

INSIGHTS

## Treasury Department and IRS Release Guidance on the Energy Community Bonus Credit

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The energy community bonus credit (the EC Bonus), which was introduced by the Inflation Reduction Act of 2022 (the IRA), provides a bonus credit for projects located in Energy Communities. The EC Bonus is available for projects that qualify for clean energy tax credits under Internal Revenue Code Section 45 (production tax credit or PTC), Section 45Y (clean electricity production credit or CEPC), Section 48 (investment tax credit or ITC), or Section 48E (clean electricity investment credit or CEIC).

On April 4, 2023, the Treasury Department and Internal Revenue Service (IRS) provided initial guidance under the EC Bonus in [Notice 2023-29](#) (the Notice). The Notice provides rules, guidance, and clarifications with respect to the EC Bonus that the Treasury Department and IRS intend to include in future proposed regulations. In addition, along with the Notice, various data and additional resources were released to help taxpayers determine whether particular project sites are located in Energy Communities.

The proposed regulations are expected to apply to taxable years ending after April 4, 2023. However, until these proposed regulations are issued, taxpayers may rely on the substantive guidance provided in the Notice.

### The EC Bonus under the IRA

Under the IRA, a project that is eligible for the PTC or CEPC and is located in an Energy Community will receive a 10 percent increase to the base credit amount.<sup>[1]</sup> A project, including an energy storage project, that is eligible for the ITC or CEIC and is placed in service (as determined for federal income tax purposes) within an Energy Community will receive a 10 percentage point increase to the applicable credit.<sup>[2]</sup>

The IRA defines an Energy Community as one of the following location types:

- a brownfield site, which means (1) 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 and (2) certain mine-scarred land but, in each case, excluding the categories of property described in 42 U.S.C. Section 9601(39)(B) (for example, a site that is subject to remediation, on the Superfund National Priorities List, or previously permitted for hazardous waste disposal or treatment) (the Brownfield Category);
- a metropolitan statistical area (MSA) or non-metropolitan statistical area (Non-MSA) that (1) has, or had at any time during or after 2010, at least 0.17 percent direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas (Fossil Fuel Activities) or at least 25 percent of local tax revenues related to such activities and (2) has an unemployment rate at or above the national average for the previous calendar year (the Statistical Area Category); or
- a census tract, or a directly adjoining census tract, in which (1) a coal mine closed during or after the year 2000 or (2) a coal-fired electric generating unit was retired during or after 2010 (the Coal Closure Category).

## **Definitional Guidance under the Notice**

### **Brownfield Category Safe Harbor**

The Notice provides that a brownfield site as defined under U.S.C. Section 9601(39)(A) (other than properties excluded under 42 U.S.C. Section 9601(39)(B)) will qualify as an Energy Community if (1) the brownfield site was previously determined by federal, state, territory, or federally recognized Indian tribal brownfield resources to qualify as a brownfield site as defined in 42 U.S.C. Section 9601(39)(A), (2) an ASTM E1903 Phase II Environmental Site Assessment confirmed that a hazardous substance, or a pollutant or contaminant, is present on the brownfield site, or (3) for a project with a nameplate capacity of 5 megawatts or less (determined in alternating current) on the site, an ASTM E1527 Phase I Environmental Site Assessment has been completed for the brownfield site.

### **Definitional Guidance under the Statistical Area Category**

- Distinguishing MSAs and Non-MSAs. The Notice provides that MSAs are groups of counties or county equivalents that are grouped according to standards determined by the Office of Management and Budget, which standards are updated every 10 years in connection with the U.S. census. After MSAs are delineated, counties outside of MSAs are grouped together as Non-MSAs by the U.S. Bureau of Labor Statistics (BLS). [Appendix A to the Notice](#) lists the MSAs and Non-MSAs used for purposes of the Notice.

- Determining if the Fossil Fuel Employment Threshold is Met. The Notice provides that, to determine the rate of direct employment related to Fossil Fuel Activities, a taxpayer must divide (1) the number of individuals employed in the industries identified by certain 2017 North American Industry Classification System (NAICS) codes [\[3\]](#) in the MSA or Non-MSA, by (2) the total number of individuals employed in the MSA or Non-MSA. [Appendix B to the Notice](#) lists the MSAs and Non-MSAs (by county) that have, or had at any time during or after 2010, a direct employment rate related to Fossil Fuel Activities of at least 0.17 percent and therefore meet the Fossil Fuel Activities employment threshold.
- No Guidance for Determining MSA and Non-MSA Tax Revenue. The Notice does not provide guidance for determining whether a MSA or Non-MSA has, or had at any time during or after 2010, at least 25 percent of local tax revenues related to Fossil Fuel Activities. The Notice recognizes that there are numerous challenges inherent in making this determination and therefore requests public comments addressing the possible data sources, revenue categories, and procedures to be used for making the determination.
- Determining the Unemployment Rate. BLS unemployment data will be used for purposes of determining the rate of unemployment for an MSA or Non-MSA. Unemployment data for 2022 is not yet available. Unemployment data for each calendar year is expected to be released in April of the following calendar year, and the Treasury Department and IRS intend to provide a list of the MSAs and Non-MSAs that have an unemployment rate at or above the national average for each calendar year in May of the following calendar year.

#### **Definitional Guidance under the Coal Closure Category**

- Scope of Closed Coal Mine and Retired Coal-Fired Electric Generating Unit. A closed coal mine is a surface or underground mine that, for any period of time during or after the year 2000, had a mine status of abandoned, or abandoned and sealed, by the Mine Safety and Health Administration of the Department of Labor (MSHA). A retired coal-fired electric generating unit means a generation unit that, at any time during or after the year 2000, was classified as retired by the Energy Information Administration of the Department of Energy (EIA) and is designated as a coal-fired unit within the EIA's data. Coal mines and coal-fired electric generation facilities with irregular location information generally are excluded from the Coal Closure Category, although taxpayers may provide evidence to the MSHA or EIA, as applicable, to correct the irregular information.
- Determining Census Tracts and Adjoining Census Tracts. The Notice provides that the Coal Closure Category will utilize census tracts as delineated for purposes of the 2020 U.S. census. [Appendix C to this Notice](#) lists census tracts that are in the Coal Closure Category. A census tract is deemed to be directly adjoining to a tract included in Appendix C if the boundaries of the two tracts touch at any point. It is currently unclear

whether the Coal Closure Category will utilize updated census tracts in the future, for instance, in connection with the 2030 U.S. census.

### **Mapping Tool**

In addition to the Appendices described above, the Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization released a [mapping tool](#) to help taxpayers identify (1) the census tracts and directly adjoining tracts that are in the Coal Closure Category and (2) MSAs and Non-MSAs that have had at least 0.17 percent direct employment related to Fossil Fuel Activities during or after 2010. [4] The mapping tool has been provided for informational purposes, only, and may not be relied upon by taxpayers.

### **Determining Whether the Location Requirement is Met**

#### **Geographical Location Rules**

The Notice provides that an energy generation project or energy storage project will be treated as located in or placed in service within an Energy Community if the project satisfies a test based on nameplate capacity (Nameplate Capacity Test). All other projects (including, for instance, biogas projects eligible for the ITC) must satisfy a test based on geographical footprint (the Footprint Test).

Under the Nameplate Capacity Test, a project is considered located in or placed in service within an Energy Community if 50 percent or more of the project's nameplate capacity is attributable to energy generating units or energy storage devices that are located in an area that qualifies as an Energy Community. Nameplate capacity for an energy generating unit means the maximum electrical generating output, expressed in megawatts, that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer determined in a manner consistent with in 40 CFR Section 96.20. Nameplate capacity for an energy storage device means usable energy capacity expressed in megawatt hours.

For offshore projects that do not have an energy generation unit in a census tract, MSA, or non-MSA, the Nameplate Capacity Test is applied by attributing all of the project's nameplate capacity to the land-based power conditioning equipment that conditions energy generated by the project for transmission, distribution, or use and that is closest to the point of interconnection. The Notice provides an example with respect to an offshore wind project.

Under the Footprint Test, a project without a nameplate capacity is deemed to be 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.

#### **Testing Date Rules**

The Notice provides that, if a project is located in an Energy Community on the day on which construction begins, (1) for purposes of the PTC or CEPC, the location of the project will continue to be considered an Energy Community for the duration of the 10-year credit period or (2) for purposes of the ITC or CEIC, the location of the project will continue to be considered an Energy Community on the placed-in-service date (the BOC Test). For this purpose, the Notice adopts the beginning of construction standard contained in previous IRS notices, including (presumably) the continuity requirement.

The initial version of the Notice provided that the BOC Test is satisfied if the relevant project is located in an Energy Community on the date construction of the project begins, regardless of the year in which construction begins. A revised version of the Notice, released on April 10, 2023, however, limited the application of the BOC Test to projects for which construction begins on or after January 1, 2023.<sup>[5]</sup>

If a PTC- or CEPC-eligible project does not satisfy the BOC Test, it must satisfy the Nameplate Capacity Test or the Footprint Test to qualify for the EC Bonus for each taxable year of the project's 10-year credit period. For this purpose, a project will be treated as located in an Energy Community for a taxable year if it is located in an Energy Community during any part of the taxable year. If an ITC- or CEIC-eligible project does not satisfy the BOC Test, it must satisfy the Nameplate Capacity Test or the Footprint Test on the day the project is placed in service or else be ineligible for the entire EC Bonus.

In light of these rules, the sponsor or developer of a project that does not satisfy the BOC Test will lack certainty as to whether a PTC- or CEPC-eligible project would be eligible for the EC Bonus during each year of the 10-year credit period, or, in the case of an ITC- or CEIC-eligible project, whether the project would be eligible for the EC Bonus when placed in service. Projects seeking to claim the EC Bonus by inclusion in the Statistical Area Category that do not satisfy the BOC Test are expected to have the greatest uncertainty as to qualification for the EC Bonus given that the unemployment data for an MSA or Non-MSA can fluctuate from year to year and such data for any calendar year will not be released until the following calendar year.

### **Recordkeeping**

The Notice provides that a taxpayer claiming the EC Bonus must comply with the general recordkeeping requirements under Internal Revenue Code 6001 in order to substantiate that a project is eligible for the bonus. The Notice, however, does not explain how to apply these requirements, which are general in their application, to the various nuances of the EC Bonus.

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<sup>[1]</sup> The 10 percent increase is applied to the PTC or CEPC amount before the application of the 10 percent increase for projects that satisfy the domestic content requirements.

**[2]** If a project does not satisfy the prevailing wage requirements and/or the apprenticeship requirements (or is not exempt from these requirements), the EC Bonus is reduced to 2 percentage points. We discussed recent guidance under the prevailing wage requirements and the apprenticeship requirements [here](#).

**[3]** The relevant NAICS codes are:

NAICS code	Description
211	Oil and Gas Extraction
2121	Coal Mining
213111	Drilling Oil and Gas Wells
213112	Support Activities for Oil and Gas Operations
213113	Support Activities for Coal Mining
32411	Petroleum Refineries
4861	Pipeline Transportation of Crude Oil
4862	Pipeline Transportation of Natural Gas

**[4]** As noted above, unemployment rates for 2022 are not yet available and therefore taxpayers using the mapping tool will not be able to determine whether MSAs and Non-MSAs are properly included in the Statistical Area Category.

**[5]** We discussed the revised version of the Notice [here](#).