Comments re: Notice 2022-51

Sections:

.01 Prevailing Wage Requirement

Establish that "construction of which begins" in Code Section 45Q(h)(2)(A) and (B) means as described in the start of construction safe harbor guidance previously issued.

Clarify that "alteration or repair" in Code Section 45(b)(7)(A)(ii) excludes normal periodic operations and maintenance, and de-minimis drop in equipment replacements which are a part of normal operations and maintenance. De minimis could be defined as an activity which does not result in replacement of more than 2% of the original cost of the facility.

.02 Apprenticeship Requirement

Same comments as above.

.03 Domestic Content Requirement

Clarify that the domestic content adder for manufactured products applies all or nothing to the facility as a whole. Some interpret that the adder is available on a component by component basis. For example, if 100% of the racking is domestic, the adder is available on the cost of that component regardless of the other components of the facility. So a credit rate of say 33% is possible. We don't interpret IRA that way. Code Sec. 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) refer to the "total costs of all such manufactured products of such facility…" which to us requires an aggregate computation across the whole facility. That is, the facility as a whole goes from a 30% credit rate to a 40% credit rate.

Nondomestic Steel or Iron in Manufactured Products. Many projects are wanting to source 100% domestic steel but are concerned that small amounts of steel in manufactured products will contaminate their 100% domestic steel content. 100% steel down to the last screw is not technically possible unless all manufactured products are ALSO sourced in the U.S.

An example is an inverter which may contain incidental steel. Another example is a steel shed or storage container. It seems to us that the intent is to source domestic steel for everything that is practically sourceable and controllable by the taxpayer. But if a de minimis amount of steel in a manufactured product ruins the domestic steel content, where the taxpayer had otherwise domestically sourced 100% of the components that are primarily steel components, then all of the incentive to use domestic steel goes away. That would be counter to the intent.

We suggest clarification that the domestic steel content will be met notwithstanding some nondomestic steel if either (i) the amount of nondomestic steel in the whole facility is de minimis [e.g. <3%], or (ii) the nondomestic steel is part of a manufactured product that consists of less than a certain percentage [e.g. 25%] steel by weight and is not structural steel.

One Facility or Multiple Facilities? The addition of new types of facilities to Code Sec. 48(a)(2)(A)(i) like energy storage technology calls the question how the domestic content rules apply where there are multiple facilities being co-located (e.g. solar + storage). Such different technologies have different equipment and different supply chains. We suggest that the taxpayer may treat multiple co-located projects as one facility or multiple facilities, for purposes of domestic content.

Records and documentation. We suggest that taxpayer is allowed to rely on a certificate from the manufacturer of such product, or the supplier of such steel or iron, as evidence of the domestic content thereof. In turn, an end manufacturer is allowed to rely on similar certificates from manufacturers of subcomponents.

.04 Energy Community Requirement

Clarify that a "brownfield" includes sites (i) listed in a state brownfield or voluntary cleanup database; (ii) identified with "recognized environmental conditions," "historical recognized environmental conditions," or "controlled recognized environmental conditions" in a Phase I Environmental Site Assessment; (iii) that have received brownfield funding, (iv) to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.) and not listed on the NPL or subject to corrective action orders, and (v) for which assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26.

This clarification is appropriate because the CERCLA definition of a "brownfield" under 42 USC 9601(39) is primarily a function of site eligibility for brownfield funding from the government and therefore excludes sites that may be funded under other programs, but otherwise involve similar degrees of environmental challenges for redevelopment. The definition of a "brownfield" excludes:

- Landfills (and many other facilities) under 42 USC 9601(39)(B)("a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.)").
- Sites with petroleum impacts that have received funding under the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26. (42 USC 9601(39)(B)(ix)).

- Sites that have received funding under the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.)(2 USC 9601(39)(B)(ix)).

The proposed clarification to the definition of "brownfield" addresses both the vagueness of the term under 42 USC 9601(39)(A) and the likely unintended exclusions under 42 USC 9601(39)(B).

.05 Increase for facility with maximum net output of less than 1 MW-AC.

Clarify that this requirement can either be documented by design specification of the system itself, or by reference to a maximum contractually limited interconnection export of 1 MW-AC.

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