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SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA: LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: **Treasury Department and IRS Guidance on Prevailing Wages and Apprenticeship Requirements, Domestic Content Adder and Energy Communities Adders Implementation from the IRA**

Dear Ms. Batchelder and Mr. Paul:

Cypress Creek appreciates the opportunity to submit comments regarding the Inflation Reduction Act ("IRA") pursuant to Notice 2022-51, focused on questions from the Treasury Department and IRS regarding various requirements and credit adders in the IRA, including prevailing wage and apprenticeship requirements, the domestic content credit adder, and the energy communities adder. We worked closely with the American Clean Power Association (ACP) and Solar Energy Industries Association (SEIA) to develop much of the comments below, and very much appreciate the staff of those organizations for their efforts.

I. EXECUTIVE SUMMARY

Cypress Creek Renewables in its comments below recommends prioritizing the following key topics for clarification and guidance:

- For the prevailing wage and apprenticeship requirements, we recommend ensuring that terms such as "construction", "alteration and repair", "laborers and mechanics", and "site work" are well defined, and staked in the realities of the statutory definitions of those and other terms, as well as the realities of project development, as detailed below. We also counsel that a comment period, taking in diverse stakeholders, would particularly aid development implementation of these critical provisions of the IRA.

- Further, on prevailing wage and apprenticeships, Cypress Creek urges the IRS to take oversight for curing any errors in payment of correct wages or apprenticeships by providing a forum for expeditiously resolving any such claims and provide a right for the taxpayer to respond thereto and appeal any determination before it becomes final, in a timely manner.
- On the domestic content adder, we urge IRS to further clarify what is meant by "steel and iron" versus a "manufactured product," and how each factor into a "qualified facility," as per the IRA. See below for our view on this matter – which seeks to provide a reasonable barrier between steel and iron and manufactured product, such that the intent of the law is satisfied, and developers have the clarity to build our projects and properly take advantage of this adder.
- Finally, and especially critically, for the energy communities adder, we recommend that the IRS should confirm:
    - The correct federal sources of data for determining unemployment and fossil fuel employment in Metropolitan Statistical Areas and Non-Metropolitan Statistical Areas, national unemployment, and closed energy facilities. Cypress Creek, among others, has put together detailed maps using identified sources of data for each of the energy communities' qualifications, to follow Congress' intent through the law, all of which are laid out below.
    - The specific timing when a project can exert its qualification for the energy communities adder, and that the timing be a flexible window starting early enough in the process to plan around as detailed below. Specifically, a developer should be able to certify or file for qualification or a determination at any time beginning up to 5 years before construction, and the "previous year" for unemployment data should be for the previous complete calendar year at the time of qualification filing.

II. PREVAILING WAGES

Q1. Application of Davis-Bacon Wage Requirements.

Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

Cypress Creek Renewables encourages the IRS to adopt additional guidance for clarification of how the Davis-Bacon prevailing wage requirements will apply for purposes of § 45(b)(7)(A) to be consistent with the Department of Labor's (DOL) current application of the Davis-Bacon Act and existing legal precedent.

As the IRA does not provide clear definitions of several important terms that are key to applying prevailing wage (and relevant apprenticeship) requirements, IRS should provide clear definitions for (1) construction; (2) alteration and repair; (3) laborers and mechanics and (4) the site of work. Below is provided detailed discussion from the American Clean Power (ACP) association which we would like to endorse, as on-the-ground developers. For consistency and clarity, we urge IRS to adopt these definitions for determinations of compliance with both prevailing wage and apprenticeship requirements. As an initial matter, we respectfully request that such guidance be issued in draft form (*i.e.*, in a form that expressly will not trigger the 60-day clock in § 45(b)(6)(B)(ii)), so that interested parties can provide public comments within a reasonable comment period.

ACP Definitions:

a. Definition of Construction

The IRS should provide a definition of "construction" that aligns with the way the DOL currently treats construction activities under the Davis-Bacon Act. The term "construction" should refer only to work[1] of a significant nature,[2] performed at the site of work (as defined in subsection (d) below)[3] during the construction period. Each of these is discussed in more detail below.

1. Work of a Significant Nature

In general, prevailing wage and apprenticeship requirements during the construction period should only apply to construction work that creates *new* tangible property that is integral to the production or storage of electricity.[4] IRS guidance should make clear that construction work is limited to work that falls under the definitions in DOL regulations applicable to prevailing wages at 29 CFR 5.2. Under DOL regulations, the term "construction" is intended to cover "construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."[5]

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[1] 29 C.F.R.§ 5.2(j) "The term *construction* . . . mean[s] the following: all types of work done on a particular building or work at the site thereof, *including work at a facility which is deemed a part of the site of the work.*") (Emphasis added); § 5.2(i) (The word "construction work" is defined to "generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."). "The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work [covered by Davis-Bacon] . . . unless conducted in connection with and at the [project] site."

[2] "Significant work" has been distinguished in proceedings. *See, e.g., In the Matter of: Paper, Allied-industrial, Chemical and Energy Workers International Union and Local No. 8-652, Dispute Concerning the Applicability of the Davis-bacon Act (dba)*, 2005 WL 3263821, at *2 ("landscaping work, standing alone, can constitute DBA construction work, the DOE determined that the landscaping work was *too trivial* a part of the overall excavation project to be considered construction work").

[3] Davis-Bacon regulations are limited to "[a]ll types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work . . . [performed] by laborers and mechanics employed by a construction contractor or construction subcontractor." 29 CFR 5.2(j)(1). 29 C.F.R.§ 5.2(l) states: "The site of the work" as "the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed" *but* "*provided* that such site is established *specifically for the performance of the contract or project*")("[A] commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work" is also not included in the relevant "site of the work" definition). Thus, there is a distinction between project specific construction versus general manufacturing sites for national distribution; the former extends to sites that may be adjacent/elsewhere so long as they are established for the purpose of the project.

[4] As further discussed below in Section d, IRS should make clear that such property does not include work performed on existing facilities, or property used for the interconnection of a qualified facility to the grid or utility, public roads to or from a qualified facility or energy property and fencing and existing buildings on the site of the project.

[5] 29 CFR 5.2(i).

Construction work should not include transportation of materials or supplies to or from the site of the work.[6] This includes the delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, even if those materials are delivered directly into a contractor's mixing facilities at the work site.[7] However, if the mechanics and laborers of a material supplier, after transporting items to a worksite, then perform part of a construction contract as a subcontractor (*i.e.*, mixing supply items after delivery), that work should be considered construction work, and laborers or mechanics employed at the site should be subject to applicable prevailing wage and apprenticeship requirements.

If mechanics and laborers generally employed in construction activities perform incidental transportation activities at the site of work, including: (a) transportation between the construction site and a facility dedicated to the construction site; and (b) transportation of significant portions of the construction work from a location, treated as part of the site of the work, to final physical place(s) where it will remain.[8] Those activities should properly be included within the scope of construction activities. Consistent with legal precedent, the applicable time for prevailing wage or apprenticeship requirements is limited to time spent on the site of work; the time that such mechanics and laborers spend offsite should not be covered.[9]

Similarly, IRS guidance should clarify that only activities of a "significant nature" should be included in the scope of construction activities, and specifically exempt activities that are *de minimis*. Although DOL has not elected to set a percentage amount in its regulations for what constitutes significant work (or *de minimis* work), its enforcement practice is to only require prevailing wages for laborers and mechanics who perform construction activities for which more than 20 percent of their work hours are spent on site.[10] However, if such employees spend a substantial amount of their time in any work week (i.e., more than 20 percent) on the site performing manual, physical, and mechanical functions, which are those of a traditional craftsperson, they shall be considered laborers or mechanics for the time so spent.[11] IRS guidance should adopt such a standard, or a similar standard, for establishing what activities constitute those significant enough to be considered activities of a significant nature for purposes of these requirements.

2. Construction Period

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[6] "[T]he transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not 'construction." 29 CFR 5.2(j)(2). *See Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.)*, 932 F.2d 985 (D.C. Cir. 1991).

[7] "[M]aterial delivery truck drivers who come onto *the site of the work to* merely to drop off construction materials are not covered." *Bldg. & Const. Trades Dep't AFL-CIO v. U.S. Dep't of Lab. Wage Appeals Bd*., 932 F.2d 985, 992 (D.C. Cir. 1991).

[8] 29 C.F.R. § 5.2(j) ("Construction" includes "[t]ransportation between *the site of the work* . . . and a facility which is dedicated to the construction of the building or work and deemed part of *the site of the work*" and [t]ransportation of portion(s) of the building or work between a site where a significant portion of such holding or work is constructed . . . and the physical place or places where the building or work will remain."

[9] *Id.*

[10] *See* DOL Field Operations Handbook at 15e16(c) ("For enforcement purposes, if . . . an employee spends more than 20 percent of his/her time in a workweek engaged in such activities on the site, he/she is [Davis-Bacon] covered for all time spent on the site during that workweek."), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf.

[11] US Department of Labor Field Operations Handbook - Chapter 15 [FOH 15e06].

To establish when prevailing wage and apprenticeship requirements are applicable, the IRS should clarify that onsite construction work should be considered to start at the earliest of the excavating to change the contour of the land, excavation for any permanent foundation(s), post/piling installation, or anchor bolts into the ground, or the pouring of the concrete pads of the foundation of a qualified facility or energy property (*i.e.*, work to tangible property that is integral to the production or storage of electricity). Preliminary activities, such exploring, conducting surveys, clearing a site, drilling or pile driving and pull testing to determine soil condition, installation of meteorological towers and stations, or removing existing equipment on the site should not be considered construction activities.[12] Treasury guidance should also clarify that construction work should be limited to construction-like activity, including for purposes of repowering a project. Prevailing wage and apprenticeship requirements applicable for construction activities should end when the qualified facility or energy property is at a state of readiness and availability to perform its specifically assigned function, which typically occurs when it has been placed in service.

b. Definition of Alteration and Repair

"Alteration, and repair" should only include work performed on the site of work of a qualified facility or energy property and limited to actions that the taxpayer is required to capitalize as costs.[13] The site of work definitions applicable to construction in section (d) should also be applicable to alteration and repair activities and performed only by the laborers and mechanics that are defined in section (c).

The terms "alteration"[14] and repair"[15] should refer to making permanent and substantial work on the site of a qualified facility or energy property. This would include the reconstruction or remodeling of existing

[12] Under DOL regulations for Davis-Bacon, construction activities generally do not include development work (i.e., exploratory, preparatory, pre-construction work at the project site). 29 CFR 5.2(j)(1).

[13] Tax law applies definitions in the context of "incidental repairs" versus capital improvements. Under I.R.C. § 162 and Treas. Reg. § 1.162-4, taxpayers are allowed a deduction for ordinary and necessary trade or business expenses, including for "amounts paid for repairs and maintenance to tangible property if the amounts paid are not otherwise required to be capitalized." This regulation has traditionally applied to the cost of "incidental repairs" that "neither materially add to the value of the property nor appreciably prolong its useful life but keep it in an ordinarily efficient operating condition." Rev. Rul. 2001-4, 2001-1 C.B. 295, 297. On the other hand, capitalization of costs has traditionally been required where repairs are "in the nature of replacements that arrest deterioration and appreciably prolong the life of the property." Id. Treas. Reg. § 1.263(a)-3 includes detailed rules to determine whether amounts are paid to improve tangible property and addresses "routine maintenance," which is deemed not to improve a unit of property (i.e., requiring capitalization). This regulation provides, in part:

> Routine maintenance for property other than buildings is the recurring activities that a taxpayer expects to perform as a result of the taxpayer's use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. Routine maintenance activities include, for example, the inspection, cleaning, and testing of the unit of property, and the replacement of damaged or worn parts of the unit of property with comparable and commercially available replacement parts. . .. Factors to be considered in determining whether maintenance is routine and whether the taxpayer's expectation is reasonable include the recurring nature of the activity, industry practice, manufacturers' recommendations, and the taxpayer's experience with similar or identical property.

Treas. Reg. § 1.263(a)-3(i)(1)(ii).

[14]

[15] 29 C.F.R. § 5.2 (j) The terms construction, prosecution, completion, or repair mean the following:

facilities, buildings, or components thereof, by overhauling, reprocessing, or replacing constituent parts or materials that have deteriorated to a substantial degree and have not been corrected through routine maintenance. This would also include unplanned maintenance that requires replacement or material alteration of the property, significant construction activity, or work that requires skilled labor to restore equipment. The terms would not include normal and routine operation and maintenance activities (including landscaping and vegetation management), preventive maintenance work, and minor repairs (such as cyclical, planned work on capital assets to keep equipment working in its existing state, i.e., preventing its failure or decline).

In determining whether work constitutes alteration and repair, a *de minimis* threshold should be applied so that the requirement does not apply to any scope of work for which projected expenses required for the alteration and repair of the project have a total gross cost below 10% (or $1,000,000 if greater) of all initial construction costs and expenses required to place the project in service.

c. Definition of Laborers and Mechanics

These requirements should be limited to laborers or mechanics, which should be defined as those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from clerical or managerial tasks.[16] A laborer or mechanic should not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.[17] According to the DOL Field Operations Handbook, such workers that are excluded from the definition of laborers or mechanics include engineers, architects, guards and watchmen, managers, timekeepers, owner-operators, and material suppliers.[18] Laborers and mechanics include apprentices, but such apprentices are not required to be paid prevailing wage rates if they are qualified as such under 29 CFR 5.2(n)(1), (2), (4) and 5.5(a)(4)(i), (ii).

Under the IRA, prevailing wage requirements are also applicable to the taxpayer's employees, in addition to contractors and subcontractors. However, we expect that only a limited number of taxpayer employees would fall under the definition of laborers and mechanics (i.e., workers whose duties are manual

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(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996, all work done in the construction or development of the project), including without limitation—
(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;
(ii) Painting and decorating;
(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996 in the construction or development of the project).

[16] Such physical work duties are distinguished by DOL from those considered to be "mental or managerial." 29 CFR 5.2(m).

[17] *Id.* The IRA similarly allows taxpayers to exclude from the calculation of total labor hours the hours worked (for purposes of determining the total number of apprenticeship hours required) hours worked by foremen, superintendents, owners, or persons employed in a bona fide executive, administrative, or professional capacity. I.R.C. § 45(b)(8)(E)(i)(II). For purposes of defining persons employed in a bona fide executive, administrative, or professional capacity, see 29 CFR part 541.

[18] *See* DOL Field Operations Handbook at 15e07-15e21, *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf.

or physical in nature). In normal circumstances, the majority, if not all, of the taxpayer's employees that are involved in the construction of a qualified facility or energy property are employed in primarily administrative, executive, or clerical capacities, and would therefore be excluded from prevailing wage requirements applicable to laborers and mechanics.

Treasury guidance should also clarify that transient workers (i.e., workers who travel from project to project or to offsite headquarters or branch locations) must be paid prevailing wage rates only for their time on the site of the work. Treasury guidance should apply the *de minimis* standard discussed above in paragraph (a)(1) to exempt employees who spend insignificant time onsite (i.e., 20 percent of their work hours are spent on site).

d. Definition of "Site of Work"

The term "site of work" should be defined for both prevailing wage and apprenticeship requirements to be consistent with the Davis-Bacon Act, DOL's implementing regulations, and legal precedent.

1. Background

Under the Davis-Bacon Act, prevailing wages requirements apply to "mechanics and laborers employed *directly upon the site of the work*."[19] Both the D.C. Circuit and the Sixth Circuit have found that this term "clearly connotes . . . a geographic limitation" and "the Act applies only to employees working directly on the physical site of the public building or public work under construction."[20] Such limitations are well-reasoned: if the geographic proximity of the Davis–Bacon Act were expanded, it would "create the difficult problem of determining which off-site workers were indeed closely enough 'related' to the public work site to justify inclusion under the Act."[21]

DOL's current definition of the site of work in its Davis-Bacon regulations are consistent with this precedent and our recommendations. Under DOL regulations, the "site of the work" is defined as "physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project."[22] "Other sites" are only included if they are established after

[19] 40 U.S.C. § 276a(a).
[20] *Bldg. & Const. Trades Dep't AFL-CIO v. U.S. Dep't of Lab. Wage Appeals Bd.*, 932 F.2d 985, 990 (D.C. Cir. 1991) (*Midway)* ("Congress intended the employment status of the worker, rather than the location of his job, to be determinative of the Act's coverage"); *see also Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1452 (D.C. Cir. 1994) ("The limitation in the statute making it applicable to " 'mechanics and laborers employed directly upon the site of the work' restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed.").
[21] *L.P. Cavett Co. v. U.S. Dep't of Lab.*, 101 F.3d 1111, 1115 (6th Cir. 1996).
[22] 29 CFR 5.2(l)(1). In the final rule establishing these limitations on the site of work, DOL noted that it considered many different options, considering a range of adjacent sites outside the construction site that would qualify as a site, or

construction of the project has begun, are dedicated exclusively, or nearly so, to performance of the contract or project, and are adjacent or virtually adjacent to the site of the work.[23] Examples of such sites include job headquarters, tool yards, batch plants, borrow pits, and similar locations. Facilities, buildings, or other locations, whether on or offsite, *established before construction on the qualified facility or energy property begins,* are not included in the definition of the "site of the work," even i

If they are adjacent or virtually adjacent to the site of work and dedicated to the project for any period.[24] These can include permanent home offices, manufacturing facilities, branch plant establishments, fabrication plants, tool yards, and similar locations.[25]

2. Application to Qualified Facilities and Energy Property

Cypress Creek urges the IRS to issue guidance establishing the "four corners" of the site of work for purposes of applying the IRA to specific qualified facilities and energy properties. Consistent with previous IRS guidance and DOL regulations, the site of work should include components of property necessary to generate or store electricity up to the fence line/boundary of the qualified facility. This generally includes the electricity generation equipment (i.e., wind turbines, solar panels (or other arrangements of solar cells), battery energy storage systems, and hydrogen production facilities), as well as other equipment or structures necessary to ensure the generation of energy is conducted safely (i.e., mounting equipment, support facilities, tracking equipment, monitoring equipment, transformers and other power conditioning equipment, inverters, and computer control system housing).[26] If there is access road construction within the site of work, that work should be included, but public roads should be excluded. Adjacent or virtually adjacent facilities should be included in the limited circumstances described above (i.e., included only if they are established after construction of the project has begun, are dedicated exclusively, or nearly so, to performance of the contract or project, and are adjacent or virtually adjacent to the site of the work).

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whether transportation should be involved, but in the end, declined to include those activities. 65 FR at 80,274 (Dec. 20,2000). DOL stated that this limit was necessary to exclude "[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components." *Id.*

[23] 29 CFR 5.2(l)(2). Courts have found that sites that "adjacent" or "virtually adjacent" are sites located within no further than two miles from the site of work. *See In re Gary J. Wicke*, ARB No. 06-124, 2008 WL 4462982 (ARB Sept. 30, 2008) (citing *Bechtel Constructors Corp*., ARB No. 97-149, slip op. at 5-6 (ARB Mar. 25, 1998). However, in the preamble to the December 2000 final rule, DOL declined to establish an exact milage limit in its regulations. ("I]t can be almost impossible to determine the exact outer boundaries of large public works projects, such as . . . a major highway construction project. Thus, a numerical figure representing the maximum distance a dedicated facility can be located from the construction site would be arbitrary and impractical to apply."). 65 FR at 80272-73.

[24] 29 C.F.R. 5.2(l)(3). ("Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.").

[25] 29 CFR 5.2(l)(3).

[26] *See* IRS Notice 2018-59, Section 7.01(1) (citing Rev. Ruling 94-31).

The site of work generally should *not* include off-site gen-tie line work or property beyond the point of interconnection of the qualified facility to the grid. As noted above, facilities, buildings, or other locations, whether on or offsite, *established before construction on the qualified facility or energy property begins,* are not included in the definition of the "site of the work," even if they are adjacent or virtually adjacent to the site of work and dedicated to the project for any period.

In addition to the above definition clarifications, Cypress Creek also recommends that guidance would be helpful on what prevailing wage job classifications apply to the labor performed on various aspects of project construction. PV racking and modules installation, for instance, do not need to be installed by electricians and are often performed by general labor or carpenters. The Davis-Bacon wage requirements will have different wages for these job classifications. Clear guidance from IRS on this question is vital to developers, labor and others in the solar and storage industries. At minimum, we request that Treasury clarify that this question of which labor role and associated prevailing wage job classification is used for what work on infrastructure construction should be determined by the taxpayer based on the labor role's qualification to do the work and historical shown ability to do the work.

Q2. Further Cure Guidance.

What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

Section 45(b)(7)(B)(i) provides for a correction and penalty mechanism for taxpayer failure to satisfy prevailing wage requirements. In enforcing such measures, IRS should be responsible for determining whether a taxpayer failed to satisfy prevailing wage requirements and any applicable corrections or penalties related to such a failure. IRS should provide a forum for expeditiously resolving any such claims and provide a right for the taxpayer to respond thereto and appeal any determination before it becomes final.

Once IRS issues a notice of a final determination that a taxpayer has failed to pay prevailing wages, the agency should allow the taxpayer an opportunity to cure the discrepancy between wages paid and prevailing wages within 180 days after a final notice is issued. If the taxpayer cures the discrepancy within that period, there should be no recapture of the tax credit.

If the taxpayer (or contractor or subcontractor) timely cures any deficiency in wages paid to any laborer or mechanic for work performed and timely pays the proper penalty amount (if any), the prevailing wage requirement should be deemed to be satisfied and the full rate should apply. In the case of any failure to pay prevailing wage rates, any reduction in the credit rate should apply only to the specific period during which the failure to timely pay the prevailing wage rate occurred and was not cured by making the required payments. Such reduction should not be applied retroactively to disallow credits that have already accrued during prior periods and taxable years, unless IRS determines the taxpayer acted with intentional disregard. A taxpayer should be able to cure the failure to pay prevailing wage in two ways: (1) if last known address is available, the taxpayer should demonstrate that it has mailed corrective payment to respective laborer or mechanic; or (2) if address is unavailable, the taxpayer should provide such payment to Secretary to be held in trust.

For example, assume that a taxpayer satisfied the labor requirements during the construction of wind facility, but did not meet the requirement for covered activity in the third year after the facility is placed in service, if such failure is not cured, the value of the PTC would be reduced only with respect to PTCs in such third year. Additionally, for a finding of intentional disregard under section 45(b)(7)(B)(iii), the rules should clarify that the taxpayer knowingly or willfully chose to ignore the applicable prevailing wage and apprenticeship requirements or acted voluntarily in withholding required information. [27]

Q3. Verification and Documentation.

What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Treasury and IRS should clarify that compliance will be determined on an audit-only basis, as is normal tax process, and that ongoing or contemporaneous submission to and approval by Treasury or IRS will not be required.

We respectfully recommend that Treasury provide clear and specific guidance, after seeking stakeholder input, on what are the core requirements to support that prevailing wage has been paid, and what the relevant repertoire of tools or systems that could help support that evidence, aside from the Federal standard.

Acknowledging that certified payroll records are required on covered Federal projects --and a number of states may require something similar-- the creation, introduction and administration of such highly regulated payroll requirements, process, and tool will be new to the thousands of solar and renewable companies who constitute the ranks of taxpayers, contractors, and subcontractors. Requiring certified payrolls and the resulting development, promulgation, and administration of such a requirement would be disruptive to the prompt and aggressive deployment of clean energy that is one of the core purposes of the IRA.

For those taxpayers who decide to utilize their existing payroll systems for both Federal and private projects, compliance with the Treasury-defined elements should align.

Treasury could publish an FAQ with a list of compliant tools for which they are aware of that meet the core elements for compliance, and update that list as additional tools are available. Many entities, such as states, cities, and counties either recommend or operate their own payroll software for their respective projects and those records, as well as similar records from similar software outside civic entities, should be deemed equivalent for tax records. We recommend that required elements for records by Treasury should be a focus of guidance. This should include specific details on what a company should document, such as the following for the company, for each employee paid prevailing wage:

a. Company (taxpayer, contractor, and subcontractor) information (name and address)
b. Project information (location and project identifier)

[27] In the context of civil penalties imposed under I.R.C. § 6721(e), for incorrect information returns, "a failure is due to 'intentional disregard' if it is 'knowing or willful'" – determined on the basis of all the facts and circumstances in the particular case. Treas. Reg. § 301.6721-1(f)(2). Relevant facts and circumstances include whether the failure is part of a pattern of conduct by the person who filed the return and whether correction was promptly made upon discovery of the failure. Treas. Reg. § 301.6721-1(f)(3).

c. Payroll period (number or other identifier) and date
1) Payroll information as noted below:
2) Name
3) Work Classification(s)
4) Hours worked daily, by date, including straight and overtime
5) Total hours
6) Rate of pay
7) Gross amount earned
8) All payroll deductions and the total deductions, including those for Fringe and Benefits categories
9) Net wages
10) Statement of compliance from employer with name, title, date, and department (Payroll, Finance, Human Resources, Legal, etc.)

Q4. Alteration or Repair.

Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

For purposes of determining whether the full 100% PTC rate applies under section 45(b)(6)(A), the prevailing wage requirements under section 45(b)(7)(A)(ii) should apply to such taxable year in which the alteration or repair of a qualified facility occurs. IRS guidance should clarify the prevailing wage requirements are not applicable in such taxable years in which no alteration or repair of a qualified facility occurs, and that such requirements resume upon commencement of applicable alteration and repair work.

To eliminate uncertainty as to whether an employer has paid a prevailing wage, Treasury should determine that a company has met the requirement so long as it has paid a prevailing wage that is has a rational basis to believe the role qualifies for. Currently, prevailing wage at https://sam.gov/content/wage-determinations requires reference to a Davis-Bacon WD#, which is based on a job classification. The availability of classifications changes between localities, such as state or county.

Additionally, there is existing ambiguity in the DOL's prevailing wage tables because workers in different prevailing wage occupations or classifications can and do perform the exact same activities in many areas. For example:

- Erecting scaffolding can be carried out by an ironworker, a laborer, a carpenter or an operating engineer
- A solar panel can be installed by a construction laborer, a carpenter or an electrician
- Heavy equipment can be transported on a jobsite by a driver, a laborer or an operating engineer

Treasury should make clear that no penalties or recapture will apply, and the taxpayer will be deemed to be compliant, if prevailing wage rates were paid for the classification to which the company assigned the work, provided that the company had a rational basis for making the assignment. Examples of such a rational basis would include selecting classifications that had been assigned and/or had performed the same or similar work in the past or if the classification included job titles or activities applicable to the role.

II. APPRENTICESHIP REQUIREMENTS

Q5. Determination of Apprenticeship Hours.

What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?

The statutory language under section 45(b)(8) introduces apprenticeship requirements with respect to the construction of any qualified facility in order for that facility to receive full tax credit amounts under sections 45, 45Y, 45V, 48, and 48E. For further clarity, IRS should also make explicit that such apprenticeship requirements need only be met during the project construction phase for purposes of determining compliance, consistent with the statutory language.[28]

IRS guidance should determine that the applicable number of apprentices required shall be determined wholistically for a qualified facility by adding the applicable number of labor hours for construction, activities in a given taxable year and multiplying it by the applicable percentage and such requirement shall be met wholistically for a qualified facility by aggregating apprentices employed by all contractors and subcontractors. In cases where the number of labor hours performed by an apprentice in a job is lower than one full-time position, there should be no express requirement that an apprentice be in a full-time position.

Q6. Good Faith Exception.

(i) What, if any, clarification is needed regarding the good faith effort exception?
(ii) What factors should be considered in administering and promoting compliance with this good faith effort exception?
(iii) Are there existing methods to facilitate reporting requirements, for example, through current Davis-Bacon reporting forms, current performance reporting requirements for contracts or grants, and/or through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database?

Under § 45(b)(8)(D)(ii) the taxpayer shall not be treated as failing the apprenticeship requirement if such taxpayer has made a good faith effort to request qualified apprentices from a registered apprenticeship program.

- **Definition of Good Faith Effort:** Treasury guidance, should provide a clear definition of what constitutes a "good faith effort." This exception should include instances where: (1) the taxpayer exhausts all reasonable means to identify and contact a registered apprenticeship program, as defined section 3131(e)(3)(B), in the same State as the construction, alteration, or repair work and the other criteria enumerated in section 13101(f)(8)(D)(ii) are satisfied; or (2) a registered apprenticeship

[28] "APPRENTICESHIP REQUIREMENTS.—The requirements described in this paragraph with respect to the construction of any qualified facility. . . . Taxpayers shall ensure that, with respect to the construction of any qualified facility, not less than the applicable percentage of the total labor hours. . . ." In contrast, the prevailing wage section, states the requirements apply to: "'(i) the construction of such facility, and (ii) . . . the alteration or repair of such facility."

program, as defined in section 3131(e)(3)(B), does not exist in the same State, within a 100 mile radius of the project at least 90 days prior to the date when the applicable type of labor for a given apprentice would be needed at the site of construction. These means to show good faith efforts also should apply to replacement of an apprentice if an apprentice quits or is released during the construction project. In addition, the good faith exemption, as written, only applies to the referral procedures typically found in union apprenticeship programs; however, the applicability to good faith efforts of non-union contractors should also be addressed by IRS guidance considering granting a "good faith" exemption if there is a registered apprenticeship program but not enough apprentices enrolled to support the project.

- **Attestation:** Additional clarification should specify that a taxpayer may accept and reasonably rely on a contractor's or subcontractor's attestation that the prevailing wage and apprenticeship requirements have been met for purposes of executing a certification statement of compliance to IRS guidance. In doing so, the taxpayer must set forth the basis for such reliance in its records, which should be maintained in conjunction with its certification statement.

- Cypress Creek also suggests that Treasury both specify how far beyond the geographical location of the site of the facility an employer needs to search to seek a registered apprentice program and that Treasury set a reasonable geographical limit for purposes of the good faith exception. We recommend that to comply with the good faith exception, a company need only request apprentices from registered apprenticeship programs in relevant occupations that have a physical office within 100 miles of the project site and are registered in the state where the project site is located.

Q7. Verification/Documentation.

What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

- **Documentation:** To demonstrate compliance with apprenticeship requirements under section 45(b)(8)(A), (B), and (C), IRS guidance should make clear a taxpayer should comply with the recordkeeping requirements for registered apprentice programs outlined in 29 C.F.R. 30.12. If the IRS elects to create its own recordkeeping requirements, such requirements should be those similar to those outlined in 29 C.F.R. 30.12. Imposing documentation or substantiation standards that do not currently exist in the ordinary course of business would be unduly burdensome for the taxpayer.

  Cure Procedures: Similar procedures to cure deficiencies under prevailing wage requirements should apply to a taxpayer who fails to comply with apprenticeship requirements. IRS should be responsible for the full and impartial determination of whether a taxpayer failed to satisfy apprenticeship requirements and any applicable corrections or penalties related to such a failure. IRS should provide a forum for expeditiously resolving any such claims and provide a right for the taxpayer to respond thereto and appeal any determination before it becomes final.

  Upon notice of a final determination from the IRS that a taxpayer has failed to comply with apprenticeship requirements, the taxpayer should have an opportunity to cure the deficiency, consistent with the process set forth in section 3131(e)(3)(B) for prevailing wages, by paying the

applicable penalty within 180 days of such determination. If the taxpayer cures the discrepancy within that period, there should be no recapture of the tax credit.

If there is a submission for a failure to satisfy requirements due to the unavailability of qualified technicians, taxpayers should have the ability to fully cure with a penalty payment. In the case where someone has failed to meet the apprenticeship requirements, but not in the case of intentional disregard, the penalty payment should fully satisfy the rule without the potential for invalidation of credits. If the taxpayer (or contractor or subcontractor) timely pays the proper penalty amount, the apprenticeship requirement should be deemed to be satisfied and the full rate should apply. In the case of any failure to pay any such penalties in a timely manner, any reduction of credit should only apply to the specific period during which the failure occurred and has not been timely cured. Such a reduction should not be applied retroactively to disallow credits that have already accrued during prior periods and taxable years unless intentional disregard is determined.

IV. DOMESTIC CONTENT

(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?

Cypress Creek recommends that instead of using the placed-in-service date, IRS clarify that for purposes of applying domestic content requirements the "completion of construction" is the point where the qualified facility or energy property is at a state of readiness and availability to perform its specifically assigned function. This should be without regard to whether it has been placed in service, as readiness is the metric over which project developers (who will, in most instances, be the relevant taxpayer) have control. For example, if transmission upgrades not constructed by the taxpayer are delayed, a project may not be placed-in-service even if it is otherwise physically and electrically ready to safely operate.

(c) Should the definitions of "steel" and "iron" under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

Cypress Creek urges the IRS to use Federal Trade Administration (FTA) precedent as a guideline for applying steel and iron requirements. Accordingly, IRS should clarify that the steel or iron requirements are limited to "construction materials made primarily of steel or iron" that have a structural, load bearing, or support function, such as "structural steel or iron, steel or iron beams and columns."[29] These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products.[30] In those circumstances, the item should instead be analyzed under the manufactured product test, which is discussed in more detail below.

[29] 49 CFR § 661.5(c).

[30] Id.; *FTA Guidance Letter, Kone Elevators* (Jan. 8, 2015) (elevator guide rails of steel have a primary role to ensure "proper positioning of the elevator within the hoistway" and balance and control speed (in emergency circumstance) – and are not subject to steel requirements under 49 CFR 661.5(b)).

Certain materials and components will benefit from explicit guidance as to where the steel and iron test should be applied. For example, the tracker structure for a PV array consists of steel and iron components but may be considered a manufactured product. Clarity on which items the domestic steel requirement applies to will be necessary to allow developers to plan for meeting domestic content requirements.

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

Cypress Creek recommends that the IRS adopt the following requirements, which will allow a taxpayer to certify that it has complied with the domestic content requirements to be eligible for the bonus credit amount:

- A taxpayer should attach the certification statement to the return on which such credit is claimed. In making its certification, a taxpayer may rely upon: (i) language in its contracts with suppliers requiring that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the United States: or (ii) certification from its suppliers that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the U.S. Where the taxpayer, itself, was the producer or manufacturer, it shall maintain records of such production or manufacturing activity sufficient to support its certification. Upon audit by the IRS, a taxpayer shall make available for inspection the contracts, supplier certifications, and other records supporting the taxpayer's certification.

- A taxpayer must maintain records supporting the enhanced credit, including the contracts, supplier certifications, and other records supporting the taxpayer's certification that the domestic content requirement has been met, in accordance with section 6001 and Treas. Reg. § 1.6001-1(e).

Q2. Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

(c) Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

Cypress Creek recommends that IRS use definitions in FTA regulations and guidance as guidelines for determining components and end products, with minor changes tailored to the clean energy industry that are discussed herein. In determining the domestic content of a qualified facility or energy property for purposes of the domestic content bonus, consistent with FTA guidance in 49 CFR §§ 661.3 and 661.5 for construction projects, a qualified facility or energy property should be categorized in terms of an end product, components, and subcomponents.

1. Mined, Produced, or Manufactured in the United States

IRS should clarify the meaning of "mined, produced, or manufactured" in the United States." Under the IRA, the manufactured products which are components of a qualified facility upon completion of construction are deemed to have been "produced" in the U.S. if "not less than the adjusted percentage (as determined under IRC § 45(b)(9)(C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are *mined, produced, or manufactured in the United States*."

IRS should consider a manufactured product to have been "mined, produced, or manufactured" if the product undergoes a "manufacturing process." Consistent with FTA regulations and guidance, IRS should define the manufacturing process as "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from its components." In the case of a manufactured end product, the components should include all preassembled manufactured products delivered to the final assembly location, as well as those products partially or fully manufactured at the site. The following are examples of manufacturing processes: forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, layup, casting, resin application, wire drawing, annealing, swaging, twisting and stranding, integration, testing, mixing, blending, filing, lapping, finishing, vacuum impregnating, chemical synthesis, molding, compression, injection, laminating, casting, machining, pressing, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.[31]

In the case of solar power generation facilities, for example, trackers are partially manufactured on-site through a complex and exacting process, which requires specialized knowledge and extensive training for installers and adherence to a detailed installation manual and electrical wiring diagram. In this regard, manufacturing the trackers on-site requires extensive "collection, interconnection, and testing of various elements," which the FTA has recognized constitutes a "manufacturing processes" for "mechanical products," such as a trackers.[32] The various subcomponents of a tracker have a useful function only when they are integrated in a specific way that results in a distinct new product—i.e., a tracker—that is "functionally different from that which would result from mere assembly of the elements or materials."[33] The

[31] *See* Final Rule, Buy America Requirements, 56 Fed. Reg. 926, 929 (Jan. 9, 1991).
[32] *See id.; see* FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (installation of an elevator on-site is a manufacturing process; constituent parts of the elevator are subcomponents—and not components—of the building).
[33] *See* 49 CFR 661.3.

process of identifying a qualified facility or energy property that is a manufactured end product, components, and subcomponents is discussed in more detail in the sections below.

As for the U.S. production requirement, under longstanding regulatory precedent, a component is of U.S. origin if it is manufactured in the U.S., regardless of the origin of its subcomponents.[34] Therefore, IRS should clarify that any individual manufactured product that is a component of a qualified facility or energy property will be deemed to have been produced in the U.S. if the manufacturing processes for the product took place in the U.S., regardless of the origin of its subcomponents.

2. Qualified Facility or Energy Property as the System that is an End Product

Eligibility for the domestic content bonus credit amount is determined at the qualified facility level for purposes of section 45;[35] the same determination is made at the energy project level for purposes of section 48.[36] The qualified facility or energy property is the structure or system that directly incorporates the constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly change(s).

As an initial matter, we recommend that IRS define both "system" and "end product" to provide general clarity as well as consistency with FTA regulations. For "system," we recommend that IRS define it to mean "a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables, or circuitry, or by other devices, which are intended to contribute together to a clearly defined function."

For "end product," we recommend defining it as "any structure, product, article, material, supply, or system, including a qualified facility or energy property, which directly incorporates constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly changes." FTA regulations recognize that there are several types of end products, including "manufactured end products." Further, the term "manufactured end product" refers to an "infrastructure project" that can encompass, among other things, freestanding structures such as train terminals, bus depots, and other facilities.[37] As applied to energy projects, IRS should make clear that the term "manufactured end product" also encompasses clean energy "infrastructure projects," such as a wind, solar, or energy storage system. Based on these definitions, we urge IRS to make clear that the qualified facility or energy property is the manufactured end product.

Consistent with this approach, as discussed below, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis, per the two options below.

3. Manufactured Product as a Component of a Qualified Facility & Subcomponents

As noted above, the IRA provides specific provisions for "manufactured products" that are "components of a qualified facility." To clarify these provisions, Cypress Creek recommends that IRS adopt

[34] See 49 CFR 661.5(d)(2).
[35] See IRC § 45(b)(9).
[36] See IRC § 45(b)(9); IRC § 48(a)(9)(ii).
[37] See 49 CFR § 661.3, Appendix A.

a definition for a "manufactured product" as "an item produced as a result of the manufacturing process, including a component of a qualified facility or energy property." For components, we recommend that IRS define a "component" as including any article, material or supply that is directly incorporated into the qualified facility or energy property. To distinguish a subcomponent from a component, IRS should also define a "subcomponent" to be any article, material, or supply, whether manufactured or unmanufactured, that is a "lower-level" item (i.e., one step removed) from a component in the manufacturing process and that is incorporated directly into a component.

Along with the definitions above, the IRS should also provide explicit clarity on which products are components, and which are subcomponents, for all covered technologies. For the entire solar system (qualified as energy property), the following should be considered components: solar modules, trackers, racking, and inverters. The subcomponents should include, but not be limited to, torque tubes, fasteners, module glass, and cells—and not subject to domestic content requirements.

Finally, IRS should clarify that manufactured products that are components of a qualified facility should be *only* those that are directly incorporated into the qualified facility, as defined by the system that produces energy (or which absorbs, stores, and delivers energy, in the case of energy storage), or energy property. Other items should not be treated as part of the manufactured end product.

Finally, for a battery energy storage system that is a qualified facility and a manufactured end product, components should be the following manufactured products: the integrated battery storage enclosure and inverters, among others, because they undergo manufacturing processes to create a manufactured end product (a battery storage system that is capable of absorbing, storing, and delivering energy). Any subcomponents of these components, such as the battery cells, modules, racks, climate control systems, fire suppression systems, DC wiring, battery interface cabinets, uninterrupted power supply, and other integral equipment that are subcomponents of the integrated battery storage enclosure, should be able to be foreign sourced without impacting the categorization of the integrated battery storage enclosure at the component level.

4. Steel and Iron Product as a Component of a Qualified Facility

As noted above, we urge IRS to use FTA precedent as a guideline for applying the steel and iron requirements. Accordingly, IRS should clarify that the steel or iron requirements are limited to "construction materials made primarily of steel or iron" that have a structural, load bearing, or support function, such as "structural steel or iron, steel or iron beams and columns." These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products. IRS should also make clear, under FTA precedent, that components of manufactured products that are made of steel and iron should be deemed manufactured component products even when the components have a secondary structural or load bearing function. [38]

[38] *See* 49 CFR 661.5(c) ("[Domestic steel and iron] requirements do not apply to steel or iron used as components or sub components of other manufactured products."); *see also* FTA Guidance Letter, Applicability of FTA's Buy America Rules to a Traffic Signal System (June 8, 2011) (traffic signal system's mast base, which was "constructed to support the [traffic light's] mast arm," is treated as a manufactured component product of the larger traffic signal system end product, despite its secondary load-bearing function).

For example, solar trackers operate by rotating the solar modules to track the sun's movements throughout the day to maximize the electrical generation output of solar modules. Even though solar trackers incidentally lend to the structural integrity of the solar module, their primary function is to optimize energy generation; like the elevator guiderails in *Kone Elevators*,[39] they should not be subject to the steel and iron requirements. Put differently, because trackers are components of a manufactured product (the solar array), trackers should not be subject to the steel and iron requirements.[40]

Finally, integrated battery storage enclosures include steel containers that house the batteries, battery management systems, climate control systems, and other subcomponents as an interdependent part of the energy property. Even though steel containers lend to the structural integrity of the energy storage facility, that function is secondary to their primary function in controlling the ambient environment for battery operations and ordering subcomponent wiring and other systems. In other words, because steel containers are components of a manufactured product (the integrated battery storage enclosure), steel containers should not be subject to the steel and iron requirements.[41]

(b) Does the determination of "total costs" regarding all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?

The manufactured products that are components of a facility that is incorporated into the qualified facility or energy project should be deemed to have been produced in the United States if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the facilities incorporated into the energy project are attributable to manufactured products that are produced in the U.S. Consistent with the IRA, in determining whether the applicable adjusted percentage has been satisfied for a qualified facility or energy property, Cypress Creek urges the IRS to divide the total cost of the manufactured products that are components of the qualified facility or energy property and that are mined, produced, or manufactured in the U.S. by the total costs of all of the manufactured products that are components of the qualified facility or energy property.

Consistent with the discussion above, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis and, therefore, provide the following options for applying the manufactured product test.

Project-Level Test for ITC and PTC

Under this option, eligibility for the domestic content bonus credit amount would be determined at the project level. The manufactured products that are components of each energy property incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted

[39] FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (elevator guide rails of steel have a primary role to ensure "proper positioning of the elevator within the hoistway" and balance and control speed (in emergency circumstance) – and are not subject to steel requirements under 49 CFR 661.5(b)).
[40] Id.
[41] Id.

percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components incorporated into the energy project are attributable to manufactured products that are produced in the U.S.

To illustrate this option, a taxpayer intends to claim the ITC in connection with an energy project consisting of: (1) a solar energy property (i.e., solar arrays and supporting equipment); and (2) interconnection energy property (i.e., a transformer). Both the solar energy property and the interconnection energy property would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of both the solar energy property and interconnection property are attributable to manufactured products that were produced in the U.S.; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the solar energy property and interconnection property conform with the requirements of 49 CFR § 661.5.

In the way of another example, a taxpayer intends to claim the PTC in connection with an energy project consisting of twenty wind turbines (each of which is a qualified facility), cables, and a transformer. The energy project would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of all twenty wind turbines, cables, and transformer are attributable to manufactured products that were produced in the United States; and (B) any steel and iron construction materials that are not part of a manufactured product and that are incorporated therein conform with the requirements of 49 CFR § 661.5.

V. ENERGY COMMUNITIES ADDER

4.01 1& 5. Locational and Timing Considerations

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?

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?

Cypress Creek encourages IRS to adopt a readily understandable definition for the term "located in."

The Energy Communities (EC) bonus is meant to provide tax benefits to projects located in certain communities that have been negatively affected by the energy transition or environmental damage from fossil fuel extraction and combustion. If an energy project is in these communities, as defined in the statutory text via brownfields, census tracts and Metropolitan Statistical Areas and Non-Metropolitan Statistical Areas, the IRS should deem the energy project to be in an EC that satisfies the requirements under the IRA.

There is little potential to "game" this tax credit, as placing part of a project in an EC area would still directly and indirectly benefit that community. Creating an overly restrictive threshold or percentage of project area

requirement would stymie the development of a number of deserving projects that, because of geographic size, landowner interest, or transmission constraints, might not be wholly located within ECs. For instance, it is exceedingly unlikely that any projects of any size will be located entirely within a brownfield, in part because doing so is likely to raise Clean Water Act issues. Therefore, IRS should adopt a sufficiently flexible and attainable standard for determining if a project is located in an EC so that this credit will actually be useable – as this was Congress's clear intent.

Specifically, for any of the three categories in section 13101 of the IRA, we recommend that projects be able to claim the adder for ECs if a significant portion of either the nameplate capacity of generation or storage, total project cost, or area by acreage; or (2) a substation of the project, or switchgear for projects that do not have a substation, is located in an EC and the majority of the project's output is routed through such substation or switchgear.

As for timing requirements, IRS should allow developers to either certify or seek the EC designation from the IRS before construction begins, up until project completion. Specifically, a developer should be able to certify or file for a determination at any time beginning up to 5 years before construction, and up until construction finishes. Project proponents require this certainty as the EC eligibility of an area could change in the planning process or thereafter. This is necessary to allow taxpayers to adequately plan where to develop renewable energy projects; typically, at least 5 years prior to construction allows for siting, permits, and other necessary planning. If the determination of the EC tax credit is not granted during the planning process, many projects that might appear to initially qualify would have no guarantee that they would maintain the designation and tax credit by the time construction completes, especially given the fluctuating nature of regional employment and decennial remapping of census tracts. Allowing pre-construction employment qualification would incentivize more taxpayers to develop projects in ECs by providing greater certainty for realizing the credit. This flexible timing of the EC determination must be granted to projects that qualify for any of the three categories in section 13101 of the IRA, including projects that qualify based on unemployment rates and census tracts.

The determination of what constitutes the "previous year" also has significant implications for application of the EC credit based upon employment or tax revenue in metropolitan or non-metropolitan statistical areas. Only one interpretation, the calendar year before the certification filing is made, preserves the intent of the IRA. This interpretation leads to predictable planning and certainty. Any other definition would lead to an unwieldy and untenable position for developers, due to the lack of certainty regarding qualification for the credit. For example, the second category of the EC pathways requires identification of areas with higher-than-average unemployment and historic rates of fossil fuel employment. If the "previous year" is interpreted to mean the year before construction is finished, then planning would not be possible. Indeed, the very jobs brought by these renewable energy projects might then disqualify them from receiving the essential tax reductions that brought the investment in the first place. Accordingly, we urge the IRS to adopt a "previous year" definition allowing taxpayers to identify and claim the EC credit with sufficient time to plan and implement the project.

Finally, IRS should make it clear that a qualification should be granted a single time for the full duration of the tax credit - not on an annual basis. This is particularly important for projects claiming the PTC. Having a benefit of only one year at a time will not provide sufficient incentive to encourage projects located in ECs.

Q3. Metropolitan and Non-Metropolitan Statistical Areas and Determinations of Previous Energy Industry Employment

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?

Metropolitan statistical areas (MSAs) are well-defined by Office of Management and Budget (OMB) and U.S. Bureau of Labor Statistics (BLS), and Cypress Creek urges IRS to apply these well-understood statistics and guidance to both MSA's as well as non-MSA's.

Further, the IRS should also clearly delineate the complete list of activities for employment-based EC designations that include but are not limited to the extraction, processing, transport, or storage of coal, oil, or natural gas. Specifically, any area in which direct employment by coal, gas, or oil companies is above 0.17 percent or greater qualifies an area as an EC. The most straightforward way to determine whether an area meets this employment threshold is to use North American Industry Classification System (NAICS) and/or Standard Industrial Classification system (SIC) codes as a proxy for these activities.

BLS conducts the Quarterly Census of Employment and Wages (QCEW), which tracks NAICS level employment monthly across the U.S. Applicable NAICS codes should include:

NAICS Code	NAICS Title
211	Oil and Gas Extraction
2121	Coal Mining
213111	Drilling Oil and Gas Wells
213112	Support Activities for Oil and Gas Operations
213113	Support Activities for Coal Mining
221112	Fossil Fuel Electric Power Generation
2212	Natural Gas Distribution
23712	Oil and Gas Pipeline and Related Structures Construction
324	Petroleum and Coal Products Manufacturing
32411	Petroleum Refineries
424710	Petroleum Bulk Stations and Terminals
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)
4861	Pipeline Transportation of Crude Oil
4862	Pipeline Transportation of Natural Gas
48691	Pipeline Transportation of Refined Petroleum Products

As for determining unemployment in a given area in a "previous year," IRS should use the BLS Local Area Unemployment Statistics (LAUS) program data on annual unemployment as much as possible. IRS should work with BLS and their Regional Economic Analysis and Information Offices in conducting consultations

with taxpayers if there remains uncertainty as to whether an area would have the unemployment levels to qualify as an EC.

Q4. Census Tracts and Coal Closure Definitions

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)?

Cypress Creek recommends that IRS incorporate the Mine Safety and Health Administration's database of retired coal mines, and the Energy Information Administration's (EIA) data on retired coal generating units to create a broad list of potential EC sites. Currently, taxpayers must cross-reference incomplete information from multiple sources to ascertain the census tracts in which coal mines have been closed or coal-fired generating units have been retired. It makes more sense to have a complete list and standardized data sources to provide a greater level of certainty. Though a small number of eligible ECs will require individual consultation, that number and the associated resources will be far fewer than if no periodically updated list existed.

We further urge IRS to recognize that a coal-fired electric generating unit closure should include coal-fired units that were modified or repurposed, including retrofits. This may include retrofit for different modes of cleaner energy generation, or as an interconnection point for other energy projects. In addition, the intentional usage of the term "unit" directly implicates partial coal plant closures that have powered down at least one coal burning unit of a multi-unit facility, even if other units remain operational.

For example, if a coal unit is converted to a natural gas or hydrogen burning facility, that should count as a "closure" for EC purposes. These retrofits often take significant time to complete, during which many community members who operated the coal facility might be left un- or under-employed. Additionally, gas plants employ far fewer people than coal. In the same vein, power generating units with coal as a secondary fuel source that retire or are repowered should also qualify as an EC. The IRS should also include coal-fired units and mines that have been mothballed for a period of time (at least 3 years), as they might not officially have been decommissioned, but are extremely unlikely to come back online and have already had a significant economic impact on the surrounding community.

Cypress Creek notes that the IRA refers to "directly adjoining" census tracts for the third category of ECs. Our understanding from geospatial information systems analysts is that "directly adjoining" means touching; this includes two corners meeting at a point. We recommend that the IRS clearly adopt this interpretation of "directly adjoining" to allow for certainty regarding which census tracts adjoin coal mines or coal-fired power plants. This includes adjoining census tracts without regard to state boundary.

Finally, given the changing nature of census tracts, we urge IRS to clarify that "census tracts" for the purposes of EC determination include census tracts as they were at the time of closure as well as all progeny tracts. This will both capture the congressional intent of directing investment to communities affected by the closure, regardless of how census tracts change later, as well as offer sufficient certainty to developers as to where ECs are during the construction timeline and allow the investment to be directed as Congress intended.

Q6. 25 Percent or Greater Tax Revenue Determinations

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?

In mapping the energy communities credit adders to look at our current and future projects, the 25 percent tax revenue determination has been the single most difficult qualification of the adder to properly map, due to confusing bill text and a lack of reliable resources to use.

Cypress Creek therefore suggests that for determinations of the source of local tax revenues, the IRS require a taxpayer to use applicable data from the Census Bureau, or comparable data from a combination of county tax data in proportion to the county's share of the area. We also suggest that other sources of information on direct and indirect revenues from fossil fuels be includable. While the IRA designates a "tax revenue" metric, an excessively narrow definition could improperly remove some areas from consideration as ECs. For example, areas in which tens of billions of dollars are generated each year from fossil fuel production on public lands, much of which funds local schools or state-run higher education through payments in lieu of taxes, might not count as traditional "tax revenue." By using the phrase "related to," the IRA implies that not only direct revenue from fossil fuels should be included, but also indirect and induced revenues.

Although the use of MSA and NMSA is workable for unemployment metrics, it is much more difficult for tax revenue purposes. Calculating area-wide employment is relatively straightforward but doing so for tax revenues is challenging. Calculating tax revenues would involve gathering data for every county government, city government, school district, and other taxing entity within a statistical area. For many areas—especially large rural ones—this data analysis means trying to aggregate hard-to-find data across hundreds of taxing entities. Again, a system designed around average tax revenue based on counties, and the proportions of them that comprise each MSA and NMSA would function more clearly; otherwise, a patchwork of differing local laws and reporting requirements will make this EC provision extremely challenging in application. We also request that IRS publish a list of statistical areas that meet this criterion, as IRS has much more robust access to this data than do private developers. Uncertainty would discourage investment in these communities that most need it, contrary to congressional intent.

IV. CONCLUSION

We appreciate the opportunity to respond to this request for comments on the labor, domestic content and energy communities provisions and their implementation and look forward to continuing engagement with the IRS and Treasury on this issue.