

## Part III - Administrative, Procedural, and Miscellaneous

### New clean renewable energy bonds application solicitation and requirements

Notice 2009-33

#### **SECTION 1. PURPOSE**

This notice solicits applications for allocations of the present total national bond volume limitation authority (“volume cap”) of \$2.4 billion to issue new clean renewable energy bonds (New CREBs) under § 54C(a) of the Internal Revenue Code (the “Code”) to finance certain qualified renewable energy facilities described in § 45(d) of the Code (also referred to in this notice as a qualified “project” or “projects”). This notice also provides related guidance on the following: (1) eligibility requirements that a project must meet to be considered for a volume cap allocation; (2) application requirements and the application form for requests for volume cap allocations; (3) the method that the Internal Revenue Service (“IRS”) and the Treasury Department will use to allocate the volume cap; and (4) certain aspects of the applicable law and interim guidance in this area.

Applications for New CREB volume cap allocations pursuant to this notice must be filed in accordance with this notice by the following application deadline: August 4, 2009.

This notice will use the term CREBs for clean renewable energy bonds issued under § 54 and the term New CREBs for new clean renewable energy bonds issued under § 54C. To the extent that this notice refers generally to the clean renewable energy bond program, the term CREB program will be used.

## **SECTION 2. BACKGROUND**

### **.01 Introduction**

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), added § 54 to the Code. Section 54 originally provided for a total national volume cap of \$800 million for CREBs to finance eligible clean renewable energy projects and delegated to the Secretary the authority to allocate that volume cap, subject to the constraint that the Secretary could allocate no more than \$500 million of that volume cap to qualified borrowers that were governmental bodies (with the balance to be allocated to qualified borrowers which were cooperative electric companies). Section 54 originally required that CREBs had to be issued by an expiration date of December 31, 2007.

Section 202 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006) (the "2006 Act"), amended § 54 in three respects. First, the 2006 Act increased the total national bond volume cap for CREBs from \$800 million to \$1.2 billion. Second, the 2006 Act extended the expiration date for the issuance of CREBs under the total authorized national volume cap of \$1.2 billion from December 31, 2007,

to December 31, 2008. Third, the 2006 Act increased the maximum allocations or reallocations to qualified borrowers which are governmental bodies from \$500 million to \$750 million (with the balance to be allocated to cooperative electric companies). In 2007, the IRS completed the allocation with respect to the volume cap under § 54 of the Code, as amended.

Section 15316 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008) (the “2008 Food Act”), added new § 54A to the Code. Section 54A provides certain general program requirements and operating rules for qualified tax credit bonds. Section 54A(a) provides that a taxpayer that holds a qualified tax credit bond on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under § 54A(b) with respect to such dates.

Section 107 of the Energy Improvement and Extension Act of 2008, Division B of Pub. L. No. 110-343, 122 Stat. 3765 (2008) (the “2008 Energy Act”) (the 2008 Food Act and the 2008 Energy Act are referred to collectively as the “2008 Acts”), added new § 54C to the Code to provide for a new national volume cap of \$800 million for New CREBs to finance qualified renewable energy facilities. Section 107(b) of the 2008 Energy Act amended § 54A(d)(1) of the Code to provide that the term qualified tax credit bond, in part, means a New CREB that is part of an issue that meets the requirements of § 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions on financial conflicts of interest, respectively. Section 107(d) of the 2008 Energy Act

provides that amendments to the Code made by § 107 of the 2008 Energy Act apply to obligations issued after October 3, 2008.

Section 1111 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (the “2009 Act”), increased the national bond volume cap for New CREBs by \$1.6 billion.

Section 107(c) of the 2008 Energy Act extends the expiration date for the issuance of CREBs under authority previously allocated by the IRS pursuant to § 54 of the Code from December 31, 2008, to December 31, 2009. In addition to providing for authority to issue New CREBs, the 2008 Acts amended certain provisions and requirements applicable to CREBs with respect to New CREBs authorized under §§ 54A and 54C of the Code. These amended requirements include: (1) requiring that 100 percent of the “available project proceeds” (as defined in § 54A(e)(4)) be used for capital expenditures incurred for one or more qualified renewable energy facilities; (2) reducing the amount of annual CREB credit under § 54C to 70 percent of the amount determined under the general rules of § 54A(b); (3) providing that not more than one-third of the national volume cap of \$800 million may be allocated to qualified projects owned by each of three types of qualified owners, including public power providers, governmental bodies, and cooperative electric companies, respectively; (4) allowing unrestricted investments of available project proceeds during a prescribed three-year spending period and, subject to certain restrictions, allowing investments of certain sinking funds expected to be used to repay the CREBs within certain limitations; (5) permitting credit “stripping” or separation of the ownership of a qualified tax credit bond, including a New CREB, and the entitlement to the credit under § 54A with respect to a

qualified tax credit bond under regulations to be promulgated by the Secretary; and (6) omitting the requirement that the New CREBs be repaid in equal annual installments.

## **.02 New clean renewable energy bonds under § 54C**

Section 54C(a) provides that a “new clean renewable energy bond” or New CREB means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for capital expenditures incurred by qualified owners, including governmental bodies, public power providers, or cooperative electric companies, for one or more qualified renewable energy facilities; (2) the bond is issued by a qualified issuer; and (3) the issuer designates such bond for purposes of this section.

Section 54C(b) provides that the annual credit amount under § 54A(b) with respect to any New CREB issued under § 54C shall be 70 percent of the amount so determined without regard to § 54C(b).

Section 54C(d)(6) defines a “qualified issuer” as: (1) a public power provider; (2) a cooperative electric company; (3) a governmental body; (4) a clean renewable energy bond lender; or (5) a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. Section 54C(d)(2) provides that the term “public power provider” means a State utility with a service obligation, as such terms are defined in § 217 of the Federal Power Act (as in effect on the date of the enactment of this paragraph). Section 54C(d)(3) provides that the term “governmental body” means any State (including the District of Columbia and any possession of the United States) or Indian tribal government, or any political subdivision thereof. Section 54C(d)(4) provides that the term “cooperative electric company” means a mutual or cooperative

electric company described in § 501(c)(12) or § 1381(a)(2)(C). Section 54C(d)(5) provides that the term “clean renewable energy bond lender” means a lender that is a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002, and shall include any affiliated entity controlled by such lender.

Section 54C(d)(1) defines the term “qualified renewable energy facility” to mean any of the following qualified facilities (as determined under § 45(d) without regard to paragraphs (8) and (10) thereof and to any placed in service date) owned by a public power provider, a governmental body, or a cooperative electric company: (1) a wind facility under § 45(d)(1); (2) a closed-loop biomass facility under § 45(d)(2); (3) an open-loop biomass facility under § 45(d)(3); (4) a geothermal or solar energy facility under § 45(d)(4); (5) a small irrigation power facility under § 45(d)(5); (6) a landfill gas facility under § 45(d)(6); (7) a trash combustion facility under § 45(d)(7); (8) a qualified hydropower facility under § 45(d)(9); and (9) a marine and hydrokinetic renewable energy facility under § 45(d)(11).

Section 54C(c)(2) provides that the national bond volume cap for New CREBs is \$2.4 billion. Section 54C(c)(2) further provides that the Secretary shall allocate no more than one third of the volume cap to qualified projects owned by public power providers, governmental bodies, and cooperative electric companies, respectively. Section 54C(c)(3)(A) provides that with respect to public power providers, after the Secretary identifies the qualified projects of public power providers that are appropriate for receiving an allocation of the CREB volume cap, the Secretary shall, to the maximum extent practicable, make allocations among such projects in such manner that the

amount allocated to each such project bears the same ratio to the cost of such project as the portion of the CREB volume cap that may be allocated to public power providers bears to the cost of all such projects. Section 54C(c)(3)(B) provides that with respect to governmental bodies and cooperative electric companies, the Secretary shall make allocations of the respective CREB volume caps among qualified projects of governmental bodies and cooperative electric companies in such manner as the Secretary determines appropriate.

### **SECTION 3. APPLICATION REQUIREMENTS IN GENERAL**

Each application for an allocation of the New CREBs volume cap under § 54C (“Application”) must be prepared and submitted in accordance with this section. In order for an Application to comply with this section, among other things, the Application must be prepared in substantially the form attached to this notice as Appendix A, subject to such minor changes or variations as the IRS and the Treasury Department may approve in their discretion. This Notice, including Appendix A, may be found on the IRS web site at <http://www.irs.gov/taxexemptbond/index.html> or <http://www.irs.gov/pub/irs-drop/>. By submitting an Application, the applicant agrees to comply with the requirements of this notice.

a. Qualified issuer. An Application must be submitted by a qualified issuer within the meaning of § 54C(d)(6). A “qualified issuer” is: (1) a public power provider (as defined in § 54C(d)(2)); (2) a cooperative electric company (as defined in § 54C(d)(4)); (3) a governmental body (as defined in § 54C(d)(3)); (4) a New CREB lender (as defined in § 54C(d)(5)); or (5) a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. An Application must identify the

qualified issuer (including the qualified issuer's Federal tax identification number) and must demonstrate that the entity constitutes a qualified issuer within the meaning of § 54C(d)(6).

b. Signatures. An Application must be signed and dated by, and must include the printed name and title of, an authorized official of the qualified issuer. For purposes of this notice, the term "authorized official of the qualified issuer" means an officer, board member, employee, or other official of the qualified issuer who is duly authorized to execute legal documents on behalf of the qualified issuer in connection with incurring debt of the qualified issuer (e.g., a mayor, chairperson of a city council, chairperson of a board of directors, county or city administrator or manager, chief executive officer or chief financial officer), similar to the kind of duly authorized official of an issuer who would be authorized to execute documents in connection with an issuer's declaration of official intent to reimburse expenditures from the proceeds of a borrowing under § 1.150-2(e), Income Tax Regs.

c. Contact person. An Application must designate one or more persons with knowledge regarding the project that the qualified issuer duly authorizes to discuss with the IRS any information relating to the Application. The designation must include the designee's name, title, telephone number, fax number, and mailing address. If a designee is not an official or officer of the issuer, the Application must include an executed Form 8821 (Taxpayer Information Authorization), authorizing the disclosure of taxpayer information specifically relating to the Application to the designee.

d. Addresses. An Application must be submitted by hard copy in duplicate accompanied by a copy of the Application in electronic format on compact disc ("CD")

by mail to the IRS, TEB CREBs Allocations, 1122 Town & Country Commons, St. Louis, Missouri 63017.

e. Due date. An Application must be filed with the IRS on or before the Application deadline of August 4, 2009.

f. Project description. Each Application must contain the information required by this subsection f.

(i) Qualified owner. Each Application must identify the public power provider, governmental body, or cooperative electric company expected to own the qualified renewable energy facility. A “public power provider” is a State utility with a service obligation, as such terms are defined in § 217 of the Federal Power Act (as in effect on October 3, 2008). A “governmental body” is any State or Indian Tribal government, or any political subdivision thereof (within the meaning of § 103 of the Code). A “cooperative electric company” is a mutual or cooperative electric company described in §§ 501(c)(12) or 1381(a)(2)(C) of the Code. The Application must demonstrate that the entity is a public power provider, governmental body, or cooperative electric company within the meaning of § 54C(d)(2), (3), and (4), respectively.

(ii) Qualified project. Each Application must describe in reasonable detail the qualified renewable energy facility or facilities constituting the project to be financed with the proceeds of the New CREBs. The Application must demonstrate that each project will constitute a “qualified renewable energy facility” under § 54C(d)(1). The Application must indicate the expected date that the acquisition and construction of each project will commence and the expected date that each project will be placed in service.

The Application must contain a certification by an independent, licensed engineer that each project will meet the requirements for a “qualified facility” under § 45(d)(but without regard to § 45(d)(8) and (10) and to any placed in service date), and that the project will be technically viable and will produce electricity.

If the project is a qualified hydropower facility under § 45(d)(9) producing incremental hydropower production (as defined under § 45(c)(8)(B)), then the certification also must state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in § 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. If the project is a qualified hydropower facility under § 45(d)(9) for qualified hydropower production at a nonhydroelectric dam under § 45(c)(8)(C), then the certification also must state that: (i) the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements; and (ii) the facility will be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.

(iii) Prior allocations and related projects. Each Application must describe the amount of CREB volume cap previously allocated to each project under § 54 of the Code described in the Application and to any “related projects.” For purposes of this notice and the Application, the term “related projects” means projects that are owned by the same entity, or a “related party” as defined in § 1.150-1(b), that are of the same type

under § 45(d), located on the same site, and integrated, interconnected, or directly or indirectly dependent on each other, based on all the facts and circumstances (“Related Projects”). For purposes of the allocation methodology described in section 6 of this notice, a facility the construction of which causes an increase in capacity (measured in units of power) of a project for which an Applicant previously received an allocation under § 54 will not be treated as a Related Project with respect to such project.

(iv) Location of project. The Application must indicate the location of the project.

(v) Regulatory approvals. The Application must describe a plan to obtain all necessary Federal, state and local regulatory approvals for the project.

g. Plan of financing. The Application must contain a reasonably detailed description of the plan of financing for the project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the project, and the issuer’s reasonably expected schedule for spending proceeds of New CREBs. If the owner intends to use the proceeds of New CREBs to reimburse amounts paid with respect to a qualified project, the Application must demonstrate that the requirements under § 54A(d)(2)(D) will be met.

h. Dollar amount of allocation requested. The Application must specify the dollar amount of the volume cap requested for the project.

#### **SECTION 4. REQUIRED DECLARATIONS IN APPLICATIONS**

Each application submitted under this notice must include the following declaration signed and dated by an authorized official of the qualified issuer who has

personal knowledge of the relevant facts and circumstances: “Under penalties of perjury, I declare that I have examined this document and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete.”

## **SECTION 5. CONSENT TO DISCLOSURE OF ALLOCATION**

In order to provide the public with information on how the volume cap authorized by Congress has been allocated and to facilitate oversight of the CREB program, the IRS intends to publish the results of the allocation process. The information will be the most useful to the public if it identifies the specific allocations awarded. Pursuant to § 6103, consent is required in order for the IRS to disclose identifying information with respect to applicants awarded an allocation. Therefore, the IRS requests that each applicant submit with the Application a declaration consenting to the disclosure by the IRS of the name of the applicant (issuer), the name of the qualified renewable energy facility owner (if other than the issuer), the type and location of the qualified renewable energy facility that is the subject of the Application, and the amount of the New CREBs volume cap allocation for such facility in the event the facility receives an allocation. To provide valid consent, the declaration must be in the form set forth in Appendix B. An applicant is not required to provide a declaration consenting to disclosure in order to receive an allocation. The IRS will not publish identifying information with respect to applications that are not awarded an allocation of volume cap or while applications are pending.

## **SECTION 6. VOLUME CAP ALLOCATIONS AND METHODOLOGY**

a. In general. New CREB volume cap under § 54C will be allocated in accordance with this section for qualified projects for which Applications meeting the

requirements of this notice have been filed with the IRS on or before the Application deadline set forth in this notice. For purposes of this section 6, all Related Projects, as defined in section 3(f)(iii), will be treated as a single project.

b. Allocation methodology for governmental bodies and cooperative electric companies. Up to one-third of the total national volume cap will be allocated to qualified projects owned by governmental bodies and up to an additional one-third of the total national volume cap will be allocated to qualified projects owned by cooperative electric companies. With respect to each such category of qualified owners, the full amount of volume cap requested will be allocated beginning with the project for which the smallest dollar amount of volume cap has been requested and continuing with the project for which the next-smallest dollar amount of volume cap has been requested until the total amount of volume cap set aside for that category of qualified owners has been exhausted or until all applications from that category of qualified owners have been granted, whichever occurs first. For this purpose, except for projects consisting of increases in capacity as described in section 3(f)(iii) of this notice, any amount of the CREB volume cap previously allocated to a project under § 54 (for CREBs) of the Code will be taken into account by increasing the amount requested for that project in the Application submitted pursuant to this notice by the amount previously allocated to the project. A project that causes an increase in capacity of an existing project or of a project that was previously allocated CREB volume cap under § 54 will be treated as a separate, new project for purposes of the allocation of New CREBs volume cap under this section.

c. Allocation methodology for public power providers. Up to one-third of the total national volume cap will be allocated to qualified projects owned by public power providers using the pro rata allocation method described below. The amount of volume cap allocated to a project for a public power provider will bear the same proportion to the national volume cap allocated to public power providers as the amount of volume cap requested for that project bears to the total amount of volume cap requested for all projects by public power providers.

## **SECTION 7. INSUBSTANTIAL DEVIATIONS FROM APPLICATION PROVISIONS**

Generally, any allocation of CREBs or New CREBs volume cap is valid for purposes of § 54 or § 54C, respectively, with respect to bonds issued pursuant to such allocation that are used to finance qualified renewable energy facilities described in the application. An allocation of CREBs or New CREBs under §§ 54 and 54C, respectively, is also valid notwithstanding insubstantial deviations with respect to the information submitted in the Application. Whether a deviation with respect to the information submitted in the Application is insubstantial is determined based on all the facts and circumstances using criteria similar to those used under § 5f.103-2(f)(2) and Prop. Reg. § 1.147(f)-1(b)(6), as amended from time to time, relating to the insubstantial deviation in the information required for public approval of an issue of governmental bonds under § 147(f) of the Code. Applications for approval of specific insubstantial deviations must be submitted by hard copy and in electronic format on compact disk (“CD”) by mail to IRS, TEB CREBs Determinations, 1122 Town & Country Commons, St. Louis, Missouri 63017. An application for approval of a specific insubstantial deviation must include (a) a detailed description of the proposed deviation, (b) facts establishing the continued

technical viability of the project and that no other taxpayer or the Government will be prejudiced, (c) a copy of the allocation letter issued by the IRS, and (d) a declaration pursuant to section 4 of this notice signed by an authorized person in accordance with section 3.b. of this notice.

## **SECTION 8. INFORMATION REPORTING**

Section 54A(d)(3) requires issuers of New CREBs to submit information reporting returns to the IRS similar to those required to be submitted under § 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under § 149(e) on such forms as shall be prescribed by the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for New CREBs, in the case of an issue of New CREBs, the issuer must submit to the IRS an information return on Form 8038, *Information Return for Tax-Exempt Private Activity Bond Issues*, at the same time and in the same manner as required under § 149(e), with modifications as described below. Issuers of New CREBs should complete Part II of Form 8038 by checking the box on Line 20c (Other), writing “New Clean Renewable Energy Bonds” or “New CREBs” in the space provided for the bond description, and entering the issue price of the New CREBs in the Issue Price column. For purposes of this notice, the term “issue” has the meaning used for tax-exempt bond purposes in § 1.150-1(c).

## **SECTION 9. RELIANCE ON NOTICE AND INTERIM GUIDANCE**

### (a) Generally

Pending the promulgation and effective date of applicable future regulations or other published administrative guidance, taxpayers may rely on the interim guidance provided in this notice and, to the extent not inconsistent with §§ 54A and 54C and this notice. Taxpayers may also rely on Notice 2006-7, 2006-1 C.B. 559 (March 6, 2006), and Notice 2007-26, 2007-14 I.R.B. 870 (April 2, 2007).

(b) Credit Rate

For New CREBs issued under § 54C, the credit rate is determined as of the date that the issue of New CREBs is sold. The New CREB credit rate is published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <https://www.treasurydirect.gov>. The credit rates will be determined by the Treasury Department in accordance with Notice 2009-15, 2009-6 I.R.B. 449 (February 9, 2009).

(c) Maximum term

The maximum term for a New CREB is determined under § 54A(d)(5) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. For purposes of this notice, a bond is “sold” on the first day on which there is a binding written contract for the sale or exchange of the bond. The maximum term for a New CREB is published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <https://www.treasurydirect.gov>.

(d) Permitted sinking fund yield

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the arbitrage requirements of § 148 by reason of any fund which is expected to be used

to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B) (the “permitted sinking fund yield”).

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semi-annually, each month in a revenue ruling published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at: <https://www.treasurydirect.gov>.

(e) Joint ownership of qualified renewable energy facilities

Joint ownership of qualified renewable energy facilities financed with New CREBs will be recognized in a manner similar to the recognition of joint ownership of output projects under the private activity bond restrictions on tax-exempt bonds under § 141.

(f) Allocation and accounting

In determining whether all or a part of a facility will be eligible to be a qualified renewable energy facility for New CREBs purposes, allocation and accounting rules similar to those employed for mixed-use projects will be applied.

(g) Qualified expenditures

For purposes of the requirement under § 54C(a)(1) to use 100 percent of the available project proceeds of an issue of New CREBs for qualified costs to finance capital expenditures for qualified renewable energy facilities, available project proceeds used to finance a reserve, sinking, or replacement fund (e.g., a debt service reserve fund to secure the New CREBs), including a Qualified Tax Credit Bond sinking fund, will be treated as nonqualified costs. Except in limited circumstances involving reimbursements to which § 54A(d)(2)(D) applies, costs of acquiring existing facilities, including refinancing costs (as contrasted with costs of enhancements, repair, or rehabilitation of existing facilities) generally will be treated as nonqualified costs for purposes of the 100 percent use of proceeds test under § 54C(a)(1).

(h) Coordination with tax credit under § 45K

A qualified renewable energy facility under § 54C(d)(1) shall include a qualified facility under § 45(d)(6) without regard to the limitation under § 45(e)(9)(A) (which limitation disallows the renewable electricity production credit under § 45 for certain facilities which receive the nonconventional source production credit under § 45K), provided that the owner of the qualified renewable energy facility has not been allowed a credit under § 45K during any taxable year with respect to landfill gas to be used by the qualified renewable energy facility.

(i) Cooperative electric companies treated like state or local governmental entities

Cooperative electric companies under § 54C(d)(4) will be treated as “governmental persons” under § 1.141-1(b) for purposes of (1) applying the arbitrage investment restrictions under § 148, including the program investment definition under

§ 1.148-1(b), and (2) determining whether New CREBs are private activity bonds under § 141 in applying any particular arbitrage investment restriction that depends on whether bonds are private activity bonds.

(j) Expiration of allocation

An allocation of New CREBs volume cap is valid for 3 years after the date of the letter issuing the allocation (the “allocation date”). An allocation of unused volume cap will expire and revert back to the IRS on the first day following 3 years after the allocation date. Any bonds issued pursuant to such expired allocation will not be New CREBs for purposes of §§ 54A and 54C. Under a program to be announced, the IRS plans to reallocate any unallocated volume cap, and any allocated volume cap that has been relinquished or that has reverted to the IRS. For purposes of reallocation, relinquished volume cap means volume cap previously allocated to a qualified issuer to finance a qualified project for which the IRS has received written notice from a duly authorized official of the qualified issuer stating that the issuer will not issue CREBs pursuant to the allocation.

To facilitate reallocation of the unused New CREBs volume cap, a qualified issuer that determines it will not issue bonds within 3 years from the allocation date must notify the IRS of such determination in writing within 90 days after the determination is made. If no determination is made, a qualified issuer that fails to issue bonds pursuant to its allocation within the 3-year period must notify the IRS of such failure within 90 days after the end of the 3-year period. The notification must include a copy of the original allocation letter and must be submitted by hard copy and in electronic format on compact disk (“CD”) by mail to the IRS, TEB CREBs Forfeiture,

1122 Town & Country Commons, St. Louis, Missouri 63017.

Consistent with allocation requirements under § 54C(c)(2), any relinquished or reverted New CREB volume cap under § 54C will be reallocated only for a qualified project owned or to be owned by the same category of qualified owner as the owner that originally received the relinquished or reverted allocation. The IRS does not plan to reallocate any unused, relinquished, or unallocated portion of the CREB volume cap authorized under § 54 of the Code.

#### **SECTION 10. EFFECT ON OTHER DOCUMENTS**

To the extent not amended by the 2008 Acts and 2009 Act, references to § 54 of the Code under Notice 2006-7 and Notice 2007-26 apply as if the references were to corresponding provisions of §§ 54A and 54C.

#### **SECTION 11. DRAFTING INFORMATION**

The principal authors of this notice are Zoran Stojanovic and Timothy L. Jones of the Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this notice and the Application, contact Janae Lemley on (636) 255-1202 (not a toll-free call).

## APPENDIX A

### APPLICATION FOR ALLOCATION OF NEW CLEAN RENEWABLE ENERGY BOND VOLUME CAP

Internal Revenue Service  
TEB CREBs Allocations  
1122 Town & Country Commons  
St. Louis, Missouri 63017

The following constitutes the application (“Application”) of (Name) (the “Applicant”) for allocation of new clean renewable energy bond (“New CREB”) volume cap under Section 54C(c) of the Internal Revenue Code (the “Code”) (unless otherwise noted, section references herein are to the Code) to finance the project described below. *(If a single Application is used to request New CREB volume cap for more than one project, then all of the required information in the Application must be provided separately for each project.)*

**1. Name of Applicant/Issuer** \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone Number \_\_\_\_\_ Fax Number \_\_\_\_\_

**2. Status of Issuer** – *(Select as appropriate)*

The Applicant/Issuer is a “qualified issuer” under section 54C(d)(6) because it is --

(i) a “clean renewable energy lender” that is a cooperative owned by, or has outstanding loans to, 100 or more cooperative electrical companies and was in existence on February 1, 2002, or is an affiliate that is owned by such a lender, as demonstrated by the attached documents included as Exhibit D.

(ii) a “cooperative electric company” that is a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), as demonstrated by the attached documents included as Exhibit D, including a copy of the determination letter previously obtained from the IRS, if any (or other relevant documents).

(iii) a “governmental body” that is a State, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the

foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial taxing, eminent domain, and police powers such as generally a county, city, municipality, township, or borough.)*

(iv) a “public power provider” that is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on October 3, 2008), as demonstrated by the attached documents included as Exhibit D.

(v) a “not-for-profit electric utility which has received a loan or loan guarantee under the rural Electrification Act,” as demonstrated by the attached documents included as Exhibit D. For this purpose, supporting documents should include copies of the articles of incorporation and bylaws of the not-for-profit electric utility, and of the loan or loan guarantee documents.

**3. Name of Qualified Renewable Energy Facility Owner** \_\_\_\_\_

\_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone Number \_\_\_\_\_ Fax Number \_\_\_\_\_

**4. Status of Owner** – *(Select as appropriate)* The Owner is a qualified entity under section 54C(d)(1) because it is --

- (i) a qualified owner under section 54C(d)(4) that is a mutual or cooperative electric company under section 501(c)(12) or section 1381(a)(2)(C), as demonstrated by the attached documents included as Exhibit D, including a copy of the determination letter previously obtained from the IRS, if any (or other relevant documents).
- (ii) a qualified owner under section 54C(d)(3) that is a “governmental body” and is a State, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial*

*taxing, eminent domain, and police powers such as generally a county, city, municipality, township, or borough.)*

- (iii) a qualified owner under section 54C(d)(2) that is a “public power provider” and is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on October, 3 2008), as demonstrated by the attached documents included as Exhibit D. For this purpose, supporting documents should include copies of the articles of incorporation and bylaws of the not-for-profit electric utility, and of the loan or loan guarantee documents.

**5. Name of Qualified Renewable Energy Facility.**

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**6. Detailed Description of the Qualified Renewable Energy Facility.** A reasonably detailed description of the qualified renewable energy facility (the “Project”) is set forth below or in attached Exhibit A, including reasonably expected costs of components, such as land, site prep, equipment, installation, other dedicated facilities such as transmission, Project capacity and projected or expected use of the power produced at the Project:

**7. Qualified Renewable Energy Facility.** The Project is a “qualified renewable energy facility” within the meaning of section 54C(d)(1) of the Code because it is a “qualified facility” (as determined under section 45(d) of the Code without regard to section 45(d)(8) and (10) and to any placed in service date) that is (*select as appropriate*)-

(1) a wind facility – a facility using wind to produce electricity;

(2) a closed-loop biomass facility – a facility using closed-loop biomass (as defined in section 45(c)) to produce electricity or, if owned by the taxpayer prior to January 1, 2008, a facility using closed-loop biomass to produce electricity which is modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation;

(3) an open-loop biomass facility – a facility using open-loop biomass (as defined in section 45(c)) to produce electricity and in the case of a facility using agricultural livestock waste nutrients, the nameplate capacity rating of which is not less than 150 kilowatts;

(4) a geothermal or solar energy facility – a facility using geothermal energy (as defined in section 45(c)) or solar energy to produce electricity (not including a facility described in section 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under section 48 of the Code);

(5) a small irrigation power facility – a facility using small irrigation power (as defined in section 45(c)) to produce electricity;

(6) a landfill gas facility – a facility producing electricity from gas derived from the biodegradation of municipal solid waste (as defined in section 45(c));

(7) a trash combustion facility – a facility that burns municipal solid waste (as defined in section 45(c)) to produce electricity;

(8) a qualified hydropower facility – a facility engaged in qualified hydropower production (as defined in section 45(c)); or

(9) a marine and hydrokinetic renewable energy facility – a facility producing electricity from marine and hydrokinetic renewable energy (as defined in section 45(c)) with a nameplate capacity of at least 150 kilowatts.

**8. Construction Commencement Date and Placed in Service Date.** The Borrower begun or expects to begin the construction, installation and equipping of the Project on \_\_\_\_\_. The Borrower expects that the Project will be placed into service on or before \_\_\_\_\_.

**9. Independent Engineer’s Certificate:** *(If the Application is for more than one Project, a separate certificate must be included for each Project.)* Attached as Exhibit B hereto is a certification by an independent, licensed engineer to the effect that the Project will be a “qualified renewable energy facility” within the meaning of section 54C(d)(1) and a “qualified facility” within the meaning of section 45(d) of the Code (without regard to section 45(d)(8) and (10) of the Code and to any placed in service date), and that the project is technically viable and will produce electricity.

If the project is a **qualified hydropower facility** under section 45(d)(9)--

a. producing incremental hydropower production, then the engineering certificate also must state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards; or

- b. that is a nonhydroelectric dam under section 45(c)(8)(C), then the engineering certificate also must state that the facility, when constructed, (a) will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements, and (b) will be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.

**10. Location of the Project:**

Project address or physical location (do not include postal box numbers or mailing address) \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

County where Project is located \_\_\_\_\_

**11. Individual to contact** for more information about the Project:

Individual Name \_\_\_\_\_

Company Name \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone Number \_\_\_\_\_

Fax Number \_\_\_\_\_

Email Address \_\_\_\_\_

*(Include as appropriate)* The contact person is not an authorized official or officer of the Issuer and a properly executed Form 8821 is included with this Application that authorizes the disclosure by the IRS of information that relates to this Application and the Project(s) described above to the contact person.

**12. Regulatory Approvals.** Identify each regulatory body, the action that must be taken, status of any pending action and the remaining timeframe required to obtain each

required approval such as a FERC approval, or siting permits. The plan of the Applicant for obtaining such approvals is as follows: *(or attach an Exhibit)*

**13. Plan of Financing.** Include a reasonably detailed description of the plan of financing for the Project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the Project, and the issuer's reasonably expected schedule for spending proceeds of New CREBs. Attached as Exhibit C is a plan of financing for the Project.

**14. Reimbursements.** *(For reimbursements, include the following statement.)* The Issuer intends to use the proceeds of New CREBs to reimburse costs of the Project in accordance with section 54A(d)(2)(D).] *(In addition, the Issuer must demonstrate that the requirements of § 54A(d)(2)(D) will be met.)*

**15. Dollar Amount of Allocation Requested for the Project.** To finance the Project, the Applicant hereby requests a New CREB allocation in the amount of \$\_\_\_\_\_.

**16. Prior Allocations for the Project or Related Project.** *(If the Project or any Related Project (as defined in section 3.f.(iii) of this notice) previously received an allocation of CREBs volume cap under section 54 of the Code, then this paragraph must include a statement to that effect.)*

*[If applicable, include the following statement: On (Insert date), the Project previously received a CREBs volume cap allocation in the amount of \$\_\_\_\_\_. A copy of the IRS allocation letter for that allocation is attached.]*

*[If applicable, include the following statement: On (Insert date), a Related Project previously received a CREBs volume cap allocation in the amount of \$\_\_\_\_\_. A copy of the IRS allocation letter for that allocation is attached.]*

**17. Other Allocation Requests for Related Projects to the Project.** Included below are descriptions of other projects that are Related Projects (as defined in paragraph 16 above) to the Project for which the applicant or other entities are applying for a CREB volume cap allocation. With respect to an applicant on a Related Project other than the Applicant, set forth below are the names, addresses, contact persons, and telephone numbers for any such applicant.

**18. Pooled Financing Bonds.** *(If the issuer expects to use the requested allocation of New CREB volume cap as part of a pooled financing bond within the meaning of section 149(f), then the issuer should include the undertaking noted below.)*

[The Applicant Issuer expects to use the requested allocation for New CREBs volume cap in a pooled financing bond within the meaning of section 149(f), and the Issuer expressly agrees that it will obtain a written loan commitment for all borrowers from the issue of New CREBs to which the requested allocation relates before the issue date of that issue.]

I hereby certify that I am an authorized officer or official of the Applicant and am duly authorized to execute legal documents on behalf of the Applicant in connection with incurring debt and that I am duly authorized to execute legal documents on behalf of the Application in making this Application. Under penalties of perjury, I declare that (i) I have knowledge of the relevant facts and circumstances relating to this Application and the Project(s), (ii) I have examined this Application, and (iii) to the best of my knowledge and belief, all of the facts contained in this Application are true, correct and complete.

By: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT A**

**DESCRIPTION OF THE PROJECT  
(RESPONSE TO QUESTION 6 OF THE APPLICATION)**

(Attached hereto)

**EXHIBIT B**  
**ENGINEER'S CERTIFICATE**  
**(RESPONSE TO QUESTION 9 OF THE APPLICATION)**

(Attached hereto in substantially the form below)

Dated: \_\_\_\_\_, 2009

This certificate is being provided to the Internal Revenue Service ("IRS") in connection with an application (the "Application") by [*Name of Applicant Issuer:* \_\_\_\_\_] (the "Issuer") to the IRS requesting an allocation of volume cap authority to issue new clean renewable energy bonds ("New CREBs") under section 54C of the Internal Revenue Code, as amended (the "Code"). The New CREBs are being issued to make a loan to [*Name of the qualified renewable energy facility owner:* \_\_\_\_\_] (the "Owner"), to finance the costs of certain qualified renewable energy facility or facilities described more particularly in the Application (the "Project"). The undersigned hereby certifies as follows:

1. I am an independent, licensed engineer, duly qualified to practice the profession of engineering under the laws of the State of \_\_\_\_\_, and I am not an officer or employee of the Issuer or the Borrower.

2. I have reviewed the Application for a New CREBs volume cap allocation (including the exhibits thereto) of the Issuer of even date herewith describing the Project. To the best of my knowledge, information, and belief, the Project will meet the requirements to be a "qualified renewable energy facility" under section 54C(d)(1) of the Code and correspondingly a "qualified facility" under section 45(d) of the Code (determined without regard to section 45(d)(8) and (10) of the Code and without regard to any placed in service date).

[(*Include as applicable*) To the best of my knowledge, information, and belief, the Project is a qualified hydropower facility under section 45(d)(9)--

- a. producing incremental hydropower production consisting only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. *or*
- b. that is a nonhydroelectric dam under section 45(c)(8)(C) and the facility, when constructed, (a) will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements, and (b) will be operated so

that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.]

3. To the best of my knowledge, information and belief, the Project is technically viable and, when constructed, will produce electricity.

IN WITNESS WHEREOF, I have hereunto affixed my official signature on the date of this Engineer's Certificate.

Seal and/or License number:

\_\_\_\_\_

By: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Company: \_\_\_\_\_

**EXHIBIT C**

**PLAN OF FINANCING  
(RESPONSE TO QUESTION 13 OF THE APPLICATION)**

(Attached hereto)

**EXHIBIT D**

**DOCUMENTS REGARDING ISSUER OR BORROWER ORGANIZATIONAL STATUS  
(RESPONSE TO QUESTION 2 OR 4 OF THE APPLICATION, AS APPLICABLE)**

(Attached hereto)

**APPENDIX B**

**CONSENT TO PUBLIC DISCLOSURE  
OF CERTAIN CLEAN RENEWABLE ENERGY BOND  
APPLICATION INFORMATION**

In the event that the Application of [*Insert name of applicant here*):  
\_\_\_\_\_] (the "Applicant") for an allocation of authority to issue new clean renewable energy bonds ("New CREBs") under section 54C of the Internal Revenue Code is approved, the undersigned authorized representative of the Applicant hereby consents to the disclosure by the Internal Revenue Service through publication of a Notice in the Internal Revenue Bulletin or a press release of the name of applicant (issuer), the name of the qualified renewable energy facility owner (if other than the issuer), the type and location of the facility that is the subject of the Application, and the amount of the allocation, if any, of volume cap authority to issue New CREBs for such facility. The undersigned understands that this information might be published, broadcast, discussed or otherwise disseminated in the public record.

This authorization shall become effective upon the execution thereof. Except to the extent disclosure is authorized herein, the returns and return information of the undersigned taxpayer are confidential and are protected by law under the Internal Revenue Code.

I certify that I have the authority to execute this consent to disclose on behalf of the taxpayer named below.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

Print name: \_\_\_\_\_

Title: \_\_\_\_\_

Name of Applicant-Taxpayer: \_\_\_\_\_

Taxpayer Identification Number: \_\_\_\_\_

Taxpayer's Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Note: Treasury Regulations require that the Internal Revenue Service must receive this consent within 60 days after it is signed and dated.