sequestration. Anthony York, a spokesman for Gov. Newsom, "said that with just three weeks left before lawmakers adjourn for the year, the end of the session provides an opportunity for the governor to propel climate legislation through the statehouse. The governor thinks now is the right time to take bold action." [Read more.](#)

Oil and Gas Regulations – Colorado. According to recent reports, an effort to "have a new independent commission oversee regulation of oil and gas development in Colorado won't be considered by state voters this year, after decisions by the state title-setting board and the Colorado Supreme Court."

The “Colorado Attorney General’s Office said the proposal didn’t just create a commission, but included language seeking to strip state environmental regulators ‘of their authority to regulate matters in their spheres of expertise if those matters touch on oil and gas operations.’ It would have let the new commission veto decisions by state air, water, health and solid/hazardous waste regulators that affect oil and gas operations, according to the filing.” [Read more.](#)

Energy Transition Act Rulemaking, Ozone Precursor Rule, and Ozone Advance Program – New Mexico. To follow up prior reporting from AAPL Governmental Affairs, on August 18, the New Mexico Environment Department (NMED) announced it will hold a Stakeholder Engagement Event on September 1, 2022 at the San Juan College School of Energy, Merrion Rooms A & B, 5301 College Boulevard, Farmington, NM, 87402. The event will provide an in-person and virtual opportunity to learn about, and provide input on, the Air Quality Bureau’s Energy Transition Act Rulemaking, Ozone Precursor Rule, and Ozone Advance Program. For more information on attending, [Read more.](#) The Air Quality Bureau (aqb) will also be holding an industry workshop regarding compliance with the newly effective [Ozone Precursor Rule](#) the same day. Staff from the aqb will be reviewing portions of the rule, compliance guidelines and frequently asked questions. In-person and virtual attendance options will be provided. [Read more.](#) For more information about the NMED regulatory programs noted above, [Read more.](#)

Hydraulic Fracturing Ban – New York. New York Republican gubernatorial candidate Lee Zeldin, a U.S. congressman from the state, has called for an end to the state’s hydraulic fracturing ban and seeks to open up the shale rich Western Slope area of the state to natural gas development and production. The ban was initially put in place administratively in 2014 by then-Gov. Andrew Cuomo and then codified into law by the Democrat-controlled legislature in 2021. “Each well could bring in millions of dollars in direct economic benefits that bring in spin off jobs as well as direct jobs from the drilling itself,” said James Hanley, a senior policy analyst with the Empire Center think tank.

In most recent polling, the incumbent Democrat governor Kathy Hochul holds a single-digit advantage over Zeldin with less than three months to go before the November general election. [Read more.](#)

STATE – Judicial

Marketable Title Act; Duhig Rule – Ohio. On July 26, in [Senterra, Ltd. v. Winland](#) (Case No. 2022-Ohio-2521), the Ohio Supreme Court was “asked to determine the ownership rights to an oil and gas interest that has been severed from its surface property.” Here, the owner of the surface property at issue sought to quiet title to the disputed oil and gas interest in its favor and urged the court to apply the rule of equity set forth in the 1940 Texas Supreme Court case, *Duhig v. Peavy-Moore Lumber Co.*, known as the *Duhig* rule “which estops a grantor from claiming title to a severed oil and gas interest when doing so would breach the grantor’s warranty as to the title and interest purportedly conveyed to the grantee.” [Read more.](#) The heirs to the oil and gas interest argued that the *Duhig* rule was inapplicable and that Ohio’s Marketable Title Act (MTA) applied to the interest and gives them marketable record title to it. Here, the court affirmed the lower court ruling and declined to apply the *Duhig* rule, “as it is inapplicable to the facts of this case. Moreover, there is an unbroken chain of record title to the oil and gas interest at issue for at least 40 years following the root-of-title deed to the property.” As noted by law firm, Vorys, “in its decision, the Court clarified that the *Duhig* rule only applies if the grantor owns the exact interest needed to remedy the breach of warranty at the time of the conveyance.” Thus, the MTA applied and preserved the heirs’ oil and gas interest. [Read more.](#)

Leasing; Well Obligations – Texas. In *TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth International Airport Board* (Case No. 02-20-00054-CV), the Texas Court of Appeals, Second District (Fort Worth), considered whether a contractual obligation to drill “fourteen new wells” can be satisfied by drilling vertical as opposed to horizontal wells. The court held that it can under the lease agreement’s plain language and

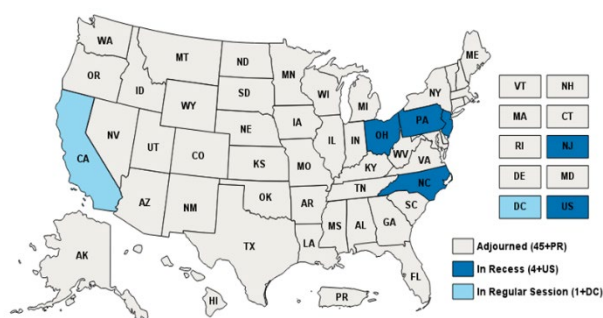
reversed the trial court's judgment, instead ruling in favor of the operators. In the case, an operator informed the Board that it "would drill vertical wells to fulfill the drilling commitment, even though vertical wells had never before been drilled on the leasehold." The Board filed a lawsuit seeking, among other items, "a declaration that the drilling commitment required horizontal wells." The operators claimed the lease terms could be satisfied by drilling vertical wells. Here, the court found that the agreement does not indicate that "only horizontal wells could satisfy the commitment or that vertical wells were excluded from the wells referred to. And the remainder of the lease shows that the parties limited the type of well when necessary. While we recognize that vertical wells had never been drilled on the leasehold before and that the parties likely contemplated horizontal wells, we cannot go beyond the plain language of the lease to construe it in line with DFW's desired interpretation." [Read more.](#)

INDUSTRY NEWS FLASH

► **Permian oil output projected to rise to record level in September.** On August 15, the U.S. Energy Information Administration (EIA) projected that oil output in the Permian in Texas and New Mexico is due to rise 79,000 barrels per day (bpd) to a record 5.408 million bpd in September. The EIA also reports total output in the major U.S. shale oil basins will rise 141,000 bpd to 9.049 million bpd in September, the highest since March 2020. [Read more.](#)

LEGISLATIVE SESSION OVERVIEW

States in Session



Session Notes: **California** is in regular session. The **U.S. Congress** is in summer recess.

The following are in recess until the dates provided: **Michigan** (September 7), the **Pennsylvania House** (September 12), the **Ohio House** (September 14), the **Pennsylvania Senate** (September 19) and the **Ohio Senate** (September 21).

California is scheduled to adjourn its legislative session on August 31. **Michigan** lawmakers reconvened the regular session for one day on August 17 and both chambers recessed again until September 7.

The following states are currently holding 2022 interim committee hearings: [Alabama](#), [Alaska](#), [Arizona](#), [Arkansas](#), [Colorado](#), [Connecticut](#), [Delaware](#), [Hawaii](#), [Georgia](#), [Idaho](#), [Illinois House](#) and [Senate](#), [Indiana](#), [Iowa](#), [Kansas](#), [Kentucky](#), [Louisiana](#), [Maine](#), [Maryland](#), [Massachusetts](#), [Missouri House](#) and [Senate](#), [Minnesota](#), [Mississippi House](#) and [Senate](#), [Montana](#), [Nebraska](#), [Nevada](#), [New Hampshire House](#) and [Senate](#), [New Mexico](#), [North Dakota](#), [Ohio](#), [Oregon](#), [Rhode Island](#), [South Carolina House](#) and [Senate](#), [South Dakota](#), [Tennessee](#), [Texas House](#) and [Senate](#), [Utah](#), [Vermont](#), [Virginia](#), [Washington](#), [West Virginia](#), [Wisconsin](#) and [Wyoming](#).

The following states are currently posting 2023 bill drafts, pre-files and interim studies: [Florida](#), [Kentucky](#), [Montana](#), [Nevada](#), [North Dakota](#), [Utah](#), [Virginia](#) and [Wyoming](#). ■

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