CLEARPATH

November 4, 2022

ClearPath Response to the Department of Treasury Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Request for Comment title and reference number:
Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022 (Notice 2022-51)

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Introduction:

ClearPath appreciates the opportunity to respond to the Department of the Treasury Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements. ClearPath's mission is to develop and advance policies that accelerate breakthrough innovations to reduce emissions in the energy and industrial sectors. An entrepreneurial, strategic 501(c)(3) nonprofit, ClearPath collaborates with public and private sector stakeholders on nuclear energy, carbon capture, natural gas, hydropower, geothermal, energy storage, hydrogen, and heavy industry to enable private-sector deployment of critical technologies.

The Department of the Treasury has a critical role in implementing many of the provisions passed in the Inflation Reduction Act of 2022. Some of the tax credits enacted or amended through this legislation have a history of bipartisan support to promote innovation in clean energy technologies. In their prior form, these credits have spurred tremendous growth in clean energy technologies over the past two decades. With the new credit structure, project developers now turn their attention to forthcoming Treasury guidance to resolve new statutory uncertainties. In our responses below, we detail several areas that will need clear and specific guidance from the Treasury for these credits to be durable and predictable for the private sector.

Thank you for the opportunity to provide a response. Please do not hesitate to reach out for additional information.

Sincerely,

Matthew Mallioux
Policy Advisor
ClearPath

Response to Questions on prevailing wage, apprenticeship, domestic content, and energy community requirements for increased or bonus credit (or deduction) amounts to inform §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D.

03 Domestic Content Requirement

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed in service date? If not, why?

Response: The terms "completion of construction" and "placed in service" are not necessarily synonymous. Treasury should issue guidance consistent with the industry definitions of each term and apply them separately for the purposes of the statute.

The statute uses each of these terms in the same section, implying that an intentional distinction between these requirements was purposely made. In order to qualify for the credit under section 45Y, a qualified facility must be "placed in service after December 31, 2024." Separately for 45Y(g)(11)(B), the taxpayer must certify to the Secretary that any steel, iron, or manufactured product which is a component of the qualified facility (upon completion of construction) was produced in the United States.

One example where "completion of construction" and the "placed in service" date would not be the same is for a qualified facility that must undergo testing before it is officially placed in service on the grid. If there is a lag between the completion of construction and the placed in service date, the taxpayer may be subject to other requirements depending on whether this lag occurs across more than one tax year.

Additionally, if Treasury interpreted these terms to be synonymous in guidance, a project which completes construction prior to December 31, 2024 would not be eligible for the credit under section 45Y even if it does not enter service until some time in 2025. This would be inconsistent with the statutory language.

.04 Energy Community Requirement

(1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for

determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

Response: Treasury should apply the methodology described in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines) to address qualified facilities that are partially located in an energy community.

For energy communities that are brownfield sites, Treasury should apply a similar test, but should emphasize the portion of the brownfield site that is used by the qualified facility rather than the share of the property located on a brownfield site compared to the total size of the property. This exception would recognize that some brownfield sites are quite small compared to the size of a qualified facility.

Consistent with the Response to Question 5, if the Secretary does determine that list and boundaries of energy communities should be periodically reviewed, the legislation does not address the status of the enhanced credit value if the location ceases to qualify as an energy community. Therefore, the Secretary should promulgate guidance that includes a safe harbor provision so that a qualifying facility located in an energy community at the beginning of construction retains the enhanced credit value attributable to the energy community provision for the duration of the underlying tax incentive.

The legislation does not consider how to treat a qualified facility that first claimed a credit prior to the enactment of this paragraph. ClearPath recommends that such facilities be granted the elevated credit value for any year where the qualified facility is located in an energy community, but such facilities should not be guaranteed this elevated rate should the location cease to be an energy community in future taxable years.

(2) Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

Response: The statute uses the pre-existing definition under 42 U.S.C. 9601(39) to define the term brownfield site. Brownfield sites are highly clustered in urban areas. As a result, many brownfield sites have a small footprint that may make development difficult for the purposes of claiming a clean energy tax credit that is eligible for the credit enhancement. Based on that definition, a qualifying facility located on any part of the real property that meets the definition under this paragraph should be entitled to the elevated credit value.

Projects that are partially located both on real property that is a brownfield site and other real property that is not a brownfield site should be determined to be located in an energy community for the purposes of this section.

The lack of a nationwide database of all brownfield sites will limit the ability of project developers to fully understand which locations meet the energy community requirements for the enhanced credit value. The Government Accountability Office estimates that there are between 450,000 and 1 million brownfield sites in the U.S.[1]

(3) Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "nonmetropolitan statistical area" (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of "direct employment" for purposes of this section?

Response: A location may qualify as an energy community if it is part of:

> "(ii) a metropolitan statistical area or non-metropolitan statistical area which—
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> "(I) has (or, at any time during the period beginning after December 31, 2009, had) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas (as determined by the Secretary), and

There are several aspects of this provision that should be clarified through Treasury guidance. In order to qualify as an energy community, the location must have met a 0.17 percent threshold for direct employment related to various occupations. Treasury should use the "194 Order Industry Sectoring Plan" provided by the Office of Occupational Statistics and Employment Projections, within the Bureau of Labor Statistics, or a similar document for employment categorization based on the 2017 North American Industry Classification System (NAICS) Manual.

Eligible occupations under this clause should include the following NAICS codes and descriptions: Oil and gas extraction (211), Coal mining (2121), Support activities for mining (213), natural gas distribution (2212), pipeline transportation (486), and petroleum and coal products manufacturing (324).

The second requirement for this provision is based on a comparison between the current unemployment rate for a MSA or non-MSA region with the national average unemployment rate for the previous year.[2] This subclause, written in the present tense,

[1] https://www.gao.gov/assets/gao-05-94.pdf
[2] "(II) has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary)

implies that the metric should be interpreted as the current unemployment rate for the location. Unlike the preceding subclause, which uses a historical window from December 31, 2009 to the present, subclause (II) only accounts for the **current** unemployment rate in an MSA or non-MSA region. Furthermore, the word "average" does not appear in relation to the unemployment rate for the MSA or non-MSA region, it only appears in relation to the national unemployment rate for the previous year.

Current unemployment rates by county are published on a monthly basis by the Bureau of Labor and Statistics (BLS) through the Local Area Unemployment Statistics program. This county level data can then be aggregated into MSA and non-MSA regions to determine the current unemployment rate using the latest available data available from the Occupational Employment and Wage Statistics (OEWS) program at BLS. The Secretary should perform this calculation on an annual basis in alignment with the taxable year that a qualified facility seeks to claim the credit.

The second part of subclause (II) requires the secretary to determine "national average unemployment rate for the previous year". The legislation does not prescribe any particular form of an average, leaving it to the Secretary's discretion. Leaning on the term "previous year" ClearPath recommends that the average be taken on a calendar year basis using the annual average as calculated by the Bureau of Labor Statistics through the Labor Force Statistics from the Current Population Survey[3] . For calendar year 2021 the average national unemployment rate was 5.3 percent. This approach will create a more predictable environment for taxpayers as opposed to a rolling average of the last 12 months.

(4) Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

Response: A location can meet the definition of an energy community as a census tract (or directly adjourning census tract) where a coal-fired electric generating unit has been retired after December 21, 2009 or a coal mine closed after December 31, 1999.

Coal Mines: To establish where a coal mine has closed since December 31, 1999, Treasury should use data from the Mine Safety and Health Administration Data dataset 13 - "Mines Data report". In this report mines are classified as "Abandoned, Abandoned and Sealed, Active, Intermittent, New Mine, NonProducing and Temporarily Idled." Treasury should include mines that meet the "Abandoned" or "Abandoned and Sealed" determinations, but should not include "non-producing" or "temporarily idled" mines.

[3] (Series Id LNU04000000)

As part of ClearPath's energy community analysis, we determined that the geographic coordinates of 175 records in this report were located outside the United States and 129 records have coordinates that were located in the wrong state. Treasury should work with MSHA to establish an authoritative set of mines that meet the definition of an energy community and determine their specific location.

Coal-Fired Electric Generating Units: A large combustion-based electric generation plant typically consists of one or more electric generating units. In some cases, each unit may operate using a different fuel source, such as biomass or natural gas.

The statutory language reflects that generating units at a single plant may initially come online or be retired at different times. Meeting the requirements of an energy community by statute requires only that a single coal-fired electric generating unit has been retired, even if other units at the same plant continue to operate using coal or alternative feedstocks. Similarly, the legislation requires no minimum size for a retired coal-fired electric generating unit to qualify the census tract as an energy community.

This follows the current practice for other tax credits that are applicable based on a single electric generation unit at a facility where multiple units are in operation. While this subclause does not refer to the distinction between an electric generating unit and an "electric generating facility" or "electric generation station", had the legislation intended to apply this at the facility level the statute would reflect that difference as appears in other subsections of the Internal Revenue Code.[4]

In the case of a dual fuel unit capable of firing coal or more or more alternative feedstocks, the Department should interpret the statute broadly to include any unit that had been regularly used to fire coal to produce electricity prior to its retirement, based on the attestation of the operator and receipts of coal shipments.

In the case of an electric generating unit that is repowered to run on an alternative feedstock than coal, such projects should be considered retired for the purposes of this section. According to documents published by the Environmental Protection Agency (EPA) retirement is the first phase of coal power plant decommissioning. At this phase of a closure there is no requirement or expectation to remove existing equipment or demolish buildings, only to "announce retirement and cease power production."[5] For a unit that is to be repowered using an alternative feedstock such as natural gas or nuclear power, this should constitute a "retirement" for the purposes of this paragraph as the unit

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[4] The distinction between units and facilities is specifically drawn elsewhere in the IRC. For example, see 26 U.S.C. 204(a)(15) "Certain electric generating stations.—The amendments made by section 201 shall not apply to a project located in New Mexico consisting of a coal-fired electric generating station (including multiple generating units, coal mine equipment, and transmission facilities)...

[5] Environmental Protection Agency, . "Plant Decommissioning, Remediation, and Redevelopment" EPA Publication #560-F-16-003.
https://www.epa.gov/sites/default/files/2016-06/documents/4783_plant_decommissioning_remediation_and_redevelopment_508.pdf

is no longer a coal-fired electric generating unit and the number of coal-fired electric generating units in the census tract has been permanently altered as a result of repowerment.

(5) For each of the three categories of energy communities allowed under § 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a "brownfield site" under § 45(b)(11)(B)(i), a "metropolitan statistical area or non-metropolitan statistical area" under § 45(b)(11)(B)(ii), or a "census tract" under § 45(b)(11)(B)(iii) should be considered, and why?

Response: If the Secretary does determine that energy communities should be periodically reviewed, the legislation does not address the status of the enhanced credit value if the location ceases to qualify as an energy community. Therefore, the Secretary should promulgate guidance that includes a safe harbor provision so that a qualifying facility located in an energy community when the tax credit is first claimed at beginning of construction retains the enhanced credit value attributable to the energy community provision for the duration of the underlying tax incentive.

The legislation does not consider how to treat a qualified facility that first claimed a credit prior to the enactment of this paragraph. ClearPath recommends that such facilities be granted the elevated credit value for any year where the qualified facility is located in an energy community, but such facilities should not be guaranteed this elevated rate should the location cease to be an energy community in future taxable years.

The legislation does not explicitly consider how to treat the expansion of a qualified facility under the paragraph establishing energy communities. ClearPath recommends that for the purposes of this paragraph, the expansion of a qualified facility located in an energy community during the taxable year be granted safe harbor to receive the increased credit value for the duration of the credit, but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit. This is consistent with the long-standing requirements for expansions under subsection (d).

Under this approach, and consistent with the recommendations under "pre-existing facilities" section above, an expansion of a facility located in an energy community at the time it begins construction would receive the elevated credit rate for the lifetime of the credit. Conversely, the portion of the qualified facility that was placed in service prior to the effective date of paragraph (12) would only receive the elevated credit value in taxable years where the location qualifies as an energy community.

(6) Under § 45(b)(11)(B)(ii)(I), what should the Treasury Department and the IRS consider in determining whether a metropolitan statistical area or non-metropolitan statistical area has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas? What sources of information should be

used in making this determination? What tax revenues (for example, municipal, county, special district) should be considered under this section? What, if any, consideration should be given to the unavailability of consistent public data for some of these types of taxes?

Response: Another way for a location to qualify as an energy community is for an MSA or non-MSA region to have had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas in any year since December 31, 2009. MSAs are not taxing entities and are composed of potentially hundreds of independent taxing jurisdictions. Based on the statutory language, the entire MSA or non-MSA would need to meet or exceed this threshold in aggregate in order to qualify. Plainly, this data does not exist in a centralized location.

It is unlikely that the Treasury will be able to access reliable public data nationwide that will satisfy this provision. For the purposes of this provision, Treasury should account for tax revenues from any county, municipality, and/or special district located within a MSA or non-MSA region. There may be hundreds of independent taxing jurisdictions located within a given MSA or non-MSA. While collection of these separate local tax records would be burdensome, the statute does not provide a release value for estimation or localization of the tax revenue requirement.

Treasury should consider the unlikelihood of this provision qualifying additional locations given that many MSAs or non-MSA regions that would satisfy the criteria for local tax revenues will also satisfy the criteria of the unemployment threshold in this section.

(7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

Response: As discussed previously, there is a significant opportunity to address several data challenges to assist the private sector in determining the locations that qualify as an energy community. The three major areas were the lack of a centralized databank of local tax revenues related to fossil fuel resources, the lack of a comprehensive national inventory of brownfield sites and the real property associated with each, and incorrect geographic coordinates for coal mines from the National Mine Safety Administration dataset.