March 28, 2024

Inflation Reduction Act: IRS Expands Eligibility for Energy Community Bonus Credit

By Steven Lorch, Jonathan Macke, Nathan Bunch, and Natalia Pierotti

On March 22, 2024, the Treasury Department and Internal Revenue Service (IRS) released Notice 2024-30 (the 2024 Notice). The 2024 Notice, which modifies Notice 2023-29 (the 2023 Notice),[1] generally increases the likelihood that offshore wind projects will be eligible for the energy communities adder (the EC Adder) and grows the number of US counties that are eligible for status as an energy community (an Energy Community).

The Basics of the EC Adder

Under the Inflation Reduction Act of 2022, a project that is eligible for the investment tax credit (ITC) under Section 48 of the Internal Revenue Code of 1986, as amended (the Code), or the clean electricity investment credit (CEIC) under Section 48E of the Code will receive a bonus credit of up to 10 percentage points if located in an Energy Community.[2] By contrast, in the case of the production tax credit (PTC) under Section 45 of the Code or the clean electricity production credit (CEPC) under Section 45Y of the Code, the credit rate will be increased by 10 percent if the project is located in an Energy Community.[3]

Each of the following qualifies as an Energy Community:

- a brownfield site;
- a census tract, or a directly adjoining census tract, in which a coal mine closed after 2009 or a coal-fired electric generating unit closed after 2009; and
- a metropolitan statistical area (MSA) or non-metropolitan statistical area (Non-MSA) that (1) has, or had at any time since 2009, at least 0.17 percent direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas (Fossil Fuel Employment) and (2) has an unemployment rate at or above the national average for the previous calendar year.[4]

[1] The 2023 Notice previously was modified by Notice 2023-45 and Notice 2023-47.

[2] For example, the energy percentage of an ITC-eligible project would increase from 30 percent to 40 percent (assuming the prevailing wage and apprenticeship requirements are satisfied).

[3] For example, the credit per kilowatt hour for a PTC-eligible project would increase from $2.75 to $3.03 (assuming the prevailing wage and apprenticeship requirements are satisfied).

[4] Section 45(b)(11)(B)(ii) of the Code provides that an MSA or Non-MSA also would qualify as an Energy Community if it (1) has, or had at any time since 2009, at least 25 percent of 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 for the previous calendar year. Taxpayers have not yet received substantive guidance regarding qualification for the EC Adder on this basis. In the 2023 Notice, the Treasury Department and IRS conceded that collecting local tax data presents certain challenges and requested public comments on the topic.

A project is eligible for the EC Adder if it is considered to be located in an Energy Community when construction of the project begins (the BOC Safe Harbor).[5] For a PTC- or CEPC-eligible project, this means that the project would be eligible for the EC Adder for the duration of the 10-year credit period.

If an ITC- or CEIC-eligible project does not satisfy the BOC Safe Harbor, the project must be placed in service within an Energy Community in order to be eligible for the EC Adder. By contrast, if a PTC- or CEPC-eligible project does not satisfy the BOC Safe Harbor, the determination of whether the project is located in an Energy Community must be determined separately for each year in the 10-year credit period.

An electricity generation project is considered to be located in or placed in service in, as the case may be, an Energy Community if 50 percent or more of the project's nameplate capacity is attributable to energy generating units that are located in an area that qualifies as an Energy Community (Nameplate Capacity Test).[6]

Expansion of the Nameplate Attribution Rule for Offshore Wind Facilities

The 2023 Notice provided a special rule for applying the Nameplate Capacity Test to projects with nameplate capacity but without a generation unit located in a census tract, MSA, or Non-MSA (the Nameplate Attribution Rule). Under the 2023 Notice, all of the nameplate capacity of such an offshore project would be attributed to the land-based power conditioning equipment (e.g., a step-up transformer) that conditions energy generated by the project for transmission, distribution, or use and that is closest to the point of interconnection.

The 2024 Notice expands the Nameplate Attribution Rule in two ways.

First, the 2024 Notice broadens the Nameplate Attribution Rule, as provided under the 2023 Notice, to permit attribution to any land-based power conditioning equipment that conditions energy generated by the project for transmission, distribution, or use before the energy is transmitted to any point of interconnection. Accordingly, the revised Nameplate Attribution Rule no longer requires attribution to the power conditioning equipment closest to the point of interconnection and also recognizes that offshore wind facilities often have more than one interconnection point.

Second, the 2024 Notice adds an alternative Nameplate Attribution Rule for supervisory control and data acquisition (SCADA) equipment of an offshore project. To be eligible for attribution, SCADA equipment must be:

- Owned by the same taxpayer that owns the relevant project (the Project Owner);
- Used to remote monitor and control the project's operations; and

[5] For this purpose, the beginning of construction standard from previous ITC and PTC guidance generally applies. The BOC Safe Harbor is available only for projects that begin construction on or after January 1, 2023.

[6] The location of energy storage projects also is determined by the Nameplate Capacity Test. The location of projects that have no nameplate capacity (including, for instance, biogas projects eligible for the ITC) is determined based on the project's geographical footprint.

- Located in a port (1) that is used full or part-time to facilitate maritime operations necessary for the installation or operation and maintenance of the project, (2) at least partially owned or leased (for a term of at least 10 years) by the Project Owner, and (3) at which staff employed by, or working as independent contractors for, the Project Owner are based and perform functions essential to the project's operations.[7]

Expansion of Energy Communities Based on Fossil Fuel Industry Employment

The 2023 Notice provided that the percentage of Fossil Fuel Employment is determined by dividing (1) the number of people in the relevant MSA or Non-MSA employed in certain fossil fuel industries identified in the 2017 North American Industry Classification System (NAICS) by (2) the total number of people in the MSA or Non-MSA.

The 2023 Notice identified the following fossil fuel industries for purposes of this calculation:

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

The 2024 Notice supplements this list by adding Natural Gas Distribution (2017 NAICS code 2212) and Oil and Gas Pipeline and Related Structures Construction (2017 NAICS code 23712).

By including these industries, the 2024 Notice adds more than 440 additional MSAs and Non-MSAs to the list of statistical areas that have, or have had since 2009, at least 0.17 percent Fossil Fuel Employment (set forth on Appendix 1 to the 2024 Notice). Of these, more than 120 MSAs and Non-MSAs also had an unemployment rate at or above the national average unemployment rate for 2022 (set forth on Appendix 2 to the 2024 Notice) and therefore qualify as Energy Communities as of January 1, 2023.[8]

[7] To satisfy this requirement, the staff must perform (collectively, if not individually) all of the following functions: management of marine operations, inventory and handling of spare parts and consumables, and berthing and dispatch of operation and maintenance vessels and associated crews and technicians.

[8] The Treasury Department and IRS are expected to provide a revised list, based on 2023 unemployment data, in May 2024.

Key Takeaways

The 2024 Notice has been applauded by a broad range of project owners, stakeholders, and industry participants.

The changes to the Nameplate Attribution Rule, which are expected to make it easier for offshore wind projects to qualify for the EC Adder, have been well-received by the offshore wind industry, which views the revised Nameplate Attribution Rule as more closely reflecting the onshore presence of a typical project.

The two new 2017 NAICS industry codes significantly expand the potential footprint of the EC Adder; these additions grow the list of MSAs and Non-MSAs that currently have Energy Community status and, perhaps more importantly, broaden the pool of MSAs and Non-MSAs that have had, since 2009, at least 0.17 percent Fossil Fuel Employment and therefore are eligible to become Energy Communities pending future unemployment data.

* * *

If you have questions concerning the contents of this alert, or would like more information about Weil's Tax practice group, please speak to your regular contact at Weil or to the authors:

Authors

Steven Lorch (NY)	View Bio	steven.lorch@weil.com	+1 212 310 8060
Jonathan Macke (DA)	View Bio	jonathan.macke@weil.com	+1 214 746 8194
Nathan Bunch (NY)	View Bio	nathan.bunch@weil.com	+1 212 310 8299
Natalia Pierotti (NY)	View Bio	natalia.pierotti@weil.com	+1 212 310 8724