

'Energy Communities' Update May Clarify Tax Credit Eligibility

By **Anne Loomis, Adam Kobos and Mitchell Emmert** (June 17, 2024)

On June 7, the U.S. Department of the Treasury Department and the Internal Revenue Service issued Notice 2024-48, which includes lists of information that taxpayers may use to determine whether they meet certain requirements for energy communities under the statistical area category or the coal closure category.[1]

On June 7, the IRS also updated its FAQs for energy communities.[2]

Notice 2023-29, issued in April 2023,[3] provides rules for determining what constitutes an energy community, organized into three categories — the brownfield category, the statistical area category and the coal closure category.[4]

The Treasury and the IRS intend to include these 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, Notice 2023-47, Notice 2024-30 and Notice 2024-48.[5]

Notice 2024-48

Notice 2024-48 provides two new appendices that taxpayers may use to determine whether they meet certain requirements under the statistical area category and the coal closure category.

The appendices to Notice 2024-48, as well as the previous appendices published with Notices 2023-39, 2023-45, 2023-47 and 2024-30, apply only to the energy community bonus applicable to the production tax credits and investment tax credits available under Sections 45, 45Y, 48 and 48E of the Internal Revenue Code.

They may not be used for purposes of the qualifying advanced manufacturing credit under Section 48C.

Appendix 1

The statistical area category includes each metropolitan statistical area, or MSA, and non-metropolitan statistical area that (1) has, or had at any time after Dec. 31, 2009, 0.17% or greater direct employment, or 25% or greater local tax revenues, related to the extraction, processing, transport, or storage of coal, oil, or natural gas and (2) has an unemployment rate at or above the national average unemployment rate for the previous year, in each case as determined by the secretary of the Treasury.

MSAs and non-MSAs that meet the above fossil fuel employment test were previously published in Appendix B to Notice 2023-39, Appendix 1 to Notice 2023-47 and Appendix 1 to Notice 2024-30.



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Appendix 1 to Notice 2024-48 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 2023.[6]

The list in Appendix 1 uses the 2023 calendar year county unemployment rates released on April 19, by the Local Area Unemployment Statistics program of the Bureau of Labor Statistics. The energy community status of the MSAs and non-MSAs listed in Appendix 1 became applicable as of June 7, and will continue until the Treasury and the IRS issue an updated list based on unemployment rates for calendar year 2024.

The June 7 applicability date is consistent with Notice 2023-29, which indicated that the first statistical area category appendix would apply for the period beginning on Jan. 1, 2023, and ending with the subsequent annual release, which in turn would apply for the period beginning with such annual release.

This approach, which is based on the somewhat arbitrary date of the publication of guidance, rather than the beginning of a calendar or taxable year, has caused some confusion in the industry and raises the possibility that, for example, a facility placed in service in March 2024, before the update occurred, could be treated differently from a facility placed in service in July 2024, after the update occurred, a consequence that does not seem to be intended by the statute.

Appendix 2

The coal closure category includes census tracts, and census tracts directly adjoining such census tracts (1) in which a coal mine has closed after Dec. 31, 1999, or (2) in which a coal-fired electric generating unit has been retired after Dec. 31, 2009.

Appendix C to Notice 2023-29 provided a list of census tracts that satisfied the coal closure category, and was subsequently updated by Appendix 3 to Notice 2023-47.

Appendix 2 to Notice 2024-48 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.[7]

These were identified using the Mine Safety and Health Administration, or MSHA, Mine Data Retrieval System data and data from the U.S. Energy Information Administration's Form 860 and Form 860M as of April 1, as well as historical extracts from the Mine Data Retrieval System that enumerate each status change for a mine.

Appendix 2 to Notice 2024-48 should be combined with Appendix C to Notice 2023-29 and Appendix 3 to Notice 2023-47, to provide the full list of census tracts satisfying the coal closure category.

The "Timing and Location" section of the IRS' FAQs for energy communities includes new Question 10, which addresses a scenario where the MSHA or the Energy Information Administration revises or corrects a dataset, and the revision or correction is not yet reflected in an IRS appendix.

The IRS states that mine closures and generating unit retirements added to the list of eligible census tracts in Appendix 2 to Notice 2024-48 confer eligibility to energy community projects placed in service after Dec. 31, 2022.

For example, if the MSHA corrects location data for a mine closure that occurred in 2012 and adds it to their dataset between the release of Notice 2023-47 and Notice 2024-48, the census tract that had the mine closure would be an energy community from Jan. 1, 2023, rather than after the release of Notice 2024-48.

Census tracts newly added to Appendix 2 but not listed in the previously published appendices are not distinguished according to whether the additions are the result of mines closing or generating units retiring since Dec. 31, 2022, or if they are the result of updates to location information since the publication of the previous appendices.

Although not entirely clear, this FAQ can be read to suggest that if a mine in a census tract closes in 2024, the census tract would be treated as an energy community beginning in 2023.

Brownfield Category

Notice 2024-48 does not address the brownfield category. However, new Question 11 in the "Determining Brownfield Status" FAQs addresses what sites count as "previously assessed through federal, state, territory, or federally recognized Indian tribal Brownfield resources as meeting the definition of a Brownfield site" under Title 42 of the U.S. Code, Section 9601(39)(A), for purposes of one of the Brownfield Category safe harbors addressed in Notice 2023-29.

The IRS states that a site qualifies for the safe harbor if a federal, state, territory or federally recognized Indian tribal program that supports the evaluation of potential contamination at sites by collecting and reviewing existing information has determined that the site qualifies as a brownfield site under the definition in Section 9601(39)(A), and is not excluded under Section 9601(39)(B).

The IRS further clarifies that a previously assessed site may include a site that has planned or has ongoing remediation activities, engineering or institutional controls, or long-term operations and maintenance monitoring. A previously assessed site may also include a site where a determination of "no further action" has been made.

Conclusion

Since the April release of 2023 unemployment data, taxpayers have been eagerly awaiting the updated statistical area category appendix.

Notice 2024-48 should provide certainty for developers and financing parties, regarding projects for which qualification depends on their location being included in the appropriate IRS appendix as of the placed-in-service date.

In addition, because sponsors can secure future energy community status by beginning construction on a project during a period in which it is located in an energy community, the release of Notice 2024-48 should allow developers to begin physical work or satisfy the 5% safe harbor with respect to projects located in MSAs and non-MSAs currently included on Appendix 1 of Notice 2024-48.

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[1] <https://www.irs.gov/pub/irs-drop/n-24-48.pdf>.

[2] <https://www.irs.gov/credits-deductions/frequently-asked-questions-for-energy-communities>.

[3] <https://www.troutman.com/insights/treasury-and-irs-release-guidance-on-energy-community-enhancements-under-the-inflation-reduction-act.html>.

[4] We described each of these in our previous alert on Notice 2023-29, <https://www.troutman.com/insights/treasury-and-irs-release-guidance-on-energy-community-enhancements-under-the-inflation-reduction-act.html>.

[5] <https://www.troutman.com/insights/treasury-and-irs-release-additional-guidance-on-energy-community-enhancements-under-ira.html>.

[6] <https://www.irs.gov/pub/irs-drop/n-24-48-appendix-1.pdf>.

[7] <https://www.irs.gov/pub/irs-drop/n-24-48-appendix-2.pdf>.