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Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

November 8, 2022

Re: Public Comments to Notices 2022-49 (Request for Comments on Certain Energy Generation Incentives), 2022-50 (Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits), 2022-51 (Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022)

Evergreen Renewables Inc. ("Evergreen") is pleased to provide comments to the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") in response to the solicitations for comment set forth in IRS Notices 2022-49, 2022-50, and 2022-51. We appreciate the work of the staff at the IRS to issue the Notices and prioritize guidance that will facilitate tax-paying and non-taxpaying entities alike to obtain the full benefits of energy tax credits authorized in the Inflation Reduction Act of 2022 (the "Act"). We further appreciate the work of the staff of other federal agencies and administration officials specialized in clean energy finance and development to support the IRS's vital IRA implementation work.

By way of introduction, Evergreen is currently in the business of aiding companies, both public and private, in meeting their decarbonization goals through the sponsoring of new renewable energy projects, initially in Texas and then throughout the United States. In exchange for their sponsorship, our customers will receive renewable energy certificates ("RECs"), generally purchased over time through forward contracts. These new projects are developed by us and developer partners with whom we work.

Following the passage of the amendments to the Internal Revenue Code (the "Code")[1] set forth in the Act, we propose to set up a new, complementary business to facilitate sponsorship of

[1] All references herein to "Section" refer to the Internal Revenue Code of 1986, as amended.

renewable energy projects through direct purchase of energy tax credits. The business may operate along one of several models, described herein.

We appreciate your consideration of the recommendations and requests for clarifications discussed below and look forward to the issuance of proposed regulations and other guidance that will facilitate much-needed investment in facilities and property to reduce greenhouse gas emissions and overall advance the Act's objectives of promoting high-paying domestic clean energy jobs and energy security. If you have any questions, please do not hesitate to contact us at: team@ever.green.

Sincerely,

Ben Dickson
Chief Legal Officer
Evergreen Renewables, Inc.

I. Executive Summary

Evergreen may advance one or more of the below-described models to help facilitate a new clean energy tax credit market, now facilitated by the direct pay and transferability regimes authorized by the IRA. In planning for these various scenarios, Evergreen respectfully submits requests for clarification, as well as recommendations and overarching information regarding how Evergreen foresees such a market operating.

One model would be for us to create a tax-credit marketplace that functions as a two-sided market to connect tax credit buyers and sellers. The entry point for tax credit sellers would be a compliance/document management system. Each developer would upload transaction documentation (third party appraisals, payment information) helpful to document compliance with the tax code either on their own behalf (if they are project owner) or on behalf of the project owner for whom they are building a project. We anticipate that tax credit owners would pay a fee for the service, that would accrue over time.

Potential tax credit buyers would then access the marketplace to purchase tax credits, and would be able to review the documentation, as well as a due diligence report/confirmation created by the platform on the project. The buyer would generally pay a purchase price at a discount to face value of the credit, to provide the buyer with an appropriate risk-adjusted financial return. A non-refundable transaction fee in connection with each purchase, based on the size of the transaction proceeds, would be paid to Evergreen out of said proceeds. We would also seek to partner with a financial institution to provide insurance in the event of recapture.

Another model that we have seen operate on the state level would be to set up a fund that would acquire tax credits. Such a fund could have several variations. In the first variation, a pass-through fund would be created by one or more investors with appropriate tax appetite, that will acquire tax credits by purchase. All tax benefits from the credits would flow up from the fund to the owners. In the second variation, a pass-through fund would be held by multiple entities, and would acquire tax credits through a tax equity partnership conforming to existing IRS guidance. The tax equity partnership would then liquidate the tax credits allocated to it under the partnership on the transfer market, and pass proceeds directly to the equity holders. A third variation would be for the fund to enter into tax credit purchase agreements and then assign the agreements to equity holders prior to completion of the sale.

We are approaching this new opportunity because we believe that the corporate entities we work with regarding environmental attributes – corporations that have tax appetite for energy credits but have not been investors in the traditional tax equity market – are the most likely parties to use the transferability regime because of the promise it offers of relatively low transaction costs and a liquid market for tax credit transfers. Further, if the goal of introducing the transferability regime is to spur the production of greater renewable energy capacity by increasing demand for federal energy tax credits, we believe these corporate buyers are precisely where the bulk of this new demand is likely to come from – precisely because they have not participated in traditional tax equity, have substantial tax appetite and have often entered into public-facing commitments to make sustainability-based investments. At the same time, relatively small solar developers, several of whom we are partnering with, have had difficulties accessing traditional tax equity. We believe much of the new supply of tax credits for the transferability regime, if it does materialize, will need to come from these smaller developers.

Our comments below, which are organized in response to each Notice, are therefore offered with the intention of making participation in this regime more likely for these new parties. The key to this participation, as we understand from our research to date, is to deliver on the inherent promise of lower uncertainty and transaction costs in the transferability regime, when compared to traditional tax equity investments, while not compromising on safeguards against tax avoidance or evasion. We are aiming to solve part of this problem ourselves by creating a standardized diligence and compliance process that developers accessing our platform would undertake, effectively providing visibility into projects and demonstrating their credibility to potential tax credit buyers as a service. We believe that third parties intermediaries like ourselves will be key to the growth of this new market.

The guidance issued by the IRS will be very important in determining transaction costs and uncertainty as well, however, and we therefore believe, to further the Act's purposes of spurring investment in renewable energy, that the IRS should do its utmost to (1) create a simple process for tax credit transfer, (2) make the compliance and enforcement process as easy as possible for compliant parties, (3) create reliability and certainty around the potential increases in energy percentages, (4) limit instances of recapture of transferred tax credits, to the extent possible, to events in control of the parties to a tax credit transfer. The first two goals are focused on reducing transaction costs and burdens for participants in the transferability regime; the second two are more focused on delineating and clarifying the risks created by the regime and thereby limiting uncertainty, so that participants can accurately assess those and potentially insure against them. Our specific comments below, which begin with Notice 2022-50 (as it deals directly with transferability) and then continue to 2022-49 and 2022-51 (which are relevant since they impact potential recapture of transferred tax credits), are made with those goals in mind.

II. Comments and Recommendations for Notice 2022-50

Limitations on the taking of credit

- Question (4) asks "[w]hat, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit?"
  Two clarifications would be helpful here.

First, it would be helpful to understand how the passive activity loss rules set forth in Section 469 and related IRS guidance apply to transferred credits. For example, Section 469(g) provides that passive tax credits are released (i.e., available to offset the tax on any type of income) once the taxpayer disposes of its "entire interest in the passive activity." We would like to know how the IRS would characterize the "interest" held by a tax credit transferee in the energy facility from which the credit is generated, given that there is no requirement in the Act that the transferee hold any debt or equity interest in the facility (and, as a practical matter, we believe that most tax credit transferees will not hold any such interest, given that investors able and willing to take on the additional transaction costs and diligence burdens of structuring such a debt or equity investment are able to take advantage of traditional tax equity structures).

Second, we would request confirmation that exempt taxpayers eligible for direct pay under Section 6417 are able to act as purchasers of the credits. There seems to be no restriction on this in the Act but it would be helpful to the market to have confirmation on this point.

The taxable year in which a credit may be taken

- Question (5) asks "[f]or purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)?"

Section 6418(d) states that "In the case of any credit (or portion thereof) with respect to which an election is made under subsection (a), such credit shall be taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined." We would request clarification as to whether the language "or after" would permit the following fact pattern: a transferee taxpayer takes a credit earned in the eligible taxpayer's taxable year ending December 31, 2022, into account with respect to such transferee taxpayer's taxable year ending December 31, 2023.

Documentation of transfer

- Question (8) asks "[f]or purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(a)?"

We would recommend that the IRS create a form that the transferor of any tax credit amount must send to each transferee to whom they sell a portion of such credit, to be filed with the transferee's tax return and which each such transferor will also file with their tax return. The form would be signed by the transferor and list each party's taxpayer identification number, the type and amount of the credit claimed by the eligible taxpayer, the amount transferred to such transferee, and the address or location of the energy property against which the credit would be claimed, as well as other details regarding the energy property, including the type of energy property, installed nameplate capacity, and date on which the property was placed in service. Such a notice system, similar to that implemented by the IRS for the 1603 Program under the American Recovery and Reinvestment Act of 2009, would allow each dollar of transferred credit to be reliably traced back to the original tax credit owner and, we believe, strike the appropriate balance between concerns regarding prevention of the bad acts laid out in the cited question and the need to create a liquid, efficient market for tax credit transfers.

We would also propose that, ideally, this reporting form would allow the transferor to disclose that the amount of credit it was selling to a given transferee was directly attributable to one or another part of the "energy percentage stack" or "production credit stack" created by the Act. By "energy percentage stack" we mean the different tiers of the credit attributable to (i) the base amount of the investment tax credit (6%); (ii) the five times multiplier attributable to prevailing wage and apprenticeship compliance (or automatically granted to projects under one megawatt); and (iii) the additional amount of credit attributable to domestic content, location in an energy community, or having been allocated a portion of the environmental justice capacity limitation pursuant to section 48(e). The "production credit stack" would be the corresponding concepts for the production tax credit. Tax credit buyers may impute different risks of recapture to each such part of the credit and it will likely be within a developer's interest to be able to sell these parts separately, with different discounts to face value.

Any tax credit transaction will likely also be affected through a purchase agreement. Purchasers should be required to maintain copies of such purchase and sale agreements through the vesting period of the agreement.

Enforcement: Reasonable Cause

- Question (9) in Notice 2022-50 asks "[w]hat, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount?"

One of the key items that we believe will require clarification is the definition of "reasonable cause." There are, we believe, two approaches that the IRS could take that would both be workable from the perspective of market participants.

First would be that a party could claim reasonable cause based on representations provided by the seller of a tax credit, to the extent such representations are backed by an enforceable indemnity provision. The idea here is that the existence of financial risk on the part of the seller if the amount of the credit is deemed excessive (due to the buyer's contractual recourse against the seller) is sufficient to provide the buyer with reasonable cause to believe that the credit is not excessive.

The second approach would be to require a certain level of due diligence to be undertaken by the buyer. This could include review of the budget for the project, the engineering, procurement and construction agreements and other key agreements governing capital expenditures on the project, and receipt by the buyer of some certification that the facility had been placed in service at its projected nameplate capacity. The IRS might want to require this level of diligence if it does not believe indemnification provisions will create sufficient deterrent for developers of solar projects to overclaim tax credits, when compared against the audit risk developers who do not transfer their credits will face.

While we believe that indemnification risk should likely be a sufficient deterrent for overclaims, the second approach outlined above could also be workable, so long as buyers can rely on third party experts, such as insurers or operators of tax credit brokerages or platforms to provide such diligence. A network of such intermediaries is likely necessary for a liquid market to emerge in any event, and such intermediaries would be more likely to possess or develop the skills necessary to adequately diligence projects on behalf of buyers; one can look to the network of analysts and brokers in the securities markets for analogies. Requiring such diligence to be undertaken and skills to be developed by the buyers themselves, however, could possibly stifle the market before it could ever develop by effectively reimposing significant transaction costs on any tax credit transaction.

Regardless of the approach, we believe that it would also be helpful to clarify that, at the time a system is placed in service, a buyer has reasonable cause to assume that the seller will take care to avoid any circumstances creating recapture after the fact (such as failure to abide by prevailing wage guidelines), in particular if seller has made an enforceable promise to do so. In other words, we would expect that, in the presence of such an agreement and absence of any evidence of actual knowledge that such promise was unlikely to be complied with, we would not expect the excessive credit transfer to be applied to such after the fact recaptures.

Enforcement: Recapture Notice

- Question (10) asks "[p]ursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice? Likewise, pursuant to § 6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice?"

These two notices should be deliverable together in one notice, and each notice should (1) be required to specify whether the taxpayer intends to indemnify the transferee with respect to the recapture event and (2) be delivered to any other parties, such as guarantors or insurers, to whom the transferee has instructed the taxpayer in advance to deliver such notice.

Cash Consideration

- Question (12) asks "[p]lease provide comments on any other topics that may require guidance."

We assume that any series of installment payments, to be made in cash, or note to be settled in cash, would satisfy the requirement that a transferred credit be "paid in cash" in Section 6418(b)(2), but would appreciate confirmation.

III. Comments and Recommendations for Notice 2022-49

Interconnection Property

- Question .02(1)(b) asks "[s]ection 48(a)(8) provides that for certain energy property amounts paid or incurred for qualified interconnection property may be included in basis. (i) For interconnection property, what types of additions, modifications, or upgrades to the transmission or distribution system are required for the purpose of accommodating interconnection? (ii) For interconnection property, what type of documentation, in addition to interconnection agreements and cost certification reports, is readily available for a taxpayer to demonstrate that they have paid or incurred interconnection costs? (iii) For interconnection property, is guidance needed to define energy property that has a maximum net output of not greater than 5 megawatts (as measured in alternating current)?"

Interconnection property typically includes additional capacity added to transformers, additional metering devices, line extensions, the reconductoring of existing lines to add capacity, SCADA upgrades, network protectors and 3V0 protection and, for larger projects, the construction of an entirely new substation.

These upgrades are typically documented in the applicable interconnection agreement, and an invoice and receipt that the owner of the system uses to prove that the payment has been made to the applicable utility to carry out the interconnection upgrades.

Finally, with respect to aggregation rules, we note that many independent system operators, such as the Electric Reliability Council of Texas, generally have rules governing aggregation, since they place different regulatory burdens on projects of different size. We would recommend that the IRS defer to these regulations, with a project being deemed to avoid aggregation for federal purposes to the extent it is not aggregated by the governing independent system operator. Moreover, whatever rules are decided upon should be consistent with the same rules applied to the definition for when a project has maximum net output greater than one megawatt in the context of the prevailing wage and apprenticeship requirements.

Low-income communities

- Question .06(1) asks "[s]ections 48(e)(4)(A) and 48E(h)(4)(A) require the Secretary to establish a program to allocate amounts of environmental justice capacity limitation to applicable facilities. In establishing such program, the Secretary must provide procedures to allow for an efficient allocation process. (a) What should the Treasury Department and the IRS consider in providing guidance regarding the application process for taxpayers seeking an allocation of the environmental justice capacity limitation? (b) How can the application procedures and application process be made accessible to taxpayers?"

We would suggest that the Treasury Department and IRS set a yearly deadline by which applications must be submitted, and publish this deadline at least several months in advance. This would reduce the risk of the1.8 gigawatt annual environmental justice capacity limitation from being entirely allocated to a few large companies possessing the most extensive existing pipelines and resources for application preparation. Instead, the annual deadline would allow the IRS to evaluate the applications against each other based on merit and compare the whole pool of project applications to make sure the most impactful ones are awarded the additional benefit.

In addition, we believe there should be carve outs under the allocation for several types of projects, including distributed energy resource projects under one megawatt located in urban areas and projects that are co-located with load at affordable housing sites. The IRS should also consider the density of the low-to-middle income population around the project site (not necessarily solely limited to the census tract) in awarding projects. Ultimately, the IRS should consider both the carbon and equity impacts of each project in making the awards.

- Question .06(2) asks "[w]hat stage of completion, if any, should be required of the taxpayer at the time of application for or allocation of amounts of environmental justice capacity limitation (since the taxpayer will have four years to place the facility in service)?"

Based on our conversations with developers, the most useful time for this would be after site control but prior to achieving an interconnection agreement and notice to proceed.

- Question .06(3) asks "[w]hat methods currently exist or need to be designed for a taxpayer to certify that a project is being built in a low-income community, on Indian land, or as part of a low-income residential building project or a qualified low-income economic benefit project?, and question .06(4) asks what appears to be a very related question, "What mechanisms exist for a taxpayer to demonstrate that the financial benefits of the electricity produced by an applicable facility are allocated equitably among the occupants of a low-income residential building project and do not impact the occupants' eligibility for their housing? Similarly, what mechanisms exist for a taxpayer to demonstrate that at least 50 percent of the financial benefits of electricity produced by an applicable facility which is part of a low-income economic benefit project are provided to households within certain income thresholds?"

We would recommend that the IRS produce an official map of low-income communities and Indian land on which the additional benefits would be available, based on applicable census data. We would also suggest that the IRS clarify that the benefit of location in a low-income community is fixed as of the date the application is granted by the IRS, since that certainty will be required to proceed with financing of the project based on the granted additional investment tax credit.

With respect to whether a residential building project is a low-income residential building project, we would suggest that, if a map of such buildings cannot be produced, applicants for the allocation should be able to submit a simple certification from the building owner, certifying participation in one or more of the federal housing assistance programs that would qualify a building for such status.

With respect to determining how the benefits of a low-income residential building project or qualified low-income economic benefit projects are actually being distributed, we understand that energy (and thus saving on electricity) are often allocated to residents via community solar programs, and in such cases, there will generally exist an allocation sheet submitted to the applicable utility. Projects that do not explicitly participate in community solar can likely produce similar sheets. If our suggestions regarding the definition of "financial benefit" are accepted below, then other documentation – such as pay-related documentation – would also need to be considered.

- Question .06(5) asks "[i]s guidance needed to clarify the meaning of the term "financial benefit"? and .06(6) asks the related question "What is a financial benefit of the electricity produced by an applicable facility other than electricity acquired at a below-market rate for occupants of low-income residential building projects and low-income economic benefit projects? "

We would advocate that guidance is needed on this point, and would propose a formulation along the lines of the financial benefit is the aggregate financial returns or net gains that are directly or indirectly attributable to electricity produced by the project. So, for example, if the electricity produced by the project results in profits that are shared with households meeting the definitions set forth in Section 48(e)(2)(C), that should be included in the calculation of financial benefit for the project. If the capital expenditures for the project are paid for through a note, and proceeds from the sale of electricity are used to pay down this note, then the benefits of the capital expenditures (including, potentially, labor costs or other ancillary benefits) should be included in the project's financial benefits. If the savings in electricity are not directly shared with low-income households but are used to fund an organization or business that provides its benefits primarily to such households (for example, a food bank) then we would also recommend that such benefits be considered, even though they are indirect.

We advocate the IRS take an expansive view of the definition of "financial benefit" to fully capture the benefits that a project could bring to low-income households, in particular through jobs or other ancillary benefits. On the other hand, we do include a concept of "returns" or "net gains" in our definition as well, because the benefit should ultimately be after deduction of any additional costs that the project places on relevant low-income households (for example, if there is any additional subscription fee required to be paid for the electricity generated by the project).

- Question .06(7) asks "what should the Treasury Department and the IRS consider in providing guidance regarding the recapture of the benefits of the credit increase allowed under §§ 48(e) and 48E(h) when property ceases to be property eligible for such credit increase?"

First, for purposes of recapture, the word "located" in Section 48(e)(2)(iii)(I) in the phrase "located in a low-income community…or on Indian land" should be interpreted as a past tense verb, meaning that eligibility for the tax credit based on that clause should be satisfied if the facility is situated, at the time of placement into service, in a low-income community (as defined in the Act) or on Indian land. To be clear, recapture should not require that the applicable census tract remain a low-income community or Indian land at the time of the next census.

The reason for this is that, from a policy perspective, renewable energy projects that are built in a low-income community should not be recaptured if the census tract in which they are located no longer meets the definition under section 45D(e), because doing so would severely mitigate the incentive effect of Section 48(e)(2)(iii)(I). Whether a particular census tract in which a power plant is located depends on factors completely outside of a developer (or any party that monetizes the tax credit through investment or sale). These factors not only include the poverty rate and median wage of the census tract (which the renewable energy project would hopefully ameliorate); it also includes the boundaries of the census tract itself. As a result, requiring recapture if a renewable energy project ceases to be "located" (interpreting the word as an adjective) in a low-income community would be a non-controllable risk that could be non-insurable, and would likely, in our view, deter projects from being placed in low-income communities. The incentives set forth in clause (II), on the other hand, are arguably more justifiably recaptured, because they are likely to either be under the developer's direct control or the control of parties with whom the developer has ongoing contractual relationships.

- Question .06(7) also asks "[h]ow should the one-time restoration of eligibility be documented before recapture?"

The one-time restoration of eligibility should be documented in the same allocation sheet referred to in our answer above.

IV. Comments and Recommendations for Notice 2022-51

Prevailing Wages and Apprenticeship: General

- Sections .01 and .02 in Notice 2022-51 request comment on several points related to the determination, documentation and proof of compliance with the prevailing wage requirements in the Act. We address them together here.

Based on our discussions with renewable energy developers, we believe further clarification is needed in these areas. In particular, we understand that (1) substantive compliance is not viewed to be a pressing issue, but excessive record-keeping and reporting obligations could be a source of significant extra cost, and (2) many solar developers do not use apprentices at this time.

If the goal of the Act to promote additional renewable energy, we would therefore suggest that additional guidance be issued on these topics, and that such guidance (1) creates a compliance regime mainly focused on the eligible taxpayer's (or their transferee's) ability to prove prevailing wages and apprenticeship compliance during an audit, (2) takes a flexible approach to allowing proof of compliance and (3) promotes and rewards good faith efforts at compliance with the apprenticeship requirements.

On the first point, we presume that any taxpayer claiming the benefit of the multiplier in the Act will have to certify on their tax returns that they have complied with the appropriate regulations. We submit that the main mechanism of enforcement should be audit, in particular since no requirement for an ongoing reporting regime is laid out in the Act. One additional point we would make here is that eligible taxpayers who transfer their credits to transferees should have some obligation to assist transferees by providing relevant documentation.

On the second point, we believe a flexible approach should be taken on showing compliance– any records kept in the ordinary course of business that are relevant to the determination of prevailing wages or apprenticeship compliance should be permitted, but in particular pay stubs, W-2s, timesheets and similar tax reporting forms, and documentation of benefit plans.

In situations where a subcontractor has been employed, we believe that a regime where each contractor must conduct an audit of its subcontractors to benefit from the tax credit will be overly onerous on many developers and potentially defeat the purposes of the Act. We would therefore suggest that the eligible taxpayer should be permitted to rely on a certification provided by such subcontractor as to such subcontractor's compliance with prevailing wage laws and number of apprentice hours worked. To help guard against false certifications, certain requirements could be laid onto such certification: for example, that such certification provide the relevant wages and benefits of laborers and mechanics used by the subcontractors with sufficient detail such that the eligible taxpayer can confirm compliance with the regulations (based on such reported data), or that the certification identify the registered apprentice programs used by the subcontractor, or that the subcontractor grant an audit right to the eligible taxpayer in the event of the eligible taxpayer's audit. If a subcontractor is found to be non-compliant with the labor-related requirements during an audit, such fact could be publicized by the IRS, at which time taxpayers would no longer be able to rely on certifications from the subcontractor.

On the third point, given the unfamiliarity many developers have with apprenticeship programs, we believe the IRS should create a resource for developer compliance by publishing all registered apprenticeship programs offering apprentices for work in renewable energy projects. Furthermore, the IRS should reward good faith efforts at compliance by ensuring that the requirements of an apprenticeship program with which developers are required to comply are reasonable, either by allowing developers seeking to use the exception to claim that a requirement they did comply with was unreasonable or by having the IRS directly require that the requirements of registered apprenticeship programs are reasonable through its review and registration of these programs.

Finally, as a minor matter, we believe the regulations should clarify that if no repair work is done on a renewable energy project in a given year, that these requirements simply do not apply and no recapture will be triggered.

Prevailing Wage: Cure Provisions

- Question .01(2) asks "[s]ection 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 rules developed by the Treasury Department and IRS should clarify that the reference to "taxpayer" in the language of the Act applies to the transferee of a credit, as well as the eligible taxpayer that has earned the credit, such that where the credit has been transferred pursuant to Section 6418 either party (or such party's contractual designee) is able to make the cure payments necessary to restore the credit and avoid recapture.

Energy Communities

- Several successive questions in section .04, specifically (2), (3), (4) and (5), relate to the various definitions of "energy community" – the determination of brownfield sites, metropolitan and non-metropolitan statistical areas, and coal-mine and coal plant closures, and the correct information sources for some of these determinations. We address them together here.

Given our interest in both finding suitable land for our own projects under development as well as our interest in allowing parties to properly size credits for transfer, we have begun our own research into the areas likely to be deemed energy communities, including review of the following sources:

- Brownfields: data from epa.gov, in particular https://www.epa.gov/frs/epa-state-combined-csv-download-files
- Abandoned Coal Mines: msha.gov, in particular https://arlweb.msha.gov/OpenGovernmentData/DataSets/Mines.zip
- Closed Coal Plants: epa.gov eGrid data, in particular https://www.epa.gov/egrid/download-data
- Tract adjacency: redistrictingdatahub.org, in particular https://redistrictingdatahub.org/dataset/2020-census-adjacency-files-for-{state_name}
- Employment Statistics: census.gov, in particular https://data.census.gov/cedsci/table and table CB2000CBP
- Unemployment Data: bls.gov, in particular Local Area Unemployment Statistics from https://www.bls.gov/data/#unemployment

Our review is limited, however, as certain data, including tax rates and prior-year unemployment rate, need further definition, as well as the exact types of employment that constitute direct employment "related to the extraction, processing, transport, or storage of coal, oil, or natural gas." The exact scope and size of the land deemed an energy community due to a brownfield site needs to be clarified as well, as many brownfields are fairly small, much smaller than a typical renewable energy project. Moreover, we have identified certain inaccuracies in the existing datasets we have reviewed. For example, we know (by virtue of our chief executive officer's previous employment at CPS Energy) that the JT Deeley power plant southeast of San Antonio was permanently closed in 2018, but is listed as being scheduled for closure in 2024 in the EPA's official data. We also note that areas may fall in and out of the definition of "energy community" easily through the second prong of the definition, in particular due to fluctuations in local and national unemployment rates.

From speaking to developers and prospective tax credit buyers, we believe there needs to be certainty as to whether a given tax credit is earned, and certainty that it will not be recaptured due to fluctuations in demographics and employment statistics. There are questions, for example, as to whether the data be updated based on five-year census estimates, one year estimates, or only every ten years. As a result, we would urge the IRS to include the following in its regulations:

- An official map of all energy communities on which developers and tax purchasers can rely.
- A procedure for challenging inaccuracies on the map.
- Clarification that the definition of energy community is fixed at a certain point for a given project – in other words, that recapture will not occur simply because the demographic factors of the community in which the energy project is located have changed.
- Provide that the fixation of the definition of "energy community" for a given project occurs as early as possible, ideally after the developer has achieved site control on a project and prior to submission of an interconnection application, but in any event no later than once construction commences on a project, again to give developers certainty about the level of credit they can expect.

The last point is especially important because often a developer will spend significant resources on interconnection applications, studies and upgrades required by such studies and upgrades, and information as to available tax credits is crucial to a developer's decision as to whether to invest those resources on a site. By commencement of construction, a developer will need to have locked-in a financing structure, which will typically be based off of and depend on the size of the credit; uncertainty at this point in construction would almost certainly prevent projects that could be otherwise financeable from happening.

V. Summary and Conclusion

In summary, we recommend that Treasury provide the following guidance in proposed regulations across the three Notices cited in this comment letter:

- Create a simple procedure for tax credit transfers to guard against fraud and facilitate a liquid market for tax credit transfers.
- Create a yearly application system for the allocation of the environmental justice capacity limitation, in a way that considers both carbon impact and equity.
- Create resources to help define eligibility for the additional incentive amounts created under the Act, in particular where those are geographically defined.
- Clarify the definition of certain key terms in the Act, such as "financial benefit" and "reasonable cause," that will be of key significance for participants in a tax equity transfer market and for developers generally.
- In general, clarify the application of certain rules related to incentives, transfer of credits, and recapture events to promote certainty and reduce risk for both developers and buyers of tax credits.