Fidelis New Energy, LLC
109 N. Post Oak, Suite 140
Houston, TX 77024
(832) 551-3300
Fidelisinfra.com

Submitted via *www.regulations.gov*

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, DC

RE: Fidelis New Energy, LLC – Comments Responding to the Department of the Treasury and Internal Revenue Service Notice 2022-51

Dear Sirs and Madams:

Fidelis New Energy, LLC (Fidelis) respectfully submits these comments in response to a request from the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") in Notice 2022-51. Notice 2022-51, entitled "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," solicits comments on certain energy tax provisions in Public Law 117-169, commonly known as the Inflation Reduction Act of 2022 ("IRA").

Fidelis is an energy transition company driving decarbonization through investments in renewable fuels, low-carbon intensity products, and carbon capture and storage. Using proprietary technology, Fidelis aims to develop, invest, and deliver climate positive and carbon negative infrastructure to reach carbon reduction and climate positive targets. Specifically, Fidelis develops carbon negative sustainable aviation fuel, renewable diesel, renewable naphtha, and clean hydrogen infrastructure. Fidelis also develops and operates CO2 capture, pipelines, sequestration sinks, and infrastructure.

Section 3 of Notice 2022-51 provides questions regarding various aspects of the IRA, including those concerning prevailing wage, apprenticeship, domestic content, and energy community.

SECTION 3. REQUEST FOR COMMENTS

Section 3.01 Prevailing Wage Requirement

Section 3.01 (1) – Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, which is

commonly known as the Davis-Bacon Act. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

Fidelis believes that the language in Section 13101(f) of the IRA, which amends Section 45(b), adequately incorporates the Davis-Bacon Act (DBA) prevailing wage requirements through the issuance of wage determinations by the Secretary of Labor as delegated to the Wage and Hour Division (WHD) of the US Department of Labor (DOL). Equally significant, if not more so, is the fact that the IRA neither incorporates any other aspect of the DBA nor authorizes DOL to exercise any authority with respect to the IRA, aside from the ministerial duty to issue wage determinations.

The IRA fails to notify the regulated community of the point in time at which the "most recently determined" wage determination applies. For example, a taxpayer may enter into a contract with a contractor to construct an eligible facility with construction scheduled to start at a later date. Thus, the question could arise as to which DBA wage determination applies "as most recently determined" to the construction of an eligible facility. Is it the wage determination in effect (1) when at least a majority the funding is committed for the construction of an eligible project under IRA, (2) when all federal, state, and local permitting required to construct an eligible project is satisfied, (3) when the contract to construct an eligible facility is entered into, (4) when construction begins, or (5) some other potential date.

A more typical contractual arrangement where DBA applies occurs when a government agency awards a contract to a contractor and incorporates the current wage determination in effect at the time of the award. In the IRA context, there is no government agency awarding a contract into which the agency can incorporate a "most recently determined" DBA wage determination. Fidelis suggests that Treasury and the IRS clarify its guidance by consulting with DOL to determine the time at which a wage determination should apply to provide a taxpayer necessary notice to determine what its labor costs could be. Such notice will provide the taxpayer with the time necessary to develop budgets for a project and to assess whether the construction of a qualified facility is financially viable.

Many of the projects the IRA seeks to support require significant funding (in the hundreds of millions if not billions of dollars). Therefore, the more notice a taxpayer has as it relates to its labor costs (i.e., the sooner the prevailing wage determination is incorporated) the better opportunity a taxpayer has to assess its financial obligations and project viability overall.

Treasury and IRS should clarify in its guidance that the prevailing wage requirement of the IRA only applies to the situs of the qualified facility and not to other locations where some construction activity may occur. This determination is supported by the plain language of the IRA, which states "the taxpayer shall ensure that […] laborers and mechanics […] shall be paid wages at rates not less than the **prevailing rates in the locality in which such [qualified] facility is located** as most recently determined by the Secretary of Labor[…]" (emphasis added). Sites where other construction-related activities may occur, such as fabrication plants, do not constitute localities in which a qualified facility is located and, therefore, should not be subject to the prevailing wage requirement.

Fidelis recommends that Treasury and IRS incorporate into the definition of the term "site of the work" as that term is defined in the rule in 29 CFR 5.2(l) that was in effect at the time of the passage of the IRA, as well as subsequent case law that construed that rule.

Finally, projects eligible for enhanced tax credits under the IRA may require construction crafts or skills which are not listed on the applicable DBA prevailing wage determination. While DOL has a conformance process through which job classifications can be added to DBA wage determinations, this process is oftentimes time-consuming and burdensome. Fidelis recommends that Treasury and IRS issue guidance to (1) authorize a different or new procedure for adding omitted crafts to a DBA wage determination, (2) require DOL to respond to a conformance request within a designated time period, and (3) ensure conformance becomes effective upon the failure to act in a timely manner upon the request. For example, should Treasury and IRS opt to retain the current DOL conformance process, then the guidance should require DOL to respond to a conformance request within fifteen (15) days of submission to DOL. If DOL fails to respond within fifteen days, the conformance request should, automatically, be deemed valid, binding, and applicable (unless and until DOL responds to the request). Alternatively, Treasury and IRS could provide guidance authorizing a different or new procedure for adding an omitted craft to a DBA prevailing wage determination. One suggestion would be to authorize the DOL Regional Wage Specialist, or its successor position, to approve a conformance request or to authorize an IRS entity to approve a request to add a craft or skill to a prevailing wage determination for purposes of the IRA only.

Section 3.01 (2) – Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

The IRA states that a "taxpayer which fails to satisfy the [prevailing wage] requirement… shall be deemed to have satisfied such requirement if… such taxpayer" makes two (2) payments. One payment would be to any laborer or mechanic who was underpaid the prevailing wage rate, and would equal the sum of the difference between the amount of wages paid to the laborer or mechanic and the amount of prevailing wages that should have been paid to the laborer or mechanic **plus** interest established by Internal Revenue Code (IRC) section 6621, by "substituting '6 percentage points' for '3 percentage points.'" Treasury and IRS should issue guidance explaining exactly how such an interest rate is determined, stating the exact interest rate applicable when its guidance is issued, and confirming that Treasury and IRS will update the applicable interest rate guidance whenever there is a change to it based upon the IRC provision. Such a system will provide clarity to taxpayers as well as laborers, mechanics, and other employees, contractors and subcontractors.

The other payment that must be made is a penalty payable to the Secretary of the Treasury. According to the IRA, this penalty is computed by multiplying $5,000 times the total number of laborers or mechanics who were paid less than the applicable prevailing wage amount. Fidelis recommends that the Treasury and IRS guidance describe: (1) how payments

can be made (such as by check, electronic transfer, etc.), (2) to which entity within Treasury or the IRS payment must be tendered, and (3) some timeframe for making such payments. Also, Treasury and IRS should clarify that this penalty is only paid based upon the number of laborers or mechanics who were paid less than the applicable prevailing wage amount and not the number of weeks laborers or mechanics were paid less than the applicable prevailing wage amount.

It does not appear that the IRA authorizes Treasury and IRS to request proof of payment. That said, if Treasury and IRS guidance does require proof of payment such guidance should include information as to whether it may request proof of payment of the prevailing wage underpayment and, if so, which entity may do so and what constitutes proof of payment.

Further, the IRA does not incorporate the DBA enforcement mechanism, including a proof of payment process, currently utilized by DOL. Guidance should address how a payment would be handled if a taxpayer or contractor on a taxpayer's behalf mails a payment to the last known address of a laborer or mechanic and such payment is returned as undeliverable by the US Postal Service.

Section 3.01 (3) – What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

Fidelis notes that DOL currently enforces a certified payroll requirement under DBA. DOL also offers contractors and subcontractors a payroll template that they can use. This template is designated as a WH-347 Form and it, along with instructions, can be accessed at: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf. Treasury and IRS guidance should authorize the use of WH-347, as well as any other payroll process – electronic or otherwise – that satisfy the DBA prevailing wage requirements used by contractors and subcontractors. This guidance should afford contractors, subcontractors, and taxpayers maximum flexibility to meet the IRA prevailing wage requirements.

Section 3.02 Apprenticeship Requirement

Section 3.02 (1) – Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?

The Office of Apprenticeship (OA), which operates under the Employment and Training Administration (ETA) in the DOL, regulates the establishment and recognition of registered apprenticeship programs. In addition, OA has recognized a State Apprenticeship Agency (SAA) in approximately twenty-eight (28) states, plus the District of Columbia, as authorized to register apprenticeship programs. In particular, the regulatory standards for the registration and recognition of an apprenticeship program are found in part 29 of title 29 of the Code of Federal

Regulations. Thus, one source of information to consider by way of response would be any relevant guidance OA currently utilizes.

Treasury and IRS should target its guidance to define who is a qualified apprentice for IRA purposes. Fidelis recommends that Treasury and IRS define a qualified apprentice to include the following: (1) an apprentice currently participating in a registered apprenticeship program; (2) an individual who previously participated in but did not complete a registered apprenticeship program; and (3) an individual who participated in and successfully completed an apprenticeship program.

Section 3.02 (2) – Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement?

(a) What, if any, clarification is needed regarding the good faith effort exception?

Fidelis recommends that Treasury and IRS clarify that a taxpayer need only request qualified apprentices from a registered apprenticeship program if such a program exists within twenty-five (25) miles of the location of a qualified facility. If a registered apprenticeship program is not located within twenty-five (25) miles of a qualified facility, then the taxpayer should be deemed have satisfied the good faith effort exception. Requiring taxpayers to seek qualified apprentices from registered apprenticeship programs that are outside of a twenty-five (25) radius of a qualified facility is inequitable and impractical.

Requests by taxpayers and responses by registered apprenticeship programs must be provided in writing and transmitted by US Postal Service certified mail. A registered apprenticeship program will be deemed to have "received" a taxpayer request on the day the certified mail is delivered to the program. The registered apprenticeship program fails to respond to such a request if it does not mail a response, by US Postal Service certified mail, within five business days of receiving the request.

Any guidance should clarify that no contractor or subcontractor shall be liable for the payment of any penalty for failure to satisfy the apprenticeship requirements of the IRA.

(b) What factors should be considered in administering and promoting compliance with this good faith effort exception?

As recommended above, if a registered apprenticeship program is not located within twenty-five (25) miles of a qualified facility then the taxpayer should be deemed have satisfied the good faith exception.

Section 3.02 (3) – What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

As a practical matter, contractors, subcontractors, contractor associations, unions or alliances between such organizations operate approved or registered apprenticeship programs; a "taxpayer" seeking enhanced tax credits for a qualifying facility may not. Therefore, these entities should be required to demonstrate compliance with apprenticeship requirements in § 45(b)(8)(A), (B), and (C), not taxpayers.

Section 3.04 Energy Community Requirement

Section 3.04 (1) – 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?

The term "Located in" should be "Real property" as defined in 26 CFR §1.856-10(b) and "Improvements to land" as defined in 26 CFR §1.856-10(d). If a project straddles census tracts, a framework similar to that employed in 26 USC § 1397C(f) should be utilized to determine the energy community status. If a qualified facility is considered to be in an energy community at the commencement of construction, the facility should continue to retain that determination regardless of whether the statistical area no longer meets the definition of "energy community" at a future date.

Section 3.04 (3) – 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?

In the event that more granular information is not available, MSA and non-MSA should be defined by the U.S. Office of Management and Budget (OMB). If more detailed employment information is available, data from the county/parish/city level where the facility is located should also be allowed for the purposes of determining an energy community.

In many cases an MSA can have an extraordinarily large geographic footprint and can encompass multiple areas that should count as an energy community even if, in aggregate, the MSA as whole is not an energy community. For this reason, a well-defined subsection of the MSA, such as a county or census tract, should be eligible for energy community status. For example, the Houston metropolitan statistical area is over 10,000 square miles, which is larger than New Jersey and New Hampshire, there are likely areas within the MSA that should rightfully be defined as energy communities.

For the purposes of determining direct employment, either the Federal Bureau of Labor Statistics (BLS) or statistics provided by a State (such as through its department of labor, workforce commission, or similar entity) should be considered eligible to determine direct employment. For the purposes of determining unemployment rate, the BLS Unemployment Rates for Metropolitan Areas (Not Seasonally Adjusted) rate should be used for calculating MSA unemployment. State and county level statistics should also be allowed for non-MSA calculations.

In terms of Industries and Occupations – the BLS codes or a similar State level classification should be allowed for the purposes of determining direct energy employment. From BLS statistics, the following should be considered as base occupations to determine energy community employment:

- All Construction and Extraction Occupations (47-0000)
- All Installation, Maintenance, and Repair Occupations (49-0000)
- All Non-Food and Non-textile occupations under Production occupations (51-0000)
- All Transportation and Material Moving Occupations except for parking attendants (53-0000)
- All Building and Grounds Cleaning and Maintenance Occupations (37-0000)
- All Life, Physical, and Social Science Occupations (19-0000)
- All Architecture and Engineering Occupations (17-0000)
- Any Business and Financial Operations Occupations (13-0000) or Management Occupations (11-0000) that can be shown to be directly related to the energy sector

Section 3.04 (5) – 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?

As mentioned above, if a qualified facility is considered to be in an energy community at the commencement of construction, the facility should continue to retain that determination regardless of whether the statistical area no longer meets the definition of "energy community" at a future date. The reason for this is that qualified facilities are largescale and long-lived investments that provide significant economic benefits at the community and state level while also providing national security benefits. Developers and operators of these crucial facilities should have certainty that the investment benefits provided by a demographic based benchmark will be provided even if the demographics of the area change over the time. Not providing such certainty will reduce the number of facilities built and diminish the effectiveness of this provision.

Section 3.04 (6) – 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?

If a tax collecting sub-unit of the metropolitan statistical area (i.e., a county, parish, or city) where the qualified facility is located can show that 25 percent or greater tax revenues are related to the energy industry (including extraction, processing, transport, or storage of coal, oil, or natural gas), then the qualified facility should be considered as being in an energy community. The status should not be related to the metropolitan/micropolitan statistical area as a whole.

Taxes for consideration should be property tax, sales tax, or any form of natural resource extraction (severance) tax. Calculation of tax revenues should be based on the primary activities of the corporate taxpayers located in the area. Because of difficulties smaller municipalities and counties may encounter as it relates to aggregating and classifying data to prove eligibility, a grace period with retroactive benefits should be allowed to prove an area has the tax revenue mix required to be an energy community.

Section 3.05 Increased Credit Amount for Qualified Facility With Maximum Net Output of Less than 1 Megawatt

Section 3.05 (1) – Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules. Does the determination of when a facility or project will be considered to have a maximum net output of less than 1 megawatt need further clarification? If so, what should be clarified?

Section 45(b)(6)(A) provides for an increased credit amount in the case of any qualified facility that satisfies the requirements of § 45(b)(6)(B). One way that a qualified facility can satisfy the requirements of § 45(b)(6)(B) is if it is a facility with a maximum net output of less than 1 megawatt (as measured in alternating current). Similarly, § 48(a)(9)(A) provides for an increased credit amount in the case of any energy project that satisfies the requirements of § 48(a)(9)(B), and one way that an energy project can satisfy the requirements of § 48(a)(9)(B) is if it is a project with a maximum net output of less than 1 megawatt of electrical (as measured in alternating current) or thermal energy. Sections 45Y(a)(2)(B) and 48E(a)(2)(A) also provide similar rules.

Thank you for the opportunity to submit these comments. We welcome the opportunity to meet with Treasury and IRS to discuss these issues in greater detail and to answer any questions that may arise.

Respectfully submitted,

Fidelis New Energy, LLC