



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

May 31, 2023

via Email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to an expedited consultation on a [Notice of Proposed Rulemaking \(REG-110412-23\) "Additional Guidance on Low-Income Communities Bonus Credit Program"](#) under Section 48(e) of the Inflation Reduction Act of 2022 (Section 48(e)). This consultation will be held virtually on Monday, June 26, 2023, 1pm-4pm EDT.

Background

The Inflation Reduction Act of 2022 (IRA) represents the most significant legislation to invest in clean energy and address climate change in our nation's history. These tax incentives include opportunities for Tribal governments and entities conducting qualified projects on Indian Lands as described in Treasury's [October 29, 2022 IRA Dear Tribal Leader Letter](#). On November 28 and 29, 2022, Treasury hosted Tribal consultations on the IRA.

One credit that received significant interest from Tribal governments during consultation was Section 13103 of the IRA, which amends Section 48 of the Internal Revenue Code to add subsection (e) to increase credits for qualified solar and wind facilities in the following areas:

- Increase of 10 percentage points for facilities located in a low-income community, as defined in section 45D(e) (Category 1 facility)
- Increase of 10 percentage points for facilities on Indian land, as defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)) (Category 2 facility)
- Increase of 20 percentage points for eligible property that is part of a qualified low-income residential building project (Category 3 facility)
- Increase of 20 percentage points for eligible property that is a qualified low-income economic benefit project (Category 4 facility).

On February 13, 2023, IRS issued [Notice 2023-17](#), which established the Low-Income Communities Bonus Credit Program under Section 48(e) and provided initial guidance for potential applicants for allocations of calendar year 2023 Capacity Limitation. This initial guidance provides the general eligibility requirements, a description of the four statutory facility categories for which an eligible facility may request an allocation,

amounts of capacity limitation reserved for each facility category, a general description of the program design and goals, the application review process, and the proposed timeline for opening two 60-day application periods in 2023 based on project categories.

[Notice 2023-17](#) further provided that a total of 1.8 gigawatts of direct current capacity will be reserved for the Capacity Limitation for calendar year 2023 as follows:

Category 1: Located in a Low-Income Community	700 megawatts
Category 2: Located on Indian Land	200 megawatts
Category 3: Qualified Low-Income Residential Building Project	200 megawatts
Category 4: Qualified Low-Income Economic Benefit Project	700 megawatts

On May 31, 2023, Treasury published a Notice of Proposed Rulemaking in the *Federal Register* entitled “Additional Guidance on Low-Income Communities Bonus Credit Program” (NPRM) which contains proposed rules concerning the low-income communities bonus energy investment credit program. The NPRM describes proposed definitions and requirements regarding the program that would be applicable for calendar year 2023, which also would inform guidance applicable for future program years. The NPRM covers the following topics:¹

1. the definition of facility based on single project factors
2. the definition of “in connection with” to demonstrate what it means for energy storage technology to be considered “installed in connection with the qualifying solar and wind facility”
3. definitions of the terms “financial benefit” and “electricity acquired at a below market rate” under section 48(e)(2)(D), as well as a manner to apply such definitions, appropriately, to Category 3 facilities that are part of qualified low-income residential building projects and Category 4 facilities that are part of qualified economic benefit projects
4. the definition of “located in” for relevant geographic criteria, including the Nameplate Capacity Test.
5. a rule for facilities placed in service prior to an allocation award
6. reservations of Capacity Limitation allocation for applicant facilities that meet certain Additional Selection Criteria
7. sub-reservations of Capacity Limitation allocation for facilities built in a low-income community
8. application materials demonstrating facility viability in order to allow for an efficient allocation process
9. documentation and attestations to be submitted when a facility is placed in service

¹ As stated in the NPRM, additional detailed guidance for the Low-Income Communities Bonus Credit Program applicable for calendar year 2023, including a comprehensive set of issues and procedures beyond the scope of this document, will be provided upon finalizing the proposed rules.

10. post-allocation compliance including disqualification and recapture of section 48(e) Increases.

Importantly, as highlighted in Number 6 above, this NPRM contains proposed reservations of 50 percent of Capacity Limitation in each of the four facility categories listed above for applicant facilities that meet certain Additional Selection Criteria. The two Additional Selection Criteria are Ownership Criteria and Geographic Criteria. Facilities meeting at least one of the two Additional Selection Criteria would be eligible for an allocation of the Capacity Limitation reserved for facilities that meet the Additional Selection Criteria, and facilities meeting both of the Additional Selection Criteria categories may be prioritized for such an allocation.

- A qualified solar and wind facility would meet the Ownership Criteria if it is owned by a Tribal Enterprise, Alaskan Native Corporation, a renewable energy cooperative, a qualified renewable energy company meeting certain characteristics, or a qualified tax-exempt entity such as a Tribe.
- To meet the Geographic Criteria, a facility must be located in a Persistent Poverty County (PPC) or in a census tract that is designated as a disadvantaged community based on the Energy Category calculation of census tracts that are (1) at or above the 90th percentile for energy cost or PM2.5 in the air and (2) are at or above the 65th percentile for low-income population in the Climate and Economic Justice Screen Tool (CEJST).

Additionally, as highlighted in Number 4 above, the NPRM also provides that “[a] qualified solar and wind facility is treated as ‘located in a low-income community’ or ‘on Indian Land’ under section 48(e)(2)(A)(iii)(I) or located in a geographic area under the Additional Selection Criteria if the facility satisfies the nameplate capacity test (Nameplate Capacity Test).” Under the Nameplate Capacity Test, a facility that has nameplate capacity (for example, wind and solar facilities) is considered located in or on the relevant geographic area if 50 percent or more of the facility nameplate capacity is in a qualifying area. A facility’s nameplate capacity percentage is determined by dividing the nameplate capacity of the facility energy-generating units that are located in the qualifying area by the total nameplate capacity of all the energy-generating units of the facility.

Consultation Content

Pursuant to Executive Order 13175, President Joseph R. Biden’s Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships; the Presidential Memorandum on Uniform Standards for Tribal Consultation; and Treasury’s Action Plan for Tribal Consultation and Collaboration, Treasury is commencing expedited consultation on this NPRM to inform the development of final guidance to implement section 48(e).²

² Treasury ordinarily provides 30 days’ notice prior to a consultation and a 30 day comment period following the consultation. Due to IRA implementation timelines, this consultation is being held on an expedited timeline to ensure Tribal leader feedback is received to inform the development of final guidance.

Specifically, Treasury requests the assistance of Tribal leaders in addressing the following questions:

- A. As described above on page 1 of this DTLL, the NPRM provides guidance on a series of definitions. What questions and/or comments do Tribal governments have with regard to the definitions contained in Number 1-4 above?
 - i. With regard to Number 4, what questions and/or comments do Tribal governments have regarding the definition of “located in” and the Nameplate Capacity test for relevant geographic criteria, which includes Indian Lands?
- B. As described above on page 1, the NPRM also covers administrative requirements that address process and compliance. What questions and/or comments do Tribal governments have with regard to the guidance contained in Numbers 8,9, and 10 of this DTLL?
- C. The Additional Selection Criteria, described above, provides for Tribal inclusion and reserves 50 percent of Capacity Limitation in each facility category for qualifying governments and entities.
 - i. With regard to Ownership Criteria, this section also defines an eligible Tribal Enterprise as follows:

“Tribal Enterprise” for purposes of the Ownership Criteria is an entity that (1) an Indian Tribal government (as defined in section 30D(g)(9)) owns at least a 51 percent interest in, either directly or indirectly (through a wholly owned corporation created under its Tribal laws or through a section 3 or section 17 Corporation), and (2) the Indian Tribal government has the power to appoint and remove a majority (more than 50 percent) of the individuals serving on the entity’s board of directors or equivalent governing board.

What questions and/or comments do Tribal governments have with regard to the Additional Selection Criteria, including the definition of Tribal Enterprise?

- ii. The Additional Section Criteria also includes Geographic Criteria as described above. Should this criteria apply on Indian lands under Category 2?
- D. What other questions or comments, if any, do Tribal governments have regarding the NPRM?

[Register here](#) for the consultation.

We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants.

In addition to a Tribal consultation, Treasury is accepting written or electronic comments received by June 30, 2023, 11:59 p.m. Alaska Time. Submit written comments at tribal.consult@treasury.gov.

Please note that consultations are off the record and not for press purposes.

We will send out an Agenda and a list of registered speakers before or on June 23, 2023.

We hope that you will be able to join us for this important discussion and value your participation.

Sincerely,

Chief Lynn Malerba
Treasurer
Point of Contact for Tribal Consultation
U.S. Department of the Treasury