# The Inflation Reduction Act as a Mine Finance Alternative

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## I. Introduction

It has been a little over a year and a half since the enactment of the Inflation Reduction Act (IRA) promoted by the Biden administration, and critical mineral producers and their investors are rushing to find ways to monetize the IRA tax credits and/or utilize the loan guaranty programs under the IRA to finance new mining projects or provide capital for existing ones. Whether a mining company is taking advantage of the 10% tax credit under Section 45X (Advanced Manufacturing Production Credit),[1] applying for tax credit under Section 48C (Qualifying Advanced Energy Project Credit Program), or applying to one of the loan guaranty programs under the Title 17 Clean Energy Program, critical mineral producers and their investors are organizing and working with their lawyers to submit applications in hopes of being selected as a qualified project by the Department of Energy (DOE) under these programs.

Unfortunately, while the race is on, many of these incentives and programs are so new to the critical mineral space that a number of questions around qualifying criteria remain unanswered by the Internal Revenue Service (IRS) and the Department of Treasury (Treasury). Historically, mining projects were initially financed and then capital was maintained by a mix of equity from investors, debt facilities from financial institutions (generally via project financing), payments pursuant to royalty agreements, or pre-payments via streaming agreements. Today, we are seeing that the IRA tax credits and loan incentives offer an alternative means of financing and capital maintenance for mining projects, depending on the various stages of the project.

## II. Section 45X (Advanced Manufacturing Production Credit)

Under Section 45X, tax credits are available to producers of energy components and products that are sold to unrelated persons, including eligible components produced in the United States involving critical minerals. These critical minerals include graphite, cobalt, lithium, and nickel, key minerals for electric vehicles and cell phone batteries. While the tax credit allowed is based on the eligible component being produced, the tax credit is also available to certain mineral producers and processors and can be as much as up to 10% of the costs of the critical mineral produced. Note that there is some disappointment among industry players with recent guidance issued by Treasury and the IRS in December 2023 suggesting that the actual costs of "extraction" of a raw material cannot be included in this 10%.[2]

Of course, critical minerals need to be "extracted" before they can be processed, purified, or refined and then sold into supply chains. Mineral producers have argued that not allowing these costs to be included seems contrary to the purposes of the IRA and the DOE-suggested goals. In February mining companies and the electric vehicle industry joined together to "warn"

[1] All "Section" references are to the Internal Revenue Code of 1986, as amended (Code) or the Income Tax Regulations (26 C.F.R. pt. 1).
[2] *See* Notice of Proposed Rulemaking, 2023-27498, 88 Fed. Reg. 86,844 (proposed Dec. 15, 2023) (to be codified at 26 C.F.R. pt. 1).

Treasury that "its interpretation of the Inflation Reduction Act could undermine the Biden administration's goal of bolstering EV adoption and building up mineral supply chains."[3]

Realizing this point may not be settled, the IRS is seeking comment on this approach, and affected parties are recommended to work with their lawyers and submit comments. Even in light of this recent release, the Section 45X tax credit remains attractive to mining companies as it can be "stacked" with other tax credits, is eligible for a direct cash payment for up to five years for taxpayers with limited tax capacity, can be transferred in exchange for cash, and—with respect to eligible components that are deemed critical minerals by the IRA—is a permanent tax credit not subject to phase-out like the credit for other eligible components.[4]

## III. Section 48C (Qualifying Advanced Energy Project Credit Program)

While the Qualifying Advanced Energy Project Credit Program has been around since 2009 and was largely dormant since then as Congress did not appropriate funds to the program after the initial allocations were spent, the IRA expanded the scope and amount available, so that up to $10 billion is now available for tax credits for qualifying projects under the IRA. The tax credit allowed under Section 48C can equal up to 30% of qualified investment costs for a selected project if that selected project meets the prevailing wage and apprenticeship requirements.

This Section 48C tax credit is for projects that: (i) re-equip, expand, or establish an industrial or a manufacturing facility to produce or recycle specified advanced energy property; (ii) install technology in an industrial or manufacturing facility to reduce greenhouse gas emissions by at least 20%; or (iii) re-equip, expand, or establishe an industrial facility to process, refine, or recycle critical minerals. The IRS and Treasury have suggested that, along with satisfying all the other terms of eligibility, the processing of raw ore brines, mine tailings, and other source materials into critical materials could qualify such projects for selection under this third prong. Note also, that with the Secretary of Energy's determination last July that copper was deemed a critical material (note, not mineral), copper projects are now eligible to apply for Section 48C tax credits. The first round of this Section 48C tax credit closed last December and while the amount allocated for the first round was $4 billion, the DOE received applications for over $42 billion, ten times the amount allocated.[5]

Treasury has announced that it will issue a notice for the second round of the Section 48C allocations in the coming months, and we are seeing critical mineral producers working to get their applications finalized. Note that companies that have received the Section 48C tax credit cannot also claim the Section 45X tax credit for property produced at the same facility benefitting from the Section 45X tax credit.

## IV. Title 17 Clean Energy Financing Program

Title 17 was created by the Energy Policy Act of 2005, and is a program by which the DOE guarantees loans for innovative projects. The Act was further amended by the Infrastructure Investment and Jobs Act in 2021 and more recently by the IRA. The amendments

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[3] Hannah Northey, "Miners, EV Makers: Climate Law Must Apply to Digging Up Materials," *GreenWire* (Feb. 5, 2024).

[4] Section 1.45X-3(f)(3).

[5] *See* Jim Lane, "48C Qualified Advanced Energy Project Tax Credit: One Year into the Inflation Reduction Act," *The Digest* (Oct. 8, 2023).

under the IRA expanded the scope of Title 17 to include projects that reinvested in legacy energy infrastructure, as well as certain state-supported projects. Title 17 now has four financing programs for U.S. projects: (i) innovative energy projects (projects that use new or significantly improved technology); (ii) innovated supply chain projects (projects that include a new or significantly improved technology in the manufacturing process for clean energy technology); (iii) state energy financing institution projects (projects that use qualifying clean energy technology that receives support from a state agency); and (iv) energy infrastructure reinvestment (financing for projects that retool, repower, repurpose, or replace energy infrastructure that has ceased operating or upgraded operating infrastructure to avoid, reduce, or utilized greenhouse gas emissions). While Title 17 program eligibility can be challenging and an unprecedented amount of companies are competing for selection by the DOE, a loan guarantee thereunder can be up to 80% of the project's eligible costs, helping finance a mining project.

In an effort to strengthen the U.S. supply chain for critical minerals and accelerate our net zero goals, the IRA is providing significant financial incentives to mining companies via tax credits and loan guaranties. As noted above, the details of these tax incentives and loan programs are still being clarified and, in some instances, heavily debated. It remains to be seen whether these IRA financing options will supplement or displace traditional sources of mining capital.