

Inflation Reduction Act Brings Back Energy and Climate Provisions From Build Back Better Act

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On July 27, Senator Manchin (D-WV) and Majority Leader Schumer (D-NY) reached an [agreement](#) to add the Inflation Reduction Act of 2022 (the Act) to the FY 2022 Budget Reconciliation Bill. The Act includes many climate and energy-related provisions from the Build Back Better Act (BBBA). The announcement of the Act came as a huge surprise, given Senator Manchin's recent public statements that appeared to foreclose any climate and energy provisions in a successor to the BBBA. The legislative text of the Act has been submitted to the parliamentarian for review, and the full Senate is expected to consider it next week.

Key Differences From the BBBA

The Act includes significant changes to the version of the BBBA passed by the House on November 19, 2021, an earlier version of which we covered [here](#), including the following:

- Earlier sunset dates for the PTC and ITC (projects must begin construction before 2025);
- Removal of the ITC for transmission property;
- Limiting direct payments for certain credits to tax-exempt and government entities; and
- New rule permitting the transfer of certain credits by taxpayers ineligible for direct pay.

PTC and ITC Extensions

The BBBA would have extended the PTC and ITC for wind, solar, and other specified technologies to projects that began construction on or before December 31, 2026. The Act would pull back the beginning of construction deadline to December 31, 2024.

Standalone Storage and Interconnection Property

The Act expands the definition of "energy storage technology" to include thermal energy storage property, which is a system that stores thermal energy to be used in a heating, ventilation, or air conditioning system.

The Act also would allow a public utility otherwise subject to the normalization requirements to make an election to

opt out of the requirement for the ITC for an energy storage technology, which would allow regulated utilities to use flow-through accounting for such projects for purposes of setting regulated rates.

The Act includes the BBBA's expansion of the ITC to interconnection property.

The Act delays the effective dates for these changes to the ITC by one year. Under the Act, they would apply to standalone storage projects and interconnection property placed in service after December 31, 2022 (2021 in the BBBA). The Act does not contain a transition rule present in prior versions of the BBBA that would have limited the ITC for projects that began construction before the applicable start date to the basis of the applicable project that is attributable to construction, reconstruction, or erection after the applicable start date.

- Under current law, energy storage property can qualify for the ITC only if it is part of an otherwise ITC-eligible project (typically solar or wind) and certain other requirements are met. These requirements presumably would continue to apply to energy storage property to the extent of the applicable basis that is attributable to activities occurring before 2023.

Prevailing Wage and Apprenticeship Requirements

The prevailing wage and apprenticeship requirements for the ITC and PTC are substantially the same in the Act.

Importantly, projects that begin construction before the IRS issues guidance on the prevailing wage and apprenticeship requirements will not be subject to those requirements.

Domestic Content Requirements

The Act eliminates the “phase-up” approach for the domestic content thresholds, which would instead be fixed at 20% for offshore wind projects and 40% for all other projects. The effective date of the domestic content requirements has been pushed back by one year, such that the requirements apply to projects placed in service after 2022.

Section 45Q Credit

The Act generally extends the 45Q credit to qualified facilities that begin construction prior to 2033. The Act lowers the minimum amount of carbon oxide that must be captured for the Section 45Q credit to be available and, assuming that prevailing wage and apprenticeship requirements are satisfied, generally increases the dollar amount of the credit relative to the BBBA. However, the Act also introduces a requirement whereby carbon capture equipment for an “applicable electric generating unit” must have capture design capacity of 75% of “baseline carbon oxide” that would otherwise be released by the facility and includes detailed rules for determining baseline carbon oxide.

Direct Pay and Credit Transfer Elections

Whereas the BBBA included a direct pay election for the ITC, PTC, and Section 45Q credit that could be obtained

by most taxpayers, the Act generally restricts the direct pay election to tax-exempt organizations, state and local governments or political subdivisions, Indian tribal governments, and the Tennessee Valley Authority. The Act also expands the direct pay election to additional clean energy-focused credits. The direct pay election is available to taxpaying entities only in restricted situations, including with respect to the clean hydrogen production credit, the Section 45Q credit, and the advanced manufacturing production credit.

The Act also includes a new provision whereby the clean energy-focused credits eligible for the direct pay election can also be transferred by a taxpayer (who is not eligible for the direct pay election) to an unrelated taxpayer in exchange for cash. The credit must be transferred by the due date of the tax return for the taxable year in which the credit is determined, and a credit cannot be subsequently transferred.

- The transferability of the tax credits means that some taxpayers could decide to forgo tax equity transactions and monetize the tax credits simply by selling them.

Carryback and Carryforward of Clean Energy Credits

The one-year carryback for credits eligible for the direct pay election is extended to three years.

Transmission Property ITC

The Act eliminates the BBBA's ITC for transmission line and related property. Certain transmission property continues to be ITC-eligible under the ITC for qualified interconnection property, discussed above.

Clean Electricity Production Credit and Clean Electricity Investment Credit

The Act substantially preserves the BBBA's broad emissions-based credits that cover projects used for the generation of electricity with a greenhouse gas emissions rate at or below zero that are placed in service after the expiration of the PTC (*i.e.*, in the Act, after December 31, 2024) or existing projects to the extent construction of a new unit or addition of capacity begins after such date.

Assuming the prevailing wage and apprenticeship requirements are satisfied, the incentive would be available in the form of a 10-year production tax credit (CEPTC) or 30% investment tax credit (CEITC), with phasedowns and eventually elimination at times determined by decreases in carbon emissions by the electric power sector. While the Act lowers domestic content thresholds for the PTC and ITC, such thresholds are higher for the CEPTC and ultimately "phase up" to 55% where construction begins after December 31, 2026 (December 31, 2027 for offshore wind projects).

Low-Income Community Enhancements

The Act substantially preserves the BBBA's enhanced ITC (for 2023 and 2024) and CEITC for certain solar and wind projects in low-income communities and Indian land to which the secretary makes an allocation of environmental justice solar capacity limitation.

Energy Communities Enhancements

The Act substantially preserves the BBBA's enhanced ITC, PTC, CEPTC, and CEITC for projects that are placed in service within an energy community. The Act expands the definition of "energy community" to include certain brownfield sites and areas that from 2000 have had significant employment from coal, oil, or natural gas; the term continues to cover a census tract or any adjacent census tract in which a coal mine has closed after 1999, or a coal-fired electric generating unit has been retired after 2009.

Corporate Alternative Minimum Tax

The Act preserves the BBBA's 15% alternative minimum tax on corporate profits for corporations that have average annual adjusted financial statement income in excess of \$1 billion over a three-year period. As in the BBBA, the corporate alternative minimum tax would be offset by general business credits under Section 38, such as the ITC and PTC, subject to limitations (e.g., Section 38 credits may offset only up to 75% of the sum of a corporation's normal income tax and alternative income tax that exceeds \$25,000).

Publicly Traded Partnerships

The BBBA contained a proposal to include certain income from renewable projects (including ITC-eligible and PTC-eligible projects, as well as carbon capture projects) as "qualifying income" for purposes of Section 7704(d)(1)(E). The Act does not contain this proposal.

We will continue to provide updates. In the meantime, please feel free to contact us with any questions.

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