

Client Alert

May 2019

IRS to Seek Comment on Key Issues to be Interpreted in Section 45Q Tax Credit

The Department of Treasury (“Treasury”) and Internal Revenue Service (“IRS”) have released [Notice 2019-32](#) (the “Notice”) seeking comment on key issues to be interpreted in the Section 45Q carbon oxide sequestration tax credit.

Congress significantly enhanced the Section 45Q tax credit in the Bipartisan Budget Act of 2018 (“BBA”), increasing the credit from \$10/ton for CO₂ used as a tertiary injectant (i.e., to produce oil or gas) to \$35/ton; and increasing the credit for CO₂ geologically stored but not used as a tertiary injectant from \$20/ton to \$50/ton. See our previous blog post [here](#) for additional details on the applicable credit amounts for projects before and after enactment of the BBA, and other credit amount details.

The BBA also enhanced the credit by establishing a 12-year credit term, making it easier to transfer the credit, expanding the credit to cover sequestration of emissions of other carbon oxides in addition to CO₂, and extending the credit to “utilization” of carbon oxides in ways that keep them out of the atmosphere, other than geological sequestration (e.g., fixation of carbon oxides in building materials, or use for growth of algae or bacteria). “Utilization” requires the IRS to apply a lifecycle analysis, which may reduce the credit amount if some of the utilized carbon oxides return to the atmosphere.

The IRS Notice does not provide any substantive guidance but seeks comments from interested parties on a full range of questions on key issues in the Section 45Q tax credit. Those comments will be considered by Treasury and the IRS in drafting regulations or other guidance. The issues on which comments are requested include:

- What requirements should apply to demonstrate that carbon oxides have been securely geologically stored;
- What rules should apply for the government to recapture the credit should carbon oxides no longer be stored;
- Is guidance needed to clarify terms such as “carbon capture equipment,” “qualified carbon oxide,” “qualified facility” and others;
- What types of “utilization” should qualify for the credit;
- What are the boundaries for determining lifecycle emissions of carbon oxides that are “utilized”;
- What are common types of contractual arrangements between investors and parties who capture and dispose of carbon oxides, and what are some of the common terms of contracts specifically when the carbon oxides are used as a tertiary injectant;
- What issues should be considered regarding transfer of the Section 45Q tax credit;

- What should constitute the beginning of construction for purposes of the credit;
- Is guidance needed regarding partnership structures between project developers and investors; and
- What issues may arise in determining the amount of carbon oxides utilized by the taxpayer, based on a lifecycle analysis.

Comments will be due 45 days after the Notice is published in the Federal Register.

Our Tax and Administrative Law Teams will be assisting clients on responding to the request. Please reach out to us if you have any questions or we can be of assistance.

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