

January 22, 2024

The Honorable Lily L. Batchelder
Assistant Secretary (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

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Re: Definition of Energy Property and Rules Applicable to the Energy Credit (REG-132569-17)

Dear Assistant Secretary Batchelder and Mr. Paul:

We, the undersigned organizations, welcome the opportunity to comment on the proposed definition of energy property and rules applicable to the energy credit under section 48 of the Internal Revenue Code.¹ The Inflation Reduction Act of 2022 (“IRA”) amended section 48 in several ways, including by making additional types of energy property eligible for the section 48 credit.²

We commend the Department of Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) for their efforts to provide taxpayers with timely, updated guidance that reflects the IRA’s amendments to section 48. As set forth below, however, we urge Treasury and the IRS to reconsider the exclusion of “gas upgrading equipment” from the proposed definition of “qualified biogas property” eligible for the section 48 credit, as amended by the IRA, which would contravene the letter and spirit of the new law.

Background

Section 48 was originally enacted by section 2 of the Revenue Act of 1962 to spur economic growth by encouraging investments in various capital projects across various industries including energy, transportation, and communications.³ In general, section 48 provides an investment tax credit in an amount up to 30% of a taxpayer’s basis in “energy property” placed in service during the tax year.⁴ Section 48 has been amended multiple times since its enactment but most recently by the IRA, which, among other

¹ Definition of Energy Property and Rules Applicable to the Energy Credit, 88 Fed. Reg. 82,188 (proposed November 22, 2023). Unless otherwise indicated, all textual references to “section” herein are to sections of the Internal Revenue Code of 1986, as amended (“Code”)

² An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14, Pub. L. 117-169, § 13102, 136 Stat. 1818, 1913–21 (2022).

³ 88 Fed. Reg. at 82,188.

⁴ See I.R.C. § 48(a)(1), (a)(9).

things, added “qualified biogas property” to the list of energy property eligible for the section 48 credit.⁵ Congress’s core purposes in enacting the IRA were to promote the development of various clean energy technologies, reduce greenhouse emissions, and support American manufacturing innovation.⁶ We are deeply concerned, however, that the proposed regulations would contravene this purpose through their overly restrictive definition of “qualified biogas property” eligible for the section 48 credit.

Definition of Qualified Biogas Property and Upgraded Gas Equipment

For purposes of the section 48 credit, “energy property” generally consists of all the components of property that meet the statutory requirements for an energy property as defined by section 48(a) and not otherwise specifically excluded.⁷ As mentioned above, the IRA added “qualified biogas property” to the types of energy property eligible for the section 48 credit. Under the proposed regulations, however, that term would be interpreted to specifically exclude “gas upgrading equipment.”⁸ We believe this interpretation is inappropriate, as discussed below.

Returning to the statute, section 48(c)(7)(A) provides that the term “qualified biogas property” means property comprising a system that (i) converts into a gas which (I) consists of not less than 52% methane by volume, or (II) is concentrated by such system into a gas which consists of not less than 52% methane, and (ii) captures such gas for sale or productive use, and not for disposal via combustion.⁹ Section 48(c)(7)(B) further states that the term “qualified biogas property” includes any property that is part of such system which *cleans or conditions* such gas.¹⁰ The proposed regulations would restate this definition and provide that “qualified biogas property” includes a waste feedstock collection system, mixing or pumping equipment, and an anaerobic digester.¹¹ As previously mentioned, however, the proposed regulations would specifically exclude “gas upgrading equipment necessary to concentrate the gas into the appropriate mixture for injection into a pipeline through removal of other gases such as carbon dioxide, nitrogen, or oxygen.”¹²

⁵ Pub. L. 117-169, § 13102(f), 136 Stat. 1818, 1914–17 (2022) (codified at I.R.C. § 48(a)(3)(A)(x), (c)(7)).

⁶ See, e.g., 168 Cong. Rec. S4165–66 (daily ed. Aug. 6, 2022); Letter from Sen. Sherrod Brown to Sec’y Janet Yellen (Jan. 16, 2024).

⁷ See I.R.C. § 48(a), Prop. Treas. Reg. § 1.48-9(c)-(d), 88 Fed. Reg. at 82,212.

⁸ Prop. Treas. Reg. § 1.48-9(e)(11)(i), 88 Fed. Reg. at 82,214.

⁹ I.R.C. § 48(c)(7)(A).

¹⁰ I.R.C. § 48(c)(7)(B) (emphasis added).

¹¹ Prop. Treas. Reg. § 1.48-9(e)(11)(i), 88 Fed. Reg. at 82,214.

¹² *Id.*

As amended by the IRA, section 48(c)(7)(B) expressly includes property that “cleans or conditions” gas as part of the definition of “qualified biogas property.” Neither the statute nor its legislative history contemplates any limitation on what constitutes “cleans or conditions” gas for purposes of defining “qualified biogas property.” The exclusion of “gas upgrading equipment” prevents taxpayers from claiming the section 48 credit for all or a portion of the cleaning and conditioning equipment necessary to convert raw biogas into a usable product (i.e., into a gas consisting of approximately 95% methane by volume). The proposed regulations would, therefore, effectively limit the credit’s application in this context to equipment that cleans and conditions raw biogas into a gas with limited marketability. This proposed rule disregards the intent of Congress in driving clean energy technology that reduces methane emissions and promotes the use and production of advanced biofuels.¹³ Indeed, as U.S. Senator Sherrod Brown recently confirmed in a letter to Treasury Secretary Janet Yellen, Congress intended for all “cleaning and conditioning” equipment to be included in the definition of “qualified biogas property,”¹⁴ which should include “gas upgrading equipment.”

Following the IRA’s enactment, businesses in the solid waste sector and other industrial landowners (e.g., farms) planned multi-billion-dollar investments in biogas processing infrastructure. These kinds of investments help provide communities with additional sources of revenue while reducing emissions and creating a domestic energy source.¹⁵ The exclusion of “gas upgrading equipment” puts such investments at risk because they would no longer qualify for the section 48 credit. We therefore urge Treasury and the IRS to reconsider the proposed exclusion of this type of cleaning and conditioning equipment from section 48 credit eligibility. Thank you for your attention and consideration of this important issue.

Sincerely,

American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
National Waste & Recycling Association
U.S. Chamber of Commerce

¹³ See e.g., U.S. Dept. of Energy, *The Inflation Reduction Act Drives Significant Emissions Reductions and Positions America to Reach Our Climate Goals* (Aug. 2022), https://www.energy.gov/sites/default/files/2022-08/8.18%20InflationReductionAct_Factsheet_Final.pdf; S. Con. Res. 14, Pub. L. 117-169, 136 Stat. 1818 (2022).

¹⁴ See Letter from Sen. Sherrod Brown to Sec’y Janet Yellen (Jan. 16, 2024).

¹⁵ *Id.*

cc: The Honorable Ronald L. Wyden, Chairman, Committee on Finance, United States Senate
The Honorable Michael D. Crapo, Ranking Member, Committee on Finance, United States Senate
The Honorable Jason T. Smith, Chairman, Committee on Ways and Means, United States House of Representatives
The Honorable Richard E. Neal, Ranking Member, Committee on Ways and Means, United States House of Representatives
Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, United States Congress