



January 22, 2024

Via Electronic Transmission: www.regulations.gov

Ms. Martha Garcia and Mr. Boris Kukso
Office of the Associate Chief Counsel (Passthroughs & Special Industries)
CC:PA:LPD:PR (REG-132569-17), Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on the Definition of Energy Property and Rules Applicable to the Energy Credit; Docket ID – IRS-2023-0054

Dear Ms. Garcia and Mr. Kukso:

The National Waste & Recycling Association (NWRA) and Solid Waste Association of North America (SWANA) are pleased to submit comments on the Internal Revenue Service’s (IRS’s) Definition of Energy Property and Rules Applicable to the Energy Credit, Docket ID No. IRS-2023-0054. NWRA and SWANA represent companies, municipalities, and professionals in the solid waste industry. NWRA is a not-for-profit trade association representing private solid waste and recycling collection, processing, and management companies that operate in all fifty states. SWANA is a not-for-profit professional association in the solid waste management field with more than 10,000 members from both the private and public sectors across North America. Members of both organizations strive to deliver collection, composting, recycling, and disposal services that are protective of the environment in a safe, science-based, and technologically advanced manner.

Definition of Qualified Biogas Property

We are concerned with IRS’s proposed definition of the term “qualified biogas property,” which although closely adhering to the definition found in the Inflation Reduction Act (IRA) improperly excludes “gas upgrading equipment necessary to concentrate the gas into the appropriate mixture for injection into a pipeline.” This exclusion was not contemplated by the legislation, which includes property necessary to be “concentrated by such system into a gas which consists of not less than 52 percent methane.” The definition in the statute essentially requires the system to concentrate raw biogas into a gas that is a minimum of 52 percent methane by volume in order for the system to be credit-eligible. Any interpretation by Treasury that views the “52 percent methane requirement” as a maximum

threshold for credit eligibility is inconsistent with Congress’s goal under the IRA of driving economy-wide investments consistent with the Administration’s climate objectives.

Further, the exclusion of “gas upgrading equipment necessary to concentrate the gas into the appropriate mixture for injection into a pipeline” adds confusion:

- Would equipment required to concentrate raw biogas from less than 52 percent methane by volume to a concentration much higher than 52 percent methane by volume qualify for credit?
- If the only practical outlet for productive use of raw biogas that is less than 52 percent methane by volume were via pipeline injection, would equipment necessary to clean and condition the gas to meet the specifications for a usable product (i.e., into a gas consisting of approximately 95% methane by volume) be credit ineligible?

The agency effectively lessens the potential impact of the IRA by imposing a restriction not found in the statute, effectively declaring that only equipment that cleans and conditions raw biogas into a gas with limited marketability would be credit-eligible. This proposal undermines the intent of Congress to incentivize the deployment of technologies that capture methane emissions that otherwise would be emitted into the atmosphere, promote the production of advanced biofuels, and reduce demand for conventional natural gas in vehicle, building, and industrial applications.

The solid waste sector has responded to the IRA by planning multi-billion-dollar investments in biogas processing infrastructure. Sometimes, local power prices, which follow Subregion prices, and “medium-BTU” uses are not sufficient in price or breadth to justify upgrading equipment, meaning that the proposal to exclude “gas upgrading equipment” from eligibility would virtually nullify the purpose of the IRA in incentivizing methane abatement solutions within our sector. These sustainability investments are at risk if the proposed regulations are not revised. We thus request that the agency reconsider its proposed exclusion of this type of cleaning and conditioning equipment from credit eligibility and suggest that the definition of qualified biogas property be modified to hew closer to the definition found in the statute. as follows:

(11) *Qualified biogas property* —(i) *In general.* Qualified biogas property is property comprising a system that converts biomass (as defined in section 45K(c)(3) of the Code, as in effect on August 16, 2022) into a gas that consists of not less than 52 percent methane by volume (~~tested at the point described in paragraph (e)(11)(ii) of this section~~), or is concentrated by such system into a gas that consists of not less than 52 percent methane (~~tested at the point described in paragraph (e)(11)(ii) of this section~~), and captures such gas for sale or productive use and not for disposal via combustion. Qualified biogas property also includes any property that is part of such system that cleans or conditions such gas. For example, qualified biogas property includes, but is not limited to, a waste feedstock collection system, a landfill gas processing equipment ~~collection system~~, mixing or pumping equipment, and an anaerobic digester. ~~However, 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 is not included in qualified biogas property.~~

The “80/20 Rule” and Multiple Ownership Scenarios

The proposed rule also is potentially problematic for our sector in its interpretation of the term “qualified biogas property” to include a facility’s landfill gas collection system. This is potentially problematic for renewable natural gas (RNG) production facilities located at pre-existing landfills in two respects. First, under existing tax precedent, a facility containing used property can only be considered originally placed in service (and thereby have its new capital spending qualify for the credit) if the fair market value of the used property does not exceed 20 percent of the qualified facility’s total value (known as the “80/20 Rule”). The inclusion of landfill gas collection assets as part of the qualified biogas property makes it difficult to know how to apply this rule in a common situation where an RNG facility is located at a pre-existing landfill, thereby jeopardizing the RNG facility’s qualification for the credit.

Secondly, the treatment of a landfill gas collection system as a part of the qualified biogas property means that, as proposed, the same taxpayer must have tax ownership of both the landfill gas collection system and the other RNG facility assets in order for the RNG facility assets to be credit-eligible. This ownership structure may be problematic in another common situation, where a taxpayer intends to enter into an arrangement involving third-party development and ownership of an RNG facility at a landfill or other waste disposal facility owned by the taxpayer (thereby potentially resulting in disallowance of the credit to the third-party developer).

Nothing in the statute suggests that Congress intended for an existing landfill gas collection system to disqualify a new RNG facility from credit eligibility or for the credit to be limited to scenarios where a landfill and the RNG facility are owned by the same taxpayer. Therefore, the agency should either (1) clarify that qualified biogas property does not include collection wells and associated equipment that are already required by existing regulation or permitting requirements (a change that we view to be consistent with other with other pre-existing, analogous tax credit authorities), or (2) otherwise clarify this issue in the final rule so as to reach a more appropriate result avoid unintended results and further confusion within our sector.

We very much appreciate the Agency’s consideration of this information. Should you have any questions about this letter, please contact the undersigned at agermain@wasterecycling.org or koldendorf@swana.org.

Very truly yours,



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