



*Submitted electronically via the Federal eRulemaking Portal  
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August 3, 2020

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

Dear Internal Revenue Service:

NRG Energy, Inc. (an independent energy company, NYSE: NRG) and JX Nippon Oil Exploration (EOR) Limited (a US subsidiary of JX Nippon Oil & Gas Exploration Corporation, a global oil and gas company headquartered in Japan) thank you for the timely and comprehensive Section 45Q guidance and clarification issued in the form of Notice 2020-12 and Revenue Procedure 2020-12. And we thank you for the issuance of proposed 45Q regulations (REG-112339-19) on May 28, 2020.

NRG and JX Nippon jointly developed and placed into service the Petra Nova project, which is the only U.S. facility capturing carbon oxide in large quantities (over 1 million metric tons per year) from a fossil-fueled power plant. Petra Nova captures carbon oxide from NRG's WA Parish power plant, a coal-fired electric generating facility owned by NRG and located southwest of Houston, Texas. Once captured by Petra Nova, the carbon oxide is compressed and transported 81 miles southwest via pipeline to the West Ranch oilfield where it is used as a tertiary injectant in connection with enhanced oil recovery (EOR) operations and ultimately sequestered in the subsurface geology of the field.

Petra Nova became operational on December 29, 2016. As of the end of June 2020, the plant has captured almost 3.8 million metric tons of carbon oxide, removing it from the atmosphere while simultaneously boosting the production of domestic oil and enhancing the United States' goal of energy independence.

Section 45Q credits are a critical source of funding necessary to mitigate the high upfront capital costs and ongoing operating costs associated with this nascent technology, especially in the current environment of low oil prices. While we believe the proposed regulations, in their present form, will significantly remove the uncertainties surrounding 45Q and therefore provide incentive for companies to invest in carbon capture, utilization, and sequestration projects like our Petra Nova Project, we believe the applicability dates included in the proposed regulations are inconsistent with the legislative intent of Section 45Q and create unnecessary (and we believe

unintended) uncertainty for certain taxpayers, such as Petra Nova, for carbon oxide captured during 2018.

Section 45Q was re-codified in full by the Bipartisan Budget Act of 2018, Pub. L. 115-123, Div. D, Title II, § 41119(a), Feb. 9, 2018, 132 Stat. 162. In section 45Q(h) of that provision, Congress directed the Secretary to “prescribe such regulations and other guidance as may be necessary or appropriate to carry out this section ...” Among other changes, as part of this legislation, Congress made a policy decision that facilities that were placed in service prior to enactment date, would be eligible to claim the credit beginning February 9, 2018, if the taxpayer had not previously claimed the Section 45Q credit in effect prior to the re-codification. More specifically, pursuant to Section 45Q(f)(6), eligible taxpayers could make an election to treat an “applicable facility” as having been placed in service on February 9, 2018, thereby making that facility eligible for the credits provided by Sections 45Q(a)(3) and 45Q(a)(4) in lieu of the credits provided by Sections 45Q(a)(1) and 45Q(a)(2) with respect to qualified carbon oxide captured by the facility on or after February 9, 2018. Proposed Regulations Section 1.45Q-2(g)(4) provides operative guidance relating to the election contemplated by Section 45Q(f)(6).

The re-codified provision was effective for tax years beginning after December 31, 2017. Pub. L. 115-123, Div. D, Title II, § 41119(b), Feb. 9, 2018, 132 Stat. 162.

Notwithstanding the effective date of the legislation, the proposed regulations do not allow taxpayers to rely on them for all tax years beginning after December 31, 2017.

Specifically, each of Proposed Regulations Sections 1.45Q-1, 1.45Q-2, 1.45Q-3, 1.45Q-4, and 1.45Q-6 provides generally that they apply to taxable years beginning after the date final regulations are published in the Federal Register. Each of these Sections also provides a look-back provision, however, pursuant to which "Taxpayers may choose to apply this section for taxable years beginning on or after February 9, 2018" provided the taxpayer applies each section in their entirety and in a consistent manner.

Petra Nova is a calendar year taxpayer, as is likely the case with other taxpayers actually placing facilities in service or with facilities that are deemed placed in service during 2018, either on or after February 9th. In fact, based on development and construction lead-times associated with these capital intensive projects, it would be extraordinary for a taxpayer to have a taxable year beginning on the date a facility was placed in service in 2018. As a consequence, Petra Nova and other impacted taxpayers, could be prevented from relying on the regulations in order to claim Section 45Q credits consistent with the legislative intent.

More specifically, in the case of a facility placed in service in 2018 on or after February 9th, a strict reading of the look-back provisions included in the proposed regulations suggests that the earliest date on which a calendar year taxpayer like Petra Nova could begin relying on the proposed regulations would be January 1, 2019, notwithstanding that such a taxpayer would have been eligible for credits during a portion of the 2018

calendar year. Similarly, in the case of a facility placed in service prior to February 9, 2018, a calendar year taxpayer that chooses to make a Section 45Q(f)(6) election could only begin relying on the proposed regulations (including the guidance relating to such elections) on January 1, 2019, notwithstanding that the statute permits such an election to be made with effect from February 9, 2018.

In light of the limited Section 45Q guidance provided prior to the issuance of the proposed regulations, the look-back provisions provide taxpayers with access to much-needed certainty with respect to projects placed in service before the date on which the Proposed Regulations otherwise become applicable. We respectfully submit, however, that by limiting the application of the look-back provisions to taxable years beginning on or after the date of Section 45Q's re-codification, the certainty provided by those look-back provisions is unnecessarily limited in a way that, for the reasons noted above, we do not believe was intended and is contrary to the purpose of those look-back provisions.

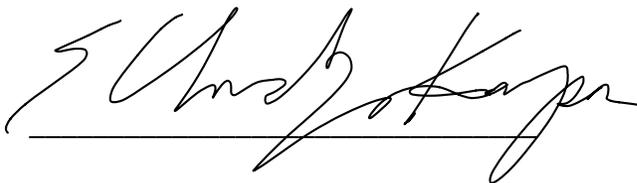
Recommendation:

In order to correct this unintended consequence, we recommend that the applicability dates be modified such that Taxpayers may choose to apply each section for taxable years which include the date on which qualifying facilities which were placed in service on or after February 9, 2018, or deemed to have been placed in service on February 9, 2018 by reason of a Section 45Q(f)(6) election. Alternatively, we recommend that the applicability dates be modified such that taxpayers could choose to apply the regulations to years beginning after December 31, 2017, consistent with the effective date explicit in the Bipartisan Budget Act.

NRG Energy, Inc., JX Nippon Oil Exploration (EOR) Limited, and Petra Nova thank you for your attention to this matter and your consideration of these comments. Please feel free to contact us if you have any questions or need any additional information.

NRG Energy, Inc.

JX Nippon Oil  
Exploration (EOR) Limited



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Vice President - Tax

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President