



June 14, 2023

ATTORNEY WORK PRODUCT

To: Tribal Energy Clients
From: Pilar M. Thomas
Re: IRS Notice of Proposed Rulemaking for the Low-Income Community Bonus Credit Program

On June 1, 2023, Treasury issued a notice of proposed rulemaking (NPRM) to implement the Low-Income Community Bonus Credit Program (LICBCP). See, 88 FR 35791 (Jun. 1, 2023). The LICBCP is intended to implement the environmental justice capacity limitation program (Capacity Limitation) authorized under the Inflation Reduction Act and codified at 26 USC 48(e). The NPRM confirms several aspects of the initial guidance issued by Treasury in February, and updates that guidance in several important ways. Treasury has scheduled tribal consultation for June 26, 2023, and written comments are due June 30, 2023.

Background of the LICBCP

The IRS authorized the environmental justice capacity limitation program which allows for additional investment tax credits for up to 1.8 GWdc of installed solar, wind, small wind, and energy storage projects that meet certain criteria. Projects located in low-income communities or on Indian lands are eligible for an additional investment tax credit of 10%. Projects that benefit low-income housing (including tribal housing) or economic development projects are eligible for an additional investment tax credit of 20%. Projects must be a maximum of 5 MWac installed capacity.

In February's initial guidance, Treasury further allocated the statutory 1.8 GW Capacity Limitation between the statutory categories as follows:

Category	Allocation (in MW)	Tax Credit Bonus
1 - Low Income Community	700 MW	10%
2 - Indian Lands	200 MW	10%

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Category	Allocation (in MW)	Tax Credit Bonus
3 - Low Income (including tribal) Housing	200 MW	20%
4 - Low Income Economic Development	700 MW	20%

Under the LICBCP, in order to claim the additional investment tax credit, the project owner must apply for a Capacity Limitation allocation from Treasury. Once the allocation is approved, the project must be built ("placed into operation") within 4 years of receiving an allocation.

Summary of the Proposed Rule

The newly published proposed rule addresses several aspects of how the LICBCP will be implemented, including applicable definitions, the application process, prioritization of applications, and application documentation. Key aspects of the proposed rule include:

- **Project Size.** A project owner cannot split up a larger project into smaller projects to meet the maximum capacity limit of 5 MW, so IRS will aggregate projects based on single project factors previously adopted by IRS, such as ownership, location, and common interconnection point.
- **Energy Storage.** Projects can include storage that is directly connected to the solar or wind project. Storage capacity will not count towards the maximum 5 MWac.
- **For low-income housing projects,** the renter or resident must receive equitable benefits from the project; if there are net energy savings, at least 50% of the savings must be passed onto the occupants. There are several ownership scenarios presented, each with a shared benefits calculation and requirements.
- **For low-income economic benefit projects,** at least 50% of the financial benefits from the project must be distributed to low-income households, with at least a minimum 20% bill credit.
- **At least 50% of the nameplate capacity (2.5 MW) must be located in low-income communities or on Indian lands;** solar will be rated in ac, wind rated in dc, storage does not count.
- **The Low-Income Community allocation of 700 MW (Category 1) will include a reservation of at least 560 MW for behind the meter projects, including rooftop solar.** The remainder can be used for front of the meter projects or non-residential behind the meter projects.

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- All four categories will have a minimum 50% reservation for projects that meet the Ownership Criteria (described below).
- Tribes can meet the Ownership Criteria in several ways: through direct ownership, Tribal Enterprise ownership, or through "qualified renewable energy company" ownership. A Tribal Enterprise or qualified renewable energy company that is at least 51% owned and controlled by a tribe or tribal enterprise wholly owned by the tribe meets the Ownership Criteria.
- All allocation applications will now be accepted during an initial application period. After the initial application period, if there are still available Capacity Limitations allocation remaining, then applications will be accepted on a rolling basis. Certain applications will be given priority: projects that are owned by certain entities, including tribes, tribal enterprises and Alaska Native Corporation (Ownership Criteria); or projects that are located in areas of persistent poverty (Geographic Criteria). Applications will be processed in the following order: 1) if meet both criteria; 2) then if meet at least one of the criteria; 3) then don't meet either criteria.
- Applications must include, among other items: copy of executed interconnection agreement; attestations related to site control evidence, required permits, size of project relative to load; ownership criteria; eligible location. Application requirements will vary by category, project size, and whether in front of or behind the meter.
- Once the project is placed into operation, several additional documents will have to be submitted.

Implications for Tribes

As a reminder, Tribes will be eligible to elect to receive a direct payment in the amount of the tax credit for eligible energy projects, including projects eligible for the LICBCP. As such, a Tribe could receive as much as a 70% tax credit/direct payment for an eligible project.

In the Dear Tribal Leaders Letter (DTLL), Treasury has asked the following questions for tribal consultation, scheduled for June 26. Our observations are highlighted in bold:

- 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?

Observations

- Number 1: Single project factors seem reasonable for larger projects. However, it's unclear how to aggregate multiple rooftop or facility projects. The aggregation of multiple projects must allow**

for phased approaches for rooftop solar projects, and to treat each phase as a different project.

Number 2: Does "in connection with" include interconnection costs? The NPRM should allow interconnection costs to be included, as the IRS has expanded tax credit eligibility to include interconnection costs for projects less than 5 MW.

Number 3: Treasury proposes a very limited definition of "financial benefit" and these formulas may not work for tribal owned housing (especially single family homes), or projects directly owned by tribes or tribal housing authorities. Further, the definitional calculations may not work in states or utilities that don't allow net metering or community solar. They may not also work if Tribes can negotiate virtual net metering with their utilities that create savings for tribal members. Finally, Low-Income Economic Development Projects should not be required to benefit individual households only. Treasury should expand the definition of "financial benefit" to include direct benefits from the additional tax credit (especially for projects owned by the Tribe and receiving elective payments from Treasury), job creation and economic benefits to small businesses located on Indian lands.

- 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?

Observations: This does not likely create ambiguity for projects located on tribal lands, except where projects might be located off of reservation lands (such as on fee land or off-reservation trust lands). Tribes might want to propose the use of "dependent Indian community" or a census based definition.

- 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?

Observations:

- **Application material does not seem unreasonable, except as follows:**
 - **any third-party operating on Indian lands should have a tribal resolution (not all tribes have permitting processes)**

- **requiring negotiated or approved interconnection agreements is very premature – especially since tribes will have up to 4 years to develop and place a project in service**
 - **projects owned directly by tribe or tribal housing authority should not have to comply with site control, customer disclosures, or benefit sharing agreements with households**
- 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?

Observations:

- **The Category 2 allocation should be fully reserved (not 50% reserved) for projects that meet the Ownership Criteria (Tribes, Tribal Enterprises, ANCs and qualified renewable energy companies that are 51% owned by Tribes).**
 - **If a Tribe owns and operates an LLC, it may not have a board. So the board appointment requirement should only be applicable if there is a board.**
- ii. The Additional Section Criteria also includes Geographic Criteria as described above. Should this criteria apply on Indian lands under Category 2?

Observations:

The Geographic Criteria could apply for off-reservation trust lands, but not necessary if Category 2 is fully reserved to projects that meet the Ownership Criteria. It should apply on Indian lands for Categories 3 and 4 so that tribal projects located in PPC or EJ communities can fairly compete in those categories.

- D. What other questions or comments, if any, do Tribal governments have regarding the NPRM?

Observations:

- **What is the rationale for treating capacity rating different for wind and solar? The 5 MW limit should be based on ac for both as the statute indicates.**
- **Rationale for not allowing projects placed into service after January 1, but before receiving an allocation, is insufficient. Many tribal projects planned, started and constructed since the IRS passed, in anticipation of qualifying for the bonus credit. This expectation escalated tribal projects, which should not be penalized because of the IRS timing on issuing these rules. The Capacity Limitation is available January 1, 2023 – so as long as the project is placed into service after January 1, it should qualify for a Capacity Limitation allocation.**
- **Clarify that if a Tribe owns an LLC, and the LLC owns the project, the Tribe is the applicant and not the LLC. The LLC should be allowed to apply, as long as it shows it's a disregarded entity, and at least 51% owned by the Tribe (or Tribal Enterprise).**

We strongly recommend that your Tribal leadership participate in the upcoming consultation session. You can register here:

<https://ustreasury.zoomgov.com/meeting/register/vJlscuihpzwiGy7AdIKDOL0rrq4trbKcB> 8.

We also recommend the Tribe provide written comments to Treasury by June 30.

Please let us know if you have any questions or require further information about this proposed rule, or would like us to assist you with preparing for the tribal consultation or drafting comments.