



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

Re: Definition of Energy Property and Rules Applicable to the Energy Credit

To Whom it May Concern:

On behalf of the members of the Novogradac Renewable Energy Working Group (the RE Working Group), we appreciate the opportunity to comment on the proposed update to the rules for the investment tax credit under IRC Section 48 - *Definition of Energy Property and Rules Applicable to the Energy Credit*. The RE Working Group was founded to identify and address technical and administrative issues that arise around the Inflation Reduction Act (IRA) of 2022. The group counts among its members attorneys, investors, syndicators, lenders, for-profit and nonprofit developers, sponsors, consultants, and other renewable energy professionals interested in working together to coalesce around solutions to technical renewable energy issues and make the renewable energy tax credit programs more efficient in providing benefits.

Attached please find the RE Working Group's comments including requests for guidance and recommendations regarding the Notice. Our comments are meant to provide the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) with information needed to help guide their decisions as they make plans to **implement the IRA's energy provisions.**

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance. We would be happy to discuss our comments in further detail. Thank you in advance for your time and consideration.

Yours very truly,

Novogradac & Company LLP

By *Nathaniel Eng*

Nathaniel Eng, Partner

Attachment: RE Working Group Comments on Notice of Proposed Rulemaking, Investment Tax Credit Under IRC Section 48



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Definition of Energy Property and Rules Applicable to the Energy Credit

1. Proposed requirement that functionally interdependent energy property can only be owned by a single taxpayer or in the case of multiple parties **to extent of each party's** fractional ownership interest.

Comments:

We respectfully request reconsideration of this requirement as there are often practical scenarios whereby different components of energy property may be owned by different taxpayers outside of ownership scenarios involving fractional ownership interest. Examples include fact patterns where there is shared infrastructure/equipment where economic, regulatory and operational considerations may necessitate tax ownership bifurcation.

2. Proposed requirement that functionally interdependent energy property is only comprised of equipment placed in service contemporaneously and/or satisfy the 80/20 rule if claiming energy credit.

Comments:

We respectfully request reconsideration of these requirements as incorporating additional equipment and other incremental improvements to existing energy properties subject to the energy credit may be more economically efficient than encouraging **full scale “repower” of existing** energy properties. Additionally, functionally interdependent as currently defined, appears to introduce an additional layer of disparity between various technologies subject to the energy credit. For example, battery property augmentation whereby additional battery modules are added to energy storage property to compensate for degradation, appears to be eligible for energy credit whereas equipment that may make trash or biomass energy properties more efficient are not eligible for the energy credit even on an incremental basis as previously supported by various case law.

We further respectfully request consideration of various factors such as the planned vs. unplanned improvements and the five year recapture period if a deadline for improvements or additions is considered.

3. Proposed provision that excludes cleaning and conditioning equipment from energy credit basis in connection with biogas energy properties.

Comments:

We respectfully encourage reconsideration of the provision excluding cleaning and conditioning equipment from biogas energy credit eligible basis. We note there appears to be inconsistency between cleaning and conditioning equipment considered necessary to process biogas for sale or productive use relative to inverters, transformers and other power conditioning equipment commonly integrated in wind, solar and energy storage properties, where such power conditioning equipment is typically included in energy credit basis.

We further note, the proposed definition of qualified biogas property in Proposed §1.48-9(e)(11) has the effect of disqualifying from basis any equipment installed by a taxpayer after a biogas conversion system reaches the threshold of 52 percent methane by volume. The proposed rule excludes from the **definition “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.”
Such gas upgrading equipment is by necessity property that “cleans or conditions” such methane gas.**

We understand and note Congress specifically included in the definition of qualified biogas property **“any property which is part of the such system which cleans or conditions such gas”** in IRC Section 48(c)(7)(B) of the Code. The proposed rule appears to contradict this statutory definition.

4. Single property definition for purposes of the prevailing wage and apprenticeship increased credit rate, the domestic content bonus, and the energy community bonus.

Comments:

We noted there are currently two separate criteria for defining a unit of property as follows:

- i. **An eight factor “facts and circumstances” analysis which applies to the low income/environmental justice adder** which originated from IRS Notice 2018-59
- ii. A more limited seven factor test (assuming the energy property is owned by a single taxpayer), whereby satisfying any two of the factors would indicate multiple energy properties are operated as a single property. This applies specifically to the prevailing wage and apprenticeship increased credit rate, the domestic content bonus, and the energy community bonus.

We respectfully request **the “facts and circumstances” single property definition applicable to the low income adder** to be consistently applied to the prevailing wage and apprenticeship increased credit rate, the domestic content bonus, and the energy community bonus from a consistency standpoint. We note **this “facts and circumstances” approach** is consistent with other areas of federal tax law such as placed in service determination where often a higher threshold of satisfying relevant criteria is applied by industry practitioners. Lastly, we note single property located across multiple jurisdictions (counties) may potentially have varying prevailing wage requirements.

Illustrative Example: A school district (“District”) will install solar energy properties on a school, district offices, and a supply warehouse. The energy properties are in separate non-contiguous locations across the District boundaries. The District issues a single series of tax-exempt bonds to finance construction costs at all properties. After a single request for proposal, the District selects a single contractor to construct the energy properties at each location. Even if the District sends out requests for proposals for each separate property, the same contractor may be selected for all sites. In addition, although the District can issue separate series of bonds for each site, the bonds may be considered a single issue under Treasury Regulation §1.150-1. Under the proposed guidance, the various solar energy properties would be considered a single project even though the energy properties are distinct and located miles apart.

5. Qualified interconnection property

Comments:

We respectfully request additional clarity and/or an example involving potential situations where multiple energy properties may share or utilize interconnection property. Additionally we request additional examples on the application **of the “Five-Megawatt Limitation” with respect to various technologies and specifically solar energy property.**

6. Property that is not energy property¹ - “Energy property also does not include power purchase agreements, goodwill, going concern value, or renewable energy certificates”

Comments:

We respectfully request additional clarification and/or examples on the potential bifurcation of renewable energy certificates from energy property tax credit basis. Depending on jurisdiction, renewable energy certificates are often transacted at current market established prices in much the same way as the sale of power at merchant rates. Accordingly, industry practitioners typically do not assign value to renewable energy certificates.

7. Prevailing **wage** “One-Megawatt Exception” **for** electrochromic glass property, fiber-optic solar, and microgrid controllers

Comments:

We respectfully request consideration of an eligible basis dollar threshold with respect to prevailing wage exemptions for the above energy property technologies that do not generate electricity.

1. Proposed §1.48-9(d)(2)