



June 15, 2018

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2018-43) Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**Re: Notice 2018-43: Public Comment Invited on Recommendations for 2018-2019 Priority Guidance Plan**

In response to Treasury Notice 2018-43 (“the Notice”), the Energy Advance Center (“EAC”) recommends that the Department promptly conduct a rulemaking on the definition of “secure geologic storage” as required by 26 U.S.C. Section 45Q(f)(2) as adopted by Section 41119 of the Bipartisan Budget Act of 2018 (“BBA”). The EAC is a voluntary association of energy and energy related companies whose purpose is to promote the energy industry’s interests in issues related to carbon capture, utilization, and storage (“CCUS”).

Since 2008, Section 45Q has required the Secretary of Treasury, in consultation with the Environmental Protection Agency (“EPA”) and other agencies, to issue regulations defining “secure geological storage” so that the CO<sub>2</sub> “does not escape into the atmosphere.” The Internal Revenue Service (“IRS”) issued interim guidance regarding the term in 2009, but it has never issued regulations. Section 41119 of the BBA repeated the requirement for Treasury to issue regulations defining secure geological storage (codified as section 45Q(f)(2) of the Internal Revenue Code).

The Notice issued in 2009 and subsequent IRS interpretation of that Notice has led to confusion on this issue which could subject taxpayers to inconsistent treatment. A rulemaking will allow a more thoroughly considered, durable, and legally binding definition of the term, and will allow for stakeholder review and comment, as required by law.

The EAC respectfully provides the following additional information in response to the considerations on which the Department has requested comment.

**1. Whether the recommended guidance resolves significant issues relevant to many taxpayers.**

The significant issue that needs to be addressed through a notice and comment rulemaking process is the criteria by which captured CO<sub>2</sub> used in enhanced oil recovery (“EOR”) projects will be considered disposed of by the taxpayer in secure geological storage.

EOR provides the most economic option for securely storing captured CO<sub>2</sub> today. Accordingly, Treasury must get the rules for EOR use right if the expected environmental benefits of section 45Q are to be fully realized.

There are more than 130 EOR projects operating at present. Sixty-five million tons of CO<sub>2</sub> are purchased each year by the oil and gas industry and injected into oil fields to increase their productivity. Using CO<sub>2</sub> captured from industrial sources that would otherwise have been emitted, instead of CO<sub>2</sub> from naturally occurring, underground CO<sub>2</sub> deposits, provides the environmental benefits that Congress envisioned by enacting section 45Q.

Energy Information Administration (“EIA”) analysis suggests that the BBA could trigger the largest surge in carbon capture investment of any policy instrument to date. EIA estimates that the tax credit could lead to capital investment on the order of \$1 billion over the next six years, potentially adding 10 to 30 million tons or more annually of additional CO<sub>2</sub> capture capacity. This would increase total global carbon dioxide capture by around two-thirds. Economics will determine whether these anticipated investments go forward, and the ability to utilize the captured CO<sub>2</sub> in EOR projects will be a key consideration in those economics.

Accordingly, many taxpayers and large capital investments are awaiting formal Treasury regulations that clarify the treatment of captured CO<sub>2</sub> used in EOR projects.

**2. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the Service.**

Properly issued regulations will reduce controversy and lessen the burdens on taxpayers and the IRS because they will replace faulty and confusing guidance currently in place.

IRS personnel have erroneously conditioned the credit on unnecessarily burdensome and expensive monitoring and reporting requirements for CO<sub>2</sub> used in EOR projects. This has led to disagreements between taxpayers and the IRS. Treasury regulations are needed to settle the issue. If such burdens are to be imposed on taxpayers, they should first go through a robust rulemaking process to establish that they are indeed justified.

**3. Whether the recommendation involves existing regulations or other guidance that is outdated, unnecessary, ineffective, insufficient, or unnecessarily burdensome and that should be modified, streamlined, expanded, replaced, or withdrawn.**

As noted above, the IRS issued interim guidance to taxpayers on this issue in 2009 (Notice 2009–83). However, direction it issued to its agents in 2013 is inconsistent with the interim guidance to taxpayers. At a minimum, the current interim guidance is therefore conflicting, “ineffective” and “insufficient.”

The 2009 interim guidance advised taxpayers that in demonstrating “secure geological storage” to be eligible for the credit, they should comply with EPA regulations applicable to their facility. Some of those EPA regulations were planned but had not yet been completed. Specifically, EPA had not yet issued two regulations: (1) regulations for a new well class (geologic sequestration wells), which when issued in 2010 became Class

VI of the Underground Injection Control program (these wells are distinct from EOR wells, which are regulated under Class II); and (2) rules for reporting CO<sub>2</sub> atmospheric emissions, known as the GHG reporting rule. In the final GHG reporting rule, EPA created two new reporting requirements: 40 CFR Part 98 Subpart RR for Geologic Sequestration of Carbon Dioxide for Class VI wells and 40 CFR Subpart UU for Injection of Carbon Dioxide (Class II EOR wells). The Subpart RR rules, applicable to the new Class VI well class, included a requirement to have an approved monitoring, reporting and verification (“MRV”) plan. The IRS 2009 interim guidance advised taxpayers to follow the EPA regulations that would be applicable to them – i.e., Class II and the new Subpart UU for EOR wells, and new Class VI and new Subpart RR for geologic sequestration wells. However, EPA added confusion to the issue due to an erroneous statement of the 2009 IRS guidance in the preamble of its new GHG reporting rule.

The preamble of the rule states: “As clarified in the IRS Guidance, taxpayers claiming the section 45Q tax credit must follow the appropriate UIC requirements. The guidance also clarifies that the taxpayer claiming section 45Q tax credit must follow the MRV procedures that are being finalized under 40 CFR part 98, subpart RR in this final Rule”

This interpretation misreads the IRS Notice as explained above.

Further, a 2013 IRS manual, which purports to be premised on the 2009 guidance, erroneously directs IRS agents to apply the MRV requirements for the new Class VI wells both to those wells and to Class II EOR wells.

The confusion has created a serious risk that the IRS will erroneously apply “unnecessary” reporting requirements that could conflict with other law.

**4. Whether the recommended guidance would be in accordance with Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, Executive Order 13777 Enforcing the Regulatory Reform Agenda (82 FR 12285), or other executive orders.**

Yes. The guidance would reduce regulatory burden and cost because it would synchronize Treasury and EPA requirements and reduce regulatory uncertainty.

**5. Whether the recommended guidance promotes sound tax administration.**

Reducing ambiguity and unnecessary cost/burden/litigation is in the public interest and in the interest of sound tax administration. This approach is consistent with the direction from Congress in enacting section 45Q credit, and will provide certainty for potential CCUS investments that Congress meant to incentivize.

**6. Whether the Service can administer the recommended guidance on a uniform basis.**

A rulemaking would establish bright line rules specifying the actions required of taxpayers to document the quantities of qualified CO<sub>2</sub> that is securely stored in association with EOR projects. The guidance would apply consistently to all taxpayers.

**7. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance.**

Yes, rules that reference the appropriate EPA regulations can be easily drafted and understood by all taxpayers.

Sincerely,

A handwritten signature in black ink that reads "Fred Eames". The signature is written in a cursive, flowing style.

Fred Eames

Counsel to the Energy Advance Center