

NEW MASTER RENEWABLE ENERGY CERTIFICATE TRADING AGREEMENT

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In February 2007, culminating a two-year effort, a working group organized by the Environmental Markets Association (EMA), the American Council On Renewable Energy (ACORE), and committees of the American Bar Association Section of Environment, Energy, and Resources (namely, its Renewable Energy Resources Committee and its Special Committee on Energy and Environmental Finance), published a standard form master agreement for national trading of Renewable Energy Certificates (RECs, or “green tags”). It is available online at <http://www.acore.org/programs/rectrading.php> and <http://environmentalmarkets.org>.

The master agreement is legal infrastructure to (1) help buyers and sellers transact, (2) foster market mechanisms to promote renewable resource development, and (3) stave off potential balkanization of U.S. REC markets. It combines the efforts of volunteers from renewable resource developers, energy marketers and traders, utilities, NGOs, law firms, brokerages, and government agencies active in renewable resource development and REC markets. The working group co-chairs at publication were Jeremy Weinstein of the Law Offices of Jeremy D. Weinstein, Christopher Berendt of PACE Global Environmental Services, Baird Brown of Ballard Spahr Andrews & Ingersoll, Roger Feldman of Andrews & Kurth, Richard Saines of Baker & McKenzie, and Michael Eckhart of ACORE. The document reference library, located online at the EMA’s Web site, provides insight into the development process, the invaluable contributions by many others to the drafting of the document, and the many policy and other debates in which the working group engaged.

RECs represent aspects of the renewable energy nature of generation from renewable resources, which are separated from the electricity itself. Active REC markets maximize cost-effective resource allocation and allow states to implement aggressive renewable portfolio standard (RPS) targets, while minimizing

increases in electricity costs for consumers and businesses. How RECs are separated from the electricity, and the components of what constitutes a REC, can vary across state programs due to varying political and other agendas.

RPSs in twenty-three states and the District of Columbia now mandate that load-serving entities procure a minimum percentage of retail energy from renewable resources. The adoption of state standards in the absence of a federal standard has caused concern among some observers about the risk of different state programs creating barriers, either deliberate or not, to national REC trading across state borders. The need for a working group to promote a national master agreement became apparent as states sought to implement RECs that could (1) be fungible across state programs, (2) provide mutual reciprocity, and (3) provide a legal infrastructure to complement a developing physical infrastructure of information systems that track renewable resource generation.

The master agreement is technology neutral, usable across the voluntary and compliance markets, and legally robust regardless of state jurisdiction. The “Introduction for Users and Guidance Notes,” posted on the Internet, contains a detailed explanation of how the master agreement is used, and defines the terms that are unique to RECs. The REC master agreement works much like a typical master trading agreement and includes a cover sheet with identifying information and core elections for payment, credit, and other terms, and contains flexibility to incorporate custom terms.

For the unique needs of a REC as an environmental commodity, the master agreement uses a disclosure-driven model. Much debate has transpired over what a REC represents and what it should contain. Rather than take sides in the debate, the master agreement does not mandate what is in a REC, but provides mechanisms that enable full and accurate disclosure of what is in the specific RECs bought and sold by the parties to the agreement. The master agreement provides a range of definitions. Between two bookend definitions of RECs, one with all attributes and another with generation-only attributes, sits the specific REC

for which a seller discloses the REC's attributes and any applicable verification methodology. The Disclosure Document, which does not include the economics of the transaction, travels downstream with the REC in further transactions. Use of the Disclosure Document by the parties is optional, but it is a powerful tool for unlocking the potential value in RECs as REC and Carbon markets develop.

As for meeting the requirements of the various state programs for RECs, the disclosure model requires the parties to indicate the state programs with which the RECs comply, rather than trade using each state's separate REC definition. The working group considered but rejected the concept of adding to the master agreement the REC definitions for each state. Instead, the trading parties define the product they are trading and make representations about compliance with applicable state programs. The risk of fostering balkanization with many disparate definitions was overwhelming, and the document's definitions instead emphasize commonalities of the RECs and their components, and specify under which RPS programs they qualify.

Unless otherwise agreed, the buyer of a REC is assumed to bear the risk of a change in law or regulation that causes the REC to cease to qualify for recognition by regulators before it is delivered. Allocation of "change in law" risk was addressed with a designation called "Regulatorily Firm." Normally, when a REC is sold in a compliance market, the seller represents that it complies with the requirements of a particular program as of the date of the agreement, and the buyer accepts the risk of change in law after the date of sale. But if the product is sold as "Regulatorily Firm," the change in law risk is shifted to the seller, who promises that the product will comply with the program when delivered. However, a regulatory change that makes a REC more valuable, like enactment of a state RPS, does not obligate the buyer to pay more or excuse delivery by the seller. Parties are also given options to assign responsibility for verifying the attributes of the REC. Options may include self-certification or verification by independent organizations such as the Center for Resource Solutions, which administers the well-known "Green-e" program.

RECs and RECs markets are likely to be impacted significantly, if not subsumed, by the development of Carbon markets, as adoption of greenhouse gas mitigation legislation in the United States accelerates at the state, regional, and federal levels. The drafters of the REC master agreement recognized this, and gave the agreement multiple entry points for RECs into future Carbon markets. In fact, the working group's leadership, building upon the work done for the REC master agreement, is exploring the possibility of re-engaging the working group to develop a master agreement for trading verified Carbon emissions reductions.

The next step will be to review market response to the REC master agreement. The working group will keep the document current and review comments from users. Those who are interested in the group are encouraged to contact the author or any of the group's co-chairs listed on the Environmental Markets Association's Web site.

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

ABA Annual Meeting

Aug. 9-14, 2007

San Francisco, California

15th Section Fall Meeting

Sept. 26-30, 2007

Pittsburgh, Pennsylvania