Comment from California Energy Storage Alliance

Preliminary Comments of the California Energy Storage Alliance on Treasury and Internal Revenue Service (IRS) Notice 2022-47 Requesting Public Comment on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements of the Inflation Reduction Act (IRA) of 2022

November 4, 2022

Submitted electronically via the Federal eRulemaking Portal

Re: Preliminary Comments of the California Energy Storage Alliance on Treasury and Internal Revenue Service (IRS) Notice 2022-47 Requesting Public Comment on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements of the Inflation Reduction Act (IRA) of 2022

To Whom It May Concern:

The California Energy Storage Alliance (CESA) appreciates the opportunity to submit comments on Notice 2022-51 on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements.

CESA is a 501(c)(6) organization representing over 120 member companies across the energy storage industry. CESA member companies span the energy storage ecosystem, involving many technology types, sectors, configurations, and services offered. As the definitive voice of energy storage in California and the largest trade association in the nation focused on grid-connected energy storage, CESA is uniquely positioned to speak to the various issues and questions posed in the Treasury Notices. However, we note that the comments below do not represent any particular view or position of any individual member company.

We appreciate the opportunity to provide these comments and would appreciate the opportunity to discuss them further with you. If you or your staff would like to discuss the contents of these comments, please contact Jin Noh, Policy Director of CESA at 510-296-0420 or jnoh@storagealliance.org, with a copy to Grace Pratt at gpratt@storagealliance.org.

I. INTRODUCTION & SUMMARY.

The IRA represents landmark legislation that will transform the nation's economy and will spur historic levels of investment in clean generation, energy storage, alternative fuels, transportation, and consumer/commercial devices and appliances – all in a national effort to tackle climate change and increase the sustainability and resiliency of the economy. With the IRA touching on so many aspects of the clean energy economy, Treasury and IRS are tasked with many areas of implementation of the IRA's key provisions. As such, in issuing six different notices requesting public comment, Treasury and IRS have expressed their core principles in guiding the implementation process and have quickly moved to solicit public comments.

CESA appreciates the timely action to seek public comment in order to mobilize the various clean energy investments over the medium and long term and provide greater clarity and certainty for many investments already underway or planned in the near term. Given the multitude and complexity of many IRA provisions, as well as the likely resourcing constraints faced by the Treasury and the IRS to review and process thousands of public comments, CESA submits these preliminary comments as key areas of clarifications and potential proposals that are important to the grid-connected energy storage industry.

II. LABOR REQUIREMENTS.

In Notice 2022-51, Treasury and IRS seek comments and responses to questions on various provisions regarding §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the Internal Revenue Code. In these comments, CESA seeks the following clarifications and offers several recommendations for consideration.

- Establish prevailing wage based on the rate at the time of begin construction or at some point in time prior to construction
- Clarify whether the prevailing wage and apprenticeship requirement applies to routine maintenance for certain equipment
- Clarify the applicability of labor requirements to qualified interconnection property
- Clarify record-keeping and compliance documentation for prevailing wage and apprenticeship requirements

A. Establish prevailing wage based on the rate at the time of begin construction or at some point in time prior to construction

The IRA added prevailing wage provisions in §§ 30, 45, and 48 to qualify for the labor-related bonus credits. However, a key uncertainty is around how the prevailing wage requirement would apply if the prevailing wage level for the locality changes over time, such that a project could qualify in one year but not the next if prevailing wage increases over time, leading to disqualification and/or recapture risk. To illustrate, for large infrastructure-like generation and/or energy storage projects in particular, local labor statistics could be significantly impacted given the high number of construction jobs created by the project at hand. Regardless, the dynamic nature of labor statistics poses uncertainties for any project of any size to qualify for labor-related bonus credits.

To address these questions and uncertainties, CESA recommends that Treasury and IRS establish clear guidance that the prevailing wage requirements would be set based on the prevailing wage level applicable to the locality at the time of begin construction. Ideally establishing the prevailing wage rate at some point in time prior to construction would be

preferred given the advanced planning required for securing financing as well as equipment and supplies and developing construction plans. In doing so, the risk of recapture or disqualification from labor-related bonus credits are eliminated.

B. Clarify whether the prevailing wage and apprenticeship requirement applies to routine maintenance for certain equipment

In line with our requests for distinctions to be made on augmentation versus routine maintenance work, CESA requests that Treasury and IRS clarify whether and how the prevailing wage and apprenticeship requirement apply for projects seeking to satisfy the wage and apprenticeship requirements. Certain activities such as commissioning, inspections, and other vendor services are distinct from the construction and operation of eligible energy property. While the provisions appear to require all construction, repair, or alteration in the first five years of the project being placed in service, it is less clear on whether the prevailing wage requirements cover the full scope of services required for the project, including routine maintenance. To this end, CESA requests that Treasury and IRS explicitly and narrowly define what constitutes "alteration" or "repair" as it relates to labor requirements and how it is or not distinct from routine operations and maintenance.

C. Clarify the applicability of labor requirements to qualified interconnection property

As it relates to the apprenticeship requirement, CESA requests clarification on whether construction and labor hours tied to the qualified interconnection property must also meet prevailing wage and apprenticeship requirements. While it is clear that the project itself must meet this standard, it is unclear if qualified interconnection property (which falls within the definition of energy property if the 5 megawatt threshold is met) must also meet this standard even though they may fall outside the physical boundaries of the project.

D. Clarify record-keeping and compliance documentation for prevailing wage and apprenticeship requirements

CESA recommends that the taxpayer should only be required to provide compliance documentation for prevailing wage or apprenticeship requirements upon request from the IRS, thereby balancing administrative burden to the IRS and to the taxpayer with assurances for adherence to the labor requirements. Furthermore, the record-keeping and documentation requirements should be specified to support compliance in this regard. For example, for the apprenticeship requirements, CESA recommends that adoption of forms similar to Division

of Apprenticeship Standards (DAS) 140[1] and 142[2] and in California so that taxpayers can show they have complied with the good-faith efforts of hiring apprentices.

III. DOMESTIC CONTENT REQUIREMENTS.

In Notice 2022-51, Treasury and IRS seek comments and responses to questions on various provisions regarding §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the Internal Revenue Code. In these comments, CESA seeks the following clarifications and offers several recommendations for consideration.

- Make domestic content determinations at the "component" level of a manufactured product and use the "substantial transformation" standard and manufactured date of the component(s) and product(s)
- Define "good-faith" effort and develop similar criteria and process to seek exceptions
- Establish industry-wide lists of components that would qualify for exceptions

A. Make domestic content determinations at the "component" level of a manufactured product and use the "substantial transformation" standard and manufactured date of the component(s) and product(s)

The IRA amended and added multiple provisions in §§ 30, 45, and 48 to specify how bonus credits would be available for energy property that meet domestic content requirements, but there is significant uncertainty around how determination will be made for qualification. Overall, it is unclear if domestic content requirements are an all-or-nothing determination or one based on the weighted cost/value of the components and sub-components and their country of origin. In making this determination, it is also unclear precisely which components or sub-components will qualify in this domestic content calculation, especially when considering the balance of system costs and hybrid configurations that involve generation and energy storage facilities (*e.g.*, shared facilities such as inverters), which qualify for credits in accordance with their technology-specific provisions.

Given these uncertainties, CESA suggests that Treasury and IRS focus this determination on the "component" level, which may require some definition. Since various equipment factor into the full balance of system of the energy property or facility, each component category should be categorized and classified, inclusive of not only the energy

[1] *See* DAS Form 140 here: https://www.dir.ca.gov/das/dasform140.pdf
[2] *See* DAS Form 142 here: https://www.dir.ca.gov/das/dasform142.pdf

storage technology but also the materials and equipment that store the energy, transformers, inverters, and other supporting equipment. This categorization of components will support efficient calculation of domestic content and define the granularity of the assessment.

Further, Treasury and IRS should clarify whether labor is a "component" in domestic content calculations since they can constitute a large portion of costs, particularly for major construction projects of energy storage technologies that must be constructed onsite (*e.g.*, compressed air storage cavern) rather than shipped as a fully assembled (*e.g.*, containerized) product. If domestic labor is used for these significant cost components of the energy property or facility, a case could be made for its inclusion in the calculation, especially as labor may be a cost or value driver for the manufacturing or assembly process for different components. As such, Treasury and IRS should clarify that expenditures on installation and labor may factor into the calculation of the total domestic content of product.

When assessing the components of a qualifying energy property or facility, CESA suggests that Treasury and IRS use the "substantial transformation" standard in making determinations of domestic content qualifications and bonus credit eligibility. As defined by the U.S. Department of Commerce (Commerce), "Substantial transformation means that the good underwent a fundamental change (normally as a result of processing or manufacturing in the country claiming origin) in form, appearance, nature, or character, which adds to its value an amount or percentage that is significant in comparison to the value which the good (or its components or materials) had when exported from the country in which it was first made or grown."[3] Even if some raw materials or sub-components were sourced from elsewhere, if the component is manufactured and substantially transformed in the United States, the component should qualify as domestically produced or manufactured and thereby factored into the percentage calculation for domestic content of the energy property or facility. Going further into sub-components or below will be administratively burdensome and prohibitive for Treasury/IRS and developers and technology providers alike.

With domestic content determinations made at the component level using the substantial transformation standard, CESA recommends that Treasury and IRS (or some other designated agency) calculate the applicable percentage for the tax year by summing the dollar value of each component and attributed to either the United States or another country of origin. In addition, domestic content should be tied to the equipment manufactured date as posted on the equipment's nameplate. Due to project deployment related delays (*e.g.*, permitting, interconnection delays), the use of the manufactured date is more appropriate than the placed in service date of the project.

Finally, CESA requests that Treasury and IRS clarify the accounting and compliance process for qualifying for the domestic content adder. Once qualified, it will be helpful for

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[3] *See* International Trade Administration's "Determining Origin: Substantial Transformation": https://www.trade.gov/rules-origin-substantial-transformation#:~:text=Note%3A%20Substantial%20transformation%20means%20that,to%20the%20value%20which%20the

an official list be produced and published to show approved domestic components for use by developers in their projects, easing the process to source projects and secure financing.

B. Define "good-faith" effort and develop similar criteria and process to seek exceptions

For the purposes of the domestic content requirements, the IRA explicitly requires that steel and iron that goes into an energy property or facility must be 100% produced in the United States, with allowable exceptions as determined by the Secretary if the domestically-manufactured steel or iron products: (1) increase the overall costs of construction by more than 25% or (2) are not available in sufficient quantities or of satisfactory quality.

In a similar way, there may be other materials and components that go into an energy storage technology or other equipment in energy property or facilities that merit similar exceptions to be determined by the Secretary. For example, there is currently a shortage in transformer equipment industry-wide,[4] which is commonly needed for individual generation and energy storage projects. In cases such as these, Treasury and IRS (or some other designated agency) could publish a consistent and standard list of equipment that would automatically qualify for the exceptions.

C. Establish industry-wide lists of components that would qualify for exceptions

To ease the burden of requesting demonstration for exception requests on a project-by-project basis, CESA recommends that Treasury and IRS (or through some other designated agency, *e.g.*, Commerce) develop and maintain an official federal list of common components as being "insufficiently available." Given some of the shared materials or components across different generation and energy storage projects, this list would ease the administrative burden for Treasury and IRS, as well as that of the taxpayer and developer. Since the 25% cost threshold for construction of qualified facilities is project specific, this may not be something maintained within an official list.

IV. <u>ENERGY COMMUNITIES REQUIREMENTS</u>.

In Notice 2022-51, Treasury and IRS seek comments and responses to questions on various provisions regarding §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the

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[4] *See, e.g.*, Behr, Peter. "How a transformer shortage threatens the grid." E&E News on October 20, 2022. https://www.eenews.net/articles/how-a-transformer-shortage-threatens-the-grid/

Internal Revenue Code. In these comments, CESA seeks the following clarifications and offers several recommendations for consideration.

- Provide timely updates on energy communities and provide grace periods if designations change over time
- Interpret the definition of qualifying "brownfield site" expansively to include "mine-scarred" lands and development encumbered by pollution where the cost of remediation is excessive
- Develop and publish maps on qualifying low-income households and energy communities
- Clarify the definition of "adjoining" regarding the eligible census tracts associated with coal mine closures or coal generation unit retirements
- Clarify that that employment statistics from the Bureau of Labor Statistics are to be used for determining Energy Community status

A. Provide timely updates on energy communities and provide grace periods if designations change over time

The IRA added provisions to define "energy community" across three eligibility criteria. The eligibility criteria are less subject to change for two of them: (i) brownfield site and (iii) census tract where a close mine closed or a coal-fired generation facility retired by a certain date; by contrast, designations of energy communities in order to qualify for bonus credits are potentially subject to change over time, particularly for those around eligibility criterion (ii), which is subject to changes in absolute/relative employment statistics or local tax revenues similar to previously-mentioned prevailing wage requirements. Depending on the correlation of local and national employment statistics, or the economic development of a locality that would either increase or decrease the share of local tax revenues from either the coal, oil, or natural gas industries, localities may fluctuate in their eligibility for the energy communities requirement along criterion (ii).

Considering the risk of change in the eligibility for the energy communities requirement, CESA recommends that Treasury and IRS develop an official list updated regularly of eligible communities and allow any project beginning construction within a five-year grace period to qualify. If, for example, an energy community was designated in 2023 but would no longer be eligible in at the beginning of 2024, projects that begin construction by the beginning of 2028 should still be able to qualify for the bonus credit. The risk of goal posts moving over time is disruptive to project development and introduces significant financial uncertainty. Inversely, if new energy communities become eligible for the bonus credit, CESA strongly encourages Treasury and IRS (or some other designated agency)

publish information on the new designations as quickly as possible. As a result, projects can immediately pursue opportunities to support these underserved and burdened communities.

B. Interpret the definition of qualifying "brownfield site" expansively to include "mine-scarred" lands and development encumbered by pollution where the cost of remediation is excessive

The IRA added energy communities provisions in §§ 30C, 45, and 48, where qualifying "energy community" for the purposes of the bonus credit, includes "brownfield site" as one of the three eligibility criteria. Specifically, the definition for brownfield site is referenced explicitly from 42 USC § 9601(39).

Considering that the Secretary has discretion in making designations for qualifying energy communities, CESA recommends that Treasury and IRS generally adopt a fairly expansive definition for brownfield site that adheres to the referenced code and aligns with the intent of the IRA to support the transition of communities away from polluting industries. Along these lines, CESA suggests that Treasury and IRS consider a general definition that qualifies energy communities for sites that have property where expansion, redevelopment, or reuse encumbered by pollution and hazardous substances and where the cost of remediation is excessive. As such, like with coal mining communities and areas where coal generation is retired, the definition of brownfield sites should include other similarly situated communities and locations, such as those impacted by oil/gas drilling, operating or retiring natural gas generation units, mining-impacted sites, among others.

Specifically, CESA recommends that Treasury and IRS affirm and adopt a definition for "mine-scarred land" for the purposes the IRA credits to include the extraction of aggregate materials as eligible mining activity. Unfortunately, EPA regulations that implement CERCLA do not define the term "mine-scarred land," though EPA guidance refers to "lands, associated waters and surrounding watersheds where extraction, beneficiation, and processing of ore and minerals (including coal) has occurred."[5] Generally, aggregate mining (including, but not limited to, rock, clay, sand, gravel and limestone) may qualify as extraction, beneficiation and processing of minerals. In doing so, the objectives to encourage reuse and redevelopment of mining-impacted and otherwise burdened communities for the purposes of clean energy projects and economic/workforce development will be advanced. Moreover, Treasury and IRS should affirm the agency that will determine whether a location is "mine-scarred" land (*e.g.*, EPA).

C. Develop and publish maps on qualifying low-income households and energy communities

[5] *See* Brownfields Mine-Scarred Lands Initiative (EPA 2004).

For any geospatial eligibility criteria for IRA provisions and related credits, CESA recommends that Treasury and IRS work with other agencies to publish GIS maps that help to easily identify eligible low-income households and energy communities, which will facilitate the siting of projects to support these customers and communities and ease the burden of curing deficiencies or modifying project sites and designs despite the original intent to qualify for these bonuses and adders. An official map and consistent dataset maintained by Treasury or by way of reference to that developed and maintained by another government agency is important for consistency across developers and taxpayers and certainty of investment. Similar tools and maps have been developed by the U.S. Environmental Protection Agency (EPA), such as the CalEnviroScreen used today in California for various program eligibility and resource planning considerations.[6] At the same time, Treasury and IRS should provide clear disclaimers and clarifying language that the communities shown in any map is not exclusive to other communities, whereby a taxpayer could still approach or "apply" to Treasury and IRS about the eligibility of a particular unlisted community for qualification as an energy community.

D. Clarify the definition of "adjoining" regarding the eligible census tracts associated with coal mine closures or coal generation unit retirements

Criterion (iii) related to the definition of energy community includes census tracts where coal mine closures or coal generation unit retirements occurred directly in, but it also allows for "adjoining" census tracts to also qualify. This definition of "adjoining" is not clear and should be clarified through Treasury and IRS guidance. Minimally, all adjacent or tangent census tracts of the impacted census tract should be clarified as eligible, but the definition may also be expanded to broader regions in line with the consideration of metropolitan statistical areas as specified in criterion (ii).

E. Clarify that that employment statistics from the Bureau of Labor Statistics are to be used for determining Energy Community status

Given that different government agencies maintain employment industries for different industries, CESA requests that Treasury and IRS affirm that the statistics from the Bureau of Labor Statistics are used as the authoritative source for determining Energy Communities. Clarifications in this regard will facilitate consistent understanding in identifying Energy Communities.

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[6] *See, e.g.*, CalEPA Environmental Mapping Tools and Data: https://calepa.ca.gov/environmental-mapping-tools-and-data/

V. **CONCLUSION**.

CESA appreciates the opportunity to provide these comments on the Treasury Notices and look forward to collaborating with Treasury in implementing the various provisions of the IRA.

Respectfully submitted,

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