

## PROPOSED TEMPORARY RULES

**Note from the Codifier:** The OAH website includes notices and the text of proposed temporary rules as required by G.S. 150B-21.1(a1). Prior to the agency adopting the temporary rule, the agency must hold a public hearing no less than five days after the rule and notice have been published and must accept comments for at least 15 business days.

For questions, you may contact the Office of Administrative Hearings at 919.431.3000 or email [oah.postmaster@oah.nc.gov](mailto:oah.postmaster@oah.nc.gov).

### TITLE 04 – DEPARTMENT OF COMMERCE

**Rulemaking Agency:** North Carolina Tax Reform Allocation Committee (the "TRAC")

**Codifier of Rules** approved this rule as an emergency rule effective July 15, 2011 and received for publication the following notice and proposed temporary rule on July 7, 2011.

**Rule Citations:** 04 NCAC 01H .0501

**Public Hearing:**

**Date:** July 27, 2011

**Time:** 10:00 a.m.

**Location:** Department of Commerce, Board Room, 301 N. Wilmington Street, Raleigh, NC 27601

**Reason:** Section 1112 of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009), amended 26 USC 54D(d) to increase the national bond volume cap authorization for Qualified Energy Conservation Bonds ("QECCBs") from \$800 million to \$3.2 billion. Additionally, that section in the ARRA created the availability of "green community programs" as a tool for utilization of QECCB capacity. North Carolina general statutes provided that the TRAC is the appropriate state entity to allocate QECCB capacity and directed the TRAC to create procedures regarding such allocation. See, e.g., G.S. 143-433.8 and G.S. 143-433.9(a). Finally, 150B-21.1B provides that "It is the policy of the State...to quickly and efficiently complete the awards of grants and contracts under the ARRA" and provides that ARRA rule-making provisions be "liberally construed to allow agencies maximum flexibility in implementing the ARRA."

The TRAC has been informed that a substantial number of energy conservation projects are anxiously awaiting the allocation of QECCB capacity, and the TRAC is in need of rules in which to allocate such capacity to eligible issuers. As such, it is imperative that QECCB capacity be allocated immediately so that energy conservation projects can be commenced.

In any event, the ARRA itself provided in Section 5 ("Emergency Designation") that: "Each amount in this Act is designated as an emergency requirement and necessary to meet emergency needs pursuant to section 204(a) of S. Con. Res. 21 (110<sup>th</sup> Congress) and section 301 (b)(2) of S. Con. Res. 70 (110<sup>th</sup> Congress), the concurrent resolutions on the budget for fiscal years 2008 and 2009."

To the extent, if any, that such may be necessary, the agency requests the Commission and/or the Codifier to waive any 210-day requirement under 150B-21.1(a2) or other law upon consideration of the degree of public benefit, the lack of control by the Agency, the need for a waiver, and other relevant factors in order to comport with the liberal construction contemplated by 150B-21.1B ("Adoption of rules to implement the American Recovery and Reinvestment Act").

**Comment Procedures:** Comments from the public shall be directed to: Mark Poole, Department of Commerce, 301 N. Wilmington Street, 4301 Mail Service Center, Raleigh, NC 27699-4301. The comment period begins July 15, 2011 and ends August 5, 2011.

### CHAPTER 01 - DEPARTMENTAL RULES

#### SUBCHAPTER 01H - PRIVATE ACTIVITY BOND VOLUME CAPACITY PROGRAM

#### SECTION .0500 - QUALIFIED ENERGY CONSERVATION BONDS

#### 04 NCAC 01H .0501 PROCEDURES AND CRITERIA FOR ALLOCATION OF QUALIFIED ENERGY CONSERVATION BONDS

The North Carolina Tax Reform Allocation Committee (the "Committee") is directed to allocate Qualified Energy Conservation Bond ("QECCB") capacity to eligible issuers of such bonds as follows:

- (1) To "large local governments," as such term is used in 26 U.S.C.S. 54D(e)(2) in such amounts and manner as specifically directed by the United States Internal Revenue Service ("IRS") in 26 U.S.C.S. 54D and all relevant implementing notices provided by the IRS (including IRS Notice 2009-29), as may be modified, amended or supplemented. For purposes of calculating the populations of local governments to determine which constitutes a "large local government," the Committee shall use population estimates as of July 1, 2007, as directed by the IRS.
- (2) To "Indian tribal governments," as such term is used in 26 U.S.C.S. 54D(h) in such amounts as may be specifically directed by the IRS in 26 U.S.C.S. 54D and relevant implementing notices provided by the IRS (including IRS Notice 2009-29), as may be modified, amended or supplemented.
- (3) Following the allocations described in Items (1) and (2) of this Rule, the Committee shall allocate the remaining QECCB capacity to eligible issuers. Such allocation shall be made by the Committee in its sole discretion, upon completed application by an eligible issuer, and after consideration of any factor the Committee deems relevant in its good faith and discretion, including (without limitation) some or all of the following factors:

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- (a) The ability of the State to ensure that at least 70 percent of the State's allocation is used for government projects, and no more than 30 percent for projects considered QECCB private activity bonds under IRS rules, regulations and guidelines;
- (b) The extent to which the project constitutes an eligible conservation purpose under 26 U.S.C.S. 54D and all relevant implementing notices provided by the IRS (including IRS Notice 2009-29), as may be modified, amended or supplemented;
- (c) The extent to which the project demonstrates the potential to directly conserve energy;
- (d) The extent to which the project supports the development or implementation of innovative energy conservation technology;
- (e) The extent to which the project uses renewable resources to produce energy;
- (f) The number of citizens benefiting from the project;
- (g) The estimated number of jobs to be produced by the projects (for private activity allocations) and the amount of QECCB authority per job produced;
- (h) The readiness of the project to proceed;
- (i) The certainty of the issuer using the allocation within the estimated timelines;
- (j) The amount of other public and private funding leveraged by the QECCB allocation;
- (k) The amount of local community support for the project;
- (l) The best interests of the State of North Carolina with regard to economic development, energy conservation, green initiatives and the general prosperity of the State;
- (m) Whether the unit of local government is in competition with another state for project benefits such as jobs and tax base;
- (n) Whether the availability of the allocation is a crucial part of attracting a new company or keeping an existing company in place;
- (o) Whether the requested allocation will benefit a project for which an eligible issuer is already issuing QECCBs;
- (p) The ability of the unit of local government or company benefiting from the QECCB to obtain financing and close the issue in a timely manner, including demonstration of a commitment from a bank or other financial institution to purchase or underwrite the QECCBs;
- (q) The total amount of capacity available to the Committee for allocation.
- (4) Where required by law, local governments shall coordinate issuance of QECCBs with and through the North Carolina Local Government Commission (the "LGC") in the Office of the North Carolina State Treasurer, and shall obtain approval from the LGC for QECCB issuance.
- (5) Entities allocated QECCB capacity by the Committee and/or entities who issue QECCBs shall ensure compliance with all federal and state laws, rules, regulations and requirements applicable to such allocation or issue.
- (6) Entities receiving an allocation under Items (1) and (2) of this Rule ("large local governments" and "Indian tribal governments") have the right to waive and/or reallocate to the State of North Carolina all or a portion of their allocation. Upon the State's receipt of any additional QECCB capacity through any such waiver or reallocation, the Committee shall allocate such capacity to eligible issuers in the manner described in Item (3) of this Rule.
- (7) The Committee shall attach such contingencies upon any allocation of QECCB capacity made under Item (3) of this Rule as the Committee may deem appropriate, including (without limitation) contingencies relating to a time deadline for issuance of the QECCBs pursuant to the allocated capacity and contingencies limiting the use of the allocated QECCB capacity for public or private activity bonds.

*Authority G.S. 143-433.6(d); 143-433.8; 143-433.9(a); 150B-21.1B; S.L. 2009-140; S.L. 2009-475.*