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

RE: “Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022,” Notice 2022-51 (Oct. 5, 2022)

The Solar Energy Industries Association (“SEIA”) is the national trade association of the U.S. solar energy industry. Our members promote the environmentally responsible development of distributed and utility-scale solar energy and storage. We are committed to working with federal agencies, environmental and conservation organizations, Tribal governments, state agencies, and other stakeholders to achieve this goal. On behalf of our member companies, SEIA appreciates the opportunity to provide these comments on the Internal Revenue Service’s (“IRS”) “Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022,” Notice 2022-51 (Oct. 5, 2022).

I. Introduction

SEIA is committed to building a strong solar industry to speed the country’s energy transition and address the climate crisis. As the national trade association for the U.S. solar energy industry, which employs more than 230,000 Americans, we represent over 1,000 organizations that manufacture, install, and support the development of solar energy. We firmly believe that the clean energy transition must be based on principles of equity and opportunity. These values are infused throughout our organization and ones we are actively working to advance within our industry.

Implementation of the tax credit provisions of the Inflation Reduction Act (“IRA”), which will reduce the impacts of the power sector on historically overburdened communities, is a paramount priority for the solar energy industry. Solar energy is clean, abundant, and the United States has some of the richest solar resources in the world. Deploying more solar energy reduces carbon emissions and other harmful pollutants, which have disproportionately impacted low- and moderate-income (“LMI”) neighborhoods, rural

communities, and communities of color, in comparison to fossil fuel-based energy sources. It is an energy solution that provides clean, reliable electricity, increases consumer choice, and helps consumers and business owners save money on their utility bills. Critically, solar energy helps our nation address the threats of climate change, which imposes billions of dollars of additional costs on LMI communities every year.

Climate change poses unique risks to LMI communities, many of which have already borne disproportionate burdens related to the emissions-generating activity that causes climate change. This is because LMI communities suffer disproportionate impacts of the natural disasters and extreme heat caused by climate change. As has been well-documented, this is due to inadequate housing, infrastructure,¹ inability to contend with potential losses of income,² and fewer resources to address health impacts³ due to extreme weather, among other factors. By spurring more investment in localized clean energy deployment, the IRA can create jobs and local business opportunities while reducing the emissions that contribute to extreme weather.

The solar industry is deeply committed to helping our nation meet the renewable energy targets set forth by President Biden in a just and equitable manner. In order to modernize the grid and address the climate crisis, solar energy must account for at least 30% of U.S. generation by the end of this decade and 40-50% by 2035. That means roughly quadrupling our current pace of installations by 2030. We are in a race against time, and the IRA can supercharge the nation's capacity to combat climate change in the very communities suffering the most from it.

Given the significant role in power sector decarbonization that solar energy will have, we believe that every tool in the toolbox – including the IRA – should be used to spur its development. Promoting clean energy investment activities that will abate the GHG emissions that cause climate change represents a rare opportunity to simultaneously advance three of the top Administration priorities - advancing environmental justice, combatting the climate crisis, and creating jobs.

¹ See, e.g., Eleanor Kruse and Richard V. Reeves, "Hurricanes Hit the Poor the Hardest," THE BROOKINGS INSTITUTION (Sept. 18, 2017), available at <https://www.brookings.edu/blog/social-mobility-memos/2017/09/18/hurricanes-hit-the-poor-the-hardest/>; U.S. GLOBAL RESEARCH PROGRAM, Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States, available at <https://nca2018.globalchange.gov/>; Bev Wilson, "Urban Heat Management and the Legacy of Redlining," 86 J. OF THE AMER. PLANNING ASSOC. 443, (2020), available at <https://www.tandfonline.com/doi/full/10.1080/>.

² Patrick Sisson, "In Many Cities, Climate Change Will Flood Affordable Housing," BLOOMBERG (Dec. 1, 2020), available at <https://www.bloomberg.com/news/articles/2020-12-01/how-climate-change-is-targeting-affordable-housing>.

³ See Eleanor Kruse and Richard V. Reeves, *supra* n.1.

II. Executive Summary

Solar and related storage must be built at four times the current rate in order to meet critical climate goals. This is a massive undertaking that needs clear, explicit, and implementable guidance from Treasury. SEIA respectfully asks Treasury to issue guidance that provides certainty to solar and storage companies so that they are able to meet this challenge. This includes guidance on:

Prevailing Wage, Apprenticeship

1. SEIA respectfully requests that IRS issue draft guidance with a reasonable time period for public comment *prior to* issuing final guidance that triggers the IRA 60-day clock.
2. Record Keeping – provide a detailed list of what prevailing wage and apprenticeship information must be internally documented and maintained so that a company knows what it needs to demonstrate compliance if audited by the IRS.
3. Definitions – issue key definitions and lists of occupations for relevant statutory terms including construction, alteration, and repair and define the temporal and geographic boundaries of a project.
4. Classifications – issue clear guidance so that companies can securely utilize prevailing wage classifications to comply with the law and not face penalties attributable to ambiguities or absences in the classification structure. This should take into account that companies will use a rational basis to choose a classification, where multiple relevant ones may exist, and in cases where the needed classification is not available in a locality, the company may choose another classification for the prevailing wage.
5. Geography – set a reasonable geographical limit on how far from a construction site an employer must seek the relevant apprentices for the project to satisfy the good faith exception. Clarify that for registered apprentices from one state working in another state, their respective hours and participation qualify for purposes of the tax credit.
6. Errors – clarify that errors which are self-corrected in a reasonable time period upon discovery do not implicate the taxpayer for penalties or other noncompliance.

Domestic Content

1. Rules – make clear that 49 C.F.R. § 661 *et seq.* are the applicable rules for determining domestic content.
2. Definitions – recognize that the Qualified Facility, e.g., solar power plant, is the end product and the components are those articles delivered to and integrated into the solar power station, e.g., modules, trackers, inverters, racking, and energy storage devices.

3. Manufacturing process – rely on 49 C.F.R. § 661.3 for determining what qualifies as U.S. manufacturing.
4. U.S. iron or steel – indicate that U.S. iron or steel requirements apply to structural or load bearing materials and not manufactured products.
5. Total costs – include both manufactured products and materials made primarily of iron or steel.

Energy Communities

1. Definitions – set clear and inclusive definitions on what constitutes retired coal-fired electric generators and closed coal mines. Set clear, broad guidelines for what constitutes the footprint of retired and closed facilities. Set clear guidelines on what counts as a brownfield site and how the expanse of a brownfield site is determined for the purposes of defining an energy community.
2. Geography – allow flexibility of the taxpayer to select among different census tract vintages and metropolitan and non-metropolitan area vintages. Changes in these delineations from one vintage to the next could cause uncertainty about area eligibility even if the impacted community remains the same.
3. Data – work with the Bureau of Labor Statistics to quickly develop more comprehensive estimates of coal, oil and gas employment by metropolitan and non-metropolitan areas. Work with the Mine Safety and Health Administration to correct mine location data as soon as possible. Work with the Environmental Protection Agency to publish a list of known eligible brownfields.
4. Durability – Provide assurances that any error in government data that is discovered and later corrected but which was relied upon to define an energy community will not be a basis for recapturing energy community bonus credits.

III. Responses to Requests for Comment

.01 Prevailing Wage Requirement

(1) Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of

title 40, which is commonly known as the Davis-Bacon Act. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

A) Yes. SEIA supports the issuance of guidance to clarify a number of issues related to prevailing wage requirements, including but not limited to issues discussed below. As an initial matter, we respectfully request that such guidance be issued in draft form (*i.e.*, in a form that expressly will not trigger the 60-day clock in § 45(b)(6)(B)(ii)), so that interested parties have the ability to provide public comments within a reasonable comment period.

While prevailing wages are a well-understood for many federal, state, and local government funded projects, similar definitions and compliance practices do not exist with respect to federal tax policy. This distinction raises a number of important implementation questions.

SEIA recommends that there be clear, transparent, and understandable guidance for administering the prevailing wage requirements under the IRA to avoid areas of uncertainty that could halt the rapid deployment of renewables by making compliance uncertain. We hope that guidance will provide clarity so that projects can move ahead on a timeline needed to meet critical climate goals.

B) On prevailing wage requirements, SEIA offers the following areas for clarification with potential options and rationale:

SEIA supports paying a prevailing wage and urges the adoption of guidance that will help avoid unnecessary misunderstandings. For this reason, we initially recommend that Treasury issue a clear definition of the terms “construction, alteration, and repair.” Such definition could draw language from 29 CFR 5.2(j)(1), for construction, alteration, and repair.

Solar and storage construction projects have traditionally been built without clear reference to the terms “construction, alteration, and repair”. Therefore, those existing definitions may not provide enough clarity to easily determine which parts of a solar project fall under each term. For this reason, we further suggest that Treasury issue a list of activities that typically take place in building a solar and storage project and provide guidance on which activities will be included and which activities will be excluded from the definition of construction, alteration, and repair for purposes of interpreting and administering the requirements of the IRA.

“Construction”: For example, for purposes of defining “construction”, such activities directly related to the construction of a solar project (such as earthwork for site preparation, the erection of racks, placement of panels, etc.) could be included as a list of construction activities while related activities that do not involve the building of structures or the improvement of land (such as logistics, the delivery of equipment and materials from a remote location) would be used as examples of activities excluded from the definition of construction.

“Alteration”: Similarly, activities included under the definition of “alteration” could be the substitution of different components (not replacements) than those in the original building or structure and completed after a project is placed in service (like adding a new type of inverter, transformer, or combiner box) that are necessary for full operation of the plant. Some activities that would be excluded from the definition of “alteration” would be changes that are not integral or part of the structures/building used in the generation of power (such as landscaping changes, changes in signage, etc.)

“Repair”: Finally, examples of activities included in the definition of “repair” would include the replacement of damaged/non-functioning essential components of the building/structure (such as a nonfunctioning circuit board, conduit and wiring replaced after damage by an event, or a broken series of piers that require repair to return the project to full operation), while examples of activities excluded from the definition of “repair” would include routine or scheduled maintenance, cleaning and replacement of materials and fixtures.

Other: Additional activities not included in the definitions of “construction, alteration or repair” and understood to be maintenance operations include landscaping or vegetation management, washing PV modules or maintaining cleanliness of completed facilities, and routine checking of connectors and wiring or replacing fuses, auxiliary equipment, and individual panels. In addition, pre-fabrication offsite work is a part of the manufacturing process and outside the control of the project developer and should therefore be excluded from the definition of construction, alteration, and repair.

Finally, Treasury should consider the situation in which a manufactured item has been installed during construction (where prevailing wage would be required) and following completion of construction, that equipment or item can only be maintained by a third-party technician in order to maintain its manufacturers’ warranty, such that consideration be given. In this instance, the wage rate of the third-party technician may not be within the scope of control by the taxpayer, contractor, or subcontractor to comply with the prevailing wage requirement.

A strong definition and significant list of inclusions and exclusions is an important first step, but we also expect that many questions on whether discrete activities constitute construction, alteration, or repair are likely to arise in the initial year of implementation. For this reason, we recommend that IRS exercise enforcement discretion for initial errors. Additionally, especially in the first year, if a need for clarity arises, Treasury should consider establishing a mechanism to evaluate and resolve questions on

what qualifies as construction, alteration, and repair, or other questions, in the form of a new notice or informal FAQs on the IRS website.

We also respectfully urge Treasury to include in its guidance clear rules governing key locational issues such as a definition of the site of work and the treatment of work that is not performed on or contiguous to the project site. This will help companies understand when the prevailing wage requirement is applicable, depending on the geographic requirements of the provision. In this area, we recommend that Treasury guidance reflect the standards in existing Davis Bacon case law regarding when work is considered to be “offsite” work to which prevailing wage requirements do not apply. At present, a nearby (or contiguous) off-site staging location utilized to aid in construction of a single covered project is ordinarily covered under prevailing wage, whereas the prevailing wage requirements do not apply either to an entirely separate manufacturing facility creating and selling products to multiple projects and businesses in many locations or to a remote location where construction components are fabricated before they are transported to and erected on a project site. Since there could be uncertainty in this area, Treasury’s clearly articulating the standard in guidance will help companies know how to comply with the law.

SEIA recommends that Treasury define temporal parameters so that companies know when application of the requirements related to construction, alteration, and repair start and end. We suggest that the requirement related to construction – to pay prevailing wage and meet apprenticeship standards – apply when significant on-site construction (as clearly defined in guidance) starts, and ends when a project is completed and ready to be placed in service. We suggest that the prevailing wage requirements relating to alteration and repair, which can apply after a project is placed in service, be specified as ending after the final day for the which the project qualifies for claiming a tax credit.

To eliminate any uncertainty around which prevailing wage must be paid, SEIA recommends that Treasury identify <https://sam.gov/content/wage-determinations> as the only reference tool for wage determinations, to determine the applicable prevailing wage as required by the IRA. Further, to ensure that no taxpayer accidentally seeks to comply with the IRA by paying a separate prevailing wage that may be determined by a state or county or any other entity, we recommend that Treasury make clear satisfying the prevailing wage requirements is contingent only on paying Federal prevailing wage as determined at <https://sam.gov/content/wage-determinations>.

To eliminate uncertainty as to whether an employer has paid a prevailing wage, Treasury should determine that a company has met the requirement so long as it has paid a prevailing wage that it has a rational basis to believe the role qualifies for. Currently, prevailing wage at <https://sam.gov/content/wage-determinations> requires reference to a Davis-Bacon WD#, which is based on a job classification.

The availability of classifications changes between localities, such as state or county.

Additionally, there is existing ambiguity in the DOL's prevailing wage tables because workers in different prevailing wage occupations or classifications can and do perform the exact same activities in many areas. For example:

- Erecting scaffolding can be carried out by an ironworker, a laborer, a carpenter or an operating engineer
- A solar panel can be installed by a construction laborer, a carpenter or an electrician
- Heavy equipment can be transported on a job site by a driver, a laborer or an operating engineer

Treasury should make clear that no penalties or recapture will apply, and the taxpayer will be deemed to be compliant, as long as prevailing wage rates were paid for the classification to which the company assigned the work, provided that the company had a rational basis for making the assignment. Examples of such a rational basis would include selecting classifications that had been assigned and/or had performed the same or similar work in the past or if the classification included job titles or activities applicable to the role.

Absent clear guidance on this topic, it will be impossible for taxpayers to determine whether they have selected and paid the correct prevailing wage, and taxpayers could unfairly face significant ex post facto repercussions even after making a decision in good faith. In contrast, in the federal contracting space, this question can usually be answered affirmatively in advance on a project-by-project basis.

Additionally, we strongly recommend that Treasury clarify what a taxpayer should do if there is a situation in which a needed classification is not included in <https://sam.gov/content/wage-determinations> for a particular locale. In the instance that a necessary classification is not available in a locality, the company may choose another classification that is available with its associated prevailing wage and remain in compliance with the law. Over time, we expect that increased wage surveys will expand coverage and detail, and this situation will become less common.

Last, SEIA understands the statutory term “ensure” to mean that a taxpayer must require contractors and subcontractors to pay prevailing wage by so including that requirement in contracts and subcontracts; we request that Treasury should confirm this understanding, and such contract language should be considered part of an effort by companies to fulfill prevailing wage requirements.

(2) Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. 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?

SEIA believes that the long history of prevailing wage requirements and strong interest from industry will lead to widespread compliance. Moreover, since taxpayers are seeking and relying on a significant tax credit, they will make appropriate efforts to comply.

Still, it is possible to make administrative errors in any workplace setting; for example, if a supervisor enters an incorrect code, a human resources officer misfiles a form, or a transition isn't immediately reported. In the federal contracting space, errors like these that are quickly fixed do not implicate non-compliance. Therefore, SEIA recommends that guidance include that if a taxpayer makes a self-correction of errors in a timely way, it would be considered to satisfy the prevailing wage requirement and not require any payment of penalties or fall under 45(b)(7)(B)(iv).

Additionally, as referenced above and below, we urge Treasury to issue definitions, list of activities, and details on internal record-keeping so that companies can know with certainty that they are complying with the law. In the event of an audit, this would also allow them to provide relevant information to the IRS.

SEIA requests that Treasury clarify the procedure and manner of making the final determination. Specifically, SEIA requests that the "final determination" means the final determination made following the IRS examination of taxpayer's return for the applicable taxable year. Any examination of the prevailing wage requirement should be made as part of the return examination (IRS audit), and accordingly, any dispute as to the eligibility for the increased credit amount under § 45(b)(6) should be subject to deficiency procedures and process relating to income tax. SEIA supports an IRS process.

SEIA encourages that in determining the meaning of the term "intentional disregard," Treasury provide a definition of the term similar to that found in other parts of the Internal Revenue Code. For example, Treas. Reg. § 301.6721-1 imposes a higher amount of penalty if certain failure is due to intentional disregard, which is defined as a knowing or willful failure and determined based on the facts and circumstances basis. Similarly, for purposes of § 45(b)(7)(B)(iii), the failure to meet prevailing wage requirement would be due to intentional disregard if it is a knowing and willful failure, determined on the facts and circumstances of each case. We suggest it would be useful for the guidance to provide examples of intentional disregard such as where a taxpayer upon knowing (or has a reason to know) of the failure of the prevailing wage requirement, did not promptly correct the failure.

(3) What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

SEIA requests that Treasury and IRS clarify that compliance will be determined on an IRS audit-only basis, as is normal tax process, and that ongoing or contemporaneous submission to and approval by Treasury or IRS will not be required.

We respectfully recommend that Treasury provide clear and specific guidance, after seeking stakeholder input, on what are the core requirements to support that prevailing wage has been paid, and what the relevant repertoire of tools or systems that could help support that evidence, aside from the Federal standard.

Acknowledging that certified payroll records are required on covered Federal projects --and a number of states may require something similar-- the creation, introduction and administration of such highly-regulated payroll requirements, process, and tool will be new to the thousands of solar and renewable companies who constitute the ranks of taxpayers, contractors, and subcontractors. Requiring certified payrolls and the resulting development, promulgation and administration of such a requirement would be disruptive to the prompt and aggressive deployment of solar energy that is one of the core purposes of the IRA.

For those taxpayers who decide to utilize their existing payroll systems for both Federal and private projects, compliance with the Treasury-defined elements should align.

Treasury could publish an FAQ with a list of compliant tools for which they are aware of that meet the core elements for compliance, and update that list as additional tools are available. Many entities, such as states, cities, and counties either recommend or operate their own payroll software for their respective projects and those records, as well as similar records from similar software outside civic entities, should be deemed equivalent for tax records. We recommend that required elements for records by Treasury should be a focus of guidance. We believe this should include specific details on what a company should document, such as the following for the company, for each employee paid prevailing wage:

- a. Company (taxpayer, contractor, and subcontractor) information (name and address)
- b. Project information (location and project identifier)
- c. Payroll period (number or other identifier) and date
 - 1) Payroll information as noted below:
 - 2) Name
 - 3) Work Classification(s)
 - 4) Hours worked daily, by date, including straight and overtime
 - 5) Total hours
 - 6) Rate of pay
 - 7) Gross amount earned

- 8) All payroll deductions and the total deductions, including those for Fringe and Benefits categories
- 9) Net wages
- 10) Statement of compliance from employer with name, title, date, and department (Payroll, Finance, Human Resources, Legal, etc.)

We encourage Treasury guidance directing that a company must maintain these documents for three years.

(4) 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?

We expect that certain facilities will not require alteration or repair during a year in which prevailing wage requirements apply, though many will.

(5) Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

Although clear in the legislation, we recommend that Treasury clarify that requirements are applied on a year-by-year basis with respect to the PTC. Additionally, we ask for clarity on how a taxpayer should anticipate treatment of a situation in which requirements are not met in one portion of a recapture period but then are cured and satisfied in a subsequent period.

.02 Apprenticeship Requirement

(1) Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. 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?

As long as the apprentice is part of a registered apprenticeship program and such apprentice works on the project, the taxpayer should be considered compliant. The apprentice shouldn't have to work precisely the same number of hours as other workers, since there is already an overall "percentage of hours" requirement for the entire project.

(2) Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

(a) What, if any, clarification is needed regarding the good faith effort exception?

1. Geographic scope – SEIA suggests that Treasury both specify how far beyond the geographical location of the site of the facility an employer needs to search to seek a relevant registered apprentice program and that Treasury set a reasonable geographical limit for purposes of the good faith exception. We recommend that to comply with the good faith exception, a company need only request apprentices from registered apprenticeship programs in relevant occupations required for the project that have a physical office within 75 miles of the project site and are registered in the state where the project site is located. Given the importance of the apprenticeship provision and potential guidance, we would appreciate further discussion with Treasury.
2. Loss of registration – The bona fide registration status of the apprentice at the time of their initial employment on the project site should qualify for compliance. Should an apprentice leave the program or employ of the taxpayer, contractor, or subcontractor, their previous compliant employment should be considered to have met the compliance obligation, regardless of an apprentice exiting the program or the program's being later disqualified. While it is expected that a replacement would be sought for apprentices prematurely leaving employment on a project site and/or graduating from apprentice status during the life of the project, if a company makes a good faith effort to obtain a replacement, the company should qualify for the exception.

(b) What factors should be considered in administering and promoting compliance with this good faith effort exception?

In addition to the above:

An employer should maintain written copies of requests for apprentices, as well as any rejections. Additionally, they should document lack of response from registered apprenticeship programs. On audit, they should be prepared to share these documents with the IRS to demonstrate good faith effort.

For apprenticeship programs sponsored by an employer or group organization or association, the company should maintain records of hiring apprentices, assigning apprentices and should maintain their employment records.

(c) 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?

Documentation from workforce/apprenticeship organizations and employers, such as apprenticeship enrollment records by programs (such as through RAPIDS), payroll, scheduling, and timecards or commercial contracts, may facilitate documentation for evidentiary purposes. SEIA recommends that Treasury consider issuing a consistent list of factors necessary for audit purposes rather than requiring a specific tool so as to avoid negatively affecting industry's ability to deploy more solar energy due to new or burdensome tool integration.

(3) 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?

Work hours, project hours, and apprenticeship tracking required by the registered apprenticeship program. SEIA also notes that companies keeping records for purposes of demonstrating compliance with prevailing wage should automatically keep track of apprenticeships, since apprentice wages are specified in prevailing wage classifications.

(4) Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

A) Portability – Treasury should clarify whether apprentices in a registered apprenticeship program in one state continue to meet requirements for purposes of the Federal tax credit if they are working in a different state with differing registered apprenticeship standards. SEIA believes that hiring the enormous number of apprentices required under the IRA is likely to be a challenge. Allowing apprentices to work in other states for purposes of the tax credit would help meet this challenge and would be consistent with the apprenticeship requirements of the IRA.

B) Registered Apprenticeship Program Types – Equitable consideration should be given for all the approved types of registered apprenticeship programs as specified in the IRA language.

C) Intentional Disregard definition equivalency – Acknowledgement that “intentional disregard” in § 45(b)(8)(D)(ii) is the same as § 45(b)(7)(B)(iii).

D) Apprentice-to-journeyworker ratio – The language currently states that the appropriate ratio to apply can be that of the Department of Labor or the State Apprenticeship Agency. Some states have different ratios and some collective

bargaining agreements, and apprenticeship training programs may include different ratios. Treasury should clarify how to treat those differences. For example, where the state ratio may require a lower number of apprentices assigned to a journeyworker than the Federal ratio, clarity is needed on which ratio to apply. Similarly, the Federal ratio may be lower than the State applicable ratio. SEIA proposes that whichever ratio results in more apprentices on-site, to increase the workforce opportunities in the industry, should be the prevalent ratio.

E) Compliant Examples – SEIA urges that Treasury provide illustrative examples of companies complying with the “total labor hours” requirement in apprenticeship provisions. This includes definitions of and how to account for those workers included (those carrying out construction, alteration, and repair) and the excluded employee categories (foremen, superintendents, owners, and persons within the meaning of part 541 of title 29, Code of Federal Regulations).

F) Tribal Lands and TERO – SEIA supports that Treasury will conduct a Tribal Consultation in late November with the Tribal Leaders of Federally Recognized Tribes and that there will be subsequent comments regarding the Prevailing Wage and Apprenticeship provisions that will contribute to guidance. We specifically request that Treasury preserve the Tribal Employment Rights Ordinance (TERO) requirements.

G) Meetings / Discussions – In order to ensure that predictable and reliable clean energy business planning can occur and permit renewable energy companies to properly incorporate the prevailing wage and apprenticeship requirements of the IRA, SEIA respectfully recommends that Treasury consider holding meetings on specific topics and allow time for ongoing input by interested parties. Since many of these topics are new ground in tax policy, we respectfully urge ongoing opportunity for input and review, including the ability to provide public comments on draft guidance within a reasonable comment period.

.03 Domestic Content Requirement

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

49 C.F.R. § 661, related Federal Transit Administration (“FTA”) Guidance letters, and other official interpretation of these regulations should guide the application of the IRA’s domestic content provisions. Based on the FTA’s application of 49 C.F.R. § 661, domestic content is determined by first identifying the: (i) end product; (ii) components; and (iii) subcomponents.

Understanding whether a manufactured product is an end product or a component depends on the context. In the context of §§ 45(b)(9)(B) and 45Y(g)(11)(B), the end product is the qualified facility (“QF”), *e.g.*, a solar power plant. Components include those articles delivered to and directly incorporated into the QF, *e.g.*, solar modules, trackers, inverters, racking, energy storage devices, and other primary components integrated into the solar power station.

When an entire facility is the end product, the components of such facility include the manufactured products that are installed at such facility.⁴ For example, a solar tracker would be considered an individual component given that its integration into the solar power plant is a manufacturing activity and more than mere assembly.⁵

Subcomponents include both articles used in the production of components and articles used to integrate components into a QF, *e.g.*, industrial fasteners such as nuts and bolts.

In determining what qualifies as U.S. manufacturing, the definition of “manufacturing process” set forth in § 661.3 should apply. This definition has been well understood for decades.

(b) What should the Treasury Department and the IRS consider when determining “completion of construction” for purposes of the domestic content requirement? Should the “completion of construction date” be the same as the placed in service date? If not, why?

The “completion of construction date” should be the same as the placed in service date, but only if the qualified facility would be considered the same upon completion of construction as it would be when placed in service – *i.e.*, when mechanical completion and interconnection to a transmission facility have been accomplished. In other words, interconnection equipment, other utility equipment, etc., that may connect to the qualified facility after completion of construction but before mechanical completion should not be considered part of the qualified facility. Alternatively, Treasury should use the date of authority having jurisdiction (AHJ) inspection to determine the year to which a project must meet domestic requirements, since utility upgrades could create uncertainty regarding the timing of a domestic content qualification.

⁴ See Letter dated June 8, 2000, from Federal Trade Administration (FTA) Acting Administrator to David R. Perkins, President, Macton Corporation (explaining the analysis of the installation of a vehicle lift—itsself manufactured in Albany, N.Y. out of Canadian parts—at a garage located in Concord, CA as follows: “Here, the procurement contract was for the garage; accordingly, the vehicle lift to be installed in the garage was the component. Further, the end product must be the result of a manufacturing process. In this case, the hoist will ultimately be a fixture of the garage, and installation of the hoist is part of the manufacturing process. The construction of the garage as a whole, is . . . the end product.”).

⁵ As discussed herein, trackers are manufactured on-site through a complex and exacting process that requires, among other things, extensive “collection, interconnection, and testing of various elements,” which the FTA has recognized constitutes a “manufacturing process” for mechanical products. FTA Guidance Letter, *Kone Elevators* (Jan. 8, 2015) (installation of an elevator on-site is a manufacturing process).

Taxpayers should have the right, for purposes of both domestic content and prevailing wage rules, to either isolate or aggregate qualified facilities and properties that are part of an energy project, where more than one of either is part of a project (similar to multiple properties in Notice 2018-59). This will reduce unintended foot-faults that kick a taxpayer out of the provisions entirely. At the same time, if only a portion of a project qualifies based on an aggregation, then a smaller portion of the multiplier or adder, as applicable, would apply.

(c) Should the definitions of “steel” and “iron” under 49 C.F.R. §§ 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

Generally yes, and Treasury and the IRS should adopt additional definitional concepts from OMB’s recent “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,”⁶ at Sec. I, i.e., (1): iron and steel produced in the United States “means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

SEIA urges the IRS to use FTA precedent as a guideline for applying steel and iron requirements. The IRS should clarify that the steel or iron requirements are limited to “construction materials made primarily of steel or iron” that have a structural, load-bearing, or support function, such as “structural steel or iron, steel or iron beams and columns.”⁷ These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products.⁸

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer’s certification that they have satisfied the domestic content requirements?

A taxpayer should attach the certification statement to the return on which such credit is claimed. Upon a request for inspection by the IRS, a taxpayer must provide certifications of suppliers or books and records of the taxpayer, in printed or in digital form on which the taxpayer relied for the taxpayer’s certification to the IRS. A taxpayer may accept and reasonably rely on a contractor’s or subcontractor’s written certification or representation regarding the country in which an article was mined, produced, or manufactured.

A taxpayer must maintain books and records demonstrating compliance with the domestic content requirements for three years from date of claiming the bonus, consistent with IRC § 6107.

⁶ <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

⁷ 49 C.F.R. § 661.5(c).

⁸ *Id.*; FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (elevator guide rails of steel have a primary role to ensure “proper positioning of the elevator within the hoistway” and balance and control speed (in emergency circumstance) – and are not subject to steel requirements under 49 C.F.R. § 661.5(b)).

(2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term “component of a qualified facility” need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

“Component of a qualified facility” should be defined consistent with the definition of “component” in 49 C.F.R. § 661.3. If a component is a construction material made primarily of iron or steel and has a structural, load-bearing, or support function, then the requirements of § 661.5 should apply to that component. For solar facilities, this would include, for example, iron or steel structural support posts; but would not include trackers or steel fasteners used to integrate components into the QF (such fasteners should be treated as subcomponents). In addition, pursuant to 49 C.F.R. § 661.5(c) the U.S. “iron or steel requirements do not apply to steel or iron used as components or subcomponents of other manufactured products”

Provided that a “qualified facility” or solar power plant is a manufactured end product, then components of that QF include those articles delivered to and fully integrated into the QF, *e.g.*, solar modules, trackers, inverters, and energy storage devices.

In determining whether a component is mined, produced, or manufactured in the United States under 49 C.F.R. § 661.3, FTA precedent indicates that the component must undergo, in the United States, “processes to alter the form or function of materials or of elements of the [component] in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials [that make up the component].” For example, and as discussed above, a solar tracker would be considered an individual component of a QF, given that its installation into the solar power plant is a part of the manufacturing process that results in the QF. In turn, the solar tracker should be treated as mined, produced, or manufactured in the United States if its production involves processes in the United States that alter the form or function of materials or of elements of the solar tracker in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials that make up the solar tracker.

Trackers are manufactured on-site through a complex and exacting process, which requires specialized knowledge and extensive training for installers and adherence to a detailed installation manual and electrical wiring diagram. In this regard, manufacturing the tracker on-site requires extensive “collection, interconnection, and testing of various elements,” which the FTA has recognized constitutes a

“manufacturing process” for “mechanical products” such as a tracker.⁹ The various elements of a tracker have a useful function only when they are integrated in a specific way that results in a distinct new product -- i.e., a tracker -- that is “functionally different from that which would result from mere assembly of the elements or materials.”¹⁰

As for the United States production requirement, under longstanding regulatory precedent, a component is of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.¹¹ Therefore, IRS should also clarify that any individual manufactured product that is a component of a qualified facility or energy property shall be deemed to have been produced in the United States if the manufacturing processes for the product took place in the United States, regardless of the origin of its subcomponents.

For reasons discussed above, interconnection property and other utility-owned and controlled property should not be considered a component of a qualified facility.

(b) Does the determination of “total costs” with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term “mined, produced, or manufactured”?

The cost (under IRC § 1012) of articles primarily made of iron or steel should be included in the computation of total costs for manufactured components, and 40% of the total cost of all manufactured products incorporated into the qualified facility must be of U.S. origin. Cost is determined at the component level and every component is either a U.S. manufactured product or not based on the requirements of 49 C.F.R. §§ 661.5(b)-(c) for components primarily made of iron or steel or § 661.5(d) for other components.

(c) Does the term “manufactured product” with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an “end product” (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

A “manufactured product” can be either a “manufactured end product” or a component. This interpretation is consistent with the FTA’s guidance in *Kansas City Area Transportation Authority*.¹² The first step in applying Section 661, and the way the FTA approaches its analysis of domestic content, is to identify the end product, components, and subcomponents. Under 49 C.F.R. § 661, end products and manufactured components must be produced in the United States, while

⁹ See *id.*; see also FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (installation of an elevator on-site is a manufacturing process; constituent parts of the elevator are subcomponents—and not components—of the building).

¹⁰ See 49 C.F.R. § 661.3.

¹¹ See 49 C.F.R. § 661.5(d)(2).

¹² See, e.g., FTA letter dated June 8, 2011, to Kansas City Area Transportation Authority (regarding application of § 661 to a traffic signal system).

subcomponents can be foreign produced. Appendix A(3) to § 661.3 provides examples of “manufactured end products” and includes infrastructure projects such as terminals, depots and garages, as well as systems that include multiple pieces of equipment working together as a single unit such as fare card and security systems.

The plain language of the IRA indicates that the end product is the “qualified facility,” or solar power plant. The IRA then states that any steel, iron, or manufactured product which is a “component” of such qualified solar facility must be produced in the United States.

Section 661.3 defines components as “any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location,” e.g., modules, inverters, trackers, racking, energy storage devices, and other primary components integrated into the solar power station.

The next step is to determine whether any of these components is a construction material made primarily of iron or steel. Construction material “primarily of steel and iron” means “made principally or entirely from either steel or iron” (*see* 61 Fed. Reg. 6,300) and include beams and columns, running rail and contract rail, bridges and structures whereas items deemed not “primarily of steel and iron” include elevators, rolling stock (buses, vans, cars, etc.); fare collection systems; computers; information systems; security systems; mobile lifts, and hoists. Within the category of components satisfying the “primarily” iron or steel standard, the focus of the U.S. iron or steel requirement is on “structural” and “load-bearing” construction material, such as structural support posts or piers in solar power plants. Importantly, iron or steel included in manufactured products or as subcomponents is not covered.¹³

Section 45(b)(9)(B)(ii), as enacted by the IRA, instructs taxpayers to apply 49 C.F.R. § 661.5 to determine if the steel or iron qualifies as a U.S. produced steel or iron product. Section 661.5 requires that to qualify as a U.S. produced steel or iron product all manufacturing processes must take place in the United States except metallurgical processes involving refinement of steel additives.

Section 45(b)(9)(B)(iii), as enacted by the IRA, establishes that not all of the manufactured components of the solar project need be produced in the United States but that U.S. produced manufactured products must reach at least 40 percent of the overall cost of the manufactured products.

For components of the solar facility that are not primarily made of iron or steel, to qualify for the 40% power plant domestic content calculation, the components must satisfy the definition for U.S. “manufacturing process” set forth in 49 CFR 661.3. This is a qualitative definition, *i.e.*, the component’s inputs or subcomponents must be “altered in form or function” into a “new end product.”

¹³ *See* 49 C.F.R. § 661.5(c).

While mere assembly does not qualify as U.S. manufacturing, manufacturing is not limited to the factory floor. While the installation of components at a QF is part of the manufacturing process that creates a solar facility, such installation standing alone is not sufficient for the components themselves to be considered produced in the United States. The components themselves must undergo a manufacturing process in the United States that alters the components' form or function into a new end product.

Pursuant to 49 C.F.R. § 661.5(d), which is not explicitly referenced in the IRA, a component is considered of U.S. origin if it meets the U.S. manufacturing process definition regardless of the origin of its subcomponents. For example, if a solar module is considered a manufactured product that is a component of the solar project and the module's production is found to meet the definition for U.S. manufacturing process, the origin of all module inputs, e.g., glass, cells, encapsulant, etc., is irrelevant for domestic content purposes as they would be considered subcomponents. Similarly, if a solar tracker is considered a manufactured product that is a component of the solar project and the tracker's production is found to meet the definition for U.S. manufacturing process, the origin of all the tracker's subcomponents, e.g., the drive motor, torque tube, and structural fasteners, is irrelevant for domestic content purposes as they would be considered subcomponents. The key is that there must be a manufacturing process in the United States, as defined in 49 C.F.R. § 661.3, that results in the production of the solar module or solar tracker.

To summarize, under the FTA rules there are both (i) manufactured end products, and (ii) manufactured products that are components of the manufactured end product. Based on the plain language of the IRA, Congress intended the solar project itself as the manufactured end product and that the iron/steel and manufactured products that go into the project are components of that end product and 40 percent of those manufactured product components must be manufactured in the United States (see §§ 45(b)(9)(B)(i) and (iii), as enacted by the IRA that reference the project and its manufactured product components). The argument then follows that articles, materials, and supplies that go into the manufactured components are subcomponents that can come from anywhere. As an example, the qualified solar project is the end product, a module is a component, and solar cells are subcomponents. Similarly, a tracker is a component of the solar project end product, and tracker torque tubes are subcomponents. By definition, a qualified solar project must be produced in the United States. To count towards the domestic content requirement, the module or solar tracker must also be produced in the United States, but the place of production of the solar cells or torque tubes will not be relevant.

(d) Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?

Guidance should confirm that the 40% adjusted percentage is applied with respect to the qualified facility (i.e., the end product). Guidance should confirm that the 40% adjusted percentage compares the total costs of all components made of iron

or steel and other components of U.S. origin to the total costs of all components whether of U.S. or foreign origin.

(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

Guidance should confirm that the 40% adjusted percentage in § 45(b)(9)(B)(iii) does not require any comparison or allocation of domestic and foreign costs at the component or subcomponent level (i.e., that 40% of the costs of the component or subcomponent must be U.S. origin in order to be treated as domestic). Rather, if a component of the qualified facility, such as a solar module, is determined to be a component of U.S. origin, then the entire cost of that component is treated as domestic content. Guidance should also confirm that the origin of the subcomponents is irrelevant if the component undergoes a manufacturing process in the United States consistent with Section 661.3.

(3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of steel, iron, or manufactured product[s] that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

(a) Does the determination of “overall costs” and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

The “overall cost of construction” is not clear in the statute. If the test is that a specific steel order or manufactured product would need to increase the overall cost of construction by 25 percent this would be a virtually impossible test to meet and would result in the possibility of U.S. manufacturers escalating prices to a point that makes projects uneconomical. The test should be described in the regulations such that an exception is applicable for a manufactured product that increases the overall cost of manufactured products by 25 percent. Similarly, a waiver should be granted if a steel or iron product increases the overall cost of steel and iron products by 25 percent.

The cost of a component should include the full cost of shipping, storage, and delivery cost. This is a cost to jobsite which is inclusive of logistics and packaging.

(b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

The requirement for an item to be produced in the U.S. should not apply with respect to such item if not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality in the time frame needed to complete the qualified project on its construction schedule.

Treasury should maintain a list of products that have been determined to be unavailable, which it may borrow from FAR 25.104 and add to for items specific to the solar industry. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(c) Do the “sufficient and reasonably available quantities” and “satisfactory quality” standards need further clarification? If so, what should be clarified?

Non-availability can be demonstrated by documented market research appropriate to the circumstances, including seeking of domestic sources through RFIs or RFQs or declarations showing unsuccessful attempts to purchase manufactured products or steel and iron with the required specifications. Importantly, the implementing regulations should make clear that unavailability includes circumstances where the offered delivery date for the U.S. product would result in a delay to the scheduled completion date of the qualified facility by 45 days or more. The economical delivery of a solar project requires the timely delivery of critical components.

(4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

Regardless of whether a taxpayer is seeking a § 45 PTC or a § 48 ITC, the “manufactured end product” should be the same and should be synonymous with a “qualified facility.” Treasury should note that many of the “energy properties” identified in § 48 are also manufactured end products, but some of those energy properties are components of a qualified facility — e.g., “energy storage technology” and “microgrid controller” are newly added examples of “energy properties.” So for instance, a rooftop PV system may be combined with both a battery and a load controller to maximize the output of the rooftop solar power plant. Those properties should therefore be identified in Treasury regulations as components of a PV solar system end product (§ 48(a)(3)(1)).

(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

Clarification is needed on how combination projects will be treated regarding the domestic content bonus, e.g., a single site location or project that incorporates both rooftop and ground-mounted solar. It is recommended that such projects have the option of receiving different adder amounts for separate systems located on a single customer premises.

Treasury should recognize that a retrofit or addition to an existing qualified facility would be considered a new qualifying facility for the purposes of domestic content requirements.

.04 Energy Community Requirement

(1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term “located in” for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

Treasury and IRS should adopt a percentage-based cost or physical location test. For example, Treasury could adopt a 50% test as used in the continuity safe harbor for federal lands in Notice 2021-05, to receive the credit for the entire facility.

Treasury should allow taxpayers who do not meet the stated percentage of assets required to be in the energy community to receive the entire credit to still receive a portion of the credit based on the percentage of facility assets contained in the energy community.

As for “relevant timing considerations,” once an energy community has been identified as such, this identification should operate as a “designation” that remains intact even if the factors leading to its inclusion as an “energy community” in the first instance later change. In other words, designation as an “energy community” should be more or less permanent. In the alternative, if an area is identified as an “energy community” and later falls outside of the designation, it should nevertheless retain its status as an energy community for purposes of § 48(a)(14) for at least two years after Treasury has given notice that it no longer fits the definition. In order to achieve the IRA’s objectives companies will need to invest in energy communities through, for example, expanding operations in those communities. The more certainty that a company has that it will be operating in an energy community, the more likely the IRA will expand access to renewable energy in the communities that need it most.

(2) Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

1. Consider whether the reference to 42 U.S.C. § 9601(39)(A) can be further clarified by referencing existing IRC sections, such as § 198.
2. Confirm that the reference to 42 U.S.C. § 9601(39)(B) actually excludes those enumerated sites from the definition of energy community.
3. Confirm that aggregate mining sites qualify as “mine-scarred land” for purposes of the IRA’s definition of “brownfield site.” EPA regulations that implement CERCLA do not define the term “mine-scarred land,” though EPA guidance refers to “lands, associated waters and surrounding watersheds where extraction, beneficiation, and processing of ore and minerals (including coal) has occurred.”¹⁴ Generally, aggregate mining (such as, but not limited to, rock, clay, sand, gravel and limestone) may qualify as extraction, beneficiation, and processing of minerals. Accordingly, SEIA requests Treasury to confirm that the term “mine scarred land” for purposes of the IRA includes aggregate mining. This clarification is consistent with encouraging reuse of mining-impacted sites for clean energy projects and reinvestment in energy communities historically affected by mining activities. Without this clarification, the financial and other challenges associated with reclaiming aggregate mining areas will continue to discourage reuse of these sites for clean energy infrastructure development. The requested clarification also would be consistent with how mining activities are characterized for other federal purposes (*e.g.* the North American Industry Classification System (NAICS) defines the “Mining (except Oil and Gas)” sector to include “quarrying” (the extraction of rock, etc.) and “beneficiating” (*e.g.*, crushing and screening)).
4. Treasury should specify what documentation is required to demonstrate property qualifies as a brownfield.
5. EPA cites studies finding significant impact on property values extending at least 1.29 miles from brownfield *properties*. Thus, a brownfield “site” should be considered the entire impacted area where redevelopment is complicated and devalued due to proximity to brownfield properties.¹⁵ Treasury should determine that the energy community defined by a brownfield site is all areas within 1.5 miles of the brownfield property.

¹⁴ See “Brownfields Mine-Scarred Lands Initiative” (U.S. EPA 2004).

¹⁵ <https://www.epa.gov/brownfields/brownfields-program-environmental-and-economic-benefits#:~:text=A%202017%20study%20concluded%20that%20cleaning%20up%20brownfield%20properties%20led%20to%20residential%20property%20value%20increases%20of%20C2%A0%205%20%2D%2015.2%25%20withi n%201.29%20miles%20of%20the%20sites.>

(3) Which source or sources of information should the Treasury Department and the IRS consider in determining a “metropolitan statistical area” (MSA) and “non-metropolitan statistical area” (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of “direct employment” for purposes of this section?

SEIA recommends that IRS clearly define MSAs and non-MSAs based solely on county (or county equivalent) boundaries. IRS should use BLS “metropolitan statistical areas” and “non-metropolitan areas” as a starting point, then revise the statistical areas to always follow county (or equivalent) boundaries. For example, BLS’s definitions follow township boundaries in six New England states, and there are some discrepancies between BLS and OMB definitions. This revision is needed for the determination of historical fossil fuel employment rates to be feasible in all areas, as data is not reliably available for units smaller than counties. OMB “metropolitan statistical areas” and “micropolitan statistical areas” are not sufficient as an alternative to BLS because they don’t cover the entirety of the country as is intended by the IRA. And, importantly, the BLS definitions are more stable due to being updated only every 5 years and choosing those would add clarity and certainty.

There appears to be at least two ways to calculate employment in coal, oil and natural gas for these areas and either should be considered acceptable. Treasury should clarify how data for a non-metropolitan area when the area included counties A, B, and C later applies when county C moves into an adjacent metro area.

1. Estimating historical and recent coal, oil and natural gas direct employment by Occupation Code using BLS OEWS report data

BLS publishes annual data on employment by “metropolitan area” and “non-metropolitan area” with detail by certain occupations in its Occupational Employment and Wage Statistics (OEWS). BLS’s OEWS data only has industry-specific employment estimates for geographic areas larger than MSAs and NMAs. At the MSA and NMA levels of geographic granularity, BLS does provide estimates of employment by occupation. There are 23 occupation codes/titles that should be considered directly related to the coal, oil and gas sectors. The list of relevant occupation codes and titles is below. Treasury should affirm that all occupations listed below will count as direct coal, oil, and natural gas employment.

OCC Code	OCC Title
17-2151	Mining And Geological Engineers
17-2171	Petroleum Engineers
17-3031	Surveying And Mapping Technicians
17-3098	Calibration Technologists
47-5011	Derrick Operators
47-5012	Rotary Drill Operators
47-5013	Service Unit Operators
47-5022	Excavating And Loading Machine Operators
47-5041	Continuous Mining Machine Operators
47-5043	Roof Bolters
47-5044	Loading And Moving Machine Operators
47-5071	Roustabouts
47-5081	Helpers Extraction Workers
47-5098	Underground Mining Machine Operators
51-8012	Power Distributors And Dispatchers
51-8013	Power Plant Operators
51-8021	Stationery Engineers And Boiler Operators
51-8091	Chemical Plant Operators
51-8092	Gas Plant Operators
51-8093	Petroleum Pump Station Operators
51-8099	Plant And System Operators
53-7071	Gas Compressor And Gas Station Operators
53-7073	Wellhead Pumpers

The OEWS also contains an estimate for total employment for each year at the MSA and non-MSA level of geographic detail that should be used as the denominator for calculating the 0.17% threshold.

2. Estimating historical and recent coal, oil and natural gas direct employment by North American Industry Classification System (NAICS) codes using data from BLS or Census Business Patterns

An alternative and preferable approach would be for Treasury to work with the Bureau of Labor Statistics to develop comprehensive estimates of coal, oil and gas employment at the county and county-equivalent level without having to rely on summaries by occupation code or NAICS code already provided by BLS. Current BLS publications (QCEW) suppress data at the county and MSA/NMA levels when there is concern about confidentiality. NAICS-code-based analysis could be more comprehensive than occupation-code-based analysis because it counts all employment related to coal, oil and natural gas rather than just certain occupations within those sectors. However, the volume of data suppression in BLS reports increases as the level of geographic granularity increases. As much as half of employment for certain NAICS could be suppressed at the county level (the basic building blocks of MSA and NMSAs). However, if BLS itself aggregated across all relevant NAICS for counties and/or MSAs/NMSAs, there could be less need for suppression, allowing a more accurate assessment of whether a given area has ever met the 0.17% threshold.

Note that because of data suppression, the NAICS code approach provides a less complete estimate of employment than the occupation code approach. However, if BLS is able to produce aggregated estimates at the county or MSA/NMA levels, less suppression could be possible and this method could be more comprehensive. We suggest Treasury work with BLS to act on this as quickly as possible.

However, we believe either the occupation code or NAICS methods/data should be considered adequate to demonstrate a given area has met the 0.17% threshold.

If using NAICS codes, the following codes should be used.

NAICS Code	Title
211	Oil and Gas Extraction
2121	Coal Mining
213111	Drilling Oil and Gas Wells
213112	Support Activities for Oil and Gas Operations
213113	Support Activities for Coal Mining
2212	Natural Gas Distribution
23712	Oil and Gas Pipeline and Related Structures Construction
324	Petroleum and Coal Products Manufacturing
33313	Mining and Oil and Gas Field Machinery Manufacturing
42352	Coal and Other Mineral and Ore Merchant Wholesalers

4247	Petroleum and Petroleum Products Merchant Wholesalers
4861	Pipeline Transportation of Crude Oil
4862	Pipeline Transportation of Natural Gas
48691	Pipeline Transportation of Refined Petroleum Products

3. Estimating “Previous Year” unemployment

Areas that meet the requirement of having had 0.17% employment in coal, oil and gas since December 31, 2009, must also have “an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary).” “Previous year” should be defined as the most recent full calendar year for which final data is available on unemployment, and guidance should specify which unemployment rate applies.

Eligibility under this subsection should be at the election of the taxpayer and based on either the year in which a project begins construction or the year in which a project is placed in service. That is, if a given MSA had coal, oil and gas employment in 2015 of 0.20% and had an unemployment rate greater than the national average in 2022, a project that begins construction in 2023 should qualify if that project is placed in service before the ITC/PTC phases down after 2032. Likewise, a project that is placed in service in such an area in 2023 should qualify.

Separately, previous year should be based on the previous calendar year or, at the election of the taxpayer, the previous 12 months for which data is available. This flexibility is necessary as full calendar year data may be delayed at the start of a new year and could cause delays. Flexibility is needed for clarity and certainty.

4. Certainty related to metropolitan and non-metropolitan area eligibility

In the event that preliminary or even final government data that shows an area has gained eligibility as an energy community is later updated (due to either error and/or additional information) and found to no longer meet the required thresholds, such correction should not be the basis for recapture of energy community bonus credits.

(4) Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

Closed coal mine data is available from the MSHA.¹⁶ Retired coal-fired electricity generating unit data for both generators that have closed and that are expected to close is available from the Energy Information Administration (EIA) form 860 and form 860m data sets.

Census tract shapes change frequently and IRS should allow the taxpayer to elect any census tract vintage between the year a retired coal-fired generating unit or closed coal mine was placed in service and year the qualifying property is placed in service. This will help provide clarity and certainty to taxpayers and is consistent with defining the community impacted by these retirements and closures since those communities were defined by many iterations of census tracts over the years those generators and mines were in operation

Guidance should clarify:

1. Any government data or document showing the retirement of a coal-fired electricity generating unit should qualify as sufficient evidence of coal generator retirement. For example, generator data reported on Energy Information Administration (EIA) form 860 or form 860m as retired should be considered sufficient evidence of plant retirement.
2. Treasury should confirm that “coal-fired electric generating unit” is the same as any “generator” as reported to the Energy Information Administration. Generators are sub-units of power plants. One or more generating units of a power plant may retire while others remain operational, and Treasury should confirm that retirement of a single generator qualifies as a retired coal-fired generating unit under this section.
3. Any electricity generator that used coal as one of its fuel sources should qualify. Some plants use or used coal as a secondary fuel source but not as a primary fuel source. Any generator that used coal for any of its fuel should qualify.
4. A generator that has repowered from using coal to only using non-coal fuels should qualify as retired coal-fired electricity generating unit because it has retired its coal use.

¹⁶

<https://arlweb.msha.gov/OpenGovernmentData/OGIMSHA.asp#:~:text=Mines%20Data%20Set%0AThe.Abandoned%20and%20Sealed%20Mines>

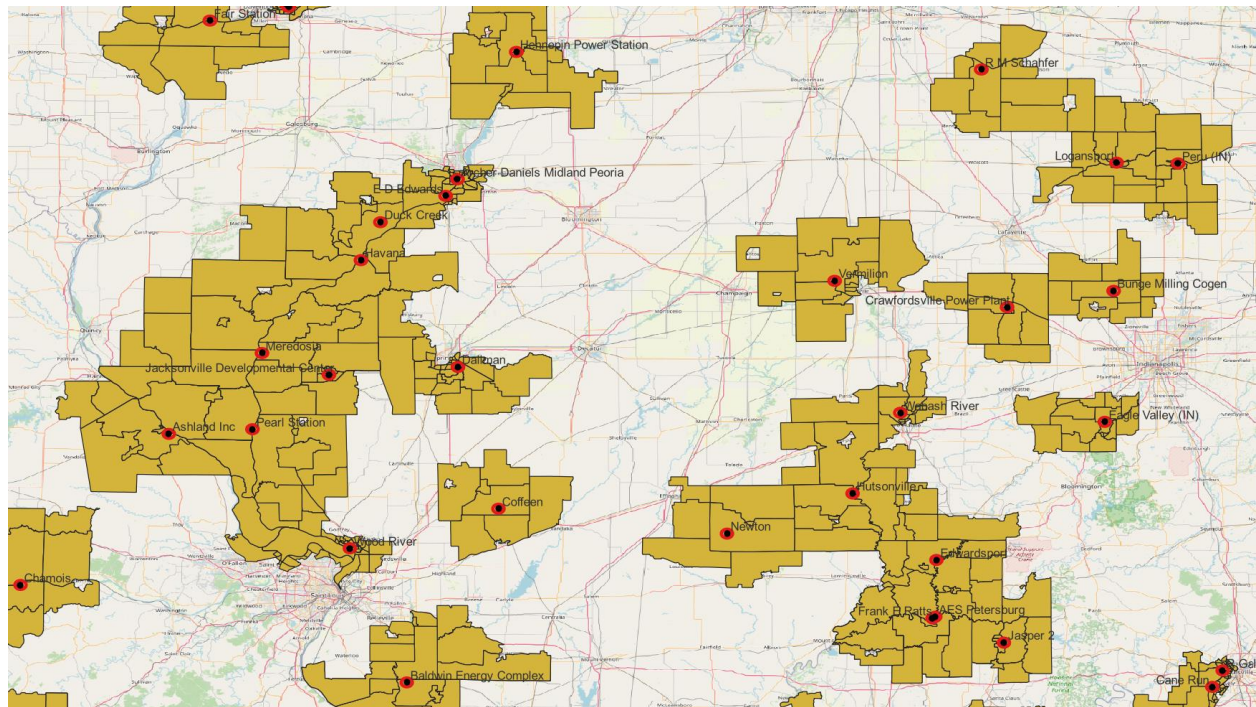
5. If a previously retired coal-fired generating unit should be recommissioned, this does not change the fact that such unit had been retired with impacts on the community. The IRA does not require that coal-fired electricity generating units remain retired.
6. Any coal mines listed by MSHA in any status including “abandoned,” “abandoned and sealed,” “nonproducing” and “temporarily idled” should qualify as “closed.” Any of these statuses indicate that mine employment in the area may be impacted by the status of the mine. Moreover, “Nonproducing” and “temporarily idled” statuses can be precursors to abandoned status or can be a status reported by a mine operator for a mine that is closed but for which remediation has not begun or is not complete.
7. In addition to mines tracked by MSHA any coal mines no longer active that can be identified through other documentation including state agencies, EPA or property records should qualify as closed coal mines.
8. Mines not producing as of the date of enactment of the IRA and any moving into the “closed” statuses enumerated above thereafter should qualify their tracts and adjoining tracts going forward. The IRA does not require that mines remain closed.
9. Mines classified by MSHA as “underground,” “surface,” and “facility” should all count as mines. “Facilities” may process material from multiple mine sites and are integral parts of the mine operations. Not only are they an essential part of a mine, but their employment also makes them part of the energy community associated with the mines they served.
10. For both coal mines and coal-fired electric generating units, Treasury should determine what features define the boundaries of such facilities for determining the tract or tracts in which they closed/retired. As discussed later in our comments, these facilities have many parts and operations including runoff that should be considered part of those facilities. Moreover, the extent of such facilities may be difficult to determine and EIA should accept an approximation of location/footprint based on a 1.5-mile radius around the latitude and longitude of such facilities provided by the Energy Information Administration, the Mine Safety and Health Administration or other government agency.
11. Treasury should consider that some mines may have partially closed, where one portion of a mine surface or underground may have closed but the larger complex remains in operation. To do this, Treasury can use the employment data provided by MSHA and pick a threshold for decline in employment at a mine that qualifies that mine as partially closed. For example, if employment at a mine has fallen to 50% of its peak as reported in MSHA data, that mine could be considered closed. Note that some mines

could continue to have employees even when fully closed due to remediation work.

12. What constitutes a “directly adjoining” census tract? While most tracts share linear border area, there are some that adjoin at a corner as shown below. Such corners touches should be considered adjoining tracts.



13. Because of how tracts are sometimes split, there are often cases where an island tract is created within another tract. There are other instances where a tract could be entirely surrounded by several tracts that are all adjoining tracts. In such instances, Treasury should consider such island tracts to be adjoining tracts. See examples in the image below and note that all island tracts are closer to the retired coal-fired generators than parts of the tracts that encircle them.



14. Separately, Treasury should work with MSHA to clean its mine location data. The coordinate (latitude and longitude) data provided by MSHA contains many errors that require attention to accurately identify mine location. Moreover, the address data for mines Provided by MSHA is often not consistent with the coordinate data.

(5) For each of the three categories of energy communities allowed under § 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a “brownfield site” under § 45(b)(11)(B)(i), a “metropolitan statistical area or non-metropolitan statistical area” under § 45(b)(11)(B)(ii), or a “census tract” under § 45(b)(11)(B)(iii) should be considered, and why?

1. Taxpayers need reasonable certainty that a project planned to be located in an energy community will remain an energy community at the time when the credit is received.

2. Census tracts are sometimes split over time if their population grows beyond 8,000 people. Likewise, tracts can be merged if neighboring tracts fall below 1,400 people. Census updates tract shapefiles annually meaning that consistency from one year to the next could be challenging. We recommend that Treasury allow the taxpayer to elect shape of census tracts based on any vintage of tract from when the retired coal-fired generator or coal mine was placed in service to when a qualifying property is placed in service.
 - a. For example, a coal-fired generator that retired in 2017 that was placed in service in 1990 occupied a year 2000 vintage tract that was split in two for the 2020 vintage tracts. The taxpayer should be able to elect the year 2000 or year 2010 tract vintages to define the tract in which it retired and which tracts are adjacent.
3. If an area is an energy community at the time construction of the energy project is commenced, then the taxpayer should not be subject to a recapture if the area ceases to be an energy community thereafter. The purpose of the bonus for energy communities is to encourage development in these communities. Developers should be able to rely on the existence of that credit when they invest in these communities. Indeed, the goal of this credit is to turn these communities around. The Act's successes should not result in a rescission of the credit for developers who were responsible for bringing economic benefits to these communities.

(6) Under § 45(b)(11)(B)(ii)(I), what should the Treasury Department and the IRS consider in determining whether a metropolitan statistical area or non-metropolitan statistical area has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas? What sources of information should be used in making this determination? What tax revenues (for example, municipal, county, special district) should be considered under this section? What, if any, consideration should be given to the unavailability of consistent public data for some of these types of taxes?

Revenues should include both state and federal severance taxes or royalties related to coal, oil and gas extraction. Treasury should specify what data sources and documentation will be required to illustrate eligibility under this section.

(7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

For the purposes of determining census tracts “in which” a coal mine has closed or a coal-fired electric generating unit has retired, Treasury should consider the entire footprint of a coal mine or coal power plant’s operations in determining the census tract *or* tracts in which such a facility has closed or retired. Both coal mines and coal-fired electric generating units include area beyond a single point on a map.

Coal mines may include staging areas, office complexes, rail yards, railroad spurs, processing facilities, parking, etc. Coal-fired electric generating units may contain coal piles, cooling ponds, ash ponds, cooling water in-takes, electrical substations, rail yards, railroad spurs, as etc.

The entire footprint of these facilities (including the underground expanse of underground mines) should qualify any census tract that overlaps with or touches such footprint as a “census tract in which” a coal mine or coal-fired electric generating unit has closed or retired.

For coal-fired generators that were cogeneration facilities, the entire expanse of the industrial campus they served should be considered part of the facility.

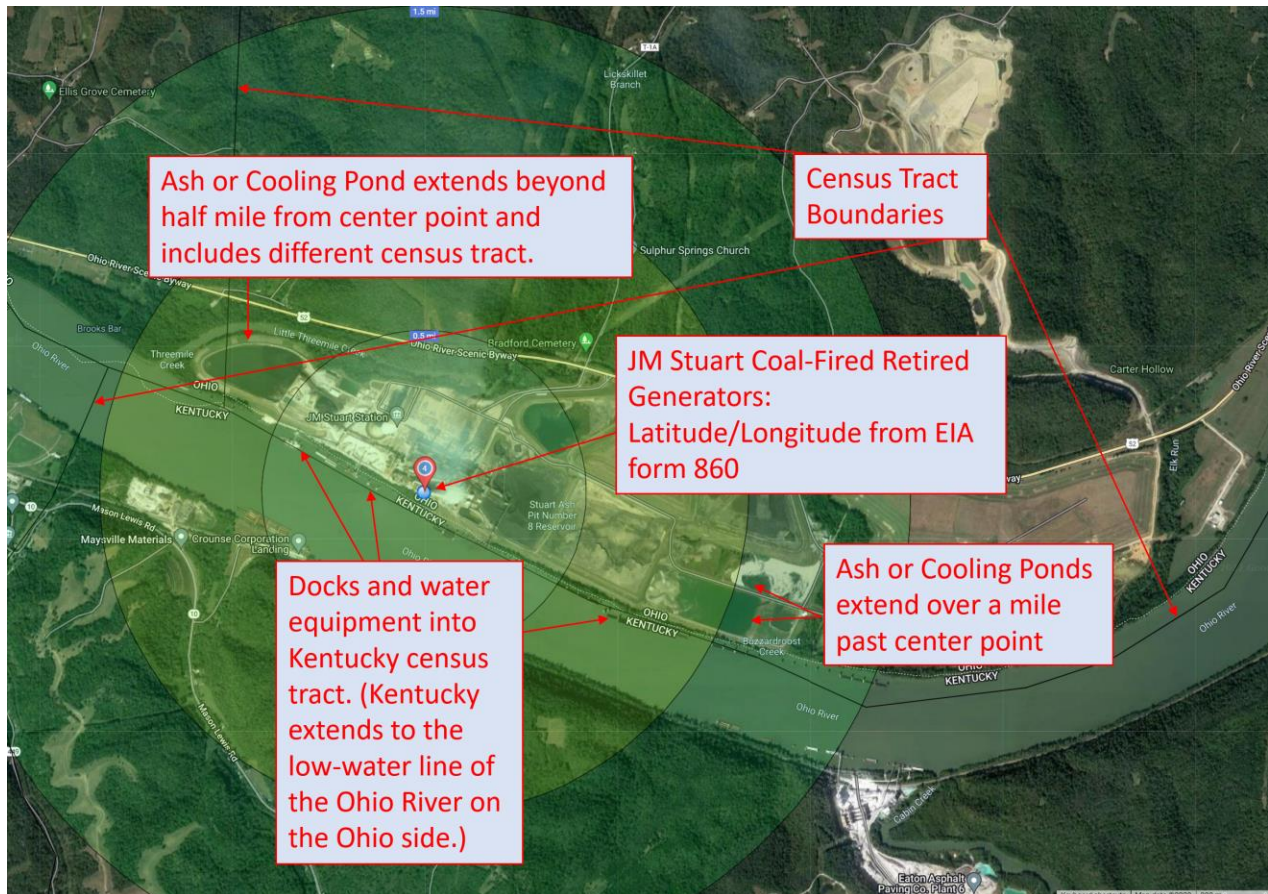
The footprints of these facilities can be expansive and may be administratively difficult to determine. For example, the underground expanse of a mine may be difficult to document. For mines and power plants that closed or retired years ago where remediation has begun, it may be difficult to show the expanse of the mine/plant footprint. Much of the footprint may no longer be visible in current satellite images and property may have been redeveloped with new property boundaries.

The combined total of closed coal mines and coal-fired electricity generating units already includes about 6,000 locations. The process of producing and verifying precise mine and generator land surveys and land records (which could be complicated by subdivision/redevelopment after a mine closes or generator retires) would be administratively burdensome and would add little value. We recommend that Treasury ease the administrative burden of defining the area of a closed mine or retired generator by accepting a 1.5-mile radius from the MSHA or EIA-provided geographic coordinates as a proxy for the expanse of such facilities, or at the election of the taxpayer, documentation of the full expanse of such facility. That 1.5-mile radius from the latitude and longitude provided by MSHA or EIA for mines and generators, respectively, will cover the expanse of those facilities in most circumstances and is consistent with Treasury’s goal of “ensuring as many eligible taxpayers as possible benefit from the incentives provided by law while protecting against fraud and abuse.” Treasury should consider each census tract that falls under a portion of such radii to be tracts in which a coal mine has closed or coal generator has retired and all tracts adjacent to such tracts should qualify as part of that energy community.

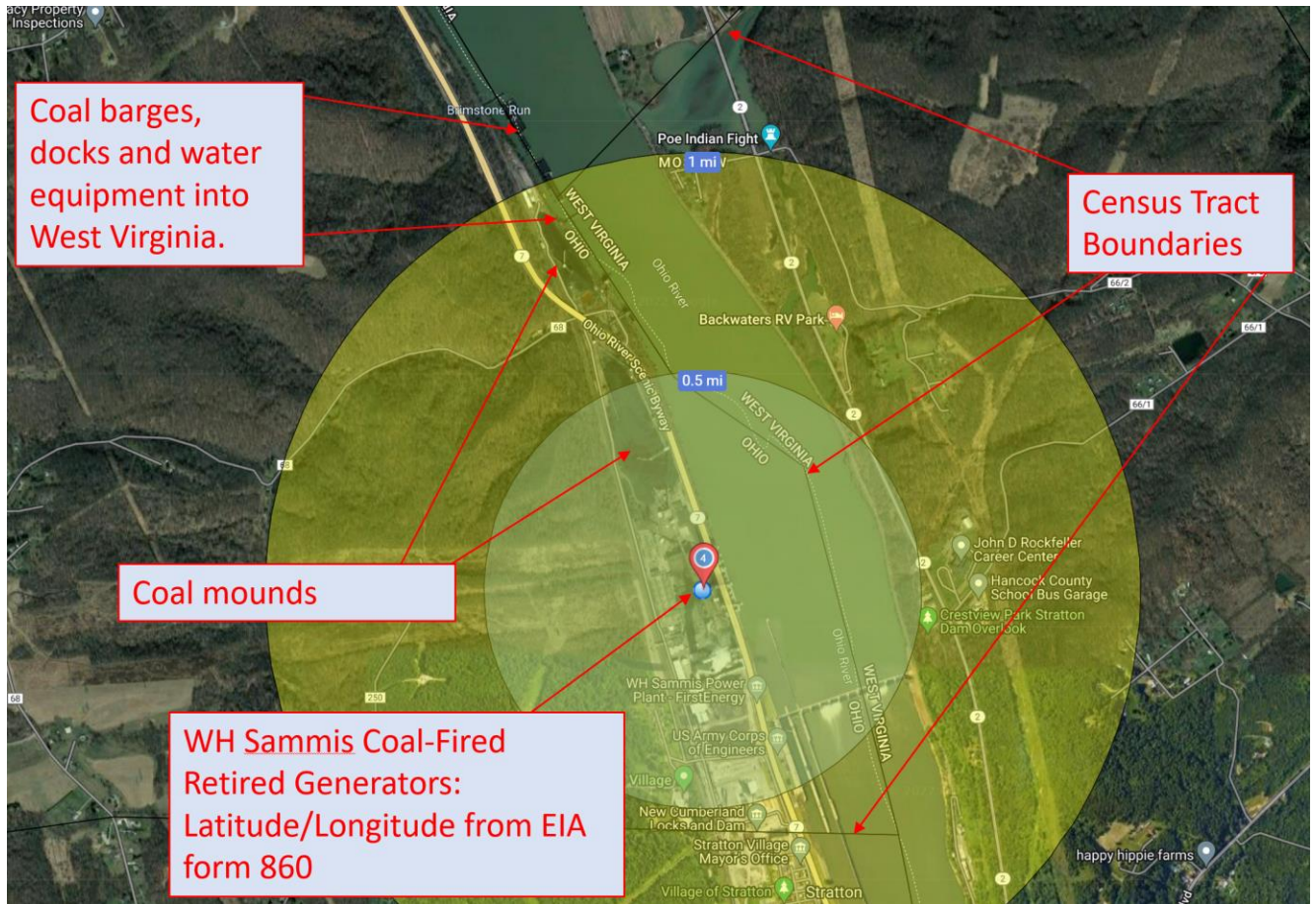
This radius approach will also help address imprecisions associated with any rounding of latitude and longitude coordinates found in MSHA and EIA data.

The image below illustrates one example of the expanse of a retired coal-fired generating unit. Some cooling/ash ponds extend over a mile past the latitude/longitude coordinate supplied in EIA form 860 for the JM Stuart Plant in Ohio. One such pond extends across census tract boundaries. Further, docks and water-handling equipment extend past the low-water line on the Ohio side of the

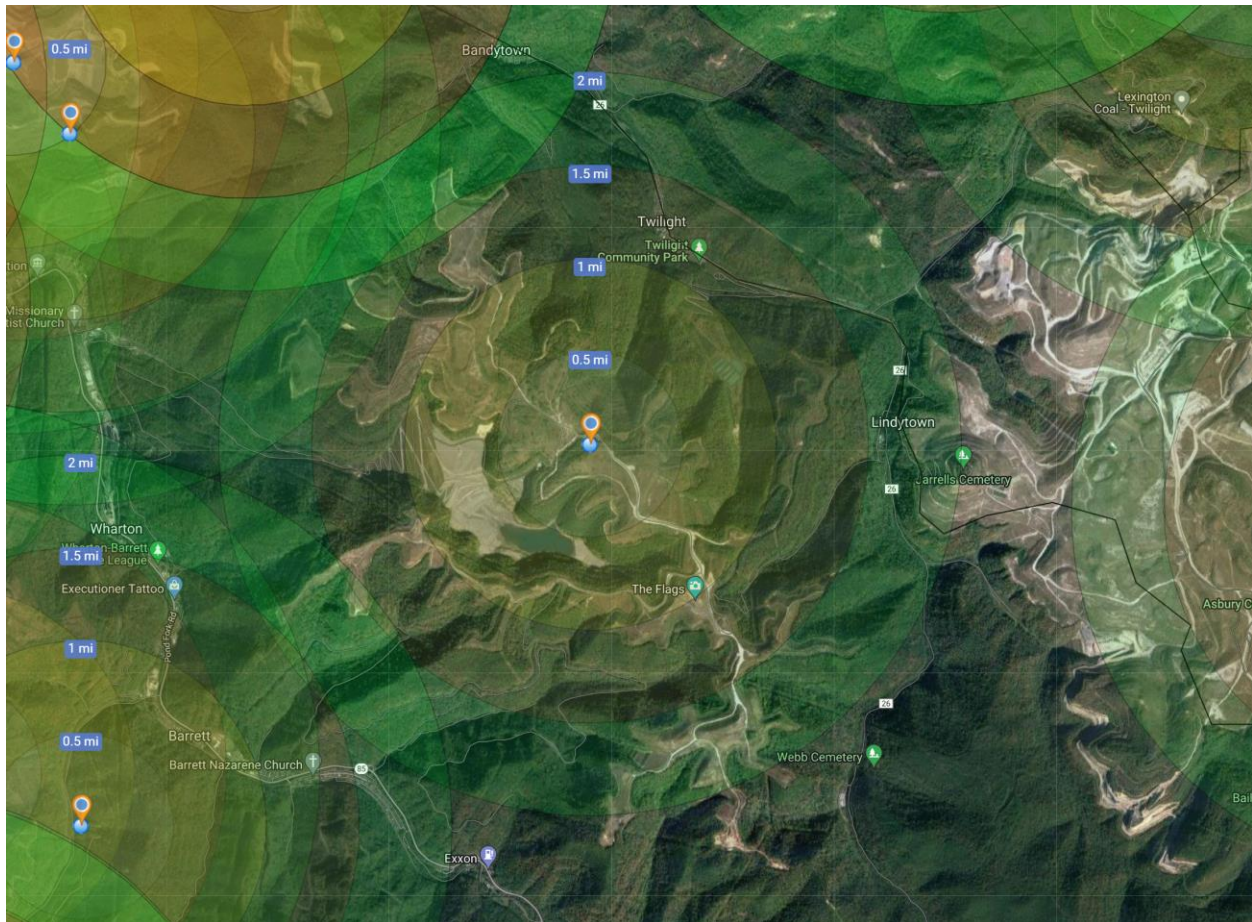
Ohio River which is the border between Ohio and Kentucky and (necessarily) the boundary of a census tract. Thus, we have three census tracts in which these coal-fired generating units retired. It is worth noting because coal-fired generators require a cooling water source and census tracts often use water as a border, we will frequently find such facilities near or straddling census tract boundaries. Using a radius proxy for the expanse of a plant will ease the administrative burden of demonstrating in which census tracts a mine closed or generating unit retired.



The image below shows another example of a coal-fired power plant's footprint extending over a mile beyond the EIA reported latitude and longitude.



The image below illustrates the expanse of the Synergy Surface Mine No 1 that was listed as “abandoned” in September 2022.



.05 Increased Credit Amount for Qualified Facility With Maximum Net Output of Less than 1 Megawatt

Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules. Does the determination of when a facility or project will be considered to have a maximum net output of less than 1 megawatt need further clarification? If so, what should be clarified?

Such qualified facilities should be determined based on the maximum amount AC that they can send out to the grid (i.e., post-inverter for inverter-based resources).

Facilities that include, for example, generation and storage assets that exceed 1 MW_{AC} could still qualify provided that their inverter(s) are not capable of sending out 1 MW_{AC} or more. This can be an inverter configuration or can be a commercial limit based on an interconnection agreement with the interconnecting utility. For purposes of this provision, the 1 megawatt should be defined as 1 megawatt of *real* power, not as *apparent* or *reactive* power.

IV. Conclusion

SEIA appreciates the Department of the Treasury's efforts to implement the IRA. As described above, this effort represents an incredible opportunity to minimize the harmful effects of fossil fuel combustion, climate change, and extreme weather on LMI communities, including rural communities, communities of color, and Native communities, while boosting local economies and the national economy. Time is of the essence to fight the climate crisis, and we are encouraged by your quick efforts to clarify the IRA's clean energy rules of the road. We look forward to continuing to work with you on implementation.

Thank you for the opportunity to provide these responses. If you have any questions, please contact Ben Norris at (202) 556-2909 or bnorris@seia.org.

Sincerely,

/s/ Sean Gallagher

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