



LEGAL ALERT

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When Is a Brownfield Site Not a Brownfield Site? IRS Issues Guidance Regarding Energy Communities

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On April 4, 2023, the IRS released [Notice 2023-29](#), Energy Community Bonus Credit Amounts under the Inflation Reduction Act of 2022.

The Notice provides guidance on the Inflation Reduction Act of 2022 (IRA), which provided for an increased credit amount under Internal Revenue Code Sections ("Section") 45, 45Y, 48, and 48E if certain requirements pertaining to "energy communities" are satisfied. These code sections provide that in the case of a qualified facility located in an energy community, the renewable electricity production credit is increased by ten percentage points, the clean electricity production credit is increased by ten percent points, the investment tax credit is increased by two percentage points (ten percentage points if the wage and apprenticeship requirements or a maximum kilowatt hour test are met), and similar rules for the clean electricity investment credit.

The Notice describes certain rules that the Treasury and IRS intend to include in proposed regulations regarding what constitutes an energy community under Section 45(b)(11)(B). These regulations will be proposed to apply to taxable years ending after April 4, 2023.

Developers may find the Notice's Brownfield provisions particularly interesting. The IRA included "brownfield site" in its definition of an "energy community" as defined in subparagraphs (A), (B), and (D)(ii)(III) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39)). Section 5 of the Notice provides a safe harbor specifying that the IRS will accept that a site meets the definition of a "brownfield site" if it satisfies at least one of the following conditions and it is not a site described in 42 U.S.C. Section 9601(39)(B):

1. The site was previously assessed through federal, state, territory, or federally recognized Indian tribal brownfield resources as meeting the definition of a brownfield site under 42 U.S.C. § 9601(39)(A). Potential site lists may be found under the category of Brownfields Properties on the EPA's Cleanups in My Community webpage or on similar webpages maintained by states, territories, or for federally recognized Indian tribes;
2. An ASTM E1903 Phase II Environmental Site Assessment (Phase II 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 II Environmental Site Assessment Process of ASTM International and such Phase II Assessment confirms the presence on the site of a hazardous substance as defined under 42 U.S.C. § 9601(14), or a pollutant or contaminant as defined under 42 U.S.C. § 9601(33); or
3. For projects with a nameplate capacity of not greater than 5MW (AC), an ASTM E1527 Phase I Environmental Site Assessment (Phase I 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.

This alert focuses on the second and third safe harbor rules provided in the Notice because New York State's definition of a "brownfield site" does not specifically follow the federal definition under CERCLA.



Implementation of ASTM-compliant Phase I Assessments and Phase II Assessments is common within New York State's Brownfield Cleanup Program ("BCP"). Thus, most projects that have been accepted into the BCP will already meet the second safe harbor of the Notice. If a project has been issued an approved Remedial Action Work Plan and Decision Document by the Department of Environmental Conservation, then the project would have also performed a Phase II Assessment (under the BCP defined as a Remedial Investigation). The Phase II Assessment performed for the purposes of the BCP under the DER-10 standard is more comprehensive than the ASTM E1903 Phase II Assessment outlined in the safe harbor provision, thereby satisfying the second safe harbor without the need to meet the nameplate capacity limitation under the third safe harbor. Generally, brownfield sites that have applied or been accepted into the BCP have already had a Phase I Assessment performed or a Phase I Assessment can be performed to meet this requirement. In that case, as long as the project in question also satisfies the nameplate capacity limitation, then the project would satisfy the third safe harbor rule noted above. Additionally, project sites that are not considered contaminated enough to get into New York's BCP, may still be considered a "brownfield site" under the IRA as long as they have a done a Phase I and meet the name plate capacity limitation.

**For any questions regarding the IRA program or
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