

ELEVATE

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Internal Revenue Service
ATTN: CC:PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: 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 (Notice 2022-51)

To Whom It May Concern:

Elevate Renewables F7, LLC (“Elevate”) submits these comments on the Internal Revenue Service (“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” (“IRA”)¹ (“Request for Comments”). As a national developer of battery energy storage, Elevate has a significant interest in the energy community tax credit and any implementing guidance from the IRS. These comments respond to the Request for Comments on clarifications with the determination of a “brownfield site” and possible changes to the “brownfield site” definition in the IRA.² Elevate appreciates the opportunity to share these comments.

Elevate is a national developer focused on the development of battery energy storage resources co-located with existing generation facilities owned by private equity funds managed by ArcLight Capital Partners. Such funds currently hold indirect ownership interests in generation resources totaling approximately 25,000 MWs. Elevate is uniquely positioned to increase renewable penetration in conjunction with directly reducing the environmental footprint of the power sector through the deployment of carbon neutral resources. Elevate is focused on the safe, reliable, environmentally conscious energy transition in a way that benefits all of our stakeholders together with the broader communities in which we operate.

¹ P.L. 117-169, 136 Stat. 1818 (Aug. 16, 2022).

² See Request for Comments at 16-17 (“(2) 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?” and “(5) . . . what past or possible future changes in the definition, scope, boundary, or status of a ‘brownfield site’ under § 45(b)(11)(B)(i) . . . should be considered, and why?”).

The IRA represents a historic investment in a clean energy future for the United States. Congress put forth various measures in the IRA intended to curb carbon emissions and accelerate the buildout of renewable energy, energy storage, and emerging energy technologies. Among those measures, the IRA expanded production tax credits (“PTCs”) and investment tax credits (“ITCs”) and provided an enhanced tax credit for those energy projects that meet certain requirements. Specifically, projects eligible for PTCs and ITCs that are located in an “energy community” may receive a 10% increase in available tax credits. The IRA offers multiple definitions of what constitutes an energy community, including certain “brownfield sites.”

“Brownfield sites” are generally characterized by historic contamination and are often located in industrial areas, including those with fossil-fuel energy assets. These areas are ripe for revitalization and clean energy investments through the IRA’s enhanced tax credits. However, the nuanced definition of “brownfield sites” in the IRA contains exclusions that may undermine congressional intent—perhaps due to Congress’ expedited consideration of the IRA. As such, Elevate suggests that legislative changes define “brownfield sites,” without exclusion, as an energy community under the IRA. In the absence of such legislation, Elevate suggests that IRS guidance apply a broad approach to the definition of “brownfield sites” for purposes of the IRA. Such an approach would accelerate the energy transition, reduce carbon emissions, advance environmental justice, and promote economic development—as Congress intended. Elevate also suggests that IRS guidance complement this approach with a narrow interpretation of the exclusions to the definition of “brownfield sites” in the IRA, consistent with existing brownfield guidance and caselaw.

ANALYSIS

I. Future Amendments to the IRA “Brownfield Site” Definition Would Provide Certainty for Clean Energy Developers and Communities.

In response to the Request for Comments on future changes to the “brownfield site” definition, Elevate recommends a technical amendment to remove the reference to the subparagraph (B) exclusions to “brownfield sites.” The IRA applies to “brownfield sites” (as defined in subparagraphs (A), (B), and (D)(ii)(III) of §101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”). While subparagraph (A) reflects the general understanding of a “brownfield site” (i.e., “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant”), the subparagraph (B) exclusions are ill-suited for purposes of the IRA and should be removed.

a. Exclusions to the Definition of “Brownfield Site” Frustrate the Purpose of the IRA.

While the inclusion of “brownfield sites” is a welcome addition to the definition of an energy community, limiting the definition to the narrow parameters set out in the text of CERCLA frustrates the purpose of the IRA’s energy community bonus tax credit.

The Brownfields and Land Revitalization Program (the “Brownfields Program”) was initiated in 1993, providing seed money to communities to stimulate redevelopment and reuse of

properties affected by the potential presence of environmental contamination.³ In the beginning, the Brownfields Program was funded with the same money as the Superfund program's appropriations.⁴ In 2002, Congress provided specific, statutory authority for the Brownfields Program⁵ with the enactment of the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Act").⁶ Among other provisions, the Brownfields Act authorized a separate grant program to promote the cleanup and reuse of brownfields and offered an explanation for the exclusions to what qualifies as a "brownfield site."

The Brownfields Act explains that the definition of the term "brownfield site," as defined in CERCLA, was intended to foster reuse of abandoned or idled sites that are less contaminated than those higher risk sites that are more appropriately addressed by other state and federal programs.⁷ For example, under CERCLA Section 101(39)(B)(iii), the term "brownfield site" excludes any facility that is the subject of a CERCLA unilateral administrative order, court order, administrative order on consent, or judicial consent decree.⁸ Such exclusions would also ensure that the limited resources allocated to brownfield revitalization would not be expended on sites that would otherwise be cleaned up.

The concern about efficient allocation of limited resources that gave rise to the narrow definition of a "brownfield site" under CERCLA is not applicable to the enhanced tax credits available under the IRA, which are theoretically boundless and should presumably be implemented to the maximum extent practicable, so as to accelerate the clean energy transition and achieve the U.S. carbon emissions reduction goals. In the context of CERCLA, Congress explicitly recognized that sites excluded from the narrow definition of "brownfield sites" may "nonetheless have significant redevelopment potential,"⁹ including a savings clause in CERCLA to address this concern. Section 104(k)(11) of CERCLA provides that exclusion of a site from the definition of "brownfield site" shall have no effect on eligibility for assistance under any other provision of federal law.¹⁰ Elevate does not view the reasons for the exclusions to the CERCLA definition of "brownfield sites" as relevant in the context of the IRA.

³ *Brownfields and Land Revitalization Program History*, EPA, <https://www.epa.gov/brownfields/brownfields-and-land-revitalization-program-history>.

⁴ The Superfund program was established in 1980 to clean up the nation's most contaminated land and was paid for (when the responsible parties are unidentified or cannot afford the cleanup) with (1) a trust funded by a tax on chemical and petroleum industries, and (2) annual appropriations from Congress.

⁵ P.L. 107-118.

⁶ *The Environmental Protection Agency's Brownfields Program: Scope, Authorities, and Implementation*, EveryCRSReport.com, <https://www.everycrsreport.com/reports/RS22965.html#fn5>.

⁷ "The definition of the term 'brownfield site' in S. 350 is intended to foster reuse of abandoned or idled sites that are contaminated to a lesser degree, if at all, relative to those higher risk sites that are more appropriately addressed by other state and federal programs. Federal brownfield expenditures are appropriately limited to sites where, due to the threat of real or perceived contamination, no reuse is likely, and no federally directed or funded cleanup is underway or imminent. The language ensures that the limited resources available under this section are not expended on sites that will be cleaned up under other provisions of federal law." *BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001*, S. Rep. no 107-2, <https://www.congress.gov/congressional-report/107th-congress/senate-report/2/1?overview=closed>.

⁸ 42 U.S.C. 9601(39)(B)(iii).

⁹ *Supra* note 7.

¹⁰ 42 U.S.C. 9604(k)(11).

b. The IRA Definition of “Brownfield Site” Should Be Amended.

While it is clear Congress intended to expand the scope of an energy community under the IRA, the limited legislative history on the inclusion of “brownfield sites” suggests the legislative text may not have been meaningfully considered by Congress, and would benefit from technical amendments.

The IRA definition of “brownfield site” is rooted in the Build Back Better Act (the “BBB Act”). Neither the version of the BBB Act that passed by the U.S. House of Representatives, nor any of the earlier iterations, included “brownfield sites” in the definition of “energy community.” Under the House-passed version of the BBB Act, an “energy community” was limited to census tracts with certain closed coal mines or retired coal-fired power plants.¹¹ This narrow definition was expanded by the U.S. Senate in an updated version of the BBB Act released by the U.S. Senate Committee on Finance in December 2021.¹²

Although the version of the IRA introduced by Senate Majority Leader Schumer and Senator Manchin on August 3, 2022 included the House-passed BBB Act definition of “energy community,” the August 7, 2022 amended IRA passed by the U.S. Senate included “brownfield sites.”¹³ Notably, the Senate-passed IRA, which ultimately became law, further expanded the definition of “energy community” by including certain areas with significant employment in the fossil energy industry.¹⁴

Given the short window of time between the introduction and passage of the IRA, the opportunity to make legislative improvements is to be expected. If there had been more time for public review of the amended IRA text before U.S. Senate passage, or an opportunity for amendments in the House, Elevate believes the unintended consequences related to the “brownfield site” exclusions could have been addressed. For these reasons, it would be appropriate for Congress to make a technical amendment to the “brownfield site” definition that removes the reference to exclusions under subparagraph (B) of the definition in CERCLA.

¹¹ House-passed BBB (“(B) ENERGY COMMUNITY.—The term ‘energy community’ means a census tract or any directly adjoining census tract in which — (i) after December 31, 1999, a coal mine has closed, or (ii) after December 31, 2009, a coal-fired electric generating unit has been retired.”).

¹² See U.S. Sen. Comm. on Finance, Press Release, Finance Committee Releases Updated Build Back Better Text, Dec. 11, 2021, <https://www.finance.senate.gov/chairmans-news/finance-committee-releases-updated-build-back-better-text> (“(B) ENERGY COMMUNITY.—(i) IN GENERAL.—For purposes of this paragraph, the term ‘energy community’ means—(I) a ‘brownfield site’ (as defined in subparagraphs (A) and (B) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980’ (42 U.S.C. 9601(39)))...”).

¹³ See H.R. 5376, available at <https://www.congress.gov/bill/117th-congress/house-bill/5376/text/pcs> (Placed on Senate Calendar Aug. 8, 2022); see also Sen. Amdt. to H.R. 5376, <https://www.congress.gov/bill/117th-congress/house-bill/5376/text/eas>.

¹⁴ See Sen. Amdt. to H.R. 5376, <https://www.congress.gov/bill/117th-congress/house-bill/5376/text/eas> (“(I) has (or, at any time during the period beginning after December 31, 2009, had) 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 (as determined by the Secretary), and (II) has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary)”). This version of the IRA was passed by the U.S. House of Representatives on August 12, 2022 and signed into law on August 16, 2022. See, Actions Overview H.R. 5376, <https://www.congress.gov/bill/117th-congress/house-bill/5376/actions>.

II. IRS Guidance Should Apply a Broad Approach to the Definition of “Brownfield Sites” to Fulfill the Purpose of the IRA.

In response to the Request for Comments on clarifying the definition of a “brownfield site,” absent legislative changes, Elevate suggests that IRS guidance apply a broad approach to the definition of “brownfield sites” to better fulfill Congressional intent.

a. A Broad Approach to “Brownfield Sites” Would Reduce Carbon Emissions and Accelerate the Energy Transition.

Congress intended for the enhanced tax credits in the IRA to accelerate the energy transition and help the U.S. achieve its carbon reduction goals. A broad approach to the definition of “brownfield sites” would put the U.S. on the best path to accomplish these goals.

When describing the IRA, Congress and the White House shared a view that the law would reduce carbon emissions by roughly 40% by 2030.¹⁵ In order to accomplish this ambitious goal, Congress recognized that clean energy investments would need to be made in areas beyond those with closed coal mines and retired coal plants. While the IRA expanded the “energy community” definition to specified areas with high employment in the fossil fuel industry, the inclusion of “brownfield sites” provide an opportunity to invest in areas with other fossil energy assets ripe for transition. Properties with such assets also provide an opportunity for greater environmental benefits over other areas as developers can often leverage existing infrastructure and protect open space, thereby reducing the nation’s overall carbon footprint. Under a broad approach to “brownfield site,” projects in these areas could be eligible for the enhanced credits. Thus, to spur the energy transition and achieve the carbon reduction goals envisioned by the IRA, any IRS guidance should apply a broad definition of “brownfield sites.”

b. A Broad Approach to “Brownfield Sites” Would Support Environmental Justice.

A broad approach to the definition of a “brownfield site” would allow the IRA to more effectively address environmental justice as envisioned by Congress. According to an IRA analysis cited by Senate Majority Leader Schumer, “*through greater clean energy development, the bill could avoid up to 3,900 premature deaths and up to 100,000 asthma attacks annually by 2030,*” primarily in environmental justice communities.¹⁶ The enhanced energy tax credits for projects at “brownfield sites” will help spur the necessary clean energy development to realize these benefits.

¹⁵ U.S. Sen., Summary of Energy Security and Climate Change Investments in the Inflation Reduction Act, https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf.

¹⁶ *Schumer Statement on New Nonpartisan Analysis Confirming Inflation Reduction Act Will Put U.S. on Path Toward 40% Emission Reduction by 2030 and Reduce Deaths and Asthma Attacks*, Press Release, Aug. 1, 2022, <https://www.democrats.senate.gov/newsroom/press-releases/schumer-statement-on-new-nonpartisan-analysis-confirming-inflation-reduction-act-will-put-us-on-path-toward-40-emission-reduction-by-2030-and-reduce-deaths-and-asthma-attacks> (citing Modeling The Inflation Reduction Act Using the Energy Policy Simulator, Energy Innovation, Aug. 2022, https://energyinnovation.org/wp-content/uploads/2022/08/Modeling-the-Inflation-Reduction-Act-with-the-US-Energy-Policy-Simulator_August.pdf).

The EPA has found that populations at and around “brownfield sites” have higher poverty rates, lower education rates, and larger minority population percentages than the national average.¹⁷ These are precisely the communities Congress intended to help with the IRA enhanced tax credit. Whether a contaminated site is subject to an administrative settlement between responsible parties and the EPA (one of the exclusions to the CERCLA definition of “brownfield sites”) does not necessarily have a bearing on the likelihood that the surrounding community suffers environmental injustices. A broad definition of “brownfield sites” would incentivize clean energy projects in these communities and help address the contamination and emissions at the root of environmental justice concerns.

c. A Broad Approach to “Brownfield Sites” Would Promote Economic Development and Job Growth.

Broadening the definition of “brownfield sites” would also promote economic development through increased tax base and jobs. An IRA fact sheet released by the White House characterized the tax adder for clean energy projects as “*creating jobs and economic development* in the communities that have powered America for generations.”¹⁸ This could be fully realized if the IRS determines what constitutes a “brownfield site” broadly, rather than narrowly.

The Brownfields Program has clear, positive impacts on economic growth. Through fiscal year 2021, on average, \$20.43 was leveraged for each EPA dollar awarded to “brownfield sites,” and 10.3 jobs were leveraged per \$100,000 of EPA Brownfield Program funds expended on assessment, cleanup, and revolving loan fund cooperative agreements.¹⁹ However, the Brownfields Program, as applied through CERCLA, is actually broader than the definition under the IRA. CERCLA Section 101(39)(C) allows for site-by-site determinations, whereby financial assistance can be authorized in spite of the site falling under one of the other exclusions enumerated in CERCLA Section 101(39)(B) “if the President finds that financial assistance will protect human health and the environment, and...promote economic development...”²⁰ The IRA definition does not incorporate subparagraph (C) in the definition of “brownfield sites.” This depresses the potential economic growth that could be stimulated by expanding the IRA definition of “brownfield sites” to be artificially smaller than even the limited Brownfields Program itself. Tax incentives that prompt greater investments in green energy will create jobs in connection to the projects that are built with the support of the tax credits, and increase the tax base of the communities where such projects are built. A broad approach to the definition of a “brownfield site” would maximize the extent to which these benefits are realized.

¹⁷ *Supporting Environmental Justice through EPA Brownfields and Land Revitalization*, EPA, <https://www.epa.gov/system/files/documents/2021-10/supporting-cj-through-brownfields-10-13-21-508-compliant.pdf>.

¹⁸ The White House, FACT SHEET: The Inflation Reduction Act Supports Workers and Families, Aug. 19, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/> (“Create good-paying union jobs in energy communities. Clean energy tax credits will be increased by 10% if the clean energy projects are established in communities that have previously relied upon the extraction, processing, transport, or storage of coal, oil, or natural gas as a significant source of employment, creating jobs and economic development in the communities that have powered America for generations.”) (emphasis added).

¹⁹ *Brownfields Program Environmental and Economic Benefits*, EPA, <https://www.epa.gov/brownfields/brownfields-program-environmental-and-economic-benefits>.

²⁰ 42 U.S.C. 9601(39)(C).

III. The IRS Should Provide Clarification of the Definition of “Brownfield Site” Consistent with EPA Guidance.

In response to the Request for Comments on clarification regarding the IRA definition of “brownfield sites,” Elevate suggests—absent legislation—that IRS guidance provide two clarifications regarding the subparagraph (B) exclusions to the definition of “brownfield site.” First, consistent with EPA guidance, IRS guidance should confirm that the reference to permits issued under the “Federal Water Pollution Control Act (33 U.S.C. 1321)” in the subparagraph (B) exclusions is limited to permits issued under the Oil Pollution Act and expressly does not include Natural Pollutant Discharge Elimination System or other Clean Water Act permits. Second, also consistent with EPA guidance, IRS guidance should clarify that the issuance of any of the enumerated administrative orders, consent decrees, or listed permits in the subparagraph (B) exclusions only apply with respect to the relevant portion of the property to which the order, decree, or permit applies, and not the entire property or the entire area where hazardous substances are located as a result of historic uses.

These clarifications would better reflect congressional intent with the IRA. Interpreting the exclusions from the definition of “brownfield site” more broadly would work against the fundamental purpose of the “energy community” bonus: to incentivize development of the clean energy and storage resources needed to reduce emissions in those very communities that have long suffered from disproportionate environmental and public health burdens. Transforming the former location of fossil fuel generation into the site of clean energy development will provide tangible benefits to such communities, including property taxes, quality jobs with apprenticeship opportunities, and repurposing of critical infrastructure. However, those benefits could be denied if the IRS should apply an overly broad reading of the “brownfield site” exclusions enumerated by CERCLA. That would be contrary to the IRA’s animating purposes and Congress’ intent.

a. The IRS Should Confirm That the Reference to the Federal Water Pollution Control Act Is Limited to the Oil Pollution Act.

The exclusions to the definition of “brownfield site” under CERCLA includes the following language referencing permits issued under certain statutes:

a 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, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.). . .²¹

²¹ Pub. L. 107-118 § 211(a).

Critically, the reference to the Federal Water Pollution Control Act (“FWPCA”) is distinct from the other statutory references in two respects. First, each of the other statutory references cites to the statute as a whole and its first provision, whereas the FWPCA reference cites a particular provision in the FWPCA titled “Oil and hazardous substance liability.”

Second, each of the other statutory references contains “et seq.” indicating that the reference is to the entire statute. The FWPCA reference does not contain “et seq.” “[E]t seq.’ is defined as ‘and the following ones,’ and indicates that a party refers not only to the named section of the statute, but to all related sections of the statute that follow.” *Shashi, LLC v. Tsipilates, LLC*, No. 13-61303-CIV, 2013 WL 12091058, at *2 (S.D. Fla. Nov. 18, 2013).

Given these distinctions, it is clear that the reference to the FWPCA was intended to be limited specifically to 33 U.S.C. § 1321, the Oil Pollution Act. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23, (1983)

Indeed, EPA has reached this precise conclusion, explaining that “the exclusion for permitted facilities does not extend to facilities with National Pollutant Discharge Elimination System (“NPDES”) permits issued under the authorities of the Federal Water Pollution Control Act, but is limited to facilities issued permits under the authorities of the Oil Pollution Act (i.e., FWPCA § 1321).”²² EPA’s interpretation is correct: NPDES permits are governed by 33 U.S.C. § 1342—not § 1321—and § 1321 references only the Oil Pollution Act. Accordingly, the IRS should confirm that it agrees with this clarification provided by EPA.

a. The IRS Should Clarify That Issuance of an Enumerated Order, Decree or Permit Results in Exclusion from the Definition of Brownfield Site Only with Respect to the Relevant Portion of the Property to Which the Order, Decree or Permit Applies, Not the Entire Property.

The “brownfield site” exclusion for a “facility that is the subject of an [order or consent decree]” or “to which a permit has been issued” under one of the enumerated statutes should be interpreted narrowly, consistent with EPA policy.²³ “Facility” is a defined term under CERCLA, meaning “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”²⁴

The IRS should make clear—consistent with CERCLA—that only the specific “facility that is the subject of an [order or decree]” or “to which a permit has been issued” falls within the exclusion, not the entire property or site. An overly broad reading of this exclusion would lead to

²² EPA, *Information on Sites Eligible for Brownfields Funding under CERCLA § 104(k)*, at § 1.5.2, available at <https://www.epa.gov/sites/default/files/2018-10/documents/web-content-info-on-site-eligibility.pdf>.

²³ See 42 U.S.C. § 9601(39)(B)(iv).

²⁴ 42 U.S.C. § 9609(9).

illogical and counterintuitive results, contrary to the central purpose of the “energy community” bonus.

Consider, for example, a facility holding a RCRA permit for corrective action within a specific waste management unit that is located on a larger property that also has some residual contamination. If “facility” were interpreted broadly to include the entirety of the property, then the energy community bonus could not incentivize redevelopment of any area outside of the permitted RCRA unit, which also contains residual contamination and therefore cannot be redeveloped for unrestricted uses. Such locations of residual contamination, however, are *exactly* those that the IRA’s bonus provisions are intended to favor for development of clean energy infrastructure, such as battery storage projects or renewable generation resources.

The exclusion for facilities subject to an administrative order or consent decree or to which a permit has been issued pursuant to the enumerated statutes should be read to refer only to the relevant “building, structure, installation,” or other physical item(s) or locations listed in subsection (A) of 42 U.S.C. § 9601(9), and not the definition appearing in subsection B, which refers to any place where a hazardous substance is located. EPA has historically applied this more limited definition.

Indeed, CERCLA provides significant discretion to EPA to limit the geographic scope of a “facility.” *See* Br. of EPA, *Permacel, Inc v. EPA*, No. 95-1618, 1996 WL 34483265, at 4 (D.C. Cir. filed Nov. 26, 1996) (“Concerning the geographic extent of a particular facility, the statute affords EPA considerable discretion.”). As judicial precedents make clear, “a single geographical location may contain multiple ‘facilities.’ ‘Facilities’ may even be contained within other ‘facilities.’” *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, No. CV-F-92-5068, 1995 WL 866395, at *4 (E.D. Cal. Nov. 15, 1995), *aff’d*, 132 F.3d 1295 (9th Cir. 1997), *op. amended and superseded*, 159 F.3d 358 (9th Cir. 1997), and *aff’d*, 159 F.3d 358 (9th Cir. 1997).

A more limited interpretation of the exclusions is consistent with guidance from EPA on the definition of “brownfield site.” EPA has explained that the exclusions might in some circumstances only prevent certain *portions* of properties from receiving funding: “[I]n cases where a property *or a portion of a property* is permitted under the Resource Conservation and Recovery Act, Clean Water Act § 1321, the Safe Drinking Water Act, and/or the Toxic Substances and Control Act, *the property, or portion of the property, may not receive funding* without a property-specific determination.”²⁵

Likewise, EPA’s guidance notes that “EPA’s view is that the following types of RCRA facilities *are* eligible for brownfields grants . . . *parcels of* RCRA facilities that are not under the scope of a RCRA permit or administrative or judicial order.”²⁶ The guidance thus indicates that the exclusion for “facilities []to which a permit has been issued” should be applied only to limit those specific activities that are subject to the enumerated permits or administrative actions. Accordingly, for purposes of interpreting the exclusion from the definition of “brownfield sites” for which the “energy community” bonus is available, the IRS should clarify that it will follow the

²⁵ EPA, Information on Sites Eligible for Brownfields Funding under CERCLA § 104(k), at § 1.5.2 (emphasis added), available at <https://www.epa.gov/sites/default/files/2018-10/documents/web-content-info-on-site-eligibility.pdf>.

²⁶ *Id.* at §1.5.2. (emphasis added).

interpretations applied by the EPA and courts in limiting the exclusion to the activities, units or parcels to which any of the enumerated orders, decrees or permits apply.

To take a different approach would frustrate Congress' intention to spur investment in communities that are dealing with legacy pollution and are at risk of being left behind by the energy transition. It would deny those communities the benefits that Congress explicitly intended to confer upon them by enacting a tax credit incentive system that was intended to favor projects that will return impacted properties to productive use, in the service of the clean energy transition and the high-quality jobs that accompany that transition.

Thank you again for the opportunity to provide comments on the "brownfield site" definition under the IRA. Please contact me with any questions.

Respectfully submitted,

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