

## DOCKETED

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<b>Project Title:</b>	Hydrogen Energy Center Application for Certification Amendment
<b>TN #:</b>	204739
<b>Document Title:</b>	Declaration of James L. Croyle in Support of Applicant's Response to the Motion to Terminate
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6 Energy Resources Conservation and Development Commission

7  
8 In the Matter of:

Docket No. 08-AFC-8A

9 REVISED APPLICATION FOR  
CERTIFICATION  
10 FOR THE HYDROGEN ENERGY  
CALIFORNIA PROJECT

DECLARATION OF JIM CROYLE IN  
SUPPORT OF APPLICANT'S RESPONSE TO  
THE MOTION TO TERMINATE

11  
12 I, Jim Croyle, declare as follows:

13 1. I am the Chief Executive Officer of SCS Energy LLC, the parent company  
14 of Hydrogen Energy California, LLC ("HECA" or "Applicant") owner of the Hydrogen Energy  
15 California Project ("Project"). I am duly authorized to make this Declaration. Except where  
16 stated on information and belief, the facts set forth herein are true of my own personal  
17 knowledge and the opinions set forth herein are true and correct articulations of my opinions  
18 regarding the Project. If called as a witness, I could and would testify competently to the  
19 opinions set forth herein.

20 2. This Declaration has been prepared as evidentiary support of the  
21 "Applicant's Response to Motion to Terminate AFC," docketed on March 18, 2015 (TN#  
22 203915).

23 3. This Declaration describes the persistent, sustained activities Applicant  
24 has taken in pursuit of the Application for Certification ("AFC") with the California Energy  
25 Commission ("CEC") since the last CEC-sponsored public workshop on the Project, which was  
26 held on November 20, 2013 regarding the Preliminary Staff Assessment/Draft Environmental  
27 Impact Statement.

1           4.     Although many Project-related activities that have occurred over the past  
2 18 months have not directly involved the CEC staff or Committee, the activities nonetheless  
3 have been directly in pursuit of the AFC, with a particularized emphasis on identifying an  
4 agreement with a CO2 off-taker. As the element most necessary to advance review of the AFC,  
5 activities to secure a CO2 off-take agreement are clearly activities in pursuit of the AFC whether  
6 or not they involved directly the staff or Committee. As detailed below, HECA has engaged in  
7 frequent and sustained actions intended to produce a CO2 off-take agreement and advance  
8 review of the AFC. A month-by-month summary of those actions from November 2013 is set  
9 forth below.

10                   **November 2013**

11           5.     HECA received indications from Occidental of Elk Hills (Oxy) that it  
12 wished to change the terms of the agreement with HECA for CO2 off-take.

13           6.     HECA worked to understand the details of Oxy's proposed changes.

14           7.     HECA reinitiated activity to identify alternative CO2 off-takers. Other oil  
15 fields exist within 10-15 miles of the Project site, including some with which HECA had  
16 engaged in prior discussions regarding CO2 off-take.

17           8.     HECA met with C12 Energy, LLC, a Denver-based company that  
18 specializes in enhanced oil recovery (EOR) and CO2 storage, to strategize regarding alternative  
19 local oil fields. HECA signed a confidentiality agreement with C12 Energy.

20           9.     In mid- to late-November 2013, HECA received word from Oxy that it  
21 was prepared to re-enter discussions regarding a CO2 off-take agreement and identification of  
22 specific commercial terms to be addressed.

23           10.    HECA continued to explore options for a revised deal, which might  
24 include Oxy, Oxy and C12 (or others), or potentially an EOR project with sequestration to  
25 follow.

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**December 2013**

11. Oxy informed HECA that it was engaging a new enthusiastic team with the goal of finalizing an agreement for CO2 off-take. Oxy stated that it wanted the deal to move forward.

12. HECA and Oxy met to discuss next steps to move forward toward a final agreement.

**January 2014**

13. HECA met with Oxy in mid-January 2014. Oxy reiterated that it wanted to consummate a deal and laid out the issues that needed to be resolved from its perspective, which included concerns regarding supply interruption if HECA went off-line, and the desire to have flexibility about where best to use the CO2 within Elk Hills and perhaps elsewhere over time. Oxy sought HECA’s support in working with regulators to allow for this operational flexibility. Other business terms, including damages provisions, were discussed.

14. Toward the end of January, HECA and Oxy had a call to discuss next steps and the requirements needed by the end of the first quarter of 2014 in order to satisfy U.S. Department of Energy (“U.S. DOE”) milestones.

**February 2014**

15. Oxy announced its plans to separate its California assets, including the Elk Hills Oil Field, into a separate company to be known as California Resources Corporation (“CRC”).

16. HECA engaged in efforts to identify the appropriate decision-makers in the yet-to-be-formed CRC who would have responsibility for Elk Hills Oil Field and HECA.

17. Oxy announced that separation would not be complete, and the CRC management team would not be in place, until late 2014 or early 2015.

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**March 2014**

18. HECA was informed by Oxy that divestment activities were stalling the ability to engage in negotiations on the off-take agreement, but that the belief remained that a CO2 contract was needed with HECA.

19. HECA met with Oxy. Oxy confirmed that CO2 at Elk Hills was something they still wanted, but that it could be as late as the third quarter 2014 before an agreement could be reached in light of the ongoing activity related to the divestiture.

**April 2014**

20. HECA met with Oxy on April 25, 2014.

21. Oxy reiterated the value of CO2 for the Elk Hills Oil Field and confirmed that it was interested in acquiring CO2 from HECA. Oxy stated that it was close to having the CRC management team in place and would then be in a position to re-engage in negotiations regarding a CO2 off-take agreement.

22. HECA reiterated with Oxy that the CO2 off-take agreement was the driver regarding permitting and the overall Project schedule to close. Oxy stated that it understood the need to reinitiate the CEC process.

**May 2014**

23. HECA met with Oxy on May 27, 2014.

24. Oxy informed HECA that the majority of the CRC management team was in place and had been given direction to resume discussions with HECA.

25. Outstanding commercial issues were discussed.

26. Oxy reiterated its understanding that the CO2 off-take agreement was the critical path item for the permitting schedule and the need to move the CEC process forward. Oxy stated that the schedule was also important to Oxy given its desire for the CO2.

**June 2014**

27. HECA continued to have meetings and discussions with Oxy regarding a path forward.

1                   28.     In early June 2014, Oxy provided HECA with a schematic laying out a  
2 path forward to construction, including necessary resources, CEC past and present data needs,  
3 and the development contract.

4                   29.     Continued changes proposed by CRC management caused further delays  
5 in negotiations due to the project manager position being in flux.

6                   **July 2014**

7                   30.     HECA was introduced to the new CRC Project Manager, Shawn Kerns,  
8 who was taking over the Project-related management activities from Ivan Gaydarov. Mr.  
9 Gaydarov was to remain at CRC and was committed to staying involved with the project.

10                  31.     Discussions with CRC indicated an ability to move forward in the 3rd to  
11 4th quarter timeframe.

12                  **August 2014**

13                  32.     On August 1, 2014, I had an extensive discussion with Shawn Kerns about  
14 HECA. The outcome of the meeting was confirmation of the path forward developed in June  
15 2014. Mr. Kerns requested additional project materials so he could quickly get up to speed on  
16 the Project status and move quickly once the spinoff from Oxy was completed in the near future.  
17 Mr. Kerns noted that with transition activities, internal resources were limited, and he requested  
18 assistance from HECA to bridge this gap, which HECA agreed to provide.

19                  33.     Additional discussions with CRC indicated that they were on schedule to  
20 complete the CRC spinoff from Oxy in the 3rd to 4th quarter timeframe, as previously  
21 announced.

22                  34.     I had extensive additional discussions with Mr. Kerns to get him up to  
23 speed on the current status of the Project and the changes that were made since SCS acquired the  
24 Project from BP/Rio Tinto in 2011. Mr. Kerns and I spoke about the schedule and path forward  
25 originally provided to HECA in June, and agreed that, in general terms, the schedule and plan  
26 made sense for both parties and was achievable.

27                  35.     Todd Stevens, CEO of CRC, met with Julio Friedman of the U.S. DOE in  
28 late August regarding HECA and CRC's role in the Project. Tom Dennis, consultant to HECA,

1 reported that Dr. Friedmann communicated to him that Mr. Stevens indicated he was positive  
2 about doing business with HECA. Previously, on July 15, 2014, California labor leaders who had  
3 been negotiating a labor agreement with CRC, reported to me that Mr. Stevens mentioned having  
4 a “partnership” with HECA.

5 **September 2014**

6 36. A revised and updated Letter of Intent, reflecting recent discussions  
7 between HECA and CRC, was prepared and provided to CRC and the U.S. DOE.

8 **October 2014**

9 37. I had numerous discussions with CRC regarding timing and priorities for  
10 negotiations with Oxy/CRC during their ongoing transition period to define a workable CO2 off-  
11 take agreement.

12 38. Due to the schedule of financing related to the CRC divestiture, CRC and  
13 HECA agreed to re-engage when the CRC team returned from their equity/debt meetings in  
14 Europe in November.

15 **November 2014**

16 39. HECA held numerous discussions with CRC to discuss timing and  
17 priorities for negotiations. However, CRC was still focusing on their internal issues rather than  
18 HECA.

19 **December 2014**

20 40. With CRC continuing to focus on internal issues, HECA focused again on  
21 alternative plans for use and/or storage of CO2 that could be used as a primary plan or backup  
22 plan for CO2 output. HECA still believed that CRC would become an off-taker of CO2 at some  
23 point, but it followed up on leads for alternative use and storage.

24 41. HECA commenced communication with Lawrence Berkeley National  
25 Laboratories (LBNL) regarding potential storage opportunities for HECA’s CO2. LBNL has  
26 conducted extensive work, including geological studies and reports, regarding the storage  
27 potential for CO2 in the San Joaquin Valley.

28

1           42.    HECA had initial conversations with a potential alternative off-taker for  
2 CO2 for EOR. The oil field is in close proximity to the Project site plant and even follows the  
3 current pipeline route for the first few miles. Initial discussions are positive with plans to  
4 continue discussions.

5           43.    While HECA continued to communicate with CRC on timing and  
6 priorities for negotiation, it worked in parallel on alternate plans for use and/or storage of CO2.

7           44.    HECA evaluated one of four possible alternative injection sites for either  
8 CO2 geologic sequestration via Class VI wells and/or EOR injection.

9           45.    HECA and LBNL have been communicating regarding its assistance to  
10 HECA. LBNL has communicated that there has been extensive technical work on various sites  
11 in the San Joaquin Valley that indicate sufficient capacity and geologic structure for HECA's  
12 volume of CO2. LBNL also communicated they were interested in working with HECA  
13 regarding CO2 sequestration options.

14                   **January 2015**

15           46.    HECA continued discussions with a potential off-taker for CO2 for EOR.

16           47.    HECA submitted a proposal to the U.S. DOE to pursue possible injection  
17 sites for either CO2 geologic sequestration via Class VI wells and/or EOR injection. In the  
18 proposal HECA presented the potential injection sites based on technical work in the San  
19 Joaquin Valley, which indicated sufficient capacity to store the proposed volume of CO2.

20           48.    HECA and LBNL had follow-up communication regarding CO2  
21 sequestration options.

22                   **February - March 2015**

23           49.    HECA continued discussions with a potential off-taker for CO2 for EOR.

24           50.    HECA and LBNL had follow-up communication regarding CO2  
25 sequestration options.

26                   **Tax Credits**

27           51.    In addition to the foregoing, on April 28, 2015, the Internal Revenue  
28 Service approved HECA's request for a tax credit allocation under Section 48A of the Internal

1 Revenue Code (see **Attachment A**). Specifically, the IRS allocated \$294,780,000 of Section  
2 48A tax credit to the Project as a qualifying advanced coal project. This determination by the  
3 IRS provides an example of the ongoing viability of the Project despite the delays caused by the  
4 Oxy/CRC CO2 offtake agreement.

### 5 **Conclusion**

6 52. Overall, the preceding month-by-month summary of activity demonstrates  
7 that HECA has diligently pursued a CO2 off-take agreement as a necessary element in advancing  
8 the CEC's review of the AFC.

9 53. Until the end of 2014, HECA had a reasonable expectation that it could  
10 consummate an off-take agreement with Oxy/CRC. Oxy/CRC provided repeated assurances that  
11 it was interested in pursuing a CO2 off-take agreement with HECA. These assurances were  
12 provided not only to HECA but to the U.S. DOE and came from senior level executives at  
13 Oxy/CRC. Therefore, HECA reasonably believed, and continues to believe, that these  
14 representations were made in good faith, and that Oxy/CRC was and continues to be interested in  
15 CO2 from HECA. Unfortunately, events completely unrelated to HECA, and completely outside  
16 the control of HECA, have prevented sufficient resources from being devoted to consummating  
17 what is admittedly a complex transaction. Given the resources that have been devoted to  
18 negotiations with Oxy/CRC and evaluation of the Elk Hills Oil Field, HECA was understandably  
19 hesitant to move to alternative off-takers. Thus, HECA's actions in pursuit of an off-take  
20 agreement with Oxy/CRC were persistent, sustained and reasonably expected to achieve the  
21 desired result.

22 54. When it became apparent that CRC was not able to devote sufficient  
23 resources and attention to completing negotiation of a CO2 off-take agreement by the end of  
24 2014 as it had projected, HECA continued to accelerate its efforts to identify and enter into  
25 discussions with alternative CO2 off-takers. HECA enlisted the assistance of the West Coast  
26 Regional Carbon Sequestration Partnership (WESTCARB) and LBNL based on their extensive  
27 experience evaluating potential carbon storage locations in the vicinity of the Project. The initial  
28 results of these efforts have been positive. LBNL has expressed interest in the Project and

1 reports that its technical work to date in the San Joaquin Valley indicates that formations in  
2 proximity to the HECA site have sufficient capacity to store the proposed volume of CO2.  
3 Because some of the alternatives may involve sequestration only and not include enhanced oil  
4 recovery, HECA also re-evaluated and made adjustments to the Project's economic model to  
5 ensure that revenues associated with CO2 sale for EOR are not necessary for the Project to be  
6 economically viable.

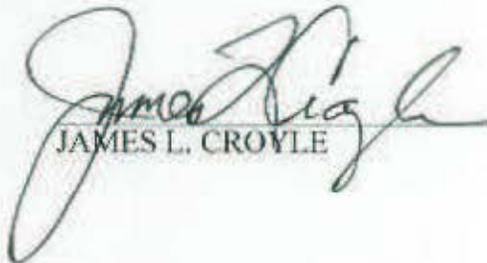
7           55. The inability to finalize an agreement with Oxy/CRC has been a setback  
8 for the Project. Oxy has been an informal partner in the Project since the decision to relocate the  
9 Project to Kern County, and the Project site was chosen in part due to its proximity to the Elk  
10 Hills Oil Field. HECA has invested tremendous resources in negotiating a formal agreement  
11 with Oxy, and then CRC, and also delayed approaching other CO2 off-takers for some time  
12 based on the reasonable expectation that an agreement could be reached with CRC. For reasons  
13 completely outside the control of HECA, that did not occur. However, the absence of a contract  
14 with CRC is neither an indication of a lack of due diligence on the part of HECA, nor a fatal  
15 blow to the Project.

16           56. In addition, the Section 48A tax credit allocation by the IRS on April 28,  
17 2015 provides an example of the ongoing viability of the Project.

18           57. In sum, HECA has undertaken an aggressive course of action to obtain a  
19 CO2 off-take agreement for the Project and thereby advance the AFC proceedings.

20           Executed on May 27, 2015, at the location of Concord, Massachusetts.

21           I declare under penalty of perjury of the laws of the State of California that the  
22 foregoing is true and correct to the best of my knowledge.

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25             
26           JAMES L. CROYLE  
27  
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# **ATTACHMENT A**



LARGE BUSINESS AND  
INTERNATIONAL DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, DC 20224

APR 28 2015

Mr. James L. Croyle  
Chief Executive Officer  
SCS Energy California, LLC  
30 Monument Square, Suite 215  
Concord, MA 01742

Dear Mr. Croyle:

This letter responds to the application submitted by SCS Energy California LLC, TIN 45-3012966, on March 31, 2015, requesting allocation of a tax credit under section 48A of the Internal Revenue Code to construct its Hydrogen Energy California qualifying advanced coal project in Kern County, California ("Project").

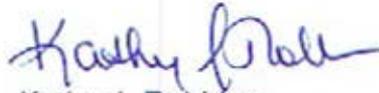
Based on the information supplied in the application by SCS Energy California LLC for the Project, we have accepted that application and have allocated \$294,780,000 of section 48A credit to the Project.

As the taxpayer receiving the credit, SCS Energy California LLC, must provide an executed copy of the agreement referenced in section 3.09 of Notice 2015-14, 2015-10 I.R.B. 722, to the Internal Revenue Service by May 29, 2015. A printed template of the required Agreement is enclosed. Please do not alter the enclosed template except for inserting the specific information indicated in brackets. We will not accept an Agreement with altered terms. Send two signed originals of the Agreement to:

Internal Revenue Service  
Industry Director, Natural Resources and Construction  
Attn: Executive Assistant (Technical)  
1919 Smith Street, floor 23  
Mail Stop 1000-HOU  
Houston, TX 77002

If you have any questions, please contact me or a member of your staff may contact Marc Bernabo, Project Manager, at (713) 209-3958.

Sincerely,



Kathy J. Robbins  
Industry Director  
Natural Resources and Construction

Enclosure

## AGREEMENT

[Insert taxpayer's name, address, and identifying number] ("Taxpayer") and the Commissioner of Internal Revenue ("Commissioner") make the following Agreement:

### WHEREAS:

1. On or before April 1, 2015, Taxpayer submitted to the Internal Revenue Service ("Service"), an application for certification under Round 2 of the § 48A Phase III program described in Notice 2015-14 ("Application for § 48A Certification").

2. Taxpayer's Application for § 48A Certification in Round 2 is for the project described below (the "Project"):

(a) The Project will use an advanced coal-based generation technology (as defined in § 48A(c)(2) and (f)).

(b) The Project will be located at [insert address or other identifying designation].

(c) The Project site in subsection (b) above may be changed only if the change is consistent with the objectives of the qualifying advanced coal project program, is requested by the taxpayer that received the credit allocation, and involves moving the Project site to improve the potential to capture and sequester CO<sub>2</sub> emissions, reduce costs of transporting feedstock, and serve a broader customer base. The Service will not agree to a project site change if the dollar amount of tax credits allocated to the taxpayer under § 48A would increase as a result of the site change or if the Project would not have been originally certified had such modification been included in the taxpayer's application.

(d) The Project is [insert either: "a new electric generation unit (as defined in § 48A(c)(6))"; "a retrofit of an existing electric generation unit (as defined in § 48A(c)(6))"; or "a repower of an existing electric generation unit (as defined in § 48A(c)(6))."]

(e) The Project will have a total nameplate generating capacity (as defined in section 3.02 of Notice 2012-51) of at least [insert number] megawatts.

(f) At all times at least 75 percent of the cumulative total fuel input (as defined in section 3.03(1) of Notice 2012-51) used during normal plant operations (as defined in section 3.03(2) of Notice 2012-51) for the Project will be coal (as defined in section 3.01 of Notice 2012-51).

3. On [insert date of acceptance letter issued under Notice 2015-14], the Service accepted Taxpayer's Application for § 48A Certification for the Project and allocated qualifying advanced coal project credit under § 48A in the amount of \$[insert number] to the Project.

4. Taxpayer understands that if Taxpayer fails to satisfy any of the certification requirements in § 48A(e)(2) within the time specified in § 48A(d)(2)(D) (2 years from the date specified in WHEREAS clause #3), or if the Service does not issue a certification for the Project under Notice 2015–14, the § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 is fully forfeited.

5. Taxpayer understands that if the Project fails to attain or maintain the separation and sequestration of CO<sub>2</sub> emissions required by § 48A(e)(1)(G), the § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 will be recaptured pursuant to § 50.

6. Taxpayer understands that if the Project is not placed in service by Taxpayer within 5 years of the date of issuance of the certification as determined under section 6.03 of Notice 2012–51, the § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 is fully forfeited. Taxpayer must provide evidence to the Service that the Project has been timely placed in service.

7. Taxpayer understands that if the plans for the Project change in any significant respect from the plans set forth in the application for DOE certification (as defined in section 5.02 of Notice 2012–51) and the Application for § 48A Certification (as defined in section 5.03 of Notice 2012–51) and, under section 7.01 of Notice 2012–51, the acceptance of Taxpayer’s Application for § 48A Certification on the date specified in WHEREAS clause #3 is void, the § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 is fully forfeited.

8. Taxpayer understands that if the Project fails to satisfy any of the requirements in § 48A(e)(1)(A), (C), (D), (E), and (F) for a qualifying advanced coal project or, during normal plant operations (as defined in section 3.03(2) of Notice 2012–51), fails to satisfy the requirement in § 48A(e)(1)(B) for a qualifying advanced coal project—

(a) at the time the Project is placed in service, § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 is fully forfeited; and

(b) after the Project is placed in service (and after satisfying all such requirements at the time the Project is placed in service), the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

9. Taxpayer understands that if at any time more than 25 percent of the cumulative total fuel input (as defined in section 3.03(1) of Notice 2012–51) used during normal plant operations (as defined in section 3.03(2) of Notice 2012–51) is not coal (as defined in section 3.01 of Notice 2012–51), the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

10. Taxpayer cannot claim the qualifying gasification project credit under § 48B for any qualified investment for which the qualifying advanced coal project credit is allowed under §48A.

11. Taxpayer understands that if Taxpayer elects to claim the qualifying advanced coal project credit on the qualified progress expenditures paid or incurred by Taxpayer during the taxable year(s) during which the Project is under construction and the Project ceases to be a qualifying advanced coal project (whether before, at the time, or after the Project is placed in service), rules similar to the recapture rules in § 50(a)(2)(A) through (D) apply.

12. This Agreement applies only to Taxpayer. Taxpayer must notify the Service within 90 days of the acquisition of the Project by any other person (a successor in interest). A successor in interest that plans to claim the § 48A credit allocated to the Project must request permission to execute a new agreement with the Service.

If the request is granted, the new agreement must be executed no later than the due date (including extensions) of the successor in interest's Federal income tax return for the taxable year in which the transfer occurs. If the interest is acquired at or before the time the Project is placed in service and the successor in interest fails to execute a new agreement, the § 48A Phase III credit in the amount specified in WHEREAS clause #3 allocated to the Project in Round 2 is fully forfeited. If the interest is acquired after the time the Project is placed in service and the successor in interest fails to execute a new agreement, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

**NOW IT IS HEREBY DETERMINED AND AGREED FOR FEDERAL INCOME TAX PURPOSES THAT:**

1. The total amount of the § 48A Phase III credit that Taxpayer will claim for the Project under this Agreement on account of the acceptance of Taxpayer's Application for § 48A Certification in Round 2 cannot exceed the amount specified in WHEREAS clause #3.

2. This Agreement does not express whether the Taxpayer has met the certification requirements under § 48A(e)(2) or other future requirements to receive tax credits under § 48A.

3. This Agreement is limited and applies only to Taxpayer. A successor in interest that plans to claim the § 48A credit allocated to the Project must request permission to execute a new agreement with the Service.

**THIS AGREEMENT IS FINAL AND CONCLUSIVE EXCEPT:**

1. The matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of a material fact;

2. It is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exception for § 7122) notwithstanding any law or rule of law; and

3. If it relates to a tax period ending after the date of this Agreement, it is subject to any law enacted after such date, which applies to the tax period.

By signing, the parties certify that they have read and agreed to the terms of this Agreement.

**Taxpayer: [insert name and identifying number]**

**By:** \_\_\_\_\_ **Date Signed:** \_\_\_\_\_

[insert name]

**Title:** [insert title]

[insert taxpayer's name]

**Commissioner of Internal Revenue**

**By:** \_\_\_\_\_ **Date Signed:** \_\_\_\_\_

Kathy J. Robbins

**Title:** Industry Director, Natural Resources & Construction