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Energy Blog

Onshore Federal Oil and Gas Leasing Resumes

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Amid ongoing court challenges, Biden administration resumes a smaller-scale onshore federal oil and gas leasing program with increased royalty rates

Introduction

On April 15, 2022, 16 months after issuing Executive Order 14008, which, among other things, enacted a temporary moratorium on the sale of new oil and gas leases on federal lands and waters (the "Climate Order"[1] discussed in prior Kirkland blog posts), the Biden administration announced that it will resume onshore oil and gas lease sales on federal lands effective April 18, 2022 (the "Announcement").[2] This action is the latest development on federal oil and gas leasing following the Biden administration's temporary moratorium on new federal oil and gas leases in the Climate Order and subsequent stops and starts in the courts (including a federal court's June 2021 preliminary injunction of the January 2021 moratorium, discussed in a prior Kirkland blog post). Although the Biden administration is continuing to appeal the June 2021 injunction to the Fifth Circuit, it is proceeding with the new onshore lease sales to comply with the June 2021 order to resume new federal oil and gas leasing. According to the Announcement, 173 parcels on approximately 144,000 acres of land will be authorized for oil and gas leasing and development pursuant to what the Announcement describes as a "significantly reformed" federal leasing program.[3]

The Announcement comes after a decision by the U.S. District Court for the District of Columbia ("D.C. District Court") in January 2022 to vacate the results of the Biden administration's November 2021 offshore Lease Sale 257 in the Gulf of Mexico on the basis that the federal government's greenhouse gas ("GHG") emissions analysis in its supporting environmental review was flawed (discussed in a prior Kirkland blog post). The Announcement also follows a series of measures taken by the Biden administration to quell the rising price of gasoline, including the release of 180 million barrels of crude from the nation's strategic petroleum reserves and lifting seasonal restrictions on ethanol blends in gasoline.[4]

Summarized below are the events leading up to the new onshore oil and gas lease sales and the more significant changes to the federal oil and gas leasing program alluded to by the Department of the Interior in the Announcement.

Background

The Climate Order was issued in January 2021 to "place the climate crisis at the forefront of [the] Nation's foreign policy and national security planning."[5] Under Section 208 of the Climate Order, the Secretary of the Interior was required to pause new oil and gas lease sales on public lands and waters "pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters."[6] This action constituted a moratorium on new oil and gas leases on federal lands and waters pending the comprehensive review.

In June 2021, a federal judge overturned that moratorium on new oil and gas leasing and ordered the federal government to resume the lease sales. Subsequently, a coalition of states and industry groups filed separate lawsuits challenging the Department of the Interior, Bureau of Land Management ("BLM") and Bureau of Ocean Energy Management's failure to resume new lease sales in violation of applicable laws and the June 2021 court order. The Department of the Interior appealed the June 2021 court ruling to the Fifth Circuit, but committed to proceed with new lease sales during the appeal process to comply with the June 2021 court order and to continue its internal review of the federal oil and gas leasing program. The appeal is scheduled for oral argument on May 10, 2022. In November 2021, the Department of the Interior conducted the first offshore lease sale of the Biden administration (Lease Sale 257 in the Gulf of Mexico); however, as discussed in a prior Kirkland blog post, that sale was effectively cancelled by the D.C. District Court, ruling in favor of environmental groups challenging the Department of the Interior's climate impacts analysis in its environmental review as flawed. Onshore lease sales have yet to take place under the Biden administration.

Also in November 2021, the Department of the Interior released its report and recommended findings after its review of the federal oil and gas leasing program as called for by the Climate Order (the "DOI Report").[7] In the DOI Report, the Secretary of the Interior made a number of recommendations to overhaul the existing oil and gas leasing and permitting program in an effort to "provide a fair return to taxpayers, discourage speculation, hold operators responsible for remediation, and more fully include communities and Tribal, state, and local governments in decision-making."[8] Chiefly, the DOI Report sought to modernize the fiscal terms used in the federal oil and gas leasing and permitting program through a number of recommendations, including:

- Increased royalty rates on new leases;
- Increased rental rates on new leases;
- Increased minimum bond amounts;
- Increased financial assurances;
- Adjustments to leasing program to avoid leasing of low potential lands; and
- Increased financial and technical qualifications for lease bidders.

The Biden administration's first formal attempt to adopt these recommendations into law came last October, just before the formal release of the DOI Report, in the form of H.R. 5376, the "Build Back Better Act," which proposed a number of specific policy reforms intended to modernize the oil and gas leasing and permitting program in accordance with the DOI Report's recommendations. A detailed summary of the Build Back Better Act is available in a prior Kirkland blog post. The Build Back Better Act has thus far failed to pass the Senate, and it is unclear what any future version of that bill would contain and whether it would become law.

Reformed Onshore Oil and Gas Leasing Program

According to the Announcement, the lease sales will incorporate "many of the recommendations" from the DOI Report, including an increased royalty of 18.75% on new leases (the current 12.5% royalty rate has not been increased since 1920), ensuring Tribal consultation and broad community input, and reliance on the "best available science including an analysis of GHG emissions." Secretary Deb Haaland said that the initiatives taken by the Department of the Interior are intended "to reset how and what we consider to be the highest and best use of Americans' resources for the benefit of all current and future generations."[9]

Notably, the new onshore lease sales will represent an 80% reduction in the leasing acreage originally considered, resulting from the Department of the Interior's reported new focus on leasing parcels near existing development in an effort to leverage existing infrastructure, reduce the GHG emissions associated with oil and gas production, and preserve "intact public lands and functioning ecosystems."[10] Regulators believe that targeting areas with existing development will help reduce venting and flaring related GHG emissions on federal lands because the flared gas is more likely to be transported with existing infrastructure such as gathering lines. In addition, according to the Announcement, as part of its environmental analysis, the "[BLM] disclosed GHG emissions and the social cost of GHG emissions, which provided important context for the agency's decision-making."[11] In prior Kirkland blog posts, we discuss other regulatory efforts focused on GHG/methane emissions and the background on the social cost of carbon and how future litigation could impact any rules or regulations implemented on the basis of such estimates.

Sales notices for the upcoming oil and gas lease sales and corresponding environmental assessments (which found no significant environmental impacts associated with the proposed lease sales of the reduced acreage) were released on April 18, 2022. The acreage offered by the BLM spans eight states: Colorado, Oklahoma, Montana, Nevada, New Mexico, North Dakota, Utah and Wyoming. According to the sales notices, 129 parcels containing more than 131,000 acres will be offered in the State of Wyoming alone, which represents more than 90% of the acreage offered in the broader sales process.[12] Although the sales notices include a fixed 18.75% royalty on all new leases issued in connection with the sales process, many of the other recommendations from the DOI Report were not ultimately incorporated into the terms of the sales notices.[13] Notably, no additional changes were made to other key commercial lease terms such as the duration of the primary term, minimum bonus bid rates or the annual rental rates. Additionally, despite the recommendations of the DOI Report, non-competitive bids are still permitted and additional lands may still be nominated through the expression of interest process detailed in the sales notices. The sales notices are now subject to a 30-day protest period, during which time the public may protest the inclusion of a parcel listed in the sales notices. All protests must be received no later than 5:00 p.m. CST on May 18, 2022. The BLM will then have until 60 days after the sale to uphold or deny a protest. The lease sales will open and close over two days, starting on June 21, 2022, at 8:30 a.m. CST, and all bidding will conclude on June 22, 2022.

We will continue to closely monitor these developments, in particular with respect to any additional changes to the federal oil and gas leasing program announced by the

Department of the Interior and the outcome of the Biden administration's appeal of the June 2021 court order pending in the Fifth Circuit.

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1. Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021) (the "Climate Order"), *available at* https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.↩

2. Dept. of the Interior, Press Release: Interior Department Announces Significantly Reformed Onshore Oil and Gas Lease Sales, www.doj.gov (Apr. 15, 2022), *available at* https://www.doi.gov/pressreleases/interior-department-announces-significantly-reformed-onshore-oil-and-gas-lease-sales (the "Announcement"). ↩

3. Dept. of the Interior, Press Release: Interior Department Report Finds Significant Shortcomings in Oil and Gas Leasing Programs: Review Identifies Reforms to Ensure Fair Return to Taxpayers (Nov. 26, 2021), *available at* https://www.doi.gov/pressreleases/interior-department-report-finds-significant-shortcomings-oil-and-gas-leasing-programs (the "Press Release").↩

4. McCormick, Myles, Jacobs, Justin, "Joe Biden resumes oil and gas leases on federal land," Financial Times (Apr. 17, 2022), *available at* https://www.ft.com/content/aaebf4c8-919e-4b13-9703-e548ed705e4c. ↩

5. Climate Order, at §102.↩

6. Climate Order, at §208.↩

7. Dept. of the Interior, Report on the Federal Oil and Gas Leasing Program, www.doi.gov (Nov. 2021), *available at* https://www.doi.gov/sites/doi.gov/files/report-on-the-federal-oil-and-gas-leasing-program-doi-eo-14008.pdf ("DOI Report").↩

8. Press Release, at 1.↩

9. Announcement, at 2.↩

10. *Id.*↩

11. *Id.*↩

12. Dept. of the Interior, Notice of Competitive Oil and Gas Interest Lease Sale, eplanning.blm.gov (Apr. 2022), *available at* https://eplanning.blm.gov/public_projects/2015621/200495701/20057771/250063953/20220418.1532.WY%202022-06%20Sale%20Notice.pdf.↩

13. *Id.*↩

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Suggested Reading

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- 22 June 2022 Energy Blog FERC Order Revokes Solar Facility's QF Status
- 11 May 2022 Energy Blog New Framework Announced for Assessing and Reporting Nature-Related Financial Risks