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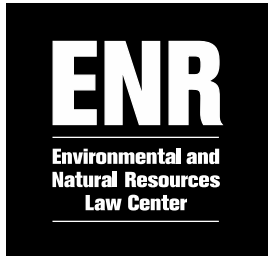
Policy Options for Attaching Labor Standards to Employment in the Clean Energy Technology Sector

**A White Paper of the University of Oregon School of Law
Environmental and Natural Resources Law Center
Energy Law and Policy Project**

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Acknowledgements

We greatly appreciate Rep. Kathy Castor, Chair of the Select Committee on the Climate Crisis, and the members of that Committee for the opportunity to conduct this research and present the findings and recommendations. In addition, the Committee legislative aides provided important insight and feedback to the students on the scope and importance of this project. Assistant Professor Dotson played an instrumental role in facilitating this project and providing the opportunity for the law students to engage in such a rich policy issue. In addition, the students had the opportunity to present the recommendations in person to the Committee on November 17, 2019.

About this Paper

This report content was originally developed as recommendations to the Select Committee on the Climate Crisis in the U.S. House of Representatives and Committee Chair Kathy Castor (FL). The recommendations were developed as a project for Assistant Professor Greg Dotson's Environmental Policy Practicum course in winter term, 2019.

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About the Energy Law and Policy Project

The Energy Law and Policy Project is one of seven theme-based, interdisciplinary research projects administered to the University of Oregon ENR Center. The Project is led by faculty leaders Greg Dotson and Roberta Mann. The mission of the Energy Law and Policy project is

to explore innovative law and policy to promote a green energy future. Important issues the Project has recently explored include efforts to increase electrified transportation and carbon policy in Oregon.

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Abstract

New climate change policies are commonly accompanied by promises of revitalized economies and green jobs. While many analysts report job expansion potential in the transition to a carbon-neutral economy, the quality of those jobs is often overlooked. Workers and communities are more likely to endorse renewable energy and technology programs that create family-wage jobs and provide important benefits such as health insurance and pensions and opportunities for career advancement.

When climate change policies and programs fail to incorporate strong and comprehensive labor standards, they create a divide between fair labor advocates and climate policy advocates.¹ Labor organizations often hesitate to support these programs because they are skeptical that quality jobs will simply appear as a function of increasing the prevalence of clean energy technologies in climate change policies.²

This skepticism is not misplaced. Though many climate change policies have the potential to create green jobs, the employment rarely provides sufficient wages and benefits to those suffering joblessness in fossil fuel and manufacturing dependent communities.³ Moreover, many climate change policies also fail to incorporate labor standards that ensure livable wages, fringe benefits, and other

worker rights. Intertwining labor standards with climate change policies enhances the quality of jobs created from those policies, ensuring that green jobs are good jobs.

This report identifies and recommends potential policy options to ensure high-road labor standards are met in the clean energy sector. The report begins by identifying high-road labor standards that could improve workers' job quality. Then, the report discusses federal actions, such as federal contracts, grants, tax credits, or other incentives, that could be tied to improved labor standards in order to expand the adoption and acceptance of the labor standards. The report also discusses how policymakers could establish a certification program to expand the potential reach of high-road labor standards beyond manufacturing into the service sector.

Current federal laws, such as the Davis-Bacon Act, require prevailing wages or other heightened labor standards for designated types of projects that receive federal funding or tax credits. In considering various policy options, the report explains existing labor standards that attach to the receipt of federal funds and analyzes how these standards could be strengthened, drawing from state and proposed federal programs. The report will also note and assess potential legal

¹ Valerie Volcovici, *Labor Unions Fear Democrats' Green New Deal Poses Job Threat*, REUTERS, Feb. 12, 2019, <https://www.reuters.com/article/us-usa-greennewdeal-coal/labor-unions-fear-democrats-green-new-deal-poses-job-threat-idUSKCN1Q11D2>.

² Robert Michaels & Robert Murphy, *Green Jobs: Fact or Fiction?* INST. FOR ENERGY RESEARCH 1 (Jan. 2009),

<https://www.instituteforenergyresearch.org/wp-content/uploads/2009/01/IER%20Study%20-%20Green%20Jobs.pdf>.

³ Benjamin S. Beach, *Using Government Policy to Create Middle Class Green Construction Careers*, 18(1) J. of L. & Policy (2009), https://www.forworkingfamilies.org/sites/default/files/publications/Govt_Policy_Green_Careers_BB.pdf.

barriers that could inhibit the proposed modifications and establishment of federal programs.

In addition to identifying existing programs that could be strengthened to ensure a just transition, the report also identifies jobs within the energy sector that do not currently benefit from the requirements of existing programs and proposes policies that could potentially address those deficiencies. Specifically, the report finds manufacturing, installation, and service jobs in the clean energy sector generally do not reap many of the benefits that attach to projects supported by federal funding. Accordingly, the report discusses how labor standards can attach to tax credits and honorary certifications to reach manufacturing and service jobs.

Finally, the report concludes with a brief discussion of the importance of encouraging the adoption of high-road labor standards, the benefits that could be realized in depressed, rural communities, and the importance of immediately improving labor standards in the renewable energy sector.

I. OVERVIEW OF EMPLOYMENT IN THE CLEAN ENERGY TECHNOLOGY SECTOR

A. SUMMARY OF ENERGY SECTOR EMPLOYMENT IN THE U.S IN 2018

Available employment in clean energy technology sectors is on the rise. Traditional energy and energy efficiency sectors together employed 6.7 million people (4.6% of the workforce) in 2018, which is a 2.3% increase from 2017.⁴ The

⁴ Nat'l Ass'n of State Energy Officials & Energy Futures Initiative, The 2019 U.S. Energy &

electric power generation sector employed 875,600, which was a slight decline of just under one percent. Job losses in solar, nuclear and coal generation were partially offset by gains in natural gas, wind, and combined heat and power (cogeneration). In the clean energy sector, 242,000 people were employed in the solar industry, a decline of 3.2%, even though 11.06 gigawatts of capacity were added to the grid. However, wind energy jobs increased by 3.5%, with a total of 111,000 people working in wind energy.⁵ Solar and wind provided the most energy-related construction jobs in 2018. By comparison, in the fossil fuel energy sector, petroleum fuels added 33,500 jobs (5.9% increase) and natural gas, coal mining, and fuels production also saw modest job increases.

Employers in the U.S. Energy sectors anticipate a 4.6% increase in employment growth for 2019; however, 77% of employers reported difficulty in hiring qualified workers. Lack of experience, training, or technical skills is nearly-universally cited as the primary reason employers can't fulfill employment needs. Policy options in this report attempt to address training deficiencies by offering apprenticeship and training opportunities to ensure the workforce is adequately prepared to meet new job opportunities, as discussed in further detail in Section II of this report.

B. POLICY EMPHASIS ON MANUFACTURING, INSTALLATION, AND SERVICE

Traditionally, many sectors related to infrastructure and construction have

Employment Report 2 (2019), <https://www.usenergyjobs.org/>.

⁵ *Id.*

strong union representation. Within the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), building and construction trades have their own department, which includes representation from the Utility Workers Union of America (UWUA); United Steelworkers (USW); United Association Union of Plumbers, Fitters, Welders & Service Techs (UA); International Brotherhood of Electrical Workers (IBEW); among many others.⁶ Accordingly, jobs in construction and infrastructure are generally accompanied by stronger workers' rights and better pay and benefits than other sectors such as manufacturing and service.

While it is important to continue to support high-labor standards in the infrastructure and construction sectors, the labor standards in manufacturing and service sectors need to be addressed to enhance and maintain competitive salaries and benefits. Clean energy technology projects could provide excellent economic benefits to depressed areas like the rural Midwest,⁷ especially when those jobs pay family wage salaries, provide competitive benefits, and career ladders.

II. HIGH ROAD LABOR STANDARDS

The phrase “high-road jobs” is both an affirmative statement of what workers and

families need to thrive and a response to “low-road” employers that engage in labor violations (i.e. wage theft and safety violations), set low pay without benefits, and hire contingent workers or contractors instead of permanent employees.⁸ High-road jobs are sustainable because they go beyond prevailing wages and benefits to include other important elements of good-quality jobs, such as paying true, living family wages, access to affordable health care, attention to worker safety, and opportunities for skills training and career ladders in the workplace. In some instances, it also includes flexible work schedules, childcare assistance, and other family-friendly policies.

Opponents of mandated higher labor standards argue that they make projects more expensive. However, from a policy perspective, high-road jobs increase worker productivity and job satisfaction while reducing dependency on taxpayer-funded social safety nets. The families of employees who are paid a living wage and receive health benefits are less likely to rely on social safety nets such as Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits, or other taxpayer-funded subsidies.⁹

In addition, setting higher labor standards enables the high-road employers to be

⁶ See *Our Affiliated Unions*, AFL-CIO, <https://aflcio.org/about/our-unions-and-allies/our-affiliated-unions> (last visited Oct. 14, 2019).

⁷ See, e.g., Arjun Krishnaswami, *Renewable Energy Brings Economic Boost to Rural Communities*, NRDC (Dec. 6, 2018), <https://www.nrdc.org/experts/arjun-krishnaswami/renewable-energy-brings-economic-boost-rural-communities>.

⁸ See e.g., PHILIP MATTERA, GOOD JOBS FIRST, HIGH ROAD OR LOW ROAD? (2009), <https://www.goodjobsfirst.org/sites/default/files/docs/pdf/gjfgreenjobsrpt.pdf>; MARK BRENNER

& LINA STEPICK, LABOR EDUC. AND RESEARCH CTR., THE UNION ADVANTAGE (Feb. 2019), <https://cpbus-e1.wpmucdn.com/blogs.uoregon.edu/dist/a/13513/files/2019/03/The-Union-Advantage-Final-Web-1yf2yg5.pdf>.

⁹ AM. SUSTAINABLE BUS. COUNCIL, THE HIGH-ROAD WORKPLACE: ROUTE TO A SUSTAINABLE ECONOMY 4 (2017) <https://www.asbcouncil.org/sites/main/files/file->

more competitive in a bidding process because they are not under-bid by employers that rely on contingent workforces or cut corners on safety and compliance with wage and hour laws. A report by the American Sustainable Business Council found that “[v]alues-based business leaders say incentives would help them adopt more high-road practices—and they believe incentives and regulations are needed to motivate other firms in their industries.”¹⁰

Federal high-road job mandates and incentives can therefore have a synergistic effect by raising the overall standards and expectations in the fast-growing renewable energy and green jobs sectors. These benefits can be further extended when combined with project labor agreements, union neutrality agreements, and community benefits agreements, as explained in the following sections.

A. LOCALLY PREVAILING WAGE AND FRINGE BENEFITS

Conditions attached to federal funding or tax exemptions for clean energy technology projects may require that employees working for an employer that contracts with the federal government, or receives other federal grants, funds, or incentives, be paid wages at rates not less than those

prevailing on construction projects or contracted manufacturing and service of a similar character in the locality. Prevailing wage law only covers specific occupations held by construction workers and does not apply to other workers on other public works projects.¹¹ However, this standard could easily be applied as a condition for other occupations working on clean energy technology projects. Alternatively, living wages have become more common as a goal in state Green New Deal proposals¹² and as a condition of Community Benefit Agreements,¹³ an agreement that ensures community support for a project by negotiating an agreement between the developer and a broad community coalition.¹⁴ Ensuring that local workers on clean energy projects are receiving living wages is critical to a successful transition to renewable energy.

Other fringe benefits are important to creating good jobs that benefit the local community through clean energy technology projects. In addition to living wages, employers should be encouraged to provide all employees with health insurance, paid sick and vacation leave, and employer-sponsored retirement plans. The quality of employer-sponsored health insurance has been continuously declining in recent years, and the U.S. is one of the only developed nations without universal healthcare.¹⁵ Until universal healthcare is

attachments/asbc_building_the_high_road_report_2017.pdf.

¹⁰ *Id.* at 3.

¹¹ *Prevailing Wage Resources*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/prevailing-wage-resources.aspx> [last visited Oct. 31, 2019].

¹² *See, e.g.*, H.F. 2836, 2019 Leg., 91st Sess. (Minn. 2019).

¹³ *See, e.g.*, *National Examples of Community Benefits Agreements (CBAs)*, PARTNERSHIP FOR

WORKING FAMILIES,

[http://somervillecdc.org/sites/default/files/sc-](http://somervillecdc.org/sites/default/files/sc-minimal/files/national_examples_of_community_benefits_agreements_cbas.pdf)

[minimal/files/national_examples_of_community_benefits_agreements_cbas.pdf](http://somervillecdc.org/sites/default/files/sc-minimal/files/national_examples_of_community_benefits_agreements_cbas.pdf) [last visited Oct. 16, 2019].

¹⁴ *See infra* Part II § D (defining Community Benefit Agreements and explaining the benefits they provide).

¹⁵ David Blumenthal, M.D., *The Decline of Employer-Sponsored Health Insurance*, THE COMMONWEALTH FUND (Dec. 5, 2017),

provided for all citizens of the U.S., it is important for the government to encourage employers to provide good health insurance to their employees. This benefits everyone as studies have shown that employees are more productive when employers provide health insurance.¹⁶

The U.S. is also the only advanced economy without a federal paid leave policy.¹⁷ Furthermore, when these benefits are provided by employers, they disproportionately favor employees with higher salaries.¹⁸ While this is unlikely to change in the foreseeable future, employers should be pressed to provide these benefits to all employees involved in clean energy technology projects through conditional federal funding or tax incentives. Retirement benefits are also an important consideration and could be encouraged through conditional federal funding. Whether through pensions or employer contributions like a 401(k) plan, these are important benefits to ensure workers' financial security at retirement.

Living wages and strong fringe benefits are critical components to attracting workers to jobs in clean energy technology. Employer-sponsored health insurance, paid leave, and employer-sponsored retirement plans should be available to all employees in this sector. Conditioning federal funding for clean energy technology projects on living wages and certain benefits incentivizes employers to adopt some of these policies

in a way that benefits workers and provides them with the means to support a family.

B. EMPLOYMENT AGREEMENTS

Contractors and building trades' labor unions can enter into collective agreements that set out prevailing wage and benefit standards, hiring practices, and worker safety conditions that apply to all contractors and subcontractors. This type of agreement is most common for an infrastructure or major construction projects. These agreements also can set out methods for dispute resolution and frequently preclude strikes or other work interruptions. By setting out these worker conditions ahead of time, these agreements provide an even playing field for contractors to estimate labor costs as they bid for jobs. Two common types of such agreements discussed below are project labor agreements and labor peace agreements.

1. Project Labor Agreement (PLA)

Currently, federal regulations require all contractors and subcontractors engaged in large-scale construction projects with the federal government to negotiate project labor agreements (PLA).¹⁹ A PLA is a collective bargaining agreement that applies to a specific construction project and lasts only for the duration of the project and typically requires all bidders to

<https://www.commonwealthfund.org/blog/2017/decline-employer-sponsored-health-insurance>.

¹⁶ Lauren Weber, *Healthier Workers are More Productive, Study Finds*, WALL ST. J. [Aug. 8, 2017], <https://www.wsj.com/articles/healthy-workers-are-more-productive-study-finds-1502219651>.

¹⁷ Richard V. Reeves & Katherine Guyot, *Four Policies to Help the Middle Class, and How to Pay for Them*, BROOKINGS [Nov. 5, 2018], <https://www.brookings.edu/blog/up-front/2018/11/05/four-policies-to-help-the-middle-class-and-how-to-pay-for-them/>.

¹⁸ *Id.*

¹⁹ 48 C.F.R. § 22.501 [2018].

agree in advance to specific terms.²⁰ PLAs set mutually binding procedures to resolve labor disputes, establish procedures for selecting subcontractors, negotiate guarantees against strikes and lockouts, and typically require employers to agree to use union labor, pay prevailing wages, and provide benefits.²¹ PLAs are an exception to the National Labor Relations regulatory requirement that a collective bargaining representative is chosen by a majority worker vote.²² However, PLAs have limited applicability because they only afford protections to employees working under a construction contract with the federal government.

Though federal regulations currently require PLAs, PLAs have always been politically contentious and are subject to change with each presidential administration. In 1992, President George H.W. Bush issued an executive order prohibiting agencies from requiring PLAs for federal construction projects.²³ Since then, the requirement has been upheld and banned several times as a function of the presidential administration's political party affiliation.²⁴ The pattern continued into President Obama's administration, which issued an executive order to re-establish

PLAs requirements to "promote the efficient administration and completion of Federal Government contracts."²⁵ However, unlike previous administrations, President Obama's executive order was effectuated through federal agencies promulgating an administrative rule to implement the requirement.²⁶ Though the Trump administration has not directly addressed PLAs through executive action like previous administrations, PLAs are still highly contentious, and PLA opponents have actively been trying to persuade President Trump to eliminate the requirement.²⁷

PLAs are commonly required for clean energy projects, which often rely on federal government grants or funding. Federal policy should aim to strengthen labor standards in a PLA that is required for clean energy technology development. For example, Senator Merkley's proposed bill, "Good Jobs for the 21st Century Act," requires specific provisions to be included in a PLA for clean energy technology companies to be considered "qualified" and thus able to obtain federal funding and incentives.²⁸ The bill stipulates that the following provisions must be included in a PLA for an entity to qualify for a federal contract or funding. The PLA must:

²⁰ U.S. CHAMBER OF COMMERCE, LABOR PEACE AGREEMENTS 3 (2016), https://www.uschamber.com/sites/default/files/documents/files/labor_peace_agreements_2013_09_12.pdf.

²¹ 48 C.F.R. § 22.504(a)-(c).

²² 29 U.S.C. § 158 8(f) (2012).

²³ Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (October 23, 1992).

²⁴ See Exec. Order No. 12,836, 58 Fed. Reg. 7,045 (Feb. 1, 1993) (revoking President Bush, Sr.'s executive order); Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 17, 2001) (renewing President Bush, Sr.'s executive order and ban against PLAs).

²⁵ Exec. Order No. 13,502, 74 Fed. Reg. 6985, 6985 (Feb. 6, 2009).

²⁶ Federal Acquisition Regulation; FAR Case 2009-005, 48 C.F.R. § 22.503 (2010), 75 Fed. Reg. 19168 (Apr. 13, 2010).

²⁷ Letter from Business Associations to President Donald Trump (Jan. 24, 2018), <https://thetruthaboutplas.com/wp-content/uploads/2018/01/Coalition-Letter-to-POTUS-on-Project-Labor-Agreement-Policy-012418.pdf>; Letter from 44 House of Representative Republicans to President Donald Trump (July 17, 2018) https://budd.house.gov/uploadedfiles/budd_-_rooney_labor_letter.pdf.

²⁸ Good Jobs for the 21st Century Energy Act, S. 2185, 116th Cong. § 2(b)(1) (2019).

2. Labor Peace Agreement (LPA)

- 1) bind all contractors and subcontractors on the project or contract;
- 2) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are a party to a collective bargaining agreement;
- 3) contain guarantees against strikes, lockouts, and other similar job disruptions
- 4) include effective, prompt, and mutually binding procedures for resolving labor disputes arising during the PLA;
- 5) provide mechanisms for labor management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety and health;
- 6) not require mandatory arbitration for any dispute involving a worker engaged in a service for the contractor or subcontractor; and
- 7) include an explicit neutrality policy on any issue involving the organization of employees of the entity, contractor, or subcontractor, for purposes of collective bargaining.²⁹

In contrast to a PLA, a Labor Peace Agreement (LPA) is a more limited neutrality agreement between an employer and a union where one or both sides waive certain rights with regard to union organizing and related activity.³⁰ Federal law could require clean energy technology companies to negotiate LPAs with a union if the federal government has a “proprietary interest” in the company. LPAs “arise when a [government] asserts a ‘proprietary interest’ in a particular facility or development project, usually as the result of financial assistance to a private sector employer.”³¹ The agreement compels employers to grant organizing concessions to a union in exchange for abstention in strikes, pickets, and other workplace disruptions.³² Though LPAs have various requirements dependent on jurisdiction, the LPAs typically include the following provisions:

- 1) Employers must grant workplace access and provide employee information, including names, job titles, and contact information, to unions early in the organizing campaign.
- 2) Employers must agree to union neutrality, which require employers to refrain from making disparaging statements about the union or intervening in an organizing campaign.
- 3) Unions must promise not to strike, boycott, or engage in other tactics that are disruptive to the workplace

²⁹ *Id.* § (a)2(2) (discussing “Covered Project Labor Agreement”).

³⁰ WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, LABOR PEACE AGREEMENTS 4 (2013), <https://www.uschamber.com/sites/default/file>

s/documents/files/labor_peace_agreements_2013_09_12.pdf.

³¹ *Id.* at 3.

³² *Id.* at 4-5.

and consent to arbitration of disputes.³³

Some LPAs also require employers to recognize a union based on signed cards rather than the results of a secret ballot election.³⁴

LPAs have emerged on the state and local government level to satisfy the “market participant” exemption to federal preemption challenges. Though the preemption challenge specifically dealt with a State’s use of a PLA for a state-funded construction project, the court held that the pre-hire agreements for state-funded projects was not preempted by federal labor laws. In its holding, the court established that such pre-hire agreements are not preempted if Congress has not expressed or implied that “a State may not manage its own property when it pursues its purely proprietary interests and where analogous private conduct would be permitted.”³⁵

Thus, states and local governments have relied on this holding to justify its intervention whenever it asserts a “proprietary interest” in a particular facility or development project.³⁶ Consequently, LPAs have been increasingly enacted

across various jurisdictions, including San Francisco, Pittsburgh, Milwaukee County, and Washington, D.C.³⁷ In practice, local governments have required LPAs in a broad variety of circumstances, including (1) when a city receives ongoing revenue through a lease of city-owned property, (2) a project is used to repay city-provided loan and debt service on bonds, (3) a city has guaranteed loans for a project, or (4) the city has some other “significant ongoing economic and nonregulatory interest that is at risk in the project’s final success.”³⁸ Accordingly, on the federal level, requiring LPAs where the federal government has as proprietary interest in clean energy technologies would strengthen labor standards in a broad range of circumstances.

C. EMPLOYMENT PREFERENCES

1. *Locally Sourced Employment*

Labor standards should include provisions that require entities to source local employment. Local hire programs are important because they direct local resources back to members of the community where the project or program is taking place.³⁹ The investment in local

³³ John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, UNIV. OF CAL. INST. FOR LAB. AND EMP. 157, 184 (2003), <http://repositories.cdlib.org/ile/sci2003/ch05> at 184; *Id.* at 1.

³⁴ *Id.*

³⁵ *Bldg. & Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./R. I.*, 507 U.S. 218, 231, (1993).

³⁶ WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, LABOR PEACE AGREEMENTS 4 (2013), https://www.uschamber.com/sites/default/files/documents/files/labor_peace_agreements_2013_09_12.pdf.

³⁷ John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, UNIV. OF CAL. INST. FOR LAB. AND EMP. 157, 184 (2003), <http://repositories.cdlib.org/ile/sci2003/ch05> at 184.

³⁸ WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, LABOR PEACE AGREEMENTS 4 (2013), https://www.uschamber.com/sites/default/files/documents/files/labor_peace_agreements_2013_09_12.pdf.

³⁹ Jennifer D. Cantrell, et al., *Enforceability of Local Hire Preference Programs*, 59 Nat’l Cooperative Highway Res. Program 5 (2013), <https://www.apta.com/wp->

communities tends to direct resources to low-income neighborhoods by targeting opportunities to low-wage workers and people of color who might not otherwise benefit from a new development.⁴⁰ Moreover, local hire programs tend to produce indirect benefits, such as reducing fragmentation during the development process, increasing communication among developers, employers, communities and local job training, providing enhanced job readiness and retention support services.⁴¹ Local hiring programs have a documented success of creating jobs that benefit low-wage workers and communities.⁴²

Sen. Kirsten Gillibrand has proposed this policy at the federal level with S.2404, the “Build Local, Hire Local Act.” The definition of “local,” as defined in the proposed bill, is “hiring within geographical boundaries of the area in which the project is located, as determined by the recipient of [federal funds], in coordination with the head of the relevant Federal agency[.]”⁴³ Importantly, the “Build Local, Hire Local Act” requires the geographical area for which workers

are considered “local” to “(1) include high-poverty, high-unemployment zip codes and (2) be the size of a county, multi-county, statewide, or multi-statewide region.”⁴⁴ Within the geographic area, the Act requires employers to give priority to (1) veterans, (2) individuals from underrepresented populations, such as women and ethnic minorities, and (3) individuals with a barrier to employment as defined in the Workforce Innovation and Opportunity Act, excluding ex-offenders and disabled individuals.⁴⁵ The Workforce Innovation and Opportunity Act identifies a wide variety of barriers that inhibit individuals from joining the workforce.⁴⁶

Though “Buy Local, Hire Local” targets a wide range of projects that fall outside the clean energy sector, it stipulates specific requirements regarding implementation, enforcement, and monitoring.⁴⁷ The Act requires the Federal agency providing funds to ensure the entity carrying out the project prioritizes hiring in accordance with the enumerated standards.⁴⁸ The Act sets out the applicable percentage of priority

content/uploads/Resources/gap/fedreg/Documents/Legal%20Research%20Digest%20No.59%20-%20Enforceability%20of%20Local%20Hire%20Preferences%20Programs.pdf.

⁴⁰ KATHLEEN MULLIGAN-HANSEL, THE PARTNERSHIP FOR WORKING FAMILIES, *Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies That Serve Low-Income Communities* LOCAL RESIDENTS 3 (2008).

<https://www.forworkingfamilies.org/sites/default/files/publications/0708-MakingDevelopmentWorkForLocalResidents.pdf>.

⁴¹ *Id.* at 4.

⁴² *Id.* at 10, 12, 13.

⁴³ Build Local, Hire Local, S. 2404, 116th Cong. § 111(a)(1) (2019).

⁴⁴ However, the Bill stipulates that nothing in the proposed Act should be construed as prohibiting interstate hiring. *Id.* § 111(a)(1)(A)-(B).

⁴⁵ *Id.* § 111(c)(1)-(3).

⁴⁶ 29 U.S.C. § 3102(24)(A)-(N) (2015) (including displaced homemakers, low-income individuals, Indians, Alaska Natives, and Native Hawaiians, individuals with disabilities, older individuals, ex-offenders, homeless individuals, , youth who are in or have aged out of the foster care system, English language learners, individuals with low levels of literacy, and individuals facing substantial cultural barriers, eligible migrant and seasonal, individuals within 2 years of exhausting lifetime eligibility under part A of title IV of the Social Security Act (42 U.S.C. 601 et seq.), single parents, long-term unemployed individuals, such other groups as the Governor involved determines to have barriers to employment.)

⁴⁷ See Build Local, Hire Local, S. 2404, 116th Cong. § 3(1) (listing variety of infrastructure programs that must comply with the Act’s requirements).

⁴⁸ *Id.* § 111(b)(1).

workers that are necessary for compliance, increasing incrementally by year:

- (1) for fiscal year 2020, 10 percent;
- (2) for fiscal year 2021, 20 percent;
- (3) for fiscal year 2022, 30 percent;
- (4) for fiscal year 2023, 40 percent;
- and
- (5) for fiscal year 2024 and each fiscal year thereafter, 50 percent.⁴⁹

Policy makers should exercise caution when implementing “hire-local” initiatives to prevent potential conflicts with World Trade Organization’s Article III of the General Agreement on Tariffs and Trade, as discussed in further detail in the legal barriers section.⁵⁰ Policies should be crafted to avoid modifying conditions of competition in a way that overtly disfavors imports and nonlocal labor, conditions incentives on the procurement of goods that are manufactured locally. Instead, a policy could include goals for community poverty reduction or require federal entities to implement a *preference* to award projects to employers or contractors that demonstrate an ability and commitment to provide training locally and purchase products that were manufactured locally. This could potentially be implemented by utilizing a point system, or certification program as discussed later in this report.⁵¹ Such systems could be done in a manner that recognizes community benefits but does not disqualify imported components and non-local labor.⁵²

2. Skilled and Trained Workforce

Local hiring should be complemented with programs that ensure workers are adequately trained for new positions in the green energy sector. According to the 2019 U.S. Energy and Employment report, every segment of the electric power generation sector reported hiring difficulty: 34% of employers reported difficulty filling installation positions, 44% reported difficulty finding qualified engineers and scientists, and 39% reported difficulty hiring technicians or mechanical support.⁵³ Notably, 76% of manufacturing employers reported it was difficult to hire new employees.⁵⁴

⁴⁹ See *Id.* § 111(b)(2).

⁵⁰ See discussion *infra* Section III.A.4; also see Panel Report, *United States—Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/R (adopted June 27, 2019), https://www.wto.org/english/tratop_e/dispu_e/510r_e.pdf.

⁵¹ See discussion *infra* Section III.C.

⁵² *Id.* ¶ 7.319.

⁵³ Nat’l Ass’n of State Energy Officials & Energy Futures Initiative, *The 2019 U.S. Energy & Employment Report* (2019), <https://www.usenergyjobs.org/>.

⁵⁴ *Id.*

As summarized in the following charts,⁵⁵ most employers surveyed noted that lack

of experience, training, or technical skills was the primary reason it was difficult to fill

Electric Power Generation Sector — Reported Occupations with Hiring Difficulty by Industry, Q4 2018

Utilities	Construction	Manufacturing	Wholesale Trade, Distribution, and Transport	Professional and Business Services	Other
Technicians or mechanical support (49%)	Installation workers (34%)	Engineers/scientists (44%)	Sales, marketing, or customer service representatives (45%)	Management (directors, supervisors, vice presidents) (36%)	Technicians or mechanical support (39%)
Electrician/construction laborers (31%)	Sales, marketing, or customer service representatives (31%)	Sales, marketing, or customer service representatives (23%)	Management (directors, supervisors, vice presidents) (19%)	Engineers/scientists (33%)	Management (directors, supervisors, vice presidents) (23%)
Engineers/scientists (23%)	Electrician/construction laborers (29%)	Management (directors, supervisors, vice presidents) (16%)	Technicians or mechanical support (19%)	Sales, marketing, or customer service representatives (16%)	Engineers/scientists (23%)

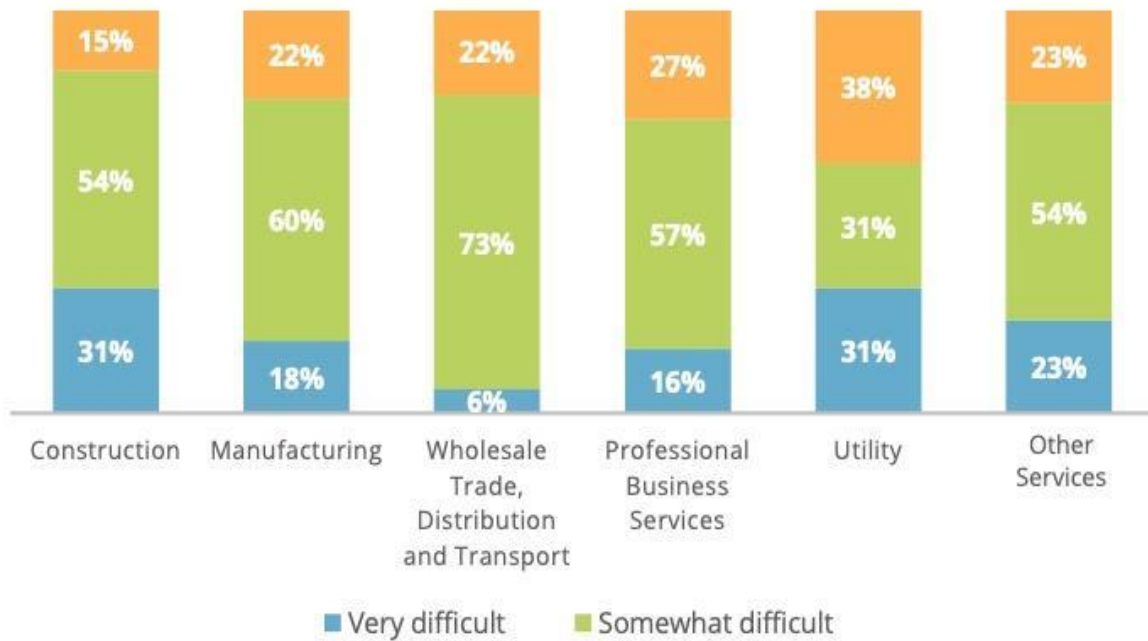
Electric Power Generation Sector — Reasons for Hiring Difficulty by Industry, Q4 2018

Utilities	Construction	Manufacturing	Wholesale Trade, Distribution, and Transport	Professional and Business Services	Other
Lack of experience, training, or technical skills (40%)	Lack of experience, training, or technical skills (50%)	Lack of experience, training, or technical skills (46%)	Lack of experience, training, or technical skills (44%)	Lack of experience, training, or technical skills (50%)	Lack of experience, training, or technical skills (67%)
Location (30%)	Difficulty finding industry-specific knowledge, skills, and interest (20%)	Competition/small applicant pool (25%)	Difficulty finding industry-specific knowledge, skills, and interest (29%)	Difficulty finding industry-specific knowledge, skills, and interest (28%)	Location (20%)
Difficulty finding industry-specific knowledge, skills, and interest (21%)	Competition/small applicant pool (18%)	Location (20%)	Location (21%)	Competition/small applicant pool (20%)	Competition/small applicant pool (17%)

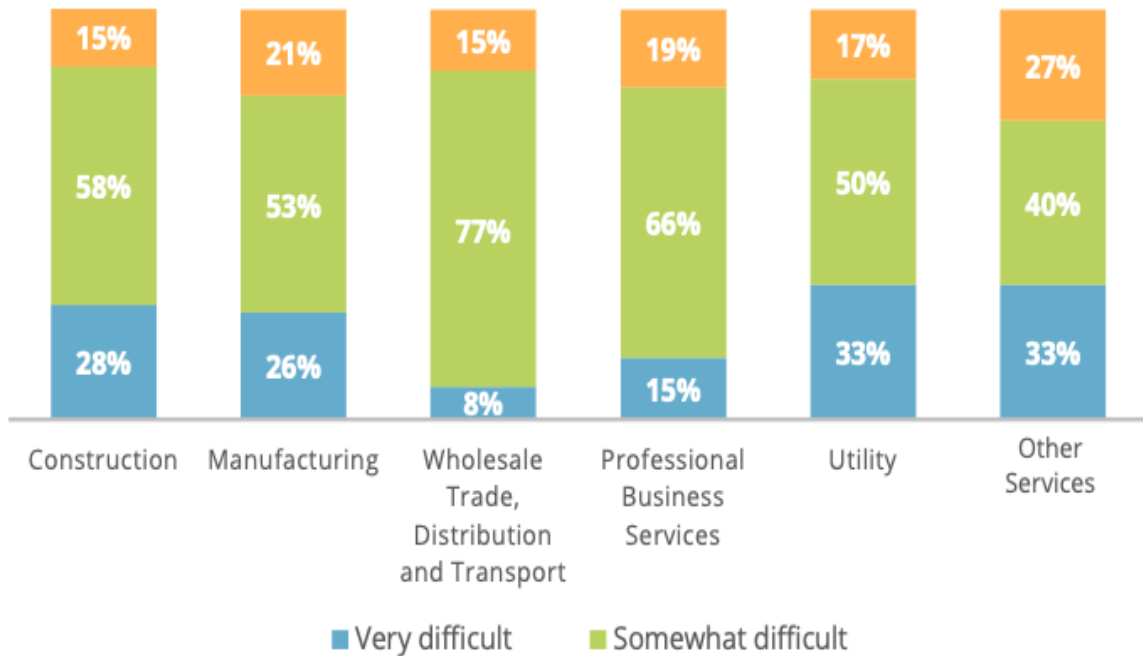
⁵⁵ Id. at Table 8. Fuels Sector – Reported Occupations with Hiring Difficulty by Industry, Q4 2018 at pg. 18; Id. at Figure 44 Wind Electric

Power Generation – Hiring Difficulty by Industry at page 69.

Solar Electric Power Generation — Hiring Difficulty by Industry



Wind Electric Power Generation – Hiring Difficulty by Industry



positions. Location and competition within the industry (competing for employees in a small applicant pool), were also significant factors for employers' difficulty filling positions. If federal policies are going to hold employers to a higher labor standard, these policies must also address the shortage of qualified workers to fill green energy positions.

For employers in wind manufacturing, 79% said it was either somewhat difficult or very difficult to hire qualified employees. Similarly, 78% of employers in solar manufacturing reported it was either somewhat difficult or very difficult to hire qualified employees.

To ensure graduates of an apprenticeship program obtain employment upon completion, high-road labor standards should incentivize or require employers to hire graduates of approved apprenticeship programs. Several programs, including California's, enacted public contracting labor standards. The Evergreen Economy Plan proposed by Governor Jay Inslee during his presidential candidacy and the proposed Good Jobs for the 21st Century Energy Act require employers to hire individuals enrolled in apprenticeship programs to ensure the training programs are backed by strong hiring.⁵⁶

California's labor code specifically requires an employer working to complete a

contract or project for a public entity to demonstrate an ability to use, and commit to use, a skilled and trained workforce.⁵⁷ A "skilled and trained workforce" requires a certain proportion of individuals working on the project to either be enrolled in a registered apprenticeship program or meet "skilled journeyman" requirements.⁵⁸ "Registered apprenticeship programs" are limited to programs that have registered with the Department of Labor or a federally-recognized state apprenticeship agency where the program is located.⁵⁹ "Skilled journeymen" must have either graduated from an apprenticeship program for the applicable occupation or has at least as many hours of experience that would be required to graduate from an apprenticeship program.⁶⁰

Skilled and trained workforce programs generally require a proportion of workers to be enrolled in or have completed an apprenticeship program. California's labor code mandates certain proportions of the workforce meet "skilled and trained" labor requirements.⁶¹ The proportion of skilled and trained labor increases with every year from the Code's enactment, beginning with a thirty percent "skilled and

⁵⁶ Skilled and Trained Workforce for Public Contracting, CAL. PUB. CONT. §§ 2600-2603 (2017); Inslee for America, Evergreen Economy Plan, 31-32 (May 16, 2019), <https://jayinslee.com/issues/evergreen-economy/text/Inslee-Evergreen-Economy-Plan.pdf>; Good Jobs for the 21st Century Energy Act, S. 2185, 116th Cong. § 2(b)(3)(A)(ix).
⁵⁷ CAL. PUB. CONT. § 2600. Note: California details specific terminology that reduces ambiguity. Accordingly, the "trained and skilled workforce,"

"registered apprenticeship," and "skilled journeymen terminology is sourced from California's public contracting code.
⁵⁸ *Id.* § 2601(d)(1), (2)(A)-(D).
⁵⁹ *Id.* § 2601(c)(1) (requiring the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations to approve apprenticeship programs pursuant to CAL. LAB. § 3075 (2017).
⁶⁰ *Id.* § 2601(e).
⁶¹ CAL. PUB. CONT. § 2601(d)(1), (2)(A)-(D).

trained” workforce requirement.⁶² In contrast, the “Good Jobs for the 21st Century Act” simply requires entities employed in construction projects to “demonstrate the ability to use and commit to use individuals enrolled in a registered apprenticeship, which . . . to the greatest extent practicable, constitute not less than 20% of individuals working on such a project.”⁶³

Thus, high-road labor standards should incentivize or require recipients of federal funds, contracts, or incentives to hire a “skilled and trained workforce”—a workforce comprised of workers who have completed or are enrolled in apprenticeship programs. Several enacted and proposed programs encourage hiring workers participating in an apprenticeship program, however the proposed programs vary in their implementation.⁶⁴

D. COMMUNITY BENEFIT AGREEMENTS

Community Benefit Agreements (CBAs) are a method for stakeholders from

affected communities, governments, and private industry to work together to maximize the benefits of a project for the community as a whole through a legally binding agreement.⁶⁵ Community benefit groups work with developers to exchange community support for benefits provided by the developer, which may include local hiring, local workforce training, and any number of other benefits for the community.⁶⁶ The CBA process promotes values like inclusiveness, transparency, enforceability, efficiency, and coalition-building in the development process, as well as projecting clear outcomes of a given project.⁶⁷ These agreements provide enforceable, reciprocal benefits for the community and developers, such as community support through public testimony and comments in exchange for living wages and local hiring.⁶⁸ CBAs have been used for fossil fuel,⁶⁹ urban renewal, and development projects,⁷⁰ but there is no reason these agreements could not be applied to clean energy technology projects to provide strong jobs in a growing industry.

⁶² CAL. PUB. CONT. § 2601(d)(1), (2)(A)-(D) [requiring 20% of the workforce to meet “skilled and trained” requirements a year after enactment, increasing the percentage by 10% each year so that the workforce must be 60% comprised of “skilled and trained” labor by 2020.]

⁶³ Good Jobs for the 21st Century Energy Act, S. 2185, 116th Cong. § 2(b)(3)(A)(ix).

⁶⁴ See, e.g. *Id.*; See Build Local, Hire Local, S. 2404, 116th Cong. § 131 (2)(A)-(C); Skilled and Trained Workforce for Public Contracting, CAL. PUB. CONT. §§ 2600-2603; Evergreen Economy Plan, 31-32 (May 16, 2019), <https://jayinslee.com/issues/evergreen-economy/text/Inslee-Evergreen-Economy-Plan.pdf>.

⁶⁵ Office of Economic Impact and Diversity, *Community Benefit Agreement (CBA) Toolkit*, U.S. DEP’T OF ENERGY, [https://www.energy.gov/diversity/community-](https://www.energy.gov/diversity/community-benefit-agreement-cba-toolkit)

[benefit-agreement-cba-toolkit](#) (last visited Nov. 5, 2019).

⁶⁶ *Id.*

⁶⁷ OFFICE OF MINORITY BUS. & ECON. DEV., U.S. DEP’T OF ENERGY, GUIDE TO ADVANCING OPPORTUNITIES FOR COMMUNITY BENEFITS THROUGH ENERGY PROJECT DEVELOPMENT 5-6 (2017), <https://www.energy.gov/sites/prod/files/2017/09/f36/CBA%20Resource%20Guide.pdf>.

⁶⁸ *Id.* at 6.

⁶⁹ See, e.g., *id.* at 9-10.

⁷⁰ PARTNERSHIP FOR WORKING FAMILIES, NATIONAL EXAMPLES OF COMMUNITY BENEFITS AGREEMENTS (CBAs), http://somervillecdc.org/sites/default/files/sc-minimal/files/national_examples_of_community_benefits_agreements_cbas.pdf (last visited Nov. 5, 2019).

CBA's are flexible so that each agreement can tailor to a specific project and community's needs and therefore typically vary in the provisions they require. For example, the Kingsbridge Armory CBA in New York City required a living wage for every job related to the development of the project, the majority of non-construction workers to be local hires, local contracting, and continued contributions to a fund controlled by the community coalition to be used for specified community needs, among other benefits.⁷¹ The Los Angeles airport LAX CBA required \$15 million in training funds for airport and aviation-related jobs; hiring priority for local, low-income, and special needs individuals; and increased opportunity for local, minority, and women-owned businesses within the airport.⁷² A CBA for a modernization project of a Chevron refinery in Richmond, CA required skills-building programs for youth and adults, a local hiring plan, pre-apprenticeship construction skills training programs with direct entry agreements to the local union, and other community investments.⁷³

Community Benefit Agreements could be an excellent strategy for communities to ensure specific clean energy projects will provide direct benefits to its members through legally-binding, enforceable agreements with project developers. These legally binding agreements between project developers and community groups could require the developer to provide local jobs, livable wages, and any number of other benefits that the community feels is important.

⁷¹ *Id.* at 1.

⁷² *Id.* at 3.

⁷³ *Id.* at 10.

⁷⁴ S.B. 6599, 2019 Leg., 2019-2020 Reg. Sess. § 2 (N.Y. 2019).

E. COMMUNITY AND STAKEHOLDER ADVISORY COMMITTEES

States have implemented additional strategies to ensure local communities and other stakeholders have voices in the transition to a clean economy. The formation of coalitions and committees to provide input regarding these projects is important to ensure that project benefits are determined and allocated equitably. Much of the focus in creating these groups is to incorporate provision of high-quality, sustainable jobs that support affected communities through livable wages, benefits, and training programs into clean energy job development projects.

One example is New York's Climate and Community Protection Act (2019) that recognizes the impacts of climate change and not only resolves to reduce greenhouse gases but also addresses the need for newly created jobs and economic activity to benefit underrepresented and disadvantaged communities.⁷⁴ This act amends several state laws including the Environmental Conservation law. It affirms the applicability of New York's prevailing wage laws⁷⁵ and expressly recognizes the importance of labor harmony and efficient performance of work in the clean energy sector by requiring workers to be well-trained and adequately compensated.⁷⁶ The Act stresses that New York has an interest in establishing strong statewide labor standards during this transition—including equity goals of providing quality jobs in safe work environments—while encouraging individual agencies and local governments to set even higher standards.⁷⁷

⁷⁵ *Id.* § 5

⁷⁶ *Id.* § 1

⁷⁷ *Id.*

The Climate and Community Protection Act’s statutory language does not directly expand labor standards in working towards achieving its greenhouse gas reduction goals, however it does establish the process for promulgating related regulations.⁷⁸ The Act empowers a climate action council to, among other things, convene advisory panels, establish a just transition working group, and engage stakeholders while developing regulations to meet established emissions targets.⁷⁹ The just transition working group must focus on training and workforce opportunities for disadvantaged communities and underrepresented population segments in the clean energy workforce while minimizing disruption during community transitions.⁸⁰

State legislators in Minnesota introduced a Green New Deal bill in April 2019.⁸¹ If enacted, this bill would direct the commissioner of a Climate Change Advisory Council to approve job training programs in industries that produce green products and services (including clean energy technologies) that are targeted at training youth, minorities, indigenous peoples, low-income individuals, fossil fuel workers, and released prisoners.⁸² The commission would be obligated to take reasonable actions to ensure the creation of high-quality jobs that pay wages that support families, recognize the rights of workers to organize and unionize, and ensure that workers have the opportunities and economic assistance needed to adapt

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ H.F. 2836, 2019 Leg., 91st Sess. (Minn. 2019). The bill was referred to the Energy and Climate Finance and Policy Division, but as of

successfully to the transition to clean energy (particularly in marginalized communities).⁸³

Frequently, committees consisting of stakeholders in the community can be influential on municipal decision makers and developers. While these types of agreements are typically non-binding, groups that are large and well organized can exert their influence and promote alternatives that provide good jobs for the community. Examples of such labor-community coalitions include Jobs with Justice (jwj.org) and local community development organizations (see e.g. Portland, Oregon’s Jade District <http://jadedistrict.org/about/>).

III. POLICY OPTIONS FOR INCORPORATING LABOR STANDARDS

A. POLICY OPTIONS FOR FEDERALLY FUNDED PROGRAMS, GRANTS, AND CONTRACTS

1. *Existing Policy and Labor Standards*

Several federal laws impose labor requirements when an entity contracts with the federal government. Specifically, the Davis Bacon Act (DBA),⁸⁴ the Walsh-Healey Public Contracts Act (PCA),⁸⁵ and the McNamara-O’Hara Service Contract Act (SCA)⁸⁶ impose labor standards for all sectors of employment including construction, manufacturing, and services. However, the DBA imposes stronger

December 2019, the committee had not held hearings or called for a vote.

⁸² *Id.* § 4.

⁸³ *Id.* § 6.

⁸⁴ 40 U.S.C. § 3141(2) (2018).

⁸⁵ 41 U.S.C. §§ 6501-6511 (2018).

⁸⁶ 41 U.S.C. §§ 6701-6707 (2018).

standards by requiring locally “prevailing wages” and applies to all “federally funded” projects through “related acts”⁸⁷—not just contracts with the government. The Davis Bacon Act (DBA), applies to mechanics and laborers working under construction contracts exceeding \$2,000,⁸⁸ as well as projects funded by the federal government through grants, loans, loan guarantees, and insurance.⁸⁹ The DBA is intended to prevent contractors from underbidding local wage levels by requiring contractors to pay locally “prevailing wages” for employees performing tasks on the “site of the work.”⁹⁰ In addition to paying prevailing wages, the DBA requires employers to execute weekly payments, post the wage scale at the job site, and provide overtime pay.⁹¹ Further, “related acts” extend the applicability of DBA requirements to numerous federal funding actions.⁹² However, unless a “related act” specifically imposes the requirements, or the contract involves constructing a “public work” and the federal government is not a

direct party to the contract, the DBA requirements will not apply.⁹³

The Walsh-Healey Public Contracts Act (PCA) provides labor standards for employees manufacturing or furnishing goods, supplies, articles, or equipment working under a federal contract exceeding \$10,000.⁹⁴ Specifically, the PCA requires payment at the prevailing minimum wage, overtime, safety and health standards, and posting requirements.⁹⁵

The McNamara-O'Hara Service Contract Act (SCA) attempts to close the gap in labor standards protection between DBA-covered construction contracts and PCA-covered manufacturing contracts by applying labor standards to service contracts in excess of \$2,500.⁹⁶ Similar to the PCA, the SCA mandates contracts in excess of \$2,500 to include prevailing minimum wage and fringe benefits, recordkeeping and posting requirements, and safety and health provisions.⁹⁷

⁸⁷ See JOHN R. LUCKEY & JON O. SHIMABUKURO, CONGRESSIONAL RES. SERV., PREVAILING WAGE REQUIREMENTS AND THE EMERGENCY SUSPENSION OF THE DAVIS BACON ACT 2-3 (2005), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1268&context=key_wkplace,

⁸⁸ 40 U.S.C. § 3142(a).

⁸⁹ Wage and Hour Division, *Davis-Bacon and Related Acts*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/govcontracts/dbra.htm> (last visited Nov. 5, 2019) (“The Davis-Bacon Act prevailing wage provisions apply to the “Related Acts,” under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.”); see 29 C.F.R. § 5.1(a) (2018) (listing acts imposing “prevailing wage” requirements).

⁹⁰ 40 U.S.C. § 3142(b).

⁹¹ 40 U.S.C. §§ 3142(c)(1)-(2), 3142(e); see also Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 3701 et seq. (2018)

(requiring overtime pay at one and a half times the basic pay rate on federally financed contracts exceeding one hundred thousand dollars).

⁹² Wage and Hour Division, *Davis-Bacon and Related Acts*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/govcontracts/dbra.htm> (last visited Nov. 5, 2019) The Davis-Bacon Act prevailing wage provisions apply to the “Related Acts,” under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.”); see 29 C.F.R. § 5.1(a) (listing acts imposing “prevailing wage” requirements).

⁹³ See *D.C. v. Dep't of Labor*, 819 F.3d 444, 445 (D.C. Cir. 2016) (“[T]wo conditions must be present in order for the Davis-Bacon Act to apply here: (1) D.C. must have been a party to the contracts for construction of CityCenterDC, and (2) CityCenterDC must be a public work.”).

⁹⁴ 41 U.S.C. § 6502(1).

⁹⁵ 41 U.S.C. § 6502(1)-(4).

⁹⁶ 41 U.S.C. § 6702(a).

⁹⁷ 41 U.S.C. §§ 6703.

2. Attaching High-Road Labor Standards to Federally Funded Clean Energy Technology Projects and Contracts

Several potential alternatives are available to extend the DBA's application beyond qualifying contracts to all federally funded projects.⁹⁸ For instance, Senator Merkley proposed the "Good Jobs for the 21st Century Energy Act," which attaches some of the high-road labor standards to any incentive payments issued by the Secretary of Energy.⁹⁹ The legislation would require renewable energy facilities to comply with DBA standards as a condition to receiving incentive payments.¹⁰⁰ Under this approach, the standards would apply to all renewable energy projects funded by the Secretary of Energy rather than all federally funded projects.

However, labor standards for federally funded projects need not be limited to payments issued by the Secretary of Energy. Several opportunities may be available to impose labor standards contingent on federal grants and contracts issued by the Department of Transportation, the Environmental

Protection Agency, and other federal agencies as they relate to clean energy technologies.

For example, the renewal of the Surface Transportation and Authorization Act, which the federal government reauthorizes every five to six years, may provide opportunities to impose labor standards as a condition to receiving federal funding or contracts.¹⁰¹ Though DBA requirements already attach to federal transportation projects, the DBA requirements can be expanded to incorporate additional high-road labor standards discussed in Section II of this paper. Because the transportation sector is recognized as the top contributor to greenhouse gas emissions, there is a close tie between transportation policy and climate adaptation.¹⁰²

America's Transportation Infrastructure Act of 2019 highlights the relationship between transportation and climate emissions by including provisions that specifically addresses climate change.¹⁰³ The bill includes mitigation measures, which can fund projects that contribute to the attainment of ambient air pollution standard, such as reducing carbon emissions from cars and trucks or

⁹⁸ Jay Inslee proposed a similar amendment in his Evergreen Economy Plan at 31.

<https://jayinslee.com/issues/evergreen-economy/text/Inslee-Evergreen-Economy-Plan.pdf> ("The Plan includes. . . strengthening Prevailing Wage Laws by extending Davis-Bacon Act requirements to all federally funded projects, regardless of source of funds, and to all federal contractors. In addition, he will work to raise prevailing wages to meet contract-bargained wages in specific sectors in a geographic area.")

⁹⁹ Good Jobs for the 21st Century Energy Act, S. 2185, 116th Cong. § 7(b)(1).

¹⁰⁰ Good Jobs for the 21st Century Energy Act, S. 2185, 116th Cong. 2(b)(3)(A)(iii).

¹⁰¹ CORNELL UNIV., ILR SCH., LABOR'S ROUTE TO A NEW TRANSPORTATION SYSTEM 1 (July 2011), <https://www.ilr.cornell.edu/sites/default/files/Cornell-GLI-s-Labor-s-Route-to-a-New-Transportation-System-Jobs-Mobility-Climate-LowRes.pdf>.

¹⁰² *Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#transportation> (last visited Nov. 5, 2019).

¹⁰³ CONG. RESEARCH SERV., CLIMATE CHANGE AND THE AMERICA'S TRANSPORTATION INFRASTRUCTURE ACT OF 2019 (S. 2302) (Sept. 3, 2019), <https://crsreports.congress.gov/product/pdf/1/F/IF11299>.

supporting bicycle and pedestrian travel.¹⁰⁴ Additionally, the Act includes adaptation measures, which reduce vulnerability and increase resilience to climate change impacts, such as administering competitive grant programs, funding “protective features” that lessen the risk of recurring damage from extreme weather, and establishing federal interagency working groups to transition to hybrid and electric vehicles.¹⁰⁵

The Department of Transportation could ensure high-road labor standards by establishing rules or guidelines that condition the receipt of federal transportation funds as they relate to climate change or adaptation on the imposition of the high-road labor standards (such as skilled labor provisions) discussed in Section II of this paper. Such requirements should also clearly establish reporting requirements and the consequences if there is noncompliance. California provides an example of labor standards enforcement language where employers are required to provide a monthly report to the federal funding entity that demonstrates compliance with the labor standards.¹⁰⁶ If the employer fails to submit a complete report, the federal entity

should be empowered to withhold further payments or funding until the employer submits a complete report. If the report does not demonstrate compliance with labor requirements, the federal entity must withhold payments until the employer provides a plan to achieve substantial compliance.¹⁰⁷

3. Attaching High-Road Labor Standards to Power Purchase Agreements (PPA)

High-road labor standards could be included in power purchase agreements (PPA) where the federal government is a party to the contract. A power purchase agreement is a contract between a third-party developer and customer in which the developer installs, owns, and operates an energy system on a customer’s property.¹⁰⁸ Once the developer produces energy, the customer purchases the generated electricity and receives stable, low-cost electricity.¹⁰⁹ Federal agencies commonly contract with energy producers through a PPA to obtain electricity.¹¹⁰ Under current interpretations of the DBA, it is undetermined whether prevailing wage

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.,* CAL. PUB. CONT. CODE § 2602(c)(1) (2019) [requiring entities to report compliance with “skilled and trained” workforce requirements]. This report proposes extending the reporting to all high-road labor standards.

¹⁰⁷ CAL. PUB. CONT. CODE § 2602(c)(1) (2019) [enforcement for “Skilled and Trained Workforce” for public contracting].

¹⁰⁸ Better Buildings, *What is a Power Purchase Agreement?*, U.S. DEP’T OF ENERGY, <https://betterbuildingsinitiative.energy.gov/financing-navigator/option/power-purchase-agreement> (last visited Nov. 5, 2019).

¹⁰⁹ *Id.*

¹¹⁰ *See* Office of Energy Efficiency & Renewable Energy, *Federal On-Site Renewable Power Purchase Agreements*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/eere/femp/federal-site-renewable-power-purchase-agreements> (last visited Nov. 5, 2019); *see also* *Energy Division – Power Purchase Agreement Program*, U.S. Army Corps of Eng’rs (May 5, 2016), <https://www.hnc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/484227/energy-division-power-purchase-agreement-ppa-program/> (explaining the U.S. Army Engineering and Support Center, Huntsville’s Power Purchase Agreement [PPA] Program).

requirements extend to federal purchases of power.¹¹¹

Accordingly, a policy that attaches high-road labor standards to a PPA would ensure that renewable energy companies provide prevailing wage jobs and additional protections. California implemented a similar policy within the State by amending its prevailing wage standard in its labor code. Specifically, California amended its “public work” definition, which triggers prevailing wage requirements: “[P]ublic work’ also means any construction, alteration, demolition, installation, or repair work done under private contract when . . . the work is performed in connection with the construction or maintenance of renewable energy generating capacity of energy efficiency improvements.”¹¹² In effect, the amendment extended labor requirements to government purchases of power through a PPA.

4. Potential Legal Barriers to Attaching High-Road Labor Standards to Federal Funds

The federal government does not have many legal barriers to attaching high labor standards to grants or other Federal funding programs. One caution is that while it would be straightforward for the federal government to impose these requirements on private recipients of federal funds, it could be problematic if the federal

government wanted to impose the requirements on states. Congress may require a state to comply with conditions in order to receive a grant, but the conditions may not be coercive and must leave the state a genuine choice in deciding whether to accept the offer.¹¹³ Congress has the authority to condition the receipt of funds based on a state’s compliance with restrictions related to the use of those funds, so that Congress may “ensure[] that the funds are spent according to its view of the ‘general Welfare.’”¹¹⁴ These conditions provided by Congress are valid under the Spending Clause unless the conditions become “so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹¹⁵ This should not be a legal obstacle for labor standards that are attached to federal programs that fund private entities and would only limit federal grants provided to states.

Although this is something to be aware of, it would likely not be a concern as applied to conditional grants or federal funding. Agencies are granted broad discretion in applying conditions to prospective federal funding, as long as the government is not also trying to withhold existing funding based on new conditions. The conditions must be related to the use of the funds, which would likely not be an issue because the high-road labor standards would be a known condition before the issuance of federal funds for clean energy technology projects and are directly related to the project.

¹¹¹ ORRICK, DEPARTMENT OF DEFENSE’S RENEWABLE ENERGY PROGRAM 4 (2014) (“Extensive discussions are taking place between the renewable energy industry and Federal procurement officers as to whether Davis-Bacon requirements should apply, although the current political environment and preliminary indications from the services suggest it is likely they will.”).

¹¹² CAL. LAB. CODE § 1720.6 (West 2019).

¹¹³ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

¹¹⁴ *Id.* at 580.

¹¹⁵ South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

Another potential legal barrier to some policies, particularly local hiring preferences, is international trade agreements. Recently, the World Trade Organization held that several U.S. state measures that encouraged the procurement of local labor and manufactured goods for renewable energy projects was inconsistent with Article III of the General Agreement on Tariffs and Trade (GATT).¹¹⁶ A Michigan program provided extra renewable energy credits to “electricity providers who generate electricity using systems made from local equipment or by local workforce,”¹¹⁷ which was held to modify the conditions of competition in a manner that disfavors imported components and non-local labor.¹¹⁸ The GATT, as well as other similar international trade agreements, could be obstacles to policies that explicitly favor local goods and labor, and therefore, place imported goods and non-local labor at a competitive disadvantage.

Finally, while not a legal barrier, it is also worth noting that some of these policies would likely be met with political resistance. These political obstacles are beyond the scope of this paper but are worth consideration.

B. POLICY OPTIONS FOR TAX INCENTIVES

1. *Existing Tax Incentives for Clean Energy Technologies*

Outside of support for apprenticeship programs (which are strongest when coupled with other support for transitional workers), there is minimal Federal investment to promote good jobs and livable wages for maintenance, service, and manufacturing jobs in the clean energy technology sector. The following programs consider offering tax credits to industries that implement fair labor practices and adhere to procurement standards and neutrality provisions.

Currently, a vast array of tax incentive programs are available to clean energy technology companies to alleviate financial risk and incentivize renewable energy product development.¹¹⁹ Significant tax benefit programs include the Solar Investment Tax Credit (SITC), accelerated depreciation, and modified accelerated cost recovery system (MACRS).¹²⁰ The SITC incentivizes solar production through providing a 30% tax credit on qualifying solar installations. The Business Energy Investment Tax credit provides 10% tax credits for geothermal and microturbines.¹²¹ Accelerated depreciation

¹¹⁶ WORLD TRADE ORGANIZATION, UNITED STATES – CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR, WT/DS510/R (June 27, 2019), https://www.wto.org/english/tratop_e/dispu_e/510r_e.pdf.

¹¹⁷ *Id.* ¶ 7.313.

¹¹⁸ *Id.* ¶ 7.319.

¹¹⁹ See *Programs*, DSIRE, <https://programs.dsireusa.org/system/progra>

[m?fromSir=0&state=US](https://www.dsireusa.org/system/programs?fromSir=0&state=US) (last visited Nov. 5, 2019) (listing available federal programs).

¹²⁰ NAT'L RENEWABLE ENERGY LAB., POWER PURCHASE AGREEMENT CHECKLIST FOR STATE AND LOCAL GOVERNMENTS 5 (May 2008), <https://www.nrel.gov/docs/fy10osti/46668.pdf>.

¹²¹ *Business Energy Investment Tax Credit (ITC)*, DSIRE,

allows producers to allocate wear and tear costs on a piece of equipment. Further, the IRS allows commercial PV systems to utilize the five-year MACRS, allowing producers to take advantage of their tax benefits within the first five years despite its ability to produce power over a longer period.¹²²

The Renewable Electricity Production Tax Credit (PTC) provides a tax credit for electricity generated using qualifying green energy sources.¹²³ Since the PTC was first enacted in 1992, it has been extended eleven times with revisions to include additional qualifying resources.¹²⁴ When the PTC was first enacted, its purpose was to “promote the development and utilization of certain renewable energy sources.”¹²⁵

Currently, credits are allotted by the per-kilowatt-hour (kWh) of energy produced, so businesses are rewarded for the actual energy produced—not merely the capacity of the plant when it was built.¹²⁶ Currently, the program has been suspended for non-wind technologies and will only apply to wind facilities that begin construction before the end of 2019.¹²⁷ Even though the benefit expires for new applicants at the end of this year, the production credits can be claimed for the first ten years of production, so PTC’s will continue to bring in funds for green energy producers for the next decade, even if the program is no longer active.

The Joint Committee on Taxation estimates that between 2018 and 2022, under the current version of the PTC, tax expenditures for the PTC are estimated to be \$25.8 billion.¹²⁸ Not all green energy produces qualify for the same credit level: wind, closed-loop biomass, and geothermal energy technologies qualify for the maximum credit amount, and a wide range of other renewable technologies qualify for a reduced credit amount.¹²⁹

2. Attaching High-Road Labor Standards to Production Tax Credits (PTC)

Throughout the many renewals and iterations of the PTC, the legislature has continually recognized its value in the “development of renewable energy infrastructure, which advances environmental and energy policy goals.”¹³⁰ If the legislature shifts its energy policy goals to include high-road labor standards and is willing to renew the PTC, the credit could certainly be amended to require that plants beginning construction after 2019 meet a set of employment standards for all on-site workers and work with manufacturers who meet comparable employment standards. President Obama’s FY2017 budget proposed a permanent extension of the PTC, which would include adding solar facilities as a qualifying green energy producer.¹³¹ The legislature could enact the Obama PTC proposal, which would broaden the credits’ impact on the broader green

<https://programs.dsireusa.org/system/program/detail/658> (last updated Mar. 1, 2018).

¹²² *Modified Accelerated Cost-Recovery System (MACRS)*, DSIRE,

<https://programs.dsireusa.org/system/program/detail/676> (last updated Aug. 21, 2018).

¹²³ CONG. RESEARCH SERV., *THE RENEWABLE ENERGY TAX CREDIT: IN BRIEF* (Nov. 27, 2018), <https://fas.org/sgp/crs/misc/R43453.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

energy production grid, and could also attach labor requirements to the list of requirements new applicants must meet to access the ten-year benefit.

The PTC is a long-running program that has motivated renewable energy development for over twenty-five years and has had an immense influence on wind facility construction in particular. However, many in the green energy sector are advocating for a policy shift away from the PTC status quo. Because the PTC is dependent on the energy produced and used in the grid, and not on the capacity of the facility, many wind producers are impacted by hydro surges and lose money if the grid doesn't require a significant amount of energy from the producer receiving PTC credits.¹³² Many are advocating for higher taxes based on carbon emissions for energy producers to even the playing field for renewable energy producers rather than continuing to provide tax credits for renewable energy production to enable green energy to compete with fossil fuels.¹³³

The options discussed here for the existing version of the PTC would complement an expected new proposal by the House Ways and Means Committee in the Green Act.¹³⁴ This proposal is a broad energy tax bill that will extend renewable production and investment tax credits, which are scheduled to phase down under a 2015 tax law.

¹³² Karl-Erik Stromsta, *Another Wind PTC Extension? No Thanks, Many in Industry Say*, GREEN TECH MEDIA (June 14, 2019), <https://www.greentechmedia.com/articles/read/another-wind-ptc-extension-no-thanks-say-many-in-industry>.

¹³³ *See id.*

¹³⁴ Geof Koss, *Democrats' Tax Bill Offers Breaks for Wind, Solar, EVs*, E&E NEWS PM, (Nov. 13,

Washington's Clean Energy Transformation Act (2019) utilizes similar tax exemptions for machinery and equipment used in the generation of clean energy while also incentivizing "high labor standards, including family level wages and providing benefits including health care and pensions[.]"¹³⁵ The exemptions apply to equipment directly used for generating energy using fuel cells, wind, sun, geothermal, tidal, and biomass.¹³⁶ The tax exemptions are paid as a remittance to equipment purchasers range from fifty to one-hundred percent of the sales and use tax for the equipment purchase. Crucially, the remittance is dependent on meeting certain labor standards as certified by Washington's Department of Labor and Industries.¹³⁷

Accordingly, the Washington Act provides a seventy-five percent remittance for local and state sales tax for projects that pay prevailing wages and a one-hundred percent remittance will be provided for projects with a project labor agreement.¹³⁸ The standards require the project labor agreement to include procurement from business owned by women, veterans, or minorities; procurement from companies that have a history of complying with state and federal wage and hour laws; utilization of apprenticeship programs; and preferred hiring of local laborers from the area

2019) <https://www.eenews.net/eenewspm/stories/1061541131/search?keyword=Green+Act+Nea+l>.

¹³⁵ S.B. 5116, 66th Leg., Reg. Sess. § 17 (Wash. 2019).

¹³⁶ *Id.* § 18.

¹³⁷ *Id.* § 18-19.

¹³⁸ *Id.* § 18.

where the project is being constructed.¹³⁹ If a purchaser does not meet all of these standards, the Department of Labor and Industries may still choose to certify it for exemption if the purchaser has made a good-faith effort to meet all of the requirements.¹⁴⁰

3. Existing Tax benefits for Oil and Gas that Could be Amended to Benefit Clean Energy Technologies

Currently, oil and gas companies are able to deduct expenses for intangible drilling and development costs.¹⁴¹ Intangible costs include “any patent, secret process or formula, goodwill, trademark, trade brand, franchise, or other like property.”¹⁴² This benefit could be extended to intangible costs of development for wind and solar energy producers, especially as companies are continually investing in new technologies to increase renewable energy production. To encourage high-road labor standards, the benefit could be made available exclusively to companies that earned the high-road certification, as described below.

Additionally, current code carves out a special credit for small oil and gas producers.¹⁴³ The marginal well production credit is an example of the legislature incentivizing a greater national objective (maximizing energy production) even when the energy producer is not the most financially lucrative. Similarly, the legislature could demonstrate a high-road labor standard as an overarching value in the renewable energy sector by rewarding and

incentivizing employers for adhering to a set of value-oriented standards.

4. Attaching High-Road Labor Standards to Opportunity Zones

Another opportunity to incentivize companies to adhere to high-road labor standards is through the Opportunity Zone program. The legislature could require employers to satisfy a high-labor threshold before they are able to access Opportunity Zone tax benefits. The 2017 Tax Cuts and Jobs Act established the Qualified Opportunity Zone program to provide a tax incentive for private, long-term investment in economically distressed communities. Investors in these programs are given an opportunity to defer and potentially substantially reduce taxes on recognized capital gains.¹⁴⁴

Opportunity zones are designed to spur economic development by providing tax benefits to investors. The tax benefits to the investor are substantial and include deferral of capital gains and a step-up of up to fifteen percent on capital gains from property investments that are reinvested in the opportunity zone. If the investment remains in the opportunity zone project for ten years, then there is no tax on the appreciated value of the project property.¹⁴⁵

¹³⁹ *Id.* § 18-19.

¹⁴⁰ *Id.*

¹⁴¹ 26 U.S.C. § 263(c) (2018).

¹⁴² 26 U.S.C. § 865(d)(2) (2018).

¹⁴³ 6 U.S.C § 451 (2018).

¹⁴⁴ *Qualified Opportunity Zones: What Investors Should Know*, WELLS FARGO (Aug. 2019), <https://www.wellsfargo.com/the-private-bank/insights/planning/wpu-qualified-opportunity-zones/>.

¹⁴⁵ *Id.*

To become a Qualified Opportunity Fund, an eligible corporation or partnership self-certifies by filing Form 8996, Qualified Opportunity Fund, with its federal income tax return.¹⁴⁶ The Opportunity Fund then invests in a redevelopment project in a federally designated opportunity zone. Although the stated purpose is to assist economically distressed communities, there are no requirements about job creation, affordability of the resulting property, or how the project serves the local community.

Opportunity zones are viewed as an under-utilized incentive for renewable energy investors. According to one report, there are over \$6 trillion in eligible capital gains within the U.S. and \$300 billion of it has been earmarked for Opportunity Funds to date.¹⁴⁷ Jon Bonanno, Chief Experience officer at New Energy Nexus (a renewable energy accelerator) explains: “Clean energy folks are beginning to jump all over this. It’s a giant money fire hose, and we want to point it at the things we want, like mobility electrification, clean electricity generation, and demand flexibility. . . . At the moment, we know many enormous capital gains investors seeking quality clean energy projects. There is no lack of capital. There is a lack of good clean energy projects.”¹⁴⁸

¹⁴⁶ See *About Form 8996, Qualified Opportunity Fund*, IRS, <https://www.irs.gov/forms-pubs/about-form-8996> (last visited Nov. 5, 2019).

¹⁴⁷ James Ellsmoor, *Opportunity Zones Can Drive Development Of US Renewable Energy*, FORBES (July 2, 2019), <https://www.forbes.com/sites/jamesellsmoor/>

Given that one of the stated purposes of this act is to assist economically distressed communities, it would make sense to incentivize or require community benefits agreements. These agreements would ensure some local benefits, such as prevailing wages, community enhancements (e.g. childcare or affordable housing), career advancement ladders for local workers, and union neutrality agreements. In addition, there should be requirements that construction contractors demonstrate a history of compliance with existing worker health and safety, and wage and hour laws.

5. Attaching High-Road Labor Standards to Tax Credits for Electric Vehicles

An important and proven incentive for electric vehicles sales are federal tax credits. The current tax credit was passed in the George W. Bush administration as part of the Energy Improvement and Extension Act of 2008. Credits ranged from \$2,500 to \$7,500 for battery-electric and plug-in hybrid passenger cars, based on the size of the battery pack. Unlike a purchase rebate, which is paid out to consumers at/near time of purchase, an income-tax credit is taken when the buyer files their U.S. income tax return for the year in which the electric car was purchased. The primary federal tax incentive for plug-in electric vehicles is the Internal Revenue Code (IRC) Section 30D credit.¹⁴⁹

2019/07/02/opportunity-zones-drive-development-of-us-renewable-energy/#70ffaad85609.

¹⁴⁸ *Id.*

¹⁴⁹ CONG. RESEARCH SERV., THE PLUG-IN ELECTRIC VEHICLE TAX CREDIT (May 14, 2019), <https://fas.org/sgp/crs/misc/IF11017.pdf>.

The expiration date for the tax credit is separate for each manufacturer and only comes after an automaker sells 200,000 qualified vehicles. Tesla and GM have reached this threshold, and credits for Tesla and GM vehicles began phasing out in 2019. A current legislative proposal introduced by Senator Barrasso (R-WY) would end these credits early.¹⁵⁰

There are now two significant proposals to extend the electric vehicle tax credit program, and these proposals provide an opportunity to insert incentives for manufacturers that provide high-roads jobs.

The Driving America Forward Act was proposed in the Senate and would expand the tax credit by another 400,000 vehicles per automaker for a total of 600,000.¹⁵¹ However, the maximum tax credit would be \$7,000, instead of prior \$7,500, and it would continue to apply to purely electric vehicles as well as some plug-in hybrids. The major benefactors of this proposal would be GM and Tesla which have maxed

out sales and have declining or eliminated tax credits under existing law.

The Electric Cars Act of 2019 is a joint Congressional House and Senate proposal that extends the tax credit for new qualified plug-in electric drive motor vehicles through 2029.¹⁵² In addition, the bill modifies the credit to

- 1) remove the limitation on the number of vehicles per manufacturer that are eligible for the credit,
- 2) allow a taxpayer to assign the credit to a financing entity, and
- 3) allow an unused credit to be carried forward for five years.

The bill also extends through 2029 the tax credits for (1) alternative fuel vehicle refueling property, and (2) alternative motor vehicles.

The legislation under consideration could be amended to provide additional incentives to manufacturers who provide high-road jobs and comply with best practices for labor-community standards.

¹⁵⁰ A pending legislative proposal, The Fairness for Every Driver Act, S. 343, H.R. 1027, 116th Cong. (Apr. 2019), would eliminate incentives and increase taxes on electric vehicles. It would repeal the existing plug-in EV credit and would impose an annual fee on alternative fuel vehicles that would contribute to the Highway Trust Fund (HTF). While some argue this fee might be viewed as a user fee for highway use, and could improve infrastructure, other analysts conclude that by increasing the cost of ownership, it would reduce the number of consumers willing to substitute a plug-in EV for a petroleum-fueled vehicle.

¹⁵¹ Driving America Forward Act, S. 1094, 116th Cong. (2019), <https://www.congress.gov/bill/116th->

[congress/senate-bill/1094](https://www.congress.gov/bill/116th-congress/senate-bill/1094) (referred to the Committee on Finance).

¹⁵² Electric CARS Act of 2019, H.R. 2042, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/2042?q=%7B%22search%22%3A%5B%22electric+cars+act+of+2019%22%5D%7D&s=1&r=1> (referred to the House Ways and Means Committee); Electric CARS Act of 2019, S. 993, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/993?q=%7B%22search%22%3A%5B%22electric+cars+act+of+2019+S993%22%5D%7D&s=2&r=1> (referred to the Committee on Finance).

For example, an additional tax credit of \$500 per car at each credit level could be available directly to manufacturers that include all or some of the components of the high-road labor standards discussed in Section II of this paper.

6. Potential Legal Barriers to Attaching High-Road Labor Standards to Standard Tax Credits

As with grants and other forms of federal funding, few legal barriers exist for the federal government when applying conditions to tax incentives. Congress is granted broad discretion in providing conditional tax incentives under the Taxing and Spending clauses. It is likely that, as with grants and other federal funding, that Congress cannot use these tax incentives in a coercive manner. If tax incentives and exemptions are carefully drafted, then this should be fairly easy to avoid.

As mentioned above, international trade agreements could act as another potential legal barrier to certain policies. The WTO held that tax rebates provided by Minnesota¹⁵³ and Washington¹⁵⁴ that encouraged the use of components manufactured in-state were held to be inconsistent with the General Agreement on Trade and Tariffs because they treated imported products less favorably than similar domestic products.¹⁵⁵ For the same reasons, tax incentives provided by Montana¹⁵⁶ that encouraged the use of domestic products were held to be inconsistent with the General Agreement

on Trade and Tariffs.¹⁵⁷ Tax incentives that explicitly provide an advantage to domestic products and labor over imported products and non-local labor may be in violation of the General Agreement on Trade and Tariffs or other international trade agreements.

C. POLICY OPTIONS FOR CERTIFYING EMPLOYERS UTILIZING HIGH-ROAD LABOR STANDARDS

One approach that could encourage improved labor standards would be a voluntary certification program with benefits provided to certified companies. The voluntary certification program would encourage employers in the clean energy technology sector to utilize high-road labor standards in exchange for certification through the Department of Labor. The Department of Labor would implement the program and favorably designate clean energy technology companies that employ high-road labor standards through certification. In turn, the company could utilize the certification for promotional purposes. Additionally, the certification could also be utilized as a tool for encouraging companies to voluntarily adopt high labor standards by providing additional benefits to certified companies, such as eligibility for tax incentives or preference in government contracts.

The Department of Labor currently implements a similar program that recognizes employers that hire and retain veterans.¹⁵⁸ The *Honoring Investments in*

Veterans, U.S. DEP'T OF VETERANS AFFAIRS (Feb. 6, 2018), <https://www.blogs.va.gov/VAntage/45037/departement-of-labor-awards-program-honors-employers-who-hire-and-retain-veterans/>.

¹⁵³ *Id.* ¶ 2.55.

¹⁵⁴ *Id.* ¶ 2.7.

¹⁵⁵ *Id.* ¶¶ 7.335, 7.257.

¹⁵⁶ *Id.* ¶ 2.20.

¹⁵⁷ *Id.* ¶¶ 7.276, 7.286, 7.296.

¹⁵⁸ Gary Hicks, *Department of Labor Awards Program Honors Employers Who Hire and Retain*

Recruiting and Employing (HIRE) Vets Medallion Program, stems from the HIRE American Military Veterans Act of 2017, which requires the Department of Labor to “annually solicit and accept voluntary information from employers for consideration of employers to receive a HIRE Vets Medallion Award.”¹⁵⁹ To implement the program, the Department of Labor designated criteria for both “platinum” and “gold” certification, dependent on the percentage of veterans in new hires, retained hires, and overall veteran employees.¹⁶⁰ Similarly, the Department of Labor could provide recognition to clean energy technologies that utilize high-road labor standards.

Several options are available for the Department of Labor to assess applicant eligibility and high-road labor standards. First, the standards could simply be a prerequisite to obtain federal contracts, funding, or other incentive. However, rigid labor requirements may be difficult or unworkable for certain projects if hiring local, components of a project labor agreement, or other standard is not feasible. An alternative to requiring the standards as a condition for federal incentives is establishing a point system for high-road labor standards, providing flexibility to both employers and regulators.

Similar point-based systems have successfully motivated businesses across the world to act in a more socially responsible manner. LEED is the most

widely used green building rating system in the world.¹⁶¹ According to LEED, “61% of corporate leaders believe that sustainability leads to market differentiation and improved financial performance.”¹⁶² By obtaining a LEED certification on their buildings, businesses are setting themselves apart, and signaling to customers who value minimized environmental impact that their values align. In 2006, Adobe announced that its new headquarters had received three LEED Platinum awards, which garnered widespread publicity and “garnered a net present value return of almost 20 to one on its initial investment.”¹⁶³

Green energy manufacturers could be offered a similar points-based certification that encourages employers to adhere to high-road labor standards to earn various levels of certification that signals value alignment to their customers and the greater public. LEED participants can earn points across nine basic areas: integrative process, location and transportation, sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, innovation, and regional priority.¹⁶⁴ The green energy high-road labor standard certification could be organized in a similar manner with areas like worksite safety, competitive wages, healthcare, training and education, and worksite safety all earning points.

Similarly, ISO 14001 is an internationally used system that establishes a set of

¹⁵⁹ HIRE Vets Medallion Program, 82 Fed. Reg. 52,186-01 [Nov. 13, 2017] (codified at 20 C.F.R. pt. 1011).

¹⁶⁰ *HIRE Vets Medallion Program: Program Criteria*, U.S. DEP’T OF LABOR, <https://www.hirevets.gov/#criteria> (last visited Nov. 5, 2019).

¹⁶¹ *This is LEED*, LEED, <http://leed.usgbc.org/leed.html#targetText=LEED%20certification%20means%20healthier%2C%20more,rates%20and%20decreased%20utility%20costs> (last visited Nov. 5, 2019).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

criteria that helps businesses modify their internal processes to meet environmental standards. Unlike LEED, ISO 14001 is less focused on the end product of a businesses' efforts, but is geared towards modifying processes that businesses engage in to arrive at their final work product.¹⁶⁵ The ISO environmental management system creates a structure for businesses to "identify, manage, monitor and control their environmental issues in a holistic manner."¹⁶⁶ The ISO 14001 model could be modified to create a program that influences green manufacturers' employment standards from a similarly "holistic" approach. The certification system could provide high-road standards for the green energy sector throughout the process: from hiring and training, to maintaining a safe work environment, through promotions and long-term employee management and retirement. Some of the benefits the ISO system promotes are insurance for participants that they're meeting all current statutory and regulatory requirements.¹⁶⁷ This benefit could easily be translated into a similar high-labor standard system, and work in conjunction with other tax and federal grant programs considered in this proposal. The ISO system also promises participants that their company will see an improved reputation and the confidence of stakeholders, competitive and financial advantages through improved efficiencies, and encourage better performance of suppliers

and partners.¹⁶⁸ All of these advantages could be easily translated into a parallel labor-focused system.

A recently passed bill in Illinois utilizes a point system when issuing licenses to entities seeking to operate a cannabis dispensary.¹⁶⁹ The bill requires license applicants to include provisions in their application, which are assigned a number of points.¹⁷⁰ The Department awards points based on the sufficiency of the applicant's response to the required information.¹⁷¹ Provisions that assign points include a sustainable employment training plan demonstrating employees understand applicable rules and laws;¹⁷² labor and employment practices providing a safe, healthy, economically beneficial working environment;¹⁷³ and community benefit agreements showing the license applicants desire to engage with the community.¹⁷⁴

Primarily, this framework could be used to assess companies' labor practices and certify that applicants are eligible for certain benefits. To determine available points, the Department of Labor would assign each high-road labor standard a certain amount of points depending on its importance for ensuring good jobs. For example, payment of prevailing wages to employees and contracted employees may be worth more points than a commitment to hire local. To obtain points for eligibility, employers must demonstrate their

¹⁶⁵ See *ISO 14000 Family – Environmental Management*, ISO, <https://www.iso.org/iso-14001-environmental-management.html> (last visited Nov. 2, 2019) (last visited Nov. 5, 2019).

¹⁶⁶ ISO, *ISO 14001 Key Benefits* (2015), https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/iso_14001_-_key_benefits.pdf.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See H.B. 1438, 101st Leg. Assemb. (Ill. 2019), <http://www.ilga.gov/legislation/publicacts/101/101-0081.htm>

¹⁷⁰ *Id.* § 15-30(c).

¹⁷¹ *Id.* § 15-30(c).

¹⁷² *Id.* § 15-30(c)(1).

¹⁷³ *Id.* § 15-30(c)(6).

¹⁷⁴ *Id.* § 15-30(d).

compliance with various high-road labor standards.

However, the Department should also include disqualifying characteristics, such as past violations, or other indications that the employer should not be recognized for their hiring practices. The Department reviews the application and awards points upon finding that the provided information is sufficient. Subsequently, the Department tallies the awarded points and will issue a certification if the employer satisfies the required number of points in an application.

In addition to using the certification for labelling purposes, the certification could be expanded to determine eligibility for various government benefits and incentives. For example, the Department of Energy may utilize a similar point system by issuing grants to applicants that include provisions that correspond with a number of points. Applicants that include labor-standards that correspond with points would obtain a preference in the grant selection process. Accordingly, points would be assigned to various high-road labor standards discussed in this Section. Thus, assigning points to specific labor standards incentivizes the applicant to apply labor high-road labor standards when implementing its grant-funded project.

The point system also can impose a tiered system based on the number of points an employer obtains, similar to the Department of Labor's veteran program. Thus, obtaining a certain number of points can elevate an employer's status and allow him or her to qualify for heightened federal incentives. For example, certain tax incentives awarded based on adopted high-

road labor standards, such as prevailing wage and fringe benefits, may be increased if the employer also includes community benefit agreements or local hiring practices.

IV. CONCLUSION

Ultimately, attaching labor standards to federal funding and tax incentives could provide a plethora of benefits to communities where renewable energy projects are occurring across the nation, similar to some effects of the New Deal following the Great Depression. Renewable energy projects, coupled with high-road labor standards, could instill feelings of pride and ownership in laborers who are aiding in the transition to a renewable energy economy.

Providing workers in multiple sectors with good jobs with living wages and fringe benefits (like employer-supported health care and retirement plans) will strengthen the middle class, bolster the economy and reduce the wealth gap.¹⁷⁵ Most companies will not adopt high-road labor standards voluntarily if it detracts from short-term profits; however, employers who adopt high-road standards benefit long-term from the health and job satisfaction of their employees.

Now is the time to encourage the adoption of high-road labor standards in renewable energy technology projects. The energy sector is in transition, and renewable energy is growing quickly. Jobs in renewable energy have grown rapidly in rural areas across the country, particularly in areas in the rural Midwest. In 2017, the

¹⁷⁵ See, e.g., Nick Hanauer, *Progressive Labor Standards*, DEMOCRACY, <https://democracyjournal.org/magazine/51/p>

progressive-labor-standards/ (last visited Nov. 10, 2019).

clean energy sector provided more than 158,000 jobs in the rural Midwest, and there was a six percent increase in clean energy jobs in that region between 2015 and 2016.¹⁷⁶

Wind energy, in particular, could continue to provide more jobs throughout rural areas of the U.S., as ninety-nine percent of the country's total wind capacity exists in rural areas across the nation.¹⁷⁷ The wind and solar potential throughout these areas could provide sustained economic growth in depressed regions. If the proper policies are implemented, people living in these rural areas could have access to jobs that provide living wages and strong benefits that could provide economic stability that has been lacking in recent decades.

In the past, the U.S. economy thrived due to programs that supported our country's laborers. A working class supported by high-road labor standards is a primary driver of the American economy, and the legislature must ensure that the adoption of these standards is encouraged in order to allow workers to continue to support families and to meaningfully contribute to the economic success of our nation.

¹⁷⁶ NRDC, CLEAN ENERGY SWEEPS ACROSS RURAL AMERICA 5 (2018),

<https://www.nrdc.org/sites/default/files/rural-clean-energy-report.pdf>.

¹⁷⁷ *Id.* at 3.