

**COMMENTS RELATING TO NOTICE 2022-58:  
REQUEST FOR COMMENTS ON CREDITS FOR CLEAN HYDROGEN  
AND CLEAN FUEL PRODUCTION**

**COMMENTS ON SECTION 45Z: CLEAN FUEL PRODUCTION CREDIT**

1. The market's understanding of the new 45Z Clean Fuel Production Credit is that it is a replacement for and a generalization of what is known as the "Blender's Credit", Section 40A: Biodiesel and renewable diesel used as fuel "credit." With Section 40A terminating at the end of 2024 to be replaced by Section 45Z, the most important issue producers face is the longevity of this credit. In the Inflation Reduction Act (the "IRA"), this new credit will only last for 3 years, expiring at the end of 2027, thereby just giving new GHG reduction projects enough time to possibly receive one or two years' worth of tax credits. Since much of the development of zero or negative GHG technologies and projects are ramping up now, or still in the early "FEED" stage, and because it takes 3 to 5 years to get to COD so stopping the credit at the end of 2027 seems misplaced. It also forces a kind of competition between a short-term credit like 45Z and a long-term credit like Section: 45Q, the Credit for Carbon Oxide Sequestration. This is because the way to maximize the "Emissions Rate" under 45Z:  $(50\text{kgCO}_2\text{e} - \# \text{kgCO}_2\text{e})/\text{MMBtu}/50\text{kg}$  is to fully integrate Carbon Capture and Sequestration ("CCS") into the qualified facility seeking the 45Z tax credit, in order to make # as large a negative number as possible. While not called this in the IRA, # is commonly known as "Carbon Intensity", or "CI", a concept well established by the California Low Carbon Fuels Standard ("LCFS") program that is based off of the same GREET model developed at Argonne National Labs that the IRA regulation for 45Z refers to in subsection (b)(1)(B) for the establishment of the emissions rate. With a large negative CI, the 45Z credit can be a large multiple of the \$1 base credit for non-aviation transportation fuels (assuming wage and apprenticeship requirements are met). Credits as high as \$6, \$7 and even \$8/gallon will not be surprising, as long as 45Z remains uncapped. This will generate a 45Z credit that is easily double the value of a 45Q credit, if taken in the same year, suggesting it would be a wiser strategy to forego 45Q in place of 45Z for the years in question (2025, 2026, and 2027), or possibly for the entire 12 years of 45Q if one knew that the 45Z credit would be extended.
2. In subsection (b)(1)(B)(i) it states "the Secretary shall annually publish a table which sets forth the emissions rate for similar types and categories of transportation fuels based on the amount of lifecycle greenhouse gas emissions (as described in Section 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)), as in effect on the date of the enactment of this section) for such fuels, expressed as kg of CO<sub>2</sub>e/MMBtu, which a taxpayer shall use for purposes of this section" Then in subsection (b)(1)(B)(ii), it specifically states that "in the case of any transportation fuel which is not sustainable aviation fuel ("SAF"), the lifecycle GHG emissions shall be based on the most recent determinations under the GREET model of Argonne National Labs..." On the other hand for SAF, the lifecycle GHG emissions modeling is based on the most recent Carbon Offsetting and Reduction Scheme for International Aviation ("CORSA") instead. The concept of having the Secretary annually publish a table setting forth the emissions rate for "similar types and categories of transportation fuels" and then the producer being obliged to use figures from that table to estimate their emissions rate is very likely to lead to significant misrepresentations of the actual lifecycle GHG emissions for a specific production process. For example, in our process we generate a # of -310kgCO<sub>2</sub>e/MMBtu. This is a large negative value based off of the same Argonne National Labs GREET model, highly dependent on the underlying technology, the feedstock, and pure injection CCS. We should not and cannot expect the Secretary and his staff to be able to replicate the calculations we have done with our consultant Lifecycle Associates ("LCA") and then got the California Air Resources Board ("CARB") to approve our Carbon Intensity score. We might suggest that the IRS implement a similar process to what CARB has done, or allow the results done by an approved consultant like LCA, and then approved by CARB, to stand on its own and be accepted by the Secretary as the official estimate of the emissions rate for a particular project's process. Of course, if a producer chooses not to go through such analysis the default

would and should be the figures in the Secretary's table for such transportation fuels.

3. It is our legal counsel's interpretation of the IRA that the 45Z Clean Fuel Production Credit scales up based on the emissions rate for the fuel produced and **is not capped**, meaning there is no limit to the value of the Clean Fuel Production Credit as long as the emissions rate is lower than (-2.5 kg) of CO<sub>2</sub>e per MMBtu. We have heard some rumors that some people do not agree with this interpretation under the argument that Congress *did not know that it was making the statute uncapped* (which we believe is wrong given the legislative intent of the statute). In any event, it is possible that a technical corrections bill could amend this statute and "cap" the emissions rate.
4. This leads to some questions we would like to have the IRS answer. They are:
  - a. What is the possibility that 45Z can be extended over and over again just like the 40A Blenders Credit has been retroactively reinstated 7 times in 2010, 2012, and 2014, 2015, 2017, 2018 and 2019, and 2020? If there is uncertainty about the longevity about 45Z, producers will most likely choose the certainty of 45Q over 45Z, even if the annual tax credit value of 45Z greatly exceeds the annual 45Q credit amounts.
  - b. Some legal advisors have suggested the following strategy. Assume a Project meets the requirements of both 45Z and 45Q and is placed into service at the beginning of 2027. If the value of the tax credit with 45Z exceeds the value of 45Q in the same year, can a producer take 45Z in 2027, and then swap into 45Q in 2028 and beyond for the remaining 11 years of 45Q until expiry at the end of 2038? While Direct Pay (under Section 6417) will not be possible to use with 45Q (it must be taken in 2027 to get the full five years of Direct Pay under the IRA rules), direct transfer will still be possible under Section 6418.
  - c. It is clear from the statutory language that a manufacturer of eligible transportation fuels that captures and sequesters carbon oxide under Section 45Q cannot also claim the Clean Fuel Production Credit for any taxable year. However, there has also been talk that the IRS may allow stacking of credits like 45Z and 45Q, so that they both can be taken in the same year. Is there any validity to this? Please comment.
  - d. In paragraph 2 above we suggest a specific project have their GHG emissions (Carbon Intensity or its equivalent) calculated specifically for their production process by a recognized Lifecycle GHG consultant, and then subsequently validated/ approved by some regulatory agency or by the IRS as an acceptable proxy for the Secretary to establish the emissions rate for that specific project. Alternatively, the Secretary could establish a team of GHG Greet model experts that do the validation of the consultant's calculations themselves on behalf of the project. Is the IRS open to this approach? If not please describe the specific approach to be used by the IRS?
  - e. In paragraph 3 above we point out that the emissions rate for the 45Z Credit is not capped, although some reviewers are suggesting that Congress *did not know that it was making the statute uncapped*. We believe this is wrong given the legislative intent of the statute. In any event, is it possible that a technical corrections bill will amend this statute and "cap" the emissions rate?

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