November 6, 2022

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

*Submitted electronically via the Federal eRulemaking Portal*

Re: Request for Comments on Energy Communities Requirements Under the Inflation Reduction Act of 2022 – IRS Notice 2022-51

Dear Acting Commissioner O'Donnell:

rPlus Energies LLC ("rPlus") appreciates the opportunity to comment on the Department of the Treasury's ("Treasury Department") and the Internal Revenue Service ("IRS") plan to issue guidance implementing the energy community requirements under the Inflation Reduction Act of 2022 ("IRA"), Pub. L. No. 117-169 (codified in various sections of Title 26 of the U.S. Code).

rPlus is a diversified renewable energy company headquartered in the "Crossroads of the West", Salt Lake City, UT. rPlus develops projects that employ both traditional and new technologies including solar, pumped storage hydro, wind, and battery energy storage systems. After forming in 2018, we have established a portfolio of over thirty projects across the United States representing over 10 GW of new renewable energy capacity, executed over 630 MW of corporate renewable PPAs, constructed two utility scale solar projects located in Utah, and initiated FERC licensing on two new pumped storage hydro projects. A large portion of our project portfolio involves projects located near historic coal and hard mining communities. Accordingly, rPlus is deeply invested in the implementation of the IRA tax credit for qualifying facilities located in "energy communities" which implicate both recently closed coal mines and the CERCLA brownfields often associated with historic hardrock mining. *See* 26 U.S.C. § 45(b)(11). We therefore submits the following comments and suggestions in response to the Internal Revenue Service's (IRS) request for comments involving the "energy communities" requirements for the bonus adder under the IRA.

## <u>COMMENTS / SUGGESTIONS</u>

I. *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?*

Utility-scale solar projects, large pumped storage hydro projects, and wind projects often occupy a large physical area. Those projects, therefore, frequently straddle lines separating census tracts, metropolitan and nonmetropolitan areas, and other geographical units. rPlus therefore urges the IRS to adopt guidance that permits parties—when their project straddles geographic units—to choose the geographic unit the IRS will use in assessing their eligibility for "energy community" tax credits. Alternatively, if a meaningful portion of a project (defining as contributing to the ability of the project to be marketable, functioning, or accessible) is located in a qualifying geographic area, then the entire project should qualify for "energy community" tax credits.

II. *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?*

The IRA makes qualifying projects eligible for an investment tax credit if they are located in an "energy community." One iteration of an "energy community" under the IRA includes brownfield sites as defined in subparagraphs (A), (B), and (D)(ii)(III) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See* 26 U.S.C. § 45(b)(11)(i). Guidance from the IRS should make clear that a project need not be literally *coterminous* with a brownfield site to be "located in" a brownfield "energy community" under section 45(b)(11)(i). The IRA's "energy community" provision strives to incentivize clean energy investment in areas that suffered economic decline due to shifts away from fossil fuels and extractive industries. Requiring a qualifying project to literally inhabit the "site" of a brownfield blunts the impact of the "energy community" tax credit. The economic detriment stemming from a closed coal mine, for instance, extends far beyond the literal footprint of the resulting brownfield. Requiring clean energy investment to occupy the exact physical space of a brownfield will diminish the accessibility of this particular form of "energy community" and, consequently, deprive economically depressed communities of much-needed investment. In fact, the Environmental Protection Agency (EPA) *already* incentivizes the rehabilitation of brownfields.[1] The IRS should take care that brownfield "energy communities" do more than merely duplicate EPA efforts.

III. *Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "non-metropolitan 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 17 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?*

Another iteration of an "energy community" under the IRA includes "a metropolitan statistical area or non-metropolitan area which . . . has (or, at any time during the period beginning after December 31, 2009, had) 0.17 percent or greater direct employment or 25 percent 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* . . . has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary)." *See* 26 U.S.C. § 45(b)(11)(ii) (emphasis added). The statute has not defined which kinds of "direct employment" are "related to the extraction, processing, transport, or storage of coal, oil, or natural gas." *Id.* rPlus urges the IRS to adopt guidance that broadly defines extractive employment under the Act. Importantly, the statute specifically vests the IRS with the ability to define the scope of "extraction, processing, transport, or storage of coal, oil, or natural gas." *See* 26 U.S.C. § 45(b)(11)(ii) (stating that extractive industry has the meaning "determined by the Secretary"). When statutes contain "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" courts tend to give that regulation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Lindeen v. SEC*, 825 F.3d 646, 656 (D.C. Cir. 2016); *see also United States v. O'Hagan*, 521 U.S. 642, 673 (1997) ("Because Congress has authorized the [agency] . . . to prescribe . . . rules, we owe the [agency's] judgment more than mere deference or weight."). The IRS, therefore, likely has broad latitude to promulgate guidance that expansively defines extractive employment. Accordingly, we urge the IRS adopt guidance that would include within the definition of "direct employment" those service industries that directly support the extractive industry, such as environmental and engineering services.

[1] *See Supporting Brownfields Redevelopment Using Tax Incentives and Credits*, United States Environmental Protection Agency (Apr. 20, 2022) https://www.epa.gov/brownfields/supporting-brownfields-redevelopment-using-tax-incentives-and-credits-0.

IV. *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 final form of "energy community" under the Act is "a census tract . . . in which . . . after December 31, 1999 a coal mine has closed, or . . . after December 31, 2009, a coal-fired electric generating unit has been retired, or [a census tract] which is directly adjoining to any census tract described [in the preceding sentence]." *See* 26 U.S.C. § 45(b)(11)(ii). As previously noted, the IRA's "energy community" provision strives to incentivize clean energy investment in areas that suffered economic decline due to shifts away from fossil fuels and extractive industries.

rPlus urges the IRS to adopt guidance that takes an expansive view in determining which census tracts it considers to be "directly adjoining" tracts in which a coal plant or coal mine has closed. Specifically, we urge the IRS to interpret "directly adjoining" as including census tracts that are *in close proximity* to tracts containing closed mines or plants, even if not directly *adjacent* those tracts. rPlus urges this broad construction because requiring direct contact with a census district containing a closed plant or mine would blunt the provision's impact in certain areas of the country, such as the American West. Large portions of the American West are sparsely populated. Accordingly, western census tracts are often irregularly shaped in an effort to incorporate sufficient population. Consequently, two areas that are closely *economically* related might be separated by large, irregularly shaped census tracts.

A recent rPlus undertaking—the Appaloosa Solar Project—typifies the dangers of narrowly construing the Act's "energy community" provisions. In the Appaloosa Project, rPlus is constructing a solar project and seeking "energy community" status based on its close proximity to several closed coal mines. *See* 26 U.S.C. § 45(b)(11)(ii). The Appaloosa Project is located in Census Tract 1102.02, in Iron County Utah. In close proximity to Tract 1102.02 is Tract 1301, a tract in Kane County Utah that contains the now-closed Coal Hollow Mine. In addition to their close physical proximity, Tract 1102.02 (containing the Appaloosa Project) and Tract 1301 (containing the Coal Hollow Mine) are part of the same economic community; that entire portion of south-western Utah faces economic headwinds stemming from the decline in the extractive industry.

Yet despite the close geographic and economic proximity between the Appaloosa Project and the Coal Hollow Mine, the Appaloosa Project risks not qualifying for "energy community" status under 26 U.S.C. § 45(b)(11)(ii). Appaloosa's potential failure to qualify stems from the presence of Tract 1101, a long, narrow census tract occupying the whole eastern edge of Iron County that separates the tract containing Appaloosa from the tract containing the Coal Hollow Mine. Tract 1101 is irregular in its length and narrowness (particularly compared to eastern census tracts), but is typical of western census tracts that must incorporate vast expanses to capture sufficient population. The ultimate effect is that Appaloosa, despite typifying the Inflation Reduction Act's goals of incentivizing clean energy investment in "energy communities," may not qualify for the "energy community" tax adder. In short, narrow interpretation of the Act frustrated its purpose.

The IRS need not constrain its interpretation of the IRA so narrowly as to frustrate its intent. When statutes are subject to more than one reasonable interpretation, the law has long reasoned that agencies deserve deference in interpreting those laws. *See e.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). One of several reasonable interpretations of "directly adjoining" includes an interpretation that includes tracts that are in *close physical proximity* to abandoned coal mines and power plants.[2] Accordingly, the IRS has a reasonable basis upon which it can broadly interpret the term "directly adjoining."

---

[2] *See Adjoin*, Merriam-Webster, https://www.merriam-webster.com/dictionary/adjoin (last visited Nov. 3, 2022) (defining adjoin as "*to be close to* or in contact with one another").

A principle rationale for extending agencies the latitude to choose an appropriate statutory interpretation (from among competing interpretations) in promulgating regulations stems from the fact that agencies have practical expertise in implementing laws in the real world. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (stating that "practical agency expertise is one of the principal justifications behind Chevron deference"). In fact, agencies have superior expertise in determining whether a particular regulation is "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of an Act the agency must enforce. *Futures Trading Com'n v. Schor*, 478 U.S. 833, 845 (1986). Here, the IRS (unlike Congress and the courts) has practical experience in effectuating tax credits, as well as ample input from stakeholders regarding the practical realities involved in implementing the "energy community" tax credit. The law therefore likely gives the IRS latitude to regulate in a way that will faithfully execute the intent behind the Inflation Reduction Act. *See also U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (asserting that an agency's "technical expertise" weighs in favour of according that agency deference in its interpretation of the statutes it administers).

Additionally, courts routinely affirm agency interpretations that are consistent with the legislative record. *Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 890 (9th Cir. 1993) (affirming an agency interpretation of a statute when the interpretation was consistent with the legislative history of the act); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 434 (1987) (rejecting an agency interpretation of a statute in part because it was inconsistent with the legislative history of the Act). Here, the legislative record is clear; the "energy community" tax credit aims to incentivize clean energy investment in historically extraction-dependent communities. For instance, the Act's chief sponsor has asserted that one of the chief accomplishments of tax break component of the Act was to "attract[] new investments and creat[e] new opportunities" for "coal and fossil fuel communities." Joe Manchin, *Manchin's Inflation Reduction Act Will Lower Energy and Healthcare Costs, Increase Domestic Energy Production, and Pay Down National Debt* (Aug. 07, 2022), https://www.manchin.senate.gov/newsroom/press-releases/manchins-inflation-reduction-act-will-lower-energy-and-healthcare-costs-increase-domestic-energy-production-and-pay-down-national-debt; *see also Wiley v. Bowen*, 824 F.2d 1120, 1122 (D.C. Cir. 1987) (asserting that "statements by the sponsor and other key legislators" are indicia of legislative intent); *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 225 (D.C. Cir. 2001) (relying on sponsor statements to ascertain legislative intent).

Put quite simply, the "energy community" tax credits strive to incentivize clean energy investment in communities that have suffered economic privation due to shifts away from extractive industry. rPlus urges the IRS to broadly construe the statutory definitions of a qualifying "energy community." In so doing, the IRS will faithfully hew to Congress's intent, will benefit necessitous communities, and will promote sorely needed investments in the green economy.

V. *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 a preliminary matter, rPlus refers to and incorporates its previous comments regarding brownfield energy communities under 26 U.S.C. § 45(b)(11)(i). It also takes the opportunity, however, to emphasize further points. Regarding brownfields "energy communities," rPlus reemphasizes that the underlying rationale of defining an "energy community" to include brownfields is to incentivize clean energy investment in communities whose economies previously relied on extractive industry. Accordingly, any IRS guidance should define a brownfield as including areas surrounding the brownfield within a specified geographic radius, for example 20 miles. Such guidance would more faithfully implement the underlying intent of the statute.

rPlus also urges the IRS to adopt flexible guidance interpreting which metropolitan or nonmetropolitan statistical area a project is located in when determining "energy community" status under 26 U.S.C. § 45(b)(11)(ii). In the west, localities typically qualify as metropolitan areas when their population exceeds 50,000 inhabitants. Continued population grown means that the boundaries of metropolitan areas are constantly changing. Consequently, a county that has spent many years as part of one statistical area might suddenly merge into an adjacent statistical area, or vice versa. These shifting boundaries mean that a project that has long been located in a statistical area which qualifies as an "energy community" might suddenly, based on changing demographics, find itself in a different, ineligible statistical area. rPlus therefore urges the IRS to adopt guidance that permits applicants for the "energy community" tax credit to choose between the statistical containing the project before the 2020 census or the statistical area containing the project after the 2020 census.

In fact, the same is true of section 45(b)(11)(iii) census tacts. Like metropolitan areas, census tract boundaries are in constant flux in the west. Accordingly, in assessing "energy community" eligibility for projects in close proximity to abandoned coal mines or power plants, rPlus urges the IRS to adopt guidance that allows a party to choose to be assessed using the project's 2010 census tract *or* their 2020 census tract.

On a related note, rPlus also urges the IRS to consider adopting guidance that would extend the "energy community" tax credit to applicants located in a *county* with sufficient extractive industry under 26 U.S.C. § 45(b)(11)(ii), even if the statistical area *containing* that county does not qualify. In the west, statistical areas (particularly nonmetropolitan statistical areas) can be vast. Consequently, a statistical area might itself not qualify as an "energy community" but may nevertheless contain counties that would individually qualify as energy communities based on the presence of extractive employment. For instance, Duchesne County Utah, though individually containing significant extractive industry, is part of the Eastern Utah nonmetropolitan area. The Eastern Utah nonmetropolitan area contains wide swaths of national forest and other protected land that potentially decreases the proportion of employment and tax revenue stemming from extractive industry. A strict interpretation of section 45(b)(11)(ii), therefore, could preclude many extraction-dependent counties from qualifying as "energy communities" because they are part of a large nonmetropolitan area that contains many other counties with negligible extractive industry. Adopting a more flexible interpretation of section 45(b)(11)(ii) will ensure that needful communities are not barred from investment based on the vagaries of a peculiarly drawn statistical area.

VI. *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?*

rPlus does not have specific recommendations as to how the IRS should define "local tax revenue" under section 45(b)(11)(B)(ii)(I) but, as with other sections, encourages the IRS to interpret the provision expansively. rPlus urges this broad interpretation because a narrow construction of this iteration of "energy community" might inadvertently frustrate the underlying purpose of the Act. As previously mentioned, western metropolitan and nonmetropolitan statistical areas are, simply put, vast. Accordingly, areas with high concentrations of extractive industry are often part of the same statistical area as areas with low concentrations of extractive industry. Accordingly, if the IRS guidance takes a narrow view of what kinds of revenue count toward section 45(b)(11)(B)(ii)(I)'s 25-percent threshold, necessitous communities that are extraction-intensive might fail to qualify as energy communities and, consequently, be deprived of clean energy investment. One way of addressing this issue might involve assessing the "tax revenue" requirement on a county-by-county basis. Whatever guidance the IRS guidance ultimately adopts, rPlus urges casting the broadest possible net in determining which information it will use to determine whether a statistical area has sufficient tax revenue from extractive industry to qualify as an "energy community." Again, rPlus takes the opportunity to emphasize that

Congress has explicitly empowered the IRS to determine the scope of tax revenue from extractive industry. *See* 26 U.S.C. § 45(b)(11)(B)(ii)(I) (stating that the scope of eligible tax revenue is to be "determined by the Secretary"). When, as with here, Congress has explicitly authorized an agency to write rules, courts will give that regulation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Lindeen*, 825 F.3d at 656.

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

Other than urging the IRS to promulgate guidance that is faithful to the underlying purpose of the IRA, rPlus has no further comments at this time.

* * * *

Thank you for the opportunity to submit these comments. If you or your staff have any questions concerning our comments, please do not hesitate to contact Cliff Smith, Chief Operations Officer, at csmith@rplusenergies.com or myself, Luigi Resta, President, at lresta@rplusenergies.com.

Regards,

Luigi Resta
President, rPlus Energies LLC