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**Section 45Q Tax Credit for CCUS  
Proposed Changes in Build Back Better Act**

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The House of Representatives passed the Build Back Better Act (“BBBA”) on November 19, 2021. The House Bill is currently under consideration in the U.S. Senate. The BBBA proposes to amend Section 45Q in a number of ways.

The amendments discussed below apply to facilities or carbon capture equipment the construction of which begins after December 31, 2021. Facilities or carbon capture equipment that begin construction before that date remain subject to the Code provisions, including the tax credit rate and other provisions, in effect before the amendment.

Generally, the amount of the section 45Q credit and the party that is eligible to claim the credit depend on whether the taxpayer captures qualified carbon oxide using carbon capture equipment originally placed in service at a qualified facility before February 9, 2018 (“Old 45Q Facility”), or on or after February 9, 2018 (“New 45Q Facility”), and whether the taxpayer disposes of the qualified carbon oxide in geological storage (“sequestration”), uses it as a tertiary injectant in a qualified enhanced oil or natural gas recovery project (“EOR”), or utilizes the carbon oxide in certain specified ways (“utilization”).

The BBBA will substantially reduce the production thresholds and add an efficiency requirement for electric generating facilities.

- A direct air capture facility must capture at least 1,000 metric tons per taxable year.
- An electricity generating facility must capture not less than 18,750 metric tons of qualified carbon oxide during the taxable year and not less than 75 percent by mass of the carbon oxide that would otherwise be released into the atmosphere by such facility during such taxable year.
- In the case of any other facility, it must capture not less than 12,500 metric tons of qualified carbon oxide during the taxable year.

The beginning of construction date is extended to December 31, 2031. Subject to satisfying all other requirements, any project that begins construction by that date will qualify for the Section 45Q tax credit.

The current rate of \$35 for utilization and use for EOR and \$50 for sequestration are adjusted for facilities to which the amendments apply:

- For any taxable year before 2027, the “base rate” for utilization and use for EOR is \$12. An inflation adjustment factor is added for taxable years beginning in 2027.
- For any taxable year before 2027, the “base rate” for sequestration is \$17. An inflation adjustment factor is added for taxable years beginning in 2027.
- A special rate is provided for direct air capture. With respect to direct air capture, for any taxable year before 2027, the “base rate” is \$36 for sequestration and \$26 for utilization and use for EOR. An inflation adjustment factor is added for taxable years beginning in 2027.

The “base rate” is increased by a multiple of 5 for projects that satisfy prevailing wage and apprenticeship requirements. In other words, the base rate is multiplied by 5 to reach the full tax credit value.

- The full tax credit value for sequestration is \$85 ( $\$17 \times 5$ )
- The full tax credit value for utilization and use for EOR is \$60 ( $\$12 \times 5$ ).
- The full tax credit rate for direct air capture is \$180 for sequestration and \$130 for EOR and utilization.

These rates are subject to inflation adjustment beginning in 2027.

# Prevailing Wage and Apprenticeship Requirements

- The effective date for satisfying the prevailing wage and apprenticeship requirements is for facilities or carbon capture equipment that starts construction after the date that is 60 days after Treasury issues guidance on how to comply with the prevailing wage and apprenticeship requirements.
- Projects that begin construction after that date will have to satisfy the prevailing wage and apprenticeship requirements to get the full tax credit rate. Projects that start construction after that date which do not satisfy the requirements will get only the base rate, i.e., 20% of the full credit amount.
- Projects that begin construction after December 31, 2021 and before the date that is 60 days after the Treasury issues guidance will receive the full tax credit rate without satisfying prevailing wage and apprenticeship requirements.



# Prevailing Wage Requirements

The prevailing wage requirement is as follows: Any laborers and mechanics employed by contractors and subcontractors in (i) the construction of a facility or carbon capture equipment, and (ii) for the 12-year period beginning on the date the facility or carbon capture equipment was originally placed in service, for the alteration or repair of such facility or carbon capture equipment, shall be paid wages at rates not less than the prevailing rate for construction, alteration, or repair of a similar character in the locality as most recently determined by the U.S. Department of Labor.

Note that the prevailing wage requirement is limited to construction, alteration and repair of the facility or carbon capture equipment. This activity should be limited to the project site. Payment of prevailing wages for alteration and repair continues for 12 years from the placed in service date and could affect the Section 45Q tax credit for any year in that 12-year period.

# Prevailing Wage Requirements

Failure to satisfy prevailing wage can be corrected by paying the difference between the wages paid and the applicable prevailing wage to the affected workers plus interest and a \$5000 per affected worker penalty to the IRS. If there is intentional disregard of the requirement, the payment is increased to *three times* the sum of the difference between wages paid and the applicable prevailing wage and interest, and the \$5000 penalty per worker is increased to \$10,000 per worker.

# Apprenticeship Requirements

All contractors and subcontractors engaged in the performance of construction, alteration, or repair work on any project shall ensure that a percentage of the total labor hours of such work be performed by qualified apprentices. The percentage of total labor by apprentices phases in from 10% for projects that begin construction before January 1, 2023, 12.5% for projects that begin construction before January 1, 2024, and 15% for any project that begins construction after December 31, 2023.

There is a good faith exception to the apprenticeship requirement if the contractor has requested qualified apprentices from a registered program and the request is denied or not responded to within 5 days. If the good faith exception does not apply, the taxpayer can pay a penalty to the IRS of \$50 for every hour that the requirement was not satisfied. There is an increased penalty for intentional disregard of the requirement.

The credit is reduced if the facility or carbon capture equipment is financed with tax-exempt bonds. If tax-exempt bonds are used to finance the facility or carbon capture equipment, the credit is reduced by the lesser of 15 percent or a fraction the numerator of which is the tax-exempt bond proceeds used to finance the facility or carbon capture equipment and the denominator of which is the capital cost of the facility or carbon capture equipment.

The BBBA provides an election for direct payment of the tax credit by the government to the taxpayer.

- The election applies to the Section 45Q tax credit that is attributable to carbon capture equipment that is placed in service after December 31, 2021 and for which an election is made.
- In the case of a taxpayer that is a corporation or individual, the amount of the tax credit is treated on the taxpayer's tax return as a payment of tax, like a payment of estimated tax. To the extent that the estimated payments, including the tax credit amount, is in excess of the tax liability on the tax return, the government (IRS) will issue a refund/payment of that amount to the taxpayer.
- For Section 45Q, the election is made for each separate qualified facility.

Special rules apply for partnerships, S-corporations, and tax-exempt and government entities.

- In the case of a partnership or S-corporation that directly owns carbon capture equipment and qualifies for the tax credit, the IRS will make a payment to the entity in the amount of the tax credit. Such payment is treated as tax-exempt income to the entity.
- In the case of a tax-exempt or governmental entity, the election treats the tax credit amount as used in connection with a trade or business and allows the entity to receive a direct payment of the credit.

The election for direct pay will be made on the taxpayer's tax return. Such election must be made no later than the due date, including any extension, for the tax return for the taxable year in which the carbon capture equipment is placed in service. The election is irrevocable and applies to all taxable years for which the tax credit is claimed