



Dept. of Treasury Changes Course Regarding Biogas Property: Upgrading Equipment Included Again

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BACKGROUND

Biogas, which can be produced from sources like landfills, wastewater treatment facilities, livestock farms and food waste, has existing and potential commercial uses that can replace more carbon intensive energy sources while enhancing energy security and reliability. Section 48 provides an investment tax credit (ITC) for qualified biogas property.

UPDATE

The Dept. of Treasury has corrected a notice of proposed rulemaking or NPRM (REG-132569- 17) published in the Federal Register on November 22, 2023, containing proposed regulations that would amend the regulations relating to the energy credit for the taxable year in which eligible energy property is placed in service.

Under the published Proposed Regulations, gas upgrading equipment necessary to concentrate gas into the appropriate mixture for injection into a pipeline through removal of other gases was excluded from qualified biogas property (*i.e.*, ineligible for credit). See Proposed §1.48-9(e)(11)(i). Meanwhile, proposed §1.48-9(f)(1) provides that property owned by the taxpayer that is an integral part of an energy property (as defined in proposed §1.48-9(f)(3)) is treated as energy property. This apparent conflict confused (and alarmed) many commenters and stakeholders.

Treasury has therefore clarified a more sensible approach: gas upgrading equipment that is necessary to concentrate the gas from qualified biogas property into the appropriate mixture for injection into a pipeline through removal of other gases would be energy property *if it is an integral part of an energy property* as defined in proposed §1.48-9(f)(3). Treasury declined to follow suggestions to treat downstream cleaning and conditioning equipment as functionally interdependent with upstream energy property.

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The Proposed Regulations previously read:

“However, 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 is not included in qualified biogas property.”

See FR Doc. 2023-25539, pg. 82214 (second column and before the first full paragraph). The revised proposed language would now read as follows:

“However, 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 is not a functionally interdependent component (as defined in paragraph (f)(2)(ii) of this section) of qualified biogas property.”

SUMMARY

The correction clarifies that cleaning and conditioning equipment that is integral to processing biogas into renewable natural gas, though not functionally interdependent, is not excluded from the meaning of energy property for purposes of the ITC under IRC §48.

The energy tax landscape continues to develop as federal agencies publish, interpret, and respond to changing laws and guidance. Foster Swift Collins & Smith, PC is actively monitoring these developments and ready to assist in planning and assessing projects for credit eligibility.

The correction to REG-132569-17 is available here: [Technical Correction Regarding Definition of Energy Property](#)

Contact Foster Swift attorneys Nick Stock (nstock@FosterSwift.com) and Mike Zahrt (mzahrt@FosterSwift.com) for more information on the ITC under IRC §48.