Internal Revenue Service
United States Department of the Treasury
Ben Franklin Station
P.O. Box 7604, Room 5203
Washington, D.C., 20044

RMI
1850 M St NW, Suite 280
Washington DC, 20036

November 4, 2022

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

Dear Secretary Yellen and Commissioner Rettig:

Thank you for the opportunity to provide input on the implementation adders to specific tax credits. This comment focuses on Energy Community questions, not because they are necessarily higher priority than the other questions, but because that is where RMI has focused its research. RMI is a global non-profit organization that focuses on deep decarbonization of the world's most-polluting sectors and leads sustainability programs across five geographies: the U.S., India, China, the Global South, and cities.RMI is a leading non-governmental organization addressing the challenges and opportunities faced by energy communities and analyzing the potential for renewable energy development on brownfield sites.

Guidance is mostly urgently needed on Question 7, in which RMI recommends that the Treasury Department and the IRS request that the Department of Energy in partnership with the Environmental Protection Agency publish and maintain a list of qualifying sites to provide clear and consistent guidance to the Treasury Department and the IRS, project developers and investors, energy communities, and other stakeholders. Our goal is to provide informative, technical comments and clarify language in IRA to ensure that the ITC is implemented efficiently and accurately.

If you have questions or want to discuss anything in this document further, please reach out to Russell Mendell at rmendell@rmi.org, Maria Castillo mcastillo@rmi.org or Sam Mardell smardell@RMI.org.

Sincerely,

RMI
Common Defense
Environmental Defense Fund
Evergreen Action
League of Conservation Voters
Sierra Club
Union of Concerned Scientists

.05 Energy Community Requirement

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?

- A cornerstone of the Inflation Reduction Act's (IRA) climate provisions is the certainty about the timelines for clean energy tax incentives. Not since Section 45 was enacted in 1992 has Congress provided a comparable long-term assurance that clean energy tax incentives will remain available for more than a year or two into the future.

- While date-certainty is critical, so is definitional certainty. It is important that a location's eligibility for Energy Community status does not change from year to year in an unpredictable way. The Energy Community definition in the IRA has three portions that use three different geographic markers, and the boundaries or definition of each of these markers is subject to change. For example, retired coal-fired generating units and closed coal mines qualify in the census tract in which they are located. However, census tracts are not static, they are redrawn every ten years. The same is true of Metropolitan Statistical Areas (MSAs) as MSA delineation files provided by government organizations are often updated annually. A brownfield location may lose its classification when the site is remediated. The possibility that a location may qualify one year but lose that qualification the next creates significant risk for project developers and stands to discourage investment in these communities.

- RMI recommends that projects "lock-in" their eligibility when they achieve significant project development so they do not risk losing their qualification if the census tract, MSA, or brownfield site is reclassified subsequent to the project development. This is particularly important for projects that elect the Production Tax Credit. Projects should secure the increased credit amount if the project is located in a defined Energy Community at the time that the developer incurs 5% project cost or begins physical work of a significant nature, consistent with the existing Continuity Safe Harbor provision for renewable energy tax credits. Treasury should consider the remediation of brownfield sites for the purposes of readying the site for project construction to satisfy the definition of physical work of a significant nature.

- Projects may qualify for the increased credit if they are located in a MSA or non-MSA with an unemployment rate at or above the national average unemployment rate for the previous year. Treasury and the IRS should clarify the definition of "previous year." RMI suggests that the "previous year" be defined as the full year previous to the year in which the developer incurs 5% project cost or begins physical work of a significant nature,

consistent with the existing Continuity Safe Harbor provision for renewable energy tax credits. If the necessary employment data have not yet been published for the "previous year" when a project meets the Continuity Safe Harbor provision definition, the unemployment rate for the MSA or non-MSA should be defined using the most recent full year in which the data are available. As with potential changes to the geographic demarcation of an energy community, described above, projects that qualify for the increased credit amount should secure this benefit for the duration of the tax credit payment period, even if the direct energy employment, energy related tax revenues, or unemployment rate changes such that the MSA or non-MSA in which the project is located loses its qualification as an Energy Community.

- RMI believes that a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines) would be appropriate for determining whether a project is located in an Energy Community and therefore eligible for the increased credit amount. If the point of grid interconnection for a project is located in a qualifying Energy Community, the project should receive the additional credit amount.

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?

- According to the U.S. Environmental Protection Agency (EPA),[1] the most updated definition of a brownfield site is found in Public Law 107-118 (H.R. 2869), the "Small Business Liability Relief and Brownfields Revitalization Act", signed into law January 11, 2002. To maximize environmental justice opportunities to accelerate the clean energy transition across America in communities impacted by sites complicated by their past use, RMI would strongly encourage that the Treasury embrace a broad definition that ensures inclusivity of sites in EPA's Landfill Methane Outreach Program, state and tribal brownfields programs, and voluntary cleanup programs. RMI would recommend consistency across brownfields definitions between the EPA and Treasury. This is particularly important to focus reuse on the sites that specifically may have contributed to or currently contribute to environmental injustices and plan for new uses of these sites that are productive, sustainable, and aligned with the Biden Administration's Justice40 goals.

- Additionally, in the spirit of this legislation, we encourage the IRS to consider how the Energy Communities adder would apply to projects that are partially, but not fully sited on a qualifying brownfield. Brownfields may have adjacent land (or buffer land) that is not contaminated but where redevelopment is limited because of, or complicated by, the brownfield site itself. While development on brownfield land and adjacent land would be complicated by the potential contamination of the brownfield site, it is unclear whether a

1 https://www.epa.gov/brownfields/overview-epas-brownfields-program

project located on the adjacent land would qualify for the increased credit amount. Our recommendation is that a project must substantially reuse the qualifying brownfield site itself to qualify, even if part of the contiguous project is not sited on the qualifying brownfield site. Here, the IRS would need to define or clarify “substantially”, which could be based on percentage of site acreage, a proportion of energy capacity, or another factor that may be similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines). In the case where a substantial portion of a project does reuse the qualifying brownfield site, the entire project should qualify for the additional credit.

- Lastly, RMI interprets the current legislation to include the Energy Communities provision as stackable with other new tax incentive adders, such as the domestic content adder and the qualifying low-income community adders. The ability to stack this provision is critical to effective and equitable clean energy reuse. In no place in the legislation is the stacking of these provisions prohibited, whereas the stacking of 45Q and 45V credits is explicitly forbidden. Thus, we recommend providing clarity explicitly by naming which tax incentives are stackable with the Energy Communities adder. For example, combining the Energy Communities adder and qualifying low-income adder would not only enable the brownfield site owner to benefit, but would also spur a new wave of community solar projects on brownfields that would dramatically increase access to clean energy in low-income communities around brownfields and reduce their energy burden. This aligns with many complementary objectives of DOE’s National Community Solar Partnership as well as EPA’s Brownfields program.

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?

- The Treasury Department and the IRS should use data sources from the U.S. Bureau of Labor Statistics (BLS) to determine MSA and non-MSA locations and boundaries and to determine the direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas in these geographic areas.
- For MSA and non-MSA locations, the BLS publishes a list of locations that are identified as MSA and non-MSA areas as part of their Occupation Employment and Wage Statistics program.[2] Non-MSAs are identified at the state level as one or multiple counties within that state.

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2 Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment and Wage Statistics, May 2021 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, on the Internet at https://www.bls.gov/oes/current/oessrcma.htm#top

- For direct employment data, Treasury and the IRS should consider the BLS Quarterly Census of Employment and Wages (QCEW) program, which publishes quarterly employment information at the national, state, county, and MSA level. Using the BLS list of MSA and non-MSA locations, the county level employment data can be connected to non-metropolitan statistical areas where applicable. The County Business Patterns (CBP) dataset from the Census Bureau is a satisfactory alternative for the QCEW.

- The QCEW is RMI's preferred choice for direct employment data because it is published more frequently than other data sources and has the widest coverage. The QCEW includes employment information from more than 10.4 million establishments in every NAICS industry, with some exclusions. According to the BLS, an establishment is an economic unit, such as a farm, mine, factory, or store, which produces goods or provides services. The QCEW releases quarterly data within five months after the end of each quarter, and annual data within six months after the end of each reference year. The CBP data set covers 6 million single-unit establishments and 1.8 million multi-unit establishments. CBP data are released annually about 16 months after the end of each reference year.[3] Additionally, Census data are reported at the MSA and micropolitan level and matching non-MSA to micropolitan level data is challenging.

- While the QCEW program provides more timely data and larger coverage than CBP, the QCEW dataset has sometimes significant levels of data suppression that are pronounced in varying NAICS codes and geographies. Research organizations, such as one at Indiana University, have designed methodologies for generating point estimates for QCEW suppressed data.[4] While CBP data are not published as frequently and include information from fewer establishments, the Census applies a methodology to the dataset that leads to less data suppression.

- For data on unemployment, Treasury and the IRS should consider the Bureau of Labor Statistics' Local Area Unemployment Statistics (LAUS) program which produces monthly and annual unemployment data for metropolitan areas or counties which can be connected to BLS-identified non-metropolitan areas.

- BLS and the Census use NAICS employment codes to classify industries and occupations. Some occupation codes clearly meet the definition in Section 45(b)(11)(A). Other occupation codes describe both job functions that RMI believes meet the definition and other functions that likely do not meet the definition. For example, rail workers employed in the transport of coal or liquid fuels should be counted toward the threshold, but rail workers who do not handle the transport of fuels should not. Contractors employed by qualifying sectors may also not be captured by the NAICS employment codes. RMI suggests a two-tiered definition of "direct employment" to manage the complexity inherent to developing a precise definition for qualifying employment. Treasury should direct the DOE to develop these definitions, as an essential part of the methodology for publishing a list of qualifying Energy Communities as described in RMI's

3 https://www.bls.gov/opub/hom/cew/concepts.htm#comparisons-with-other-data-programs

4 https://www.incontext.indiana.edu/2020/jan-feb/article2.asp#_ftn2

response to Question 7. Category 1 of the “direct employment” definition should include NAICS occupation codes that automatically qualify toward the threshold. Category 2 should define a set of NAICS codes that may qualify toward the threshold but require additional documentation to verify the number of jobs that are engaged in employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas. We suggest the following NAICS codes for inclusion in Category 1 and Category 2. These codes may not be comprehensive of all occupations that should qualify, and DOE should invite and use input from stakeholders to update this list.

- Category 1:
    - Natural Resources and Mining
        - Oil and gas extraction – 211
        - Coal mining – 2121
        - Support activities for mining – 213
    - Construction
        - Oil and gas pipeline and related structures construction – 23712
    - Trade, Transportation, and Utilities
        - Pipeline transportation – 486
        - Petroleum and petroleum products merchant wholesalers – 4247
        - Fossil fuel electric power generation - 221112
    - Manufacturing
        - Petroleum and coal products manufacturing – 324

- Category 2:
    - Manufacturing
        - Petrochemical manufacturing – 32511
        - Industrial gas manufacturing - 32512
        - Plastics product manufacturing – 3261
        - Nitrogenous Fertilizer Manufacturing – 325311
        - Boiler, Tank, and Shipping Container Manufacturing - 3324
        - Mining and Oil and Gas Field Machinery Manufacturing – 33313
        - Engine, Turbine, and Power Transmission Equipment – 3336
        - Pump and Compressor Manufacturing - 33391
    - Trade, Transportation, and Utilities
        - Fuel dealers - 4572
        - Truck transportation – 484
        - Rail transportation – 482
        - Deep Sea Freight Transportation – 483111
        - Support Activities for Water Transportation – 4883
    - Information
        - Hazardous Waste Collection – 562112
        - Hazardous Waste Treatment and Disposal - 562211
    - Professional Services
        - Engineering Services - 54133

4. Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

- The Treasury Department and the IRS should consider the U.S. Energy Information Administration's Monthly Electric Generator Inventory (EIA-860M) and Annual Electric Generator Inventory (EIA-860), Schedule 3 'Fuel Switching' datasets to determine whether a coal-fired electric generating unit has retired after December 31, 2009. EIA-860M includes a comprehensive list of generating units that have retired since 2002. A list of retired generating units is in the 'Retired' sheet of EIA 860M and their retirement month and year are defined by the 'Retirement Month' and 'Retirement Year' data fields, respectively. To ascertain whether they are a coal-generating unit, the 'Technology' data field should be 'Conventional Steam Coal' or 'Coal Integrated Gasification Combined Cycle'. The EIA 860 Schedule 3 'Fuel Switching' data set includes information on retired multi-fuel generators. The 'Retired' sheet of this data set has a list of retired generators with 'Retirement Month' and 'Retirement Year' data fields. Qualifying coal units in this sheet are generators with any of the following energy source codes listed in the energy source and cofire energy source columns: ANT (Anthracite Coal), BIT (Bituminous Coal), LIG (Lignite Coal), RC (Refined Coal), SC (Coal Synfuel), SGC (Coal-Derived Synthesis Gas), SUB (Sub-bituminous Coal), and WC (Waste/Other Coal).

- Treasury should clarify that other sources of information may include, but are not limited to, evidence or certification that a source has relinquished its Title V operating permit, certifications or notifications filed with the relevant RTO/ISO indicating a unit has been deactivated, certification from the operator that the unit has been deactivated.

- Treasury and the IRS should consider allowing census tracts with out of service coal-fired electric generating units to qualify for the increased credit amount, if the unit is not expected to return to service in the next calendar year and is therefore likely providing reduced employment for the community in which the unit is located. Out of service generating units that are not expected to return to service in the next year are captured in EIA-860M in the 'Operating' sheet and are listed as 'OS' by the 'Status' data field.

- Treasury and the IRS should clarify that a census tract and adjoining census tract where a coal-fired electric generating unit converted to gas after December 31, 2009 qualifies as an "energy community" where a "coal fired electric unit has been retired."

- Treasury and the IRS should consider allowing census tracts with announced coal-fired electric generating unit retirements to qualify for the additional credit amount. Generating unit owners report planned retirement dates to the EIA and this information is captured in EIA-860M in the 'Operating' sheet. Most often reported planned retirement dates have been previously announced to state level regulators, when applicable. RMI suggests

allowing census tracts that host generating units with planned retirement dates that are 24 months or fewer from the present month qualify for the additional credit amount. The planned retirement month and year are defined by the 'Planned Retirement Month' and 'Planned Retirement Year' data fields, respectively. 24 months is a time period that both matches clean energy project development timelines and allows energy communities to attract local investments to help replace some fiscal payments and employment lost when coal units retire. At a minimum, the Treasury should clarify that a qualifying facility will be entitled to the full "energy community" credit so long as a coal unit in the census tract has retired when the project developer incurs 5% project cost or begins physical work of a significant nature, consistent with the existing Continuity Safe Harbor safe harbor provision for renewable energy tax credits. This would provide more certainty for renewable energy investments that would replace retiring coal units, consistent with the text and purpose of the statute.

- Treasury and the IRS should consider the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) Mines Dataset (#13) to determine whether a coal mine has closed after December 31, 1999.

- Treasury and the IRS should consider allowing census tracts with permitted coal mine operations that have completed Phase 1 bonding or have not produced coal in two or more years to qualify. Reviewing coal production data by mine is possible using the MSHA data query system. Mine reclamation is tracked through SMCRA permits. Determining coal mine closure is not always straightforward, and these additional definitions would allow coal mines that are not and have not provided employment or local benefits to qualify, which RMI believes is consistent with the spirit of the law.

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?

- U.S. EPA and Treasury should note that once a brownfield site is properly remediated, it may no longer legally be considered a brownfield site. Treasury and the IRS should clarify whether these sites should qualify under the Energy Communities provision. As detailed in RMI's response to Question 1, a project that is located on a brownfield site and elects to take the PTC should still receive the additional credit amount for the duration of PTC eligibility if the brownfield site is remediated during this time period.

- As detailed in RMI's response to Question 7, the Treasury and the IRS should direct the U.S. EPA to publish a list of qualifying sites that are linked to EPA and state databases. If a site is not in that map and/or database, the EPA should establish a separate application and approval process to determine whether the site is eligible for the Energy Communities provision. This methodology for site approval should be publicly available and easy to access.

- As detailed in RMI's response to Question 7, the Treasury and the IRS should direct the U.S. EPA to publish a list of qualifying sites that offers 1) an EPA database of qualifying sites; and/or 2) a separate certification process to clarify and confirm whether the site is eligible for the Energy Communities provision when a site is not in that database but is actively being considered for clean energy reuse. This methodology for site approval should be publicly available, easy to access and complete, and provide clarity to planners, developers, and other stakeholders.

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?

- RMI recommends that the Treasury Department and the IRS take an expansive view when defining what tax revenues should be considered, in order to reflect the importance of these payments to local tax-collecting jurisdictions. Taxpaying entities engaged in activities related to the extraction, processing, transport, or storage of coal, oil, or natural gas make a wide range of tax and non-tax payments (including royalty payments, other payments-in-lieu-of-taxes, and community benefit agreements) to municipalities, counties, and other special districts. These fiscal revenues support essential public services including schools, fire departments, and road maintenance.
- RMI recommends that Treasury and the IRS include state taxes when considering local tax revenues. Some states collect severance tax payments for the right to extract minerals and other resources, including coal, oil, and natural gas. These payments are often passed on to local governments and can be essential revenues for Energy Communities.
- As detailed in RMI's response to Question 7, Treasury and the IRS should request that the U.S. Department of Energy (DOE) and EPA publish a list of qualifying Energy Communities. As noted in the Question, consistent public data for certain types of taxes is either unavailable or difficult to collect. Treasury and the IRS should empower the DOE in partnership with EPA to develop proxies that reasonably capture the amount of local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas. Proxies for measuring fossil energy related local tax revenues may be related to the amount or value of land used for these activities, for example. Further, DOE and EPA should allow project developers and other stakeholders the ongoing opportunity to provide materials that demonstrate tax revenues related to the extraction, processing, transport, or storage of coal, oil, and natural gas, and these materials should be considered when determining whether an MSA or non-MSA qualifies. This recommendation is expanded in RMI's response to Question 7.

7. Please provide comments on any other topics relating to the energy community requirement that may require guidance.

- RMI recommends that the Treasury Department and the IRS request that the U.S. Department of Energy in partnership with the U.S. Environmental Protection Agency and with input from other Federal agencies as required produce and maintain a list of census tracts, MSA and non-MSA, and brownfield sites that are defined as Energy Communities. This list should be published in an accessible and machine-readable format, such as through a GIS database. Treasury and the IRS should use this list of locations when determining whether a project applicant should receive the additional credit.

- The list produced by DOE in partnership with EPA is necessary to provide certainty and clarity for developers and lenders to finance and develop new projects, and for local governments and other stakeholders to attract local investments. DOE and EPA should publish an accompanying methodology document that identifies the data used and decisions made to produce the qualifying list of Energy Communities. DOE should be empowered to engage additional Federal agencies for technical input when developing the list.

- As noted in Question 6 and throughout this RFI, some inputs to producing a qualifying list are difficult to source, in particular data sources related to local tax revenues. The DOE and the EPA should invite and use applications from project developers and other interested parties that include documentation demonstrating that a census tract, MSA or non-MSA, or brownfield site should qualify under the definitions established in Section 45(b)(11)(A) and clarified in guidance from the Treasury Department and the IRS. DOE should detail a process, including information on the types of documentation that are required and accepted, in which interested stakeholders may file a case that a location should qualify as an Energy Community.

- In the DOE list, geographies that are found to qualify under these 'Energy Community' provisions should be assessed regarding the Biden's Administration's Justice40 Initiative. The Biden Administration has indicated that the Inflation Reduction Act is a 'Justice40' covered program[5]. Connecting the list of energy community geographies with Justice40 could be done by indicating which defined Energy Communities are also 'disadvantaged communities', based on a list of disadvantaged communities created by the White House Council on Environmental Quality's Climate and Economic Justice Screening Tool (CJEST)[6] that is available for download and routinely updated. In addition, 'disadvantaged communities' that have been designated as disadvantaged due to the 'Clean Energy and Efficiency' category used in the White House Council on Environmental Quality's CJEST tool should be tagged as such.

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5 https://www.whitehouse.gov/environmentaljustice/justice40/

6 https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5

- DOE and the EPA should update the list of qualified locations based on agency staff analysis and information obtained from third-party applications at least once a year.

Thank you again for the opportunity to comment on the implementation of this landmark legislation. We know that the capable staff of the Department of Treasury and the Internal Revenue Service are working overtime to implement this seminal law, and we are grateful for your consideration of our views. We have a significant amount of technical expertise in our organization, and we are happy to provide that expertise to your staff if needed.