Brad Kelley, CEO
Purefield Ingredients
1030 E. 15th Street
Russell, KS 67665

December 9, 2022

Mr. Douglas O'Donnell
Acting Commissioner

Ms. Holly Porter
Associate Chief Counsel (Passthroughs and Special Industries)

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-58, Notice 2022-57)
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted electronically via **http://www.regulations.gov**

Re: Comments of PureField Ingredients LLC in Response to Notice 2022-57 and Notice 2022-58

Dear Mr. O'Donnell and Ms. Porter,

On behalf of PureField Ingredients LLC, I appreciate the opportunity to submit these comments on the clean fuel production credit under Section 45Z of the Internal Revenue Code and the carbon oxide sequestration credit under Section 45Q of the Code, in response to Notices 2022-58 and 2022-57 respectively.

PureField Ingredients is one of America's most trusted providers of food ingredients. We are the nation's largest domestic supplier of wheat protein, producing more than 70 million pounds of Vital Wheat Gluten (wheat protein) per year. In addition, and of particular relevance in this context, we also produce 50 million gallons of ethanol each year at our biofuels facility in Russell, Kansas, primarily using the by-product waste stream from our wheat protein production. This makes us one of the most efficient producers of ethanol in the country, and we are proud to achieve a carbon intensity score for our fuels that is among the lowest of any major ethanol manufacturing facility in the USA. We operate using 6 different fuel production pathways, out of one ethanol production facility. We believe that the weighted average carbon intensity score of our ethanol production utilizing these 6 pathways is the lowest in the USA. And we are actively looking to make more improvements, further reducing our carbon intensity. If properly constructed, we intend to apply for the clean fuel production credit under section 45Z of the internal Revenue Code after building appropriate new systems at our facility, some of which are novel, which will further reduce our CO_2 emissions and lower our CI scores. If 45Z is not constructed well, or it takes too long for clear guidance to be issued, we may not build some, or any, of these new systems.

Summary of Comments

We respectfully recommend that, in implementing the clean fuel production credit and the amendments to the carbon oxide sequestration credit effected by the Inflation Reduction Act, the IRS and Treasury:

- Clarify that the emissions rate for a transportation fuel, for purposes of Section 45Z(b)(1) of the Code, **depends on the "pathway"** used to produce the transportation fuel (within the meaning of the GREET model).[1]
- Confirm that the emissions rate for a transportation fuel (and thus the emissions factor of the transportation fuel under Section 45Z(b)(1) of the Code) will be **less than zero** if the lifecycle greenhouse gas emissions of the transportation fuel under the GREET model is a negative amount.
- Act quickly to **produce a draft table** of emissions rates and **establish a process** for the determination of provisional emissions rates so taxpayers can begin investing in projects with long lead times.
- Provide an opportunity for **notice and comment** on the draft table of emissions rates, and the methodology by which they are determined, as soon as reasonably practicable so that comments can be given due consideration before Section 45Z goes into effect.
- Provide that each **distinct production pathway** used by a taxpayer constitutes a **separate facility** for purposes of Section 45Z(d)(4).
- Confirm that status as a "qualified facility" under Section 45Z(d)(4) is determined independently for **each taxable year** in which a taxpayer claims the clean fuel production credit.
- Clarify that the reference in Section 45Z(d)(4)(B) to other credits "allowed" during a taxable year **does not preclude** a taxpayer from receiving the clean fuel production credit even if the taxpayer's activities also qualify under (but the taxpayer **does not claim**) another of the specified credits.
- Provide that taxable years in which a taxpayer claims the clean fuel production credit are **not taken into account** in computing the 12-year period for the carbon oxide sequestration credit under Section 45Q(a)(3)(A).

---

[1] Because the ethanol we produce is not sustainable aviation fuel as defined in Section 45Z(a)(3)(B) of the Code, its emissions rate will be determined using the GREET model. *See* I.R.C. Section 45Z(b)(1)(B)(ii). The same principles, however, apply under the models described in I.R.C. Section 45Z(b)(1)(B)(iii), which apply to the determination of emissions rates for sustainable aviation fuel. For simplicity, we refer only to the GREET model in this letter, but our comments are equally relevant to sustainable aviation fuel.

We believe these recommendations are consistent with the text and conceptual framework of the Inflation Reduction Act, and will enhance the efficiency of the clean fuel production credit and the carbon oxide sequestration credit in furtherance of Congressional policy and intent. We discuss each of them in greater detail below.

A. Determination of Clean Fuel Production Credit

One of the primary goals of the Inflation Reduction Act is to incentivize "historic levels of private investment in clean energy."[2] There are ambiguities, however, in the provisions of the Act relating to the clean fuel production credit. Uncertainty as to the application of these provisions reduces the ability and willingness of the private sector to commit capital for such historic levels of investment. To unlock the capital necessary to increase American energy security while substantially reducing greenhouse gas emissions, which is a goal we are passionately pursuing, we encourage the IRS and Treasury to provide guidance addressing these ambiguities.

We respectfully submit that the IRS and Treasury can effectively facilitate investment in technology and infrastructure to reduce greenhouse gas emissions from transportation fuels by establishing a clear and pragmatic interpretive framework for determining the amount of the clean fuel production credit under Section 45Z of the Code incorporating the recommendations set forth below.

1. Emissions Rates Depend on Production Pathways

Under the GREET model, the lifecycle greenhouse gas emissions for a transportation fuel depend on the specific production pathway used to produce the transportation fuel. Transportation fuels produced using pathways with different carbon intensity scores are not fuels of "similar types and categories" with respect to their impact on the climate, even if they are chemically similar or identical. We therefore recommend that the IRS and Treasury clarify that the emissions rate for transportation fuel is determined separately for each production pathway used in the production of the transportation fuel. This will prevent taxpayers from benefiting inappropriately from reductions in emissions that they do not achieve, nor being penalized inappropriately for greenhouse gases that they do not emit, as a consequence of emissions rates associated with pathways other than those the taxpayers actually use to produce the transportation fuel they sell.

Section 45Z of the Code defines the clean fuel production credit for any taxable year as the product of (i) a specified amount for each gallon (or gallon equivalent) of transportation fuel meeting certain requirements that a taxpayer produces and sells during the taxable year, and (ii) the emissions factor for

---

[2] *See Update: How to Engage with Treasury on Clean Energy Tax Incentives,* White House (Nov. 29, 2022), https://www.whitehouse.gov/cleanenergy/clean-energy-updates/2022/11/29/how-to-engage-with-treasury-on-clean-energy-tax-incentives.

the transportation fuel.[3] The "emissions factor" of a transportation fuel is based on a formula which takes as its input the "emissions rate" for such fuel.[4]

Section 45Z(b)(1)(B)(i) of the Code requires taxpayers to determine the applicable emissions rate using a table to be published annually by the Secretary (the "Annual IRS Table"), "set[ting] forth the emissions rate for similar types and categories of transportation fuels."[5] The table is to be "based on the amount of lifecycle greenhouse gas emissions (as described in section 211(o)(1)(H) of the Clean Air Act…) for such fuels."[6] Under section 211(o)(1)(H) of the Clean Air Act, "lifecycle greenhouse gas emissions" means

> "the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential."

Under this definition, the lifecycle greenhouse gas emissions for a transportation fuel depend not only on the characteristics of the transportation fuel itself but also on the method used to produce and distribute the transportation fuel. (These are commonly referred to collectively as the "pathway" for the transportation fuel.) To accurately determine the emissions rate of a transportation fuel, it is therefore important to identify the correct pathway for the transportation fuel. Transportation fuels produced and distributed under different pathways will generate different amounts of lifecycle greenhouse gas emissions and should have different emissions rates for purposes of Section 45Z.

To illustrate this, we note that the lifecycle greenhouse gas emissions of ethanol used as a transportation fuel depend in part on the source of sugars used to produce the fuel and the method used to convert those sugars into ethanol. But even two separate ethanol production facilities producing ethanol from the same type of source and using the same production plant may have differing "lifecycle greenhouse gas emissions" based on factors such as the source of energy used to power the production process. An ethanol plant that uses on-site wind turbines to power its production equipment, for example, will generate lower lifecycle greenhouse gas emissions under the GREET model than an otherwise-identical ethanol plant that burns fossil fuel to power its equipment. It would undermine the purpose of the clean fuel production credit and frustrate the intent of Congress in adopting the Inflation Reduction Act if taxpayers received the same amount of tax credits under Section 45Z of the Code for

---

[3] *See* I.R.C. Section 45Z(a).

[4] *See* I.R.C. Section 45Z(b)(1)(A).

[5] I.R.C. Section 45Z(b)(1)(B)(i) ("the Secretary shall annually publish a table… which a taxpayer **shall use** for purposes of this section") (emphasis added).

[6] I.R.C. Section 45Z(b)(1)(B)(i).

ethanol produced at these very different plants because the Annual IRS Table treats ethanol fuels broadly as "similar types and categories of transportation fuels" and assigns them the same emissions rate.

We believe that guidance from the IRS and Treasury that recognizes the inherent link between pathways and emissions rates is essential to preserve the incentive for producers to develop pathways that reduce lifecycle greenhouse gas emissions. An ethanol producer who incurs additional expense by installing on-site wind turbines to power the plant's equipment, for example, should get credit for the environmental benefits of doing so. It would be both unfair and inconsistent with the statutory scheme if the producer were required to determine its clean fuel production credit using the same emissions rate value from the Annual IRS Table as a competitor who used fossil fuels in its production process. We therefore recommend that the IRS and Treasury Department take into account, to the extent practicable, all factors that may affect a transportation fuel's lifecycle greenhouse gas emissions in determining the applicable emissions rate under the Annual IRS Table.[7]

2. Guidance Should Confirm that Emissions Rates May be Less Than Zero

Section 45Z of the Code does not explicitly state that a transportation fuel may have a emissions rate that is below zero. We note, however, that the GREET model can generate negative values for lifecycle greenhouse gas emissions. In addition, Section 45Z provides that emissions rates between 2.5 and -2.5 kilograms of CO_2e per mmBTU may be rounded to zero,[8] implying that Congress recognized and intended the possibility of negative emissions rates. To avoid any uncertainty, we recommend that the IRS and Treasury provide guidance explicitly confirming this interpretation.

This accords with the Congressional objective to "decarbonize" the American economy. It is logical that Congress would provide a greater incentive for the production and sale of a transportation fuel that results in a net reduction in atmospheric greenhouse gases over its entire lifecycle than for a transportation fuel which is merely carbon-neutral.

---

[7] We recognize that it would likely not be practical to expect the IRS to determine an emissions rate for every conceivable pathway that might be used to produce transportation fuel. I.R.C. Section 45Z(b)(1)(B)(i) therefore cannot be understood to impose such a requirement in connection with the preparation of the Annual IRS Table. For a proposed solution that takes account of both the IRS's legitimate interest in efficiency and administrability and the need to identify a pathway so that an accurate emissions rate can be determined under the GREET model, please see the discussion below under "3.iii. Taxpayers Should Be Permitted to Determine Provisional Emissions Rates Directly Using Applicable Models, Subject to a Rebuttable Presumption."

[8] *See* I.R.C. Section 45Z(b)(1)(C)(ii).

3. A Process Is Needed to Determine Emissions Rates Quickly and With Certainty

Taxpayers require clarity and, to the extent possible, certainty as to the material economic terms of a transaction in order to make investments on the scale contemplated by the Inflation Reduction Act.[9] This is particularly true because those investments involve large infrastructure construction projects and novel production methods that by their nature will take a number of months, if not years, to finance and build.

i. Guidance Should be Issued As Soon as Possible, and Well Before 2025

Section 45Z(e) of the Code directs the Secretary of the Treasury to issue guidance regarding the clean fuel production credit, including the Annual IRS Table, not later than January 1, 2025. While we recognize that these are complicated issues, we are concerned that guidance may be timely under the statute and nevertheless arrive too late to be useful to taxpayers. As discussed above, this concern is particularly relevant because of the amount of capital that clean fuel production facilities require and the long lead time required to raise the capital and develop the facilities.

Additionally, we are mindful that the clean fuel production credit expires at the end of 2027.[10] To enable new projects to be developed and placed into service in time to benefit from the credit, we believe it is important for guidance to be released as soon as possible, recognizing that this will entail substantial time and commitment from the IRS and Treasury.

We therefore respectfully recommend that the IRS and Treasury prioritize efforts to publish a first draft of the Annual IRS Table in the next several months. We acknowledge the complexity and difficulty of this undertaking. Because of that complexity, however, we think it is important that taxpayers have the opportunity to review the draft Annual IRS Table and submit comments which the IRS and Treasury have ample time to consider before the clean fuel production credit goes into effect in 2025.

ii. The IRS Should Explain How It Uses the GREET Model to Determine the Emissions Rates it Publishes in the Annual IRS Table

To make the clean fuel production credit as effective as possible in unlocking private-sector investment, we recommend that the Annual IRS Table include transparent explanations of how the IRS applies the GREET model to make the determinations reflected in the Annual IRS Table, including the relevant inputs and data sources. This would allow taxpayers to modify each input as appropriate for their particular operation, and get a clear picture of what the emissions rate specific to their project and

---

[9] *See Readout: Stakeholder Roundtable on Clean Power Generation and the Inflation Reduction Act,* U.S. Dep't of the Treasury (Oct. 26, 2022), https://home.treasury.gov/news/press-releases/jy1051 ("Secretary Yellen emphasized that the Inflation Reduction Act provides long-term clarity and certainty for the clean energy sector, and underscored Treasury's commitment to work expeditiously to provide guidance so that investments can move forward and our climate and economy can realize the benefits of the law as quickly as possible.")

[10] *See* I.R.C. Section 45Z(g).

operation would be. Otherwise, we are afraid it is unlikely that many, if any, new projects would be built in order to take advantage the clean fuel production credit.

iii. Taxpayers Should Be Permitted to Determine Provisional Emissions Rates Directly Using Applicable Models, Subject to a Rebuttable Presumption

We acknowledge that, because of the multiplicity of factors affecting the lifecycle greenhouse gas emissions of a particular transportation fuel, it is not practicable for the IRS and Treasury to anticipate all the ways in which different factors could affect a transportation fuel's emissions rate under the GREET model and provide accurate values in the Annual IRS Table that take all of those factors into account.

Although the ability of a taxpayer to petition the Secretary for a provisional determination of the emissions rate with respect to a particular fuel provides some relief,[11] this process will inevitably take time. The Congressional objective of facilitating investment in clean fuel production will be frustrated if taxpayers who are prepared to make large capital investments in production equipment are left hanging while they wait for the IRS to act on a petition.

To address this, we recommend that the IRS and Treasury adopt a rebuttable presumption under which, if the IRS has not determined and published an emissions rate for a particular pathway under the Annual IRS Table, a taxpayer's determination of the lifecycle greenhouse gas emissions for transportation fuel produced under that pathway will be presumptively valid to establish the emissions rate for the transportation fuel under Section 45Z of the Code, provided that the taxpayer applies the GREET model accurately and on the basis of the same principles and methods as those the IRS uses in preparing the Annual IRS Table.

Such a process might be implemented by means of a form on which taxpayers who claim the clean fuel production credit would indicate whether they are relying on the Annual IRS Table or on their own calculations to compute the applicable emissions rate. Taxpayers performing their own calculations could use the form to describe the relevant production factors under the GREET model, explain why the emissions rate for the transportation fuel differs from those reflected in the Annual IRS Table, and present their calculation of the emissions rate. The form would constitute a component of their tax returns for the relevant taxable year, and thus would be subject to IRS examination and review under the regular audit process.

This mechanism would benefit the IRS and taxpayers alike. Taxpayers would be able to make investment decisions with confidence that they can accurately calculate the applicable clean fuel production tax credits if they apply the GREET model correctly. This also furthers the policy objectives underlying the clean fuel production credit, because it ensures that the appropriate incentives will apply more broadly and more precisely than would be possible if the universe of applicable emissions rates was limited to

---

[11] *See* I.R.C. Section 45Z(b)(1)(D).

those that the IRS provides in the Annual IRS Table. By permitting taxpayers to calculate the emissions rate for transportation fuels using the production factors specific to such fuel, this mechanism will provide the proper incentives to manufacture transportation fuels in a manner designed to minimize greenhouse gas emissions even if the IRS does not have sufficient resources to establish an emissions rate sua sponte for the relevant pathway.

For the IRS, this mechanism is an efficient way to administer the clean fuel production credit program under Section 45Z, because taxpayers would be responsible for describing the factual background that forms the basis for their calculation of the applicable emissions rate and performing the required analysis under the GREET model. The IRS would have the information needed to review and, if necessary, challenge the taxpayer's determinations, without having to independently identify the relevant pathways and evaluate the facts and assumptions necessary to apply the GREET model appropriately. The data collected by the IRS through this process could also inform further additions to the Annual IRS Table based on the production pathways actually being utilized by taxpayers. In some cases, ethanol producers are already calculating their applicable emissions rates for multiple pathways, with an experienced state government agency certifying the accuracy of the inputs, and calculations. Perhaps instead of the IRS duplicating such analysis, and as an alternate to the above procedure, The IRS may rely on the good work of state agencies already doing similar, if not identical, analysis and verification for certain ethanol plants.

iv. Administrative and Procedural Recommendations in More Detail

To accomplish the objectives discussed above, we recommend that the IRS and Treasury adopt procedures that include the following elements:

- To the extent that an entry in the Annual IRS Table is based on particular assumptions around the production method of a particular type or category of transportation fuel, those assumptions should be published contemporaneously with the Annual IRS Table.
- The IRS should implement a process whereby, if a taxpayer determines that (a) the pathway for a particular transportation fuel is not reflected in the Annual IRS Table and, as a result, the actual lifecycle greenhouse gas emissions for its transportation fuel cannot be determined from the Annual IRS Table, or (b) the actual lifecycle greenhouse gas emissions for its transportation fuel differ for whatever reason from those reflected in the Annual IRS Table for the relevant pathway, the taxpayer may request that the IRS determine the emissions rate for such fuel under Section 45Z(b)(1)(D) of the Code.[12] We think it would be reasonable for the IRS, in such a case, to ask that the taxpayer provide an analysis setting out its proposed determination for the relevant emissions rate and the basis for that proposal under the GREET model. If the IRS does

[12] The IRS has the authority to make this determination because in such a case the taxpayer's transportation fuel would not be of the same "type or category" as any transportation fuel for which an emissions rate is included in the Annual IRS Table.

not accept the taxpayer's analysis, it should provide the reasons for its decision and offer the taxpayer a consultation.[13]

- A taxpayer who makes, or enters into a binding contract for, an investment in a clean fuel production facility in reliance on an emissions rate from the Annual IRS Table or determined under the process described above may continue to calculate the clean fuel production credit using that emissions rate even if the emissions rate for the relevant pathway is subsequently redetermined.

- In addition to the process described above for determinations pursuant to Section 45Z(b)(1)(D), or as an alternative to that process, the IRS and Treasury should permit taxpayers producing transportation fuels using a pathway that is not reflected in the Annual IRS Table to claim clean fuel production credits by using the GREET model to determine the emissions rate for the pathway and disclosing the relevant facts and calculations on their tax returns, subject to review and examination by the IRS in the ordinary course of tax administration. We would encourage the IRS and Treasury to develop a form to facilitate disclosure of the relevant information by taxpayers and review of that disclosure by the IRS.

B. Interaction Between Section 45Q and 45Z of the Code

Section 45Z(a)(1) requires that any transportation fuel qualifying for the clean fuel production credit be produced at a qualified facility. Section 45Z(d)(4) defines the term "qualified facility" to mean a facility used for the production of transportation fuels, and that it does not include a facility for which certain other credits are allowed for a taxable year. The term "facility" is not defined.

1. Different Pathways Should Be Treated as Separate Facilities for Purposes of Section 45Z(d)(4) of the Code

As discussed above under "B.1. Emissions Rates Depend on Production Pathways," the emissions rate for a particular transportation fuel depends on the specific production pathway used in the production of that fuel. Not only will different ethanol producers utilize different production pathways that result in different emissions rates, but it is also common in the ethanol business to have one physical plant that produces ethanol using different production pathways at different times. For example, pathways may use different feedstocks, and/or may use renewable (zero-carbon emissions) electricity during hours of sunlight and grid electricity during other times. Each one of these variables creates different emissions factors for fuel produced at one physical facility. To avoid illogical and inappropriate results, we recommend that the IRS and Treasury interpret the reference to "facility" in Section 45Z(d)(4) of the

[13] Our recommendation is informed by the IRS's private ruling process. Because of the timing issues discussed in more detail above, however, we respectfully suggest that this is likely to require a streamlined process so that determinations can be made more quickly than is typically the case for private rulings.

Code to refer to a particular plant operating a particular pathway, not simply to a location that operates multiple pathways.

Consider, for example, a taxpayer who operates two 50 million gallon / year ethanol plants at two different locations. At one plant (i.e. plant A), process electricity is sourced from the grid, which is generated in that region by a mixture of coal generators and gas generators ("high emissions pathway"). The second plant (plant B) uses electricity primarily generated through the use of solar panels and/or other renewable energy sources ("low emissions pathway"). Both plant A and plant B capture and sequester the carbon oxides from the fermentation of ethanol they would otherwise emit. In this case, it seems clear that the two plants will be considered separate facilities for purposes of Section 45Z of the Code. The taxpayer will be able to claim the carbon capture and sequestration credit under Section 45Q of the Code in respect of plant A and the clean fuel production credit under Section 45Z of the Code in respect of plant B, if that would result in a greater benefit than claiming the same credit for both plants.

Now consider a second taxpayer who operates one 100 million gallon / year ethanol plant (plant C) that runs on solar and other renewable energy sources 50% of the time and uses fossil-fuel-generated grid electricity (similar to plant A) the other 50%, and also captures and sequesters fermentation carbon oxides. Plant C produces the same product (ethanol), in the same amounts as plants A and B combined (100 mm gallons / year), and uses the same blend of renewable / fossil-fuel-generated electricity as plants A and B combined (50%/50%).[14] However, if plant C were treated as a single facility, Section 45Z(d)(4) of the Code provides that plant C would be excluded from the definition of "eligible facility" for purposes of the clean fuel production credit if the taxpayer claims the carbon capture and sequestration credit for **any** of the pathways. As a result, the taxpayer would be required to choose one of these credits and forego the other, even though one pathway, considered separately, would qualify for a larger credit under Section 45Z of the Code and the other pathway, considered separately, would qualify for a larger credit under Section 45Q of the Code. It is possible that the second taxpayer would not even consider building solar electricity generation capacity in the first place, if they weren't able chose separate credits for what it considers to be separate pathways.

This is an illogical result that does not further (and, in fact, operates counter to) the policy objectives under Section 45Q and Section 45Z. Rather, it creates a perverse incentive: in order to accept Congress's invitation to invest in decarbonization technologies, a taxpayer in this situation may need to take the economically inefficient and environmentally wasteful step of building a second, duplicative plant to isolate the production pathways that can utilize Section 45Q more effectively than Section 45Z in a separate facility from the production pathways that can utilize Section 45Z more effectively than Section

[14] In this example, plant C is similar to how the ethanol industry actually structures their operations. Solar energy would provide power for a part of the day, and the grid would power operations at night. It is common industry practice for Plant C to have at least 2 pathways – one which it would used when powered by renewables, and one used when running off grid electricity. Most ethanol plants operating in the US have at least two pathways depending on feedstock, energy source and other factors.

45Q. Of course, in practice, given the cost and time to build a separate ethanol plant, the taxpayer would likely do nothing – neither build the second plant, nor add solar generation capacity to an existing plant.

Furthermore, if a single plant with multiple pathways were considered a single facility, then the incentive for the plant's operator to lower emissions or increase carbon sequestration for a single pathway or to launch a new pathway could be reduced. If a plant with multiple pathways, some of which qualify for a larger tax credit under Section 45Q of the Code and others of which qualify for a larger tax credit under Section 45Z of the Code, were required to choose a single type of credit for all pathways, the result would be a mismatch between some pathways (whose activities are a better fit for one tax credit) and the tax credits available. As a result, incremental improvements in the performance in such a mismatched pathway, in producing low-emissions transportation fuel or in sequestering carbon, as the case may be, would not result in an increased tax credit, and the taxpayer would not have an incentive to make such incremental improvements.

The IRS and Treasury can solve this problem by treating a plant that operates two or more pathways as two or more separate facilities, one for each pathway. This would enable the taxpayer to claim the carbon capture and sequestration credit for the high-emissions pathway, for example, and to claim the clean fuel production credit for the low-emissions pathway. As a result, the taxpayer would have a continuing incentive to find ways of reducing plant C's greenhouse gas emissions, regardless of whether those reductions are accomplished through improved carbon capture and sequestration activities or lower-emission clean fuel production activities.

Such an interpretation would advance the policy goals of the Inflation Reduction Act in a way that is both consistent with market practice and faithful to the text of Section 45Z. Because activities would be treated as comprising a single facility if they are part of the same pathway, Section 45Z(d)(4) of the Code would operate as intended to prevent taxpayers from receiving inappropriate double benefits for the same activities.

2. Guidance Should Confirm that the Qualified Facility Test under Section 45Z(d)(4) of the Code is Applied Separately in Each Taxable year

The term "qualified facility" is defined by reference to whether certain other credits are allowed for a facility in a particular taxable year.[15] This implies that the test is applied annually, without regard to which credits the taxpayer may have claimed with respect to that facility in prior taxable years. We recommend that the IRS and Treasury clarify that this is indeed how the term "qualified facility" will be applied.

---

[15] *See* I.R.C. Section 45Z(d)(4)(B) (providing that a qualified facility "does not include any facility for which one of the following credits is allowed under section 38 **for the taxable year**") (emphasis added).

3. A Taxpayer Should be Permitted to Claim the Credit under Section 45Z if it Qualifies for, but Does Not Claim, Another Credit Listed in Section 45Z(d)(4)(B) of the Code

Section 45Z(d)(4)(B) of the Code defines "qualified facility" to exclude any facility for which certain other credits, including the carbon capture and sequestration credit, are "allowed" for a taxable year. To avoid any possibility of an overbroad interpretation of this clause, we recommend that the IRS and Treasury clarify in guidance that it does not apply to taxpayers who do not claim those other credits, whether or not they might meet the requirements to do so. We believe Congress intended this provision to prevent duplicate benefits, not as an ordering rule under which the clean fuel production credit would be a sort of "credit of last resort" that is available only when the other credits are not.[16]

To interpret this provision otherwise would force taxpayers who wish to claim the clean fuel production credit to take affirmative steps to avoid qualifying for the other credits, almost certainly with negative environmental consequences. For example, a taxpayer who has invested in carbon capture equipment but wishes to claim the clean fuel production credit would have a strong incentive to ensure that the total amount of qualified carbon oxide it captures is below the threshold for a "qualified facility" under Section 45Q(d)(2) of the Code, or to release qualified carbon oxide that it captures into the atmosphere rather than inject it into secure geological storage.

This cannot be what Congress intended. We therefore recommend that the IRS and Treasury issue guidance clarifying that Section 45Z(d)(4) does not prevent a taxpayer from electing to claim the clean fuel production credit instead of another credit listed in Section 45Z(d)(4)(B) for which it may also be eligible.

4. Claiming the Credit Under Section 45Z Should Not Impair a Taxpayer's Ability to Claim the Credit Under Section 45Q in Future Years

Section 45Q requires that, in certain cases, qualified carbon oxide must be captured within the 12-year period beginning on the date the equipment that captures such qualified carbon oxide is originally placed in service (the "Twelve-Year Period"), in order to claim the carbon oxide sequestration credit in respect of such qualified carbon oxide.[17]

As discussed above under C.1. Different Pathways Should Be Treated as Separate Facilities for Purposes of Section 45Z(d)(4) of the Code and C.4. Claiming the Credit Under Section 45Z Should Not Impair a Taxpayer's Ability to Claim the Credit Under Section 45Q in Future Years, equipment may be used for activities that would qualify for tax credits under both Section 45Q and Section 45Z, and so taxpayer may be required to choose which credit to claim in a given taxable year.

---

[16] There is nothing in the extensive legislative history of the Inflation Reduction Act suggesting that this provision may have been intended as an ordering rule. Our concern arises solely because the term "allowed" is often used to describe actions that one is permitted to take, regardless of whether one does so.

[17] *See* I.R.C. Section 45Q(a)(3)(A) and (4)(A).

Because the carbon capture and sequestration credit is only available for qualifying activities during the Twelve-Year Period and the clean fuel production credit is only available from 2025 through 2027, this can lead to perverse results. If the Twelve-Year Period includes years in which a taxpayer would receive higher credits under the clean fuel production credit, the taxpayer will have to forego the carbon capture and sequestration credit for those years, effectively wasting a portion of the Twelve-Year Period. As a result, a taxpayer who is prepared to install carbon capture equipment at a clean fuel production facility would have an incentive to hold off on placing that equipment into service until 2028 to ensure that the Twelve-Year Period does not overlap with years in which the taxpayer would elect the clean fuel production credit. This incentive, of course, would be diametrically opposed to the policy goals of the Inflation Reduction Act.

We therefore respectfully urge the IRS and Treasury to issue guidance tolling the Twelve-Year Period for any taxable year in which a taxpayer claims the clean fuel production credit under Section 45Z of the Code. Such a rule will ensure that taxpayers place carbon capture and sequestration equipment into service as soon as reasonably practicable, without distorting their incentives to do so.

We are grateful for your consideration of these comments.

Very truly yours,

Brad Kelley
Chief Executive Officer

Copies to: Ms. Lily Batchelder
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Tom West
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Krishna Vallabhaneni
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington DC 20220

Ms. Holly Porter
Associate Chief Counsel (Passthroughs and Special Industries)

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dr. Sally Benson
Deputy Director for Energy and Chief Strategist for the Energy Transition
White House Office of Science and Technology Policy
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue
Washington, D.C. 20504