



## Implementation of Recent Amendments to the 45Q Carbon Sequestration Tax Credit

MAY 3, 2019

[\*Michael Platner\*](#)

### **Background**

The issuance of IRS Notice 2019-32, Request for Comments on Credit for Carbon Oxide Sequestration, by the Treasury Department and the Internal Revenue Service, begins their process of developing regulatory guidance to implement the amendments to Section 45Q of the Internal Revenue Code (Title 26 of U.S. Code) included in the Bipartisan Budget Act of 2018 (BBA), which became law on February 9, 2018. The modifications in the BBA were designed to enhance the existing tax incentive for carbon capture, utilization, and storage (CCUS) to promote investment in CCUS technology and carbon capture project implementation at electric generating plants and industrial facilities. The benefits of the amendments to Section 45Q can't be realized without guidance from the Treasury Department and Internal Revenue Service (Treasury/IRS) on the rules governing operation of the credit. This guidance is necessary to provide certainty to project developers and investors that their capture projects will qualify for the new credit, and input from project developers will be critical to ensuring the guidance achieves that certainty.

### **Why the Original Section 45Q Tax Credit was Amended**

Section 45Q was originally enacted in 2008 and amended in 2009, as a policy intended to incentivize the construction and deployment of carbon capture and sequestration (CCS) projects. However, the original credit imposed a 75 million metric ton cap on the metric tons of carbon dioxide (CO<sub>2</sub>) that would qualify for the credit, which created uncertainty as to whether a project would receive any tax credits. This uncertainty prevented the credit from being considered in project financing and having the incentive effect necessary to encourage the development of carbon capture projects.

### **Enhancements to the New Section 45Q Tax Credit**

The new Section 45Q credit promotes investment in new CCUS projects by:

- eliminating the 75 million metric ton cap for new projects;
- expanding the credit to include all carbon oxides (CO<sub>x</sub>) (important for emissions from steel production facilities);
- requiring new projects to begin construction before January 1, 2024 in order to qualify for the credit;
- making the credit available for CO<sub>x</sub> captured and stored during the 12-year period beginning on the date the project is placed in service;
- adding a new sequestration category for CO<sub>x</sub> utilization;
- increasing the value of the tax credit from \$10 to \$35 for CO<sub>x</sub> used in EOR and sequestered in secure geologic storage or sequestered in a utilization project and from \$20 to \$50 for secure geologic storage without using the CO<sub>x</sub> in EOR or a utilization project;
- expanding the eligibility for claiming the credit to include CO<sub>x</sub> captured through direct air capture technology;
- changing the definition of the taxpayer receiving the credit from the owner of the qualified facility (the power plant or industrial facility) to the owner of the capture equipment;
- reducing the annual capture requirement from 500,000 metric tons to 100,000 metric tons for industrial facilities other than electric generating units;
- adding a new category of qualified facilities for certain pilot projects that capture at least 25,000 metric tons per year of CO<sub>x</sub> sequestered in a utilization project; and
- providing authority for the taxpayer to transfer the credit to the person that purchases the carbon oxide to dispose of it, use it as a tertiary injectant, or utilize it.

### **Providing Certainty to Developers and Investors**

In order to provide certainty to developers of and investors in new carbon capture projects, the Treasury/IRS will need to issue regulations addressing several important definitions and issue areas raised by the new statutory language. These include the following items listed in IRS Notice 2019-32.

- Defining when construction begins is absolutely necessary to ensure that a project developer knows what has to be done before January 1, 2024, to ensure their project qualifies for the new credit.
- Defining the terms carbon capture equipment, qualified carbon oxide, direct air capture facility, qualified facility, tertiary injectant utilization, and lifecycle greenhouse gas emissions.
- The Treasury/IRS is required by the statute to establish an appropriate framework and process for demonstrating secure geological storage of qualified CO<sub>x</sub> captured from the qualified facility. The Treasury/IRS issued interim guidance for demonstrating secure geologic storage under the original 45Q statute and will need to re-evaluate that guidance, given the significant changes to the operation of the credit.
- Clear guidance on the election to transfer the credit in 45Q(f)(3), including the factors that should be considered in determining the time and manner of making the election, will be necessary to promote efficient monetization of the credit.
- The Treasury/IRS are required to issue regulations providing for recapturing the benefits of the tax credit when the qualified carbon oxides cease to be sequestered in secure geological storage. The Treasury/IRS will need to evaluate provisions that will ensure the ability of a company to rely on receiving the value of these credits.
- Guidance will be required to establish boundaries for lifecycle emissions analysis to determine the amount of qualified carbon oxide that qualifies under the utilization provisions and any issues that may arise under those provisions.
- Guidance concerning structuring of partnerships between project developers and investors and allocation of the credit and potential recapture of credit among partners will be necessary to promote financial investment.

It will be very important for the owners of industrial facilities and power plants; carbon capture technology companies; companies involved in enhanced oil recovery; project developers; and investors to provide comments on the issues raised in Notice 2019-32 to the Treasury/IRS and be actively involved in the process of developing the regulatory guidance for the new Section 45Q. Involvement in this process is the only way to ensure that the Treasury/IRS, in consultation with the Environmental Protection Agency, Department of Energy, and Department of Interior, produce the necessary guidance to implement this credit in a way that will promote the development of carbon capture, utilization and storage technology with environmental integrity.

### For more information

If you need more information on these issues or assistance in determining how to provide comments on §45Q in response to Notice 2019-32, please contact Michael Platner ([mlp@vnf.com](mailto:mlp@vnf.com)), Shannon Angielski ([sma@vnf.com](mailto:sma@vnf.com)), Janet Anderson ([jma@vnf.com](mailto:jma@vnf.com)), or your relationship partner at Van Ness Feldman LLP.

Michael Platner has over 30 years of experience in the tax policy field including several years as the Tax and Trade Counsel for a senior member of the Senate Finance Committee and extensive experience managing tax policy, legislative and regulatory issues for trade associations and multinational companies. His practice focuses on providing strategic advice, counsel, and lobbying assistance to clients on US and international tax, trade, and energy policy issues.

Follow us on Twitter [@VanNessFeldman](https://twitter.com/VanNessFeldman)

© 2019 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.