AC Power LLC

November 4, 2022

Internal Revenue Service
Office of Chief Counsel (Passthroughs & Special Industries)
CC:PA:LPD:PR (Notice 2022-51)
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments on IRS Notice 2022-51, Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

To whom it may concern:

AC Power, LLC, (AC Power) is pleased to provide comments in response to the Internal Revenue Service's (IRS) request for comments related to IRS Notice 2022-51, Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022. The focus of our comments is on the "Energy Communities" requirements found in the Notice.

AC Power was founded to facilitate the natural pairing of solar energy facilities with landfills, Superfund/NPL sites, Brownfields, RCRA sites, former mines/quarries and other sites that are undervalued due to environmental concerns. These underutilized sites can be redeveloped with solar or co-located with solar to serve multiple purposes. AC Power partners with property owners ranging from municipalities to private companies to develop clean energy facilities. Each site is unique and presents particular complexities through all stages of development including permitting, interconnection, offtake, and securing project financing.

While initially focusing on re-energizing landfills with solar, AC Power is continually expanding to repurpose previously disturbed sites and contribute to the resiliency of the national electric grid. Today, AC Power's core team boasts extensive experience developing environmentally-beneficial projects that provide green energy while spurring economic development in the communities they serve. AC Power secures financing for the development and construction of our projects with trusted, credit-worthy investors providing our landowners with peace of mind that each project will come to fruition and providing municipalities with assurances that local tax revenues will increase once the projects are completed.

Over the past two decades, solar energy development in the United States has been a marquee example of a successful public-private partnership. The Federal Investment Tax Credit laid the groundwork for a thriving market that encouraged independent developers and investors to improve our nation's energy infrastructure. We believe the Inflation

Reduction Act will add significant momentum to the industry's growth, but it is imperative that the economic incentives send correct price signals, ensuring development of projects with challenging land conditions that might remain otherwise undeveloped. AC Power's projects are a case study of how proper incentivization can drive independent investors, none of whom have association with PRP groups or existing environmental stakeholders, to deploy the capital needed to remedy contaminated sites and repurpose them as thriving assets for the electrical grid.

Solar projects, as with any type of infrastructure investment, require enough economic upside to satisfy landowners with attractive leases or purchase offers, to satisfy offtakers with attractive energy rates, to cover the property taxes needed to serve municipalities, to pay for equipment hardware and installation using prevailing-wage labor, and then provide investors with projected returns at their desired hurdle rate once all of these parties have been satisfied.

Our projects include significant additional costs not traditionally borne by "greenfield" solar projects including: site improvements; site remediation; extended project development timelines and higher budgets that include greater permitting costs due to complexity of these sites and, often, higher interconnection fees due to location; higher solar capital costs; higher operation and maintenance costs; and higher risk management systems and insurance premiums.

Meanwhile, these sites provide direct benefits to outside stakeholders and allow for sustainability and labor benefits in traditionally underserved communities. Our work to date has been regionally focused due to the industry's reliance on state-level incentives to "fill in the gap" and cover the remaining economics necessary to attract investors. **AC Power has run economic analyses for solar projects in emerging state markets (i.e. Midwest, Appalachia, etc.) and is confident that the expansion of the Investment Tax Credit, particularly including the 10% brownfield adder, would unlock the potential to develop projects on previously disturbed properties across a far greater footprint of land than currently feasible, and eventually nationwide.**

AC Power is proud that the projects we develop enhance communities that have been negatively impacted by previously disturbed and contaminated sites. We believe revising the definitions of Brownfield sites and Energy Communities to be more inclusive will ensure a just and equitable energy transition and provide access to clean, discounted energy to the communities that need it most. Brownfield solar projects incur additional costs due to the nature of the sites and the increased cost associated with the procurement of ballasted racking systems and above-ground infrastructure. Additional incentives provide a level playing field with solar projects not sited on brownfields and allow these projects to become successful, operational facilities. To provide further insight, AC Power has provided the following project examples that further exemplify community enhancement resulting from the redevelopment of brownfield sites. These sites are examples of the dozens, if not hundreds, of similar sites that could be developed with additional incentives.

- **Kin- Buc Landfill, Edison Township, NJ**
  Site Classification: USEPA Superfund – AC Power worked closely with the New Jersey Department of Environmental Protection (NJDEP) and the United States Environmental Protection Agency (USEPA) to secure approval for the solar development of Mound B at the Kin-Buc Landfill. Our team engaged with the Potentially Responsible Party (PRP) Group, which is responsible for ongoing maintenance at the site, and secured local support from Edison Township. AC Power was honored to win four of the 45 awards (out of 252 applications) for New Jersey's competitive Community Solar Energy Pilot Program - Year 1, resulting in incentive awards that allowed this project to move forward. Many of the project applications that were not awarded to this program are still on hold and awaiting additional funding before they can move forward with development.

- **Global Landfill, Old Bridge Township, NJ**
  Site Classification: USEPA Superfund – AC Power's 2.8 MW_{DC} project, located at the Global Landfill, a well-known Superfund site near the Cheesequake State Park, was recently approved as part of New Jersey's competitive Community Solar Energy Pilot Program - Year 2. This site has had an absentee owner for decades, has a large group of parties responsible for the remedy, and the site has accrued significant tax liens owing to the local government. AC Power is working as the Township-designated redeveloper and is in the process of taking title to prepare the site for solar development. The solar project will bring economic benefits to the taxpayers, discounted clean energy to the local community, and local workforce development initiatives.

- **Ciba Geigy – Hercules Plant, Queensbury, NY**
  Site Classification: Resource Conservation and Recovery Act (RCRA)
  AC Power is currently developing a 5.8 MW-DC community solar facility located on a corporate-owned property. The site is classified C (Completed) under the NYSDEC RCRA Corrective Action Program. Our team has worked extensively with the corporation's remediation group to ensure all ongoing operation and maintenance obligations required by the NYSDEC are ongoing through the life of the solar project. In addition, AC Power has coordinated with NYSDEC staff to obtain required permits and has had extensive interaction with the Town Planner and Engineer throughout the Site Plan review and approval process.

- **Lancaster Sanitary Landfill, Lancaster, NY**
  Site Classification: Solid Waste Landfill – Lancaster Sanitary Landfill is a Class 04 site (properly remediated but requiring continued site management) and is regulated by NYSDEC in the State Superfund Program. AC Power successfully developed a 12.71 MW_{DC} co-located community solar project which is currently under construction. The former landfill was closed in the 1980s with no existing post-closure monitoring plan on file. There were concerns regarding encroached wetlands, impacts to the Upland Sandpiper habitat, and an unknown degree of erosion to the landfill cap. AC Power filed a post closure monitoring and maintenance plan to include a solar PV facility as the long-term end use of the

landfill. This project incurred an additional $750,000 worth of civil improvements due to the complicated nature of the site but was still feasible because of the brownfield adder included in NYSERDA's NY-Sun Program. The facility was designed with buffers to protect surrounding wetlands and habitat areas. The project will become operational in late 2022.

- **Winzinger Landfill, Delanco Township, NJ**
  Site Classification: Solid Waste Landfill
  The Winzinger landfill ceased operation in the 1980s but had not been properly closed. AC Power worked with the landfill owner to close the landfill and secure an approved post-closure plan. The site was down the road from the Delanco Township Municipal Building and part of the town's beautification area. As part of the project, AC Power committed to improving the landscaping in order to support the town's efforts.

- **Fort Edward Landfill, Fort Edward, NY** – Fort Edward Landfill is a Class. 04 site (properly remediated but requiring continued site management) and is regulated by NYSDEC in the State Superfund Program. AC Power developed a 6.8 MW_{DC} community solar facility located on the Town of Fort Edward's closed landfill. AC Power worked closely with the Town to ensure proper post-closure O&M of the landfill. The project will provide power to residents and small businesses at a discounted rate. The project is expected to begin construction by November 2022.

AC Power has prepared nine amended landfill closure plans. Our team is in the due diligence stage at three sites where AC Power will take title to contaminated site due to inactive, unknown, or deceased landowners. Often these sites have liens and significant tax liabilities. The communities in which we develop are happy to work with AC Power to bring these sites back onto their tax rolls and generate revenue for the community.

As you can see from the above-referenced examples, such projects are only made possible by the financial enhancements given to them by local and state agencies. The IRA takes a significant step forward by providing federal incentives that should, if properly designed, continue to spur renewable energy investment in traditionally underserved communities that have contaminated properties in their midst. To do so, however, a fresh look at what it means to be an "energy community" may be required. The remainder of our comments focus on what such a fresh look might entail.

Energy Community Requirement:

Section 45(b)(11)(B) provides that for purposes of § 45(b)(11), the term energy community means: (1) A brownfield site (as defined in 42 U.S.C. 9601(39)(A), (B), and (D)(ii)(III)), (2) A metropolitan statistical area or non-metropolitan statistical area that has (or had, at any time after December 31, 2009) 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), or (3) A census tract (i) in which a coal mine has closed after December 31, 1999; or (ii) in which a coal-fired electric generating unit has been retired after December 31, 2009; or (iii) that is directly adjoining to any census tract described in § 45(b)(11)(B)(iii)(I).

***General Comment*:**

AC Power strongly requests that the IRS, Office of Chief Counsel consider recommending an amendment to the language of Section 45(b)(11)(B) to provide a revised definition of a "brownfield site." The use of the CERCLA definition, as provided in 42 U.S.C. 9601(39)(A), (B), and (D)(ii)(III) restricts the definition to a point that is in conflict with the intent of the Inflation Reduction Act's purpose of facilitating the development of renewable energy projects on contaminated or environmentally regulated sites, such as landfills, inactive hazardous waste sites (as well as those undergoing corrective action), Superfund and many federally owned facilities.

The purpose and intent of the 42 U.S.C. 9601(39) definition of a "brownfield site" is threefold: 1. To broadly include a wide range of underutilized or unused contaminated or potentially contaminated sites; 2. To provide exemptions from the definition so that polluters are not eligible for funding to remediate the sites that they themselves contaminated; and 3. To not allow polluters or wrongdoers to benefit from "bona fide purchaser" relief of liability under the CERCLA amendments.

Put another way, the exclusions provided in the CERCLA definition of "a brownfield site" were drafted to remove certain categories of sites from eligibility for Federal funding under the USEPA Brownfield program. Many of these sites are strictly regulated under other Federal and State programs and/or have resulted in enforcement actions due to a former owner or operator's negligence or wrongdoing. Using this exclusionary definition of a "brownfield site" for purposes of eligibility for renewable energy credits and incentives is punitive and counterintuitive. This action would prevent the majority of AC Power's project sites from benefiting under the energy community requirements section of the Act. However, as can be seen from the project description above, such projects had clear environmental benefits that did not, in turn, provide economic incentives to the entities responsible for contaminating the sites. Additional commentary on this issue is provided on the next page below.

Specific Requests for Comments on Energy Communities Requirement Sections:

(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?

***Comment*:**

Regarding the Energy Community Requirement (1) Section 45(b)(11)(A), the criteria for the term "located in" are clear.

Regarding the timing associated with determining site eligibility, AC Power questions the need to place a time restriction based on closure of the site for redevelopment. Any community that was host to a shuttered coal mine or coal-fired plant will have felt the impact from loss of employment as well as likely decades of negative health and environmental impacts. The condition should be based on the state of the community adjacent to or within the census tract of the site, but the 1999 and 2009 dates (which appear arbitrary) should be eliminated.

Regarding a rule similar to 1397C(f), it makes sense that contiguous portions of a site that adjoin a qualifying property should be combined and qualify as a whole.

(*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?*

***Comment*:**

The Inflation Reduction Act of 2022 narrowly relies on subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act ["CERCLA] of 1980 (42 U.S.C. 9601(39) to determine "brownfield sites" that qualify for increased credit under the "energy community requirement."

Subparagraphs (A) and (B) provides a broad definition and a series of exclusions, which eliminate a significant number and category of sites from redevelopment and reuse for renewable energy projects. Under subparagraph (A) the term "brownfield site" means 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. This is a rational definition and is a valid base or starting point. Subparagraph (B) goes on to exclude the following types of sites from the definition of "brownfield site." In so doing, broad swaths of otherwise-qualified remedial projects are barred from taking advantage of the IRA's developmental benefits and objectives. As is discussed in the bullet points below, AC Power is seeking clarification that it is the IRS's intent to exclude a significant number of properties from being able to take advantage of the IRA's incentives. If that is the case, many of these sites will continue to lay fallow and undeveloped.

Specifically, AC Power is seeking clarification on the following sites that would now be excluded by the IRA, based on the requirements of Subparagraph (B):

- a facility that is the subject of a planned or ongoing removal action under this subchapter;

Please clarify/confirm whether the intent of this exclusion is to eliminate sites subject of a planned or ongoing removal action from being eligible for the energy communities requirement incentive for solar development.

- a facility that is listed on the National Priorities List or is proposed for listing –

  Please clarify/confirm whether the intent of this exclusion is to eliminate all Superfund or NPL sites from being eligible for the energy communities requirement incentive for solar development.

- a facility 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 under this chapter;

  Please clarify/confirm whether the intent of this exclusion is to eliminate sites subject to environmental regulatory compliance action, including non-Superfund/NPL sites, from being eligible for the energy communities requirement incentive for solar development.

- 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, the Federal Water Pollution Control Act, Toxic Substances Control Act, or the Safe Drinking Water Act;

  Please clarify/confirm whether the intent of this exclusion is to eliminates site subject to environmental regulatory compliance action under the RCRA, the Clean Water Act, TSCA and Save Drinking Water Act from being eligible for the energy communities requirement incentive for solar development.

- a facility that is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures***;***

  Please clarify/confirm whether the intent of this exclusion is to eliminate permitted solid waste management units requiring corrective action for releases of hazardous waste or hazardous constituents, as well as landfills or RCRA sites with corrective action interim status, from being eligible for the energy communities requirement incentive for solar development.

- a land disposal unit with respect to which— a closure notification under subtitle C of

the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and closure requirements have been specified in a closure plan or permit;

Please clarify/confirm whether the intent of this exclusion is to eliminate RCRA landfills and hazardous waste generators and TSD sites from being eligible for the energy communities requirement incentive for solar development.

- a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

  Please clarify/confirm whether the intent of this exclusion is to eliminate federal facilities or federal land owned in fee, from being eligible for the energy communities requirement incentive for solar development.
- a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of title 26;

  Please clarify/confirm whether the intent of this exclusion is to eliminate all sites registered in a program for Leaking Underground Storage Tanks, from being eligible for the energy communities requirement incentive for solar development.

(4) Which source or sources of information should the T*reasury 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)?*

***Comment*:**

Sources of information that Treasury could access for planned decommissioning include: US Energy Information Administration (EIA), which publishes a monthly electric generator inventory and includes retired plant data (https://www.eia.gov/todayinenergy/detail.php?id=50838); the individual utilities; and/or the State Public Service Commission or similar entity. As the demand for coal decreases, so does the need to mine coal, which is also tracked by the EIA. The American Geosciences Institute also produces a variety of interactive maps including coal resources and active and abandoned coal mines in various states. The US EPA also hosts an interactive map that provides data on current/former coal mines and associated methane recovery.

Closure of a coal mine or retirement of a coal-fired electric generating unit (EGU) should take into consideration scheduled closures of these facilities in addition to the legacy closure dates included under 45(b)(11)(B)(iii). Many renewable developments take several

years from origination to commissioning, in particular due to long queues for interconnection. If a coal mine or coal-fired EGU is scheduled to close within 2-3 years of the origination of the solar PV plant, it should be considered as qualifying under this program as it will provide a supplement/replacement of the fossil fuel generated power with clean energy.

(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?

***Comment*:**

AC Power requests and strongly recommends that any regulations that are drafted and promulgated in support of the IRA clarify the definition of "a brownfield site" as follows:

- Confirm that the term "brownfield site" means 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.

- Specifically clarify and interpret the definition to include those sites identified by the USEPA in the Agency's RE-Powering America's land mapper, which includes but is not limited to, designated Brownfields program sites, Superfund sites, coal mines, landfills, RCRA sites, and State remediation program sites (https://geopub.epa.gov/repoweringApp/?page=home);

- Specifically clarify and interpret the definition to include those sites identified by the USEPA in the Agency's Superfund Redevelopment Mapper which includes, but is not limited to, sites designated as having "Redevelopment Potential," a "Solar Resource" or a "Wind Resource" (https://www.epa.gov/superfund-redevelopment/superfund-redevelopment-mapper);

- Specifically clarify and interpret the definition to include those sites identified by the USEPA in the Agency's Cleanups in My Community Mapper, which includes, but is not limited to, sites designated as Brownfields, Superfund sites, RCRA Corrective Action sites, Federal facilities, and Removals sites (https://www.epa.gov/cleanups/cleanups-my-community);

- Specifically clarify and interpret the definition to include those sites listed or inventoried by a State or local regulatory agency as a "brownfield site" and/or identified under a non-Federal brownfield cleanup program (e.g. NYSDEC Brownfield Cleanup Program, CTDEEP Brownfields Inventory);

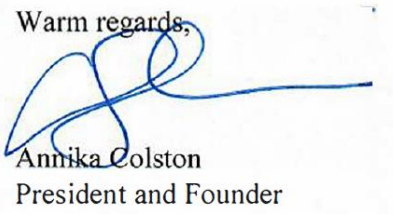
- Former or reclaimed non-coal mining sites, quarries, and sand/gravel extraction sites that meet the base definition.

- Identified and listed in a federal or state registry or program.

- Documented evidence above state or federal clean-up criteria or guidance that would subject it to remedial requirements.

In conclusion, it is important to note that the development timelines for many of these projects are routinely three to five years and cost hundreds of thousands of dollars. The development relies on collaboration between many stakeholders, including site owners, regulatory agencies, communities and the public sector. Given that developing on contaminated sites relies on incentives, and the "Energy Communities" adder in particular, there needs to be certainty that a site will quality at the start of the development process. We have seen firsthand the negative impact that stalled or shelved projects can have on the communities support for renewable energy projects. It would be ideal if we could rely on a database listing sites that will qualify for this incentive.

We greatly appreciate your time and effort ensuring that the Inflation Reduction Act has the most meaningful impact transitioning our nation to cleaner energy.



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