November 4, 2022

SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-49 and Notice 2022-50)
Room 5203
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RE: Treasury Department and IRS Guidance on Prevailing Wages and Apprenticeship Requirement Implementation from the IRA

Submitted via email: *www.regulations.gov;* Notice 2022-51

The American Clean Power Association[1] (ACP) appreciates the opportunity to submit the following comments in response to the Internal Revenue Service's (IRS) *Request for Comments on the Prevailing Wages and Apprenticeship Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022*.[1] IRS guidance will be crucial to ensuring that taxpayers, including the clean energy industry, can effectively navigate the requirements of the Inflation Reduction Act (IRA) regarding the labor requirements for securing full value tax credits.

I. QUESTIONS RAISED BY TREASURY/IRS

A. Prevailing Wages

Q1. Application of Davis-Bacon Wage Requirements.

[1] Available at https://www.irs.gov/pub/irs-drop/n-22-51.pdf (Notice).

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

ACP encourages 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.** We provide a detailed discussion of each of these terms and further clarification as to their unique application to qualified facilities and energy properties in the subsections below. For consistency and clarity, we urge IRS to adopt these definitions for determinations of compliance with both prevailing wage and apprenticeship requirements.

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[2] of a significant nature,[3] performed at the site of work (as defined in subsection (d) below)[4] 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

[2] 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."

[3] "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").

[4] 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.

production or storage of electricity.[5] 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."[6]

Construction work should not include transportation of materials or supplies to or from the site of the work.[7] 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.[8] 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.[9] 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.[10]

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

[5] 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.
[6] 29 CFR 5.2(i).
[7] "[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).
[8] "[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).
[9] 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."
[10] *Id.*

than 20 percent of their work hours are spent on site.[11] 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.[12] 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

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 excavation 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 as 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.[13] 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.[14] The site of work definitions applicable to construction in section (d) should also be

[11] *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.

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

[13] 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).

[14] 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

applicable to alteration and repair activities and performed only by the laborers and mechanics that are defined in section (c).

The terms "alteration" and repair"[15] should refer to permanent and substantial work on the site of a qualified facility or energy property. This would include the reconstruction or remodeling of existing 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). All service activities that are covered under an annual service fee for a service and maintenance contract are to be considered routine maintenance.

Application of the prevailing wage requirements to the alteration or repair of a qualified facility or energy project, after such project has been placed in service, should be limited in scope. Guidance should define "alteration or repair" consistent with the tax law rules related to "incidental repairs" and "routine maintenance." Further, guidance should clarify that work performed under service and maintenance contracts are to be considered routine maintenance and adopt a de minimis threshold under which any alteration or repair work on a qualified facility or energy

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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).

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

project will not require prevailing wages to be paid if the total amount paid by the taxpayer for such work is less than the greater of: (1) $1,000,000; or (2) 10% of the original capitalized cost of the qualified facility or energy project (as defined above).

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 of an administrative, executive, or clerical, rather than manual nature.[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 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"

[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.

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 wage 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 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*

[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 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.

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 of time.[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

ACP urges 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).

The site of work generally should *not* include 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 of time.

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?

[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).

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 the 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 a wind facility, but did not meet the requirements 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 the 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?

[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).

IRS guidance should require certification by the taxpayer that it has complied with the prevailing wage and apprenticeship requirements to be eligible for the full value of the credit amounts under sections 45, 45Y, 45V, 48, and 48E. ACP recommends the process include a certification statement attached to the taxpayers return on which such credit is claimed. Upon a request for inspection by the IRS, a taxpayer should provide such books and records, in printed or in digital form, which are sufficient to establish taxpayer has met the prevailing wage and apprenticeship requirements.

The rules should also specify that satisfaction of the prevailing wage reporting requirements will not include public disclosure of proprietary financial information of taxpayers, contractors, and subcontractors. Any wage and hour data should be treated as tax return information to which section 6103 applies and any that is made public should be released on an aggregated, non-identifiable basis, consistent with current practices under the Davis-Bacon Act.

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.

B. 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]

[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

IRS guidance should determine that the applicable number of apprentices required shall be determined collectively 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 collectively 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 program, as defined in section 3131(e)(3)(B), does not exist in the same State, within a 50 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.

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."

- **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.

- **Qualified Apprenticeship Programs:** Additional clarification should specify that apprenticeship programs can qualify if certified under the National Apprenticeship Act.[29]

- **Offshore Energy Projects:** For offshore qualified facilities or energy properties, the applicable State apprenticeship agency (or agencies) should be the State apprenticeship agency of the State where the majority of onshore staging and construction used in the project takes place. For projects that use multiple ports in multiple states, the applicable State apprenticeship agency should be the one in the state where the port that is used for the highest percentage of onshore staging and construction takes place for a project.

See response to Question 7 for Methods of Documentation.

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

[29] Section 45(b)(8)(E)(ii) defines "qualified apprentice" as "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B)." Section 3131(e)(3)(B) of the Code defines a "registered apprenticeship program" as an "apprenticeship registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.) that meets the standards of subpart A of part 29 and part 30 of title 29, CFR].

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.

II. ADDITIONAL COMMENTS ON ISSUES NOT RAISED BY IRS

A. Unavailability of Wage Information

For determining applicable prevailing wage requirements in instances in which wage information is not publicly available from DOL for a given locality wherein a qualified facility or energy property is located, IRS should clarify that the employer, contractor, or subcontractor may use a state average wage for the applicable craft category. Furthermore, if such craft-based wages are not available in a given location for a given category, the taxpayers may defer to other wage determinations that would serve as a reasonable proxy. The taxpayer will be required to notify IRS and DOL within 30 days of employing either such substitute methods and must maintain the resources and assumptions used.

For offshore energy projects, the taxpayer should pay the wage applicable at the location of the port from which the laborers or mechanics are based for purposes of that offshore work. For projects that use multiple ports, the prevailing wage should be an average of the locality pay at the ports where 15% or higher of the total cost of onshore staging and construction used for the project takes place. For example, if a project uses three ports where more than 15% of the total cost of the onshore staging and construction used for the project is performed at each port, the taxpayer should

pay a wage that is an average of the locality pay at all three ports. If the locality pay for a laborer is $15.00/hr at port 1, $20.00/hr at port 2, and $25.00/hr at port 3, the average locality pay should be $20.00/hr, and should be the uniform pay rate for the project, regardless of the location of where the work takes place, including at the offshore wind site of construction.

B. Project Labor Agreement

Construction, alteration or repair contracts for a qualified facility or energy property awarded pursuant to a Project Labor Agreement (PLA)[30] may have different labor standards for shift, premium, and overtime work. If the qualified facility or energy property is constructed under a PLA, and the employer, contractor or subcontractor has provided shift, premium, overtime, and other non-standard rates as they appear in a project's pre-negotiated labor agreement for all laborers and mechanics who are subject to the PLA, the taxpayer should be deemed compliant with the prevailing wage requirement. Unless relieved of such requirements by entering into a duly executed PLA, taxpayers should be responsible for complying with all prevailing wage requirements (including but not limited to reporting requirements). The taxpayer should be required to maintain a record of the project labor agreement and provide an attestation that the wages paid are at or above the average prevailing wage of localities where the project is located.

C. Posting Requirements.

The prevailing wage requirement as contained in section 3142(b-c) of title 40 (regarding weekly pay and posting the scale of wages on site) should not apply for purposes of these prevailing wage and apprenticeship requirements.

D. Energy Storage Augmentation

Section 48(c)(6)(B) provides that new capacity added to energy storage technology, for which a new investment tax credit under sections 48 or 48E is claimed, should be treated as a modification to the property, not as construction. Therefore, only the prevailing wage and apprenticeship requirements associated with "alteration or repair" should apply to such a modification. ACP requests that IRS clarify that any such modifications to energy storage technology, as described in section 48(c)(6)(B), which qualify for an investment tax credit under sections 48 or 48E, should be considered an alteration to the existing qualifying energy project and, therefore, should not extend or trigger the five-year period for prevailing wage requirements that start on the date such project is originally placed in service.

E. Apprentice Safety

Safeguarding apprentices' welfare and well-being should be of paramount consideration in applying the apprenticeship requirement to offshore activities. Offshore work environments are challenging for a host of reasons, including their remote locations and the physical challenges of the work and the work environment. Apprentices who are new to the construction industry lack

[30] In accordance with FAR 22.504, General requirements for project labor agreements.

experience in sufficiently identifying jobsite hazards, as evidenced by the increased prevalence of injuries among short-tenured workers. The unique health and safety considerations associated with offshore construction should be considered when developing guidance for the apprenticeship requirements. Specifically, we make the following recommendations:

- IRS should consider limiting the apprenticeship utilization requirement to hours worked by classifications of laborers and mechanics for which a registered apprenticeship program exists within the Office of Apprenticeship List of Officially Recognized Occupations, and within the geographical area of the qualified facility.

- IRS should consider whether apprentices engaged in offshore construction can reasonably maintain their status as apprentices in good standing within their registered apprenticeship program while working offshore for extended periods of time, as apprentices may be unable to attend requisite classroom-based instruction.

- IRS should consider the nature of offshore construction, including but not limited to unique safety and environmental risks and limitations on the berthing capacity of vessels/ships engaged in offshore works, when issuing guidance for the apprenticeship requirement and associated ratios. Established apprentice-to-journey worker ratios, as set forth by the DOL or the applicable State apprenticeship agency for traditional land-based construction, alteration, or repair work, may not be feasible or appropriate in the context of offshore construction.

- IRS and DOL should consider developing a field operation handbook outlining the process for requesting apprentice referrals and compliance with apprenticeship requirements, including recommendations for good faith practices.

III. CONCLUSION

We appreciate the opportunity to respond to this request for comment on the labor requirements in the IRA and look forward to continuing engagement with IRS on this issue.

Sincerely,

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