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SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-49 and Notice 2022-50)
Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
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Re: Request for Comments on Regulatory Implementation of the Inflation Reduction Act and Energy Community Requirements Pursuant to Notice 2022-51

Dear Ms. Batchelder and Mr. Paul:

NextEra Energy, Inc. ("NextEra") appreciates the opportunity to respond to the Internal Revenue Service's request for comments regarding the Inflation Reduction Act ("IRA") pursuant to Notice 2022-51.

I. Background

The Treasury Department and the Internal Revenue Service ("IRS") plan to issue guidance regarding several sections, including Section 45, of the Internal Revenue Code, as amended or added by Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022.

Treasury and the IRS have issued Notice 2022-51 (the "Notice"), requesting comments on general as well as specific questions pertaining to several provisions, including the energy-community requirements for increased or bonus credit. In response to the Notice, NextEra submits the following responses concerning questions about the energy-community provisions.

II. Questions Raised by the IRS

(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?

Regarding the term "Located in:" Where a single project straddles a census tract or MSA/non-MSA boundary, such that some turbines or energy blocks fall inside, and others outside the applicable boundary, the single project should be treated as located in an energy community. Applying different PTC rates within the project would be extremely challenging administratively. IRS Notice 2013-29 (as modified by subsequent notices) treats multiple facilities that are operated as part of a single project as a single facility for purposes of section 45, and it is important to continue to follow that approach for energy communities. NextEra recommends the use of the "single project" concept rather than the Enterprise Zone rules to preserve consistency across the renewable energy tax rules.

Timing considerations: Whether a project is located in an energy community should be tested as of the date of a facility's start of construction within the meaning of IRS Notice 2013-29 (as modified by subsequent notices), or the facility's commercial operation date, at the taxpayer's election. This ensures that taxpayers who are incentivized to construct a facility based on energy community qualification do not then lose that incentive as a result of post-start-of-construction changes in energy community qualification (e.g., as a result of changes in unemployment rates). As an alternative, taxpayers should be entitled to choose to use a facility's commercial operation date. This allows events between start of construction and COD that are intended to qualify an energy community (e.g., coal generation retirement) to be captured for a project.

(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?

NextEra believes that the following areas need clarification: (1) the location of qualified facilities within a brownfield site, (2) how to measure the requirement that being located in a brownfield site complicates redevelopment within the meaning of §101(39)(A), (3) how to apply the apparent exclusion of petroleum-contaminated brownfields from the IRA, and (4) the process concerning how a taxpayer should make the determination that its qualified facility is located in a brownfield site.

(1) Location: Clarification is needed for the geographic boundaries of a brownfield site to provide guidance on situations where a taxpayer locates wind turbines or solar blocks in a manner that avoids contamination within a brownfield site. NextEra recommends a rule providing that, if any portion of a taxpayer's owned or leased parcel of land is (a) located within the permitted or licensed boundary of the qualified facility or is otherwise necessary for the operation and maintenance of the qualified facility, and (b) includes, is adjacent to, or contiguous with a brownfield site, then the entire qualified facility shall be treated as being located in an energy community for this purpose.

(2) Complication of redevelopment: To provide an objective and administrable standard for whether contamination on a given site has complicated redevelopment of that site, NextEra recommends clarifying that where such contamination caused the taxpayer to incur costs or extend the time required

to develop a project, the property can be considered a "brownfield site" for purposes of section 45(b)(11)(B)(i).

(3) Petroleum exclusion: Clarification is required on the extent to which contaminants resulting from chemicals mixed with or added to petroleum may cause a qualified facility to be located in a brownfield site. Environmental Protection Agency ("EPA") interprets the phrase "petroleum, including crude oil or any fraction thereof," — which is excluded from both the "hazardous substance" and "pollutant or contaminant" definitions — to include crude oil, crude oil fractions, and refined petroleum fractions. *See* EPA General Counsel, "Scope of the CERCLA Petroleum Exclusion," p. 7 (July 31, 1987); *see* "Specific substances excluded under CERCLA petroleum exclusion," www.epa.gov ("Petroleum Exclusion Guidance").

As a result, according to EPA, petroleum includes hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process. *See* "Petroleum Exclusion Guidance." This includes indigenous hazardous substances, the levels of which are increased as a normal part of the refining process. *Id.*

Substances that are added to petroleum or that increase in concentration as a result of contamination of the petroleum during use, however, are not considered part of the petroleum, and are therefore regulated under CERCLA. *Id.* For example, releases of oils that have had hazardous substances added to them subsequent to the petroleum refining process are not excluded from CERCLA regulation. *Id.* In addition, some oils are regulated under CERCLA because they are specifically listed. For example, 40 CFR 302.4 specifically lists a number of waste oils and their reportable quantities (RQs). *Id.* If these waste oils are released in quantities equal to or greater than their RQs, the release must be reported and the oils may be regulated under CERCLA. *Id.*

(4) Process for determining whether a qualified facility is in a brownfield site: Clarification is needed as to how a taxpayer should determine that its project is located on a brownfield site. NextEra recommends a rule providing that a taxpayer may designate a site as a "brownfield site" within the meaning of Section 45(b)(11)(B)(i) based on the taxpayer's evaluation of a site assessment conducted by an "environmental professional" as defined by EPA guidance, EPA-560-F-17-191.

This is appropriate because, the IRA, CERCLA, and corresponding EPA guidance concerning brownfields do not require that an agency (*e.g.*, EPA) declare a property to be a brownfield site before it can be considered a brownfield. A taxpayer can hire an environmental professional to conduct a site assessment to determine if the property is a brownfield. "Assessing Brownfield Sites," www.epa.gov.

There is precedent for such an action: for other tax provisions, the IRS will similarly allow a taxpayer to hire a third-party professional to determine whether certain requirements are met before the taxpayer can claim a credit. *See, e.g.,* 26 C.F.R. § 1.45Q-2(d)(2)(ii) (stating that a taxpayer must provide "an attestation" from a third-party engineer in order to satisfy a requirement regarding the credit for carbon oxide sequestration); 26 C.F.R. § 1.43-3(a) (stating that a petroleum engineer must certify that an enhanced oil recovery project meets the requirements to claim the enhanced oil recovery credit).

(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)?

NextEra recommends use of the definitions employed by the United States Office of Management and Budget and the Bureau of Labor Statistics (BLS). This data is readily available for all relevant time periods.

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?

Direct employment test: The BLS collects and publishes industry data that classifies industries based on North American Industry Classification System ("NAICS") codes and permits MSA-level measurement of employment[1] in industries where their employees would satisfy the "direct employment" statutory requirement. A key challenge with taxpayer use of this data is the common omission of employment totals to preserve confidentiality for certain employers. This results in both urban MSAs and rural non-MSAs incorrectly appearing to fail the 0.17% standard on the basis of public data. [2]

NextEra recommends that the IRS work with the BLS to publish a list of qualifying MSA and non-MSAs based on IRS examination of confidential BLS data. If there are administrative barriers to the IRS accessing the confidential BLS data, as an alternative it could use Census data from the County Business Patterns dataset. The Census Bureau manages confidentiality by limiting data omission and in most cases instead introducing random noise into the NAICS data release. This creates some possibility for error, but the errors are not likely to be significant over a series of measurements across different years for a given MSA.[3]

For whatever data source is chosen, NextEra recommends dividing the number of employees designated as falling within the list of NAICS codes below by the total employment within an MSA or non-MSA consisting of employment for all NAICS codes for this purpose.

Based on NextEra's evaluation of NAICS codes, its recommendation is that all employees classified under the following codes be treated as reflecting direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas for purposes of the statute. Taxpayers may be able to demonstrate additional qualifying employment not falling within these NAICS codes, but all employment in these NAICS codes should be deemed qualifying direct employment.

[1] BLS data is provided at the MSA level. For non-MSAs, BLS data must be aggregated across counties comprising the non-MSA.

[2] *See* https://www.incontext.indiana.edu/2020/jan-feb/article2.asp for a discussion of the problem.

[3] See https://www2.census.gov/programs-surveys/cbp/technical-documentation/methodology/noise-data.pdf for a description of the Census Bureau's methodology for the introduction of noise. As an example of where Census data is helpful, dividing BLS-published employment in the NAICS codes below by total employment for the Albuquerque, NM MSA in 2020 produces 0.12% direct employment (failing the 0.17% requirement), but use of County Business Patterns data yields 0.27% (passing the 0.17% requirement).

NAICS Code	Rationale for Inclusion
Oil and Gas Extraction (NAICS 2111)	Core NAICS code for extraction of oil and natural gas
Coal Mining (NAICS 2121)	Core NAICS code for extraction of coal
Drilling Oil and Gas Wells (NAICS 213111)	Necessary for extraction of oil and natural gas
Support Activities for Oil and Gas Operations (NAICS 213112)	Necessary for extraction of oil and natural gas
Support Activities for Coal Mining (NAICS 213113)	Necessary for extraction of coal
Natural gas distribution (NAICS 221210)	Necessary for transport of natural gas
Oil and gas pipeline and related structures construction (NAICS 237120)	Necessary for transport of oil and natural gas
Petroleum Refineries (NAICS 324110)	Necessarily entails processing of oil
Petrochemical manufacturing (NAICS 325110)	Necessarily entails processing of oil
Other Petroleum and Coal Products Manufacturing (NAICS 32419)	Necessarily entails processing of oil and coal
Mining and Oil and Gas Field Machinery Manufacturing (NAICS 33313)	Necessary for extraction of oil and natural gas
Petroleum and Petroleum Products Merchant Wholesalers (NAICS 4247)	Necessary for distribution of oil; also involves bulk storage facilities that store significant amounts of oil
Pipeline Transportation of Crude Oil (NAICS 4861)	Necessary for distribution of oil
Pipeline Transportation of Natural Gas (NAICS 4862)	Necessary for distribution of natural gas
Pipeline Transportation of Refined Petroleum Products (486910)	Related to processing and distribution of oil

Unemployment Test: The BLS's local area unemployment statistics are the principal source of government unemployment data, and it would be appropriate to use BLS's data here. There is ambiguity in the statutory reference to an MSA which "has an unemployment rate at or above the national average unemployment rate for the previous year" in that it is unclear both whether the MSA's unemployment is measured for the same "previous year" period that national unemployment is measured, and which testing period is chosen under the "previous year" standard.

Our recommendation is to measure unemployment in an MSA over the same time period that unemployment is measured nationally. To do otherwise, e.g. by comparing a point estimate of MSA unemployment in the month of a project's COD to a prior-year national unemployment measure, would cause national variations in unemployment over the measurement period (e.g., through entry and exit from recessions) to swamp regional variations in unemployment intended to be captured by the statute.

To apply the "previous year" standard for measuring MSA/non-MSA and national unemployment rates, a facility's start of construction date or commercial operation date, at a taxpayer's election, is the appropriate time for the taxpayer to test unemployment rate for the previous year, for the reasons set forth in the response to Question (1) above under "Timing Considerations." For ease of administration and predictability, and to ensure that a given MSA/non-MSA's status as an energy community does not change within a given tax year, NextEra recommends that the calendar year prior to the testing date be used to measure both MSA/non-MSA-related unemployment and national average unemployment.

(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)?

For retired coal plans, NextEra recommends use of the Energy Information Administration (EIA) database, available at https://www.eia.gov/electricity/data/eia860m/. For retired coal mines, NextEra recommends use of the Mine Safety and Health Administration (MHSA) database at https://www.msha.gov/mine-data-retrieval-system as supplemented by coal mine boundaries maintained by the U.S. Office of Surface Mining Reclamation and Enforcement at US Office of Surface Mining Reclamation and Enforcement at https://geomine.osmre.gov/. These data sources are not necessarily complete, and it is important to allow taxpayers a path to demonstrating that their qualified facility is located in an area with a qualifying mine or coal-fired generation unit independent of a government designation.

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)?

Coal mine closure: A mine operator's satisfaction of state or federal regulations governing the revocation of the right to operate the mine should establish that the coal mine was closed. In addition, the operator's filing of an application with the relevant state or federal regulators to retire the mine within a year will establish that the unit has been retired. Forms sufficient to establish closure shall include a federal mine-closure notice sent to the Department of Labor per 30 C.F.R. § 75.1204 (or an equivalent notice sent to a state agency).

Coal-fired generation retirement: A coal-fired electric generation unit operator's satisfaction of state or federal regulations governing the revocation of the right to operate an electric generating unit will establish that the unit was retired. In addition, the operator's filing of an application with the relevant state or federal regulators to retire the unit within a year should be sufficient to establish that the unit has been retired. Forms sufficient to establish retirement should include data sent to the EIA concerning monthly electric generator inventory (collected in Form EIA-860(M)).

For both closed coal mines and retired coal-fired generation units, to cover situations where the above documentation is unavailable or has not been timely prepared, NextEra recommends a safe harbor providing that, if a mine has ceased coal production or a coal-fired generation unit has ceased electricity production for twelve uninterrupted months, the mine will be presumed to be closed or the electric generation unit deemed retired as of the date of the commencement of the cessation.

(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?

NextEra has no comments on potential changes in the definition of brownfield sites. We recognize that the boundaries of MSAs and census tracts may shift over time, and for ease of administration, propose basing qualification for the enhanced credit on the boundaries of the relevant area either in the project's start of construction/COD year or in the year in which employment or coal closure/retirement is being tested. For example, a 2023 COD project with 2022 start of construction is located in an MSA that has changed in boundaries over time. Based on the 2021 MSA boundaries, it does not qualify for the 0.17% employment threshold in any post-2009 year, but based on pre-2021 MSA boundaries it crosses the 0.17% threshold in several years. We would recommend allowing the site to qualify for the enhanced credit to avoid the burden and complexity associated with applying 2021 MSA boundaries to prior years.

(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?

Determining local tax revenues: NextEra recommends that the Treasury Department and IRS consider publicly available tax records for municipalities within a statistical area (e.g., property tax records and oil-and-gas severance tax records) to establish that 25 percent or greater local tax revenues are related to the extraction, processing, transport, or storage of coal, oil, or natural gas.

Sources of information: Property tax records are a source of information that should be used to make this determination. The Treasury Department and IRS should also consider oil-and-gas severance tax records (which can include oil and gas conservation fees, levies, assessments, or value taxes on oil and gas production).

Tax revenues that should be considered: NextEra recommends that the Treasury Department and IRS consider the following tax revenues: (1) property, (2) oil-and-gas severance, and (3) coal-excise taxes.

Issues regarding the unavailability of consistent public tax data: Consideration should be given to the unavailability of consistent public data for some of these types of taxes. Thus, to ensure accuracy, the IRS should allow taxpayers to use the category of taxes (e.g., property tax) for which they can find the most consistent public information when determining whether a statistical area has or had 25 percent or greater local tax revenues related to oil and gas processing.

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

NextEra recommends that the regulations should clearly state that the size of a closed "coal mine" or retired "coal-fired electric generation unit" is not relevant for purposes of testing enhanced credit eligibility. Further, the credit should apply to any retired subsets of larger mines or generation so long as those subsets, viewed in isolation, are sufficient to extract coal or generate electricity.