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Re: **Notice 2022-51**
Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Aypa Power respectfully submits the following comments in response to the above referenced request from the Department of Treasury and the Internal Revenue Service with respect to certain clarifications under the definition of "energy community" in Inflation Reduction Act of 2022 (IRA), specifically Section 45(b)(11)(B) of the Internal Revenue Code (IRC):

1. **Brownfields.** With the inclusion of the brownfields energy tax credit bonus in the IRA [*see* IRC Section 45(b)(11)(B)(i)], Congress seeks to encourage the use of contaminated properties for renewable energy and energy storage projects in order to encourage the remediation and reuse of these sites. The definition of "brownfield site" contained in Section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was added to CERCLA in 2002 to tailor eligibility for certain limited federal grant funding. There are terms within the exclusions to the general definition of brownfield site under CERCLA which may result in unnecessarily diminishing the availability of the IRA bonus credits thereby diminishing the intended reach of the IRA provision.

In particular, Section 101(39)(B)(i) excludes from the definition of a "brownfield site" a site that is the subject of ongoing removal actions. Where intended to identify sites eligible to receive federal grant funding, this exclusion appears reasonable – a site that is already undergoing removal actions need not obtain additional funding for that same purpose. This does not mean, however, the site is fully remedied and available for reuse without incurring additional costs for that purpose. There are monitoring and reporting requirements, as well as potential vapor control and soil management requirements, among other things, that may continue long after the physical removal operations are completed, or a cleanup or corrective action which has been planned or is enumerated in various orders or permits [*see* Sections 101(39)(B)(i), (iii), (v), (vi), and (viii)] may come with costs that would otherwise dissuade a developer from reusing the brownfield site for renewable energy or energy storage.

Significant work may still be required based on the condition of the property and the nature of required engineering and institutional controls. Many of these so-called excluded brownfield sites may fall squarely within the threshold definition of a property whose "expansion, redevelopment or reuse" is complicated by the presence of hazardous substances [*see* Section 101(39)(A)]. Guidance should

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disregard the fact that a site is already subject to ongoing removal actions for purposes of determining whether "expansion, redevelopment or reuse" of the site is complicated by the presence of hazardous substances.

Furthermore, the exclusion of a site simply because there exists a federal or state permit issued under the Clean Water Act, or other federal environmental statutes, does not promote the intent of the IRA and is severely and unnecessarily restrictive [*see* Section 101(39)(B)(iv)]. The existence of a permit may have no impact on the contamination of the property. Contamination, if present, should result in the characterization of the property as a true brownfield site as defined in Section 101(39)(A), whether or not there is a water discharge permit, for example. Therefore, guidance should disregard the mere presence of a federal or state permit issued under the Clean Water Act or other federal environmental statute for purposes of determining whether a site is a brownfield site.

Finally, within the same exclusion [Section 101(39)(B)(iv)], there is an implication that any "facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties," for any reason, in any jurisdiction, whether related to environmental cleanup or not, somehow disqualifies the property from being considered a brownfield site. This implication too does not make sense and should not be considered a contraction of the intent of the IRA with respect to its incentives for the reuse of brownfield sites. Guidance should provide that the presence of such an administrative or court order or decree does not disqualify a site that would otherwise be treated as a brownfield site.

2. **Coal-fired Generating Unit Retirement.** With respect to the provision in the IRA regarding eligibility for a bonus credit for renewable energy and energy storage development in census tracts (and adjacent tracts) in which a coal-fired generating unit was retired after 2009 [*see* IRC Sections 45(b)(11)(B)(iii)(I)(bb) and (iii)(II)], the language is straight forward in defining such a location for development. The provision was designed to encourage the retirement of coal-fired generating units and to replace the community's resulting lost tax revenue and employment with what comes from low carbon energy and green jobs. A question has arisen regarding the eligibility for the adder in a tract where a coal-fired generating unit has been timely retired and was replaced with a natural gas facility. Guidance should provide that it is irrelevant whether a natural gas facility is now located where the coal-fired unit was located. Given the higher employee numbers required at coal facilities compared to gas facilities, we believe incentivizing job-creating investments in new renewable energy and storage projects in these areas is consistent with the language of the statute as drafted and the clear intent of Congress.

Respectfully submitted,

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