

Production Tax Credit for Refined Coal

Part III - Administrative, Procedural, and Miscellaneous

Notice 2009-90

SECTION 1. PURPOSE

This notice sets forth interim guidance pending the issuance of regulations relating to the tax credit under § 45 of the Internal Revenue Code (Code) for refined coal.

SECTION 2. BACKGROUND

Sections 45(c)(7), (d)(8), and (e)(8) of the Code provide definitions and rules relating to the tax credit for refined coal (the refined coal credit). Section 45(e)(8) provides that the refined coal credit increases a taxpayer's credit determined under the other provisions of § 45. The credit is allowed for qualified refined coal (1) produced by the taxpayer at a refined coal production facility during the ten-year period beginning on the date the facility is originally placed in service, and (2) sold by the taxpayer to an unrelated person during that ten-year period.

Sections 45(c)(7), (d)(8), and (e)(8) were added to the Code by sections 710(a), (b)(1), and (b)(2), respectively, of the American Jobs Creation Act of 2004,

Pub. L. No. 108-357. These provisions were amended by sections 403(t) and 412(j)(1) and (2) of the Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, and by sections 101 and 108 of the Energy Improvement and Extension Act of 2008, Division B of Pub. L. No. 110-343.

SECTION 3. DEFINITIONS, ETC.

The following definitions apply for purposes of this notice:

.01 Refined Coal.

(1) In General. Except as otherwise provided in this section 3.01, the term “refined coal” means fuel that--

(a) is a liquid, gaseous, or solid fuel produced from coal (including lignite) or high carbon fly ash, including (except to the extent inconsistent with section 3.01(1)(b) of this notice) such fuel used as a feedstock;

(b) is sold by the taxpayer (producer), to an unrelated person, with the reasonable expectation that it will be used for the purpose of producing steam; and

(c) is certified by the taxpayer as resulting (when used in the production of steam) in a qualified emission reduction.

(2) Steel Industry Fuel. Refined coal includes steel industry fuel (as defined in § 45(c)(7)(C)) that is produced and sold after September 30, 2008.

(3) Pre-2009 Facilities. Refined coal does not include fuel (other than steel industry fuel) that is produced and sold from a facility placed in service before January 1, 2009, unless such fuel is produced in such a manner as to result in an increase of at least 50 percent in the market value of the fuel (excluding any

increase caused by materials combined or added during the production process) as compared to the feedstock coal.

.02 Coal. The term "coal" means anthracite, bituminous coal, subbituminous coal, and lignite. Coal includes waste coal (that is, usable material that is a byproduct of the previous processing of anthracite, bituminous coal, subbituminous coal, or lignite). Examples of waste coal include fine coal of any of the listed ranks, coal of any of the listed ranks obtained from a refuse bank or slurry dam, anthracite culm, bituminous gob, and lignite waste.

.03 Comparable Coal. The term "comparable coal" means, with respect to any feedstock coal, coal that is of the same rank as the feedstock coal and that has an emissions profile comparable to the emissions profile of the feedstock coal.

.04 Qualified Emissions Reduction. The term "qualified emissions reduction" means--

(1) in the case of refined coal produced at a facility placed in service after December 31, 2008, a reduction of at least 20 percent of the emissions of nitrogen oxide (NO_x) and at least 40 percent of the emissions of either sulfur dioxide (SO₂) or mercury (Hg) released when burning the refined coal (excluding any dilution caused by materials combined or added during the production process), as compared to the emissions released when burning the feedstock coal or comparable coal predominantly available in the marketplace as of January 1, 2003; and

(2) in the case of production at a facility placed in service before January 1, 2009, a reduction of at least 20 percent of the emissions of NO_x and at least 20 percent of the emissions of either SO₂ or Hg released when burning the refined coal

(excluding any dilution caused by materials combined or added during the production process), as compared to the emissions released when burning the feedstock coal or comparable coal predominantly available in the marketplace as of January 1, 2003.

.05 Refined Coal Production Facility. The term "refined coal production facility" means--

(a) for purposes of the refined coal credit allowable with respect to steel industry fuel, any facility (or any modification to a facility) which is placed in service before January 1, 2010, and

(b) for purposes of the refined coal credit allowable with respect to refined coal other than steel industry fuel, any facility placed in service after the date of the enactment of the American Jobs Creation Act of 2004 and before January 1, 2010, other than a facility producing fuel for which a credit under § 45K (or under § 29, as in effect on the day before the date of enactment of the Energy Tax Incentives Act of 2005) was allowed for the taxable year or any prior taxable year.

.06 Related Persons. Persons are treated as related to each other if they would be treated as a single employer under the regulations prescribed under § 52(b). A corporation that is a member of an affiliated group filing a consolidated return is treated as selling coal to an unrelated person if the coal is sold to an unrelated person by another member of the affiliated group.

.07 Placed in service. The year in which property is placed in service is determined under the principles of § 1.46-3(d).

SECTION 4. COMPUTATION OF CREDIT

.01 In General. The refined coal credit for a taxable year is the tentative credit for the year determined under this section 4.01, reduced to the extent provided in sections 4.02 and 4.04 of this notice. If the taxable year is a calendar year, the tentative credit for the taxable year is the tentative credit for the calendar year. If the taxable year includes parts of two calendar years, the tentative credit for the taxable year is the sum of the tentative credits for each partial calendar year included in the taxable year. The tentative credit for any calendar year (or partial calendar year) is the applicable amount per ton of qualified refined coal (1) produced by the taxpayer at a refined coal production facility during the ten-year period beginning on the date the facility is originally placed in service, and (2) sold by the taxpayer to an unrelated person during that ten-year period and during the calendar year (or partial calendar year). The applicable amount for sales of refined coal during a calendar year is \$4.375 multiplied by the inflation adjustment factor for the calendar year to adjust for inflation since 1992.

.02 Limitation of the Credit.

(1) In General. The tentative credit with respect to sales of refined coal during a calendar year is reduced by an amount that bears the same ratio to the tentative credit as the excess reference price for the calendar year bears to \$8.75.

(2) Excess Reference Price. The excess reference price for a calendar year is the amount by which (a) the reference price for the calendar year of fuel used as a feedstock exceeds (b) an amount equal to 1.7 multiplied by \$31.90 and further multiplied by the inflation adjustment factor for the calendar year.

.03 Reference Price and Inflation Adjustment Factor. The reference price and inflation adjustment factor for a calendar year are provided by notice published in the Internal Revenue Bulletin. See, for example, Notice 2008-48, 2008-21 I.R.B. 1008.

.04 Reduction for Grants, Tax-Exempt Bonds, Subsidized Energy Financing and Other Credits. The tentative credit, after the reduction, if any, under section 4.02 of this notice, is reduced by a prescribed percentage if the project received government grants, subsidies, or other credits. The reduction percentage for a tax year is the lesser of 50 percent or the percentage that is determined by dividing the sum for the taxable year and all earlier taxable years of the four items listed below by the aggregate additions to the capital account attributable to the project for the taxable year and all earlier taxable years. Those four items are (1) governmental grants received for the project; (2) proceeds from tax-exempt state or local government bonds used to finance the project; (3) directly and indirectly provided subsidized energy financing under a federal, state or local program in connection with the project and (4) any other credit allowable with respect to any property that is part of the project.

SECTION 5. RULES RELATING TO THE AVAILABILITY OF THE REFINED COAL CREDIT

.01 Leased Refined Coal Production Facility. The refined coal credit is allowed for qualified refined coal produced and sold to an unrelated person by the taxpayer, without regard to whether the taxpayer owns the refined coal production facility in which the refined coal is produced. Accordingly, a taxpayer that leases or

operates a facility owned by another person may claim the credit for refined coal that the taxpayer produces in the facility.

.02 Addition or improvement to an existing facility. A refined coal production facility will not be treated as placed in service after October 22, 2004, if more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) is attributable to property placed in service on or before October 22, 2004. The Service will not issue private letter rulings relating to when a refined coal production facility has been placed in service.

SECTION 6. RULES RELATING TO EMISSION REDUCTION

.01 Emission Reductions Attributable to Mining Processes Disregarded.

(1) In General. A qualified emission reduction does not include any reduction attributable to mining processes or processes that would be treated as mining if performed by the mine owner or operator. Accordingly, in determining whether a qualified emission reduction has been achieved, the emissions released when burning the refined coal must be compared to the emissions that would be released when burning the feedstock coal. Feedstock coal is the product resulting from processes that are treated as mining under section 6.01(2) of this notice and are actually applied by a taxpayer in any part of the taxpayer's process of producing refined coal from coal.

(2) Processes Treated as Mining. Any process described in § 613(c)(2), (3), (4)(A), (4)(C), or (4)(I), or that would be described in those provisions if performed by the mine owner or operator, shall be treated as a mining process for purposes of this notice. Section 613(c)(2) provides that the term 'mining' includes not merely the

extraction of the ores or minerals from the ground but also the treatment processes considered as mining described in § 613(c)(4) (and the treatment processes necessary or incidental thereto). Section 613(c)(3) provides that extraction of ores or minerals from the ground includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. Section 613(c)(4)(A) provides, in the case of coal, that cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment by a mine owner or operator shall be considered as mining. Section 613(c)(4)(C) provides in the case of minerals that are customarily sold in the form of a crude mineral product--sorting, concentrating, sintering, and substantially equivalent processes to bring to shipping grade and form (see § 1.613-4(f)(3)(i)) shall be considered as mining. Section 613(c)(4)(I) provides that the Secretary may prescribe certain treatment processes that will be treated as mining; for example, § 1.613-4(f)(5) provides that drying to remove free water, provided that such drying does not change the physical or chemical identity or composition of the mineral, is treated as mining. Section 613(c)(5) describes treatment processes that are not considered as mining unless they are provided for in § 613(c)(4) or are necessary or incidental to a process provided for in § 613(c)(4). Any cleaning process, such as a process that uses ash separation, dewatering, scrubbing through a centrifugal pump, spiral concentration, gravity concentration, flotation, application of liquid hydrocarbons or alcohol to the surface of the fuel particles or to the feed slurry, provided such cleaning does not change the physical or chemical structure of the coal, and drying to remove free water, provided such

drying does not change the physical or chemical identity of the coal, will be considered as mining.

(3) Exception.

(a) In General. A cleaning process shall not be treated as a mining process for purposes of applying this section 6.01 to refined coal produced from waste coal at a facility placed in service before January 1, 2010, for the primary purpose of producing refined coal from waste coal. For purposes of this section 6.01(3), waste coal means the waste materials that are separated through ordinary mining processes during the process of producing a merchantable product from the coal extracted from a natural deposit. This section 6.01(3) does not apply with respect to the refined coal produced at a facility during a taxable year unless a verification of waste coal supply, as described in section 6.01(3)(b), is available for such facility.

(b) Verification of Waste Coal Supply. The verification of the waste coal supply for a facility required under this section 6.01(3) must contain the following:

(i) The name, address, and telephone number of the qualified individual.

(ii) A statement that the person providing the verification of the waste coal supply is a qualified individual.

(iii) A statement that the coal to be processed by the facility is “waste coal” within the meaning of section 6.01(3)(a).

(iv) A declaration, signed by the qualified individual, in the following form:

“Under penalties of perjury, I declare that I have examined this verification statement and, to the best of my knowledge and belief, it is true, correct, and complete.”

(c) Qualified Individual. A qualified individual for purposes of this section 6.01(3) is an individual that--

(i) is not related (within the meaning of § 45(e)(4)) to the taxpayer claiming the refined coal credit;

(ii) is properly licensed as a professional engineer; and

(iii) has the requisite qualifications to provide the verification required under this section 6.01(3).

.02 Basis for Determining Emission Reduction.

(1) In General. Emission reductions are determined by comparing the emissions that result when feedstock coal and refined coal are used to produce the same amounts of useful thermal energy.

(2) Emissions Resulting from Production Process. Emissions that result from the process of producing refined coal from feedstock coal are treated for purposes of this section 6.02 as emissions that result when the refined coal is used to produce useful thermal energy. In any case in which waste heat from an activity other than the production of refined coal is used in the process of producing refined coal from feedstock coal, the emissions associated with the waste heat are not treated as emissions that result from such process. The emissions that result when refined coal is produced from feedstock coal must be determined using a method that accurately measures such emissions.

(3) Adjustment for Additives. In any case in which additives are used to produce the refined coal, appropriate adjustment must be made in determining the useful thermal energy produced by the refined coal.

.03 Emission Reduction Testing Methods.

(1) CEMS Field Testing.

(a) In General. The emissions reduction may be determined using continuous emission monitoring system (CEMS) field testing. CEMS field testing is testing that meets all the following requirements:

(i) The boiler used to conduct the test is coal-fired and steam-producing and is of a size and type commonly used in commercial operations.

(ii) Emissions are measured using a CEMS.

(iii) If EPA has promulgated a performance standard that applies at the time of the test to the pollutant emission being measured, the CEMS must conform to that standard.

(iv) Emissions for both the feedstock coal and the refined coal are measured at the same operating conditions and over a period of at least 3 hours during which the boiler is operating at a steady state and at least 90 percent of full load.

(v) Emissions of SO₂ are measured upstream of any SO₂ scrubber.

(vi) Emissions of Hg are measured upstream of any SO₂ scrubber or Hg control device (such as activated carbon injection).

(vii) Emissions of NO_x are measured upstream of any NO_x controls.

(viii) A qualified individual verifies the test results in a manner that satisfies the requirements of section 6.03(1)(b) of this notice.

(b) Verification of Test Results. A verification of test results for purposes of this section 6.03(1) must contain the following:

(i) The name, address, and telephone number of the qualified individual.

(ii) A statement that the person providing the verification of test results is a qualified individual.

(iii) A statement that the testing satisfied all the requirements specified in section 6.03(1)(a)(i) through (vii) of this notice.

(iv) A statement that the amount of the emissions reduction was determined in accordance with the provisions of section 6.01 and section 6.02 of this notice.

(v) A declaration, signed by the qualified individual, in the following form: “Under penalties of perjury, I declare that I have examined this verification statement and, to the best of my knowledge and belief, it is true, correct, and complete.”

(c) Qualified Individual. A qualified individual for purposes of this section 6.03(1) is an individual that--

(i) is not related (within the meaning of § 45(e)(4)) to the taxpayer claiming the refined coal credit;

(ii) is properly licensed as a professional engineer; and

(iii) has the requisite qualifications to provide the verification required under this section 6.03(1).

(d) Reliance Permitted. If CEMS field testing is used to determine the emissions reduction, the IRS will not, on examination, require any additional proof of the emission reduction achieved. The IRS may, however, require the taxpayer to establish that the testing used qualifies as CEMS field testing.

(2) Other Testing Methods. Methods other than CEMS field testing may be used to determine the emissions reduction. If a method other than CEMS field

testing is used, the IRS may require the taxpayer to provide additional proof that the emission reduction has been achieved. Permissible methods include the following:

(i) A testing method using a demonstration pilot-scale combustion furnace if it is established that the method accurately measures the emissions reduction that would be achieved in a boiler described in section 6.03(1)(a)(i) of this notice and a qualified individual verifies the test results in a manner that satisfies the requirements of section 6.03(1)(b)(i), (ii), (iv), and (v) of this notice.

(ii) Laboratory analysis of the feedstock coal and the refined coal. The laboratory analysis must comply with a currently applicable EPA or ASTM standard and may be used only for purposes of determining the emissions reduction for SO₂ and Hg.

.04 Frequency of Testing.

(1) In general. A taxpayer may establish that a qualified emissions reduction determined under section 6.03 of this notice applies to production from a facility by a determination or redetermination that is valid at the time the production occurs. A determination or redetermination is valid for the period beginning on the date of the determination or redetermination and ending with the occurrence of the earliest of the following events:

(i) The lapse of six months from the date of such determination or redetermination.

(ii) A change in the type, source, or rank of feedstock coal that occurs after the date of such determination or redetermination.

(iii) A change in the process of producing refined coal from the feedstock coal that occurs after the date of such determination or redetermination.

(2) Redetermination methods. In the case of a redetermination required because of a change in the process of producing refined coal from the feedstock coal, the redetermination required under this section 6.04 must use a method that meets the requirements of section 6.03 of this notice. In any other case, the redetermination requirement may be satisfied by laboratory analysis establishing that the SO₂ and Hg content of both the feedstock coal and the refined coal do not vary by more than ten percent from the SO₂ and Hg content of the feedstock coal and refined coal used in the most recent determination that meets the requirements of section 6.03 of this notice.

.05 Certification of emissions reduction. The certification requirement of section 3.01(1)(c) of this notice is satisfied with respect to fuel for which the refined coal credit is claimed only if the taxpayer attaches to its tax return on which the credit is claimed a certification that contains the following:

(1) A statement that the fuel will result in a qualified emissions reduction when used in the production of steam.

(2) A statement indicating whether CEMS field testing was used to determine the emissions reduction.

(3) If CEMS field testing was not used to determine the emissions reduction, a description of the method used.

(4) A statement that the emissions reduction was determined or redetermined within the six months preceding the production of the fuel and that there have been

no changes in the type, source, or rank of feedstock coal used or in the process of producing refined coal from the feedstock coal since the emissions reduction was determined or was most recently redetermined.

(5) A declaration signed by the taxpayer in the following form: “Under penalties of perjury, I declare that I have examined this certification and to the best of my knowledge and belief, it is true, correct, and complete.”

SECTION 7. RECORDKEEPING

Section 6001 provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. The books and records required by § 6001 must be kept at all times available for inspection by authorized internal revenue officers or employees, and must be retained so long as the contents thereof may become material in the administration of any internal revenue law. In order to satisfy the recordkeeping requirements of § 6001 and the regulations thereunder, a taxpayer that claims the refined coal credit must retain adequate books and records so that, for any taxable year, it can be verified from those books and records that the property with respect to which the credit is claimed satisfies the applicable requirements of § 45 and this notice.

SECTION 8. REQUEST FOR COMMENTS

The IRS and the Treasury Department invite comments concerning section 6.03 of this notice relating to emission reduction testing methods. Comments should refer to Notice 2009-90 and be submitted to:

Internal Revenue Service
CC:PA:LPD:PR (Notice 2009-90)
Room 5203
P. O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224
Attn: CC:PA:LPD:PR (Notice 2009-)

Alternatively, taxpayers may submit comments electronically to

notice.comments@irs.counsel.treas.gov. Please include "Notice 2009-90" in the subject line of any electronic communications.

All comments will be available for public inspection and copying.

SECTION 9. EFFECTIVE DATE

This notice is effective for refined coal produced after December 7, 2009.

Taxpayers may apply the provisions of this notice with respect to refined coal produced on or before December 7, 2009.

SECTION 10. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-2158.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this notice is in section 6 of this notice. This information will be used by the Service to verify that the taxpayer is eligible for the production tax credit for refined coal. The collection of information is required to obtain a benefit. The likely respondents are businesses or other for-profit institutions.

The estimated total annual reporting burden is 15 hours.

The estimated annual burden per respondent varies from 10 to 20 hours, depending on individual circumstances, with an estimated average of 15 hours. The estimated number of respondents is 100.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 11. DRAFTING AND CONTACT INFORMATION

The principal author of this notice is Philip Tiegerman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury participated in its development. For further information regarding this notice, contact Mr. Tiegerman at (202) 622-3110.