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Room 5203
P.O. Box 5203, Ben Franklin Station
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RE: Treasury Department and IRS Guidance on Energy Communities Implementation from the IRA

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

The American Clean Power Association (ACP)[1] appreciates the opportunity to respond to the Internal Revenue Service's (IRS) *Request for Comments on Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022*.[2] IRS guidance will be crucial to ensuring that taxpayers, including the clean energy industry, can

[1] ACP is the national trade association representing the renewable energy industry in the United States, including in all aspects of offshore wind energy, bringing together over 1,000 member companies, 120,000 members, and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, ACP seeks to enable the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. The views and opinions expressed in this filing do not necessarily reflect the official position of each individual member of ACP.
[2] Available at https://www.irs.gov/pub/irs-drop/n-22-51.pdf ("Notice").

effectively navigate the requirements of the Inflation Reduction Act (IRA) regarding bonus tax credits for projects located in energy communities (ECs).

I. QUESTIONS RAISED BY TREASURY/IRS

4.01 1& 5. Locational and Timing Considerations

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

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

ACP encourages IRS to adopt a readily understandable definition for the term "located in." The other frameworks that IRS mentions in its questions are significantly more complex than is necessary here.

The EC bonus is meant to provide tax benefits to projects located in certain communities that have been negatively affected by the energy transition or environmental damage from fossil fuel extraction and combustion. If an energy project is in the immediate vicinity of any of these communities, as outlined in the statutory text, and per the recommendations below, the IRS should deem the energy project to be located in an EC that satisfies the requirements under the IRA. There is little potential to "game" this tax credit, as placing part of a project in an EC area would still directly and indirectly benefit that community.

Creating an overly restrictive threshold or percentage of project area requirement would stymie the development of a number of deserving projects that, because of geographic size or transmission constraints, might not be wholly located within ECs. For instance, it is exceedingly unlikely that any projects of any size will be located *entirely* within a brownfield, in part because doing so is likely to raise Clean Water Act issues. Therefore, IRS should adopt a sufficiently flexible and attainable standard for determining if a project is located in an EC so that this credit will actually be useable – as this was Congress's clear intent.

Specifically, for any of the three categories in section 13101 of the IRA, with respect to onshore projects, ACP recommends that projects be able to claim the enhanced credit for ECs if:

(1) at least 10% of the total project is located in an EC, which can based upon the nameplate capacity of generation or storage, total project cost, or area by acreage; or (2) a substation of the project, or switchgear for projects that do not have a substation, is located in an EC and the majority of the project's output is routed through such substation or switchgear.

Offshore wind projects can have direct, economic benefits for ECs even though much of those projects will be in federal waters (on the Outer Continental Shelf). Consistent with the intent of the EC provision, offshore wind has the potential to benefit these intended energy communities by generating a large amount of economic activity in them.[3] In order to ensure offshore wind activities are similarly incentivized to "locate in" such communities, offshore wind facilities should be eligible for this bonus credit if: (1) the land for its interconnection facility is located in an EC; (2) a port facility substantially used for staging and crewing (i.e., a construction port) for the project is located in an EC; and/or (3) a node at which power from the project is commercially settled is located in an EC.

As for timing requirements, IRS should allow developers to either certify or seek the EC designation from the IRS before construction begins, up until project completion. Specifically, a developer should be able to certify or file for a determination at any time beginning up to 5 years before construction, and up until construction finishes. Project proponents require this certainty as the EC eligibility of an area could change in the planning process or thereafter.

This is necessary to allow taxpayers to adequately plan where to develop renewable energy projects; typically, at least 5 years prior to construction allows for siting, permits, and other necessary planning. If the determination of the EC tax credit is not granted during the planning process, many projects that might appear to initially qualify would have no guarantee that they would maintain the designation and tax credit by the time construction completes, especially given the fluctuating nature of regional employment and decennial remapping of census tracts.[4] Allowing pre-construction employment qualification would incentivize more taxpayers to develop projects in ECs by providing greater certainty for realizing the credit. This flexible timing of the EC determination must be granted to projects that qualify for any of the three categories in section 13101 of the IRA, including projects that qualify based on unemployment rates and census tracts.

The determination of what constitutes the "previous year" also has significant implications for application of the EC credit based upon employment or tax revenue in metropolitan or non-metropolitan statistical areas. Only one interpretation, *the calendar year*

[3] Congressional intent on this subject can be found in the remarks of Rep. Auchincloss: "Offshore wind farms that connect to wholesale electric grids in such communities should be eligible for this additional support, as well, to maximize these credits' impact"), Congressional Record – House, 168 Congressional Record H7565, 2022, available at https://www.govinfo.gov/content/pkg/CREC-2022-08-12/pdf/CREC-2022-08-12-house.pdf https://www.c-span.org/video/?c5027586/user-clip-rep-auchincloss-inflation-reduction-act.

[4] Available at https://www.federalreserve.gov/econres/notes/feds-notes/labor-market-outcomes-in-metropolitan-and-non-metropolitan-areas-signs-of-growing-disparities-20170925.html.

before the certification process begins, preserves the intent of the IRA. This interpretation leads to predictable planning and certainty. Any other definition would lead to an unwieldy and untenable position for developers, due to the lack of certainty regarding qualification for the credit. For example, the second category of the EC pathways requires identification of areas with higher-than-average unemployment and historic rates of fossil fuel employment. If the "previous year" is interpreted to mean the year before construction is *finished*, then planning would not be possible. Indeed, the very jobs brought by these renewable energy projects might then disqualify them from receiving the essential tax reductions that brought the investment in the first place. Accordingly, ACP urges the IRS to adopt a "previous year" definition allowing taxpayers to identify and claim the EC credit with sufficient time to plan and implement the project.

Finally, IRS should make it clear that a qualification should be granted a single time for the full duration of the tax credit - not on an annual basis. This is particularly important for projects claiming the PTC. Having a benefit of only one year at a time will not provide sufficient incentive to encourage projects located in ECs.

Q2. Brownfield Designations

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

ACP urges IRS to clarify that the definition of brownfields in the IRA, which references only some of the language in the definition for brownfields from the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), does not exclude areas in which contaminants associated with petroleum products exist.[5]

Additionally, ACP urges IRS to identify that past military lands, such as Formerly Used Defense Sites (FUDS) and sites that include or could include Unexploded Ordinance (UXO), may also qualify as a brownfield EC under CERLCA. The presence of state or local permits or consent agreements for remediation of a given brownfield site should not disqualify a project from claiming the federal EC bonus based upon brownfield eligibility.

Finally, we understand that a "brownfield" includes sites that are undergoing remediation, meaning the energy project would have to wait until remediation was completed before it could be built. If that is a correct interpretation, it should be clarified that a site that is "clean" whether or not it has been the subject of remediation and is adjacent to a site that is undergoing remediation should qualify as a brownfield site due to the possible stigma the clean site may carry due to its location adjacent to a site being remediated. It is difficult to see a developer incurring cost to develop a project on a site undergoing remediation given the

[5] IRA Section 13001(g)(11)(B)(i).

uncertainties involved in the remediation process. Allowing clean adjacent sites to be characterized as brownfield sites would be consistent with the goal of the statute, which is to encourage development in communities having such tainted properties.

Q3. Metropolitan and Non-Metropolitan Statistical Areas and Determinations of Previous Energy Industry Employment

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

Metropolitan statistical areas (MSAs) are well-defined by Office of Management and Budget (OMB) and U.S. Bureau of Labor Statistics (BLS), and ACP urges IRS to apply these well-understood statistics and guidance.[6] However, IRS must precisely define what constitutes a non-MSA (NMSA). 42 U.S. Code § 300e (9) defines the term "non-metropolitan area" as an area "no part of which is within an area designated as a standard metropolitan statistical area and which does not contain a city whose population exceeds fifty thousand individuals." The NMSA and MSA areas together must form a complete set, and together should encompass any location in the nation and its territories.

ACP recommends that IRS clearly define MSAs and NMSAs based solely on county borders, since neither OMB's nor BLS's definitions meet both criteria. This is needed for the determination of historical fossil fuel employment rates to be feasible, as data is not reliably available for units smaller than counties. BLS has a semi-complete list of potential MSAs and NMSAs, and ACP encourages IRS to fully implement this list while incorporating boundaries that adhere to those of counties.[7] Further, these boundaries evolve over time, and what was once part of an NMSA could be absorbed into an MSA, or vice versa. IRS should clarify that, like census tract metrics, a project can qualify based on MSA/NMSA statistics in the year preceding IRA passage or the year prior to seeking certification.

IRS should also clearly delineate the complete list of activities for employment-based EC designations that include but are not limited to the extraction, processing, transport, or storage of coal, oil, or natural gas. Specifically, any area in which direct employment by coal, gas, or oil

[6] See BLS, Occupational Employment and Wage Statistics, available at https://www.bls.gov/oes/current/msa_def.htm.
[7] *Id.*

companies is above 0.17 percent or greater qualifies an area as an EC. The most straightforward way to determine whether an area meets this employment threshold is to use North American Industry Classification System (NAICS) and/or Standard Industrial Classification system (SIC) codes as a proxy for these activities.

BLS conducts the Quarterly Census of Employment and Wages (QCEW), which tracks NAICS level employment monthly across the U.S. Applicable NAICS codes should include:

NAICS Code	NAICS Title
211	Oil and Gas Extraction
2121	Coal Mining
213111	Drilling Oil and Gas Wells
213112	Support Activities for Oil and Gas Operations
213113	Support Activities for Coal Mining
221112	Fossil Fuel Electric Power Generation
2212	Natural Gas Distribution
23712	Oil and Gas Pipeline and Related Structures Construction
324	Petroleum and Coal Products Manufacturing
32411	Petroleum Refineries
42471	Petroleum Bulk Stations and Terminals
4861	Pipeline Transportation of Crude Oil
4862	Pipeline Transportation of Natural Gas
48691	Pipeline Transportation of Refined Petroleum Products

As for determining employment and unemployment in a given area in a "previous year," IRS should use the BLS Local Area Unemployment Statistics (LAUS) program data on annual employment and unemployment as much as possible. However, BLS, QCEW, and LAUS data disclosure rules inhibit obtaining the answer to direct employment percentage for many rural communities. IRS should work with BLS and their Regional Economic Analysis and Information Offices in conducting consultations with taxpayers if there remains uncertainty as to whether an area would have the employment or unemployment levels to qualify as an EC.

Q4. Census Tracts and Coal Closure Definitions

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

ACP recommends that IRS incorporate the Mine Safety and Health Administration's database of retired coal mines,[8] and the Energy Information Administration's (EIA) data on retired coal generating units to create a broad list of potential EC sites.[9] Currently, taxpayers must cross-reference incomplete information from multiple sources to ascertain the census tracts in which coal mines have been closed or coal-fired generating units have been retired. It makes more sense to have a complete list and standardized data sources to provide a greater level of certainty. Though a small number of eligible ECs will require individual consultation, that number and the associated resources will be far fewer than if no periodically updated list existed.

ACP urges IRS to recognize that a coal-fired electric generating unit closure should include coal-fired units that were modified or repurposed, including retrofits. This may include retrofit for different modes of cleaner energy generation, or as an interconnection point for other energy projects. In addition, the intentional usage of the term "unit" directly implicates *partial* coal plant closures that have powered down at least one coal burning unit of a multi-unit facility, even if other units remain operational.

For example, if a coal unit is converted to a natural gas or hydrogen burning facility, that should count as a "closure" for EC purposes. These retrofits often take significant time to complete, during which many community members who operated the coal facility might be left either un-employed or under-employed. Additionally, gas plants employ far fewer people than coal. In the same vein, power generating units with coal as a secondary fuel source that retire or are repowered should also qualify as an EC. ACP recommends that IRS also include coal-fired units and mines that have been mothballed for a period of time (at least 3 years), as they might not officially have been decommissioned, but are extremely unlikely to come back online and have already had a significant economic impact on the surrounding community.

ACP notes that the IRA refers to "directly adjoining" census tracts for the third category of ECs. Our understanding from geospatial information systems analysts is that "directly adjoining" means touching; this includes two corners meeting at a point. ACP recommends that the IRS clearly adopt this interpretation of "directly adjoining" to allow for certainty regarding which census tracts adjoin coal mines or coal-fired power plants. This includes adjoining census tracts without regard to state boundary.

Finally, given the changing nature of census tracts, we urge IRS to clarify that "census tracts" for the purposes of EC determination include census tracts as they were at the time of closure as well as all progeny tracts. This will both capture the congressional intent of directing investment to communities affected by the closure, regardless of how census tracts change later, as well as offer sufficient certainty to developers as to where ECs actually are during the construction timeline and allow the investment to be directed as Congress intended.

[8] Available at https://www.msha.gov/mine-data-retrieval-system.
[9] Available at https://www.eia.gov/electricity/data/eia860/.

Q6. 25 Percent or Greater Tax Revenue Determinations

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

ACP suggests that for determinations of the source of local tax revenues, the IRS require a taxpayer to use applicable data from the Census Bureau,[10] or comparable data from a combination of county tax data in proportion to the county's share of the area. We also suggest that other sources of information on direct and indirect revenues from fossil fuels be includable. While the IRA designates a "tax revenue" metric, an excessively narrow definition could improperly remove some areas from consideration as ECs. For example, areas in which tens of billions of dollars are generated each year from fossil fuel production on public lands, much of which funds local schools or state-run higher education through payments in lieu of taxes, might not count as traditional "tax revenue." By using the phrase "related to," the IRA implies that not only direct revenue from fossil fuels should be included, but also indirect and induced revenues.

Although the use of MSA and NMSA is workable for unemployment metrics, it is much more difficult for tax revenue purposes. Calculating area-wide employment is relatively straightforward, but doing so for tax revenues is challenging. Calculating tax revenues would involve gathering data for every county government, city government, school district, and other taxing entity within a statistical area. For many areas—especially large rural ones—this data analysis means trying to aggregate hard-to-find data across hundreds of taxing entities. ACP recommends that IRS use average tax revenue based on counties, and the proportions of them that comprise each MSA and NMSA; otherwise, a patchwork of differing local laws and reporting requirements will make this EC provision extremely challenging in application. We also request that IRS publish a list of statistical areas that meet this criterion, as IRS has much more robust access to this data than do private developers. Uncertainty would discourage investment in these communities that most need it, contrary to congressional intent.

II. OTHER AREAS WHERE GUIDANCE IS REQUESTED

a. Provide Clarity on the Certification Process

Currently, the identification of ECs is underinclusive, as few of the potential areas have been certified as ECs. While we encourage IRS, in conjunction with other agencies, to certify

[10] Available at https://www.census.gov/programs-surveys/qtax/data.html.

more ECs, we are concerned that requiring this process up-front will be too slow to allow taxpayers to fully take advantage of the bonus credit and, in turn, bring timely greater economic activity to ECs. While other parts of the IRA explicitly call for a certification process, the EC provision does not. In order to ensure that this bonus credit more fully achieves its purpose, Treasury should therefore clarify that there are multiple pathways to certify that a qualified facility is located in an EC.

Specifically, while petitioning the IRS for a designation/certification should certainly be one available pathway, *only* allowing this pathway would likely create an administrative bottleneck of developers waiting for determinations and ultimately hinder the benefits flowing to the affected communities. As such, IRS should consider other pathways to certification.

IRS should permit the taxpayer to self-certify if they intend to build a facility in an area which the Treasury/IRS has already certified as an EC. For instance, such self-certification could be based on a list published online by the federal government (a map or database that lists all currently identified EC communities, as discussed below). If the taxpayer elects to self-certify based on such information, it should not require an application for certification to the IRS and review/approval from the agency; instead, the taxpayer would be required to retain records of compliance and be subject to audit and review by the IRS.

Another potential path for certification that should be considered is when a taxpayer can certify that the area in which they intend to construct a facility meets the criteria for an EC. To facilitate this path for certification, IRS would create a form that provides the criteria for a specific EC. If the taxpayer "checks all the boxes" on the certification form in the affirmative and submits it to the IRS, the agency would merely need to perform the administrative task of approving the application, without any further review. The certification would become effective immediately upon approval.

Until such certification pathways are established, a taxpayer with a project located in an EC can still qualify for the EC bonus by electing to do so on their tax return. As stated above, Congress did not specifically require an obligatory certification process prior to a taxpayer being able to claim the credit. While we encourage the IRS to develop the above certification pathways to provide certainty and predictability, in the meantime, the development of such pathways cannot impact taxpayers with projects in ECs.

b. IRS Should Compile a *Post Hoc* Map/Database of ECs

As mentioned before, ACP urges the IRS to create a *post hoc* official map of certified ECs, based upon locations where taxpayers have claimed the EC credit. The EC published map should follow the time frame criteria laid out in the IRA's statutory definition of an EC. For instance, it should list every MSA or NMSA that has, or had, (at any time after December 31, 2009) 0.17% or greater direct employment or 25% or greater local tax revenues related to the

extraction, processing, transport, or storage of coal, oil, or natural gas, and has an unemployment rate at or above the national average unemployment rate at any time since December 31, 2009.

This map should include an after-the-fact compilation of all areas previously determined to be an EC with individual taxpayers; IRS should then make the results publicly searchable online. As developers are now contemplating where to site projects and are looking for immediate guidance on potential ECs, IRS should seek to make this database available after 180 days. This list should aim to be a comprehensive table of communities in which a developer may claim the EC bonus through any means. The website could be updated on a monthly basis, and developers may still seek an EC determination or self-certification for a specific site even if the area is not yet listed on the website. IRS should make clear that inclusion in this database would not be a gating mechanism for eligibility for the EC credit; instead, it is intended to disseminate and standardize information to allow taxpayers greater certainty as the credit is used over time. This is particularly important for brownfield sites, given the large number of them; IRS should make clear that simply because a particular site may not be included in the *post hoc* database as a brownfield does *not* mean that that site is "uncertified."

c. Process for Establishing Additional Brownfield ECs

According to the EPA, there are an estimated half million to a million brownfields in America.[11] ACP emphasizes that the vast majority of these qualifying brownfield sites are not compiled anywhere for taxpayers to utilize in the planning phase.[12] EPA does not maintain a list of every brownfield site within the U.S. In fact, EPA only has information on brownfields properties assessed and cleaned up with the use of EPA brownfields funding, which is a small fraction of those that qualify under the IRA as an EC.[13] Therefore, ACP recommends that IRS, in conjunction with the EPA, establish a process by which taxpayers may efficiently identify and certify additional qualifying brownfield sites.

One method of certifying new brownfields could entail expedited or consolidated environmental site assessments for properties seeking the EC credit. IRS could also choose to enable taxpayers to rely upon state or local designations of brownfield sites as a basis for self-certification, subject to reasonable record-keeping requirements. Currently, taxpayers can use EPA's "Cleanups in My Community" platform to access information on State or Tribal Brownfields Response Programs, which although limited,[14] would provide additional information and avenues for development in ECs. ACP stresses that this data is not always publicly available on state and tribal websites, and IRS should take an all of the above approach

[11] Available at https://www.epa.gov/ust/petroleum-brownfields.
[12] This is another area where a proactive list from IRS would be highly valuable, and would not require frequent updates.
[13] Available at https://www.epa.gov/brownfields/frequently-asked-questions#Does%20EPA%20maintain%20an%20inventory%20of%20all%20brownfield%20sites%20within%20the%20U.S.
[14] *Id* at 4.

to help developers identify previously unregistered brownfields.[15] Brownfields are disproportionately found in historically disadvantaged communities, and cleaning up environmentally distressed properties while providing other economic benefits to communities was Congress's original and commendable aim in including brownfields in the EC tax credit.

d. Section 45 Projects that Elect Section 48 Eligible for Bonus Credits

IRS should clarify that all energy projects, including those making an election under section 48(a)(5), are eligible for the EC bonus credit if the project is located in an EC. IRS should also ensure that qualified facilities under section 45 and energy property under section 48 are treated comparably for EC purposes.

e. US Territories May Contain Energy Communities

ACP asks IRS to confirm that areas within US territories, such as Puerto Rico, may qualify as ECs. U.S. territories have census tracts defined by Census Bureau, metropolitan statistical areas defined by Office of Management and Budget, and well-defined Bureau of Labor Statistics. Therefore, if a census tract, statistical area, or brownfield in U.S. territories meet the criteria described in the IRA, it should qualify as an EC just like anywhere in the 50 states and District of Columbia.

III. CONCLUSION

We appreciate the opportunity to respond to this request for comments on EC implementation and look forward to continuing engagement with IRS on this issue.

Sincerely,

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[15] *Id.*