DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

NPRM: Clean Electricity Low-Income Communities Bonus Credit Amount Program

Consultation Summary and Federal Response

Introduction

On September 27, 2024, the U.S. Department of the Treasury (Treasury) held a consultation on a Notice of Proposed Rulemaking (NPRM) entitled "Guidance on Clean Electricity Low-Income Communities Bonus Credit Amount Program" (REG-108920-24). The NPRM contains proposed regulations under section 48E(h) of the Internal Revenue Code (Code), added by the Inflation Reduction Act of 2022 (IRA). The Clean Electricity Low-Income Communities Bonus Credit Amount Program (Program) provides an allocated "bonus" of either 10 or 20 percentage points to the 48E Clean Electricity Investment Tax Credit for eligible projects "placed in service" by a range of entities, including Tribal governments and Tribal enterprises. Starting in 2025, the Program replaces the Low-Income Bonus Communities Bonus Credit Program that was established under 48(e) of the Code for Program Years 2023-2024 and was restricted by statute to wind and solar technologies.

On August 30, 2024 Treasury noticed a Tribal consultation on this NPRM, with consultation questions via a Dear Tribal Leader Letter and held this consultation on September 27, 2024. Treasury held the consultation virtually to maximize Tribal participation across Indian Country. Fifty-six attendees joined the consultation, and nine letters were received. The comment period ended on October 18, 2024. On January 8, 2025, Treasury noticed the final regulations and an accompanying Revenue Procedure.[1]

Pursuant to Treasury's Tribal consultation policy, below is a summary of the feedback received in Tribal consultation and the federal response to this feedback.

Broad Feedback

1. **Tribal Sovereignty**

Commenters asked that Treasury and IRS respect Tribal sovereignty, reduce administrative burdens in recognition of the increased barriers Tribal governments encounter for energy development, and recognize Tribal regulatory authority, which is different from that of non-Tribal entities.

[1] *See* "Guidance: Clean Electricity Low-Income Communities Bonus Credit Amount Program" Federal Register 2025-00331, (January 13, 2025) & Rev. Proc. 2025-11 (January 13, 2025).

Federal Response:

Consistent with Treasury's Tribal consultation policy, Treasury recognizes the unique status of Tribal governments and their sovereignty, including Tribal regulatory authority. As described below, Treasury took into consideration Tribal regulatory authority in developing project viability documentation.

2. **Administrative Capacity and Flexibility**

Commenters asked for streamlined rules and reporting requirements. Commenters explained that Tribal governments have limited experience with clean energy tax credits because they previously could not access them outside of partnerships with third-parties. Commenters shared that Tribal economic development is hampered by requirements to meet "shovel-ready" standards that contrast with Tribal regulatory requirements. Commenters asked that Treasury and the IRS apply Executive Order 14112 to the Program, with maximum flexibility of operation for Tribal Nations and Tribal entities.

Federal Response:

We appreciate the feedback Tribal governments shared in explaining the challenges of developing on lands that are subject to complex multi-governmental jurisdiction. As explained below, we have sought to support Tribal access to this Program through the Additional Selection Criteria, direct application by Tribal enterprises, and recognition of Tribal regulatory authority related to project viability documentation.

3. **Technical Assistance**

Commenters asked that Treasury and IRS (and the Department of Energy) provide technical assistance to Tribal Nations and Tribal entities applying for and participating in the Program. Commenters explained that Tribal communities have high energy costs, limited capacity, disproportionate impact from pollution, and historical barriers to federal programs, tax credits, and clean energy.

Federal Response:

Treasury and IRS cannot provide technical assistance to entities applying for tax credits. In recognition of the requests for education, Treasury has held over one hundred engagements through conferences, webinars, and one-on-one meetings with Tribal governments and entities to support their understanding of IRA tax credits opportunities. We will continue to provide educational training to support Tribal access to this Program.

Tribal Responses to Consultation Questions

1. **The 48(e) program contained a 200 MW set aside for Category 2-Indian Lands. As explained above, this NPRM does not propose set asides for any eligible categories, including for Indian lands.**

    a. **Do Tribes seek a specific set aside for the Indian Lands category for the 48E(h) program in future sub-regulatory guidance and, if so, what should that amount be?**

Commenters requested that Treasury maintain the 200 MW set aside for Category 2. Commenters expect that increased pre-project financing for Tribal clean energy work, additional eligible technologies under the technology-neutral credit, and general progress among Tribal clean energy efforts will increase the number of applications in future years. Commenters also highlighted that the low number of applications in Category 2 reflects access barriers, not a lack of interest or demand in this category.

Federal Response:

Consistent with the consultation request, Treasury has maintained the 200 MW capacity reservation under Category 2 in the final regulations and Revenue Procedure. Furthermore, 50% of the capacity reservation under Category 2 is reserved at the beginning of the allocation period for applicable facilities meeting the Additional Selection Criteria described in the final regulations. The Additional Selection Criteria include both Ownership Criteria and Geographic Criteria for Categories 1, 3, and 4. Geographic Criteria does not apply to Category 2 facilities; only Ownership Criteria apply to Category 2. An applicable facility would meet the Additional Selection Criteria under the Ownership Criteria if it is owned by an Indian Tribal government (as defined in section 30D(g)(9)), a political subdivision thereof, or any agency or instrumentality of any of the foregoing; a Tribal enterprise; an Alaska Native Corporation; or a Native Hawaiian Organization.

2. **The NPRM describes a list of clean energy facility categories that qualify for the Program under section 48E(h) and provides a process for addition of more facility categories.**

    a. **What questions or comments do Tribes have regarding the list and/or the process for adding further facility categories?**

Some commenters asked that waste-to-energy, biomass, and anerobic digestion be confirmed as eligible technologies. Commenters asked that Treasury confirm that storage and batteries are eligible technologies. Commenters requested greater clarity on how Treasury and the IRS will

determine the annual list of eligible technologies and the process for adding further categories, asking if applicants will be able to submit a request for certain facility categories to become eligible in subsequent years.

Federal Response:

As explained in the final regulations and consistent with the statute, applicable facilities must not be facilities that product electricity through combustion and gasification. Waste-to-energy and biomass generally produce electricity through combustion technologies and thus are not eligible as applicable facilities under the statute. Anerobic digestion does not produce electricity directly and therefore an anerobic digester is not an applicable facility.

Pursuant to section 48E(h)(3), eligible property does not include any qualified investment with respect to energy storage technology. Section 48E(a) defines and provides an investment credit for energy storage technology distinct and separate from a credit for a qualified facility under the Clean Electricity Low-Income Communities Bonus Credit Amount Program. The statute does not support inclusion of energy storage technology in the section 48E(h) Program. If an applicant has a system that includes both an applicable facility and energy storage technology, the applicable facility would still be eligible for a credit under section 48E and the Clean Electricity Low-Income Communities Bonus Credit Amount Program increase.

Eligible technologies under the Clean Electricity Low-Income Communities Bonus Credit Program are the same technologies that are eligible for the section 48E Investment Tax Credit. On June 3, 2024, Treasury issued an NPRM entitled "Section 45Y Clean Electricity Production Credit and Section 48E Clean Electricity Investment Credit." Those proposed regulations and any subsequent guidance would identify certain types or categories of qualified facilities that are categorically non-combustion and gasification facilities with a greenhouse gas emissions rate that is not greater than zero and how other technologies would be evaluated with respect to greenhouse gas emissions.

3. **The NPRM describes Treasury's intent to deprioritize review of applications for an applicable facility that together with other qualified facilities (1) share a point of interconnection, (2) produce electricity using the same technology, (3) are owned by the same taxpayer, and (4) have an aggregate total maximum net output equal to or greater than five megawatts (alternating current).**

    a. **What questions or recommendations do Tribes have regarding this requirement?**

A commenter asked that the agencies clarify the intended meaning of the "and" before the fourth element. In other words, as currently drafted, the commenter noted that it is unclear whether a facility that meets any of the four criteria is automatically deprioritized or whether only a facility

that meets all four criteria is deprioritized. For some Tribal Nations, the applicant could be the same for multiple projects (particularly on Indian Lands), and because the type of energy resources available is often dictated by the local environment, the commenter was concerned a de-prioritization strategy founded on meeting any one criteria may negatively affect some Tribal energy development projects that share applicants or technologies. The commenter also asked that applicable facilities that are either (1) owned by Tribal Nations or Tribal entities or (2) located on Indian lands be exempt from any de-prioritization criteria.

Federal Response:

Based on Tribal consultation and public comments, Treasury adopted a different test in the final regulations than the NPRM's deprioritization approach. In the final regulations, solely for the purposes of the less than five megawatts requirement for the Clean Electricity Low-Income Communities Bonus Credit Amount Program, if an applicable facility has *integrated operations* (defined below and in the final regulations), then the aggregate nameplate capacity of the qualified facilities must be used to determine the maximum net output of an applicable facility, including in determining eligibility for an allocation of Capacity Limitation. This approach provides clarity to applicants, creates a more efficient allocation process relative to other approaches because it streamlines application intake and processing, and helps address commenters' concerns about fairness in the allocation process.

For the purposes of the less than five megawatts requirement, an applicable facility is treated as having integrated operations with one or more other qualified facilities of the same technology type if the facilities are:

1) owned by the same or related taxpayers;
2) placed in service in the same taxable year; and
3) transmit electricity generated by the facilities through the same point of interconnection or, if the facilities are not grid-connected or are delivering electricity directly to an end user behind a utility meter, are able to support the same end user.

For purposes of the less than five megawatts requirement, the term *related taxpayers* means members of a group of trades or businesses that are under common control (as defined in Internal Revenue Code §1.52-1(b)). Related taxpayers are treated as one taxpayer in determining whether an applicable facility has integrated operations.

4. **To establish project viability, the NPRM would require applicants to submit certain information, documentation, and attestations that are similar to the section 48(e) program.**

    a. **Are modifications necessary with respect to any of the application**

requirements used for the 2023 and 2024 program years to ensure access by Tribes and Tribal entities with viable projects?

b. Can certain facility categories, such as those on Indian lands, demonstrate project viability with other types of documentation? If so, please share your recommended documentation.

Commenters explained that development on Indian lands contains more barriers than development on non-Tribal lands due to the federal government's relationship with Tribal and Native lands. Commenters generally asked that project viability documentation requirements be changed, stating that the requirements are onerous and often incompatible with the timing and requirements of typical under 5MW Tribal projects. The 48E(h) allocation itself may be necessary early in project development, but documents like a fully executed PPA happen at the last stages of development before project construction begins. These documents can be expensive and time-consuming, but project financial feasibility may hinge on the credit allocation early in development.

Commenters stated that the requirement to have a fully executed or approved interconnection agreement or a power purchase agreement is unreasonable for certain projects – such as projects that are relatively small, are distributed energy projects dependent on utility approval, or are sponsored by Tribal affiliated entities but will be owned by the Tribe. As examples of alternative documentation, commenters suggested the following: an approved grant award for the project; funding agreement or other evidence of financial support for the project; executed contract for the construction of the project; interconnection application submitted; or a letter of intent to enter into a power purchase agreement. Commenters also asked that Treasury and IRS accept Tribal resolutions or other regulatory documents providing attestations or certifications for project viability.

Federal Response:

We appreciate the feedback regarding the unique challenges encountered when a project is being developed on Indian lands or on land subject to the regulatory authority of a Tribal government. We also appreciate Tribal feedback on the importance of recognizing Tribal regulatory authority in the project viability documentation process. The final regulations and revenue Procedure incorporate this input and has adopted specific requirements for facilities on land under the regulatory authority of a Tribe (including its political subdivisions, instrumentalities, and Tribal Enterprises). This also includes lands under the authority of an Alaska Native Corporation or the Department of Hawaiian Homelands. In these cases, the applicant may provide:

1) a Notice to Proceed issued by the applicable governing authority within the relevant Tribe, Alaska Native Corporation, of the Department of Hawaiian Homelands, and
2) a copy of the submitted interconnection screen/study or a notice of intent to enter into a PPA.

The Notice to Proceed should be a notice, letter, or resolution that clearly states:

1) the applicant (or taxpayer) name,
2) energy facility location (address),
3) a description of the energy facility,
4) timeline of facility development, and
5) clear approval from the Tribe, Alaska Native Corporation, or the Department of Hawaiian homelands that the facility has been evaluated and is ready to proceed.

If an interconnection agreement is not applicable to the facility (for example, due to utility ownership), the interconnection agreement requirement is satisfied by the Notice to Proceed issued by the Tribe, Alaska Native Corporation, or the Department of Hawaiian Homelands.

5. **The NPRM addresses the filing process for disregarded entities and clarifies that Tribal enterprises that are federally chartered may continue to file as a Tribal enterprise.**

    a. **What questions or recommendations do you have regarding these proposed rules?**

Per the proposed rule on Tribally Chartered Entities published on October 17, 2024, commenters asked for confirmation that Tribally chartered enterprises will be treated the same as federally chartered entities for the Program's final regulations. Commenters stated that Treasury and the IRS should consider further clarifications for Tribal energy development organizations, Section 17 corporations owned by multiple Tribes, and other Tribally chartered entities for the structure outlined in this NPRM, including whether such entity structures will be able to opt out under Subchapter K if they otherwise meet the proposed requirements outlined in this NPRM.

Federal Response:

In response to consultation feedback, Treasury has confirmed in the final regulations that wholly owned Tribally chartered entities may directly apply for the Program's allocation as a Tribal enterprise, similar to the NPRM's proposal to allow direct application as a Tribal enterprise for corporations incorporated under the authority of either section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. 5124 or section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. 5203.

6. **A Category 3 facility would not need to be installed directly on the building to be considered installed on a Qualified Residential Property (QRP) if the facility is installed *on the same or an adjacent parcel of land* as the QRP and the other requirements to be a Category 3 facility are satisfied.**

    a. **What questions or comments do Tribes have regarding these installation parameters for eligible single-family projects?**

b. If customization of the installation requirements is suggested for single-family projects, what parameters do you recommend?

A commenter stated that the agencies' proposed requirement that a facility be installed on, at a minimum, land adjacent to the qualified residential property is too restrictive. A legacy of harmful federal policies has led to "checkerboarding" of Indian land, meaning that Indian land across the United States is divided up into parcels that could be owned by private individuals, held in trust by the United States for individual Indians, owned by a Tribal Nation, held in trust by the United States for a Tribal Nation, and even other forms of ownership. Because of checkerboarding, an adjacency requirement may not be feasible for some locations. The commenter urged the agencies to take a more expansive approach to the siting of facilities on Indian Country lands. The determination of reasonable proximity is an assessment the agencies should make on a case-by-case basis and a standard that they should consider waiving for Indian lands.

Federal Response:

Section 48E(h)(B)(i) of the IRA requires that applicable facilities under Category 3 be "installed on a residential rental building which participates in a covered housing program." This statutory language does not include applicable facilities far removed from the residential building site.

The final regulations clarify that a Qualified Residential Property could either be a multifamily rental property or single-family rental property. For single family housing developments, an applicable facility would be considered "on the same or an adjacent parcel of land" as the Qualified Residential Property if the applicable facility is on or adjacent to at least one of the structures (i.e., the applicable facility is "on the same or an adjacent parcel of land" of at least one of the single-family homes).

7. For Category 4 projects, the NPRM proposes a discount rate of 30%, up from 20% in the previous program to establish financial benefits for low-income economic benefit projects.

a. What questions or recommendations do Tribes have regarding these proposed rules?

Several commenters expressed that the proposed discount rate approach was incompatible with the current state of Tribal and local regulations and that Treasury should not increase this discount rate, as that is not consistent with the current policy trends in which some states limit a discount to 25%. One commenter asked that Treasury and IRS consider alternative methods of establishing financial benefits for low-income residential building projects owned by Tribal Nations or Tribal entities or located on Indian land. For example, a presumption of financial benefit can be applied to Tribal projects given the agencies' trust and treaty obligations.

Federal response:

In response to Tribal consultation and public comments, the final regulations adopt a bill discount rate of 20 percent. The 20 percent bill discount rate – as opposed to a 30 percent bill discount rate – supports the Program's goal of national impact by allowing a broader range of facilities to apply under Category 4. Given the uncertainty of how the market will evolve and yearslong industry development timelines, the final regulations do not adjust the bill discount rate over time.

8. **What other questions or recommendations, if any, do Tribes have regarding the NPRM?**

Commenters asked for clarification on the impact of energy storage on nameplate capacity.

Federal Response:

Pursuant to section 48E(h)(3), eligible property does not include any qualified investment with respect to energy storage technology. Thus, energy storage capacity does not impact the nameplate capacity of an applicable facility under the Low-Income Communities Bonus Credit Amount Program. See the response above to consultation question 2 for additional detail.

Other Comments

Some commenters stated support for Congressional authorization to allow the IRS to give in-depth technical assistance to Tribes. Others requested that IRS provide customized educational training and a forum for Tribes to ask program questions.

Federal Response:

Treasury cannot provide technical assistance to entities applying for tax credits. Treasury and the IRS intend to continue robust educational programming to support Tribal access to clean energy tax credits.

A commenter wrote on the proposed § 1.48E(h)-1(e)(6)(i), which would require Category 3 facility owners to prepare a Benefits Sharing statement. Concerning the Benefits Sharing statement and any other legal and/or contractual documents the agencies might require between applicants and beneficiaries, the commenter asked the agencies to draft and supply template agreements for applicants to use. The commenter noted that some Tribes have limited capacity to retain the legal counsel necessary to produce these materials.

Federal Response:

In response to consultation and public feedback, a template Benefits Sharing Statement and an example draft Demonstration of Financial Benefits is available on the Program homepage.

A commenter shared support for the maximization of individual household benefits for those included in qualified low-income economic benefit projects, particularly in scenarios in which Tribal households are included in participating projects administered by non-Tribal entities. The commenter encouraged Treasury and IRS to consider, on a case-by-case basis, proposals from Tribal entities for alternative methods of meeting the financial benefits requirement for Category 4 facilities or whether this requirement can be waived entirely for Tribal entities.

Federal Response:

The IRA requires that, under category 4, applicable facilities "shall be treated as part of a qualified low-income economic benefit project if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households" with certain income requirements. Treasury is unable to provide alternative methods of meeting these requirements.

A commenter shared that, although they appreciate the agencies' clear language in the proposed rule that electricity savings to individual households will not adversely affect those households' eligibility for income-defined housing programs, they are concerned that the realization of certain projects, particularly in Category 3, may nevertheless expose individual households to adverse income determinations in the calculation of their federal income tax liability and eligibility for other income-defined benefit programs such as Supplemental Nutrition Assistance Program (SNAP), Medicaid, Temporary Assistance of Needy Families (TANF), Social Security Income (SSI), the Low-Income Home Energy Assistance Program (LIHEAP), and the Earned Income Tax Credit.

In accordance with the Department of Housing and Urban Development's Treatment of Financial Benefits to HUD-Assisted Tenants Resulting from Participation in Solar Programs Notice (Housing Notice 2023-09), and other related guidance published by HUD, in the case of Category 3 facilities for which electricity bill savings cannot be applied directly at the household level, some facilities could provide cash to those households as an alternative method to satisfy the benefit-sharing requirements of the program. The commenter expressed that it is this receipt of cash that they are concerned may count as income because gross income ordinarily means all income from whatever source derived. They requested that IRS clarify that electricity bill benefits received at the household level shall not be treated as income for purposes of personal income liability determinations or for any income-defined program over which the IRS has authority.

Federal Response:

Treasury appreciates this concern, and the final regulations address beneficiary annual income questions. In the case of a solar facility, applicants must follow guidance published by the Department of Housing and Urban Development (HUD) regarding benefits sharing, such as Treatment of Financial Benefits to HUD-Assisted Tenants Resulting from Participation in Solar Programs Notice (Housing Notice 2023-09), located here, or other applicable HUD guidance, or other guidance or notices from the Federal agency that oversees the applicable housing program identified in section 48E(h)(2)(B) to ensure that tenants' annual income for rent calculations or other requirements impacting total tenant payment are not negatively impacted by the distribution of financial value. In the case of any other applicable facility, applicants must follow applicable HUD guidance on benefits sharing, or other guidance from the Federal agency that oversees the applicable housing program. In the absence of applicable guidance from a Federal agency, applicants should apply principles similar to those articulated in the HUD guidance in the case of any other applicable facility Treasury and the IRS do not have authority under section 48E(h) to allow financial benefits from applicable facilities to not be treated as income specifically for the Clean Electricity Low Income Communities Bonus Credit Amount Program.

A commenter asked that Treasury and IRS add other Tribal-specific affordable housing programs to the list of affordable housing programs for purposes of meeting the requirements of a Category 3 facility, such as the Tribal HUD-VA Supportive Housing program, and affordable housing programs administered by Tribal governments, which may or may not be federally funded.

Federal Response:

The Revenue Procedure contains a list of Federal housing programs and policies that meet the Program requirements. The list includes:

1) Housing programs administered by an Indian Tribe or a Tribally designated housing entity (as defined in section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22)).

Consistent with the consultation request, the Tribal HUD-VA Supportive Housing program (Tribal HUD-VASH) would be considered an eligible housing program for Category 3. Because Tribal HUD-VASH is administered through grants to Indian Tribes and Tribally Designated Housing Authorities, it would qualify as a housing program administered by an Indian Tribe or a Tribally designated housing entity.