

Attachment to Conditional Commitment

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Attachment A to Conditional Commitment - Loan Conditions

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Date: \*\*

Lender: \*\*

Borrower: \*\*

Loan Amount: \*\*

USDA, Rural Development Guarantee: \*\*%

No provision stated herein shall be changed without the prior written consent of the lender and USDA Rural Development, which is referred to throughout this document as “the Agency.” Language contained in 7 CFR 5001 and Form RD 5001-2, “Lender's Agreement,” or Form RD 5001-2a, “Lender’s Agreement,” will apply as appropriate.

## 1. PURPOSE

The purpose of the loan is to provide long-term financing for **PURPOSE** on property located at **ADDRESS** to be used as a **BUSINESSTYPE** facility. Guaranteed loan funds will be used for **(use all that are applicable)** real estate acquisition (\$\*\*\*), construction costs of the facility (\$\*\*\*), machinery & equipment (\$\*\*\*), working capital (\$\*\*\*), the refinance of debt owed to \*\*\* (\$\*\*\*), and fees & costs associated with this loan (\$\*\*\*). These loan funds are to be matched by contributions from the borrower of approximately \$\*\*\* **(use the remainder of sentence only if applicable)** and from a loan/grant from **OTHERSOURCE** of approximately \$\*\*\*. Any unused guaranteed loan proceeds must be applied to the guaranteed loan balance.

Upon final disbursement of loan funds, a copy of the lender’s executed, detailed loan settlement statement must be provided to the Agency as evidence that all funds were disbursed in amounts and for purposes outlined above. No activity that is in violation of Federal law shall be permitted on the borrower’s premises nor shall any equipment or other assets funded by the USDA guaranteed loan be used for activities that are in violation of Federal law.

Any change in the loan amount or source and use of funds between the date of this Conditional Commitment and the issuance of the Loan Note Guarantee must be approved by the Agency and be documented as an amendment to this Conditional Commitment.

### Add if applicable:

This loan involves New Markets Tax Credit financing with investments made under a Leveraged Equity Structure through an Investor Fund Entity and Community Development Entity for a Qualified Low-Income Community Investment (QLICI) to an underlying Qualified Active Low-Income Community Borrower (QALICB) for the loan purposes outlined above. Guaranteed loan funds must be passed through to the QALICB through a direct tracing method. The terms and

payment schedule of the secured QLICI loan to the QALICB, including the loan's maturity, must be at least equal to the terms and payment schedule of the guaranteed loan.

**Add if potential conflict of interest situations have been identified, which may affect eligible project costs:**

No conflict of interest or appearance of conflict of interest will be allowed. Payment in excess of actual costs (e.g., profit, overhead, indirect costs, and wages to owners) incurred by the contractor or other service provider on a contract or agreement that has been entered into at less than an arm's length transaction has potential for a conflict of interest. In situations where there is common ownership or an otherwise closely-related company is being paid to do construction or installation work for a borrower, only documented costs associated with the construction or installation can be paid with guaranteed loan funds and cannot include any profit or wages to such related individual or entity.

## 2. PERCENTAGE OF GUARANTEE

An 80% guarantee will be issued after the terms of this Conditional Commitment have been met.

**or**

An 80% guarantee will be issued prior to the substantial completion of development work when the terms of this Conditional Commitment have been met. Construction conditions are outlined below that address construction requirements.

## 3. INTEREST RATE AND TERM

The term of the loan is to be \*\* years **(use the remainder of sentence only if applicable)**, including an interest-only period of \*\* months. The interest rate is variable and established by the interest rate formula of **[published base rate]** plus \*\* percent. **(use the remainder of sentence only if applicable)** There is to be a **floor/ceiling rate of \*\***. The interest rate is not to vary more often than quarterly. The loan is to be fully amortized with **(PICK ONE) monthly/quarterly/annual** installments. The lender must incorporate within the variable rate note the provision that when the loan interest rate changes, installments are to be adjusted to assure there are no balloon payments. Reasonable and customary prepayment penalties, provisions for default or penalty interest or late payment fees will not be prohibited. However, any penalties, fees or default interest will not be covered by the guarantee. If an interest rate swap is utilized, the guarantee will only cover principal and interest. The guarantee will not cover any fees relating to the swap.

**or**

The term of the loan is to be \*\* years **(use the remainder of sentence only if applicable)**, including an interest-only period of \*\* months. The interest rate is to be fixed at \*\* percent per

annum. The loan is to be fully amortized over the life of the loan with no balloon payments. Reasonable and customary prepayment penalties, provisions for default or penalty interest, or late payment fees will not be prohibited. However, any penalties, fees or default interest will not be covered by the guarantee.

**Add the following if sculpted payments are being utilized:**

Principal and interest payments will be made on a **(PICK ONE) monthly/quarterly/annual** basis using a sculpted amortization schedule. Other than modifications necessary to account for differences in the interest rate between the modeled rate used in the application and the effective rate at loan closing, the lender shall not modify the sculpted amortization schedule provided in its approved credit memo dated **[insert date]** without prior Rural Development written concurrence.

#### 4. SECURITY AND LIEN POSITION

The lender is responsible for obtaining and maintaining proper and adequate collateral to protect the interests of the lender, the Agency, and any holder. The entire loan will be secured by the same collateral with equal lien priority for the guaranteed and non-guaranteed portions of the loan. The lender will not take separate security to secure only the unguaranteed portion of the loan nor will the lender require compensating balances as a means of eliminating the lender's exposure on the unguaranteed portion of the loan. The non-guaranteed portion of the loan will not be paid first nor given any preference or priority over the guaranteed portion of the loan.

Collateral value must provide at least a **1 to 1** value after discounting.

This loan is to be secured by **(use provision(s) as applicable):**

- a first mortgage or deed of trust (including assignment of rents) on the borrower's real estate located on a **\*\*\***-acre commercial property at **ADDRESS**. All taxes and assessments are to be current at loan closing. The lender must certify that the borrower has obtained a title opinion by its attorney showing ownership of real estate and any mortgages, restrictions, lien defects or encumbrances.
- a first mortgage or deed of trust (including assignment of rents) on the borrower's leasehold interest in the land and improvements located on a **\*\*\***-acre commercial property at **ADDRESS**. The lender is to secure a transferable assignment of the lessor's ground lease. The term of the borrower's leasehold interest must be equal to or exceed the term of the guaranteed loan.
- a parity first lien on **\*\*\*** with an estimated value of **\$\*\*\***. The lien will be in a parity position with **(OTHER LOANS & LOAN AMOUNTS)** and will rank pari passu in right of payment with said loan and senior to all other unsubordinated indebtedness of the borrower. The lender must ensure that the discounted collateral values are at least equal to the guaranteed loan amount.

- A second mortgage or deed of trust (including assignment of rents) on the borrower's real estate located on a \*\*\*-acre commercial property at **ADDRESS** -- junior only to a first mortgage or deed of trust pledged to **LIENHOLDER**, with a balance not to exceed \$\*\*\* at loan closing. All taxes and assessments are to be current at loan closing. The lender must certify that the borrower has obtained a title opinion by its attorney showing ownership of real estate and any mortgages, restrictions, lien defects or encumbrances.
- a first lien on all of the borrower's machinery & equipment.
- a first lien on all business assets, including machinery and equipment, inventory, and accounts receivable.
- a first lien on all furnishings, fixtures, and equipment associated with the facility.

**add as applicable:**

- including the items listed in the appraisal by \*\*\* dated \*\*\*.
- including all items financed with this loan. A final list of all equipment financed with this loan, with a matching cost breakdown, will be provided with the loan settlement statement.

**appended with the following, if applicable:**

- indicating not more than \*\* percent of the total cost of acquisition, delivery, and installation was financed with the REAP loan.
- including a security interest in the borrower's rights under its equipment leases, junior only to the outstanding lease obligations at the time of loan closing.

**Use on all construction projects:** There are to be no construction or mechanics liens against the security.

**Use with multiple Agency funding:** The **(B&I and REAP guaranteed loans)** will be cross defaulted and cross collateralized to ensure equal collateral position on Agency funding.

**#Non-Profit:** The security will also consist of an all-inclusive security interest, pursuant to the Security Agreement and the Uniform Commercial Code, in all accounts receivable and the contract rights arising therefrom, inventory, furniture and fixtures, intangibles, machinery and equipment and any other assets of the borrower, now owned and hereafter acquired, including all replacements, substitutions and additions.

**#Public Body:** Security will be a project **(note/bond)** and loan resolution as developed by a bond attorney. The collateral will be a **(first/parity)** lien pledge of the system's net revenues.

Prior to the issuance of the Loan Note Guarantee, the lender must certify that the collateral interest described above has been obtained and is perfected. This will be accomplished with the certification found in Attachment B to the Conditional Commitment.

## 5. APPRAISALS

A current (less than 12 months old) appraisal acceptable to the Agency and completed in accordance with USPAP and FIRREA indicating that the fair market value of the real property security is not less than \$\*\*\*\*\*, excluding any value attributed to business valuation. Lenders will be responsible for ensuring that appraisal values adequately reflect the actual value of the collateral based on an arm’s length transaction. Collateral must have documented value sufficient to protect the interest of the lender and the Agency. The discounted collateral value must be at least equal to the loan amount.

**Include if loan is greater than \$250,000:** A qualified appraiser must determine the appraised market value in accordance with 7 CFR § 5001.203 prior to issuance of the Loan Note Guarantee.

**Include for construction projects:** The lender must obtain the “As Is” market value and the “As-Completed” market value as of the date of construction completion to determine the value of the real estate property or obtain an income-based appraisal as of the date of completion to determine the value of revenues that will be generated by the collateral.

**Add if applicable when existing chattel value exceeds \$250,000:** A chattel appraisal reflecting a fair market value of not less than \$\*\*\*\* will be required on the existing machinery and equipment.

**Add if applicable when purchasing new equipment with value to be verified by Bill of Sale:** For all newly acquired chattel, a bill of sale may be submitted to support the value at cost. The minimum cost of chattel proposed to be pledged as collateral for this loan is \$\*\*\*. Verification from the equipment manufacturer(s) or a similarly independent and qualified third-party that the cost-weighted average useful life expectancy of the new equipment purchased with loan funds is at least \*\* years will be required prior to issuance of the Loan Note Guarantee.

## 6. SYSTEM FOR AWARD MANAGEMENT

The lender will be required to maintain a Unique Entity ID (UEI) and maintain an active registration in the System for Award Management (SAM) database. Renewal can be completed online at: <http://sam.gov>. This registration must be renewed and revalidated every 12 months for as long as there is an active loan, grant, or guaranteed loan with the Agency.

To ensure the information is current, accurate and complete, and to prevent the SAM account expiration, the review and updates must be performed within 365 days of the activation date, commonly referred to as the expiration date. The registration process may take up to 10 business days. (See 2 CFR Part 25 and the “Help” section at <http://sam.gov>).

## 7. OTHER FEDERAL, STATE, AND LOCAL REQUIREMENTS

Beginning on the date of issuance of the Loan Note Guarantee, for proposals where facilities are financed in whole or in part with a loan guarantee by the Agency, borrowers and lenders will be required to comply with any Federal, State, or local laws or regulatory commission rules that are in existence and that affect the project including, but not limited to:

- (a) Organization and authority to design, construct, develop, operate, and maintain the proposed facilities;
- (b) Borrowing money, giving security, and raising revenues for the repayment;
- (c) Land use zoning;
- (d) Health, safety, and sanitation standards; and
- (e) Protection of the environment and consumer affairs.

## 8. NON-PROFIT ORGANIZATIONAL DOCUMENTS **(include if applicable)**

The following paragraph must be included in the lender's Loan Agreement:

If the non-profit corporation dissolves or ceases to perform the community facility objectives and functions, the board of directors shall distribute all business property and assets to one or more nonprofit corporations or public bodies. This distribution must be approved by 75 percent of the users or members and must serve the public welfare of the community. The assets may not be distributed to any members, directors, stockholders, or others having financial or managerial interest in the corporation. Nothing herein shall prohibit the corporation from paying its debts.

## 9. CRITICAL ACCESS HOSPITALS **(include if applicable)**

For projects that will relocate a Critical Access Hospital (CAH), a letter from Center for Medicare/Medicaid Services (CMS) indicating the CAH will retain the same provider agreement and its necessary provider designation is a requirement of this loan.

## 10. ESTABLISHMENT OF LINC ACCOUNT

Lender will become an approved participant in the Agency's Lender Interactive Network Connection (LINC). The LINC system allows the lender to conduct official business transactions such as submitting borrower account status reports and the payment of all fees, including the guarantee fee at closing and the retention fees. In order to participate in the LINC, the lender must have Level 2 eAuthentication credentials. The USDA eAuthentication is the system used by USDA agencies to enable customers to obtain accounts that will allow them to access USDA Web applications and services via the Internet. Please access and follow the

instructions to obtain a Level 2 eAuthentication account and obtain access to LINC:  
[https://www.rd.usda.gov/sites/default/files/OneRD\\_eAuth\\_LINC\\_Instructions.pdf](https://www.rd.usda.gov/sites/default/files/OneRD_eAuth_LINC_Instructions.pdf)

## 11. GUARANTEE FEE

The lender will be charged a one-time, nonrefundable guarantee fee of **X%**, payable to USDA Rural Development, in the amount of **\$\*\*\***. The fee is calculated by taking the amount of the loan multiplied by the guarantee fee (**X%**) then multiplied by the percentage of guarantee. This fee is due and payable upon loan closing and prior to Agency issuance of the Loan Note Guarantee. The fee will be submitted via the Pre-Authorized Debit account set up within the LINC system, prior to closing, for faster processing of the Loan Note Guarantee.

## 12. PRE-CONSTRUCTION FEE (include if applicable)

The lender has requested and meets the requirements for Agency issuance of the Loan Note Guarantee prior to completion of construction. The lender will be charged a nonrefundable fee of **X%**, payable to USDA Rural Development in the amount of **\$\*\*\*\***. The fee is calculated by taking the amount of the loan multiplied by the percentage of guarantee (**XX%**), then multiplied by the pre-construction fee (**X%**).

## 13. RETENTION FEE (include if applicable - see applicable FY Fee Notice)

This loan guarantee is subject to a periodic retention fee of **XX%** of the guaranteed portion of the outstanding principal as of December 31 of each year. It is calculated by multiplying the outstanding principal balance of the loan by the percentage of guarantee and then multiply that result by **XX%**. Payments are due to the Agency by January 31 of each year. For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first retention fee will be due January 31 of the second year following the date the Loan Note Guarantee is issued. Payments not received by April 1 are considered delinquent and may result in cancellation of the guarantee to the lender. Holder's rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Until the Loan Note Guarantee is terminated by the Agency, any delinquent periodic guarantee retention fees will bear interest at the note rate and are due upon notice by the Agency. Should the lender fail to pay any delinquent periodic guarantee retention fees, including any interest due thereon, the amount will be deducted from any loss payment due the lender.

## 14. ASSIGNMENT OF GUARANTEED LOAN

Any assignment by the lender of the guaranteed portion of the loan must be accomplished in accordance with the conditions in the Lender’s Agreement and Agency program regulations and must be documented on Form RD 5001-6, “Assignment Guarantee Agreement.” Subsequent assignments require notice to the lender and the Agency using any format, including that used by the Securities Industry and Financial Markets Association, together with the transfer of the original Assignment Guarantee Agreement.

The lender is required to hold in its own portfolio, or retain, a minimum of 7.5 percent of the total loan amount. This amount must be of the non-guaranteed portion of the loan and cannot be participated to another. The lender may sell the remaining amount of the non-guaranteed portion of the loan only through participation. The lender will be responsible for servicing the entire loan for the term of the loan in accordance with the Lender’s Agreement, Loan Note Guarantee, and Agency Program regulations.

## 15. FINANCIAL REPORTING

For all borrowers with a guaranteed loan balance in excess of \$600,000, the lender is responsible for obtaining annual financial statements. The borrower must submit financial statements to the lender within 90 days of the business’ fiscal yearend. The lender will submit the borrower’s annual financial statements to the Agency within 120 days of the end of the borrower’s fiscal year. The lender will analyze the financial statements and provide the Agency with a written summary of the lender’s analysis and conclusions, including trends, strengths, weaknesses, extraordinary transactions, and other indications of the financial condition of the borrower.

All personal and corporate guarantors of this loan must provide annual financial statements to the lender within 90 days of guarantor’s fiscal or calendar yearend.

**Include for For-Profit Borrowers:** The loan agreement must require the borrower to submit financial statements to the lender. The borrower must obtain (PICK ONE: compiled/reviewed/ audited) financial statements annually, prepared and submitted in accordance with accounting practices acceptable to the Agency. Such practices include, but are not limited to, Generally Accepted Accounting Principles (GAAP) and the industry’s standard accounting practice. Financial statements will contain, at a minimum, a balance sheet and a profit and loss statement reflecting the financial condition of the borrower as of its yearend.

**Include for Non-Profit Borrowers:** An annual audit under the Single Audit Act is required if the borrower expends \$750,000 or more in Federal financial assistance per fiscal year. The total Federal funds (including guaranteed assistance) expended from all sources shall be used to determine Federal financial assistance expended. All audits performed under the Single Audit Act are to be in accordance with subpart F of 2 CFR Part 200, as adopted by USDA through 2 CFR Part 400. The audit must be prepared by an independent auditor meeting the requirements of Generally Accepted Government Auditing Standards (GAGAS) and must be submitted within 9 months of the end of the borrower’s fiscal year.

**Use the following if the borrower is a sole proprietorship:** The borrower must provide annual financial statements *on the business operation being financed with this loan* and submit them to the lender within 90 days of the business' fiscal yearend. Financial statements will contain, at a minimum, a balance sheet and a profit and loss statement reflecting the financial condition of the borrower as of its yearend. In addition, the borrower must provide a complete, current personal financial statement annually. The lender is responsible for obtaining all required financial statements from the borrower, analyzing them, and providing copies of statements with an analysis to the Agency within 120 days.

## 16. STATUS REPORTING

For the life of each guaranteed loan, the lender must submit to the Agency, through the LINC system, semi-annual reports on the outstanding principal and interest balance of the loan(s) as of June 30 and December 31.

For each guaranteed loan that is in monetary default, the lender is required to report monthly to the Agency regarding the status of each loan, including any curative actions under consideration or undertaken to resolve the monetary default. Reports are due on the 15<sup>th</sup> working day of each month.

**Include for REAP only:** Once the project has been constructed, the lender must provide the Agency outcome project performance certifications reports from the borrower. Renewable energy project borrowers will provide a report for each of the 3 years commencing the first full calendar year following the year in which the project construction was completed. Energy efficiency project borrowers will provide a report for each of the 2 years commencing the first full calendar year following the year in which the project was completed. Reports are due 30 days after the reporting calendar year end. An Annual Outcome Project Performance Certification Report is attached for your information.

## 17. GUARANTOR(S)

In addition to the full liability of **BORROWERNAME**, a full personal guarantee for the loan is to be pledged by **\*\*\***. **Use the following only if applicable:** **\*\*\*** is to pledge a full corporate guarantee for the loan. **Use only if applicable:** Pro-rata guarantees are required from **\*\*\*** in an amount equal to their ownership interests, which total 100 percent of the ownership of the borrower. The **\*\*\*** Tribe is to be fully liable for this loan, and the lender is to obtain all necessary waivers of sovereign immunity.

Each guarantor must execute Form RD 5001-5, "Unconditional Guarantee." Personal and/or corporate guarantees are unsecured unless secured with specific collateral detailed in Item Number 7 of the Unconditional Guarantee form.

**or, if there will be no guarantors:**

**BORROWERNAME** is to have full liability for the loan.

## 18. INSURANCE

The lender must ensure the borrower obtains and maintains borrower and project insurance in substance, amount, and duration similar to that ordinarily required by lenders in the industry.

Hazard insurance naming the lender as mortgagee or loss payee, as applicable, will be maintained in an amount at least equal to the outstanding loan balance or the replacement value (whichever is greater) of the collateral. Hazard insurance includes fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicle, marine, smoke, builder's risk during construction, and property damage. Worker's Compensation must be carried in accordance with State law.

Key person life insurance naming the lender as collateral assignee, as applicable, will be maintained on the life of \*\*\* in the amount of \$\*\*\*.

**or**

Key person life insurance is not required.

**Include if applicable:** Flood insurance coverage is required.

## 19. CAPITAL EQUITY REQUIREMENTS

### **Include for REAP:**

The lender must provide evidence that there has been a minimum of 25% of other funding injected into this project. At proposed total eligible project costs of \$\*\*\*\*, the requirement for a 25 percent contribution equates to a minimum of \$\*\*\*\* of other funds injected into this project.

### **Pick one of the following for EXISTING BUSINESSES (B&I):**

A minimum of 10 percent balance sheet equity will be required at loan closing. Balance sheet equity must be met in the form of either cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Balance sheet equity will be determined using a balance sheet prepared in accordance with Generally Accepted Accounting Principles and will not include appraisal surplus or bargain purchase gains. Intangible assets reflected on the balance sheet that enhance a business' value, such as patents or franchise fees, may be included as equity only in an amount acceptable to the Agency. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the balance sheet equity requirement. **Add if applicable:** Subordinated debt from a New Markets Tax Credit investor

source may be counted as equity when calculating balance sheet equity of the underlying QALICB.

**OR**

A minimum of 10 percent borrower investment as a percentage of total eligible project costs will be required at loan closing. At proposed total eligible project costs of \$\*\*\*\*\*, the requirement for a 10 percent contribution equates to a minimum of \$\*\*\*\*\* of other funds injected into this project, which must be met in the form of cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the equity requirement.

**OR**

Owner contributed capital, as reflected in the equity section of the balance sheet, that is equal to or greater than 10 percent of net fixed assets plus depreciation is required at loan closing.

**Pick one of the following for NEW BUSINESSES (B&I) with sales contracts adequate to meet debt service and terms of the contract at least equal the loan amount:**

A minimum of 10 percent balance sheet equity will be required at loan closing. Balance sheet equity must be met in the form of either cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Balance sheet equity will be determined using a balance sheet prepared in accordance with Generally Accepted Accounting Principles and will not include appraisal surplus or bargain purchase gains. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the balance sheet equity requirement. **Add if applicable:** Subordinated debt from a New Markets Tax Credit investor source may be counted as equity when calculating balance sheet equity of the underlying QALICB.

**OR**

A minimum of 10 percent borrower investment as a percentage of total eligible project costs will be required at loan closing. At proposed total eligible project costs of \$\*\*\*\*, the requirement for a 10 percent contribution equates to a minimum of \$\*\*\*\* of other funds injected into this project, which must be met in the form of cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Subordinated debt may be included when the

subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the equity requirement.

**Pick one of the following for NEW BUSINESS (B&I) for a project involving construction where the LNG will be issued prior to completion of construction:**

A minimum of 25 percent balance sheet equity will be required at loan closing. Balance sheet equity must be met in the form of either cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Balance sheet equity will be determined using a balance sheet prepared in accordance with Generally Accepted Accounting Principles and will not include appraisal surplus or bargain purchase gains. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the balance sheet equity requirement. **Add if applicable:** Subordinated debt from a New Markets Tax Credit investor source may be counted as equity when calculating balance sheet equity of the underlying QALICB.

**OR**

A minimum of 25 percent borrower investment as a percentage of total eligible project costs will be required at loan closing. At proposed total eligible project costs of \$\*\*\*\*, the requirement for a 25 percent contribution equates to a minimum of \$\*\*\*\* of other funds injected into this project, which must be met in the form of cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the equity requirement.

**Pick one of the following for ALL OTHER NEW BUSINESSES (B&I):**

A minimum of 20 percent balance sheet equity will be required at loan closing. Balance sheet equity must be met in the form of either cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Balance sheet equity will be determined using a balance sheet prepared in accordance with Generally Accepted Accounting Principles and will not include appraisal surplus or bargain purchase gains. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a

standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the balance sheet equity requirement. **Add if applicable:** Subordinated debt from a New Markets Tax Credit investor source may be counted as equity when calculating balance sheet equity of the underlying QALICB.

**OR**

A minimum of 25 percent borrower investment as a percentage of total eligible project costs will be required at loan closing. At proposed total eligible project costs of \$\*\*\*\*, the requirement for a 25 percent contribution equates to a minimum of \$\*\*\*\* of other funds injected into this project, which must be met in the form of cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business and is subject to a standstill agreement for the life of the loan. No principal payments may be made on the subordinated debt for the life of the guaranteed loan and any lien position on the subordinated debt must be junior to senior debt. Interest payments may be made on the subordinated debt as long as loan covenants are met. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the equity requirement.

**INCLUDE THIS LANGUAGE FOR ALL BUSINESSES (B&I):**

Prior to issuance of the Loan Note Guarantee, the lender must provide the Agency with a balance sheet as of loan closing that reflects the business' post-closing status and demonstrates the required balance sheet equity, borrower investment of equity or other funds, or owner contributed capital as a part of the lender certification. This balance sheet must take into account any new assets, the guaranteed loan amount, and any non-guaranteed debt as liabilities of the borrower, regardless of whether the loan(s) has/have been fully disbursed or remain(s) to be disbursed.

**Add if applicable:**

Based upon the borrower's **(INSERT DATE)** balance sheet, a cash or earning asset injection in the amount of \$\*\*\* must be raised and injected into the business prior to loan closing in order to meet the minimum balance sheet equity requirement.

**INCLUDE THIS LANGUAGE FOR ALL BUSINESSES (REAP):**

Prior to issuance of the Loan Note Guarantee, the lender must provide the Agency with evidence acceptable to the Agency that the borrower's investment of equity or other funds as of loan closing reflects the business' post-closing status and demonstrates the required borrower investment as a part of the lender certification.

## 20. LOAN AGREEMENT

Appropriate conditions or covenants of this Conditional Commitment and any other conditions that the lender has determined are warranted to protect the interests of the lender and the Agency must be incorporated in the lender's loan agreement with the borrower. To expedite issuance of an Agency guarantee, a copy of the final proposed loan agreement should be provided for the Agency's review and concurrence prior to loan closing.

The lender is responsible for loan servicing and for notifying the Agency of any violations of the lender's loan agreement. The lender will arrange with the borrower and the Agency for field visits. The lender will be responsible for obtaining all required financial statements from the borrower, analyzing them and submitting the financial statements with the analysis to the Agency.

At a minimum, the loan agreement must contain the following requirements:

- a. Repayment and amortization provisions of the loan;
- b. Description of real property collateral, list of other collateral and identification of the lender's lien priority in the collateral;
- c. A list of persons and entities guaranteeing payment of the guaranteed loan and the percentage of guarantee;
- d. Type and frequency of borrower and guarantor financial statements to be required for the duration of the guaranteed loan. Guarantor statements must be updated at least annually;
- e. Prohibition against borrower assuming liabilities or obligations of others. Outside investment and loans/advances to stockholders, owners, officers, or affiliates require the prior written consent of the lender. Loans from stockholders, owners, officers or affiliates must be subordinated to the guaranteed loan or converted to stock. No payments are to be made on these debts unless the loan is current and in good standing;
- f. Limitations on borrower dividend payments and compensation of officers, owners and members of borrower. Dividend payments and compensation of officers, owners, and members will be limited to an amount that, when taken, will not adversely affect the repayment ability of the borrower. This amount may not be increased year-to-year unless (1) an after-tax profit was made in the preceding fiscal year, (2) the borrower is and will remain in compliance with covenants of the Loan Agreement and Conditional Commitment, and (3) all borrower debts are paid to a current status. This is not intended to apply to dividend payments to cover personal tax liability resulting from profitability of the business;
- g. Limitations on the purchase and sale of equipment and other fixed assets. The borrower must not acquire additional fixed assets (including assignments, transfers and leases) that would result in borrower not being in compliance with required ratios without the lender's written consent. Borrower will not lease, sell, transfer, or otherwise encumber fixed assets without the concurrence of the lender. Disposition of fixed assets serving as collateral for this loan must also have the concurrence of the Agency;
- h. Restrictions concerning mergers, consolidations, or other circumstances, including significant management changes, and a limitation on selling the business or project without the concurrence of the lender;
- i. Maximum debt-to-net worth ratio, when required by the lender or the Agency;
- j. Minimum debt service coverage ratio, when required by the lender or the Agency;

- k. A reserved section for any requirements, including environmental requirements, imposed by the Agency in its Conditional Commitment; and
- l. A provision for the lender and the Agency to have reasonable access to the project and its performance information during the term of the guaranteed loan, including the periodic inspection of the project by a representative of the lender or the Agency.

**Include for all borrowing entities:**

If necessary, the borrower is to take all necessary actions to remain in good standing with all licensing and/or regulatory authorities to maintain operations. The borrower is to notify the lender of any adverse findings made by licensing authorities if these cannot be corrected within 30 days. The lender must notify the Agency of this notification of adverse findings within 15 days.

**Include for franchises:**

The business will have a valid franchise agreement with \*\*\* as a condition of receiving a guarantee and will take all necessary steps to remain in good standing under the terms of its franchise agreement. A summary of the borrower's executed franchise agreement terms will be provided to the Agency. The borrower is to notify the lender of any violation of its franchise agreement that cannot be corrected within 30 days.

**Include the following for projects subject to an Affirmative Fair Housing Marketing Plan:**

An Affirmative Fair Housing Marketing Plan is required to be prepared and submitted to the Agency prior to issuance of the Loan Note Guarantee for this loan. In accordance with RD Instruction 1901-E, section 1901.203(c), the Agency requires an Affirmative Fair Housing Marketing Plan when a project involves the development of projects with five or more units, including nursing homes and assisted living facilities.

**Add if applicable:**

The final tenant list will be provided, with copies of the executed lease agreements, and matching income projections showing capacity to service the guaranteed loan debt.

## 21. ENVIRONMENTAL

The lender will take action to ensure that the continuing operations of the business and all construction associated with this credit facility are completed in accordance with applicable Federal, State, and local laws, regulations, and ordinances, with any adverse impact the project/operations may potentially have on the environment being identified and mitigated.

If the Phase I Environmental Site Assessment (ESA) that was completed in accordance with ASTM E1527-21 and included as part of the Agency's environmental review becomes more than 180 days old prior to loan closing, an updated Phase I ESA is required.

**Add the following if the Agency environmental assessment contains mitigation measures:**

The borrower will be required to comply with the following measures, identified in the Agency's environmental review process, to avoid or reduce adverse environmental impacts from this project's construction or operation as follows:

**(INSERT MITIGATION MEASURES HERE)**

**Add the following special environmental conditions, if applicable:**

- \* The lender is to provide evidence of approval by State and/or local environmental enforcement authorities of the completed clean-up and closure of the known environmental problems associated with the security property -- specifically, \*\*\*
- \* The lender is to provide evidence of approval by State and/or local environmental enforcement authorities of the remediation and/or monitoring plans on the known environmental problems associated with the security property -- specifically, \*\*\*
- \* The environmental indemnification agreement from \*\*\* will be reviewed by the lender's legal counsel and an opinion provided that it is both enforceable and transferable to the borrower and future owners (including the lender should they acquire the property).
- \* Documentation is to be provided from a qualified expert indicating that the security property's underground tanks meet all current and known future standards for underground fuel tanks and leak detection monitoring systems.

**Add the following only if the business is expected to handle hazardous materials:**

- \* Documentation that is required to be submitted to the State Department of Environmental Quality for hazardous material permit compliance is to be provided to the Agency.
- \* Indicate restrictions on storage of hazardous materials on the security property.

**Add the following if Section 106 has not been completed prior to loan approval:**

The Agency has applied the *Nationwide Programmatic Agreement among the U.S. Department of Agriculture Rural Development Programs, National Conference of State Historic Preservation Officers and The Advisory Council on historic Preservation for Sequencing Section 106 (NPA)* for this project **[Insert the reason we are applying the NPA]**.

The Agency has attached the *RD Staff NPA Certification Checklist* and *NPA Applicant Awareness Certification* forms to this agreement. These documents certify that the Agency and the applicant are aware of their roles and responsibilities under the NPA.

The Agency is aware that using the NPA conditionally concludes the Section 106 process. The disbursement of funds or construction may not begin until the Section 106 process has been completed and verified by the State Environmental Coordinator. The Agency reserves the right to de-obligate funding prior to or after award or construction if Section 106 compliance is not met.

## **22. INVERTER RESERVE ACCOUNT (include if applicable)**

On or prior to the date that is the \*\*\* anniversary of the loan closing date, the borrower shall establish an account with the lender to serve as an inverter reserve account and will pledge the same to lender as additional collateral for the loan. From year \*\* through year \*\* of the loan, the borrower will make an annual deposit into the Inverter Reserve Account in an amount acceptable to the lender and the Agency per year to pay for anticipated replacement or major repair costs (but not routine maintenance) of that portion of inverters expected to require replacement within the remaining term of the loan.

## **23. POWER PURCHASE AGREEMENT (include if applicable)**

The lender will obtain an executed copy of the Power Purchase Agreement(s) between the borrower and the power purchaser.

## **24. BUILD AMERICA, BUY AMERICA ACT (include if applicable following assessment of entity and project and consideration of current agency-wide public interest waivers, see Implementation Guide, Attachment A; does not apply to for-profit businesses)**

Lender must certify, at the time of Loan Note Guarantee execution, that their loan documents will require, and the lender will monitor the borrower's compliance with, the provisions of the Build America, Buy America Act (the "Act"). Pub. L. No. 117-58, §§ 70901-52, which was enacted on November 15, 2021.

### **I. Overview**

The Act requires that "none of the funds made available for a Federal financial assistance program for infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States." Borrowers/Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

- a. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- b. All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components

of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and

c. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

## **II. Definitions (as applied in this condition only)**

Build America, Buy America Act (BABAA) – Requirements instituted by the Bipartisan Infrastructure Law of 2021 mandating domestic preference that all iron and steel, manufactured products, and construction materials are produced in the United States.

Manufactured Product – Items assembled out of components, or otherwise made or processed from raw materials into finished products. Manufactured products must be manufactured (assembled) in the United States, and the cost of components that were mined, produced, or manufactured in the United States must be greater than 55 percent of the total cost of all components of the project.

Manufacturer’s Certification – Documentation provided by a Manufacturer, certifying that the items provided by Manufacturer meet the domestic preference requirements of BABAA.

## **III. Compliance**

The Borrower/Recipient must comply with the provisions of the Build America, Buy America Act (BABAA). Pub. L. No. 117-58, §§ 70901-52, which was enacted on November 15, 2022. By accepting these conditions, the borrower/recipient attests that they or their designee(s) will maintain documentation for BABAA provisions to indicate compliance. Minimum records include certifications from manufacturers, the architect/engineers, and the prime contractor. Supporting documentation includes purchasing records and notes and photos taken by the Resident Project Representative (RPR)/ Resident Inspector (RI).

## **IV. Evidence Standards**

Manufacturers

For each item to which BABAA applies (every item permanently installed on the project, except for aggregate and aggregate binding materials), a manufacturer’s certification letter or other document demonstrating compliance is required. It must, at a minimum, identify the item being certified (short written description as well as part number, if applicable) and affirm that the item complies with BABAA. This document must be signed by an authorized company representative. The manufacturer may submit a letter on letterhead or provide other evidence acceptable to the Agency.

### Architects and Engineers (A/E)

The need to comply with BABAA will be spelled out in agreements for A/E services, construction contracts, and procurement contracts. Generally, the A/E contract will include, as a basic service, obtaining and maintaining all BABAA documentation (particularly manufacturers' certifications) during construction, which shall be transferred to the borrower/recipient upon substantial completion of the project. The architect or engineer should certify in writing to the completeness and accuracy of the manufacturers' certifications.

### Resident project representative (RPR) / Resident inspector (RI)

As part of their duties, RPR/RI will be instructed to verify items delivered to the site and installed are accompanied by documentation of compliance with BABAA. They will photograph items as appropriate. RPR/RI daily logs and photographs will become part of the construction record and can be used as supporting information during audits, providing evidence for items that are buried or otherwise inaccessible.

### Contractors

The construction contract(s) will include a requirement to procure and install only items that comply with BABAA or are subject to a waiver approved by the Secretary of Agriculture or designee. The contractors are to provide manufacturers' certifications for all BABAA compliant items to the architect/engineer no later than with applications for payment. At substantial completion, the contractor will be required to certify that all items used on the contract complied with BABAA and that all manufacturers' certifications were provided to the architect/engineer.

## V. Obtaining Waivers under the BABA Act:

The Secretary of Agriculture or a designee may grant waivers to the procurement requirements under the following conditions:

- (1) *Nonavailability*. The Secretary or a delegate determines that the iron, steel or relevant manufactured goods or construction materials are not produced or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality.
- (2) *Unreasonable cost*. The Secretary of Agriculture or his delegate determines that the inclusion of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25%.
- (3) *Inconsistent with public interest*. The Secretary or his delegate determines that the application of these restrictions would be inconsistent with the public interest.

## VI. BABAA Waivers for RD:

A waiver of the domestic procurement requirement for a specific product in a specific infrastructure project may be obtained upon a satisfactory showing of evidence that the waiver is warranted by a borrower/recipient and a recommendation by the Agency. Waivers of the

procurement requirement are granted by the Secretary of Agriculture or by a designee of the Secretary. The requirements are posted publicly at the USDA OCFO website: [USDA Buy America Waivers for Federal Financial Assistance | USDA located at https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver](https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver)

Before submitting a request for waiver, borrower/recipient should determine whether they qualify for an Agency-wide public interest waiver that has already been approved by USDA. One such public interest waiver is referred to as the “*De Minimis*, Small Grants, and Minor Components” waiver, which has three parts. *De Minimis* is intended to prevent restrictions on the procurement of materials and products that represent a small portion of an infrastructure project, specifically no more than 5% of the project costs up to a maximum of \$1,000,000, from hindering the overall project. Small Grants exempts projects below the Federal Simplified Acquisition Threshold of \$250,000 (the grant section also applies to small loans and loan guarantees). The “Minor Components” provision of the waiver exempts miscellaneous components of iron and steel that make up no more than 5% of the total cost of an iron or steel product used in a project.

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1. Refer to RD BABAA Implementation Guidance – Attachment C: Instructions for Submitting Buy America, Build America Act Certifications
  2. Refer to RD BABAA Implementation Guidance – Attachment F: Build America, Buy America Act Sample Language for Inclusion into Contracts

## 25. CONSTRUCTION MONITORING

### **Use for LNG AFTER CONSTRUCTION:**

It is not the intention of the Agency to issue the Loan Note Guarantee for this loan until all construction has been completed, equipment has been purchased and installed, and the facility is certified as operational by the appropriate official. The lender must ensure the project facility is designed utilizing accepted architectural and engineering practices and conforms to applicable Federal, State, and local codes and requirements. The lender must ensure that the planned project will be completed within the available funds, and, once completed, will be suitable for the borrower’s needs and produce products in the quality and quantity proposed in the complete application approved by the Agency.

B&I Guaranteed Loans that involve the construction of or addition to commercial facilities that accommodate the public must comply with the Architectural Barriers Act Accessibility Standard.

For all construction contracts in excess of \$10,000, the contractor must comply with Executive Order 11246, entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 and supplemented by Department of Labor regulations 41 CFR, part 60. The borrower and lender are responsible for ensuring that the contractor complies with these requirements.

**Use for ENERGY PROJECTS LNG AFTER CONSTRUCTION:**

The Loan Note Guarantee will not be issued until the project is deemed operational. A third party, such as a power/utility company or consulting engineer, must certify that the project has been performing at a steady state operating level in accordance with the technical requirements, plans and specifications, conforms with applicable Federal, State, and local codes, and costs have not exceeded the amount approved by the lender and the Agency.

**Add the following only if construction work is performed by an affiliate of the borrower:**

Some of the construction work may be performed at least in part by an affiliate of the borrower. Such work will be performed at cost, and loan funds cannot be used as profit for any of the principals or affiliates. A copy of the contractor's cost breakdown should indicate no profit to an affiliated person or entity.

**Use for LNG PRIOR TO CONSTRUCTION:**

The lender must have a construction monitoring plan acceptable to the Agency and undertake the added responsibilities set forth in this paragraph. The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender must expeditiously report any problems in project development to the Agency.

- (a) Prior to disbursement of construction funds, the lender must have:
  - (i) The promissory note specifying the full term of the note and containing the terms and conditions of each draw period;
  - (ii) The borrower and lender have entered into a contract with an independent disbursement and monitoring firm with a construction monitoring plan acceptable to and approved by the Agency;
  - (iii) The borrower and lender have agreed to a detailed timetable for the project with a corresponding budget of costs setting forth the parties responsible for payment. The timetable and budget will be confirmed as adequate for the planned development by a qualified independent consultant (e.g., the project architect or engineer) with demonstrated experience relating to the project's industry.
  - (iv) The borrower has entered into a firm, fixed-price construction contract with an independent general contractor with costs outlined in detail and terms specifying change order approvals, the agreed retainage percentage, and the disbursement schedule;
  - (v) Evidence the lender has properly vetted the financial feasibility and past performance of the contractor to show it is able to complete the project or that the lender has mitigated risk in the event the project is never completed, such as requiring a 100-percent performance/payment bond on the borrower's contractor to be maintained until the contractor is released from its obligation. The bonding agent must be listed on Treasury Circular 570;
  - (vi) Evidence, which the Agency at its sole discretion determines is satisfactory, that the lender has completed the due diligence necessary to confirm that the

contractor is able to complete the project based on information including but not limited to the financial statements and past performance of the contractor;

(vii) When applicable, the borrower has entered into a contract with an independent technology development firm guaranteeing the following: Completion of the project with the necessary technology to successfully run the project and system performance for projects that utilize integrated processing equipment and systems, such as biorefineries, renewable energy systems, and chemical manufacturing plants. The credit underwriting of the independent technology development firm must be satisfactory to and approved by the Agency; and

(viii) Evidence, in form and substance satisfactory to the Agency, that there is sufficient contingency funding in place to handle unforeseen cost overruns without seeking additional guaranteed assistance.

- (b) Once construction begins, the lender is to:
- (i) Use any borrower funds in the project first;
  - (ii) Ensure that the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices. There is no absolute requirement that the goal be achieved by the use of a professional inspection. However, if after careful review, it appears that the use of a professional inspector is the only method that ensures that the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices, one may be required by the Agency. If one is required, inspections must be made by a qualified, independent inspector prior to any progress payment. If other less expensive or rigorous methods will achieve the same result, they may be utilized. The decision will be made on a case-by-case basis and be reasonable under the specific circumstances of the case;
  - (iii) Obtain lien waivers from all contractors and materialmen prior to any disbursement; and
  - (iv) Provide at least monthly, written reports to the Agency on fund disbursement and project status.
- (c) Once construction is completed, the lender is to provide the Agency with a copy of the Certificate of Occupancy or Notice of Completion or similar document issued by the relevant building jurisdiction.

## 26. LENDER'S CERTIFICATION

Prior to issuance of the Loan Note Guarantee, the lender will certify that all requirements of the Conditional Commitment have been met and will certify to each condition as stated in Section 5001.452(b)(8)(iii). These certifications are furnished on Attachment B to the Conditional Commitment.

## 27. LOAN CLOSING DOCUMENTATION

Coincident with, or immediately after, loan closing and prior to issuance of the guarantee, the lender will provide the Agency with the following in the request for issuance of the guarantee:

- a. The lender will prepare and deliver Form RD 5001-9, “Guaranteed Loan Closing Report,” for each loan to be guaranteed.
- b. The lender will pay the guarantee fee (**add, if applicable** and pre-construction fee) of **\$\*\*\*** (= **\$\*\*\*** x **\*\*%** x **\*%**).  
 The Agency encourages lenders to pay the guarantee fee electronically. If lender has not already established an account with the Agency, please furnish the routing and account number as soon as possible to ensure timely payment of the guarantee fee. The fee will be withdrawn from the account prior to issuance of the Loan Note Guarantee. If electronic payment is not successful, checks made payable to the U.S. Treasury should be submitted.
- c. An executed Form RD 5001-2, “Lender’s Agreement,” or RD 5001-2a, “Lender’s Agreement,” if one has not previously been executed.
- d. A copy of the executed Loan Agreement that contains any continuing loan conditions as set forth by the Agency in this Conditional Commitment.
- e. A copy of the executed Promissory Note(s).
- f. A copy of the executed Settlement Statement, which shows the specific use and disbursement of all loan funds for the project.
- g. Original, executed Forms RD 5001-5, “Unconditional Guarantee,” as required;
- h. A copy of the borrower’s balance sheet as of the date the loan was closed.
- i. Written lender certification in accordance with 7 CFR 5001.452(b)(8).

A Loan Note Guarantee may only be issued upon receipt of the Loan Closing Documentation items and the Agency’s satisfactory review for compliance with the Conditional Commitment and program requirements.

## 28. ACCESS TO PROJECT AND LENDERS RECORDS

Agency personnel and any person(s) accompanying Agency personnel shall be authorized to enter upon the premises and into any building thereon, whether permanent or temporary, jointly or separately, with personnel of the lender to carry out the functions involving its interests. Scheduled inspections may be conducted by these personnel to determine the effectiveness of the loan program.

Upon request by the Agency, the lender will permit representatives of the Agency to inspect and make copies of any of the records of the lender pertaining to the guaranteed loans. Such inspection and copying may be made during regular office hours of the lender or at any other time agree upon by the lender and the Agency.

The lender will always retain responsibility for servicing the entire loan and for notifying the Agency of any violations of the terms of the Loan Agreement or Conditional Commitment.

## 29. LENDER AND BORROWER CERTIFICATION

**LENDER NAME** (lender) certifies by accepting this Conditional Commitment for a guarantee of its **§\*\*\*** loan to the borrower that the lender understands that no adverse change may occur during the period of time from Agency issuance of the Conditional Commitment to issuance of the Loan Note Guarantee relating to **BORROWERNAME** (borrower) regardless of the cause or causes of the change and whether the change or cause(s) of the change were within the lender's or borrower's control. Prior to each disbursement, lender shall be in receipt of satisfactory evidence that there has been no unremedied adverse change in the financial or any other condition of the borrower since the date of the application or since any preceding disbursements that would warrant withholding or not making further disbursements. The lender will immediately notify the Agency of any material adverse change in the project or the borrower's financial condition.

By accepting Form RD 5001-3, "Conditional Commitment," and this attachment, **BORROWERNAME** certifies that it is not delinquent on any Federal debt, including tax debt.

By signing this Conditional Commitment, the lender and borrower certify that they understand and accept the conditions outlined herein. No provision stated herein shall be amended or waived without the prior written consent of the lender and the Agency. Any loans or advances made to the borrower by the lender after issuance of the Loan Note Guarantee will not be covered by the guarantee, except authorized protective advances. Regulations contained in 7 CFR 5001 and Form RD 5001-2, "Lender's Agreement," or RD 5001-2a, "Lender's Agreement," will apply.

Any request for an extension of the expiration date of this Conditional Commitment must be made in writing and received by the Agency prior to the expiration date. This request must be accompanied by a full explanation as to why the extension is needed.

**Attachment B to Form RD 5001-3, "Conditional Commitment"  
Loan Note Guarantee Certifications**

Prior to issuance of the Loan Note Guarantee, the lender will certify to the following conditions as outlined in 7 CFR 5001.452(b)(8)(iii). This certification, on lender letterhead, is intended to meet the requirements of 7 CFR 5001.452(b)(8)(iii) as it relates to a loan between the lender and borrower listed below.

**REQUEST FOR LOAN NOTE GUARANTEE AND LENDER CERTIFICATION**

<b>USDA RURAL DEVELOPMENT</b>		<b>DATE OF PROMISSORY NOTE:</b>
<b>Type of Loan: REAP   B&amp;I   CF   WWD</b>	<b>Amount of Loan:</b>	<b>State:</b>
<b>Name and Address of Borrower:</b>	<b>Name of Lender:</b>	

**LENDER CERTIFICATIONS**

The undersigned lender hereby requests issuance of a Loan Note Guarantee in the subject case.

**LENDERNAME** hereby certifies:

- A. All requirements of the Conditional Commitment have been met.
- B. The financial criteria specified in § 5001.303(b)(4) of the OneRD Guaranteed Loans regulation and any financial criteria contained in the Conditional Commitment were:
  - (1) Determined in accordance with any applicable requirements in § 5001.9, and
  - (2) Have been maintained through the issuance of the Loan Note Guarantee. Failure to maintain or attain the minimum financial criteria will result in the Agency not issuing a Loan Note Guarantee.
- C. No major changes have been made in the applicant, project or lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency.
- D. There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower during the period of time from the Agency's issuance of

the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control.

- (1) The borrower is a legal entity in good standing with its regulator (as applicable) and is operating in accordance with the laws of the State(s) or Tribe where the borrower was organized or has a place of business.
- (2) The borrower meets the eligibility requirements as outlined in § 5001.126(a) through (e), as applicable.

E. There is a reasonable prospect that the guaranteed loan and other project debt will be repaid on time and in full (including interest) from project cash flow according to the terms proposed in the application.

F. The guaranteed loan has been properly closed, the required security instruments have been properly executed, and all security interests obtained by the lender have been or will be properly perfected in accordance with applicable law.

G. All planned property acquisition has been or will be completed; all development has been or will be substantially completed in accordance with plans and specifications and conforms to applicable Federal, State, and local codes; all equipment required for the project is available, can be procured and delivered within the project development schedule and will be installed in conformance with manufacturer's specifications and design requirements; and costs have not exceeded the amount approved by the lender and the Agency.

H. The proposed project complies with all current Federal, State, and local laws and regulatory rules that affect the project, the borrower, and the lender activities, including, but not limited to, equal opportunity and Fair Housing Act requirements and design and construction requirements.

I. Lender-required insurances are in effect.

J. All truth-in-lending and equal credit opportunity requirements have been met.

K. The borrower has marketable title to the collateral then owned by the borrower, subject to the rights of the guaranteed loan and to any other exceptions approved in writing by the Agency.

L. Where required, necessary or prudent, the borrower has obtained:

- (1) A legal opinion relative to the title and accessibility to any rights-of-way and easements; and
- (2) A title opinion or title insurance showing the borrower has good and marketable title to the real property and other collateral and fully addressing all existing mortgages or other lien defects, restrictions or encumbrances. In those cases where there is adequate gap coverage, a title commitment may be acceptable.

M. All project funds have been or will be disbursed for purposes and in amounts consistent with the

Conditional Commitment (or Agency-approved amendment thereof) and the application submitted to the Agency. Appropriate lender controls were used to ensure that all funds were properly disbursed, including funds for working capital. A copy of the executed settlement statement by the lender detailing the use of loan and matching/equity funds is attached to support this certification.

N. When applicable, the entire amount of the loan for working capital or initial operating expenses have been disbursed to the borrower, except in cases where the Agency has approved disbursement over an extended period of time and funds are escrowed so that the settlement statement reflects the full amount to be disbursed.

O. When required, personal and/or corporate guarantees have been obtained in accordance with § 5001.204 of the OneRD Guaranteed Loans regulation.

P. Lien priorities are consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, materialmen, or other parties have been filed against the collateral, and no suits are pending or threatened that would adversely affect the collateral.

Q. Neither the lender nor any of the lender's officers has an ownership interest in the borrower or is an officer or director of the borrower, and neither the borrower nor its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the lender.

R. The loan agreement includes all borrower compliance measures identified in the Agency's environmental review for avoiding or reducing adverse environmental impacts of the project's construction or operation.

S. The lender will comply with the requirements of the Debt Collection Improvement Act.

T. The lender has executed and delivered the Lender's Agreement, completed registration in the Agency's electronic reporting system, and electronically submitted the guaranteed closing report for the guaranteed loan along with the appropriate guarantee fee.

(U) For all RES and EEI projects, the lender must provide certification that the project has been performing *or will perform* at a steady state operating level in accordance with the technical requirements, plans, and specifications. Any modification to the 30-day steady state operating level requirement will be based on the Agency's review of the technical report or vendor certification and will be incorporated into the conditional commitment.

V. For B&I, the capital/equity requirement set forth in the Conditional Commitment was met, as evidenced by a balance sheet as of the date the guaranteed loan was closed, giving effect to the entirety of the loan in the calculation whether or not the loan itself is fully advanced. A copy of the borrower's loan closing balance sheet must be included with the lender's certification.

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Lender Representative

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Title

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Date