United Association of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of the United States and Canada

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General Office File Reference: GP

February 23, 2024

Submitted Electronically

U.S. Department of Treasury
Internal Revenue Service
Ben Franklin Station, Room 5203
Washington, DC 20044

Re: Internal Revenue Service (IRS) Proposed Rule on Section 45V Tax Credit for Clean Hydrogen Facilities (REG-117631-23)

Dear Sir or Madam:

The following comments are submitted in this matter on behalf of the 373,000 members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (United Association or UA). It is widely recognized that clean energy is a top national priority and carbon-free hydrogen is a key component of this agenda. The Section 45V hydrogen tax credit, the focus of this Rule, is a cornerstone of this policy and is intended to facilitate and maximize the use of hydrogen energy throughout the economy.

The United Association is often the leading trade union on many projects in the energy sector, including those involving new clean and renewable sources and, therefore follows issues in this area closely. In addition, we regularly work in close partnership with government and industry to foster a balanced, responsible energy policy and have generally supported the legislative and regulatory initiatives of the Biden Administration in this area.

Unfortunately, we must voice our strong opposition to the *Incrementality* provision of this Rule, which, while designed to implement the hydrogen tax credit of Section 45V of the Inflation Reduction Act (IRA), imposes unfounded restrictions that contravene the letter and intent of this law. As demonstrated below, there are compelling grounds to eliminate these requirements to maximize the development of hydrogen power, and indeed, all clean and reliable energy sources.

I. FUNDAMENTAL POLICY CONSIDERATIONS

The federal government is promoting multiple strategies to enable the U.S. economy to operate entirely on clean energy sources and investing massive, unprecedented taxpayer resources to do so. To describe these efforts as "challenging" is an understatement, especially because the government seeks to engineer this massive transformation in the shortest timeframe possible.

The development of hydrogen energy is a vital component of this strategy because the U.S., like many other countries, is counting on using hydrogen not only to operate powerplants but to power other sectors of the economy that have proven extremely difficult to decarbonize, such as transportation and heavy industry.

The development of this Rule, like all new clean energy strategies, should be guided by three core principles:

(a) Responsible Energy Development;
(b) Free, Fair and Open Competition; and
(c) Maximum Benefit to Taxpayers

Upon close analysis, it is clear the incrementality requirement of the Proposed Rule fails on all three counts, most significantly because the requirement illogically and unfairly favors new clean energy sources over existing sources that have been in operation for more than three years.[1]

***Responsible Energy Development*:** Responsible energy planning should deliver not only clean power but also sufficient, reliable energy at the lowest possible cost. Imposing the incrementality requirement would obviously result in a framework where the highly valuable tax credits provided by Section 45V are only available to "new" sources—which invariably tilts the new policy in favor of wind and solar power to the exclusion of existing alternative clean sources, such as biofuels, thermal and nuclear power.

In so doing the Rule completely forecloses access to this crucial incentive for developers of sources that offer substantially greater reliability and possibly greater cost-effectiveness than wind and solar power. It is well known that the intermittent nature of the latter imposes serious reliability limitations on these sources simply because the sun doesn't shine and the wind doesn't blow 24-7. Moreover, even factoring in developments in battery storage, and assuming the most optimistic forecasts for wind and solar, these restrictions make it dangerous to adopt a policy that creates an overreliance on wind and solar capacity, which is exactly what incrementality will do.

These facts are confirmed by the recent experiences of New York and California. In these states, overly ambitious decarbonization laws have led to an unrealistic reliance on wind and solar which, in turn, has triggered threats of major power outages and astronomical electricity rates—unless steps are taken to simultaneously plan, develop, and subsidize a huge amount of alternative clean, dispatchable capacity. For example, energy experts in New York have warned that because the state's clean energy plan has failed to adequately address reliability concerns, it is "at risk *for crushing blackouts and potential public safety risks*."[2]

Reports from the New York's grid operator show that such warnings are well founded because they demonstrate it will need more than twice as much immediately dispatchable clean power to offset planned wind and solar capacity due to the reliability limitations of the latter, as well as other factors, including

[1] Proposed Rule, Section 1.45V–4(d)(3)(i)(A).

[2] 2022 Climate Action Council Meetings, 12.19.22 CAC Meeting Records, *Statement of Gavin Donahue, President, Independent Power Producers of New York* (emphasis added). Gavin-J.-Donahue.pdf (ny.gov).

escalating demands.[3] California faces similar challenges for essentially the same reasons.[4] The incrementality rule would lead to these same types of serious missteps in energy planning by creating an ill-advised policy that unfairly favors new clean sources over existing ones.

***Free, Fair, and Open Competition*:** The inexplicable exclusion of nuclear and other existing clean sources likewise flies in the face of free, fair, and open competition, a principle essential to the expeditious development of maximum clean energy sources. Competition drives both innovation and efficiency. As a nation, we have long relied on equitable rules that ensure a level playing field to achieve full and open competition, which remains the most effective means of producing goods and services across our economy.

Hydrogen development is vital to our nation's clean energy strategy in general and to its difficult-to-decarbonize industrial and transportation sectors in particular. Hydrogen development should therefore not be exempted from fundamental competitive precepts. All suppliers of clean energy should be permitted to freely compete to provide feedstock power supply to developers of new hydrogen facilities.

This fair, competitive approach will facilitate the development of hydrogen and all clean power sources in the most efficient, timely, and cost-effective manner possible. The incrementality provision is antithetical to efficiency, timeliness, and cost-effectiveness. It imposes a major roadblock to the fastest, most comprehensive buildout of clean hydrogen and other zero-carbon sources, and thereby undermines both the central goals of the IRA and the Administration's overarching decarbonization agenda policy, which is based on a well-founded "*All the Above*" strategy that embraces all viable clean energy options—*not* a favored few.

***Maximum Benefit to Taxpayers*:** Another core tenet of the Administration's clean energy agenda is to leverage government investments to create as many good jobs as possible. This is sound policy. Every sector of the clean energy industry depends directly on government subsidies in the form of tax incentives, grants, loans, or other assistance. This assistance massive, which consists of hundreds of billions of dollars in clean energy subsidies, is an investment ultimately paid for by the public.

An often overlooked yet crucial fact is that the production of alternative clean energy forms such as biofuel, thermal, and nuclear power typically creates 1,000 percent or more jobs than do either wind or solar power enterprises because of the large-scale, industrial nature of the facilities required to generate these kinds of energy. (*See* Attachment 1 hereto, *Assessing Clean Energy Options: Jobs Impact Analysis*). Critically, alternative clean sources, including nuclear, biofuels, and thermal also create substantially higher-wage

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[3] *See e.g.,* NYISO, *2022 Reliability Needs Assessment* (Nov. 15, 2022) ("*NYISO Needs Assessment*"), b21bcb12-d57c-be8c-0392-dd10bb7c6259 (nyiso.com); NYISO, *Impact of National & Global Conditions on Electricity Prices in New York (Sept. 2022)("NYISO Cost Report"),* ea6c1616-02a5-5bdd-9964-bfd6e98a2dc5 (nyiso.com); NYISO, *2022 Load & Capacity Data*, at 79–94, Table III–1 2022-Gold-Book-Final-Public.pdf (nyiso.com).

[4] *See e.g.*, K. Adam A. Milsap, *California's Energy Policy Shows Us What Not to Do,* Forbes, (2022)(emphasis added), California's Energy Policy Shows Us What Not To Do (forbes.com); Evan Halper & Erica Werner, *California Scrambles to Avoid Blackouts as it Pursues a Green Energy Future*, Wash. Post (Sept. 7, 2022), Voluntary power cuts helped California avoid blackouts during heat wave - The Washington Post; Erica Werner, *California is Awash in Renewable Energy – Except When it's Most Needed*, Wash. Post (Sept. 21, 2022) (emphasis added), California is awash in renewable energy — except when it's most needed - The Washington Post.

jobs. The significance of these facts cannot be overstated. The Biden Administration and Congress have clearly made the creation of good jobs for American taxpayers a paramount goal in the IRA, as well as the Bipartisan Infrastructure Act and CHIPS Act.

As stressed by the Department of the Treasury, the IRA is intended to create economic as well as environmental benefits. Investments provided under this statute "are a feature of what Secretary Yellen calls modern supply-side economics, which seeks to spur economic growth by both boosting labor supply and raising productivity while reducing inequality and environmental damage. Investing in these communities helps provide local opportunity and boost national productivity growth."[5]

These investments should not be carried out in any other way. After all, the massive federal assistance needed for all the new clean energy programs is ultimately paid for by taxpayers. By creating unfounded favoritism for new energy sources while foreclosing crucial assistance to existing facilities, the Rule results in further injustices by undercutting the ability of Section 45V tax credits to create maximum good paying jobs—jobs which, not incidentally, would increase the amount of tax payments made back to the U.S. Treasury.

II. THE PROPOSED RULE IS LEGALLY FLAWED

The Rule is also legally flawed on at least three important grounds. First, there is no provision in the IRA that authorizes the imposition of the incrementality requirement. Second, such requirements not only fail to serve the primary goal of Section 45V—*i.e.*, maximizing and accelerating the buildout of hydrogen capacity—but directly undermine it, as demonstrated above. Third, insofar as the IRS's expertise lies in tax law, not energy policy, the agency is not entitled to the broad deference reviewing courts typically apply in issues of statutory construction.

A. The IRA Has No Express Authorization for Incrementality

Section 45V provides that the hydrogen tax credit is available to a facility if the facility qualifies as a "*qualified clean hydrogen*" facility, *i.e.*, a facility that generates hydrogen using "a process that results in a lifecycle greenhouse gas emissions rate of not greater than 4 kilograms of CO_{2e} per kilogram of hydrogen."[6] Such facilities must also be based in the U.S. and be used in the ordinary course of the taxpayer's trade or business.[7]

These are the express statutory requirements for a taxpayer seeking the hydrogen tax credit. The IRA does *not* otherwise limit the type of power or feedstock used to produce hydrogen, which may be derived from wind, nuclear, solar, or other clean energy sources. Likewise, the statute does *not* include any provision

[5] U.S. Department of Treasury, FACT SHEET: How the Inflation Reduction Act's Tax Incentives Are Ensuring All Americans Benefit from the Growth of the Clean Energy Economy (Oct. 20, 2023), FACT SHEET: How the Inflation Reduction Act's Tax Incentives Are Ensuring All Americans Benefit from the Growth of the Clean Energy Economy | U.S. Department of the Treasury

[6] 26 U.S.C. § 45V(c)(2)(A).

[7] *Id.* § 45V(c)(2)(B).

that limits such sources to new facilities. Thus, the proposed three-year limit imposes an artificial, and indeed counterproductive, restriction that is neither authorized nor arguably even contemplated by the IRA.

B. The Incrementality Requirement Undermines Key Goals of the IRA

In addition, the incrementality requirement cannot be justified on the grounds that the IRS has implied authority to create such a regulation in furtherance of statutory objectives because the requirement effectively undermines those very objectives. As stressed by the White House, the clear, straightforward purpose of the IRA is to drive clean energy production. The law's purpose is to generate "billions of dollars in grants and loans to *spur financing and deployment of new clean energy projects that cut greenhouse gas emissions and other pollutants*[.]"[8]

A policy that is intended to promote the development of clean power production, in this case, hydrogen, is served by maximizing such production, not curtailing it with artificial restrictions clearly not authorized by the implementing statute. There is no question that the purpose of the IRA and the Administration's overarching energy policy are one and the same: to convert the entire energy sector to zero-carbon sources as soon as practically possible. The incrementality provision undermines this goal by imposing unfounded restrictions on options for powering hydrogen plants, the result of which will be fewer hydrogen facilities, not more.

The supposed justification for this requirement is the unsupported assertion that using existing power sources as feedstock for new hydrogen plants will result in increased carbon output by default. In other words, the incrementality requirement erroneously assumes that if nuclear capacity is used to power a hydrogen plant, the amount of nuclear energy used in this context can only be replaced with fossil-fuel plants. This assumption is flawed for several reasons.

Federal, state, and local governments are investing *hundreds of billions of dollars in every viable form of renewable and otherwise clean energy sources available*. In addition to nuclear, these sources include wind, solar, biofuels, thermal, and others. Given the massive incentives and corresponding opportunities for developers, as well as the fact that an increasing number of states are establishing new clean energy mandates, it is *increasingly likely that any nuclear capacity used for hydrogen will be replaced with other zero-carbon sources*.

Using thermal energy, biofuels, and nuclear power are critically needed to jumpstart hydrogen power and these sources are immediately available. Moreover, as noted, plans are currently unfolding throughout every sector of the energy industry to expand production for *all* clean sources and new, viable clean power options are being continuously developed.

In passing the IRA Congress made a clear determination that all clean energy sources, both existing, should be incentivized to accelerate hydrogen production. Moreover, the fact that it imposed certain restrictions under the statute, for example, the requirement that hydrogen facilities must be based in

[8] White House, IRA Guidebook, p. 9 (January 2023), Inflation-Reduction-Act-Guidebook.pdf (whitehouse.gov) (emphasis added).

the U.S. and must be part of the taxpayer's normal business, shows that Congress is quite capable of placing limits on these tax credits. In sum, all of these factors show that the IRS has neither express nor implied authority for the incrementality provision.

C. The Incrementality Provision is Not Entitled to Judicial Deference

As stated above, the incrementality requirement cannot be salvaged on the grounds that the IRS should be afforded deference for its administrative interpretation of the statute. While agencies are normally granted broad discretion in rulemaking, it is a longstanding principle of law that such deference is based solely on the ground that the agency's courts should recognize the agency's considerable expertise in the policy field in which it operates. The rationale for this commonsensical doctrine was explained in *SEC v. Cheney II*[9] as follows:

> The [agency's] conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make . . . .[10]

In this matter, the disputed provision clearly does *not* involve matters of tax expertise, but instead implicates the question of how best to promote the development of hydrogen energy, an issue far outside IRS's specialty area. Therefore, the incrementality provision is not entitled to the broad discretion typically afforded agencies on issues of statutory interpretation.

III. CONCLUSION

For the reasons set forth above, we respectfully recommend that the incrementality provision be eliminated from the Proposed Rule. This will permit free, fair, and open competition among all viable clean energy sources, which will promote the fastest and most cost-efficient development of hydrogen capacity. This approach is also compelled by law as it is plainly required by the IRA. It is also necessary to ensure that massive hydrogen investments are leveraged to create the greatest number of good jobs possible, as intended by Congress and the Administration. Thank you for your attention to this matter.

Sincerely,

Mark McManus
General President

Enclosure
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[9] *SEC v. Chenery Corp*. (Chenery II), 32 U.S. 194 (1947).

[10] *Id*. at 209 (citations omitted).

Attachment 1

Assessing Clean Energy Options: Jobs Impact Analysis

United Association of Plumbers & Pipe Fitters

2022

Project Name	Energy Source (Capacity)	Construction Jobs Created	Operation+ Maintenance Jobs ("M+O") Created	Workers/MW Ratio *(Construction only)*	Workers/MW Ratio *(O+M only)*	**Increase % in Construction Jobs v. Wind / Solar	Increase % in O+M Jobs v. Wind / Solar
Flint Mine Solar (NY)	Solar (100 MW)	284 to 362	1 to 2	2.84 to 3.62	0.01 to 0.02	-	-
Bluestone Wind (NY)	Wind (122 MW)	150	7	1.23	0.06	-	-
Modeled 100 MW Small Modular Reactor (SMR)	Nuclear (100 MW)	1,238	374	12.38	3.74	+242% to 336% (solar) +907% (wind)	+18,600% to 37,300% (solar) +6,133% (wind)
TerraPower Natrium reactor (Advanced)	Nuclear (345 MW)	2,000	250	5.80	0.72	+60% to 104% (solar) +372% (wind)	+3,500% to 7,100% (solar) 1,100% (wind)
Plant Vogtle 3 & 4 (Advanced)	Nuclear (2,234 MW)	9,000	800	4.03	0.36	+11.33% to 41.9% (solar) +228% (wind)	+1,700% to 3,500% (solar) +524% (wind)
Altavista Power Station (VA)	Bioenergy (51 MW)	*(Data Unavailable)*	31	*(Data Unavailable)*	0.61	*(Data Unavailable)*	+2,950% to 6,000% (solar) +954% (wind)
Bay Front Power Plant (WI)	Bioenergy (56 MW)	*(Data Unavailable)*	35	*(Data Unavailable)*	0.63	*(Data Unavailable)*	+3,050% to 6,200% (solar) +987% (wind)
ReEnergy Black River (NY)	Bioenergy (60 MW)	178	33	2.97	0.55	Up to +4.6% (solar) +142% (wind)	+2,650% to 5,400% (solar) +862% (wind)