November 4, 2022

The Honorable Janet L. Yellen
U.S. Secretary of the Treasury
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203, P.O. Box 7604
Ben Franklin Station, Washington, D.C., 20044

Re: Notice 2022-51, 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

Dear Secretary Yellen:

Marin Clean Energy ("MCE") hereby submits these comments in response to the U.S. Department of the Treasury's ("Treasury") above referenced request for comments to issue guidance regarding the provisions of §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the Internal Revenue Code ("Code"), as amended or added by Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 ("IRA").

MCE is a California Community Choice Aggregator ("CCA") and California Joint Powers Authority that provides electricity generation service to approximately 575,000 customer accounts across 37 Bay Area communities. Established in 2002 by AB 117,[1] California's CCA program allows for communities to join together as public agencies to purchase electricity and advance clean energy on behalf of community members. CCAs reinvest in our communities through a wide variety of programs, with many focused on energy efficiency, demand reduction, and decarbonizing buildings and transportation.

I. Treasury should clearly distinguish between products that are considered iron or steel and products that are considered manufactured products for purposes of the domestic content requirements.

In the interest of providing taxpayers and their suppliers clear and concise definitions so they can confidently invest in new clean energy projects, MCE strongly recommends that Treasury clearly distinguish between products that are considered to be iron and steel and items that are considered to be manufactured products under the domestic content requirements. This is important because the required percentages of steel and iron (100%) are significantly higher than those for manufactured products (40%), in each case, across a facility. For political subdivisions such as MCE, a failure by

[1] AB 117 was codified in several separate sections of the California Public Utilities Code, notably sections 331.1, 381.1, 366.2, and 707. In 2011, SB 970 strengthened the CCA program by prohibiting utilities from marketing against CCAs except through a separate marketing division that is separated from the utility's other operations. In 2016, AB 1110 established a greenhouse gas emission ("GHG") disclosure framework that applies to all electricity providers, including CCAs.

manufacturers or suppliers to meet these thresholds is not just a matter of forgoing an increased credit rate. Rather, a failure to meet them will result in a 10% reduction in available direct payments to MCE and other similarly situated entities beginning with facilities that begin construction in 2024 or later.[2]

Code Section 45(b)(9)(B)(ii)[3] points to 49 C.F.R. 661.5 to define what steel and iron are for purposes of the domestic content requirements. The language in 49 C.F.R 661.5(c) is quite broad, but ill-suited for the task at hand. The subsection provides that "[t]he steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges." However, this definition does not address renewable energy facilities--which are not infrastructure projects--and the role that steel and iron components play in them. Simply put, Treasury must separately define steel and iron for purposes of the domestic content bonus credits or taxpayers will be stiffled by the lack of certainty about how to interpret 49 C.F.R. 661.5 in the context of renewable energy facilities.

MCE urges Treasury to specify in guidance that in the context of any property or facility described in any of the Code provisions included in the IRA, steel or iron is any component made primarily of steel or iron that has solely a structural, load-bearing, or support function for the property or facility. In this context, construction materials made primarily of steel or iron should include only those components described in the immediately preceding sentence when the steel or iron content of such materials is greater than 80 percent.

Code Section 45(b)(9)(B)(iii) describes manufactured products, but does not define the concept generally or by reference to 49 CFR 661. MCE recommends that Treasury clearly define "manufactured product" to mean any item produced as the product of a manufacturing or fabrication process and expressly include in that definition any property incorporated into a qualified facility or energy property that is not steel or iron, as defined above. For this purpose, "Manufacturing or fabrication process" should be defined as the application of processes to alter the form or function of materials or of elements of tangible property in a manner that transforms those materials or property this is functionally different. For example, manufacturing or fabrication processes may include forming, extruding, bending, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, lapping, finishing, vacuum impregnating, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.

Finally, MCE urges Treasury to confirm in guidance that the waiver provisions set out in 49 CFR 661.7 are available for purposes of applying the domestic content requirements and setting forth a method of process for asking for a waiver under the circumstances described therein. MCE observes that Code Section 45(b)(10)(D) provides for certain waivers or relaxation of the domestic content requirements in certain circumstances. While this is appreciated, these waivers are quite specific and narrow. However, they are clearly not exclusive. Code Section 45(b)(10)(B)(i) refers to 49 C.F.R. 661 generally for purposes of determining if steel, iron, or manufactured products were "produced in the United States". 49 C.F.R. 661.7, which is a part of 49 C.F.R. 661, describes a waiver process applicable to four specific instances,

[2] Code Section 45(b)(10)(C). Other Code sections that utilize domestic content ultimately point to this provision for the same purpose.

[3] All of the Code sections that utilize a domestic content bonus amount ultimately point to this provision.

none of which are duplicated in Code Section 45(b)(10)(D). This waiver process applies to steel, iron, and manufactured products. Thus, Code Section 45(b)(10)(D) should be interpreted as an expansion of the class of circumstances in 49 C.F.R. 661.7 in which a waiver will be available, and not as an exclusive list of the circumstances in which a waiver will be available.

II. Treasury should adopt clear and administrable rules and documentation requirements for establishing when a manufactured product is manufactured in the United States.

Most manufactured products are complex components comprised of multiple parts or subcomponents. In many cases, it may be very difficult to determine where any single part or subcomponent originated or was manufactured or fabricated. Accordingly, MCE recommends that Treasury publish clear and administrable rules for establishing when a manufactured product is manufactured in the United States.

To set the context, it is important to have in mind the precise language in Code Section 45(b)(9)(B)(iii):

> For purposes of clause (i), the manufactured products which are components of a qualified facility upon completion of construction shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (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.

This statutory language clearly indicates that manufactured products and portions of those manufactured products that constitute components must be evaluated to determine if such components have been mined, produced, or manufactured in the United States. The statute does not require an analysis of the items of property that comprise a component. The statutory language also clearly indicates that it is sufficient that components be "mined, produced, or manufactured in the United States" (emphasis added).

To create a clear and administrable rule in this regard, Treasury must first distinguish between manufactured products, components, and items of property that are incorporated into components, which MCE refers to here as subcomponents. MCE's proposal for the definition of manufactured product appears above. MCE further recommends that Treasury define "component" to mean manufactured products, articles, materials, or supplies that are separately delivered to the project site and incorporated into or affixed to the qualified facility or energy property and "subcomponent" to mean an individual part that is incorporated into a component during a manufacturing, fabrication, or assembly process.

Then, Treasury must provide to taxpayers a method for calculating when a component is made in the United States for purposes of Code Section 45(b)(9). As noted above, it can be extremely difficult to determine whether each individual item in a component was mined, produced or manufactured. To ensure that taxpayers can realistically utilize the domestic content bonus credit, Treasury must both ensure that a taxpayer can prove compliance and that compliance is achievable. Thus, as an initial matter, MCE recommends that Treasury provide in guidance that any component is considered to be mined, produced, or manufactured in the United States if the component was manufactured, fabricated, or assembled in the United States, regardless of where its subcomponents originate.

Further, the rule adopted by Treasury should provide for a minimum threshold percentage for each component integrated into a manufactured product that must be met in order for the manufactured product as a whole to be treated as mined, produced, or manufactured in the United States. This allows suppliers a margin of error in calculating whether a component was mined, produced, or manufactured in the United States. This margin of error is very important for purposes of ultimately financing the installation of a renewable energy facility because there is no reasonable cause or "fail safe" mechanism in case of inadvertent error in calculating qualification for the domestic content bonus credit. Moreover, obtaining assurances about very rigid information in complex supply chains is extremely difficult in the context of negotiating tax equity investment. If developers and project owners are forced to meet unreasonably rigid requirements concerning whether manufactured products are mined, produced, or manufactured in the United States in order to get tax equity investors (or transferees of tax credits under Code Section 6418) comfortable enough to invest, there is a very material chance that developers will simply stop attempting to utilize the domestic content bonus credit.

For these reasons, MCE recommends that Treasury publish in guidance a safe harbor that specifies that any item that is a manufactured product shall be deemed to have been mined, produced, or manufactured in the United States if all of the manufacturing processes resulting in the conversion of components into a manufactured product took place in the United States. For this purpose, care should be taken to define manufacturing processes consistently with the concept of production of items of property under Code Section 45X.

A taxpayer should also have the ability to otherwise demonstrate that a manufactured product was mined, produced, or manufactured in the United States, *e.g.*, by making available documentation that the minerals or metallurgical ingredients used to produce a manufactured product were extracted or processed in the United States. In this case, the taxpayer should be required to demonstrate that the manufactured product was either mined, produced, or manufactured in the United States, in each case by reference to a threshold amount of the subcomponents incorporated into a manufactured product. For example, if a taxpayer can document that more than 50% of the subcomponents that comprise the biogas cleaning equipment installed at a biogas production facility were manufactured in the United States, all such biogas cleaning equipment, assuming it is a manufactured product, should qualify as mined, produced, or manufacturing in the United States.

MCE further recommends that in determining the origin of each subcomponent, each subcomponent must be treated as either entirely domestic or entirely foreign, based on the place where the component is mined, produced, or manufactured. Furthermore, the individual costs of subcomponents, even if of foreign origin, should be included in the cost of a component that is mined, produced, or manufactured in the United States.

III. Treasury should utilize standard beginning of construction rules for purposes of determining when a project is not required to meet the prevailing wage and apprenticeship requirements

Code Section 48(a)(9) states that the base credit rate shall be multiplied by five times when certain prevailing wage and apprenticeship requirements are met. However, Code Section 48(a)(9)(B)(iii) states

that these requirements will apply only to "a project the construction of which begins" before that day that is 60 days after Treasury publishes guidance concerning the prevailing wage and apprenticeship requirements. However, any guidance that Treasury releases must address not only the prevailing wage and apprenticeship requirements, but also the meaning of "the construction of which begins." This phrase, as used in Code Section in Code Section 48(a)(9)(B)(iii), is exactly the same as the statutory language used in the sunset provisions of various current and prior iterations of Code Section 48. Accordingly, MCE urges Treasury to issue guidance concerning this standard that is substantively identical to prior guidance interpreting this concept and to new guidance interpreting this concept in other circumstances under Code Section 48.

The existing beginning of construction rules are well established. They are familiar to and understood by both taxpayers and the IRS. The certainty that using established rules provides cannot be understated. Clear and understood rules provide the predictability that financing parties require and that helps developers grow their businesses so that they can build more renewable energy facilities.

For these reasons, the MCE suggest that Treasury issue guidance combining the beginning of construction rules in Notice 2018-59 and Notice 2021-41 and specifying a four-year continuous construction safe harbor. The MCE further suggest that Treasury also specifically state in this guidance that after a taxpayer acquires safe harbored property, any actions taken that would constitute continuous construction demonstrate sufficient development of a project such that safe harbored equipment may be transferred to an unrelated person.[4]

Implementing new beginning of construction rules would create unnecessary uncertainty regarding interpretation that will reduce the attractiveness of the new credits and increase administrative burden for the IRS. In addition, issuing beginning of construction rules in the context of the prevailing wage and apprenticeship requirements that are different from those in other contexts under Code Section 48 would be confusing for taxpayers and only lead to inadvertent and unnecessary error. Moreover, new or different rules are not warranted either under principles of statutory interpretation or for any apparent policy reason. Accordingly, MCE urges Treasury to utilize the existing and understood rules concerning beginning of construction in Notices 2018-59 and 2021-41 in the context of the prevailing wage and apprenticeship requirements under Code Section 48(a)(9) and similar contexts in other sections of the Code concerning U.S. federal income tax credits.

[4] *See* Section 8 of Notice 2018-59.

Thank you for considering MCE's comments. MCE looks forward to continuing to work with the Treasury and IRS on implementation of this historic investment in clean energy and decarbonization.

Sincerely,

DocuSigned by:
Nathaniel Malcolm
A028C75D90C84D5...

Nathaniel Malcolm
Senior Policy Counsel
Marin Clean Energy