



## BQ ENERGY DEVELOPMENT, LLC

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**To:** Internal Revenue Service

**From:** BQ Energy Development, LLC

**Date Submitted:** November 4, 2022

**Deadline for Comments:** November 4, 2022

**Subject:** Comments in response to IRS 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*” (submitted via the Federal eRulemaking Portal)

### **I. RELEVANT CREDENTIALS AND EXPERIENCE**

BQ Energy Development, LLC (“BQED”) is a New York-based developer that focuses exclusively on transforming landfills, brownfields, and Superfund sites into operating solar facilities.

Our team has more experience doing this type of work than anyone else in the industry. We are currently developing dozens of these brownfield sites around the United States and have gained a reputation as the leader in this market in the United States. BQED has developed well over 100MW of renewable energy on sensitive land, including a 50MW windfarm in Dumas TX, a 35MW wind project built on an old steel factory in Lackawanna, NY, and the Annapolis Solar Park in Maryland, the largest landfill solar project in operation.

BQED was pleased by the implementation of the Inflation Reduction Act of 2022 (“IRA”) as it is an important step toward reaching the country’s ambitious decarbonization goals. The IRA also includes incentives that will dramatically shift where investment in the clean energy economy will likely be prioritized, encouraging brightfields investment in lower income areas.

However, BQED and many others in the industry have concerns about the definition of “brownfield site” in the IRA, since that could potentially exclude many projects that the IRA was originally intended to support. We submit these comments as BQED’s recommendations and perspective on this topic.

## II. BQED COMMENTS TO IRS NOTICE 2022-51 – THE DEFINITION OF BROWNFIELD SITES IN THE INFLATION REDUCTION ACT

- A. We recommend that the IRS promulgate regulations for the definition of an eligible “brownfield site” that are simple to interpret, publicly obvious, and that prevent bad actors from gaming the system. To this end, we recommend that the IRS use the following three step approach when defining “brownfield sites”:
- a) First, the IRS should look to the EPA Repowering Americas Lands database (<https://www.epa.gov/re-powering>), the EPA Superfund Redevelopment Mapper (<https://www.epa.gov/superfund-redevelopment/superfund-redevelopment-mapper>) as well as the EPA Cleanups in My Community Map (<https://www.epa.gov/cleanups/cleanups-my-community>). Any sites listed on these databases should automatically qualify as “brownfield sites” eligible to receive certain bonus investment tax credits under the IRA. The EPA Superfund Redevelopment Mapper and the Repowering Americas Lands database, created by the EPA over the past 15 years, includes numerous properties that EPA has pre-screened for renewable energy potential reuse. This is exactly what the IRA has set as a goal, and the IRS should take advantage of this important resource provided by the EPA.
  - b) Second, while the various EPA lists are great resources for identifying brownfield sites, there may be other lands that are clearly a brownfield site, but which do not appear on the EPA Repowering America’s Lands, Superfund Redevelopment, nor the Cleanups in My Community lists. For this reason, as a second step in determining a brownfield site’s eligibility under the IRA, we recommend that sites which appear on any State list of brownfield properties also be eligible “brownfield sites” under the IRA.
  - c) Finally, it is feasible that a State may not maintain a list of brownfield sites, or that it may have erred in omitting a property for some reason. We recommend, as a third option for determining what is a “brownfield site” under IRA, that the IRS accept a letter or other documentation (from a State environmental agency or the appropriate State authority) that either adds the site to the State’s brownfield list, or else confirms that the site is an eligible brownfield under the IRA. We also recommend that the IRS promulgate regulations that describe what criteria the agency may consider when determining brownfield eligibility this way (including what documentation may be acceptable from a State agency or authority), but we recommend

that the agency not create any mandatory criteria. This would allow the agency to be flexible when making determinations, which is important given the broad range of brownfield sites that exist in the United States.

d) BQED additionally recommends that the following two items be added as suggested criteria that the IRS may consider (but is not required to) when determining brownfield eligibility under the IRA based on representations made in a letter or other documentation from an appropriate State agency, as described in Section II(A)(c) above:

(1) Whether the site is or has been listed or classified as a brownfield or other similar designation in any registry, database, or other list managed by the State or any locality; *or*

(2) Whether the site is subject to any remediation plans (or any similar plan or requirement), or if the site has been subject to any such plans in the past.

e) These various lists from EPA are an effective tool in that they already exist, and they are not subject to interpretation. Although these lists were not created to be a definitive authority on the location brownfield sites, they are a relevant and important resource published by the federal government. Therefore, as discussed above, we recommend that the IRS promulgate rules that allow, but do not require, the agency to reference any of these lists or databases (and any properties they contain), and to consider them in any analysis of whether a site is an eligible brownfield under the IRA.

B. Finally, there has been some notable discussion that many “brownfield site” definitions exclude Superfund sites. The EPA routinely makes such a distinction for budgetary, organizational, and programmatic reasons. For purposes of this discussion, there should be no reason to exclude Superfund sites from eligibility as a brownfield within the definition. Obviously, the whole point of this program is to redevelop properties which have been environmentally damaged with renewable energy. Superfund properties are arguably the most obvious examples of such land abuse. It is important that the IRA definition include such properties so they can qualify for the renewable energy tax credit and other benefits under the IRA.

C. Additionally, we note that Superfund properties are included in the EPA Repowering America’s Lands database. As such, if our recommendation on the use

of that database as part of the definition, then there will be no further need to deal with Superfund site eligibility under the IRA.

- cc:
1. Congresswoman Sheila Jackson Lee
  2. Congressman Al Green
  3. Congressman Sean Patrick Maloney
  4. Congressman Patrick Ryan
  5. Mr. Andrew Ginther, Mayor of Columbus, Ohio
  6. Mr. Sylvester Turner, Mayor of Houston, Texas
  7. Ms. Ann Taylor, Mayor of Waukegan, Illinois
  8. Abigail Ross Hopper, President and CEO of the Solar Industries Association
  9. Illinois Power Agency

## Appendix A

### Additional Support for BQED's Recommendations to the IRS

#### **I. Main Themes**

- A. The IRA definition of “brownfield site” from CERCLA is broad and includes both mine-scarred land and all non-excluded sites where contaminants “may complicate expansion, redevelopment, or reuse.”
- B. EPA carves out certain sites from brownfield site eligibility (e.g., coal ash ponds, CERCLA remedial-only sites) and expands eligibility to sites which, under CERCLA, should not be eligible (e.g., NPDES-permitted sites, separating RCRA parcels).
- C. An IRA brownfield site does not have to be eligible or admitted to the EPA's Brownfield Revitalization Program, as evidenced by the fact that under CERCLA mine-scarred land sites typically require a site-specific determination, and Congress omitted this paragraph from the IRA.
- D. Congress could have easily written the reference to the brownfield definitions differently if it intended only brownfield grant recipients to qualify as IRA brownfield sites.

#### **II. EPA Consultation**

- A. IRS does not need to consult EPA on eligibility. Unlike the American Jobs Creation Act of 2004 guidance, the IRA does not require the IRS to consult with EPA when making a brownfield eligibility determination.
- B. IRS should do as it has done for past references to brownfield sites as defined in CERCLA and provide permissive language in its guidance which would allow for eligibility demonstrations outside of EPA's brownfield guidance.
- C. IRS should not be bound by EPA's brownfield guidance when interpreting the IRA.

### **III. Issues With Utilizing EPA Guidance Exclusively**

- A. EPA has good reasons to limit certain sites from eligibility under its brownfield grant programs. However, EPA's brownfields guidance adopts interpretations that are contrary to the letter of CERCLA in some places and more limiting than it in others.
- B. For example, NPDES-permitted facilities fall under the fourth exclusion in CERCLA, but EPA recognizes in its guidance that to disallow facilities with these permits would do nothing to further the intent behind the brownfield grant program or prevent polluters from taking advantage of brownfield site benefits.
- C. Similarly, the brownfield guidance includes language that allows parcels not subject to a RCRA permit or order to be eligible. This adjustment ignores the fact that in other exclusions, Congress indicated its intent for ineligible portions of facilities to be considered separate so that an ineligible parcel does not sink the entire site.
- D. While these adjustments make sense and promote brownfield development, their legal bases are not unquestionable. However, the goals of the brownfield grant program are notably different from the goals of the IRA. The IRA is intended to accelerate the energy transition by spurring renewable energy development, and the brownfield grant program is meant to provide funding for assessment and cleanups of contaminated and potentially contaminated sites. The implementation of the IRA should reflect this reality.

### **IV. Mine-Scarred Land**

- A. On the other end, sometimes EPA is more restrictive than necessary, especially in its list of eligible mine-scarred lands.
- B. EPA guidance defines mine-scarred land as "lands, associated waters and surrounding watersheds where extraction, beneficiation, or processing ore and minerals (including coal) has occurred."
- C. EPA guidance on mine-scarred lands clearly recognizes that the term can include tailings and disposal ponds; but it limits these to hard rock only and does not list coal ash ponds as eligible to be brownfield sites.

D. It makes no sense to limit IRA brownfield eligibility to hard rock mine impoundments and not allow the IRA to unleash renewable energy development at sites with coal combustion residuals such as coal ash ponds.