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ENVIRONMENTAL LAW



APRIL 2023

The Internal Revenue Service Releases Guidance on the Inflation Reduction Act Energy Community Bonus Credit and Opens the Door for More Sites to Be Eligible as Brownfield Sites

The Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization (IWG) met on April 4, 2023, to announce the release of its Two-Year Report implementing the Inflation Reduction Act (IRA). During the event, a member of the IWG mentioned that the Internal Revenue Service (IRS) is finally releasing long-awaited guidance on the [Energy Community Bonus Credit Amounts under the Inflation Reduction Act of 2022](https://www.irs.gov/pub/irs-drop/n-23-29.pdf),¹ including for IRA brownfield sites. The IRS guidance provides additional clarity on eligibility by confirming “coal community” eligibility for projects in certain census tracts. These census tracts appear to match those identified in the “coal closure” mapping tool, which was quietly released by the U.S. Department of Energy (DOE) in mid-February. This new mapping tool from the DOE and guidance from the IRS also provide additional clarity concerning eligibility under the fossil fuel statistical area category. However, the IRS is seeking public comment on the statistical area fossil fuel tax revenue part of this eligibility category.

Now that the coal community and fossil fuel community categories have been almost fully addressed by the IRS, the only remaining category in need of additional clarification is the brownfield site category. The guidance indicates that the IRS will take a strikingly inclusive approach and allow many more sites than initially anticipated to qualify as IRA brownfield sites.

To qualify for the brownfield eligibility category, the project must be a “brownfield site” as that term is defined in certain provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended by the Small Business Liability and Brownfields Revitalization Act of 2002. For brownfield site eligibility under this bonus credit, the IRA references three select provisions of the CERCLA brownfield site definitions in 42 U.S.C. Section 9601(39): (1) Section 9601(39)(A), which provides an inclusive baseline definition for brownfield sites for sites which *may* be contaminated; (2) Section 9601(39)(B), which provides seemingly prohibitive exclusions that are explained away or not explicitly applied by the U.S. Environmental Protection Agency (EPA); and (3) Section 9601(39)(D)(ii)(III), which covers “mine-scarred land.” When considering the other provisions of the CERCLA “brownfield site” definitions, as well as the EPA’s existing guidance concerning site eligibility under its brownfield program, the references are potentially confusing and could lead to implementation inconsistent with existing thoughts and assumptions regarding eligibility.

While the guidance does not answer all of our questions surrounding brownfield site eligibility, particularly the application of the exclusions, it does provide some answers on how the IRS will determine baseline eligibility. Specifically, it contains very inclusive eligibility “conditions” labeled “safe harbor” provisions for sites: (1) previously assessed through federal, state, territory or federally recognized Indian tribal “brownfield resources” as listed

¹ <https://www.irs.gov/pub/irs-drop/n-23-29.pdf>



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on the EPA's Cleanups in My Community (CIMC) webpage or similar state pages; (2) where a Phase II Environmental Site Assessment (ESA) has confirmed the presence of contamination; or (3) for projects of 5 MW or less, where only Phase I ESA has been completed. Please note that the guidance does not mention the potential presence of contamination under this third eligibility condition, but this appears to be an oversight and will likely be required in the IRS regulations once promulgated.

The guidance requires at least one of the safe harbor conditions be met, but at the same time the site cannot be one that is excluded under Section 9601(39)(B). Thus, it is odd that the IRS refers to these provisions as safe harbors while at the same time labeling them conditions. This indicates the

possibility that the IRS may ignore the exclusions entirely for sites which meet the safe harbor/conditions.

At this time, we do not know whether the IRS will establish a process for site-specific eligibility determinations, but the guidance establishes a recordkeeping requirement which may be all that is required, at least in the interim. The IRS is likely to issue proposed regulations on energy community eligibility in the near future, so we may know more soon.

Additional Assistance

For further assistance, please contact a member of our [Environmental Law Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■



Albany Omni Plaza 30 South Pearl Street Albany, NY 12207-1537 (518) 472-1224

Buffalo One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400

Chautauqua 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906

Garden City 1205 Franklin Avenue Plaza Suite 390 Garden City, NY 11530-1629 (516) 742-5201

New York City 620 Eighth Ave 38th Floor New York, NY 10018-1442 (212) 759-4888

Rochester 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000

Chicago, IL 161 North Clark Suite 1700 Chicago, IL 60601-3342 (312) 794-7300

Washington, DC 1101 Pennsylvania Avenue NW Suite 300 Washington, DC 20004-2514 (202) 617-2700

Canada The Communitel Hub 151 Charles Street West Suite 100 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800