



NYSERDA

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November 4, 2022

SENT VIA ELECTRONIC FILING

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments from The New York State Energy Research and Development Authority on Notice 2022-47, Notice 2022-48, Notice 2022-49, and Notice 2022-51 issued by the U.S. Department of Treasury and Internal Revenue Service

To Whom It May Concern:

The New York State Energy Research and Development Authority is grateful for the funding and leadership that the federal government is providing to advance energy and climate issues and for the opportunity to provide feedback into the guidance that will be issued by the Treasury Department and Internal Revenue Service. Accordingly, for filing in the above-referenced docket, please find the Comments of the New York State Energy Research and Development Authority. Please contact Kevin Carey, NYSERDA Director of Government Affairs, at (518) 862-1090 ext. 3360 or via email: kevin.carey@nyserda.ny.gov with any questions.

Sincerely,

A handwritten signature in black ink that reads "John Williams". The signature is written in a cursive style with a large loop at the end.

John Williams
Executive Vice President
Policy and Regulatory Affairs

COMMENTS OF THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY

The New York State Energy Research and Development Authority (NYSERDA) is a public-benefit corporation created by the State of New York with a mission to advance clean energy innovation and investments to combat climate change, improving the health, resiliency, and prosperity of New Yorkers and delivering benefits equitably to all. NYSERDA serves as the State of New York's energy office and administers several of New York's clean energy and energy efficiency initiatives to advance the state's Climate Leadership and Community Protection Act (Climate Act). The Climate Act, inter alia, requires the state to: (i) procure at least 6,000 megawatts (MW) of distributed solar generation by 2025, 3,000 MW of energy storage by 2030, and 9,000 MW of offshore wind by 2035, and (ii) direct no less than 35% of the benefit of clean energy investments to disadvantaged communities. New York aims to achieve a zero emissions grid by 2040 and have a fully carbon neutral building stock by mid-century. To further demonstrate New York's commitment to increasing the amount of renewable energy flowing to the electric grid, in September 2021, Governor Kathy Hochul announced an expanded goal to ensure at least 10,000 MW of distributed solar, and 6,000 MW of energy storage to be installed by 2030 and to achieve two million climate friendly homes by 2030.

NYSERDA welcomes and appreciates the opportunity to provide information to the U.S. Department of the Treasury (Treasury Department or Treasury) and the Internal Revenue Service (IRS) regarding the implementation of the Inflation Reduction Act (IRA). This submission encompasses certain general comments and also provides information specific to four of the IRS notices issued on October 5, 2022.

GENERAL COMMENTS

NYSERDA manages a large portfolio of programs across all sectors of the economy that are advancing: building efficiency and electrification; onsite, community and large-scale renewables; onsite and grid level storage; energy planning; transportation and manufacturing, and beyond. As part of this large portfolio, NYSERDA manages a pipeline of 120 privately-developed, large-scale renewable energy and transmission projects, comprised of more than 14 gigawatts of renewable capacity under development. The majority of these projects intend to capitalize on the tax incentives within the IRA.

NYSERDA supports a transparent and robust stakeholder process that occurs as expeditiously as possible to provide clarity to current projects before final capital investment decisions are made. Uncertainty on timing and details within the guidance will delay the deployment of projects and increase their attrition risk, especially given current inflation concerns.

Understanding and supporting the need for a robust stakeholder process, to maximize the benefits of this law, we encourage Treasury to consider the use of interim guidance when applicable. For example: New York State is currently holding renewable and clean energy solicitations that are scheduled to close in early 2023, including offshore wind and land-based renewables. Therefore, clarity in guidance that can be released this year would help applicants appropriately formulate bids and submit accurate bid cost calculations to the benefit of customer ratepayers.

We appreciate that implementation of the IRA is a significant effort for the Treasury and the IRS. As Congress indicated, the ability to implement the programs under the IRA is contingent on adequate staffing within the IRS and we encourage hiring efforts to occur as expeditiously as possible.

Through the formal guidance process, stakeholder engagement should include states, and specifically state energy offices, who are the leading source of clean energy policies and programs in the country. NYSERDA recommends the Treasury Department and IRS create a dedicated process to convene interested states, state energy offices and stakeholders to provide targeted feedback to ensure guidance under the IRA does not contradict pre-existing criteria or goals already set by states. Designating specific staff to support this process and receive and consider feedback from states and state energy offices will help significantly streamline this process.

RESPONSE TO NOTICE 2022-0047 - Request for Comments on Energy Security Tax Credits for Manufacturing Under Sections 48C and 45X

NYSERDA is currently holding an offshore wind generation-focused solicitation that includes funding for related offshore wind supply chain projects and anticipates holding additional dedicated offshore wind supply chain solicitations in 2023 to invest a total of \$500 million in offshore wind ports and supply chain projects. Clarity on the provisions relevant to component manufacturers will be particularly important to these solicitations. As an important aspect of the current offshore wind solicitation, NYSERDA is awarding supply-chain facilities and port funding to manufacture the necessary components for offshore wind projects that bid into this solicitation. This solicitation closes in early January 2023, and these developers and manufacturers require as much advance notice as possible to incorporate federal incentives in their final business case and ensure bids are competitively and viably priced. Providing prompt clarifications on the IRA provisions would significantly reduce ratepayers cost impacts and avoid inflated bid costs due to uncertainty.

NYSERDA believes implementation of Section 48C is critical for successful policy advancement and project development to achieve New York State and Federal clean energy goals. We encourage Treasury and the IRS to issue clear guidance and expectations on the application and certification process, as well as to identify deadlines for both applications and expected award dates. Certainty with respect to timing will allow state solicitations and project proposals to be well-informed regarding project costs and reduce risks of inflated bid costs.

NYSERDA also incorporates its comments below regarding energy communities as it relates to Section 48C. Treasury and IRS are required to allocate an established amount of the Section 48C credit to projects in energy communities. NYSERDA recommends that Treasury and IRS should provide guidance that recognizes state designations, such as New York State disadvantaged communities, can be relied upon as a standard for identifying energy communities.

For both Sections 48C and 45X, Treasury and IRS should provide the necessary guidance as to what projects and eligible components qualify for the respective credits. Similarly, to the extent Section 48C requires metrics to be met in order to qualify for the credit – e.g., energy efficiency or reduction in greenhouse gasses- clarify is needed. Where possible, Treasury and IRS should use existing definitions and metrics as other similar renewable and clean energy activity implemented by federal law or agencies.

RESPONSE TO NOTICE 2022-48: Request for Comments on Incentive Provisions for Improving the Energy Efficiency of Residential and Commercial Buildings

The buildings sector is the largest user of energy in the State of New York and the most significant source of greenhouse gas emissions. Under New York's Climate Act, New York is working towards a carbon neutral building stock by mid-century. Through this process, we aim to accelerate the modernization of

aging and inefficient buildings, retrofitting homes in disadvantaged communities to be cleaner, healthier, and more resilient, while providing new jobs and business opportunities in clean energy and carbon-neutral industries. Converting the majority of buildings in New York to heating systems that run on clean and renewable energy sources is necessary to meet these goals and the Governor's commitment to deliver 2 million climate-friendly homes by 2030, of which 800,000 are low and moderate income households.

Energy Efficient Home Improvement Credit - Section 25C

Under IRA, the energy auditor must meet the certification or other requirements specified by the Secretary in regulations or other guidance. NYSEERDA recommends that Treasury Department and IRS issue guidance that will include all potentially qualified individuals for this role. NYSEERDA offers the following list for consideration, which is the same criteria NYSEERDA has established for New York's Residential Energy Audit program:

- BPI Building Analyst
- BPI Energy Auditor
- BPI Multifamily Building Analyst
- AEE Certified Energy Auditor
- ASHRAE Building Energy Assessment Professional
- HERS Rater
- LEED Rater
- ICP Quality Assurance (QA) Assessor

NYSEERDA further recommends that the guidance allow for additional, equivalent credentials to be added to the list over time.

NYSEERDA notes that the CEE Tier 1 heat pump specification referenced in Section 25C(d)(2)(A) is divided into regional North/Canada and South/Southwest requirements. NYSEERDA recommends that the IRS issue guidance detailing how the IRS will validate that a taxpayer received a heat pump that qualified for the climate region in which it was installed.

NYSEERDA also notes that the IECC prescriptive requirements referenced in Section 25C(c)(2)(C) for building envelope components are written for new construction. It will be nearly impossible to meet the standards required of the IECC 2021 prescriptive envelope components in most existing home retrofit situations in cold climates. Furthermore, the requirements will only become more challenging to meet over time as the IECC progresses toward net zero energy codes. As a result, very few homes will qualify for tax credits associated with insulation and air sealing measures unless standards that are more reasonably achievable for existing homes can be referenced.

Furthermore, the ENERGY STAR "most efficient" specification, referenced for window replacements to qualify for the Section 25C tax credit, is typically reserved for emerging technologies representing a very small percentage of the available product on the market. As a result, these products may be difficult to source and will most likely be limited to special order windows at a high-cost premium that well exceeds the \$600 annual limit on tax credits for windows.

Treasury should be cautious in adding additional requirements that will serve as barriers to accessing this credit by homeowners.

Lastly, NYSERDA notes that the HOMES and HEEHRA rebate programs introduced in the IRA clearly indicate that rebates from federally funded programs cannot be combined. Confirmation is needed as to the ability to combine federal rebates and/or rebates or tax credits from non-federal sources with these federal tax credits.

Energy Efficient Commercial Buildings Deduction - Section 179D

As a result of the IRA, tax-exempt entities can now leverage the benefit of the Section 179D deduction by allocating the credit to the person primarily responsible for designing the property. The ability to allocate to such a person has existed for some time to property installed on federal, state, or local governments or political subdivisions thereof. Treasury and the IRS have further clarified that this person can include, for example, an architect, engineer, contractor, environmental consultant, or energy services provider. Similar guidance should be provided to tax-exempt entities.

The IRA added the ability to claim the Section 179D – Energy Efficient Commercial Buildings Deduction, for energy-efficiency retrofits that are part of a qualified retrofit plan so long as the retrofit plan is expected to reduce a building’s energy use intensity by at least 25%. The plan must be prepared and certified by a qualified professional. Additional guidance should be issued to clarify whether the same professional must both prepare and certify, or whether that function can be performed by two different professionals. In addition, guidance must clarify whether the retrofit plan means detailed construction documents, quantitative description on proposed improvements, or a Level 2 ASHRAE energy audit or equivalent. NYSERDA recommends the Treasury and IRS consider issuing guidance that identifies a qualified professional as one licensed by an appropriate professional body (including but not limited to AIA and ASHRAE).

Finally, energy use intensity should be defined and can be determined by dividing the combined energy content in British thermal units of all energy delivered to the building by the gross square footage of the building. The energy content of each unit of fuel delivered should be as determined by the utility supplier.

RESPONSE TO NOTICE 2022-0049: Request for Comments on Certain Energy Generation Incentives

NYSERDA comments to this notice are specific to the IRA's environmental justice program for renewable energy facilities placed in service in connection with low-income communities. Since 2012 NYSERDA has administered the state’s distributed solar energy program, NY-Sun, and this program is of particular relevance to the environmental justice program. NY-Sun advances the state’s expanded goal to install 10,000 MWdc of distributed solar by 2030. In addition to the administration of the distributed solar incentive program, NY-Sun provides consumer education, technical assistance to local governments, training, and reduction of soft costs of installation. To date, NY-Sun incentive funds have supported installation of over 130,000 distributed solar projects with approximately 3,200 MWdc capacity. Approximately 3,250 MWdc of additional capacity has secured NY-Sun incentive funds and is in advanced stages of development or construction.¹ NY-Sun incentive funds are allocated to projects on a capacity (per Watt DC) basis where limited “blocks” of capacity are made available at set incentive rates. The “blocks”

¹ Please see the NY-Sun Data Maps and Open NY dataset for detailed information: <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Solar-Data-Maps>. “Advanced stage of construction” means a project has: (i) completed its utility-required engineering study, (ii) made a down payment towards any required utility upgrade work, if applicable, and (iii) secured non-ministerial municipal permits.

of capacity and incentive rates are periodically adjusted in response to market conditions and consultation with stakeholders. Incentive rates and available capacity are further segmented by region and project type, and are published on an online dashboard,² with available capacity updated in real time as projects submit applications through the NY-Sun Portal. As of October 2022, NYSERDA has received and processed over 14,620 applications that have been allocated approximately 1,368,500 MWdc and \$361,095,000 of NY-Sun incentive funds.

NY-Sun also includes the Solar Energy Equity Framework (SEEF) to improve access to solar electric energy for low to moderate income customers, regulated affordable housing, environmental justice communities and disadvantaged communities. NY-Sun has a total authorized budget of approximately \$3.27 billion, including \$400 million dedicated to providing additional incentives and support for projects associated with the SEEF³. The SEEF allows predevelopment/technical assistance grants to community groups and local governments, “adder” incentives for residential installations for low-to-moderate income homeowners, adder incentives for projects serving regulated affordable housing, and two initiatives based on community solar models: the Inclusive Community Solar Adder and Expanded Solar for All. In NYSERDA’s experience, community solar is a uniquely powerful model for benefitting low-income households and disadvantaged communities, and we anticipate that over 90% of the capacity developed within New York’s SEEF portfolio will be community solar.

NYSERDA respectfully submits these comments from the perspective of a public program administrator with extensive experience designing and implementing incentive application processes that include a large variety and volume of solar projects, including those serving low-income communities via the SEEF. This experience includes in-depth and ongoing stakeholder engagement with the solar industry and organizations representing low-income communities. Through these comments, NYSERDA seeks to provide the Treasury Department and the IRS with recommendations regarding the forthcoming guidance and responses to the specific questions presented in Notice 2022-49.

NYSERDA recommends the forthcoming guidance clarify that a community solar project where the generating facility may be remote from the customer electric load and serves low-income customers can also be considered an eligible “qualified low-income economic benefit project.” Specifically, Section 48(e)(2)(C) provides the following two paths to establishing the “Qualified solar and wind facility”: (i) projects located within low-income communities, or (ii) qualifying low-income economic benefit projects. NYSERDA recommends forthcoming guidance provide clarification that “qualified solar and wind facility” includes projects located remote from the low-income customer load that it serves regardless of whether the project is physically located within low-income communities. While the IRA provision provides for this as such, we are concerned that, absent further clarification, stakeholders may conflate the two paths to meet “qualified solar and wind facility”. NYSERDA strongly recommends that the qualification of “low-income economic benefit project” must not be bound by the physical location of the project within a “low-income community,” which the statute does not require. In administering NY-Sun community solar, NYSERDA came to appreciate community solar as a uniquely powerful approach to deliver financial benefits to low-income households, inclusive of renters and homeowners, and that those benefits can be effectively delivered to low-income consumers regardless of project location. Our comments below include

² NY-Sun Dashboards and Incentives at <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Contractors/Dashboards-and-incentives>

³ Please see the filed NY-Sun Operating Plan for a complete overview of NY-Sun activities and budget: <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4168B5F6-2173-47C0-A77A-41DBD412756C}>.

more detailed input regarding potential approaches to application review and project certification for community solar projects seeking allocation as “qualified low-income economic benefit projects”.

NYSERDA recommends that the guidance, to the extent possible and within standards established, allow eligible state programs, for example, state programs supporting solar projects benefiting low-income communities, to certify projects as meeting “qualified low-income economic benefit project” and “low-income residential housing” criteria. Leveraging eligible state programs can accelerate the successful implementation of IRA’s environmental justice allocation program. The Treasury Department and IRS should consider New York’s Inclusive Community Solar Adder⁴, Expanded Solar for All⁵, Multifamily Affordable Housing Incentive⁶, and Affordable Solar Residential Incentive⁷ as eligible state programs that have developed detailed criteria and in-depth review processes. NYSERDA is further committed to align its criteria with the forthcoming guidance to drive greater benefits to low-income households.

NYSERDA does not recommend that projects developed in states that have already established relevant state-level programs be given priority or weighting in the allocation process. However, we recommend that guidance on the allocation process balance the need to establish a national program with the value of avoiding an overly restrictive limit on allocations to projects in states with established programs. Further comments on this subject may be found in the response to Question 6.1 below. In furtherance of this recommendation, we encourage ongoing communication and collaboration between Treasury and the IRS and state programs, through venues such as the U.S. Department of Energy Community Solar Collaborative.

NYSERDA recommends the Treasury Department and the IRS segment or “bucket” capacity by sector (e.g., rooftop residential, onsite low-income affordable housing, community solar) within the 1,800 MW annual allocation as established by §48(e)(4)(c). For NY-Sun, NYSERDA used an analogous approach (described above) and determined it to be an effective structure for a capacity-limited program. In applying a similar approach to IRA’s environmental justice allocation process, different project types could be assigned different capacity “buckets” within the total annual allocation. Additional segmentation could be

⁴ The Inclusive Community Solar Adder supports community solar projects serving low-to-moderate income subscribers, affordable housing, and other facilities serving disadvantaged communities. The goal of the Inclusive Community Solar Adder is to increase access to community solar and resulting electric bill savings for low-to-moderate income households and to reduce operating costs for affordable housing and nonprofit entities serving disadvantaged communities. Round 1 of the ICESA allocations was completed in early 2022. At this time NYSERDA has published proposed revisions to the program application process and rules for a planned Round 2. Full documentation can be found at <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Contractors/Dashboards-and-incentives/Inclusive-Community-Solar-Adder>.

⁵ The Expanded Solar for All program, developed in partnership between NYSERDA and National Grid, will provide all low-income households participating in National Grid’s electric bill discount program (approximately 175,000 households total) with automatic community solar bill credits to supplement existing benefits. The community solar credits are sourced from a pool of projects procured by NYSERDA for the program. Complete details may be found in the Expanded Solar for All Program Implementation Plan: <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C0176DA7-B6ED-44E9-A0FB-11F837BE825D}> }.

⁶ The Multifamily Affordable Housing Incentive provides additional NY-Sun incentive funds to projects serving regulated affordable housing: <https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/NY-Sun/Contractor-Resources/Multifamily-Affordable-Housing-Eligibility.pdf>.

⁷ The Affordable Solar Residential Incentive provides additional NY-Sun incentive funding to projects serving low-to-moderate income residential customers, including both resident-owned and third-party-owned systems: <https://www.nyserda.ny.gov/affordable-solar>.

based on the range of policy and market maturity across different states. Annual adjustment to capacity tranches could account for an evolving market and policy landscape and incorporate rollover capacity.

To the extent allowable, NYSERDA further recommends prioritizing allocations for projects qualifying as low-income residential building projects and low-income economic benefit projects ahead of projects only qualifying as located within a low-income community. NYSERDA experience has shown that physical location of a project is not as good an indicator of whether a low-income community will benefit compared to the more specific criteria for low-income residential building and low-income economic benefit projects.

NYSERDA's recommended approach could potentially 1) account for the variation in development timelines for different categories of projects, and 2) encourage new projects and initiatives in states without well-established solar markets, while enabling more established markets to rapidly re-orient towards low-income benefit projects. In NYSERDA's experience, segmenting qualifying capacity by project types and providing clear and accessible information about availability of capacity block sizes through a real-time online dashboard is crucial to program success.

NYSERDA recommends that the Treasury Department and IRS give utmost consideration to "stage of completion" (also commonly referred to as project maturity) requirements for project applications, as addressed in more detail in Question 6.2. In the administration of NY-Sun, NYSERDA finds project maturity requirements for incentive applications to be the single most important factor in the long-term effectiveness of the NY-Sun program design. We recommend that, under most circumstances, projects should be required to achieve a relatively advanced stage of completion prior to becoming eligible to apply for capacity within the environmental justice allocation.

NYSERDA Response to Certain Questions Presented in Notice 2022-49

Question 6.1: Sections 48(e)(4)(A) and 48E(h)(4)(A) require the Secretary to establish a program to allocate amounts of environmental justice capacity limitation to applicable facilities. In establishing such program, the Secretary must provide procedures to allow for an efficient allocation process.

- (a) *What should the Treasury Department and the IRS consider in providing guidance regarding the application process for taxpayers seeking an allocation of the environmental justice capacity limitation?*

Based on NYSERDA's experience in administering NY-Sun, and as described above, we recommend that Treasury Department and the IRS consider a segmented or bucketed structure for the program, with application processes that may be adjusted for different segments/project types.

Notwithstanding the anticipated guidance from Treasury, we expect that residential rooftop projects owned by third parties, small-medium size projects on affordable housing properties, and large community solar projects will all seek allocations of the environmental justice capacity. Each of these major project types has very different characteristics that will impact the application process and the allocation of limited capacity within a program. For example, based on New York data, most rooftop residential projects are in the size range of 5-15 kWdc. Such projects have simple design and permitting requirements and can go from contracting to installation in a matter of months. In contrast, community solar projects are typically at or near the 5 MWac size cap and may require 3-5 years from site acquisition, through permitting and interconnection, to customer sign up and construction.

It is important to note that New York State currently has a significant pipeline (in excess of 2,000 MWdc) of community solar projects that will be placed in service in 2023-2025. In established community solar markets, projects are typically developed “on spec” and the customer acquisition and mix of residential and/or nonresidential customers are typically not finalized until several months prior to interconnection. We anticipate that, subject to additional guidance, a significant portion of this pipeline will seek allocations as low-income economic benefit projects and ultimately deliver meaningful financial benefits to low-income community residents. We therefore urge Treasury and IRS to consider that an application process that enables access to “shovel ready” projects that are already in advanced stages of development will yield rapid demonstrable benefits from projects placed in service.

(b) How can the application procedures and application process be made accessible to taxpayers?

Program guidance and the application process should provide a high degree of clarity and specificity, especially as it relates to eligibility for different kinds of projects and customers. For example, NYSERDA has found it effective to publish a list of specific affordable housing programs and regulatory arrangements that qualify a project for the NY-Sun Multifamily Affordable Housing Incentive, including the documentation requirements for a project seeking the incentive.⁸ Likewise, for rooftop residential projects serving low-to-moderate income homeowners, NYSERDA accepts multiple proxies (i.e., documented participation in another income-qualified program, such as SNAP or LIHEAP) and forms of documentation to establish eligibility for the Affordable Solar Residential Incentive.⁹

The application process should also allow for the rapid review and allocation of capacity to projects that meet the program requirements. Given the likely volume of applications, and the varied development timelines of different project types, we recommend an open rolling application process; or, if a due-date application is deemed necessary, that applications be reviewed on the most frequent basis possible. As an alternative to requiring individual applications for each project, Treasury and the IRS could consider a portfolio-based approach where project developers submit one application for a fixed amount of capacity allocation to be used across multiple projects with similar characteristics (e.g., same project type or geographical area). This approach may provide administrative efficiencies for portfolios of rooftop residential projects, clusters or campuses of low-income residential building projects, and portfolios of community solar projects that use a uniform customer contract and project structure, and thus deliver consistent financial benefits.

(c) How can the process incorporate community input, engagement, and benefit for projects seeking an allocation of the environmental justice capacity limitation?

The Fact Sheet recently issued and Notice 2022-49 set the right tone for engagement with a broad range of stakeholders regarding the environmental justice capacity allocations. In New York, we strive to maintain transparency and accessibility in our program development process. In our experience, establishing a range of venues and methods for stakeholders can prove valuable. For example, NYSERDA has just conducted a stakeholder engagement process for revisions to our Inclusive Community Solar Adder program, which provides additional NY-Sun incentive funds to community solar projects that deliver financial benefits to disadvantaged communities. In our stakeholder engagement process, we make use of public webinars,

⁸ Please see the “NY-Sun Multifamily Affordable Housing Incentive Eligibility Criteria” document at <https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/NY-Sun/Contractor-Resources/Multifamily-Affordable-Housing-Eligibility.pdf>

⁹ Please see the income verification criteria at <https://www.nyserda.ny.gov/affordable-solar> .

newsletters, one-on-one conversations, and an option to provide written feedback to interested stakeholders to make the process more accessible. In addition, we proactively reach out to community organizations that may not have resources to track the regulatory development as closely as solar developers and may not otherwise be aware of the opportunities to engage.

Question 6.2: What stage of completion, if any, should be required of the taxpayer at the time of application for or allocation of amounts of environmental justice capacity limitation (since the taxpayer will have four years to place the facility in service)?

As it relates to project in service timeline, in our program experience, residential projects can reliably be placed in service within one year of meeting the project maturity threshold required to submit an application (the applicable period may be longer in states that do not have established residential solar markets). However, larger projects, as well as many mid-sized projects sited on low-income residential buildings, often have longer development timelines and, in some instances, require a four-year period. In our experience, a varying in-service deadline for different project types ensures that allocated capacity does not get stranded for a long period of time.

NYSERDA has found that stage of completion (also referred to as “project maturity”) requirements to secure the limited capacity NY-Sun incentives has been the single most important factor in successful program implementation. As the solar market has matured, we have increased project maturity requirements needed to secure an incentive commitment. Prior to increasing project maturity requirements, NYSERDA experienced many instances where capacity with the limited program allocations were reserved by non-viable projects that were ultimately never built. In these cases, even though capacity/funding from cancelled projects could be rolled back into the program, this dynamically reduced available capacity for viable projects and affected program deployment.

This has been especially important for projects in the 1 MWac – 5 MWac size range, where, in 2018, we increased project maturity requirements to include two key thresholds: first, the payment of a 25% deposit to the distribution utility for any system upgrades needed to interconnect the project (determined in accordance with New York’s Standardized Interconnection Requirements for projects less than 5 MWac in size); and second, that a project must obtain all applicable land use and environmental approvals. Projects that meet these two thresholds have also, at an earlier stage, secured site control and completed project design and engineering. Since implementing this change, fewer than 3% of projects in this size range, that have received capacity/funding awards from NYSERDA, have subsequently cancelled these awards and failed to move forward with construction.

Question 6.3: What methods currently exist or need to be designed for a taxpayer to certify that a project is being built in a low-income community, on Indian land, or as part of a low-income residential building project or a qualified low-income economic benefit project?

NYSERDA has developed such mechanisms (relevant to low-income residential building projects and qualified low-income economic benefit projects) as part of the implementation of the Multifamily Affordable Housing Incentive and Inclusive Community Solar Adder. For example, NYSERDA requires project developers to submit documentation, such as an executed regulatory agreement with a local, state, or federal housing agency, that demonstrates that the requirements of the Multifamily Affordable Housing

Incentive has been met.¹⁰ For the Inclusive Community Solar Adder, developers must submit a Marketing & Implementation Plan upfront to secure an incentive award, and upon project completion, must submit a list of subscribed customers indicating the eligibility criteria applied (subject to audit and more in-depth documentation requests at NYSEDA's discretion).¹¹ NYSEDA believes that these examples also underscore our earlier recommendation that existing state-level programs be allowed to certify projects as meeting "qualified low-income economic benefit project" or "low-income residential building project" criteria.

NYSEDA encourages Treasury and IRS to review the detailed documentation and auditing requirements included in NYSEDA program documentation for further information. We believe that potential complexity of the certification process further underscores our recommendation that guidance should consider allowing state programs to support the certification process for the IRA's environmental justice allocations.

Question 6.4: What mechanisms exist for a taxpayer to demonstrate that the financial benefits of the electricity produced by an applicable facility are allocated equitably among the occupants of a low-income residential building project and do not impact the occupants' eligibility for their housing? Similarly, what mechanisms exist for a taxpayer to demonstrate that at least 50 percent of the financial benefits of electricity produced by an applicable facility which is part of a low-income economic benefit project are provided to households within certain income thresholds?

NYSEDA has developed such mechanisms as part of the implementation of the Multifamily Affordable Housing Incentive and Inclusive Community Solar Adder. While the current rules for these two programs may not currently fully align with IRA definitions, we believe the specific processes and mechanisms set out in NYSEDA's program documentation are largely analogous to the considerations raised in Question 6.4.

NYSEDA would like to note that, as part of its implementation mechanisms for these programs, NYSEDA has attempted to balance multiple practical and policy considerations. Specifically, NYSEDA encourages the Treasury Department and the IRS to review the mechanisms set out in the Multifamily Affordable Housing Incentive program documents¹² that allow a project to be considered as delivering benefits to low-income building residents in circumstances where 1) electricity generated by the solar project is used to directly offset building electricity costs rather than individual resident electricity costs, and 2) the housing is under a binding federal, state, or local regulatory structure that ensures that energy cost savings realized by the building will be reinvested to maintain safe affordable housing for residents.

NYSEDA also encourages Treasury and the IRS to review the mechanisms described in the Inclusive Community Solar Adder initiative documents¹³ that 1) requires the submission of a Marketing and Implementation plan for a project (or portfolio of projects) that details how customer outreach will be

¹⁰ Detailed eligibility and documentation requirements can be found in the Multifamily Affordable Housing Incentive Eligibility Criteria guide at <https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/NY-Sun/Contractor-Resources/Multifamily-Affordable-Housing-Eligibility.pdf>.

¹¹ Full documentation can be found at <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Contractors/Dashboards-and-incentives/Inclusive-Community-Solar-Adder>.

¹² Detailed eligibility and documentation requirements can be found in the Multifamily Affordable Housing Incentive Eligibility Criteria guide at <https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/NY-Sun/Contractor-Resources/Multifamily-Affordable-Housing-Eligibility.pdf>.

¹³ See *Id.*

accurate and accessible to low-income communities, and 2) where these requirements are met, allow residential customers to be considered eligible for inclusion in the project via “geo-eligibility” (i.e., residence in a census tract that has been designated a disadvantaged community by New York’s Climate Action Council)¹⁴. NYSERDA has found the “geo-eligibility” mechanism to be of particular importance to the effectiveness of the Inclusive Community Solar Adder program community solar projects and have only implemented it after extensive analysis and stakeholder feedback.

Question 6.5: Is guidance needed to clarify the meaning of the term “financial benefit”?

NYSERDA recommends that guidance clarify that “electricity acquired at a below-market rate” is inclusive of arrangements that have the same practical effect (i.e., a reduction in a household’s electric bill) but may be articulated in a different way under the applicable state energy regulations. For example, New York’s community solar regulations describe “bill credits” generated by community solar facilities that are allocated to participating customers in such a way as to reduce their net electricity bills under the state’s “net crediting” mechanism.

In addition, NYSERDA’s program design has consistently used net savings (i.e., actual reduction in customer electric bill costs) as the measure of financial benefit, rather than the total value of the electricity generated by the project. NYSERDA then sets the required level of savings based on an analysis specific to the program/project-type using available market and policy data. For example, the current Inclusive Community Solar Adder rules require that customers receive a minimum 10% net savings on electricity costs offset by community solar credits (these rules were based on a pre-IRA analysis, and based on the guidance, NYSERDA will reexamine the minimum savings requirements for projects that receive a federal low-income benefit project tax credit allocation).

Under the current framework, the proportion of a project’s financial benefits that accrue to eligible low-income customers can be calculated using the equation below. This approach allows for deeper cost savings to be delivered to low-income customers while still enabling a community solar project to have other customers, such as the large “anchor” customers that are typically sought to enhance a project’s ability to attract financing.

$$\% \text{ financial benefit to eligible customers} = \frac{\text{net electricity cost savings to eligible customers}}{\text{net electricity costs savings to all customers}}$$

Question 6.6: What is a financial benefit of the electricity produced by an applicable facility other than electricity acquired at a below-market rate for occupants of low-income residential building projects and low-income economic benefit projects?

Electricity acquired at a below-market rate is the primary financial benefit that NYSERDA has incorporated into program design. However, we recommend considering the benefits of reducing operating costs of regulated low-income residential buildings (as described in our response to Question 6.4), as well as new approaches that have been proposed by community-based organizations, such as directing some of a project’s financial benefits to a mutual aid fund for community residents.

Question 6.7: What should the Treasury Department and the IRS consider in providing guidance regarding the recapture of the benefits of the credit increase allowed under §§ 48(e) and 48E(h) when property ceases

¹⁴ New York Climate Action Council: <https://climate.ny.gov/Our-Climate-Act/Climate-Action-Council>.

to be property eligible for such credit increase? How should the one-time restoration of eligibility be documented before recapture?

NYSERDA has developed such mechanisms as part of the implementation of the Inclusive Community Solar Adder.¹⁵ In the event of an Inclusive Community Solar Adder project failing to meet ongoing eligibility requirements, a twelve-month cure period is implemented during which the project may reestablish eligibility (i.e., subscribe the required proportion of low-income or other eligible customers to the project). If eligibility is not reestablished and sufficiently documented, then NYSERDA recaptures a pro-rated portion of the Inclusive Community Solar Adder incentive payments made to date based on a twenty five-year expected project life.

Question 6.8: Please provide comments on any other topics relating to the environmental justice capacity limitation under §§ 48(e) and 48E(h) that may require guidance.

In response to this question, NYSERDA requests the Treasury and IRS consider several points made in the “Key Recommendations” section above.

RESPONSE TO 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

NYSERDA urges Treasury and IRS to prioritize guidance around the issues included in IRS Notice 2022-51 given their import to many of the IRA's tax provisions. New York State is currently holding renewable and clean energy solicitations that are scheduled to close in early 2023, and therefore any guidance that can be released this year would help bidders appropriately formulate their bids and submit accurate bid cost calculations to the benefit of customer ratepayers. Specifically, NYSERDA notes the importance of guidance regarding domestic content, prevailing wage and apprenticeship requirements, and Energy Communities on bidding and contracting for projects that are actively being designed. NYSERDA urges the Treasury and IRS to prioritize guidance on these issues as detailed below:

Domestic Content

Clarification is urged on the domestic content bonus rules. Specifically, although the statute refers to section §661.5 (a Buy America Requirement), in relation to steel and iron it is unclear whether all of §661.5 is controlling, in particular with respect to the waivers included by reference to §661.7. By contrast, the statute does not cross reference particular provisions of the Buy America Requirements as it relates to manufactured products and accordingly more guidance is needed concerning the definition of manufactured products, how to determine if they were produced in the United States (in particular when they contain components and subcomponents), and how to evaluate the value of such manufactured products for purposes of determining whether the adjusted percentage has been met. For purposes of value, further guidance should include whether for example, transportation costs, labor costs, should be considered in addition to material cost.

Prevailing Wage and Apprenticeship

¹⁵ Full documentation can be found at <https://www.nyscrda.ny.gov/All-Programs/NY-Sun/Contractors/Dashboards-and-incentives/Inclusive-Community-Solar-Adder>.

New York State has robust labor laws and strong representation by unions. To the extent possible, compliance with the applicable state prevailing wage law or workers covered under a collective bargaining agreement or project labor agreement should be deemed to have been paid the appropriate prevailing wage. Prevailing wages as set under state law are designed to protect workers and provide fair wages. Similarly, those working under a duly executed project labor agreement are deemed to be in compliance with New York State prevailing wage requirements.

Energy Communities

Given decisions must be made now as to the siting of facilities and the administrative difficulty of quickly determining where such communities meet the statutory definition, NYSERDA requests that Treasury and the IRS, to the extent possible, accept any pre-existing state or territory definition of an Energy Community.

As an example of a state approach that Treasury and IRS can rely upon, New York's work provides a clear approach, with the criteria for defining disadvantaged communities (DACs) as a product of a Climate Justice Working Group composed of representatives of state agencies and frontline communities, specifically charged with developing criteria for and a map of DACs across the state.

Leveraging existing, well-vetted criteria such as those established and published in New York would also avoid creating a patchwork of census tracts / communities where some would qualify under state law but not federal law or vice-versa. As guidance regarding Energy Communities is developed, we request that Treasury and IRS first consult with state energy offices on matters such as local energy industry employment, existing and retired power plants relevant to local communities, and the consideration and use of brownfield sites.

In addition, we seek further clarification of an Energy Community specifically as it relates to offshore wind facilities. Offshore wind projects will also have direct, economic benefits for Energy Communities, but much of the project will be in federal waters; therefore, none of the generation facilities of these projects can be "located in" an Energy Community as so defined. Further guidance is therefore urgently needed with respect to how offshore wind projects can qualify for this 10% bonus credit in a manner consistent with the intent of incentivizing offshore wind and bringing benefits to those living in Energy Communities

CONCLUSION

NYSERDA appreciates the leadership from the federal government on these issues and for the thoughtful and transparent process it is using to issue guidance. NYSERDA respectfully requests the Treasury Department and the IRS to consider the comments and recommendations made in this filing. Please reach out should you have any questions; NYSERDA would welcome the opportunity to share its experiences and knowledge.

Respectfully,



John Williams
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Regulatory Affairs and Policy