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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

Submitted electronically via www.regulations.gov; Notice 2022-51

RE: Request for Comments on Domestic Content and Energy Communities Requirements Under the *Inflation Reduction Act of 2022*
Docket ID IRS-2022-0025 (Notice 2022-51)
Docket ID IRS-2022-0023 (Notice 2022-49)

US Wind, Inc. ("US Wind") appreciates the opportunity to comment on the domestic content and energy communities requirements under the *Inflation Reduction Act of 2022* (herein, the "IRA"), as well as ITC eligibility of export cables. The IRA provides for an increased tax credit for certain clean energy projects, provided that certain domestic content and energy communities requirements are satisfied. US Wind strongly supports the dual objectives of Congress to encourage both clean energy development and domestic content.

US Wind is a constituent member of the American Clean Power Association ("ACP") and supports the recommendations submitted by ACP under separate

cover. US Wind writes separately to submit these additional recommendations to assist the Internal Revenue Service ("IRS") in balancing the dual objectives of Congress to make clean energy projects cost-effective and to maximize domestic content manufactured in the United States.

I. CONSTRUCTION MATERIALS ARE NOT COVERED

The IRA provides for bonus tax credits under Sections 45, 48, 45Y, and 48E if all steel, iron, and manufactured products which are components of the completed qualified facilities are manufactured in the United States. To determine whether such products are manufactured in the United States, the IRA provides that the U.S. Department of Transportation ("USDOT") regulations at Sections 661, 661.5 of Title 49, Code of Federal Regulations (49 C.F.R. §§ 661, 661.5).

As a result of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. No. 117-58, enacted on November 15, 2021, the USDOT regulations at 49 C.F.R. §§ 661, 661.5 now apply to three separate categories: steel and iron products, manufactured products, and construction materials. On April 28, 2022, under its authority under the IIJA, the White House Office of Management and Budget ("OMB") issued guidance[1] clarifying that a given product should be categorized as either a steel or iron product, a manufactured product, or a construction material, and not multiple categories. The OMB guidance further clarified that construction materials include non-ferrous metals, plastic, polymers, composites, glass, and wood. Products consisting primarily of these construction materials are not considered manufactured products.

With the IRA, Congress only imposed domestic content requirements on steel/iron products and manufactured products, not construction materials. It appears that Congress intended that the domestic content requirements of the IRA should not apply to construction materials including non-ferrous metals, plastic, polymers, composites, glass, and wood.

The IRS should clarify that the domestic content requirements of the IRA do not apply to construction materials including non-ferrous metals, plastic,

[1] Office of Management and Budget, Memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (Apr. 18, 2022), available at https://www.whitehouse.gov/wp- content/uploads/2022/04/M-22-11.pdf.

polymers, composites, glass, and wood, nor to products consisting primarily of such construction materials. The taxpayer certifications of the IRA may be made without regard to the source of such construction materials incorporated into the facility.

The IRS should further clarify that the domestic content requirements of the IRA do not apply to components of manufactured products, where such components consist primarily of construction materials. Accordingly, for purposes of calculating the domestic content of a manufactured product under the IRA, any component of a manufactured product that consists primarily of construction materials including non-ferrous metals, plastic, polymers, composites, glass, and wood may be considered domestic without regard to the source of such component.

II. PRODUCTS OF TRADE PARTNERS ARE CONSIDERED DOMESTIC

Under longstanding federal law, domestic content requirements considered are inconsistent with the public interest and thus not enforceable when the United States has an agreement with a foreign government to treat that country's products as domestic.[2] Under the Trade Agreements Act of 1979, Pub. L. No. 96-39, Congress has waived domestic content requirements for products from trading partners. Products from trading partners, including signatories to agreements including the WTO Agreement on Government Procurement and other free trade agreements such as the U.S.-Korea Free Trade Agreement, are considered domestic for purposes of the domestic content requirements of the Buy American Act.

Further, the United States has recently entered into additional agreements to treat steel products from trading partners as domestic steel products. Such agreements include the October 31, 2021, agreement between the U.S. and the European Union,[3] and the February 7, 2022, agreement between the U.S. and Japan,[4] to allow sustainable volumes of steel products manufactured entirely

[2] 48 C.F.R. § 25.103(a); 48 C.F.R. § 25.202(a)(1).
[3] Office of the U.S. Trade Representative, Joint US-EU Statement on Trade in Steel and Aluminum (Oct. 31, 2021), available at https://ustr.gov/about-us/policy-offices/press- office/press-releases/2021/october/joint-us-eu-statement-trade-steel-and-aluminum.
[4] U.S. Department of Commerce, Joint U.S.-Japan Statement on Trade in Steel and Aluminum (Feb. 7, 2022), available at https://www.commerce.gov/sites/default/files/2022-02/US- Statement-on-Japan-232.pdf.

within those countries to enter the U.S. without the application of Section 232 tariffs. Domestic treatment of steel and iron products from trading partners serves important policy purposes including to combat unfair trade practices by China, which threaten the domestic steel industry.

Although the United States has long treated products from trade partners as domestic for purposes of the domestic content requirements of the Buy American Act, products from trade partners have not historically been treated as domestic under 49 C.F.R. §§ 661, 661.5, due to language in the international trade agreements that makes those agreements inapplicable to federal grants.[5] Title 49 of the Code of Federal Regulations generally applies to federal grants from the USDOT to state and local transit agencies, and therefore those agencies have not been allowed to treat products from trading partners as domestic for purposes of the domestic content requirements in 49 C.F.R. §§ 661, 661.5. However, the new domestic content requirements in the IRA do not involve federal grants, and therefore products from trading partners should be considered domestic for purposes of the IRA tax credits.

The IRS should clarify that products from countries covered by the WTO Agreement on Government Procurement, and other free trade agreements such as the U.S.-Korea Free Trade Agreement, are considered domestic for purposes of the domestic content requirements of the IRA. Specifically, steel and iron products manufactured entirely within the European Union, Japan, and Korea are subject to such agreements, and are entitled to domestic treatment with respect to the domestic content requirements of the IRA.

III. NON-AVAILABILITY

The IRA allows the IRS to waive the domestic content requirements where "relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality."[6] The U.S. General Services Administration maintains a list of products that are not manufactured in the United States in sufficient quantities of satisfactory quality at 48 C.F.R. § 25.104. Products on that list are considered domestic for purposes of the Buy American Act and may be procured by the United States without regard to their country of origin. USDOT has also waived

[5] *See, e.g.*, U.S.-Korea Free Trade Agreement, Art. 17.2, ¶ 3 (making the agreement inapplicable to grants).
[6] See IRA §§ 13101(g), 13102(l), 13701(a), 13702(a).

the domestic content requirements of 49 C.F.R. §§ 661, 661.5 for such materials.[7]

As an exercise of its waiver authority under new IRC Sections 45(b)(10), 45Y(g)(12), 48(a)(13), and 48E(c)(5), the IRS should clarify that the domestic content requirements of the IRA do not apply to materials identified as non-available at 48 C.F.R. § 25.104, nor to products made predominantly from such materials. The taxpayer certifications of the IRA may be made without regard to the source of such materials incorporated into the project.

The IRS should further clarify that the domestic content requirements of the IRA do not apply to components of manufactured products, where such components are made predominantly of materials identified as non-available at 48 C.F.R. § 25.104. Accordingly, for purposes of calculating the domestic content of a manufactured product under the IRA, any component that consists predominantly of materials identified as non-available at 48 C.F.R. § 25.104 may be considered domestic without regard to the source of such component.

IV. EXISTING WAIVERS APPLY

The IRA provides that the domestic content requirements should be interpreted consistent with 49 C.F.R. §§ 661, 661.5, which are promulgated by the Federal Transit Administration (FTA) of USDOT. FTA has issued permanent nationwide waivers to the domestic content requirements of 49 C.F.R. §§ 661, 661.5, and those waivers should apply to the IRA domestic content requirements.

For example, FTA has a longstanding waiver for computers and software,[8] allowing computers and software to be incorporated into an FTA-funded facility without regard to country of origin. Further, any computer or software that is a component of a manufactured product is considered domestic for purposes of calculating the domestic content of that manufactured product.

The IRS should clarify that the domestic content requirements of the IRA do not apply to materials for which the domestic content requirements of 49 C.F.R. §§ 661, 661.5 have been waived by FTA. The taxpayer certifications of the IRA may be made without regard to the source of such materials incorporated into the facility.

[7] 49 C.F.R. § 661.7, Appendix A(a).
[8] 49 C.F.R. § 661.7, Appendix A(b).

The IRS should further clarify that the domestic content requirements of the IRA do not apply to components of manufactured products, where such components consist primarily of materials for which the domestic content requirements of 49 C.F.R. §§ 661, 661.5 have been waived by FTA. Accordingly, for purposes of calculating the domestic content of a manufactured product under the IRA, any component of a manufactured product that consists primarily of materials for which the domestic content requirements of 49 C.F.R. §§ 661, 661.5 have been waived by FTA may be considered domestic without regard to the source of such component.

V. ENERGY COMMUNITIES

Under the IRA, certain qualified facilities and energy properties may receive an additional 10% bonus credit if the qualified facility or energy property is located in an energy community, which is defined, in part, as: "(3) A census tract (i.) in which a coal mine has closed after December 31, 1999; (ii.) in which a coal-fired electric generating unit has been retired after December 31, 2009; or (iii.) that is directly adjoining to any census tract in which a coal mine has closed after December 31, 1999, or in which a coal-fired electric generating plant has been retired after December 31, 2009."

US Wind plans to interconnect clean power from its offshore wind facilities into Delaware's only remaining coal-fired power plant, the Indian River power plant in Dagsboro, Delaware. The energy communities bonus credit set forth in the IRA is meant to provide tax benefits to projects located in certain communities that have been negatively affected by environmental damage from fossil fuel extraction and combustion in order to hasten the country's transition to clean energy. US Wind's plans to connect massive amounts of clean, renewable offshore wind energy to a recently closed coal-fired power plant in Delaware seems to epitomize the intention of the law. As such, the IRS should deem US Wind's project to be located in an energy community that satisfies the requirements under the IRA.

US Wind urges the IRS to adopt a sufficiently flexible and attainable standard for determining if a project is located in an energy community to ensure maximum applicability of the bonus credit, as was Congress's intent. Specifically, US Wind urges the IRS to allow projects to claim the energy communities bonus credit if a substation of the project is located in an energy community and the majority of the project's output is routed through the energy community. Additionally, offshore wind facilities should be eligible for the bonus credit if the land its interconnection facility is located in is an energy community and/ or a node at which power from the project is commercially settled is located

in an energy community.

US Wind further asks that the IRS allow taxpayers to certify or file for a determination that a site is an energy community as that term is defined in the IRA at any time beginning up to five years before construction up until construction finishes. Such an allowance is necessary for taxpayers to be able to plan where to interconnect renewable energy facilities. In this vein, US Wind urges the IRS to create an official map of certified energy communities and post that map on a publicly available database to ensure clarity and certainty in the process.

VI. ITC ELIGIBILITY OF EXPORT CABLES

It is also important to clarify that the export cable to shore and the project substation and main power transformer on land at offshore wind facilities qualify for the investment tax credit ("ITC") in the IRA. We ask the IRS to make this clarification promptly, either in Section 48 regulations that have been on the IRS priority business plan every year since 2015 or, if that is too burdensome given the number of ITC-related changes in the IRA, by addressing the export cable in a separate notice.

The Biden administration has set a goal of deploying 30 GW of offshore wind energy by 2030. Treatment of the export cable has taken on some urgency as the first utility-scale offshore wind projects are now reaching financing. Treatment of the export cable has a material effect on the financing cost. Offshore wind companies have been discussing this issue with Treasury and the IRS since 2018.

An ITC may be claimed at a new offshore wind facility up to the point at which the electricity is considered to move into transmission. For a land-based wind farm, that point is after the project substation. Gathering lines bring the electricity from each turbine to a project substation. A transformer steps up the voltage. The electricity then moves from there through a gen-tie line to the utility grid. All the equipment from the turbines through the project substation qualifies for an ITC.

At an offshore wind facility, massive turbines are spread over a large area in the water. Subsea cables bring the electricity from each turbine to a 10-story offshore electrical services platform that collects the electricity and then steps up the voltage so that the electricity can be pushed to shore through an undersea export cable. The larger the project and the farther the distance offshore, generally the higher the voltage required. The export cable connects on land to the project substation, which has another transformer to adjust the voltage and

condition the electricity for delivery through a gen-tie line to the utility grid.

The electricity from an offshore project should not be considered in transmission until it has left the project substation and is on its way to the grid, just as for an onshore project. A diagram is attached (Exhibit A) showing the location of the various elements of an offshore project. The project substation is the last step in the process of conditioning the electricity for delivery to the utility grid. Power conditioning equipment qualifies for an ITC.

The turbines, subsea cables, electrical services platform, and export cable offshore and the project substation and transformer on land are all wholly within the perimeter of the project. The project company owns them. They are a "single project" as used in the IRS construction-start notices. The current IRS regulations define "qualified property" for ITC purposes as the parts of a project that are "tangible personal property" and "other tangible property (not including a building or its structural components) that is used as an integral part" of the wind farm. The subsea export cable and onshore project substation and transformer are tangible personal property or other tangible property that are integral to the operation of the project.

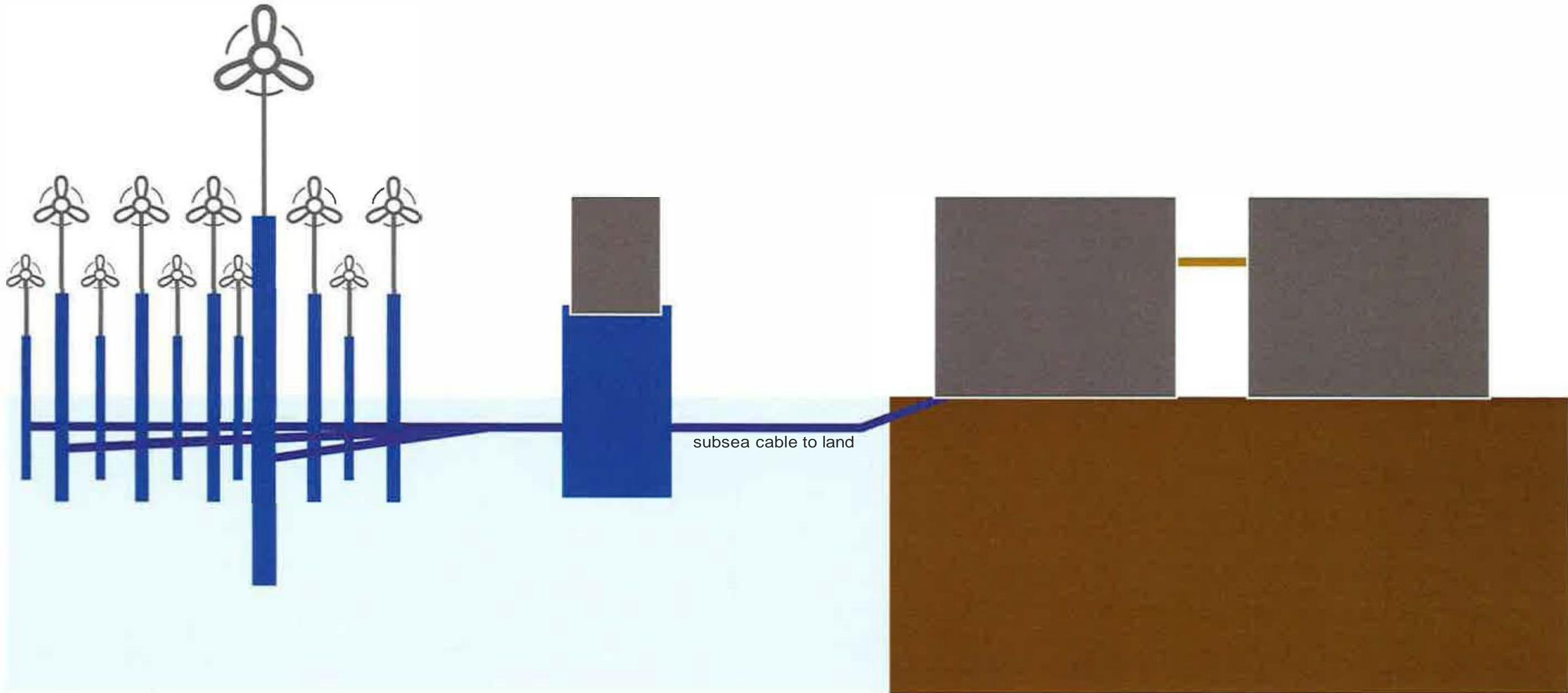
CONCLUSIONS

US Wind, Inc. appreciates the opportunity to comment on the domestic content and energy communities requirements under the IRA, as well as ITC eligibility for export cables. US Wind strongly supports the dual objectives of Congress to encourage both clean energy development and domestic content. We trust that the recommendations submitted in this letter are helpful to the IRS in achieving those objectives in the implementation of the IRA increased tax credits.

Sincerely,

Jeffrey Grybowski
Chief Executive Officer

EXHIBIT A



Offshore Wind Turbines	Electrical Platform	Substation	Substation
PROJECT-OWNED	**PROJECT-OWNED**	**PROJECT-OWNED**	**UTILITY-OWNED**