Comments on the Energy Community Requirement

By David Brown Kinloch, President, Appalachian Hydro Associates, Inc.

Appalachian Hydro Associates, Inc. is a Kentucky-based company that designs, licenses, constructs, owns and operates small hydroelectric power plants, primary in eastern Kentucky. The area in which we work in has been hard hit by our nation's shift away from the use of coal. As such, our construction projects specifically employ workers and sub-contractors that in the past have or would have been employed in the mining of coal. Appalachian Hydro Associates is made up of five partners, each with different special skills needed to develop new small hydroelectric facilities at existing non-power dams. In 2021, we completed, after a 3 year construction period, a new $11.7 million 2.64 MW plant on the Kentucky River and we are also presently constructing a new $14 million 3.0 MW hydro plant further upstream on the same river. Our company presently has plans to construct two additional new hydro plants in the future in eastern Kentucky. The ability to finance the construction of these projects is dependent upon the use of the Investment Tax Credit for new renewable energy facilities.

It appears that it was the intent of Congress to provide an additional incentive through the "Energy Community" tax credit adder for communities like the ones we work in, where coal jobs have been drying up. For that reason, Appalachian Hydro Associates has special interest in the "Energy Community" tax credit adder, and does hereby provide the following comments to the questions put forth by Treasury with respect to this tax credit adder:

04 Energy Community Requirement

Question: (1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

Comments: While I am not able to comment to the best way to address this problem, I would like to highlight this problem with respect to "Energy Communities" and these tax credits, especially pertaining hydroelectric projects. Census tracts commonly use both County boundary lines and streams as natural dividing lines between census tracts. It should be noted that almost always coal-fired electric generating plants, including retired plants in question (4) below, are located on river and streams to draw water needed to cool the plant. Likewise, conventional hydroelectric plants are always located on a river or stream. So by definition, both the retired coal-fired plant that is a qualifier for these credit, and hydroelectric plants which are receivers of these credits, will most always be located on the borders between census tracts.

This location on the edges of the census tracts present a problem. In rural areas, having the retired coal-fired plant on one end of a large census tract, and then having a facility qualifying for the tax credit at the end of another large adjacent census tract, the distance between them could be quite large. The two facilities might not actually be in the same "community".

But my concern is the other extreme, and an actual situation for one small hydroelectric plant we are hoping to build. There is a coal-fired power plant that was retired in 2016 a very short distance away (less than 5 miles) on the same river from our proposed new hydroelectric project, but because of both the retired coal-fired plant and our proposed hydroelectric plant are on the edge of their respective census tracts, with the boundaries of the river putting them in different Counties, while this is the same energy community by close proximity, they are two census tract apart and would not qualify for the tax credit.

Because these facilities are on the edge of census tracts, the first scenario above where the facilities are far apart, would qualify for the tax credits, but the second scenario with the two facilities close by and in the same "community" would not qualify.

One solution that would help, and solve this problem in most cases, would be if the IRS would allow a taxpayer to select which census tract to use, on either side of the line, when in the case of coal-fired plant and hydroelectric plants the facility sits right on the census tract line. This would offer a better chance for two facilities that are physically located close by, and thus in the same "community" to quality for the tax credits, which I believe was the intention of the legislation, to help communities that have been harmed by a coal-fired electric generating plant being closed.

Question: (2) Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of § 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

I have no comments on "brownfield sites" since they generally are not the locations of proposed hydroelectric facilities.

Question: (3) Which source or sources of information should the Treasury Department and the IRS consider in determining a "metropolitan statistical area" (MSA) and "nonmetropolitan statistical area" (non-MSA) under § 45(b)(11)(B)(ii)? Which source or sources of information should be used in determining whether an MSA or non-MSA meets the threshold of 0.17 percent or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and an .17 unemployment rate at or above the national average unemployment rate for the previous year? What industries or occupations should be considered under the definition of "direct employment" for purposes of this section?

Comments: The U.S. Bureau of Labor Statistics has a rather definitive list of "metropolitan statistical area" (MSA) and "nonmetropolitan statistical area" (non-MSA) area for the entire United States, see: https://www.bls.gov/oes/current/oessrcma.htm.

Likewise the U.S. Bureau of Labor Statistics has comprehensive employment data broken down by job type on this same page. By clicking on a particular MSA or non-MSA, you are taken to the detailed list of how many worker in this area are in each job category. A list of all occupation codes can be found at https://www.bls.gov/soc/2018/major_groups.htm. From this list, "Extraction Workers" can be found under category "47-5000 Extraction Workers" the detailed extraction workers categories are as follows:

- 47-5000 Extraction Workers
  - 47-5010 Derrick, Rotary Drill, and Service Unit Operators, Oil and Gas
    - 47-5011 Derrick Operators, Oil and Gas
    - 47-5012 Rotary Drill Operators, Oil and Gas
    - 47-5013 Service Unit Operators, Oil and Gas
  - 47-5020 Surface Mining Machine Operators and Earth Drillers
    - 47-5022 Excavating and Loading Machine and Dragline Operators, Surface Mining

    - 47-5023 Earth Drillers, Except Oil and Gas
- 47-5030 Explosives Workers, Ordnance Handling Experts, and Blasters
    - 47-5032 Explosives Workers, Ordnance Handling Experts, and Blasters
- 47-5040 Underground Mining Machine Operators
    - 47-5041 Continuous Mining Machine Operators
    - 47-5043 Roof Bolters, Mining
    - 47-5044 Loading and Moving Machine Operators, Underground Mining
    - 47-5049 Underground Mining Machine Operators, All Other
- 47-5050 Rock Splitters, Quarry
    - 47-5051 Rock Splitters, Quarry
- 47-5070 Roustabouts, Oil and Gas
    - 47-5071 Roustabouts, Oil and Gas
- 47-5080 Helpers--Extraction Workers

    - In addition, the supervisors of these workers are found in: 47-1011 First-Line Supervisors of Construction Trades and Extraction Workers

How this would be used by the IRS or the taxpayer would be as follows: We are looking at building a new small hydroelectric facility in Lee County, Kentucky. Lee County is located in the "Eastern Kentucky non-metropolitan" area so I would click on this non-MSA on the BLS website and go to https://www.bls.gov/oes/current/oes_2100004.htm. Here I retrieve that total employment in this non-MSA is 95,490. I then click on the "47-000 Construction and Extraction" link, and locate the following data:

47-5013 - 100
47-5022 - 250
47-5023 - 100
47-5041 - 190
47-5049 - (8)
<u>47-5071 - 70</u>
Extraction Workers = 702

702 / 95,490 = 0.735% which is well above the 0.17% threshold, so the Eastern Kentucky non-MSA would qualify as an "Energy Community" and thus a new hydroelectric plant to be built in Lee County, Kentucky would qualify for the 10% "Energy Community" tax credit adder, as would other projects in the Eastern Kentucky non-MSA.

It should be noted that there are also 470 jobs in the First-Line Supervisors of Construction and Extraction Workers, some but not all work be directly employed in the extraction trades. If the calculation would have been closer to the threshold, these 470 jobs could have been prorated for extraction related only, by dividing the total construction and extraction jobs into separate categories.

Question: (4) Which source or sources of information should the Treasury Department and the IRS consider in determining census tracts that had a coal mine closed after December 31, 1999, or had a coal-fired electric generating unit retired after December 31, 2009, under § 45(b)(11)(B)(iii)? How should the closure of a coal mine or the retirement of a coal-fired electric generating unit be defined under § 45(b)(11)(B)(iii)?

Comments: With respect to coal mines that have closed, there is an excellent database available that can provide this information for the IRS that can confirm a coal mines status and location. The Mine Safety and Health Administration maintains a database at https://www.msha.gov/mine-data-retrieval-system. Once there, click on the spot that says "*(For abandoned mines click here)"*. Once a mine ID number or name is entered, the website provides information including the mine's status, location, history and when it began operation. This is all the information the IRS would need to determine if a particular mine qualified.

As an example, my company is looking at a possible hydroelectric site that is in the same census tract with a mine facility that closed recently in Estill County, Kentucky. In our case, the taxpayer would provide the IRS with the Federal ID number, 1500365, the IRS could enter this number into the MSHA database and see that it mined coal, it started on 5/30/2013 (after December 31, 1999), it is located in Estill County, Kentucky, and it is "Abandoned". The taxpayer would then show the IRS the location of the mine and the taxpayer facility, and demonstrate that they are both in the same census tract or an adjacent census tract. Thus our proposed new hydroelectric plant to be built in Estill County, Kentucky would qualify for the 10% "Energy Community" tax credit adder.

It is my understanding that there may be a few very old mines may not be in this database, but may have been abandoned after December 31, 1999. Thus the IRS might also give the taxpayer to option to provide other evidence that an abandoned mine meets this criteria, even though it is not in the MSHA database.

With respect to abandoned coal-fired electric generating plants, I am not familiar with any similar centralized database. Thus the IRS might give the taxpayer the opportunity to provide evidence that a particular coal-fired power plant has been abandoned after December 31, 2009.

Question: (5) For each of the three categories of energy communities allowed under § 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a “brownfield site” under § 45(b)(11)(B)(i), a “metropolitan statistical area or non-metropolitan statistical area” under § 45(b)(11)(B)(ii), or a “census tract” under § 45(b)(11)(B)(iii) should be considered, and why?

No comments

Question: (6) Under § 45(b)(11)(B)(ii)(I), what should the Treasury Department and the IRS consider in determining whether a metropolitan statistical area or non-metropolitan statistical area has or had 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas? What sources of information should be used in making this determination? What tax revenues (for example, municipal, county, special district) should be considered under this section? What, if any, consideration should be given to the unavailability of consistent public data for some of these types of taxes?

Comments: This is a difficult one, and as such, will probably not be useful in the coal mining areas of Kentucky. For example, there are 21 counties in the Eastern Kentucky non-MSA, and many towns in each of the counties. Rounding up tax records from all of these entities would be quite burdensome. This is further complicated by the fact that many of these area get significant tax funding from the coal severance tax, which is State collected and shared with local governments. For these reasons, taxpayers in these areas will find it much easier to simply use the 0.17% of extraction jobs for this non-MSA.

There may be other taxpayers in other MSA and non-MSA areas that do not have such a complex tax collection system, which could better give guidance on how the provision might be applied.

Question: (7) Please provide comments on any other topics relating to the energy community requirement that may require guidance.

No Comments