October 30, 2023

Via Electronic Submission

Office of Associate Chief Counsel
(Passthroughs & Special Industries)
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224

Dear Office of Associate Chief Counsel,

The American Council on Renewable Energy ("ACORE") respectfully submits these comments in response to the U.S. Department of the Treasury ("Treasury" or "Department") and Internal Revenue Service ("IRS") request for public comment in response to the proposed regulations pursuant to REG-100908-23 ("proposed regulations") concerning the increased credit or deduction amounts for satisfying certain prevailing wage and registered apprenticeship ("PWA") requirements.

With its enactment of historic labor standards tied to the full value of certain tax credits, the Inflation Reduction Act of 2022 ("IRA") is poised to expand well-paying renewable energy employment opportunities in tandem with accelerated project deployment. The proposed regulations are an important step toward that end, but we appreciate your attention to several critical areas of clarification identified by the comments to follow, which we offer in support of your ongoing work to facilitate compliance through timely, fair, and practicable guidance for all parties involved.

Documentation and Substantiation

The issue concerning a taxpayer's responsibility to maintain proper records for all third-party contractors and subcontractors, including lower-tier subcontractors over which a taxpayer may have no privity of contract, is directly relevant as to whether certification provided by third-party contractors and subcontractors will be permitted to document compliance with PWA requirements.

ACORE respectfully urges Treasury to reconsider its decision not to require submissions of "certified payrolls" and instead establish an information reporting regime that would apply to any contractor and subcontractor at any level that is notified they are performing work on a project subject to the prevailing wage and apprenticeship requirements. ACORE would ask that Treasury establish an information reporting structure to provide sufficient information to taxpayers to administer the prevailing wage and apprenticeship requirements, and to document correction of any potential errors (e.g., monthly

information reporting to taxpayers and the IRS of relevant information under penalties of perjury, and rules similar to those established for other information reporting programs). ACORE respectfully recommends that taxpayers and transferees be entitled to rely upon this information for purposes of satisfying the substantiation requirements under Section 6001 of the Internal Revenue Code (IRC) and to perform the due diligence required under IRC Section 6418, respectively.

We respectfully ask Treasury to provide that the Sec. 6001 requirements are met when a contractor or subcontractor provides information in the form of a certified payroll under penalty of perjury to the taxpayer and has contractually committed to curing any defects. It is reasonable for the IRS to incorporate a reporting approach similar to IRS Form 1099. ACORE also respectfully asks Treasury to contemplate two additional mechanisms that will encourage streamlined and more accurate compliance: (1) a process for taxpayers to obtain confirmation from the IRS in "real time" whether the classifications of particular employees is correct rather than leaving it to audit (2) and a voluntary method whereby the taxpayer can submit and obtain certification of compliance with PWA requirements in advance of filing a tax return, similar to the Compliance Assurance Process (CAP) for large corporate taxpayers.

Consistent with developing the above-described information regime, ACORE members have repeated their desire for Treasury to also devise and maintain a standardized digital platform that is used for all other PWA documentation and user-friendly, especially for small businesses, by accepting information from any state, Department of Labor (DOL), and local apprenticeship programs. ACORE respectfully urges Treasury to avoid a fragmented approach to reporting and work collaboratively with DOL on approaches to help avoid an unreasonable compliance burden for taxpayers, who may need to submit information on multiple projects. ACORE members have emphasized that the simplicity of the reporting process is positively correlated with the willingness and ability of parties to comply. We also respectfully emphasize, per our recommendations above, that such a platform should accept information and certification provided by third-party contractors and subcontractors for the purposes of PWA compliance and can be relied upon by taxpayers and transferees under Section 6418.

The proposed regulations provide that "the taxpayer would be solely responsible for the PWA recordkeeping requirements, the correction and penalty provisions under the Prevailing Wage Requirements, and the Good Faith Effort Exception and penalty provisions under the Apprenticeship Requirements."[1] The proposed regulations state further that "[a]t a minimum, those records include payroll records for each laborer and mechanic (including each qualified apprentice) employed by the taxpayer, contractor, or subcontractor in the construction, alteration, or repair of the qualified facility." but Treasury lists other examples

[1] 88 Fed Reg. at 60022.

such as "[i]dentifying information, including the name, social security or tax identification number, address, telephone number, and email address" for each laborer and mechanic employed by the taxpayer, a contractor, or subcontractor and "[t]he hourly rate(s) of wages paid (including rates of contributions or costs for bona fide fringe benefits or cash equivalents thereof) for each applicable labor classification."[2]

ACORE members have expressed concern that the treatment of taxpayers as "solely responsible" for maintaining and preserving the necessary records for PWA compliance is simply unworkable. This requirement overlooks the limited control that some taxpayers may have over laborers and mechanics employed in the construction, alteration, or repair of a qualified facility, as these individuals may not be employed by the taxpayer who, further, may not be involved in the project at the time their work occurs. Rather, it is often contractors and subcontractors who employ these individuals and possess the documents necessary to comply with PWA requirements.

The discussion by Treasury of PWA requirements in the context of elective transfers of eligible credits is an illustrative example of the compliance challenge this standard would create. The proposed regulations provide that "the requirement to maintain and preserve sufficient records demonstrating compliance with the applicable prevailing wage and apprenticeship requirements remains with the eligible taxpayer that determined and transferred the credit," but Prop. Reg. § 1.6418-2(b)(5)(ii)(F) requires the eligible taxpayer to make a statement or representation, in the transfer election statement, that the transferor has provided the "required minimum documentation" to the transferee taxpayer, which includes the records necessary to satisfy PWA requirements.[3] This suggests that the taxpayer must relinquish the same payroll records and other employee information described in Prop. Reg. § 1.45-12 to credit transferees despite their likely further removal from the employment activities on a given project.

The forced exchange of sensitive information between credit transferors and transferees is just one area where the proposed regulations threaten to violate the level of confidentiality that is fundamental to the clean energy sector and competitive markets more broadly. It is important to echo our members' observation that the same contractors and subcontractors employed to work on their projects may subsequently provide services to their customers for transaction repair work and services after those projects have been built, which, under the compliance regime the proposed regulations describe, would mean the loss of control over competitively sensitive data including but not limited to employee social security numbers, hourly wage and other benefits by employee and job classification, and other private information. Moreover, the proposed regulations necessitate the prolonged retention of such information, potentially for multiple years and across multiple parties.

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[2] Prop. Reg. § 1.45-12(b)-(c).

[3] Prop. Reg. § 1.45-12(a). See also Prop. Reg. § 1.6418-1(c)(3).

We therefore respectfully urge Treasury to consider and adopt several recommendations:

1. Allow the direct employer of the laborer and mechanic to maintain the required payroll records and confidential employee information subject to contractual provisions requiring the maintenance and preservation of the records, and permitting access to such records by the IRS as part of a duly issued audit request.
2. Allow the taxpayer to collect and maintain the certified payroll records and data specified in Prop. Reg. § 1.45-12 with a third-party vendor subject to similar contractual provisions and access to the IRS audit function.
3. Allow taxpayers, transferee taxpayers, and/or their agents to inspect payroll records and data under a nondisclosure arrangement as part of proper due diligence without taking physical custody or control of such payroll records or data.
4. Allow payroll records and data to be collected and maintained by the taxpayer in a manner that redacts certain sensitive information, including social security numbers, address information, telephone numbers, email addresses, and other personally identifying information; provided, this information is maintained by the direct employer of the laborer or mechanic pursuant to binding contractual arrangements.[4]
5. Allow alternative forms of validation for hourly wage rates and other payroll data to avoid anti-trust and confidentiality concerns among taxpayers, contractors, and subcontractors.

Holistic Consideration of Local Apprenticeship Programs

In our initial comments last November, ACORE provided several recommendations both to clarify and enhance the "good faith" mechanism.[5] Paramount among these is the qualification of locally administered apprenticeship programs. Industry forecasts suggest that the existing renewable energy talent pipeline is unequipped to satisfy surging industry demand both in the near- and long term. Local and private-sector apprenticeship programs are prepared to help the sector overcome this challenge if Treasury creates a pathway for their involvement. ACORE members actively demonstrate the value of local apprenticeship programs, which includes one example designed to serve a disadvantaged urban population with no direct access to Department of Labor (DOL)- or state-registered apprenticeship programs, showcasing comparable, if not superior, standards of training and project performance in their absence.

[4] Cf. 29 C.F.R. 5.5(a)(3)(ii)(B).

[5] See ACORE Comments to Treasury on Implementing the Inflation Reduction Act's Clean Energy Tax Incentives (November 2022) p. 5-6, available at: https://acore.org/acore-comments-to-treasury-on-implementing-the-inflation-reduction-acts-clean-energy-tax-incentives/.

Incorporating the skill, diversity, and community awareness possessed by local apprenticeship programs will make an immediate and sustained contribution to the just and equitable transition, which ACORE wholeheartedly supports. We would like to emphasize that our position is to recommend the authorization of local apprenticeship programs unconditionally, whether as the original recipient of a taxpayer's request for apprentices or a backstop solution when that request cannot be fulfilled by programs registered by DOL or at the state-level. In either case, ACORE recommends that Treasury allow local programs or associated taxpayers acting on their behalf to provide evidence of the requisite specifications to ensure that training and apprenticeship activities remain local and closely associated with project construction.

Application of the Apprenticeship Requirement

ACORE respectfully asks Treasury to clarify that the apprenticeship requirement applies only "with respect to the construction" of the qualified facility (energy project or other qualified technology, as the case may be) and is not applicable after the qualified facility is placed in service. This approach reflects clear congressional intent per the statutory language in § 45(b)(8) and the PWA provisions that correspond to other tax credits in the IRA, which repeatedly use the phrase "with respect to the construction of any qualified facility" to preface the application of PWA requirements.

It is reasonable and necessary to require the use of registered apprentices during the construction of applicable projects. However, while a reading of § 45(b)(8) makes clear that the apprenticeship requirement applies only to the construction phase, we would like to underscore the observation of some ACORE members that it is impractical to request, train, and deploy apprentices for repairs that occur after projects have been placed in service and during subsequent operations, which is particularly relevant in the case of short-term, unscheduled repairs necessary to restore generating capacity.

"Good Faith" Effort Exception:

§ 45(b)(8)(D)(ii) provides that taxpayers are deemed to satisfy the apprenticeship requirement if a legitimate request for qualified apprentices was denied "for reasons other than the taxpayer, contractor, or subcontractor's refusal to comply with the program's standards and requirements or if the program fails to respond within five business days of receiving a request."[6] The proposed regulations additionally require "the taxpayer, contractor, or subcontractor to make a written request to at least one registered apprenticeship program that has a geographic area of operation that includes the location of the facility, or that can reasonably be expected to provide apprentices to the location of the facility, trains apprentices in the occupation(s) needed by the taxpayer, contractors, or subcontractors performing construction, alteration, or repair with respect to the facility,

[6] 88 Fed. Reg. at 60030.

and has a usual and customary business practice of entering into agreements with employers for the placement of apprentices in the occupation for which they are training, pursuant to its standards and requirements."[7]

It remains our strong belief that the two exceptions currently provided constitute a troublingly narrow interpretation of the term "good faith." For instance, developers of renewable energy projects planned for development in highly remote parts of the country may be unable to locate registered apprenticeship programs that fit the three criteria under the new requirement Treasury prescribed. Under which of the two "good faith" exceptions can such developers seek relief? As written, the proposed regulations would seemingly oblige taxpayers to contact potentially distant, over saturated, or unapplicable registered apprenticeship programs with no hopes of success. ACORE is concerned that this approach is unfair to taxpayers legitimately acting in "good faith" and a roadblock to projects in the current pipeline. Moreover, phrases such as "usual and customary" and "reasonably be expected," without further clarity from Treasury, could incentivize parties to lean on that ambiguity as justification for issuing a request almost certain to produce a rejection, a concern we expressed in our comments last November.[8] Given that concern, we propose taking steps to unlock local apprenticeship program participation and ensure that timing requirements do not become an impediment to good faith efforts.

Commencement of PWA Requirements and Preliminary Activities

ACORE members seek additional details from Treasury as to the precise application and duration of PWA requirements. We respectfully maintain our request for Treasury to establish these rules in a manner that maximizes the involvement of registered apprentices at the site of construction itself, while providing the flexibility and certainty that taxpayers need to achieve compliance.

First, the proposed regulations do not provide clear guidance on the commencement of PWA requirements. The IRA states that PWA applies to "construction, alteration, or repair," which are terms originating from the Davis-Bacon Act ("DBA"). In the proposed regulations, Treasury states that "the term construction, alteration, or repair would generally mean construction, prosecution, completion, or repair as provided under 29 CFR 5.2," providing further that "construction, alteration, or repair would not include maintenance work that occurs after the facility is placed in service." Does the same hold true for preliminary activities, which do not count toward the beginning of construction under tax law?

The preamble to the proposed regulations states that Treasury "would not adopt DBA guidance if the result of doing so would not be in furtherance of sound tax administration

[7] Id.

[8] See ACORE Comments at p. 7: https://acore.org/acore-comments-to-treasury-on-implementing-the-inflation-reduction-acts-clean-energy-tax-incentives/.

or the aims of the IRA."[9] In the context of PWA, there are few more pressing examples of the need to uphold that statement than aligning the term "beginning of construction" with its well established meaning under tax law and prior Treasury guidance, as incorporation of the DBA definition of "construction, prosecution, completion, or repair" in 29 C.F.R. 5.2 would be inconsistent with the correct interpretation by Treasury under Notice 2022-61, which references the beginning of construction rules under §§ 45, 45Q, and 48. This would also align with Treasury's statement in the preamble to the proposed regulations that "taxpayers may continue to rely on the guidance provided in Notice 2022-61 and the IRS Notices."[10]

Importantly, preliminary activities for some qualified projects may have commenced months if not years before the date of IRA enactment (i.e., August 16, 2022) and for which proper records to cure any violations would be challenging if not impossible to locate. Treating preliminary activities as covered work contradicts sound tax administration and the goals of the Administration to promulgate rules that lend themselves to widespread utilization of the IRA tax package, but that is the risk created by the reference in the proposed regulations to the DBA definition of "construction, prosecution, completion, or repair," which offers no clear sense to the taxpayer as to how far back in time covered work may extend.[11]

Respectfully, ACORE requests that Treasury clarify the scope of PWA requirements to include construction, alteration or repair work after the beginning of construction as defined in Notice 2022-61 and the IRS Notices for federal income tax purposes and exclude preliminary activities such as conducting surveys, demolition, land clearing, grading, excavation, and drilling.[12]

Definition of "Construction"

ACORE respectfully asks Treasury to clarify that construction begins in accordance with the Five Percent Safe Harbor and Physical Work Test rules referenced in Notice 2022-61 and for federal tax purposes generally.[13] As we noted in our comments last November, affirmation by Treasury of the consistent application of the Physical Work Test and Five Percent Safe Harbor definitions from prior guidance is critical to providing the industry with the certainty it needs to maximize the renewable deployment potential of IRA. ACORE members have noted that it would be helpful for Treasury to further confirm that the end of construction corresponds to the time when an asset is placed in service and that activities after that date

[9] 88 Fed. Reg. at 60022.
[10] 88 Fed. Reg. at 60018 and 60021.
[11] 88 Fed. Reg. at 60025.
[12] 87 Fed. Reg. at 73581.
[13] 87 Fed Regl. At 73581-73582.

are not subject to PWA requirements unless they constitute "alteration" and "repair," discussed in more detail below.

Lastly, ACORE members have observed an ambiguity whereby the beginning of construction is the result of the Physical Work Test or Five Percent Safe Harbor but where no physical work at the project site has occurred. ACORE would appreciate clarity from Treasury on the treatment of such projects, in addition to what will be required following a potential loss of "grandfather" status due to "timing out" with respect to the Continuity Safe Harbor.

Taxpayers must demonstrate either continuous construction or continuous efforts (Continuity Requirement) regardless of whether the Physical Work Test or the Five Percent Safe Harbor was used to establish the beginning of construction. However, Treasury established a safe harbor (Continuity Safe Harbor) that allows an eligible renewable energy project to be deemed to satisfy the Continuity Requirement for claiming the production tax credit (PTC) and the investment tax credit (ITC) if the taxpayer places the project in service within a certain period that starts in the taxable year in which construction of the project began. Specifically, the Continuity Safe Harbor is satisfied if the qualified facility or energy property is placed in service by the end of the calendar year that is no more than 4 calendar years after the calendar year during which construction of the qualified facility began for purposes of §§ 45 and 48, and no more than 6 years after the calendar year during which construction of the qualified facility or carbon capture equipment began for purposes of § 45Q.

Definition of "Alteration" and "Repair"

ACORE respectfully requests Treasury to limit the definition of "alteration" and "repair" as referenced commonly in the phrase "construction, alteration, or repair," which the proposed regulations provide "does not include work that is ordinary and regular in nature that is designed to maintain and preserve existing functionalities of a facility after it is placed in service."[14] Accompanying this statement is the example of a solar farm that requires a replacement part to a functioning inverter after the facility has been placed in service and is "not considered ordinary maintenance," which therefore signals application of PWA requirements.[15]

ACORE agrees with Treasury's apparent position that basic maintenance and work of an ordinary and regular nature is not construction, alteration, or repair work, but the previous example perhaps inadvertently suggests otherwise. For instance, members with experience owning and operating solar farms have noted that the replacement action described is relatively standard.

[14] § 1.45-7(d)(2)(ii).
[15] § 1.45-7(d)(2)(iii).

We respectfully request Treasury to clarify that basic or routine maintenance and standard operations and maintenance (O&M) work lies outside the scope of PWA requirements, and that standard replacements of equipment and parts, and minor or incidental repair work, should not be treated as "construction, alteration, or repair" under the PWA requirements. ACORE seeks additional examples of basic maintenance and respectfully asks Treasury to define repair work as that which is extended in nature, involves a major replacement, or is otherwise not regular and customary for the applicable type of project. In doing so, ACORE would appreciate clarification from Treasury that the exemption of ordinary maintenance work from PWA requirements is unaffected by its occurrence during − and applies similarly across − construction, alteration, and repair activities.

For example, ACORE members have noted that troubleshooting and work performed by welders, winders, or machinists to address a customer service outage should not be treated as alteration or repair work under the PWA requirements. A survey of authorities indicates that basic maintenance, routine maintenance, standard O&M, simple and standard replacements of equipment and other property, minor repair work, and similar work are covered by the McNamara-O'Hara Service Contract Act ("SCA") and are not repair work under the DBA.[16] Additionally, "repair or replacement of portions of [a] utility system to accomplish routine, day-to-day service or maintenance work" may be covered by the SCA but is not Davis-Bacon work, while repair activity that is more in the nature of "servicing and maintenance work," rather than "construction activity," is not considered DBA work.[17] This includes "routine, day-to-day work to extend the life of an item, system, or component," which is considered SCA work and not DBA work.[18] On the other hand, "major work involving modifications to upgrade a facility, use new technology, standardize components, or expand capacity" is considered DBA work.[19] Other DBA work may include such things as "installation of components not previously existing, relocation of facilities, and extension of utility systems," as well as repairing major damage or failure of property or equipment.[20] In general, repair work under the DBA refers to "construction-type" or "construction-like" activity.

The tax law applies similar definitions in the context of "incidental repairs" versus capital improvements. Under § 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

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[16] 41 U.S.C. 351-358.

[17] *K&M Maintenance Services, Inc.*, 1989 WL 241424 at *2 (Nov. 21, 1989). See also *ITT Base Services, Inc., et al.,* 1986 WL 64288 at *4 (Nov. 10, 1986).

[18] Id.

[19] Id.

[20] Id. (Internal quotations omitted).

"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."[21] On the other hand, capitalization of costs has traditionally been required where repairs are "in the nature of replacements that arrest deterioration and appreciably prolong the life of the property."[22] 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).

ACORE also agrees with commenters that a *de minimis* threshold is ultimately necessary to provide certainty around the terms "alteration" and "repair." We respectfully recommend that Treasury adopt a *de minimis* threshold limiting the application of PWA requirements to alteration or repair work for which the total amount paid by the taxpayer is less than the greater of (1) $1,000,000 or (2) 10 percent of the original capitalized cost of the qualified facility or energy project.

Lastly, ACORE respectfully asks Treasury to clarify that PWA requirements do not apply to workers with *de minimis* contact to the project site.[23] For example, in circumstances where a laborer or mechanic spends a handful of hours at the qualified facility, ACORE members have asked whether Treasury will still apply a penalty of $5,000 per employee per year. The establishment of a similar *de minimis* threshold would help to provide certainty to taxpayers, contractors, and subcontractors in these situations.

Application of PWA to Lower-Tier Subcontractors and Taxpayer's Responsibility

The proposed regulations define the term "subcontractor" as "any contractor that agrees to perform or be responsible for the performance of any part of a contract entered into with the taxpayer (or the taxpayer's contractor) with respect to the construction, alteration, or repair of a facility."[24] On the other hand, DBA regulations (29 CFR 5.2) broadly define "subcontractor" to include "subcontractors of any tier." ACORE appreciates clarity from Treasury regarding the application of PWA requirements to lower-tier subcontractors that are not in privity of contract with either the taxpayer or the taxpayer's contractor. Updated DOL guidance on DBA states that "prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract."[25] How will Treasury reconcile this approach with its statement that the taxpayer is "solely responsible" for satisfying PWA requirements, including recordkeeping?[26] ACORE members have noted that the taxpayer may have no role in the construction of the qualified facility because, in many cases, the project sponsor or developer assumes responsibility for construction prior to the

[21] Rev. Rul. 2001-4, 2001-1 C.B. 295, 297.
[22] Id.
[23] See updated DBA regulations at 88 Fed. Reg. at 57624.
[24] 88 Fed. Reg. at 60023.
[25] 88 Fed. Reg. at 57531, with statutory reference to 29 CFR 5.5(a)(6).
[26] 88 Fed. Reg. at 60022-23.

placed-in-service date. Relatedly, ACORE respectfully requests consistency from Treasury regarding the party who may request supplemental wage determinations or seek reconsideration of previous determinations, as the proposed regulations offer conflicting viewpoints.[27]

120-Day Requirement and Failure to Respond

The proposed regulations state that "the taxpayer will be deemed to have exercised a Good Faith Effort with respect to the request for a period of 120 days from the date of the request" and will lose this protection if an additional request is not submitted thereafter.[28] ACORE appreciates the effort by Treasury to provide certainty as to the applicable duration of requests for qualified apprentices, but this mechanism may cause unintentional harm without reasonable parameters. For instance, must taxpayers submit a request for qualified apprentices to the same program or a different one entirely? Relatedly, must taxpayers continue to issue requests throughout the process of construction, including as would have been necessary for phases of the project that were later completed?

ACORE members have also encountered difficulty with the statement by Treasury that a mere "[a]cknowledgement, whether in writing or otherwise," from registered apprenticeship programs would embody a response sufficient to meet paragraph (e)(1)(i)(C) of the proposed regulations.[29] ACORE is similarly concerned about the practicality of this standard, which risks undermining the necessary function of "good faith" exceptions altogether. For instance, the proposed regulations as written imply that confirmation of receipt from a registered apprenticeship program, even without an expression of intent to take further action, would foreclose access to the "good faith" exceptions and maroon projects indefinitely, undermining statutory intent.

To ensure taxpayer certainty and the timely fulfillment of requests for qualified apprentices, ACORE respectfully asks Treasury to consider removing the requirement to renew a request for qualified apprentices and the associated 120-day period, as our members have noted that dictating the timing and frequency of such requests will likely not translate to increased compliance, which the five-times credit multiplier sufficiently incentivizes, but could contribute to lingering uncertainty for taxpayers. For the purposes of "good faith" exceptions, we also feel it is prudent that the threshold for a response from registered apprenticeship programs be elevated to a conclusive affirmative or negative reply.

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[27] See Prop. Reg. § 1.45-7(b)(3)(ii)(A) providing "[a] taxpayer, contractor, or subcontractor request[s] a supplemental wage determination…" Also see Prop. Reg. § 1.45-7(b)(4) providing that "[a] taxpayer may seek reconsideration and review by the Administrator of the Wage and hour division of a general wage determination…"

[28] See amended regulations at § 1.45–8(2).

[29] 88 Fed. Reg. at 60058

Application of PWA to Operational Phase

With respect to the prevailing wage requirements, § 45(b)(7)(A)(i) and (ii) separate "construction" prior to the placed-in-service date of the qualified facility from "alteration or repair of such facility" during the 10-year PTC period. However, the proposed regulations do not clarify whether the apprenticeship requirements apply to the 10-year PTC period or are otherwise limited to "construction" through the placed-in-service date of the facility.

Consistent with our recommendations above and discussion of the logistical challenges that Treasury would create for taxpayers should the Department elect to expand PWA application beyond the scope plainly read under § 45(b)(8), ACORE respectfully requests Treasury to clarify that the apprenticeship requirements are limited to the construction of the qualified facility, and are not applicable after the qualified facility has been placed in service.[30]

Application of PWA at the Project- Versus Contract-Level

ACORE members have requested additional clarification from Treasury regarding the application of PWA requirements to circumstances in which a taxpayer adjusts a project contract to include new construction, alteration, or repair work not originally scoped. As it relates to prevailing wages, the proposed regulations provide that the general wage determination in effect when construction, alteration, or repair of the facility begins generally remains valid for the duration of the work performed with respect to the construction, alteration, or repair of the facility by the taxpayer, contractor, or subcontractor. However, a new determination is required (1) "when work on a facility is changed to include additional construction, alteration, or repair work not within the scope of work of the original project," or (2) "to require work to be performed for an additional time period not originally obligated, including where an option to extend the term of a contract for the construction, alteration, or repair is exercised."[31] The preamble, likewise, refers to "the original contract" and "the term of a contract" with respect to this rule.[32]

In general, it appears that there is a single point in time during the construction phase wherein one general wage determination applies to the project. However, the reference to a specific contract creates confusion and may suggest a contract-by-contract determination, a likely but precarious extension of DBA guidance, which the proposed regulations reference, that recognizes one contracting agency and a prime contract with the applicable wage determination originating under the prime contract.[33] The clean energy projects incentivized by IRA do not conform to this approach. There is no

[30] See § 45Q(h)(2)(B).
[31] Prop. Reg. § 1.45-7(b)(5).
[32] 88 Fed. Reg. at 60024.
[33] 29 C.F.R. 5.2.

"contracting agency" nor, per the proposed regulations, a requirement to meet the appropriate specifications in covered contracts.[34]

Additionally, the proposed regulations do not specify the threshold of additional work at which taxpayers may require a new wage determination. The proposed regulations as currently written could be interpreted as mandating a new wage determination for each discrete change to a subcontract, creating an onerous compliance and bureaucratic challenge. Moreover, the reference to "an additional time period" in the proposed regulations has been read by some members to cover project delays or extensions, which are common and often undertaken for reasons that lie outside of a taxpayer's control.[35]

ACORE respectfully requests Treasury to clarify that PWA requirements apply at the project-level and, insofar as a contractual change alters the nature of their application, allow developers adequate time to evaluate and signal the need for additional apprentices or new wage determinations without falling out of compliance. We also respectfully ask Treasury to clarify two circumstances in which a new wage determination for a qualified project is required:

1. ***Substantiality threshold.*** Only "additional, substantial construction, alteration and/or repair work" that is not within the original scope of work of the project" requires a new wage determination, though not in the case of standard change orders and unexpected, but necessary, work within the general confines of a project's specifications and footprint. ACORE members would appreciate illustrative examples by Treasury and additional clarity on the meaning of the term "substantial." We respectfully advise Treasury to modify its interpretation of the term in accordance with the *de minimis* thresholds discussed in these comments.
2. ***Exceptions for delays and extensions.*** The normality of delays and extensions for qualified projects should not require a new wage determination whenever additional time is devoted to fulfilling the original commitment or performing additional construction, alteration, and/or repair work that is merely incidental in the modification thereof. We respectfully recommend that such exceptions be limited to taxpayers or contracting parties with the unilateral right to extend a contractor's or subcontractor's obligations.

It would also be helpful for Treasury to clarify the application of the apprenticeship requirement when the duration of construction work outlasts an apprentice's tenure with a registered apprenticeship program by means of promotion, leave of absence, or other reasons. To streamline the involvement of registered apprentices and maximize certainty for developers, ACORE respectfully asks Treasury to clearly delineate the protocol in such situations and allow for grace periods.

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[34] 88 Fed. Reg. at 60022.
[35] 88 Fed. Reg. at 60024.

Additional Wage Classifications for Clean Energy Occupations

ACORE members have expressed concern that numerous highly standard occupations in the clean energy industry are unrepresented in the general wage determinations currently offered by DOL, such as wind technicians often relied upon for the installation and assembly of onshore and offshore wind turbines. Taxpayers claiming the increased credit amount for clean energy projects will need certainty regarding the applicable wage rates for such individuals.

To begin, ACORE respectfully requests Treasury to clarify the terms "laborer" and "mechanic" in accordance with their meaning under DBA regulations and authorities, which includes individuals whose duties are manual or physical in nature rather than primarily administrative, executive, or clerical. This should also cover forepersons who devote more than 20 percent of their workweek to laborer or mechanic duties and do not meet the criteria provided at 29 CFR part 541. Additionally, the preamble to the proposed regulations requests input on the "treatment of working forepersons or owners performing the duties of laborers and mechanics under certain circumstances, and other executive or administrative personnel who also perform duties of a manual or physical nature, in the construction, alteration, or repair of a qualified facility."[36] Consistent with the principles of PWA and standard approach described above, ACORE respectfully asks Treasury to clarify that PWA requirements do not apply to wind turbine commissioners and other highly skilled engineers or inspectors who are generally disregarded for the purposes of DBA.

We respectfully encourage Treasury and DOL to work collaboratively with industry to rectify any omitted categories of employees under current general wage determinations and to update that list accordingly, while adhering to DBA's definition of the terms "laborer" and "mechanic" and our recommendation to accordingly exclude highly adept professionals such as wind commissioners.

Application of PWA to Adjacent Locations and Secondary Construction Sites

Treasury states in the preamble to the proposed regulations that it understands "the DBA approach to 'site of the work' to strike an appropriate balance between the requirements of § 45(b)(7)(a) and existing construction practices and thus proposed to largely adopt the DBA approach for purposes of defining the scope of the Prevailing Wage Requirements," yet appears to rely instead on the term "geographic area and locality," which contradicts established case law even if intended to avoid, according to Treasury in the proposed regulations, such "an expansive reading of construction" that would result in "substantial compliance costs and discourage taxpayers from seeking the increased credits or

[36] 88 Fed. Reg. at 60025.

deduction available under the IRA."[37] ACORE requests that guidance not be construed in such a manner. That case law sets forth and supports traditional limitations on covered work done by laborers and mechanics only directly at the site of the work, which is the most straightforward way to avoid Treasury's earlier warning, and the market chilling effect that uncertainty about the geographic scope of PWA would induce.[38]

ACORE members have also expressed uncertainty regarding the application of PWA requirements to areas of the project site beyond the qualified facility itself. Treasury notes that "the DBA rules now provide that a secondary construction site is considered part of the site of the work, if a significant portion of a building or work is constructed at the secondary site for specific use in the designated building or work and the site either was established specifically for the performance of the covered contract or project or dedicated exclusively, or nearly so, to the covered contract or project."[39]

There is similar uncertainty regarding the treatment of secondary construction sites. Treasury stated in the proposed regulations its expectation that "taxpayers similarly [as with construction subject to the DBA] may use multiple construction sites in the construction, alteration, or repair of a facility and in certain cases prefabricate large portions of the facility offsite for later installation at the facility's location. Some of these secondary sites will be dedicated solely to the construction of a facility while others may service multiple clients and facilities."[40] ACORE members have expressed concern that this departure from the "site of the work" approach will implicate manufacturing or prefabrication sites, dedicated production lines, or modular facilities built to service multiple projects, but which may service a single large project for an extended period.

To avoid similar pitfalls resulting from potential treatment of preliminary activities as "construction," as described previously, ACORE respectfully requests Treasury to follow the recommendation of various commenters that PWA requirements should not extend beyond the immediate boundaries of the project construction site for the qualified facility in the context of the PTC, and energy project in the context of the ITC, and should rather apply only to laborers and mechanics directly employed for work at the primary project construction site. We also respectfully seek clarity regarding the application of PWA requirements to property such as access roads and substations that may not be eligible property associated with qualified facilities and energy property relative to the PTC and ITC, respectively.

Furthermore, we respectfully urge Treasury not to adopt the DBA approach to secondary construction sites, as their incorporation under the scope of PWA would add a troubling

[37] 88 Fed. Reg. at 60026.
[38] See for instance L.P. Cavett Co. v. U.S. DOL, 101 F.3d 111 (6th Cir. 1996).
[39] Id.
[40] 88 Fed. Reg. 60026.

layer of complexity to compliance efforts. If the DBA approach is adopted, we respectfully recommend that any discussion of secondary manufacturing facilities in the final rules distinguish between genuine offsite manufacturing activities and those that the newly expanded DBA definition would include; ACORE members would appreciate both illustrative examples and unequivocal clarity in the rules themselves.

Lastly, ACORE respectfully requests Treasury to clarify that structures established prior to the start of construction on the qualified facility or energy property are not covered by the phrase "site of the work" irrespective of their adjacency or dedication to that site, while recognizing that adjacent or virtually adjacent locations are not covered by PWA requirements if they exceed the 2-mile perimeter set forth in related case law.[41] ACORE members have noted that it would be prudent for Treasury to adopt similar safe harbors with respect to both qualified facilities and energy property to help taxpayers precisely determine which activities are subject to PWA requirements.

Final IRS Determinations

The proposed regulations provide for a 180-day period to cure a failure to meet PWA requirements via correction and penalty payments, with such period effective beginning from the date of a final determination by the IRS with respect to any failure.[42] The proposed regulations clarify that the final determination occurs on the date that the IRS sends to the taxpayer "a notice stating that the taxpayer has failed to satisfy the Prevailing Wage Requirements…"[43] However, the proposed regulations do not address the application of IRS deficiency procedures, including the correction payment itself, nor provide taxpayers with a pathway to challenge the correction payment as so determined. The proposed regulations also do not specify under what circumstances "deficiency procedures would apply to any determination by the IRS disallowing a taxpayer's claim for the increased credit," nor directly speak to any final determination procedures that would apply to the apprenticeship requirement.[44]

ACORE supports a process for issuing and responding to an IRS determination, affording taxpayers the opportunity to cure any deficiencies highlighted in an IRS final determination consistent with the process set forth for prevailing wages in §3131(e)(3)(B) of the Internal Revenue Code. This guarantees that there will be no recapture of the applicable tax credit if the taxpayer cures any discrepancies within the described 180-day period.[45] We also concur with the recommendation that Treasury define "final determination" to mean a decision made following an IRS examination of a taxpayer's return in the corresponding

[41] See L.P. Cavett Co v. U.S. DOL. See also Ball, Ball, & Brosamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir. 1994).
[42] § 1.45-7(c)(4)(i)
[43] § 1.45-7(c)(4)(ii).
[44] 88 Fed. Reg. at 60027.
[45] See American Clean Power Association comments in response to Notice 2022-51 at p. 13.

taxable year, and agree that any examination of PWA requirements should be made as part of an IRS audit applicable to the standard IRS deficiency procedures relating to income tax.[46]

ACORE also respectfully asks Treasury to further clarify the circumstances in which the IRS might disallow the increased credit amount because of a failure to satisfy the PWA requirements. Specifically, the statute provides the taxpayer with an opportunity to cure a failure to meet the PWA requirements (1) by paying the curative payment, interest, and the related penalty in the case of the prevailing wage requirement and/or (2) by satisfying the good faith effort exception or paying the related penalty in the case of the apprenticeship requirement. In general, it is sensible to permit taxpayers to make a curative payment in all cases where there has been a failure to meet any of the PWA requirements and avoid the loss of the increased credit amount. ACORE members have observed that, because the five-times multiplier applicable to the increased credit amount is many orders of magnitude greater than any expected curative payment amount would be, the loss of the increased credit amount is an excessive remedy: in many cases, the curative payment or penalties may be insignificant (e.g., thousands of dollars in wages) compared to the loss of potentially millions of dollars in tax credits if the increased credit amount is disallowed. For this reason, we respectfully urge that the final rules provide additional certainty with respect to the taxpayer's ability to cure a PWA failure in all circumstances.

Laborers and Mechanics Who Cannot Be Located

ACORE respectfully urges Treasury to provide guidance for situations where curative payments are due to affected laborers or mechanics who cannot be found or otherwise paid, which the statute does not address. The preamble to the proposed regulations does provide some alternatives to address a former laborer or mechanic that cannot be found and suggests an expectation that taxpayers will be able to establish correction payments. Given a general reference by the preamble to State rules, ACORE would appreciate the formalization of specific procedures by Treasury for such circumstances, and respectfully ask Treasury to solicit comments from stakeholders on this issue.[47] We support establishing those procedures to allow for alternative mechanisms to make corrective payments and guarantee that taxpayers who successfully follow such methods will be deemed in compliance with curative payment procedures.

Calculating Labor Hours and Double Penalties

ACORE respectfully requests additional clarity from Treasury regarding the time horizon for which taxpayers must calculate total labor hours. An example in the proposed regulations states: "[a]t the time A claimed the increased credit, a total of 50,000 labor hours were

[46] See Solar Energy Industries Association comments in response to Notice 2022-51 at p. 9.
[47] 88 Fed. Reg. at 60028.

spent on the construction, alteration, or repair work of the facility, 6,000 of which were performed by qualified apprentices."[48]

The example seemingly suggests that total labor hours are aggregated across all the laborers and mechanics employed by the taxpayer, each contractor, and each subcontractor at the time the tax credit claimed on an applicable tax return, but leaves open the question of the calculation method that applies in subsequent tax years for purposes of the PTC. Do labor hours continue to be aggregated or do the total labor hours only include those for which alteration or repair work occurred during each subsequent taxable year? ACORE welcomes further guidance from Treasury on this issue and would appreciate examples illustrating the proper calculation during construction and for the 10-year PTC period. The proposed regulations also provide that the penalty for violating the apprenticeship requirement is equal to the sum of any failure under both the labor hours requirement and the participation requirement. Does Treasury intend to avoid double-counting of the penalty with respect to any given labor hour? ACORE would appreciate certainty from Treasury that this situation will not occur.

Pre-Hire Project Labor Agreements

The proposed regulations provide an exception to the penalty payments with respect to any failure to pay prevailing wages (*see* Prop. Reg. § 1.45-7(c)(6)(ii)) or satisfy the apprenticeship requirement (*see* Prop. Reg. § 1.45-8(e)(2)(v)) for laborers and mechanics employed under a pre-hire project labor agreement (PLA) meeting certain requirements.[49] This exception, however, does not appear to apply to the correction payment itself under the prevailing wage requirement. ACORE respectfully requests Treasury to clarify that the agreed-upon wages under a PLA are prevailing wage for the purposes of PWA requirements and that no correction payment will be required under those circumstances. Likewise, we respectfully ask that the taxpayer's recordkeeping requirements be limited to producing a valid PLA covering all laborers and mechanics at the site of the work. ACORE members note that it would be helpful for Treasury to clarify the role of a collective bargaining agreement and a master agreement, as well as the eligible status, if any, of PLAs entered and covering periods before the publication of the proposed regulations in the Federal Register.

Treasury states in the proposed regulations that "[p]re-hire labor agreements may be used to incentivize stronger labor standards and worker protections in the types of construction projects for which taxpayers may seek the increased credit, and having a project labor agreement in place may also help ensure compliance with PWA requirements."[50] ACORE members wholeheartedly agree that PLAs are a valuable incentivize and have expressed a

[48] 88 Fed. Reg. at 60049.
[49] See Prop. Reg. § 1.45-7(c)(6)(ii) and Prop. Reg. § 1.45-8(e)(2)(v).
[50] 88 Fed. Reg. 60029.

desire for Treasury to uphold that incentive in broader circumstances, such as by clarifying that the PLA exception can apply when some, but not all, contractors on a project are able to meet specific PLA requirements.

Thank you for the opportunity to submit these comments. ACORE is grateful for your continued partnership and service as we strive to promote full utilization of the IRA tax package and unlock meaningful employment in the renewable energy sector for all who seek it.

Please do not hesitate to contact me at zayas@acore.org with any additional questions you may have.

Sincerely,

/s/

Jose Zayas,
Executive Vice President of Policy and Programs
American Council on Renewable Energy