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IRS Publishes Guidance on “Energy Community” Tax Credit Bonus

IRS Notice 2023-29 (the “Notice”) provides initial guidance on “energy community” tax credit bonuses. The Notice describes certain relevant rules and concepts that the Treasury and IRS intend to include in forthcoming proposed regulations. The Notice provides a framework for determining: 1) whether a location is within an “energy community”, and 2) when a project is considered to be within a community for purposes of an applicable tax credit bonus. Taxpayers may rely upon the Notice until the regulations are issued.

BACKGROUND

The Inflation Reduction Act of 2022 (the “IRA”) introduced the energy community concept into the Internal Revenue Code. The Notice identifies four tax credits eligible for an energy community tax credit bonus: section 45 (production tax credit or “PTC”), section 45Y (clean electricity PTC), section 48 (investment tax credit or “ITC”), and section 48E (clean electricity ITC).¹ Collectively the Notice refers to a qualifying project as an “EC Project.”²

In the case of a project eligible for the PTC, the credit amount is increased by up to 10 percent (if the prevailing wage and apprenticeship requirements are satisfied), and in the case of a project eligible for the ITC, the energy percentage is increased by up to 10 percentage points (if the prevailing wage and apprenticeship requirements are satisfied). Projects that qualify for the new technology-neutral clean energy PTC under section 45Y or the clean electricity ITC under section 48E are also eligible for energy community bonus credits.

ENERGY COMMUNITY CATEGORIES

There are three categories of energy communities: (1) Brownfields, (2) Statistical Areas, and (3) Coal Closure tracts. Each category has its own qualification criteria. Energy communities collectively cover a large cross-section of the United States.



Brownfields

Brownfield sites are defined as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of potential presence of a hazardous substance, pollutant, or containment” and certain “mine-scarred land.” The Notice provides a safe harbor for a site that is not described in 42 U.S.C. § 9601(39)(B)³ and satisfies at least one of the following three conditions:

- (a) The site was previously assessed through federal, state, territory, or federally recognized Indian tribal brownfield resources as meeting the definition of a brownfield site under 42 U.S.C. § 9601(39)(A);⁴
- (b) An ASTM E1903 Phase II Environmental Site Assessment has been completed with respect to the site and confirmed the presence of a hazardous substance, or a pollutant or contaminant on the site; or
- (c) For projects with a nameplate capacity of not greater than 5MW (AC), an ASTM E 1527 Phase I Environmental Site Assessment has been completed with respect to the site.

Statistical Areas

The term Statistical Areas include a metropolitan statistical area (an “MSA”) or a non-MSA that (i) has (or had at any time after December 31, 2009) 0.17 percent or greater direct employment (the “Fossil Fuel Employment”) or 25 percent or greater local tax revenues (the “Fossil Fuel Tax Revenue”) related to the extraction, processing, transport, or storage of coal, oil, or natural gas and (ii) has an unemployment rate at or above the national average unemployment rate for the previous year.

MSAs are determined using standards determined by the Office of Management and Budget (“OMB”), specifically MSA delineations provided by OMB NO. 19-03 (April 18, 2018). See [here](#) for delineations of MSAs and non-MSAs that are used for all purposes of this Notice. The Fossil Fuel Employment will be determined using the 2017 North American Industry Classification System (NAIC) industry codes. A list of MSAs and non-MSAs that meet the Fossil Fuel Employment test is available [here](#).⁵

The Treasury and IRS intend to update the list of qualifying Statistical Areas annually, and updates generally will be issued annually in May.

Coal Closure Areas

Coal Closure Areas are tracts (or adjoining tracts) that had either a coal mine closed after 1999 or a coal-fired electric generating unit retirement after 2009. Census tracts are defined as “relatively permanent small-area geographic divisions of a county or statistically equivalent entity defined for the tabulation and presentation of data from the decennial census and selected other statistical programs.” For purposes of determining whether a census tract is an energy community, the term census tract is defined and delineated by the Census Bureau for purposes of the 2020 Decennial Census (as described in 83 FR 56277), which is available [here](#). A list of census tracts in the third category is available [here](#).

A coal mine is treated as having closed if it is a surface or underground mine that has ever had for any period of time after December 31, 1999 a mine status listed as abandoned or abandoned and sealed by the Department of Labor’s Mine Safety and Health Administration in the Mine Data Retrieval System (MDRS). The term retired coal-fired electric generating unit means an electric generating unit classified as retired at any time (post-2009) by the Energy Information Administration (EIA) of the Department of Energy in the Preliminary Monthly Electric Generator Inventory (EIA Form 860M) or the Electric Generator Inventory (EIA Form 860).

TIME FOR DETERMINATION



The Notice provides needed clarity regarding when energy community status is relevant. While the Brownfields and Coal Closure categories should be static, the Statistical Area category could change from year to year because eligibility is determined in part upon prior year unemployment statistics exceeding a minimum threshold.⁶ For ITC purposes, the energy community definition is generally determined by reference to the date the project in question is placed in service. This could be one or more years after the project starts. For PTC purposes, the project must generally be located in an energy community each year of the project’s 10-year credit period. Thus, relying on the Statistical Area category could be problematic, especially for claiming the PTC.

The Notice alleviates this uncertainty by providing a safe harbor that fixes the relevant energy community definition for the increased ITC or PTC based upon the beginning of construction (“BoC”) date after January 1, 2023. Thus, a project will continue to be considered as having satisfied the energy community bonus requirement for the duration of the credit period for the PTC and clean electricity PTC or on the placed-in-service date for the ITC and clean electricity ITC, based upon its qualification when the BoC criteria are satisfied. The safe harbor, however, is available only to projects that begin construction after January 1, 2023.

The Notice treats a project as located in or placed in service within an energy community if 50 percent or more of the project’s nameplate capacity is in an energy community. This percentage is determined by dividing the nameplate capacity of the project’s energy-generating units located in an energy community by the total nameplate capacity of all the energy-generating units of the energy project.

In the case of offshore wind projects that have nameplate capacity, all the nameplate capacity of the project is attributed to the land-based power conditioning equipment (e.g., onshore substation) that conditions energy generated offshore for transmission, distribution or use and that is closest to the point of interconnection. Although this rule is taxpayer friendly, developers should note that where an offshore wind project has multiple power conditioning equipment, only the one that is located closest to the point of interconnection will be used to determine whether the energy project is located in or placed in service within an energy community.

If a project does not have nameplate capacity, such as a biogas project, the Notice treats such energy project as located in or placed in service within an energy community if 50 percent or more of its square footage is in an area that qualifies as an energy community. This percentage is determined by dividing the square footage of the energy project that is located in an energy community by the total square footage of the project.

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¹ All references to sections and Code are to the Internal Revenue Code of 1986 (the "Code"). Sections 45Y and 48E apply to qualifying property placed in service after December 31, 2024.

² Although not mentioned by the Notice, section 48C (qualifying advanced energy project credit) ring fences a portion of its available credits based upon part of the energy community definition. See section 48C(e)(2)(A) (referencing section 45(b)(11)(B)(iii)).

³ This is the portion of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) defining "brownfield site."

⁴ Potential site lists may be found under the category of Brownfields Properties on EPA's Cleanups in My Community webpage or on similar webpages maintained by states, territories, or for federally recognized Indian tribes. See <https://java.epa.gov/acrespublish/stvrp/>.

⁵ Due to a lack of readily available information on the Fossil Fuel Tax Revenue, the Notice does not provide guidance on calculating the Fossil Fuel Tax Revenue and instead invites public comments on various aspects of calculating the Fossil Fuel Tax Revenue.

⁶ The risk is magnified because the official statistics will not be known until employment statistics are released in May of the following year.