

Treasury and IRS Release Additional Guidance on Energy Community Enhancements Under IRA

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On June 15, the Treasury Department (Treasury) and the Internal Revenue Service (IRS) issued [Notice 2023-45](#) and [Notice 2023-47](#). Notice 2023-45 clarifies requirements for a brownfield site energy community safe harbor provided in [Notice 2023-29](#). Notice 2023-47 publishes lists of information that taxpayers may use to determine whether they meet certain requirements under the Statistical Area Category or the Coal Closure Category, each as described in [Notice 2023-29](#). The IRS also published [Frequently Asked Questions for Energy Communities](#) (FAQs) on June 15.

Notice 2023-29 provided rules for determining what constitutes an energy community, organized in three categories (the Brownfield Category, the Statistical Area Category, and the Coal Closure Category, each of which is described in our prior alert on [Notice 2023-29](#)). Treasury and the IRS intend to include the rules in forthcoming proposed regulations concerning energy communities. The regulations will apply to taxable years ending after April 4, 2023. Until the issuance of the proposed regulations, taxpayers may rely on the rules in Notice 2023-29, as modified by Notice 2023-45 and Notice 2023-47.

Notice 2023-45

Notice 2023-29 provided safe harbors pursuant to which a site will be included in the Brownfield Category if it is not described in the categories of property excluded from brownfield sites by 42 U.S.C. § 9601(39)(B). One safe harbor applied to projects with a nameplate capacity of 5MW AC or less for which an ASTM E1527 Phase I Environmental Site Assessment has been completed with respect to the site in accordance with the most current applicable version of the Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process of ASTM International.

Notice 2023-45 clarifies that a taxpayer would satisfy the safe harbor only if the Phase I Assessment identifies the presence or potential presence of a hazardous substance as defined under 42 U.S.C. § 9601(14) (hazardous substance), or a pollutant or contaminant as defined under 42 U.S.C. § 9601(33) (pollutant or contaminant).

- This clarification is not surprising. A safe harbor that applied to a project that completed a Phase I Assessment that did not identify a hazardous substance or a pollutant or contaminant could be viewed as inconsistent with the statutory intent of the Brownfield Category and was considered by many in the industry to be an error.
- The FAQs clarify what the geographical boundaries of a brownfield site are, including for purposes of the safe

harbor for Phase II environmental assessments. See Determining Brownfield Status Q&A-2. The Q&A provides that “a brownfield site is delineated according to the boundaries of the entire parcel of 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. A brownfield site is not limited to only the portion of a parcel of real property that has or may have a hazardous substance, pollutant, or contaminant that complicates redevelopment.” This is a welcome clarification of the law.

Notice 2023-45 also acknowledges a change to the beginning of construction rules in Notice 2023-29 that was made via a previously unannounced online update, as discussed in our [prior alert](#).

Notice 2023-47

Notice 2023-47 provides three new Appendices that taxpayers may use to determine whether they meet certain requirements under the Statistical Area Category or the Coal Closure Category.

[Appendix 1](#)

Appendix B of Notice 2023-29 listed each Metropolitan Statistical Area (MSA) and non-Metropolitan Statistical Area (non-MSA) that meets the Fossil Fuel Employment requirement described in Notice 2023-29, based on calculations using the annual County Files of the County Business Patterns (CBP) published by the Census Bureau for years 2010 through 2020.

Appendix 1 is a list of additional MSAs and non-MSAs that meet the Fossil Fuel Employment threshold when using the 2021 CBP data released on April 27, 2023.

- General Q&A-2 of the FAQs addresses the process that was used to address data suppression in the 2010 to 2017 CBP data analyzed in Appendix B. The process may explain why certain MSAs and non-MSAs that were listed on Appendix B do not appear to satisfy the 0.17% employment requirement based on publicly available data.

Appendix 1 should be combined with Appendix B of Notice 2023-29 to determine the full list of MSAs and non-MSAs that meet the Fossil Fuel Employment threshold for the period beginning on January 1, 2023.

[Appendix 2](#)

Appendix 2 is a list of MSAs and non-MSAs that qualify as energy communities under the Statistical Area Category because they meet the Fossil Fuel Employment threshold and have an unemployment rate at or above the national average unemployment rate for calendar year 2022.

Appendix 2 uses annual County Files of the CBP for years 2010 through 2021 and 2022 calendar year county unemployment rates released on April 21, 2023 by the Local Area Unemployment Statistics (LAUS) program of the Bureau of Labor Statistics (BLS).

The energy community status for the MSAs and non-MSAs listed in Appendix 2 is effective as of January 1, 2023 and will continue until the list is updated based on unemployment rates for calendar year 2023. Guidance identifying MSAs and non-MSAs that qualify as energy communities generally will be issued in May of each year based on the release of employment and unemployment data for the prior year.

[Appendix 3](#)

Appendix C to Notice 2023-29 provided a list of census tracts that satisfied the Coal Closure Category. Since the release of Notice 2023-29, additional coal closure data has become available.

Appendix 3 lists the newly identified census tracts with either a coal mine closure or a coal-fired electric generating unit retirement, and census tracts that directly adjoin the census tracts with coal closures, using the Mine Safety and Health Administration's (MSHA) Mine Data Retrieval System data and the U.S. Energy Information Administration's EIA Form 860 and EIA Form 860M data as of May 1, 2023.

- The FAQs address whether a coal-fired electric generating unit that switches to a different fuel source without being listed as retired on the EIA Form 860 or 860M data is considered a retired coal-fired electric generating unit, a question that was not directly addressed by Notice 2023-29. See General Q&A-3. The IRS states that such a conversion is not a retirement of a coal-fired electric generating unit, contrary to the position argued by many in the industry.

Conclusion

Notice 2023-45, Notice 2023-47, and the FAQs are timely. In particular, Appendix 2 now provides the most up-to-date information for determining whether projects that have been or will be placed in service in 2023 qualify for the energy community enhancement based on the Statistical Area Category. In addition, the FAQs clarify the IRS's position with respect to nuanced questions concerning the Statistical Area Category and the Brownfield Category.

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