

UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE
U.S. DEPARTMENT OF THE TREASURY

SECTION 45V CREDIT FOR PRODUCTION OF CLEAN HYDROGEN;
SECTION 48(a)(15) ELECTION TO TREAT CLEAN HYDROGEN PRODUCTION
FACILITIES AS ENERGY PROPERTY
(ACTION: PROPOSED RULE)

IRS-2023-0066

**COMMENTS OF THE
ELECTRIC POWER SUPPLY ASSOCIATION**

FEBRUARY 23, 2024

These comments are presented by the Electric Power Supply Association (“EPSA”)¹ in response to the December 26, 2023 Notice of Proposed Rulemaking (“NOPR”) issued by the Internal Revenue Service and the U.S. Department of the Treasury,² *Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election To Treat Clean Hydrogen Production Facilities as Energy Property*, (IRS-2023-0066) (“Proposed Rule”).

EPSA is the national trade association representing America’s competitive power suppliers. EPSA advocates for well-functioning competitive wholesale electricity markets and believes that markets provide the best foundation to reliably power our nation at the lowest cost while fostering the innovation necessary to achieve critical environmental progress. EPSA members own and operate approximately 150,000 megawatts (MW) of reliable and competitively priced, environmentally responsible

¹ These comments represent the position of EPSA as an organization but not necessarily the views of any particular member with respect to any issue.

² <https://www.federalregister.gov/documents/2023/12/26/2023-28359/section-45v-credit-for-production-of-clean-hydrogen-section-48a15-election-to-treat-clean-hydrogen>

generation facilities using a diverse mix of fuels and technologies, including natural gas, wind, solar, hydropower, battery storage, nuclear, and coal. EPSA members' assets represent approximately 20% of the nation's installed capacity.

EPSA members have an interest in appropriately determining what qualifies as "clean" hydrogen as it relates to the 45V tax credit from both the production of the commodity as well as its end use. We represent some of the largest investors, owners, and operators of renewable and clean energy projects in the country – including offshore and onshore wind, photovoltaics, and battery storage. The ability of the nation to dramatically expand its renewable energy output will rest in large part with companies, like EPSA members, investing and interconnecting new renewable energy resources to produce the emissions-free electricity vital to clean hydrogen production. Our members also own and operate conventional thermal resources that represent a meaningful customer base for clean hydrogen producers seeking a market to reduce greenhouse gas emissions.

Given the importance of this Proposed Rule to EPSA members, we echo the voices among asset owners in the energy industry that the proposed parameters for "clean hydrogen" have been drawn far too narrowly. For all intents and purposes, the clean hydrogen industry does not exist on a commercial or nationwide scale. It is a nascent industry and would greatly benefit from policies that encourage investment. Instead, the Proposed Rule creates a regime that may satisfy those hoping to limit (or prevent) clean hydrogen production (perhaps due in part to it aiding in fossil fuel generation), but as drafted will discourage and create significant barriers to expanding the clean hydrogen industry. One specific point that we will elaborate on is the ability of

the country to significantly expand its output from new renewable energy sources not already expected to meet future electricity demand outside of clean hydrogen production. It would be irresponsible to assume that there is a glut of unobligated renewable energy development that will interconnect before the 2032 expiration of the 45V credit, or that it will be easy to propose, finance, permit/site, interconnect, and operate renewables dedicated to clean hydrogen production in that timeframe.

A. THE GUIDANCE INCLUDES UNREASONABLE ASSUMPTIONS FOR NEW RENEWABLE ENERGY DEVELOPMENT IN AN UNWORKABLE TIMEFRAME

As investors, owners, and operators of all manner of electric generation and energy storage assets, EPSA members are in an ideal position to highlight the Proposed Rule's reliance on an expectation of significant quantities of new clean and renewable energy generation coming online relatively soon. EPSA members are some of our nation's largest investors in renewable energy and clean energy technologies and remain eager to play a vital role in the nation's clean energy expansion. However, limiting energy attribute certificates (EAC) to electricity produced by either new renewable energy facilities or existing facilities with a commercial operating date inside of three years from start-up of the hydrogen production facility is far too restrictive and will severely inhibit the ability for clean hydrogen investors to find *qualified* sources of renewable energy.

One of the most difficult challenges to a nationwide buildout of renewable energy to satisfy the EAC requirements is our nation's status quo permitting regime. This shouldn't be a surprise to anyone in the Treasury Department or the Administration. The numerous pitfalls, hurdles, and dead ends in the current federal permitting process under the National Environmental Policy Act (NEPA) stymies and delays energy projects of all colors, including conventional and renewable energy, fuel supply infrastructure, and electric transmission and distribution. Two examples of where the Administration has heard this from investors and builders across the industry are the U.S. Environmental Protection Agency's (EPA) effort to further limit carbon emissions under the Clean Air Act³ and the Council on Environmental Quality's (CEQ) "Phase 2" NEPA reforms.⁴ (EPSCA weighed in with our concerns on both the EPA⁵ and CEQ⁶ proposed rules.)

Banking on an inefficient NEPA permitting process (that may become even more hostile to some projects under the Phase 2 rulemaking) to dramatically accelerate development of energy infrastructure is a strategy that will result in disappointment for clean hydrogen supporters. EPSCA has advocated for comprehensive permitting reform as the need for both renewable and dispatchable resources increases to meet our nation's reliability and climate goals. However, it is wholly unrealistic to think the permitting process will reform itself simply because this Proposed Rule ties strict renewable energy parameters to clean hydrogen production.

³ <https://www.federalregister.gov/documents/2023/05/23/2023-10141/new-source-performance-standards-for-greenhouse-gas-emissions-from-new-modified-and-reconstructed>

⁴ <https://www.federalregister.gov/documents/2023/07/31/2023-15405/national-environmental-policy-act-implementing-regulations-revisions-phase-2>

⁵ https://epsc.org/wp-content/uploads/2023/08/EPSCComments_EPA111_August2023.pdf

⁶ https://epsc.org/wp-content/uploads/2023/09/EPSCA_CEQNEPAPhase2_Sept142023_Final.pdf

The Proposed Rule will further restrict the growth of clean hydrogen if it insists on a physical nexus between the clean hydrogen product facility and the renewable energy output creating the EAC. A tenet of energy production based on the weather is that investment in new facilities will flow to where the wind and sun provide optimal conditions for electricity production. The NOPR will tie the potential for clean hydrogen production in certain regions to that region's ability to produce renewable energy, thus shackling the overall potential for national clean hydrogen production (or at best simply discouraging production in regions without meaningful renewable energy potential). Insisting that within a few years clean hydrogen production be able to map its development to the timing of renewable energy output adds yet another layer of uncertainty and a variable that could halt clean hydrogen production for days at a time.

Treasury should reassess the incrementality language included in the NOPR. EPSA's understanding is that Congress intended for the 45V tax credit to serve as a vehicle to grow and expand a nascent clean hydrogen industry. However, as it relates to renewable energy development, the 2032 expiration date is not far off. Any final rule relating to the 45V tax credit should be written with an appreciation for the tremendous difficulties that new renewable energy investment (and the accompanying transmission infrastructure) will face in the coming years and expand the generation sources satisfactory for EAC qualification.

B. TREASURY'S GUIDANCE DOES NOT COMPLY WITH CONGRESSIONAL INTENT

While EPSA may believe that the Proposed Rule is written in a manner that will stifle and strangle the potential for clean hydrogen production, it is always useful to assess the reaction of those responsible for the policy. The Proposed Rule notes that it “contains proposed regulations relating to the credit for production of clean hydrogen (clean hydrogen production credit) and the energy credit, **as established and amended by the Inflation Reduction Act [IRA] of 2022**, respectively” (emphasis added). Therefore, it seems reasonable to gauge the reaction of the lawmakers responsible for writing and passing the IRA to the Proposed Rule to see if it squares with their intent.

On November 6, 2023, 11 members of the U.S. Senate (10 Democrats and 1 Independent), called on the Departments of the Treasury and Energy, as well as the White House, to ensure that the 45V guidance is “consistent with our intent to provide a robust and flexible incentive that will catalyze and quickly scale a domestic hydrogen economy.”⁷ The Senators also noted that “we hope the final guidance will avoid evolving and complex eligibility criteria—such as overly stringent additionality, deliverability, and time matching requirements—that could raise costs, suppress hydrogen production, feedstock and production pathway innovation, and private-sector investment, while discriminating against some regions based on their existing clean energy mixes.” The signatories include the Chairman of the U.S. Senate Committee on Energy & Natural Resources Joe Manchin and Chairman of the U.S. Senate Committee on Environment

⁷ subscriber.politicopro.com/f/?id=0000018b-ab2e-d7df-abbb-ef6fb5ca0000

and Public Works Tom Carper. (The letter was signed by several other committee chairs, including the Commerce, Science, and Transportation Committee.)

Chairman Manchin noted his frustration that, despite his hopes for “robust and flexible” incentives, the Proposed Rule “will only make it more difficult to jumpstart the hydrogen market...obstructing hydrogen development in our country is the short-sighted goal...For an Administration that wants to reduce emissions and fight climate change, it makes no sense to kneecap the hydrogen market before it can even begin.”⁸

On November 9, 2023, Chairman Carper sent a separate letter to the Treasury and Energy Departments, and the White House, that in part urged that “the forthcoming guidance for 45V strikes a balance between spurring our domestic clean hydrogen industry and aligning with our emissions reduction and clean energy goals...Without appropriate flexibility, I am concerned that there will be a chilling effect on this emerging clean energy industry – including harms to the growth potential of the hydrogen market, increased costs, delayed project development and construction, as well as the adoption of hydrogen in industries that are currently reliant on carbon-intensive processes.”⁹ Chairman Carper’s reaction to the Proposed Rule seems to indicate that Treasury missed the mark, as the Chairman notes that “we intended for the clean hydrogen incentives to be flexible and technology-neutral. Treasury’s draft guidance does not fully reflect this intent, potentially jeopardizing the clean hydrogen industry’s ability to get off

⁸ <https://www.energy.senate.gov/2023/12/manchin-administration-kneecapping-hydrogen-projects>

⁹ https://www.epw.senate.gov/public/_cache/files/e/4/e4183b35-14e4-47ca-b125-a60f69a35cb0/FDBCE69166D6C705D0B40634487EC73A.2023.11.09-45v-hydrogen-letter-final.pdf

the ground successfully...Without meaningful changes, I will find it difficult to support the final rule.”¹⁰

Another signatory of the November 6 letter is Pennsylvania Democratic Senator Bob Casey, whose reaction to the Proposed Rule again indicates a shortcoming in the proposal. Following release of the Treasury guidance, Senator Casey responded that “I have serious questions that this proposed rule will hinder our ability to produce clean hydrogen to power the U.S.’s energy future...I am going to keep pushing the Administration to listen to Pennsylvanians, especially those in energy communities, and ensure our Commonwealth is poised to take full advantage of this tax credit in the way that Congress intended.”¹¹

EPSA highlights these members as proxies for broader Congressional frustration that the Proposed Rule failed to capture the intent of Congress: To nurture and develop a domestic clean hydrogen production industry.

C. CONCLUSION

EPSA members appreciate that the Proposed Rule is written as yet another regulatory vehicle to spur and incentivize renewable energy investment. However, the guidance fails to address the fundamental underlying shortcomings in the development of energy infrastructure, particularly the morass of unnavigable permitting and siting regulations. The barriers raised by the status quo inefficient permitting regime will not only hamper renewable energy production, but under this Proposed Rule, would throttle

¹⁰ <https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=BEB39405-9E0E-4A25-99BB-769AEFB949B0>

¹¹ <https://www.casey.senate.gov/news/releases/casey-proposed-hydrogen-rule-may-cut-pa-workers-and-businesses-out-of-equation>

the potential for a burgeoning domestic clean hydrogen industry as well. Not only have we heard this from voices across the energy industry, but from clean hydrogen supporters in Congress as well.

We urge the Treasury Department to recognize the unworkable nature of its guidance and to reassess the best way to implement the 45V tax credit to incentive clean hydrogen production.

Respectfully Submitted,

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February 23, 2024