



August 3, 2020

CC:PA:LPD:PR (REG-112339-19)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

Submitted Electronically to Federal eRulemaking Portal: IRS REG-112339-19

Dear Secretary Mnuchin and Commissioner Rettig:

The Renewable Fuels Association (RFA) appreciates the opportunity to provide these comments to the Internal Revenue Service (IRS) regarding the proposed regulations for the credit for carbon oxide sequestration under section 45Q of the Internal Revenue Code, most recently amended by section 41119 of Division D of the Bipartisan Budget Act of 2018 (BBA), Public Law 115-123, 132 Stat. 64, 162, to encourage the deployment of carbon capture, utilization, and storage projects.

RFA is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of fuel ethanol and co-products by strengthening America's renewable fuels industry and raising awareness about the benefits of renewable energy. Founded in 1981, RFA serves as the premier meeting ground for industry leaders and supporters. RFA's 300-plus members are working to help America become cleaner, safer, more energy secure, and economically vibrant.

In addition, the RFA has long been a member of the Carbon Capture Coalition, a nonpartisan collaboration of nearly 80 businesses and organizations building federal policy support for economy-wide deployment of carbon capture, transport, use, removal and storage. Over the last two years, RFA has worked closely with the Coalition in developing and providing consensus recommendations and model guidance to inform and assist the IRS and the U.S. Department of Treasury regarding the implementation of section 45Q.

As a member of the Carbon Capture Coalition, RFA supports the broad and extensive comments submitted by the coalition to the IRS in response to the instant federal register notice. The Carbon Capture Coalition comments can be

found [here](#). However, the RFA wishes to supplement those comments by providing the following additional comments on the proposed regulation. Our comments focus primarily on the proposed carbon capture threshold for a qualified facility under the proposed regulations.

### **Carbon Oxide Capture Threshold for a Qualified Facility**

The ethanol industry is concerned that the current interpretation and guidance provided in the proposed regulations is too restrictive and would exclude certain qualified facilities that are designed to and/or regularly capture more than 100,000 metric tons of qualified carbon oxide during the year. Specifically, we are concerned that a notable economic crisis or industry downturn may cause the amount of carbon oxide captured to fall slightly short of the required carbon oxide capture requirements in a particular year. In such a circumstance, we believe that this would create uncertainty around eligibility, and thereby serve as a disincentive to investment, financing, or joint venture opportunities with many ethanol plants that are arguably eligible under the statute.

As section 45Q(d) provides in pertinent part, “. . .in the case of a direct air capture facility or any facility which is not a Section 45Q(d)(2)(A) Facility or a Section 45Q(d)(2)(B). . . , [a facility must capture] . . .not less than 100,000 metric tons of qualified carbon oxide during the taxable year.”<sup>1</sup> This provision is generally the provision that affords eligibility to many smaller and mid-size ethanol facilities to claim the 45Q carbon capture credit. In fact, it was these and other manufacturing facilities that Congress had in mind when it sought to expand the use of the 45Q credit by lowering the minimum carbon capture threshold down to 100,000 metric tons of qualified carbon oxide, per facility.

With respect to the ethanol industry today, the average mid-size ethanol biorefinery has the capacity to produce 50-60 million gallons of ethanol annually, which in turn produces roughly 125,000-150,000 metric tons of biogenic carbon dioxide emissions that can be captured for the purposes of Section 45Q.<sup>2</sup> However, in years where there is a severe economic downturn, such as what we are experiencing today due to the COVID-19 epidemic, or even in certain circumstances with much less severe economic impacts, an ethanol plant may be forced to reduce production due to market conditions and therefore could fall slightly below the 100,000 metric ton capture threshold. In cases where this might occur, we believe this would create investment or financing challenges for those banks or tax equity institutions seeking to partner with, or otherwise

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<sup>1</sup> According to Section 45Q(d), a facility that emits not more than 500,000 metric tons of carbon oxide during the taxable year must capture at least 25,000 metric tons of qualified carbon oxide that is utilized; an electric generating facility not described in the preceding sentence must capture at least 500,000 metric tons of qualified carbon oxide during the taxable year; and, a direct air capture facility, or any other facility not described in the preceding two sentences, must capture at least 100,000 metric tons of qualified carbon oxide during the taxable year.

<sup>2</sup> U.S. Ethanol Production Capacity by Plant Spreadsheet, 2020 Ethanol Industry Outlook, RFA.

underwrite certain carbon capture projects or investments. We believe that such an interpretation creates an extreme trigger in which producing just above or below a fixed number (100,000 metric tons) determines substantial risk for return on investment for a carbon capture and sequestration project. Under normal market conditions, it is highly unlikely that carbon capture by a mid-size ethanol plant would dip below 100,000 metric tons in any given year. But as the events of 2020 have shown us, an abnormally severe market downturn or economic crisis could indeed force ethanol plants to reduce production to a level that would result in less than 100,000, which would disqualify them from claiming the 45Q credit based on the current proposal.

To prevent or help avoid a situation where an arguably eligible ethanol facility could lose 45Q eligibility in a particular year, we would suggest implementing a carbon capture measurement process that would allow an industrial facility, like an ethanol plant, to either: (1) carry over excess carbon capture tonnage from the previous year (only for the purposes of determining whether the threshold is met), or (2) have the ability to rely on a three- or five-year trailing average to determine how much carbon oxide is being captured annually at the facility.

By implementing a carbon capture measurement process that provides for the use of carry-over from the previous year's excess carbon capture totals, or uses a rolling average to determine eligibility, mid-size facilities that are near or close to the threshold for eligibility would not face great or unmanageable uncertainty with respect to 45Q. We believe this would be extremely beneficial for expanding the total amount of carbon oxides captured and not allowed to be emitted into the environment, and at the same time provide sufficient certainty around 45Q to ensure that medium size ethanol facilities can utilize the credit without the fear of having the credit disappear in a down year.

We thank you again for the opportunity to provide comments. If you have any questions, or need any additional information, please feel free to contact Edward Hubbard, Jr., Esq., General Counsel for the Renewable Fuels Association, at [ehubbard@ethanolrfa.org](mailto:ehubbard@ethanolrfa.org) or (202) 315-2452.

Sincerely,

A handwritten signature in black ink that reads "Geoff Cooper". The signature is written in a cursive, slightly slanted style.

Geoff Cooper  
President and CEO  
RFA