



January 22, 2024

Internal Revenue Service
CC:PA:01:PR (REG-132569-17)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: REG-132569-17—Comments on the Proposed Rulemaking for the Definition of Energy Property and Rules Applicable to the Energy Credit, Notice of Proposed Rulemaking, Public Hearing, and Partial Withdrawal of Notice of Proposed Rulemaking, 88 Fed. Reg. 82,188 (Nov. 22, 2023)

Dear Sir or Madam:

The Energy Infrastructure Council (“EIC”) is pleased to submit comments on the proposed regulations promulgated on November 22, 2023 (the “Proposed Regulations”) concerning the rules applicable to the Energy Credit under Section 48 of the Internal Revenue Code. We are submitting this letter in support of the comments recently submitted by the Coalition for Renewable Natural Gas (“RNG Coalition”) on January 22, 2024, which recommended changes to the Proposed Rules which would support renewable natural gas’s (“RNG”) potential for remediating methane emissions in the United States. While we applaud the Proposed Regulation’s commitment to creating a “technology-neutral” standard that supports the growth of biogas and RNG investments, we are deeply concerned that these Proposed Regulations significantly undermine RNG’s potential as a tool for addressing climate change. Before the Proposed Regulations, many RNG projects were planned with the expectation that all functionally interdependent components (including all cleaning and conditioning *and* upgrading equipment) would be eligible for the ITC. Yet the decision in the Proposed Regulations to create a new category of “upgrading” equipment excluded from qualified biogas property undermines the economic viability of many of these planned projects, and so we strongly urge the Department of the Treasury and the Internal Revenue Service (“IRS”) to modify their Proposed Regulations in the manner advised by the RNG Coalition’s letter.

The EIC is a non-profit trade association dedicated to advancing the interests of traditional and renewable companies that develop and operate energy infrastructure within the United States. Our core members are traditional and renewable energy infrastructure companies that ensure that

energy from a wide variety of sources is delivered efficiently and safely from production facilities and fields to American homes, businesses, and communities. Our members, as developers, operators, investors, and financiers of many billions of dollars of energy infrastructure in America are uniquely qualified to comment on the requirements to finance and develop the major energy infrastructure needed for the United States’ energy transition.

As part of our commitment to the energy transition and to sustainability, our members have begun investing heavily in biogas and RNG technologies. Biogas is a fuel that is derived from the methane emitted by organic waste. These sources of methane can range from agricultural waste (such as waste in a manure lagoon at a dairy farm) to municipal landfills. At the point of capture, biogas typically has a methane content between 45 and 65 percent and includes a variety of contaminants like siloxanes and hydrogen sulfide.¹ After the biogas is captured, the biogas must then be cleaned and conditioned into RNG by removing contaminants and increasing the methane content to around 97 percent. The resulting RNG is a high-BTU fuel that can be used interchangeably with geologic natural gas and injected into pipelines for commercial sale. By capturing biogas from organic waste sourced methane and converting that biogas into RNG, RNG projects enable companies to utilize methane—a highly potent greenhouse gas (“GHG”)—that would have otherwise been emitted into the atmosphere, thus significantly decreasing carbon emissions from agricultural sources, landfills, and other biological sources of methane.

With the passing of the Inflation Reduction Act (“IRA”) in 2022, our organization was particularly excited by the IRA’s recognition of biogas and RNG as an important climate technology. For the first time, biogas property was included as energy property that qualified for the Section 48 investment tax credit (“ITC”)—a change that prompted a flurry of new interest and investment into the RNG space. Nevertheless, this novel application of the statute required additional clarification in order to address the unique aspects of biogas technology and provide the RNG industry with the certainty necessary to finance and develop new RNG projects.

And while we commend Treasury and the IRS for their recently released Proposed Regulations, we have significant reservations about how the Proposed Regulations apply to biogas and RNG technologies. We believe that the new regulations are at odds with how biogas and RNG are created, and we are deeply concerned that the Proposed Regulations will significantly undermine the development of new biogas projects, thus /substantially reducing the impact of the IRA on GHG emissions.

Before the release of the Proposed Regulations, most biogas industry participants assumed that the definition “qualified biogas property,” would include all equipment fundamental to the technology required to create biogas/RNG, but the new regulations have drawn a new and unexpected distinction between “cleaning and conditioning” equipment that “converts biomass into gas” from upgrading equipment that “is necessary for injection of the biogas into [a] pipeline.”² By way of background, the extensive and interconnected network of pipelines that

¹ U.S. Environmental Protection Agency (EPA), *Renewable Natural Gas*, <https://www.epa.gov/lmop/renewable-natural-gas> (last updated on Aug. 3, 2023).

² Definition of Energy Property and Rules Applicable to the Energy Credit, 88 Fed. Reg. 82,188 (Nov. 22, 2023), at 82,197.

transport and distribute natural gas to consumers all across this country operates on the basis that the natural gas placed into these pipelines is “pipeline quality,” which is a short way of saying that the natural gas must fall within a narrow range of tolerance for heating value, moisture and other contaminants to ensure the consumer safety and operational efficiencies. The “upgrading” technology that is left out of the Proposed Regulations is a vital part of allowing RNG to satisfy this safety regulation. Without it, RNG cannot enter into the existing natural gas transportation networks, which is a necessary requirement for the success of the industry.

Not only is this distinction directly counter to the fact that the RNG industry considers all “upgrading” technology to be technology that cleans or conditions biogas, but the proposed distinction between cleaning and conditioning equipment and upgrading equipment would exclude a significant amount of a RNG project’s capital costs from being eligible for the ITC, thus threatening the economic viability of many proposed RNG projects. Therefore, we are submitting this letter in support of the comments recently submitted by the Coalition for Renewable Natural Gas (“RNG Coalition”) on January 22, 2024, which recommended changes to the Proposed Rules which would protect the RNG industry and support RNG’s potential for remediating methane emissions in the United States. If these recommendations are ignored, all of the planned investments in RNG in the United States is at risk, and we are deeply concerned that these rules may significantly harm the growth of this vital climate technology before it has a chance to fully develop and achieve its potential.

In our opinion, the RNG Coalition’s recommendations provide a comprehensive overview of how the Proposed Regulations should be revised in order to ensure that RNG’s potential for addressing methane emissions is realized. RNG Coalition’s comments note several different areas of the Proposed Regulations that need to be addressed, such as clarifying that the 80/20 rules will not limit new RNG projects’ eligibility for the ITC, revising the point of measurement for determining the methane content of biogas, and, most importantly, explaining that the Proposed Regulations’ distinction between “cleaning and conditioning” equipment and “upgrading” equipment threatens to render the ITC for qualified biogas property ineffectual. Here, in addition to our wholehearted endorsement of the RNG Coalition’s recommendations, we want to emphasize two additional points about these Proposed Regulations: first, that the distinction between “cleaning and conditioning equipment” is not technology-neutral, and second, that this proposed distinction does not align with the historic treatment of similar components of other kinds of energy property under the ITC.

One of Treasury’s and the IRS’s major goals in the Proposed Regulations was to create a “technology-neutral” set of rules that would properly define Congress’ understanding of “cleaning and conditioning property” without potentially excluding new RNG technologies that do not yet exist.³ And while we commend Treasury for creating a technology-neutral standard, we are deeply concerned that these rules are not, in fact, technology-neutral. By creating a new distinction between cleaning and conditioning equipment and upgrading equipment which is not generally recognized by the RNG industry, the Proposed Regulations directly encourage the RNG industry to favor technologies for generating RNG that will be recognized under the Proposed Regulations as “cleaning and conditioning” equipment over technologies that the Proposed Regulations will

³ *Id.* at 82,197.

recognize as “upgrading” equipment. In doing so, the Proposed Regulations will encourage the RNG industry to only focus on new RNG technologies that will generally be considered “cleaning and conditioning” technologies simply because those technologies will be eligible for a larger credit than technologies that are considered under the Proposed Regulations as “upgrading” equipment. If the goal of these Proposed Regulations is to create a truly technology-neutral incentive for RNG development, then Treasury should remove the distinction between cleaning and conditioning technologies and upgrading technologies so that RNG technology can develop freely without any improper influence from the tax code.

Secondly, we want to emphasize a comparison that we believe is helpful for understanding how “upgrading” equipment is functionally interdependent with qualified biogas property and thus should be included the ITC. Historically, the IRS has defined energy property to include not just property that initially captures energy but also property that is used to adapt, transform, or upgrade energy into a form that is marketable. A prominent example of this practice would be the ITC’s historic inclusion of step-up transformers within the definition of energy property.⁴ While a step-up transformer on its own does not generate electricity, it is property that is needed to convert the energy generated by solar panels or wind turbines into electricity that can be transferred onto a common carrier at the point of interconnection. In other words, a step-up transformer is included within the ITC because it is functionally interdependent with the rest of the components that make up energy property (*i.e.*, the placing in service of all the components that make up a solar energy property (modules, arrays, inverters, etc.) are functionally interdependent upon the placing in service of the step-up transformer).⁵

From our perspective, biogas “upgrading” equipment should also be considered a part of the qualified biogas equipment because “upgrading” equipment is functionally interdependent with the rest of a biogas facility in the same way that a step-up transformer is functionally interdependent with solar energy property. Like a step-up transformer, “upgrading” equipment is used to convert raw biogas into a form that can be transferred onto a common carrier and sold on a market (in this case, injected into a natural gas pipeline so that it can be sold at market). While the upgrading equipment may not be absolutely necessary to produce biogas that is at least 52 percent methane, the upgrading equipment is necessary to capture the gas for sale or productive use in the same way that a step-up transformer is necessary to transform the power generated by a solar panel into energy that can be readily sold or applied to a productive use. Therefore, we believe that the IRS should treat upgrading property in the same way that it has handled other functionally interdependent technologies in the past and include all upgrading *and* cleaning and conditioning components within the definition of qualified biogas property.

Overall, the EIC wholeheartedly endorses the RNG Coalition’s comments on the Section 48 Proposed Regulations, and we strongly urge the IRS and the Treasury department to address these issues within the Proposed Regulations. While we applaud the government’s commitment to creating a technology-neutral set of rules that will foster the growth of RNG and energy transition technologies, we are deeply concerned that the Proposed Regulations will significantly handicap

⁴ I.R.S. Notice 2018-59, 2018-28 I.R.B. 196, at Section 7.01.

⁵ 88 Fed. Reg. at 82,199.

the RNG industry at this critical time in its growth. Before the Proposed Regulations, many planned projects had proposed facilities with the expectation that all functionally interdependent components (including all cleaning and conditioning *and* upgrading equipment) would be eligible for the ITC. Yet the decision in the Proposed Regulations to create a new category of equipment excluded from qualified biogas property will undermine the economic viability of many of these planned projects. The next few years will be a critical time in the United States's response to the climate crisis, and so we strongly urge the IRS to adopt the RNG Coalition's recommendations and make the changes to the Proposed Regulations necessary to protect the growth of RNG within the United States.

The EIC greatly appreciates the opportunity to provide these comments on the Proposed Regulations. If you have any questions about our comments, please do not hesitate to contact us.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Lori E. L. Ziebart', with a long horizontal line extending to the right.

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