

## **Notice 2007-26**

### **Part III - Administrative, Procedural, and Miscellaneous**

#### **Notice 2007-26**

#### **Section 54 -- Clean Renewable Energy Bonds**

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

This Notice solicits applications for allocations of the national bond volume limitation authority (“volume cap”), to issue tax credit bonds called “clean renewable energy bonds” (“CREBs”) under section 54(f) of the Internal Revenue Code (the “Code”) to finance eligible clean renewable energy projects described in section 45 of the Code. 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 (generally, a “smallest-to-largest” 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 regarding CREBs and expected regulatory guidance in this area.

Applications for volume cap allocations pursuant to this Notice must be filed in accordance with this Notice by the following application deadline: July 13, 2007.

This Notice *modifies* and *supersedes* Notice 2005-98, 2005-52 I.R.B.1211 (December 11, 2005), which provided guidance on CREBs in connection with the allocation process for the original volume cap authorization under section 54.

##### ***SECTION 2. BACKGROUND***

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (the “2005 Act”), added section 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 of the Treasury 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 which 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 section 54 in three respects. First, the 2006 Act increased the total national 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).

Section 54(a) provides that a taxpayer that holds a CREB on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a nonrefundable credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under section 54(b) with respect to such dates.

Section 54(b)(1) provides that the amount of the credit with respect to any credit allowance date is 25 percent of the annual credit. Section 54(b)(2) provides that the annual credit is the product of (1) the credit rate determined by the Secretary, multiplied by (2) the outstanding face amount of the bond.

Section 54(b)(3) provides that the Secretary shall determine daily a credit rate that shall apply to the first day on which there is a binding, written contract for the sale or exchange of a CREB. The credit rate for any day is the credit rate the Secretary estimates will permit the issuance of CREBs with a specified maturity or redemption date without discount and without interest cost to the issuer.

Section 54(b)(4) provides that the term “credit allowance date” means March 15, June 15, September 15, December 15, and the last day on which the bond is outstanding. Section 54(b)(5) generally provides that if a bond is issued or redeemed, or matures, during the 3-month period ending on a credit allowance date, then the amount of the credit for that credit allowance date is a ratable portion of the credit otherwise determined for that 3-month period.

Section 54(g) provides that gross income includes the amount of the credit allowed to the taxpayer under section 54 (without regard to section 54(c)) and the amount so included is treated as interest income.

Section 54(d) provides that a “clean renewable energy bond” or CREB means any bond issued as part of an issue if: (1) the bond is issued by a qualified issuer pursuant to an

allocation by the Secretary to the issuer of a portion of the volume cap under section 54(f)(2); (2) 95 percent or more of the proceeds of the issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects; (3) the qualified issuer designates the bond for purposes of section 54 and the bond is in registered form; and (4) the issue meets certain requirements described in section 54(h) regarding the expenditure of bond proceeds, including a requirement that the issuer reasonably expects, as of the issue date, that at least 95 percent of the net proceeds will be expended within 5 years.

Section 54(j)(4) defines a “qualified issuer” as: (1) a CREB lender; (2) a cooperative electric company; or (3) a governmental body. Section 54(j)(2) provides that a “CREB lender” is a lender that is: (1) a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and was in existence on February 1, 2002; or (2) any affiliated entity controlled by such a lender. Section 54(j)(1) defines the term “cooperative electric company” as a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), or a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. Section 54(j)(3) defines the term “governmental body” as any State, territory, possession of the United States, the District of Columbia, Indian tribal government, or any political subdivision thereof.

Section 54(j)(5) provides that a “qualified borrower” is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body.

Section 54(d)(2) defines the term “qualified project” as any of the following qualified facilities (as determined under section 45(d) without regard to any placed in service date) owned by a qualified borrower: (1) a wind facility under section 45(d)(1); (2) a closed-loop biomass facility under section 45(d)(2); (3) an open-loop biomass facility under section 45(d)(3); (4) a geothermal or solar energy facility under section 45(d)(4); (5) a small irrigation power facility under section 45(d)(5); (6) a landfill gas facility under section 45(d)(6); (7) a trash combustion facility under section 45(d)(7); (8) a refined coal production facility under section 45(d)(8); and (9) a qualified hydropower facility under section 45(d)(9).

Section 54(f)(1), as amended by section 202(a)(1) of 2006 Act, provides that the national volume cap is \$1.2 billion. Section 54(f)(2), as amended by section 202(a)(2) of the 2006 Act, provides that the Secretary shall allocate the volume cap among qualified projects in such manner as the Secretary determines appropriate, except that the Secretary may not allocate more than \$750 million of the national volume cap to finance qualified projects of qualified borrowers that are governmental bodies. The

amendments to section 54 of the Code made by section 202 of 2006 Act apply to bonds issued, and allocations or reallocations of volume cap made, after December 31, 2006.

Section 54(d)(2)(D) provides that, for purposes of section 54(d)(1)(B), which requires qualified borrowers to use at least 95 percent of the proceeds of an issue for capital expenditures for qualified projects, any action that a qualified borrower or qualified issuer takes that is within its control and that causes such proceeds to fail to be used for a qualified project is treated as failing to satisfy that requirement. Section 54(d)(2)(D) further provides that the Secretary shall prescribe regulations specifying remedial actions that may be taken (including conditions to taking such remedial actions) to prevent an action described in the preceding sentence from causing a bond to fail to be a CREB.

Section 54(k) generally requires that, for a CREB that is a pooled financing bond under section 149(f)(4)(A), borrowers must enter into written loan commitments before the issue date of the CREB.

Section 54(l)(5) requires that the qualified issuer pay and amortize an equal amount of the principal of an issue of CREBs during each calendar year that the issue is outstanding.

Section 54(e)(1) limits the term of a CREB to the maximum term determined by the Secretary under section 54(e)(2). Section 54(e)(2) provides that, during each calendar month, the Secretary shall determine the maximum term for CREBs issued in the following calendar month. The maximum term is the term the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of the bond. Section 54(e)(2) further provides that such present value shall be determined (1) without regard to the requirement of section 54(l)(5) to amortize the principal of CREBs amortized ratably each year and (2) using a discount rate equal to the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year.

Section 54(i) generally provides that the arbitrage requirements of section 148 applicable to tax-exempt State or local bonds apply to CREBs.

Section 54(l)(6) requires issuers of CREBs to submit information reporting returns to the IRS similar to those required to be submitted under section 149(e) for tax-exempt State or local governmental bonds.

Notice 2006-7, 2006-10 I.R.B. 559 (March 6, 2006), provides guidance regarding certain definitions used for CREB purposes.

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

Each application for a CREBs volume cap allocation (“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 section 54(j)(4). A “qualified issuer” is: (1) a CREB lender (as defined in section 54(j)(2)); (2) a cooperative electric company (as defined in section 54(j)(1)); or (3) a governmental body (as defined in section 54(j)(3)). An Application must identify the qualified issuer and must demonstrate that the entity constitutes a qualified issuer within the meaning of section 54(j)(4).

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, 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).

c. Contact person. An Application must designate one or more persons with knowledge regarding the project, whom the qualified issuer duly authorized 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 in one of the following ways: (1) by hard copy in duplicate accompanied by a copy of the application in electronic format on compact disc (“CD”) by mail to the Internal Revenue Service (IRS), Attention SE:T:GE:TEB, 1111 Constitution Avenue, NW, PE – 5N3, Washington, D.C. 20224; (2) by hard copy in duplicate accompanied by a copy of the application in electronic format on compact disc (“CD”) by hand delivery Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, PE – 5N3, Washington, D.C., attention SE:T:GE:TEB; or (3) by electronic submission in PDF format of a copy of a signed original document to the IRS to [Tina.F.Hill@irs.gov](mailto:Tina.F.Hill@irs.gov).

e. Due date. An Application must be filed with the IRS on or before the Application deadline of July 13, 2007.

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

(i) Qualified borrower. Each Application must identify the qualified borrower expected to own the qualified project. A “qualified borrower” is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body (as defined in section 54(j)(3)). The Application must demonstrate that the entity is a qualified borrower within the meaning of section 54(j)(5). If any bond is expected to be a pooled financing bond (within the meaning of section 149(f)(4)(A)), the Application must demonstrate that the qualified issuer will enter into a written loan commitment with each qualified borrower prior to the issue date of the issue of CREBs.

(ii) Qualified project. Each Application must describe in reasonable detail the project or projects to be financed with the proceeds of the CREBs. The Application must demonstrate that each project will constitute a “qualified project” under section 54(d)(2)(A). 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 section 45(d) (but without regard to section 45(d)(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 section 45(d)(9) producing incremental hydropower production (as defined under section 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 section 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 section 45(d)(9)



producing qualified hydropower production that is a nonhydroelectric dam under section 45(c)(8)(C), then the certification also must state that the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.

(iii) Prior allocations and related projects. Each Application must describe the amount of CREB volume cap previously allocated to each project 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 qualified borrower, or a “related party” as defined in § 1.150-1(b), 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”).

(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 CREBs. If the qualified borrower intends to use the proceeds of CREBs, to refinance qualified projects with CREBs, or to reimburse amounts paid with respect to a qualified project, the Application must demonstrate that the requirements under section 54(d)(2)(B) and (C), respectively, will be met.

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

#### **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 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 Service to disclose identifying information with respect to applicants awarded an allocation. Therefore, the Service requests that each applicant submit with the Application a declaration, consenting to the disclosure by the Internal Revenue Service of the name of the applicant (issuer), the name of the borrower (if other than the issuer), the type and location of the project that is the subject of the Application, and the amount of the CREBs volume cap allocation for such project in the event the project 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 Service will not publish identifying information with respect to applications that are not awarded an allocation of volume cap.

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

a. In general. Available CREB volume cap under section 54, as amended by the 2006 Act, and any “relinquished volume cap” (as defined in paragraph b. of this section) will be allocated in accordance with this section to 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. Projects for governmental bodies and mutual or cooperative electric companies described in section 501(c)(12) or 1381(a)(2)(C) will be allocated the full amount of volume cap requested beginning with the project(s) for which the smallest dollar amount of volume cap has been requested and continuing with the project(s) for which the next-smallest dollar amount of volume cap has been requested until the total amount of volume cap has been exhausted. For this purpose, any amount of the volume cap previously allocated to a project will be taken into account by increasing the amount requested for the project in the Application submitted pursuant to this Notice by the amount previously allocated to the project. All applications that meet the requirements described in this notice will be granted according to the methodology set forth above until all applications from governmental bodies have been granted, or up to a maximum of \$750 million has been allocated to projects of qualified borrowers that are governmental bodies, whichever occurs first. The remaining volume cap will be allocated under the smallest-to-largest methodology described above to qualified projects of qualified borrowers that are not governmental bodies. For purposes of this section, all Related Projects will be treated as a single project.



b. Relinquished volume cap. For purposes of this Notice, “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 before the due date for Applications under to this Notice which states that the qualified issuer CREBs will not issue CREBs pursuant to the allocation and is relinquishing such allocation.

***SECTION 7. EXPECTED TEMPORARY REGULATIONS; EFFECTIVE DATES; RELIANCE ON NOTICE***

The Treasury Department and the IRS expect to issue temporary and proposed regulations (the “Temporary Regulations”) under section 54 to provide guidance to holders and issuers of CREBs on selected issues regarding the CREBs program, including potentially, among other matters, certain definitions, general CREBs program requirements, qualified projects, use and expenditure of proceeds, remedial actions, arbitrage investment restrictions, and information reporting applicable to CREBs. The Treasury Department and the IRS expect that the Temporary Regulations will apply to CREBs sold on or after June 13, 2007 with respect to interim guidance provided in this Notice. Prior to the promulgation and effective date of the Temporary Regulations on CREBs under section 54, taxpayers may rely on the interim guidance provided in this Notice and Notice 2006-7.

***SECTION 8. MAXIMUM TERM***

The maximum term for a CREB is determined under section 54(e)(2) 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 contract in writing for the sale or exchange of the bond. The maximum term for a CREB will be published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <https://www.treasurydirect.gov>.

***SECTION 9. CREDIT RATE***

For each issue of CREBs, a separate credit rate will apply to each of the level annual repayments of principal of the issue (each, a “principal maturity”). The credit rate for a principal maturity of an issue of CREBs is the applicable CREB credit rate for that principal maturity on the date that the issue of CREBs is sold, which applicable CREB credit rate is published for that day 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 based on its estimate of the

yield on outstanding AA rated corporate bonds of a similar maturity for the business day immediately prior to the date on which the issue is sold.

### **SECTION 10. INFORMATION REPORTING**

Section 54(l)(6) requires issuers of CREBs to submit information reporting returns to the IRS similar to those required to be submitted under section 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 section 149(e) on such forms as shall be prescribed by the Commissioner of the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for CREBs, in the case of an issue of 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 section 149(e), with modifications as described below. Issuers of CREBs should complete Part II of Form 8038 by checking the box on Line 20(c)(Other) and writing "CREBs" in the space provided for the bond description. For purposes of this Notice, the term "issue" has the meaning used for tax-exempt bond purposes in §1.150-1(c).

### **SECTION 11. REMEDIAL ACTIONS**

The Treasury Department and the IRS expect that the Temporary Regulations will provide that, for purposes of the requirement of section 54(d)(1)(B) that qualified borrowers use at least 95 percent of the proceeds of an issue of CREBs for capital expenditures for qualified projects, a "deliberate action" taken by a qualified issuer or qualified borrower may cause such proceeds to fail to be used for such qualified use. For this purpose, the term "deliberate action" will have the same meaning as used in § 1.141-2(d)(3), except that "section 54" will be substituted for "section 141" in § 1.141-2(d)(3)(i). The Treasury Department and the IRS further expect that the Temporary Regulations will provide that a deliberate action that otherwise would cause an issue of CREBs to fail to meet the requirements of section 54(d)(1)(B) will not be treated as a deliberate action if the issuer takes a "remedial action" which meets the requirements specified in the Temporary Regulations. In addition, the Treasury Department and the IRS expect that the Temporary Regulations will contain a "redemption or defeasance" remedial action and an "alternative use of disposition proceeds" remedial action similar, but not identical to, the remedial actions contained in § 1.141-12(d) and § 1.141-12(e).

## **SECTION 12. ARBITRAGE REQUIREMENTS**

Section 54(i) generally requires that an issue of CREBs must satisfy the arbitrage investment restrictions under section 148 applicable to tax-exempt bonds with respect to proceeds of the issue. In general, under section 148, subject to various specific prompt spending exceptions and other exceptions, the arbitrage investment restrictions, including the yield restrictions and the arbitrage rebate requirement, apply broadly to gross proceeds of tax-exempt bonds. The Treasury Department and the IRS expect that, except as otherwise provided in this section 12, the arbitrage investment restrictions under section 148 and §1.148-1 to §1.148-11, inclusive, and the exceptions to those restrictions will apply to gross proceeds of CREBs to the same extent and in the same manner as they apply to gross proceeds of tax-exempt state or local governmental bonds the interest on which is excludable from gross income under section 103.

The Treasury Department and the IRS further expect that, in applying the arbitrage investment restrictions under section 148 to CREBs, the modifications to the general rules described in paragraphs a. through e. of this section 12, below, will apply.

a. Cooperative electric companies treated like state or local governmental entities. Cooperative electric companies under section 54(j)(1) will be treated as “governmental persons” under § 1.141-1(b) for purposes of (1) applying the arbitrage investment restrictions under section 148, including the program investment definition under § 1.148-(b), and (2) determining whether CREBs are private activity bonds under section 141 in applying any particular arbitrage investment restriction that depends on whether bonds are private activity bonds,

b. 5-year temporary period exception to arbitrage yield restriction. If an issue of CREBs meets the spending requirements of section 54(h)(1), then the proceeds of the issue of CREBs will be treated as qualifying for a 5-year temporary period exception to arbitrage yield restriction under §1.148-2(e)(2) beginning on issue date of the issue.

c. CREB credit disregarded determining CREB yield for arbitrage purposes. In determining the yield on an issue of CREBs for arbitrage purposes under §1.148-4, the CREBs credit allowed under section 54(a) and the credit rate under section 54(b)(2)(A) will be disregarded.

d. Non-AMT tax-exempt bond investment exception inapplicable. In applying the arbitrage restrictions against investing gross proceeds of an issue of CREBs in higher yielding investments under section 148(a) and §1.148-2, the exception to arbitrage yield restriction for investments of gross proceeds of tax-exempt bonds in specified non-AMT

tax-exempt bond investments under section 148(b)(3) (relating to an exception to the definition of “investment property” for specified non-AMT tax-exempt bonds) and §1.148-2(d)(2)(v) (relating to a corresponding exception to arbitrage yield limitations) will be inapplicable.

e. Application of small issuer exception to the arbitrage rebate requirement. In determining whether an issue of CREBs qualifies for the \$5 million small issuer exception to the arbitrage rebate requirement (increased to \$10 million for certain public school facilities) under section 148(f)(4)(D) and §1.148-8, both CREBs and tax-exempt bonds the interest on which is excludable from gross income under section 103 (other than private activity bonds) that are reasonably expected to be issued or actually issued by the CREB issuer (and other applicable on-behalf-of entities and subordinate entities taken into account under that section) within a calendar year will be taken into account in measuring the applicable size limitation.

### **SECTION 13. MISCELLANEOUS REGULATORY GUIDANCE**

The Treasury Department and the IRS expect that the Temporary Regulations will provide guidance on selected discrete issues that have arisen with respect to CREBs, including clarifying that: (1) in applying the reimbursement restrictions under section 54(d)(1)(C), the general reimbursement rules and exceptions in §1.150-2 will apply; (2) joint ownership of projects financed with 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 section 141; (3) in determining whether all or a part of a facility will be eligible to be a qualified project for CREBs purposes, allocation and accounting rules similar to those employed under section 141 for mixed-use projects will be applied; (4) for purposes of the requirement under section 54(d) to use 95 percent of the proceeds of an issue of CREBs for qualified costs to finance capital expenditures for qualified projects, proceeds used to finance a reserve or replacement fund (e.g., a debt service reserve fund to secure the CREBs) will be treated as nonqualified costs and will be eligible for financing with CREBs only from the five percent nonqualified portion of the proceeds; and (5) except in limited circumstances involving certain refinancings to which section 54(d)(2)(B) applies and reimbursements to which section 54(d)(2)(C) applies, costs of acquiring existing facilities (as contrasted with costs of enhancements, repair, or rehabilitation of existing facilities) generally will be treated as nonqualified costs for purposes of the 95 percent use of proceeds test under section 54(d).

**SECTION 14. EFFECT ON OTHER DOCUMENTS**

This Notice *modifies* and *supersedes* Notice 2005-98, 2005-52 I.R.B.1211 (December 11, 2005), which provided guidance on CREBs in connection with the allocation process for the original volume cap authorization under section 54.

**SECTION 15. DRAFTING INFORMATION**

The principal authors of this Notice are Zoran Stojanovic and Timothy Jones of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this Notice and the Application, contact Tina Hill at (202) 283 9774 (not a toll-free call).

**APPENDIX A**

**APPLICATION FOR ALLOCATION OF CLEAN ENERGY RENEWABLE BOND  
VOLUME CAP**

Internal Revenue Service

Washington, D.C.

Dear Sir or Madam:

The following constitutes the application (“Application”) of (Name) (the “Applicant”) for allocation of clean renewable energy bond (CREB) volume cap under Section 54(f) 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 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 54(j)(4) 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, territory, 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.)*

**3. Name of Borrower** \_\_\_\_\_

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

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

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

**4. Status of Borrower** – *(Select as appropriate)* The Borrower is a “qualified borrower” under section 54(j)(5) because it is

- (i) a qualified borrower under section 54(j)(5)(A) 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 borrower under section 54(j)(5)(B) that is a “governmental body” under section 54(j)(3)(B) and is a State, territory, 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.)*

**5. Name of Project .**

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- 6. Detailed Description of Project.** A reasonably detailed description of the project (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, and capacity:
- 7. Qualified Project.** The Project is a “qualified project” within the meaning of section 54(d)(2)(A) of the Code, because it is a “qualified facility” (as determined under section 45(d) of the Code without regard to section 45(d)(10) and to any placed in service date) that is a (*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 facilities – 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 refined coal production facility – a facility producing refined coal (as defined in section 45(c)); or

(9) a qualified hydropower facility – a facility engaged in qualified hydropower production (as defined in section 45).

**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 in Exhibit B hereto is a certification by an independent, licensed engineer to the effect that the Project will be a “qualified project” within the meaning of section 54(d)(2)(A) and a “qualified facility” within the meaning of section 45(d) of the Code (without regard to section 45(d)(10) of the Code and to any placed in service date) and that the project is technically viable.

If the project is a **qualified hydropower facility --**

- 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, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.

**10. Location of the Project:**

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

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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 \_\_\_\_\_

*(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 CREBs. Attached in Exhibit C is a plan of financing for the Project.

**14. Refinancings and Reimbursements.** *(Include the following statements, as applicable.)*  
[[*For refinancings, include the following statement.*] The Issuer intends to use the proceeds of CREBs to refinance qualified projects in accordance with section 54(d)(2)(B).]  
[[*For reimbursements, include the following statement.*] The Issuer intends to use the proceeds of CREBs to reimburse costs of a qualified project in accordance with section

54(d)(2)(C).] *(In addition, the Issuer must demonstrate that the requirements of §54(d)(2)(B) or (C), as applicable, will be met.)*

**15. Dollar Amount of Allocation Requested for the Project.** To finance the Project, the Applicant hereby requests a 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, 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 CREB volume cap as part of a pooled financing bond within the meaning of section 54(l)(2), then the issuer should include the undertaking noted below.)*

*[The Applicant Issuer expects to use the requested allocation for CREBs volume cap in a pooled financing bond within the meaning of section 54(i)(2), and the Issuer expressly agrees that it will obtain a written loan commitment for all borrowers from the issue of 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 4 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: \_\_\_\_\_, 2007

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 clean renewable energy bonds ("CREBs") under section 54 of the Internal Revenue Code, as amended (the "Code"). The CREBs are being issued to make a loan to [*Name of qualified borrower: \_\_\_\_\_*] (the "Borrower"), to finance the costs of certain clean renewable energy 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 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 project" under section 54(d)(2)(A) of the Code and correspondingly a "qualified facility" under section 45(d) of the Code, determined without regard to section 45(d)(10) of the Code and without regard to any placed in service date).

[(*Include as appropriate*) 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, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.]

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 clean renewable energy bonds (“CREBs”) under section 54 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 borrower (if other than the issuer), the type and location of the project that is the subject of the Application, and the amount of the allocation, if any, of volume cap authority to issue CREBs for such project. 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.