



July 31, 2020

Honorable Charles P. Rettig Commissioner  
Internal Revenue Service  
CC:PA:LPD:PR (REG-112339-19)  
Room 5203, Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

Dear Commissioner Rettig:

Docket ID: IRS-2020-0013-0001

Re: Comments on Credit for Carbon Oxide Sequestration, REG-112339-19

Basin Electric Power Cooperative (**Basin Electric**) appreciates this opportunity to submit comments on the Internal Revenue Service's (**IRS**) proposed regulations regarding the Credit for Carbon Oxide Sequestration (**45Q tax credit**). Basin Electric submits these comments electronically to docket ID IRS-2020-0013-0001 as noticed in the Federal Register, pages 34050 - 34075 (June 2, 2020), in accordance with the instructions in IRS' request for comment.

Basin Electric is a not-for-profit regional wholesale electric generation and transmission cooperative owned by 140-member cooperatives that has been in operation since 1961. Basin Electric provides wholesale power to member rural electric systems in nine States: Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming. Approximately three million electric consumers are served by Basin Electric's member cooperative systems.

Basin Electric has a diverse energy portfolio consisting of coal, gas, oil, nuclear, distributed, generation, and renewable energy. It owns electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa. Its coal fleet includes Antelope Valley Station (two units) and Leland Olds Station (two units) in North Dakota, and Dry Fork Station (one unit) and Laramie River Station (three units) in Wyoming. Its natural gas fleet includes the 300-net megawatt (MW) capacity combined-cycle Deer Creek Station in South Dakota and several smaller facilities in Iowa, Montana, North Dakota, South Dakota, and Wyoming.

These coal and gas units vary widely in capacity, age, geography, and other factors. Basin Electric's oldest coal unit is Leland Olds Station unit 1, which was placed into service in 1966. Its newest coal unit, Dry Fork Station, was placed into service in 2011. At the same time Basin Electric continues to diversify its electric portfolio, it has invested billions in capital in its fossil generation and remains supportive of developing cost-effective solutions to capture, utilize, and sequester carbon dioxide (**CO<sub>2</sub>**). The 45Q tax credit is a critically important incentive to developing this technology.

Further, Dakota Gasification Company, a wholly-owned subsidiary of Basin Electric, owns and operates the Great Plains Synfuels Plant. This one-of-a-kind facility gasifies lignite coal to manufacture synthetic natural gas, fertilizers, and a number of chemical co-products. As part of the coal gasification process, a stream of gas is incidentally removed that is approximately 98 percent CO<sub>2</sub> by weight. Since 2001, a portion of this CO<sub>2</sub> stream has been compressed and delivered to Canada where it is utilized for enhanced oil recovery. As such, Dakota Gasification Company has nearly two decades of experience in delivering CO<sub>2</sub> for injection and utilization, and is ideally situated to be a first mover in developing a large-scale CO<sub>2</sub> sequestration project in the United States.

Basin Electric offers comment on the following issues:

### **Definition of Carbon Capture Equipment**

Basin Electric generally supports the list of components that are included in the definition of carbon capture equipment within the proposed regulations under section 1.45Q-2(c)(2). This definition represents an improvement over that which was contained in Notice 2020-12. Given the complexity and uniqueness of the qualified facilities that could seek to claim credit and that virtually no two carbon capture systems are alike, Basin Electric had previously urged the IRS to allow for flexibility in determining the appropriate configuration of carbon capture equipment that is being “placed in-service” in order to claim the credit.

However, we believe that the definition of carbon capture equipment needs additional clarification with regard to the scope of carbon capture equipment. Section 1.45Q-2(c) of the proposed regulations provides that “in general, carbon capture equipment includes all components of property that are used to capture or process carbon oxide until the carbon oxide is transported for disposal, injection, or utilization.” Section 1.45Q-2(c)(1) goes on to further clarify that carbon capture equipment is equipment used for three purposes:

- i) Separating, purifying, drying, and/or capturing carbon oxide that would otherwise be released into the atmosphere from an industrial facility;
- ii) Removing carbon oxide from the atmosphere via direct air capture; or
- iii) Compressing or otherwise increasing the pressure of carbon oxide.

With respect to section 1.45Q-2(c)(1)(i), Basin Electric requests that the final regulations provide a test that allows for differentiation between equipment for which the primary function is to separate CO<sub>2</sub>, and equipment that incidentally separates CO<sub>2</sub> but for which the primary function is the manufacture of other products, in order to determine whether the equipment should be included as carbon capture equipment or not. In other words, equipment for which the primary function is the manufacture of other products should not be included in what constitutes carbon capture equipment at a qualified facility.

While CO<sub>2</sub> can be captured as a result of a scrubbing process from the flue gas of a fossil-fueled power generation facility, CO<sub>2</sub> is also incidentally produced as a result of the chemical processes in coal gasification and other manufacturing processes. CO<sub>2</sub> from such sources is often readily-available for capture, transport, and utilization for either enhanced oil recovery or sequestration. For example, the Great Plains Synfuels Plant utilizes a Rectisol process unit that removes CO<sub>2</sub> from coal-derived raw gas, yet the primary function is to purify the gas stream and is integral to creating the “building block” on which the primary products manufactured by the facility are based. Rectisol is a physical adsorption process that utilizes high pressure and low temperature methanol to purify the raw gas stream by removing hydrogen sulfide, CO<sub>2</sub>, and

higher molecular weight hydrocarbons (such as butane, pentane, and benzene). The resulting synthesis gas contains methane, carbon monoxide, and hydrogen, which can then be used to produce synthetic natural gas, or for production of nitrogen-based fertilizer products. All told, the Great Plains Synfuels Plant produces a total of thirteen different fertilizer, solvent, phenol, and other chemical products, and has the potential to manufacture numerous other products from this synthesis gas.

Basin Electric's previous comments also urged the IRS to ensure that the definition of carbon capture equipment did not inadvertently exclude CO<sub>2</sub> produced by such processes from qualifying for the 45Q tax credit. We believe that this clarification is important to ensure that equipment that might ultimately enable CO<sub>2</sub> capture is not ensnared by this definition contrary to its primary function. Without clarification, the definition serves as a barrier to carbon capture projects by requiring a taxpayer to own non-carbon capture equipment that is necessary for the operation of an industrial facility owned by a different entity. Given that the process equipment, or the facility itself, is often subject to a lien or otherwise secured, such an arrangement would prohibit an outside partnership from making additional investment in the appropriate carbon capture equipment components to ensure that CO<sub>2</sub> is fully captured and sequestered. The final regulations should provide this clarification to ensure consistency with the purpose of the 45Q tax credit as expanded by the Bipartisan Budget Act of 2018 (**BBA**).

### **Election to Transfer Credit**

Section 45Q(f)(3)(B) allows for the taxpayer receiving the credit to elect to transfer the credit to the person that disposes of the CO<sub>2</sub>. This provision is helpful for taxpayers with limited tax liability (such as a not-for-profit cooperative like Basin Electric), to take advantage of the 45Q tax credit and the incentive it provides for carbon capture utilization and storage technology. We support the filings identified in the proposed regulations required to make this election.

For carbon capture equipment placed in service after the date of enactment of the BBA, section 45Q(f)(3)(A)(ii) attributes the tax credit to "the person that owns the carbon capture equipment and *physically or contractually* ensures the capture and disposal, utilization, or use as a tertiary injectant" of the CO<sub>2</sub>. Whereas, under section 45Q(f)(3)(B) the credit can be allowed to the person that *disposes* of the qualified CO<sub>2</sub>. Basin Electric requests that the IRS clarify in the final regulations that the person to which the credit is being transferred under section 45Q(f)(3)(B) for disposal of CO<sub>2</sub> still has the flexibility to utilize a third party, (e.g., subcontract) for physical disposal of CO<sub>2</sub>. Given that CO<sub>2</sub> injection and sequestration is a highly-specialized field, it will be necessary in most cases to utilize third party operators with such expertise that is beyond the capability of a tax equity investment partnership. Basin Electric believes that the IRS can provide clarification of this issue while ensuring that such a partnership sufficiently ensures that the 45Q tax credit is being transferred and allocated in accordance with the BBA.

### **Private Letter Rulings**

Given the potential complexity of contractual arrangements that will utilize tax equity investors in order to utilize the 45Q tax credit, Basin Electric strongly encourages the IRS to consider issuing private letter rulings (**PLRs**). The PLR process would allow the IRS to consider the details of specific contractual arrangements and provide greater certainty for taxpayers seeking to claim and/or transfer the credit. As stated above, no two carbon capture systems are the same, and similarly no two tax equity partnerships to utilize the 45Q tax credit for a carbon capture system are likely to be the same. The PLR process would play an important role in reviewing any technical issues before claiming the credit, and thus ensure more efficient oversight of the 45Q program by avoiding unnecessary and/or costly after-the-fact audit measures that could have been resolved up front through the issuance of a binding PLR.

### **Retrofitted Qualified Facility or Carbon Capture Equipment (80/20 Rule)**

Basin Electric generally supports the adoption of the “80/20 rule” within the proposed regulations. This provision is similar to that which is allowed for the section 45 renewable production tax credit, and will allow for existing qualified facilities to qualify for the 45Q tax credit, as increased by the BBA, with sufficient investment in new carbon capture equipment. The 80/20 rule is necessary to encourage additional investment in existing qualified facilities and carbon capture equipment, and not preclude such facilities from pursuing this job-creating investment, and achieving large-scale reductions in CO<sub>2</sub> emissions.

### **Recapture of Credit**

Section 1.45Q-5(a) provides that a recapture event occurs when “qualified carbon oxide for which a section 45Q credit has been claimed ceases to be captured, disposed of, or used as a tertiary injectant during the recapture period.” The recapture period of the earlier of five years or the date monitoring ends within the proposed regulations creates unnecessary risk for tax equity investors. Basin Electric requests that the recapture period in the final regulations be shortened to three years or less. CO<sub>2</sub> injection and storage that is done in compliance with the applicable standards - either subpart RR of the Environmental Protection Agency’s Greenhouse Gas Reporting Rule, or the International Organization for Standardization standards endorsed by the American National Standards Institute for CO<sub>2</sub> storage - ensures adequate oversight of the CO<sub>2</sub>, and thus mitigates the need for an extended recapture period.

### **Expediency of Final Rule**

Overall, Basin Electric supports the IRS’ direction in the proposed regulations. Given the time that has elapsed since enactment of the BBA in 2018, and the looming construction commencement deadline of December 31, 2023, for qualified facilities and carbon capture equipment, it is critical the IRS issue a final rule as soon as practicable. A final rule is necessary to give project developers the certainty they need to move forward with projects to capture, utilize, or sequester qualified carbon oxides. At the same time, it is necessary for the IRS to ensure that the final rule appropriately addresses these issues and is workable for project developers. We acknowledge this delicate balancing act and appreciate the IRS’ efforts in developing these regulations.

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Thank you again for the opportunity to submit these comments. If you have any questions or require additional information, please contact Dale Niezwaag, Vice President of Government Relations, at (701) 557-5795.

Sincerely,

*Mark D Foss*

Mark D Foss (Aug 3, 2020 07:30 CDT)

Mark D. Foss  
Senior Vice President & General Counsel

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Submitted electronically via: <http://www.regulations.gov>

# 45Q proposed rule comment final draft

Final Audit Report

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