



California Lawyers Association

*presents*

Opportunities for Climate Resiliency Projects Under the Inflation Reduction Act --  
What Lawyers Need to Know

1.25 Hours MCLE

Saturday, September 23, 2023

3:00 PM - 4:15 PM

Speakers:

**Steve Recchia**

**Bernice Diaz**

**David Beckman**

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2023 California Lawyers Association

*All Rights Reserved*

*The California Lawyers Association is an approved State Bar of California MCLE provider.*

# Opportunities for Climate Resiliency Projects under the Inflation Reduction Act – What Lawyers Need to Know

Steve Recchia, Clark Hill  
Bernice Diaz, Sheppard Mullin  
David Beckman, Pisces Foundation

CALIFORNIA LAWYERS ASSOCIATION

SAN DIEGO / SEPTEMBER 21- 23

# ANNUAL MEETING

BREAKING BARRIERS

CALIFORNIA  
LAWYERS  
ASSOCIATION

#CLAAnnual

## Scope of Panel Discussion

### I. Tax credits: Benefits & Transferability (Steve)

- § 45 to § 48 additions to Internal Revenue Code
- Investment Tax Credit, Production Tax Credit, & Transferability

### II. Qualifications for Tax credits – Prevailing Wage/A (Bernice)

- Section 45(b)(7) & (8) of Internal Revenue Code

### III. Civil Society – (David)

- Grants, non-profits, and philanthropy

## **Inflation Reduction Act (IRA): Statutory and legal framework**

Scope: IRA impacts any major construction and financing of renewable energy projects, federal gov't backstops clean energy

Legislative History: Tax credits history + Congress approval by reconciliation process

Validity: from 2023 through 2032 (and beyond)

Gov't Agencies: IRS, Treasury, Labor Department, and EPA



## ***TAX MITIGATION***

***“Tax Credits can be obtained using the same dollars that would otherwise be payable to IRS for tax liability payments.***

***Tax credits provide a powerful dollar-for-dollar savings for every taxpayer that has tax liabilities owed to the IRS.”***

# Transferability: “new taxpayers” > new frontier

## COMPREHENSIVE:

- IRA provides benefits to any “taxpayer,” including individual and business. Traditional Tax Credit benefits targeted investor and “own and operator”

## TRANSFERABILITY

- Provides sale of tax credits without need to “own and operate” energy project – transformative
- This is a 10-year layer potentially on any tax filing that wants to monetize and buy tax credits in future

## IRA and Davis-Bacon Act

- Amended the Internal Revenue Code to add prevailing wage and apprenticeship (“PWA”) requirements to receive full amount of tax benefits
- Replaced the renewable energy credit structure with a two-tiered system: base rate and increased rate if PWA requirements are met
- Primary source of federal support for clean energy infrastructure projects is through the tax code (primarily in the form of production and investment tax credits)
- Receipt of this support historically did not require recipients of these credits to abide by the Davis-Bacon Act and pay prevailing wage
- Created perceived loophole for clean energy projects that IRA effectively closed

## IRA and Davis-Bacon Act - Continued

- Many of the legislation's new and restructured programs provide either a base credit or an increased rate if:
  - (i) the contractors and laborers are paid prevailing wages; and
  - (ii) registered apprentices represent a percentage of labor hours.
- For taxpayers who meet the PWA requirements, the “increased” credit is generally five times the base credit rate.
- On November 30, 2022, the Treasury Department and the IRS published the initial guidance on the PWA requirements.
- Projects that have begun construction before January 29, 2023, are exempt from the PWA requirements.



## Prevailing Wage Requirement

- Satisfied if the taxpayer:
  - (1) pays the prevailing wage to laborers and mechanics employed in the construction, alteration, or repair of the project; and
  - (2) maintains and preserves sufficient records, including books of account or records for work performed by contractors or subcontractors, to substantiate that prevailing wages were paid.
- The Treasury Guidance defines the term “construction, alteration, or repair” to mean the term “construction, prosecution, completion, or repair” under the Davis-Bacon Act.
- Failure to satisfy can be corrected by (1) paying the worker not paid the prevailing wage the difference between the prevailing wage and amount the worker was paid plus interest; **and** (2) paying a penalty of \$5,000 per worker to the Secretary of Treasury.

# Apprenticeship Requirement

Satisfied if the taxpayer:

- (1) satisfies the Apprenticeship Labor Hour Requirements, subject to any applicable Apprenticeship Ratio Requirements per classification;

Construction Begins	Before 1/1/2023	During 2023	After 12/31/2023
Required Percentage	10%	12.5%	15%

- (2) satisfies the Apprenticeship Participation Requirements, meaning each contractor on behalf of the taxpayer who employs four or more individuals to work on the project must employ one or more qualified apprentices.
- (3) maintains and preserves sufficient records, including books of account or records for work performed by contractors or subcontractors, to substantiate that the first two requirements were satisfied.

## Apprenticeship Requirement - Continued

- Good Faith Exception: deemed to have satisfied the requirement if the taxpayer has requested qualified apprentices from a registered apprenticeship program and either
  - (i) the request is denied for reasons other than a refusal to comply with the program's standards and requirements; or
  - (ii) the registered apprenticeship program fails to respond to the request within five business days after the date the registered apprenticeship program received the request.
    - An acknowledgment with no commitment constitutes a sufficient response.
- Failure to satisfy the Apprenticeship Requirements can be corrected by paying a penalty to the Secretary of Treasury equal to \$50 (\$500 in the case of intentional disregard of the apprenticeship requirement) multiplied by the total labor hours for which the apprenticeship requirement was not satisfied.

## Proposed Regulations on PWA Requirements

- The IRS and Department of Treasury published a notice of proposed regulations on the PWA requirements on August 30, 2023.
- A public hearing is scheduled to be held on November 21, 2023, at 10:00 a.m. ET.
- Major takeaways from the proposed regulations:
  - *Project Labor Agreements:*
    - Penalty payment to cure a failure to satisfy the prevailing wage requirement does not apply if the work is done pursuant to a pre-hire collective bargaining agreement *and* any correction payment owed is paid on or before the date on which the increased credit is claimed. (Section 1.45-7(c)(6)(ii)).
    - Penalty payment to cure a failure to meet the Labor Hours or Participation Requirement would not apply if a project labor agreement is in place. (Section 1.45-8(e)(2)(v)).

## Proposed Regulations on PWA Requirements - Continued

- *Good Faith Effort* (“GFE”): the request must be in writing to at least one registered apprenticeship program. If the request is denied or not responded to, the taxpayer will be deemed to have exercised GFE with respect to the request for 120 days from the date of the request.
  - GFE beyond 120 days of a previously denied request requires submission of an additional request.
  - Acknowledgement of receipt without providing apprentices does not constitute a non-response by the registered apprenticeship
    - does not absolve the taxpayer or contractor
    - need to make further request and receive a denial to qualify for GFE
- *Penalties*:
  - Whether taxpayers make the correction payments and pay the penalty amounts promptly is one of the factors considered in evaluating intentional disregard.
  - The IRS has discretion to waive or decline issuing penalties if the failure to pay prevailing wage is “small in amount or occurred in a limited number of pay periods.”

## Code Sections Subject to the PWA Requirements

Credit	Prevailing Wage Requirement	Apprenticeship Requirement
Section 30C – Alternative Fuel Vehicle Refueling Property Credit	✓	✓
Section 45/45Y – Production Tax Credit	✓	✓
Section 45L – New Energy Efficient Homes Credit	✓	X
Section 45Q – Carbon Oxide Sequestration Credit	✓	✓
Section 45U – Zero-Emission Nuclear Power Production Credit	✓	X

Credit	Prevailing Wage Requirement	Apprenticeship Requirement
Section 45V – Clean Hydrogen Production Credit	✓	✓
Section 45Z – Clean Fuel Production Credit	✓	✓
Section 48/48E – Investment Tax Credit	✓	✓
Section 48C – Qualifying Advanced Energy Project Credit	✓	✓
Section 179D – Energy Efficient Commercial Buildings Deduction	✓	✓

\*Code sections 45, 45Y, 48, and 48E are not subject to the prevailing wage and apprenticeship requirements if the applicable project has a maximum net output of less than 1 megawatt

## Civil Society

- ***The IRA includes \$369 billion** for clean energy projects, environmental justice initiatives, and decarbonizing the transportation and energy sector, **including \$60 billion for disadvantaged communities**, including incentives for green and clean infrastructure*
- *Lawyers have the opportunity to advise **28,000+ nonprofit organizations** about how they can play a pivotal role in ensuring these benefits are realized.*
- ***Philanthropy is catalyzing the capacity** of nonprofits to engage in implementation, with new funds offering more than \$40 million annually to nonprofits.*

## Role of Nonprofits

- **Advocacy**

*Elevate issues; apply for funding*

- **Notice and Comment**

*Program design, credits, incentives, implementation*

- **Advising / working with the government**

*Engage with local/state government on design and implementation; partner with local government to apply for funding*



# Community Benefit: Environmental Justice

**\$3B: environmental & climate justice block grants to address disproportionate impacts**

***IRA Section 60201***

**\$3B: clean ports funding to address public health and environmental impacts on surrounding communities**

***IRA Section 60102***

**\$5B: climate pollution reduction grants to implement plans to reduce harmful pollution in every state**

***IRA Section 60114***

**\$27B: Greenhouse Gas Reduction Fund (green bank) - \$15B for low air pollution abatement, solar, clean energy projects**

***IRA Section 60103***

**\$3B: transportation & reconnect communities projects that redesign or remove freeways and repair displaced neighborhoods**

***IRA Section 60501***



# Community Benefit: Farmers, Forestland, and Resilient Rural Communities

**\$20B+: to support climate-smart agricultural practices**

***IRA Section 21001***

**\$9.7B: Empowering Rural America grants to support clean energy projects by rural electric co-ops, serving 42 million people**

***IRA Section 22004***



**\$5B: grants to support healthy, fire resilient forests, forest conservation, and urban tree planting**

***IRA Sections 23001 - 23005***

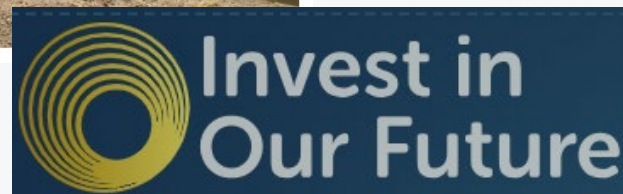


**\$2.6B: to conserve and restore coastal habitats and protect communities that depend on those habitats (farmers, ranchers)**

***IRA Section 40001***

# Philanthropic efforts

\$40M+  
annually



## Inside Philanthropy

GRANT FINDER LEARN ARTICLES PLACES CAREER CENTER

### Collaborative Green Movement Funding Initiative Grows, Looks to Harness Federal Climate Investment

Michael Kavate | April 28, 2023

f t in

