

Treasury Updates Guidance Issued Last Week on 'Energy Community' Tax Credit Adders

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Summary

On April 4, 2023, the Department of the Treasury and the Internal Revenue Service (IRS) released guidance on the “energy community” tax credit adders (EC Adders) that were added under the Inflation Reduction Act (IRA). The guidance is in the form of IRS Notice 2023-29 (Notice).

Treasury and the IRS have already updated the Notice posted to the IRS website to limit the generous safe harbor provided in the Notice to determine the location of a project based on when construction began on the project, as further described in this client alert.

The Notice provides clarity on a number of open questions, identifies numerous relevant data sets and provides appendices that list eligible areas for certain categories of eligibility. Treasury and IRS also partnered with the Interagency Working Group on Energy Communities to provide a mapping tool to assist stakeholders in confirming whether a project qualifies based on location.

Treasury and the IRS state within the Notice that official regulations are anticipated to be issued in the future and taxpayers may rely on the Notice until such regulations are issued.

Treasury has already made one substantive update to the Notice since it was originally published. **The version of the Notice originally published has been updated and replaced with a new version that makes the beginning of construction safe harbor for determining the location of a project within an energy community only available to projects for which construction begins on or after January 1, 2023.** Treasury officials had signaled that the omission of the January 1, 2023, cutoff was an inadvertent omission in the original publication. Several other typos were corrected in the updated version of the Notice, but the only substantive change is that projects that began construction prior to 2023 are no longer eligible to rely on their location as of the beginning of construction for purposes of determining the location of the project throughout its entire credit period. A comparison of the original version and the new version can be found [here](#).

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Background

The IRA created a host of new incentives with respect to the energy transition. One of the policy goals underlying the new IRA incentives is ameliorating the potential negative impact of the energy transition on communities that historically relied on the coal, oil and gas industries. The EC Adders are one of the vehicles utilized by the IRA to accomplish this goal. The idea is to promote the siting of new energy transition projects in these areas so as to spur economic activity from the energy transition that can at least partially replace the declines in economic activity tied to the coal, oil and gas industries.

The Notice groups the various locations that can qualify a project for the EC Adders into three categories:

- **Brownfield Category:** Under Section 45(b)(11)(B)(i) of the Code, the Brownfield Category is defined by direct citations to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).
- **Statistical Area Category:** A metropolitan statistical area (MSA) or non-metropolitan statistical area (NMSA) which (i) has, or at any time during the period beginning after December 31, 2009, had, either (a) 0.17% or greater direct employment related to the extraction, processing, transport or storage of coal, oil or natural gas or (b) 25% or greater local tax revenues 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.
- **Coal Closure Category:** Either (i) a census tract in which, after December 31, 1999, a coal mine as closed, or an adjoining census tract, or (ii) a census tract in which, after December 31, 2009, a coal-fired electric generating unit has been retired, or an adjoining census tract.

Brownfield Category

Given the specific cross-references to the CERCLA statutes, it is unsurprising that the Notice does not provide any expansion or restriction of these references. The referenced sites are those where the expansion, redevelopment or reuse of the site must be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant, or are mine-scarred sites, and that are not on a list of specifically excluded sites.

The Notice provides a safe harbor for the Brownfield Category if a site is not excluded as a result of 42 U.S.C. § 9601(39)(B) and one of the following three conditions is satisfied:

- 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).
- An ASTM E1903 Phase II Environmental Site Assessment has been completed with respect to the site confirming the presence on the site of a hazardous substance as defined under 42 U.S.C. § 9601(14) or a pollutant or contaminant as defined under 42 U.S.C. § 9601(33).
- For projects with a nameplate capacity not greater than 5 megawatts (MW) alternating current (AC), an ASTM E1527 Phase I Environmental Site Assessment has been completed with respect to the site.

With respect to the final potential condition for projects that are 5 MW AC or smaller, the guidance seems incomplete as there is no indication of what findings must be contained in the Phase I ESA. Presumably, the Notice will be supplemented so as to require the Phase I ESA to have found some indicia that the site would meet the definition of a brownfield site under 42 U.S.C. § 9601(39)(A).

Over time, the vast majority of energy communities based on the Statistical Area Category or Coal Closure Category will be catalogued and published by the IRS in annual updates. This is not the case for the Brownfield

Category, and thus it seems to be the category that is most likely to require significant analysis in the future given the need for specialized advisors and the presence of a list of exceptions to what most developers would commonly think of as a “brownfield” site.

Statistical Area Category

The Statistical Area Category is perhaps the most data-intensive of the categories for EC Adders and the Notice provides several helpful datasets for reference and promises more in the future.

First, the Notice attaches a list of MSAs and NMSAs.

Second, the Notice utilizes the 2017 North American Industry Classification System (NAICS) to identify eight NAICS codes that qualify as employment related to the extraction, processing, transport or storage of coal, oil or natural gas. The Notice attaches a list of MSAs and NMSAs that have the requisite amount of such employment. Certain NAICS codes were not included on the list that were widely expected to be included. Several industry associations and large developers have already committed to advocating for additional NAICS codes to be added to the list of eligible NAICS codes.

Third, the Notice indicates that Local Area Unemployment Statistics annual data from the Bureau of Labor Statistics will be utilized for determining the unemployment rate for the previous year. Since this data is generally released in April of each year, Treasury indicates that it will annually publish each May a list of MSAs and NMSAs with the requisite amount of unemployment in the previous year and such MSAs and NMSAs will remain the correct list until the May of the following year when a new list is published by Treasury. The Notice explains that this approach will be utilized in light of the lag in publication of the underlying data. Once IRS publishes the list of which MSAs and NMSAs satisfy the unemployment requirement, taxpayers should have fairly high certainty as to eligibility for the Statistical Area Category to the extent based on the employment-related method of eligibility.

Finally, with respect to eligibility based on local tax collections, the Notice states that this method of eligibility has presented data challenges because such data is not readily available from public sources. The Notice requests public comments addressing possible data sources for this method of eligibility.

Coal Closure Category

The Coal Closure Category is defined by census tracts. The Notice indicates that census tracts from the 2020 Census will be utilized and attaches a list of eligible census tracts.

The Notice clarifies that census tracts are considered “adjoining” if they touch at any single point. The Notice states that there are many cases in which multiple census tracts meet at a single point (e.g. like slices of pizza that meet only at the center point).

The Notice defines “closed coal mine” as a coal mine classified as a surface or underground mine that has ever had, for any period of time, since December 31, 1999, a mine status of “abandoned” or “abandoned and sealed” by the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA) in the Mine Data Retrieval System. Certain coal mines are excluded from the list of eligible census tracts attached to the Notice due to having “irregular location information” relating to the latitude and longitude of the coal mine not placing the mine in a listed county and state (e.g., due to a single set of locational coordinates that may represent a single entrance not being representative of the location of the entire underground coal mine) or extending only to the

tenths place. If a taxpayer is able to have MSHA verify corrections to such data, the IRS will include the correction in an annual ministerial notice.

The Notice defines “retired coal-fired electric generating unit” as an electric generating unit classified as retired at any time since December 31, 2009, by the U.S. Energy Information Administration (EIA) of the U.S. Department of Energy in the Preliminary Monthly Electric Generator Inventory (EIA Form 860M) or the Electric Generator Inventory (EIA Form 860), and was characterized as a coal-fired electric generating unit at the time of being listed as retired. To be characterized as a coal-fired electric generating unit (i) for 2010-2013, it must be listed in the EIA Form 860 data as having a primary fuel source of anthracite coal, bituminous coal, lignite coal, refined coal, coal-derived synthesis gas, subbituminous coal or waste/other coal, and (ii) for 2014-2022, it must be listed in the EIA Form 860M or 860 data as having a technology of conventional steam coal or coal integrated gasification combined cycle. Similar to coal mines, the IRS will correct its list of eligible census tracts if the EIA addresses taxpayer-identified errors in the EIA information. Finally, the Notice clarifies that only a single unit needs to be retired in a plant that contains multiple units for the census tract to be considered eligible.

Timing

The statutes for different tax credits contain different language regarding the timing of qualification. Facilities that generate investment tax credits under Section 48 or 48E are required to be placed in service within an energy community to be eligible for the EC Adders.

Facilities that generate production tax credits under Section 45 or 45Y are required to be located within an energy community to be eligible for the EC Adders. The Notice makes clear that this is tested on an annual basis for production tax credit (PTC)-generating facilities, which means a facility could cease to be located within an energy community prior to the expiration of the 10-year PTC period. For example, the employment statistics with respect to an MSA or NMSA may change over time.

However, the Notice provides what is effectively a safe harbor for certain projects based on the location of the project at the time of beginning of construction. Only projects that began construction on or after January 1, 2023, are eligible. Under this safe harbor, a project that is located in an energy community upon beginning of construction will be deemed to remain in an energy community throughout its entire credit period. Beginning of construction is analyzed in accordance with the historic IRS framework for beginning of construction analysis (e.g., requiring either paying or incurring 5% of project costs or undertaking “physical work of a significant nature”).

Project Location

In recognition that some projects may span multiple MSAs, NMSAs or census tracts, the Notice provides guidance as to determining the location of a project.

For projects that generate electricity, a project will qualify if at least one half of the nameplate capacity of the project is located in an energy community. For projects that convert direct current (DC) to AC, the DC nameplate capacity is utilized. For other projects, the AC nameplate capacity is utilized.

For projects that do not generate electricity, such as biogas projects, a project will qualify if at least one half of the square footage of the project is located in an energy community.

For energy storage devices, at least one half of the device’s usable energy capacity (MWh), which is the electric storage capacity (MW) multiplied by the duration hours of that storage capacity (h).

For offshore windfarms with no generation units in a census tract, MSA or NMSA, then the entire nameplate capacity is attributed to the land-based power conditioning equipment that conditions the energy generated by the project for transmission, distribution or use and that is closest to the point of interconnection.

The Notice references general taxpayer recordkeeping requirements without providing specificity as to any particular data that must be retained.

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