

**DEPARTMENT OF AGRICULTURE****Commodity Credit Corporation****7 CFR Part 1450**

RIN 0560-AH92

**Biomass Crop Assistance Program****AGENCY:** Commodity Credit Corporation and Farm Service Agency, USDA.**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Credit Corporation (CCC) proposes regulations to implement the new Biomass Crop Assistance Program (BCAP) authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). BCAP is intended to assist agricultural and forest land owners and operators with the establishment and production of eligible crops including woody biomass in selected project areas for conversion to bioenergy, and the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. This rule specifies the requirements for eligible participants, biomass conversion facilities, and biomass crops and materials. It also provides notice of final termination of the existing Notice of Funds Availability.

**DATES:** We will consider comments that we receive by April 9, 2010.

**ADDRESSES:** We invite you to submit comments on this proposed rule. In your comment, include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *E-Mail:* [cepdmil@wdc.usda.gov](mailto:cepdmil@wdc.usda.gov).
- *Fax:* 202-720-4619.
- *Mail:* Director of CEPD, USDA FSA CEPD, Stop 0513, 1400 Independence Ave., SW., Washington, DC 20250-0513.
- *Hand Delivery or Courier:* Deliver comments to Director of CEPD, Room 4709-S, 1400 Independence Ave., SW., Washington, DC.
- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Comments may be inspected at the mail address listed above between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this rule is available through the Farm Service Agency (FSA) home page at <http://www.fsa.usda.gov/>.

**FOR FURTHER INFORMATION CONTACT:**

Robert Stephenson at USDA, FSA, CEPD, STOP 0513, 1400 Independence Ave., SW., Washington, DC 20250-0513; telephone 202-720-6221; e-mail:

[cepdmil@wdc.usda.gov](mailto:cepdmil@wdc.usda.gov). Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at 202-720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:****Background**

Section 9001 of the 2008 Farm Bill authorizes the Biomass Crop Assistance Program (BCAP) to assist agricultural and forest land owners and operators with the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility and to support the establishment and production of eligible crops for conversion to bioenergy in selected project areas. The 2008 Farm Bill also authorizes such sums as are necessary to carry out BCAP.

On May 5, 2009, the President issued a Presidential directive establishing a Biofuels Interagency Working Group (chaired by the Secretaries of Agriculture and Energy and the Administrator of the Environmental Protection Agency). Among other programmatic specific goals, the Presidential directive laid the groundwork for a policy development process that would aggressively accelerate the development of advanced biofuels (published in the **Federal Register** on May 7, 2009 (74 FR 21531-21532)). One aspect of the larger effort outlined in the memorandum is the issuance of guidance and support related to the collection, harvest, storage, and transportation of eligible materials for use in biomass conversion facilities—a component of the BCAP.

On June 11, 2009 (74 FR 27767-27772), we published in the **Federal Register** a BCAP notice of funds availability (NOFA) for the collection, harvest, storage, and transportation of materials (CHST). This proposed rule terminates the NOFA effective on the date the proposed rule is on public display at the Office of the Federal Register. On that date, USDA will notify the public that the NOFA is terminated and that FSA will no longer accept applications for matching payments under the NOFA.

We also held a series of public meetings, as described in a different notice published on May 13, 2009 (74 FR 22510-22511), to collect public input needed to prepare an environmental impact statement (EIS) for BCAP. As outlined in the NOFA, comments from the public meetings, other public comments previously submitted in response to the NOFA, the full EIS and all comments and lessons learned from the three BCAP notices

will be incorporated into the rulemaking for the entire BCAP program, which will include CHST. As such, this proposed rule covers the whole BCAP program, including both the provisions that provide matching payments for collection, harvest, storage, and transportation of materials and the provisions that provide payment for the establishment and production of biomass crops in selected project areas. It reflects comments received on the NOFA. CCC believes that the full BCAP should be viewed in a broader policy context which promotes the Administration's priorities for increasing the production of advanced biofuels, renewable energy and biobased products. Within this context, this proposed rule, which would implement the full BCAP, terminates the NOFA and makes necessary changes to the program in a manner that is consistent with the 2008 Farm Bill and encourages the development of bioenergy, including advanced biofuels, renewable energy, and biobased products.

As defined in this rule, "advanced biofuel" means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass and other fuel derived from cellulosic biomass.

**Discussion of Comments on NOFA**

Forty-seven comments were received in response to the NOFA. Commenters included a Tribe, State government agencies, an Embassy, individuals, non-profits, corporations, small businesses, entrepreneurs, public interest groups, Federal agencies and departments, academics, trade and industry associations, and cooperatives. Comments were received from all regions within the U.S. and from Canada and the United Kingdom.

Forty-six percent of the respondents were either a biomass conversion facility or represented biomass conversion facilities, the largest majority being from the wood pellet manufacturing industry.

Twenty-one percent of the respondents commented on the constraints that resulted from requiring an “arm’s-length transaction.” Most of those comments requested that the arm’s-length transaction requirement either be removed or be reconstituted to enhance program flexibility and allow for a greater diversity of eligible material owner participation. CCC acknowledges the importance of ensuring a broad range of eligible materials in pursuing program goals, and is mindful of the constraints raised by the commenters. In order to provide appropriate safeguards to ensure transactions among disinterested parties, CCC proposes to replace the arm’s length transaction language in the proposed rule with related-party transaction language.

Related-party transaction restrictions will not make ineligible stockholders of a privately or publicly held company who deliver eligible material to that company, nor make members of a cooperative who deliver eligible material to that cooperative ineligible. CCC requests additional comments on related-party transactions.

None of the parties in a related-party transaction for the purchase of eligible material are eligible for CHST matching payments as an eligible material owner.

Twenty percent of respondents opposed the requirement to measure biomass deliveries with real-time equipment that accurately records moisture levels to meet the dry-ton measurement standard. Most indicated that common industry practice is to measure in terms of green-tons with the general assumption of a moisture level of 45 to 50 percent. Based on these comments, CCC proposes to modify its requirement for moisture testing and adopt the industry-wide standard for measuring moisture. However, in all cases, the dry-ton equivalent remains.

Seventy-six percent of the comments concerned eligible materials, with 13 percent of those comments focused on conservation and forest stewardship plans related to eligible materials. These comments included commentary for and against the 20 percent cap on Title I crop agricultural residue. Most of those in favor of the cap remarked that it ought to be a complete ban to protect soils from wind and water erosion and that no agricultural residue should be removed without a conservation plan. Many of those in opposition to the cap stated that the cap of 20 percent only would drive up market prices on forest residue and allow forest residue to become the central supply for biomass conversion facilities. In this proposed rule, there is no 20-percent cap because it is inconsistent with the 2008 Farm

Bill. Regarding protecting land from wind and water, CCC proposes in this rule that BCAP contract participants will implement conservation plans, forest stewardship plans or equivalent plans that take into account site-level conservation needs. With regard to matching payment eligibility for agricultural and forest landowners and operators removing eligible material for use in a biomass conversion facility, such removal to receive matching payments must be done in compliance with any new, updated or existing conservation plans, forest stewardship plans or equivalent plans, as well as any existing environmental laws and regulations.

Other comments concerning the conservation plans included a desire to expand the requirement for conservation plans. Suggestions for elements of conservation plans included: target erosion rates far below “T” (soil loss tolerance) and compliance with new State ordinances on items such as buffers. This standard exceeds the level for highly erodible land, which is defined in 7 CFR part 12. Therefore, CCC did not adopt this comment and requests public comment on appropriate conservation standards for land enrolled in BCAP.

Comments concerning Forest Stewardship Plans offered alternative “equivalent plans” prescribed in the 2008 Farm Bill, such as plans under the American Tree Farm Program, the Sustainable Forestry Initiatives Program or State Best Management Programs. This comment is consistent with the 2008 Farm Bill and was accepted and reflected in this proposed rule.

Less than 10 percent of the comments urged FSA and CCC to consider miscanthus as an eligible material. Miscanthus is an eligible material; however, because some States may consider miscanthus a noxious weed, it may not be considered an eligible crop in those States.

Nearly 50 percent of the comments expressed a need for the eligibility time period for matching payments to be extended beyond two years. Rationale for these requests included the fact that certain contracts, such as a timber sale contract, have task orders and options that are not necessarily executed within a two-year time period and the need for equipment acquisitions or repairs sometimes interrupt harvesting. Two suggestions were given to tie the two-year limit to land tract instead of the eligible material owner.

The 2008 Farm Bill specified the two-year period for matching payments. However, CCC modified the beginning of the time period from the date of pre-

delivery approval to the date the first payment is issued. From that first date, matching payment obligations may occur for two years to an eligible material owner. CCC did not adopt the comment to change the two-year period from “eligible material owner” to “tract” because to do so would have been an extraordinary administrative burden on FSA that would have required extensive geographic-information-system-based software to monitor and control payments.

Nearly 20 percent of the commenting respondents were concerned with the economic market impact of BCAP. Comments included concerns that the introduction of the matching payment could impact the supply of commercial timber. Commenters did not agree on the impact; concerns were expressed that the impact would be negative, reducing supply, and positive, increasing supply. Similarly, commenters expressed concern that supply impacts would result in both favorable and unfavorable pricing impacts. Several respondents noted that the drop in the housing market has depressed the current supply of biomass and the matching payment, from their perspective, might help improve waste wood supply levels. Because these comments are of a general nature, CCC took no action on these comments.

Nearly 25 percent of the comments opposed the requirement to present scale tickets or a check to qualify the delivery and validate eligibility for a matching payment. The commenting parties indicated that the burden and cost of recording on each scale ticket was too high. CCC generally agrees with the comment and modified the requirement in § 1450.104(f) so the required information that must be submitted includes total actual tonnage delivered, total dry-weight tonnage-equivalent using standard moisture determinations, total payment including per ton payment rate(s) matched with actual tonnage, and the qualified biomass conversion facility’s certification as to the authenticity of the information.

Comments on wildlife and plant life came from 15 percent of the respondents. Several comments indicated concern about ensuring standards for invasive and noxious species where eligible material was concerned. These comments suggested that CCC consult with USDA’s Animal and Plant Health Inspection Service and the National Council for Invasive Species to address geographic-specific issues. “Eligible material” is a subset of renewable biomass and is specifically defined in the 2008 Farm Bill as the

material that is eligible for a matching payment. The 2008 Farm Bill does not restrict invasive and noxious species from eligibility, however, as discussed below, CCC will require that existing measures be taken and standing guidelines followed for any harvesting, collecting, storing or transporting of such material from such species.

“Eligible crops,” however, are another subset of renewable biomass that refers to the kind and types of crops that may qualify for establishment and annual payments on land enrolled in BCAP. According to the 2008 Farm Bill, invasive and noxious species are not “eligible crops” and CCC will collaborate with other appropriate agencies and entities to ensure current listings are available.

Finally, in issuing the NOFA, we pledged to consider all public comments and incorporate relevant evidence from the full EIS as well as all lessons learned into the proposed rule that sets forth requirements for the overall BCAP. Based upon the Department’s experience in implementing the component of the program authorized by the NOFA, certain changes are necessary to implement the program in a manner that is consistent with the 2008 Farm Bill, while also supporting the Administration’s overall policy objective to encourage the development of advanced biofuels, renewable energy, and biobased products within the 2008 Farm Bill authority. The proposed rule will specifically seek public comment on how to best incentivize the development of advanced biofuels, renewable energy and biobased products from renewable biomass.

#### BCAP Overview

BCAP supports two main types of activities. First, it provides funding for agricultural and forest land owners and operators to receive matching payments for eligible material that is sold to qualified biomass conversion facilities for the production of heat, power, biobased products, or advanced biofuels. In this rule, these payments are referred to as “matching payments.” The matching payment is intended to assist producers with the cost of collection, harvest, storage, and transportation of eligible material to the facility. Such payments to a particular participant may continue for up to two years after the first payment is issued. Second, BCAP provides funding for producers of eligible crops of renewable biomass within specified project areas to receive establishment payments of not more than 75 percent of the cost of establishment of eligible woody and

non-woody perennial crops, and annual payments for up to 15 years for the production of those crops. In this rule, these are referred to as “establishment and annual payments.” To be eligible for payment, the establishment and production activities must take place in designated project areas, which may be proposed to CCC by biomass conversion facilities or by groups of producers. Production activities may include, but are not limited to, annual payments for producers who are unable to sell crop due to a reduction in the size or scope of a biomass conversion facility’s operation or if a producer experiences crop failure caused by no fault of the producer but by a natural event such as drought, flooding or hail, as determined by CCC. Producers in project areas can be eligible for both types of payments; producers outside the project areas can be eligible for matching payments only. A table summarizing the major eligibility requirements for both types of payments is provided later in this rule.

#### Terms Used in This Rule

This rule uses the term “eligible material” for the renewable biomass that is eligible for the matching payment component of BCAP and “eligible crop” for renewable biomass that may be eligible for the establishment and annual payments component of BCAP. The 2008 Farm Bill uses these two terms in this way and defines them as including different kinds of renewable biomass. The use of the terms in this rule is consistent with the way the terms are used in the 2008 Farm Bill. With this rule, CCC intends to achieve better consistency between the requirements for eligible materials collected and harvested from public and private lands. In addition, CCC seeks to avoid diverting any materials potentially eligible for BCAP matching payments from existing value added production processes already occurring in the marketplace. Therefore, CCC proposes that vegetative wastes, such as wood waste and wood residues, collected or harvested from both public and private lands should be limited to only those that would not otherwise be used for a higher-value product. More specifically, for materials collected from both public and private lands, CCC is proposing to exclude from matching payment eligibility wood wastes and residues derived from mill residues (*i.e.* tailings, *etc.*) or other production processes that create residual byproducts that are typically used as inputs for higher value-added production (*i.e.* particle board, fiberboard, plywood, or other wood product markets). However, CCC is proposing to allow as eligible for

matching payments wood waste and residue derived from slash, pre-commercial operations, wet cordwood *etc.*) that is altered to chipped or similar form solely for the purposes of transport and delivery to eligible biomass conversion facilities. As specified in the 2008 Farm Bill and the regulations in 7 CFR part 1450, the eligible material owner may be a person or legal entity who is (1) a producer of an eligible crop or (2) has the right to collect or harvest eligible material and (3) a qualified biomass conversion facility that meets those requirements and the definition. As discussed in this rule, the matching payments will be made for the delivery of the eligible material.

The term “conservation district” is used as defined in 7 CFR part 1410.

This proposed rule uses the term “participant” for the matching payments component of BCAP and the terms “producer” and “participant” for the establishment and annual payments component of BCAP. The distinction is, an eligible participant for matching payments is not necessarily the person or legal entity who produced the material, but may be the person who owns it or has the authority to sell it to the biomass conversion facility. In other words, all BCAP producers are participants, but not all BCAP participants are producers. Participants are those individuals or entities who have been approved and are bound to perform under a contract for matching payments, establishment, or annual payments.

This proposed rule uses the term “contract” and “agreement.” A contract is between CCC and the participant for BCAP payments. The contract is legally binding and specifies what the producer must do and the resulting payments that CCC will make to the producer. An agreement is with a qualified biomass conversion facility or a project area sponsor. As fully described later in this proposed rule, the agreement specifies what the qualified biomass conversion facility or the project area sponsor plans to do and how it will support the establishment and production of eligible crops for conversion to bioenergy in the BCAP project areas, for example, the type of renewable biomass that will be used, the planned use of renewable biomass, and the new uses for the renewable biomass. In addition, there may be agreements between CCC and a qualified biomass conversion facility for the matching payments, which include items such as obligations of the facility to provide a purchase list, receipts and scale tickets for the eligible material owners and agreement to provide

facility address and contact information to the general public.

### Matching Payments

As proposed in this rule, matching payments would be available for the delivery of eligible material to qualified biomass conversion facilities to a producer of an eligible crop or a person with the right to collect or harvest eligible material.

The 2008 Farm Bill provides for matching payments at a rate of \$1 for each \$1 per dry ton paid by the qualified biomass conversion facility, in an amount up to \$45 per dry ton, for a period of two years. The 2008 Farm Bill also provides that biomass conversion facilities are those that convert, or propose to convert renewable biomass into heat, power biobased products, or advanced biofuels.

For the matching payments to eligible material owners delivering to a biomass conversion facility, CCC seeks comments on the following three options.

One option is to provide the matching payments as provided in the Notice of Funds Availability. Under this option, CCC would provide matching payments at the rate of \$1 for each \$1 per dry ton paid by the CHST-qualified biomass conversion facility to the owner for delivery of eligible material to the facility in an amount not to exceed \$45 per dry ton. Under this option, a limit would be placed on those biomass facilities that convert wood wastes or wood residues into heat or power for the facility. In those cases, a historical baseline of heat or power the facility produces from these materials will be established by the Deputy Administrator and payments will be made only for materials delivered to those facilities for conversion to heat or power above that baseline.

A second option is to tailor the matching payments through a "tiered approach" designed to encourage advanced biofuels production. In this option, CCC would provide matching payments at the rate of \$1 for each \$1 per dry ton paid by the CHST-qualified biomass conversion facility; however, biomass conversion facilities converting eligible material to advanced biofuels would be able to receive matching payments at the maximum rate of \$45 per ton. Biomass conversion facilities converting eligible material to any use other than advanced biofuel—such as heat, power, renewable energy or biobased products—would be able to receive payments at some point below the maximum rate. USDA requests comments on how to assess a tiered

approach and how such an approach might be structured.

One possible approach would be based on USDA's tentative finding, in Regulatory Impact Analysis, that a \$9 per green ton subsidy would render biomass feedstock broadly appealing to farm operators and competitive as an input to the energy sector. This \$9 per green ton rate equates to approximately \$15 to \$16 per dry ton. If so, a \$16 per dry ton payment rate would be sufficient to incentivize the production of new biofuel feedstock development and associated production processes that would not otherwise occur absent this financial support.

Another approach would be to develop a payment rate based directly on the value of lowering carbon emissions. Such an approach would take account of the greenhouse gas benefits associated with the substitution of biofuels for other more carbon intensive fuel sources, such as coal. USDA has proposed a particular minimum subsidy of \$16 per dry ton, and it believes that value may "internalize" some of the societal benefit of the use of biofuel feedstock as an energy sector input, leading to significant environmental improvements. USDA specifically requests comment on how to better capture this concept and whether a higher or lower minimum payment may best reflect the greenhouse gas and other environmental benefits of biofuel feedstock energy use.

USDA specifically requests comment on whether this or another similar payment structure might be best, and on how USDA may reflect the economic and environmental goals that can be achieved through this kind of tiered payment structure.

Finally, a third option is to vary the matching payments to encourage additional biomass production beyond a historical baseline. Under this option, CCC would calculate the matching payment at the rate of \$1 for each \$1 per dry ton paid by the CHST-qualified biomass conversion facility and then reduce the actual amount paid based on the difference from the baseline. For example, full payment could be provided for delivery of eligible material to new facilities, certain public buildings, facilities, or property (such as schools, universities, military facilities or Federal and State buildings) that convert from fossil fuel consumption to renewable biomass feedstocks; for eligible material showing exceptional promise for producing innovative advanced biofuels, renewable energy, or biobased products; or for every ton of renewable biomass consumption above

a facility's established baseline.

Payments would be reduced for those facilities that do not increase renewable biomass consumption over a historical baseline.

While CCC has not formally considered all of these options, CCC seeks comments and suggestions on all three of these options for the final rule so as to achieve an expansion and strengthening of the production of advanced biofuels, renewable energy, and biobased products from non-feed renewable biomass.

### Qualified Biomass Conversion Facility

CCC proposes that in order for a delivery of eligible materials to a biomass conversion facility to be eligible for payment, the receiving biomass conversion facility would first have to become qualified for BCAP. To become qualified, the eligible biomass conversion facility would enter into an agreement with CCC, through the FSA State office in the State where the facility is physically located.

A biomass conversion facility, as specified in the 2008 Farm Bill and in this proposed rule, would be a facility that converts or proposes to convert renewable biomass into heat, power, biobased products, advanced biodiesel, or advanced biofuels such as wood pellets, grass pellets, wood chips, or briquettes. For the purposes of BCAP, advanced biofuels do not include ethanol derived from corn kernel starch, because the 2008 Farm Bill specifically excludes it in the definition.

A biomass conversion facility would not have to be a project sponsor for the establishment and annual payments component of BCAP or be in operation to submit a successful application for qualification. If the facility is not yet in operation, CCC proposes that the person requesting that a facility become qualified must provide proof of all applicable Federal, State, local, and Tribal permits and licenses required for operation or proof of application completions or letters of renewal submissions from the applicable governmental entity. Applicable permits and licenses may include, but are not limited to, business licenses, air quality permits, water discharge permits, storm water permits, or Bureau of Alcohol, Tobacco, Firearms and Explosives registrations.

CCC proposes that each biomass conversion facility enter into a separate agreement with CCC regardless of whether a single owner has multiple facilities. CCC would issue unique facility identification numbers to each qualifying biomass conversion facility.

The proposed agreement between CCC and a qualified facility would require the biomass conversion facility to make information about the facility available to CCC and institutions of higher education. The 2008 Farm Bill requires that the information be made available to the Secretary or to institutions of higher education so that the information can be used to promote the production of biomass crops and the development of biomass conversion technology. The 2008 Farm Bill also requires a report to Congress on best practice data and other information no later than four years after the enactment of the 2008 Farm Bill, so the agreement would require that such information be disclosed, with the understanding that such information would be used in the report to Congress. In addition, when a biomass conversion facility agrees to become "qualified" it will be helpful for CCC to make information available to the public that a particular facility has become qualified because it is a precursor to being eligible for a matching payment.

#### **Eligible Material Owners, Application for Matching Payments**

To be eligible for matching payments, the eligible material owners need to visit a county FSA office to sign up for payment approval as an eligible material owner. The qualified biomass conversion facility would issue a receipt or invoice upon the date of delivery to eligible material owners.

The material owner would be eligible for the payment if the owner had the legal title to the material for collection or harvest, such as the operator or producer conducting farming operations on private land, or any other person designated by the owner of the private land. Consistent with the 2008 Farm Bill, the eligible material owner could be a person(s) with the right to harvest or collect eligible material on certain Federal lands pursuant to a contract or permit with the United States Forest Service or Bureau of Land Management, such as a timber sale contract.

Eligible material owners would take the receipts from the qualified biomass conversion facility and submit them to the county FSA office for matching payments. In accordance with the 2008 Farm Bill, CCC proposes that the measure for the eligible material weight would be a "dry ton," the weight at zero percent moisture content. The facility would be required to have the necessary equipment (such as a moisture meter) to calculate the equivalent dry ton weight of the delivered material.

In addition to weight scaling for roundwood and forest residues that

have not been chipped, CCC proposes in consultation with the U.S. Forest Service to require qualified biomass conversion facilities to use a random sampling methodology and historical statistical data to determine conversion factors for eligible material. Conversion factors would need to be developed quarterly and be based on type of material such as hardwood and softwood.

For wood chips, chipped forest residuals, shavings, sawdust, bark or any other eligible intermediate forestry residuals, CCC in consultation with the U.S. Forest Service proposes the requirement of sampling for individual loads or using rapid electronic meters. Quarterly correction factors would be required and be based on monthly random samples of the eligible materials.

CCC proposes that woody biomass sampling methodologies follow standard probability sampling of materials and proposes that moisture analysis follow standard test methods for wood fuels.

An eligible owner is able to receive matching payments for a period of two years. The two-year period for matching payment eligibility would begin on the date of issue of the first matching payment. This provision differs from what was provided in the NOFA, which indicated that the 2-year time period would begin immediately after initial approval by the FSA county office for the CHST matching payment and would end 24 months later. Having the "start date" coincide with the payment date, rather than the approval date, ensures that participants would not be unnecessarily penalized if, through no fault of their own, for example, adverse weather or other conditions could delay delivery of eligible material to a qualified biomass conversion facility.

Eligible material owners may also be eligible to participate under the "Establishment and Annual Payments" component of BCAP; however, the annual payment that is received by a participant in that component would be reduced when a matching payment was issued. The "Establishment and Annual Payments" component is discussed later in this rule. If an eligible material owner or producer wishes to avoid the reduction in annual payment(s), CCC proposes that the owner or producer do so by declining the matching payment(s).

The NOFA imposed an "arm's length transaction" requirement to be eligible for a matching payment. CCC acknowledges the importance of maintaining flexibility in this new program, as well as ensuring a broad

range of eligible materials in pursuing program goals, and is mindful of the constraints raised by the comments. In order to provide appropriate safeguards to ensure transactions among disinterested parties, CCC proposes to replace the "arm's length transaction" language with related-party transaction language. Related-party transaction restrictions will not render stockholders of a privately or publicly held company who deliver eligible material to that company ineligible; nor will members of a cooperative who deliver eligible material to that cooperative be considered ineligible. CCC proposes that related-party transaction be defined as a transaction between two or more ready, willing, and able organizations, trades, or business (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) substantially owned or controlled, directly or indirectly by the same interests, as determined by the Deputy Administrator.

As otherwise explained throughout this proposed rule, CCC proposes that an eligible material owner needs to meet the following to be eligible for a matching payment:

An eligible material owner may be:

- A producer within a project area;
- A biomass conversion facility;
- A person or entity with the legal title to an intermediate ingredient or feedstock; or
- A person or a non-Federal entity that has legal title to an eligible material, including Indian Tribes and Tribal members.

An eligible material owner may apply for a matching payment at the FSA county office after delivery of eligible material to a qualified biomass conversion facility.

The eligible material must be harvested or collected from certain:

- U.S. National Forest System and BLM lands,
- Non-Federal lands, including State- and locally-held government lands, or
- Tribal land held in trust by the Federal government.

The eligible material must be harvested or collected from certain:

- Materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Bureau of Land Management System land that:
  - Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;
  - Would not otherwise be used for higher-value products; and
  - Are harvested in accordance with applicable law and land management

plans and the requirements for old-growth maintenance, restoration, and management direction of section 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f).

- Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

- Renewable plant materials such as feed grains, other agricultural commodities, and other plants and trees; and

- Waste materials including vegetative waste comprised of crop residues such as corn stover or wood wastes and wood residues that would not otherwise be used as inputs for existing value-added production.

CCC also proposes that eligible material owner(s) would not be eligible for a matching payment if:

- Payment is received before the biomass conversion facility is qualified by CCC;

- The eligible material owner did not receive approval for matching payment from the county FSA office before receiving payment;

- The delivery did not consist of eligible material (For deliveries of commingled eligible and ineligible material, only the eligible material will be eligible for payment);

- The eligible material owner knowingly supplied false information;

- The eligible material owner violated the associated conservation or forestry plan related to the land that produced the eligible material for which a matching payment is requested; or

- The formerly qualified biomass conversion facility failed to comply with the agreement it entered into with CCC and, accordingly, the agreement was terminated by CCC prior to delivery.

Comments received on the CHST NOFA encourage CCC to ensure that conservation or forest stewardship plans appropriately address soil, water, wildlife and other natural resource concerns, so that biomass production is balanced with natural resource conservation. For matching payments, CCC intends to apply existing conservation plan requirements as required by Title XII of the Food Security Act of 1985 and is requesting additional comments in this proposed rule to ensure that adequate guidance is received to determine the scope of these requirements. CCC invites further comment on specific, additional conservation and stewardship measures

that could be included or that could be contained within the matching payment options discussed previously.

#### Eligible Materials

For guidance to potential eligible material owners and biomass conversion facilities, CCC proposes to provide a list of eligible materials deemed acceptable to receive a matching payment in accordance with the 2008 Farm Bill's definitions of renewable biomass and eligible material. The list of eligible material would be provided to the public via the FSA Web site at <http://www.fsa.usda.gov/energy>. CCC proposes the list of materials be utilized for guidance with the understanding that the list is not exhaustive and would be amendable and periodically updated by the CCC—in accordance with the parameters established by the 2008 Farm Bill—as biomass energy technology evolves. When there is recommendation for an addition to the list of eligible material, CCC will review the material to make determinations—the review could include a site visit and comparison to related materials or uses. CCC will review the recommendation to ensure that the new material meets the requirements of the 2008 Farm Bill and the regulations. CCC requests comments for additional suggestions on considerations in the process to amend the list of eligible materials. As described later in this rule, a list of eligible crops for the establishment and annual payment provisions would include some additional crops not eligible for matching payments.

Renewable biomass, as specified in the 2008 Farm Bill and in this rule, includes materials, pre-commercial thinnings, or invasive species from U.S. National Forest System land and U.S. Bureau of Land Management (BLM) land that:

- Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;

- Would not otherwise be used for higher-value products; and

- Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of subsections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention provisions of subsection (f).

In other words, renewable biomass harvested on National Forest System and BLM land would typically be trees and brush removed for fire prevention

purposes, trees unsuitable for commercial timber harvest, invasive plant removal for treatment and control purposes, and diseased, damaged, or immature trees culled in accordance with appropriate forest management practices. Additionally, CCC seeks comment on additional conservation or stewardship measures that should be considered for inclusion in the final rule for the eligible materials described above.

As specified in the 2008 Farm Bill, renewable biomass also includes any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States including:

- Renewable plant materials such as feed grains, other agricultural commodities, other plants and trees, and algae;

- Waste materials including vegetative waste comprised of crop residues such as corn stover, wood wastes, and wood residues;

- Animal waste and byproducts; and

- Food waste and yard waste.

However, that definition of renewable biomass from the 2008 Farm Bill applies to more than one program in Title IX. For BCAP specifically, the 2008 Farm Bill defines “eligible material” more narrowly, so that renewable biomass excludes the whole grain derived from any crop that is eligible to receive payments under Title I of the 2008 Farm Bill.

Those crops that are subject to the provisions of Title I of the 2008 Farm Bill would therefore not be included as eligible materials or crops for either component of BCAP. These crops include the whole grain derived from a crop of barley, corn, grain sorghum, oats, rice, and wheat; oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts, pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and, cotton boll fiber.

In accordance with the 2008 Farm Bill, CCC proposes that crop residue or other similar byproducts of crop production and harvesting, such as corn stover, corn silage, straw, hulls, or sugar bagasse, remain eligible materials for matching payments without further limitation or restriction. CCC proposes that for such eligible material conservation plans should be updated or initiated to address the removal of the material as needed. Additionally, CCC invites comments and suggestions with regard to specific, additional conservation and stewardship measures

that should be considered for the collection, harvest, transportation or storage of these eligible materials.

The 2008 Farm Bill is silent as to whether, for the purposes of BCAP matching payment eligible material requirements, vegetative waste materials, such as wood waste and wood residue, available from non-Federal land should be limited only to those that would not otherwise be used for higher-value products. Based on its experience with the NOFA, CCC proposes in this rule to apply that limitation to vegetative waste materials such as wood wastes and residues so that those materials are excluded if they would otherwise be used for higher-value products. CCC invites comments and suggestions with regard to the addition of this provision.

The 2008 Farm Bill does not specifically exclude invasive or noxious species in the definition of "eligible material." Renewable biomass derived from invasive or noxious species must be handled in accordance with Executive Order (E.O.) 13112 of February 3, 1999. E.O. 13122 requires that Federal agencies "not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions."

CCC consulted with APHIS and the National Invasive Species Council experts to determine the feasible and prudent measures necessary to minimize the risk of harm related to the inclusion of invasive or noxious species for the purposes of BCAP matching payments. Based on the consultation, CCC proposes to include invasive and noxious species as eligible materials for BCAP matching payment purposes; however, such eligible materials must not be collected, harvested, or transported during reproductive or other phases that may propagate the spread or establishment of those species. Eligible material owners should contact State and local weed boards or authorities and their local USDA Service Center staff about collecting, harvesting, or transporting invasive or noxious species to ensure compliance with E.O. 13112, USDA guidelines, and other requirements.

The likely benefits of including invasive and noxious species as eligible materials, which would incentivize their removal, significantly outweighs the potential negative impacts that may result from not including them as eligible materials, specifically scenarios where removing native species from a tract of land would occur and not removing the invasive or noxious species would encourage invasive and noxious species propagation.

CCC requests comment on whether or not eligible material owners violating E.O. 13112 should be financially responsible for any or all removal costs associated with the spread or establishment of invasive or noxious species if it determined that an eligible material owner contributed to the spread or establishment of an invasive or noxious species while carrying out activities related to receiving a matching payment.

As required by the 2008 Farm Bill, the following renewable biomass materials would also be excluded from BCAP matching payments, although they would be eligible crops for BCAP establishment and annual payments:

- Animal waste and byproducts (including fats, oils, greases, and manure);
- Food waste such as food processing scraps and yard waste such as debris removal originating from municipal or commercial yard, lawns, landscaped areas or related sites; and
- Algae.

Additionally, CCC proposes that materials that are wastes or by-products of industrial or similar processes that contain inorganic materials, such as black or pulp liquor that is a by-product of the pulp and kraft paper manufacturing process, remain excluded from the definition eligible materials. While such products may have historically been used to generate heat, power, steam and electricity to operate facilities, these products are not within the parameters set by the 2008 Farm Bill because they are, among other things, not organic materials collected or harvested from land. As such, these materials, as well as otherwise eligible materials delivered and used for the generation or production of these materials, would continue to not be eligible for matching payments under this program.

Consistent with the 2008 Farm Bill, CCC proposes that eligible materials, for a matching payment, would be collected and harvested from eligible lands that would include:

- (1) U.S. National Forest System lands;
- (2) BLM lands;

(3) All Non-Federal lands in the United States; and

(4) Land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. In other words, most publicly- and privately-held land is eligible for the BCAP matching payments program, except for some Federal lands.

In accordance with the 2008 Farm Bill, CCC proposes that matching payments would be made for all eligible materials, including those derived outside BCAP project areas. CCC invites comments pertaining to the previously discussed options for structuring matching payments to provide incentives for the collection, harvest, storage and transportation of eligible materials near project areas.

Eligible materials that are considered an advanced biofuel or an intermediate ingredient or feedstock of a biobased product must be derived from an otherwise eligible material.

CCC recognizes that the production of some advanced biofuels and biobased products requires intermediate ingredients and intermediate feedstocks, such as chopped grasses or wood chips. CCC proposes that the source material and the intermediate ingredient or feedstock be considered separate eligible materials; however, only one matching payment will be issued for either the source material or the intermediate ingredient or feedstock, but not both.

#### **Eligibility for Establishment and Annual Payments**

Establishment and annual payments are proposed to be available for persons and legal entities with eligible land that is located within a project area designated by CCC. CCC proposes to accept project area proposals from a project sponsor on a continuous basis. Unlike the matching payments component of BCAP, where any owner of eligible materials can be eligible for the program, for the establishment and annual payments component, only producers in a designated project area will be eligible for payment. The payments will cover not more than 75 percent of costs of eligible practices to establish non-woody and woody perennial biomass crops, and annual payments to support up to 15 years of crop production. By designating project areas, the BCAP program can support the development of renewable biomass production near biomass production facilities.

### Proposing Project Areas

Project areas would be proposed by project sponsors, which could be either groups of producers or biomass conversion facilities.

There is no restriction in this proposed rule on who can own or operate an eligible facility, or sponsor a project area. Various parties could own a biomass conversion facility such as Federal entities, private entities, State or local government agencies, schools, or non-government organizations, provided that these parties have legal title to the facility.

CCC proposes to accept project area proposals on a continuous basis. In accordance with the 2008 Farm Bill, a complete proposal would include, at a minimum:

(1) A description of the eligible land and eligible crops of each producer that will participate in the proposed project area;

(2) A letter of commitment from a biomass conversion facility stating that the facility will use eligible crops intended to be produced in the proposed project area; and

(3) Evidence that the biomass conversion facility has sufficient equity available to operate in the future if the facility is not operational at the time the project area proposal is submitted.

While the 2008 Farm Bill does not require conservation plans or forest stewardship plans to be an acceptable proposal, it does require that all contracts within a project area provide for the implementation of a conservation plan, forest stewardship plan or equivalent plan. As such, project area proposals will also include a description of the general conservation and forest stewardship measures that will be implemented in plans under contracts within the area. CCC seeks specific comment as to further conservation or stewardship requirements that should be included in a proposal for a project area.

For item 1 above, the project sponsor would submit a narrative of the proposed project and submit maps of the project area delineating the location of the current or proposed biomass conversion facility. The maps would show: (1) Current land use, (2) roads, (3) railroad, (4) rivers and barge access, (5) proposed land use change, and (6) resource inventory maps including soils and vegetation.

For item 3 above, evidence of sufficient equity will document the projected construction, start-up, operation, and maintenance costs over the projected life-span of the project. The project sponsors would document

the estimated cash-flow of the project during its life-span (including assumptions on the production outputs and expected market prices for the products produced). In addition, the project sponsor would document its existing resources and short term and long term financing. The information provided to CCC will be confidential and CCC will use it to determine if sufficient equity is available for the facility and the project.

The project sponsor will also submit the economic impacts of the proposed project area. At a minimum the proposal will address the anticipated timing and number for job creation and retention and likelihood of attracting additional private sector investment.

At a minimum, projects must demonstrate the ability to support the development and production of heat, power, biobased product, or advanced biofuels from renewable biomass production. The facility must demonstrate long-term economic viability and ability to comply with all environmental and regulatory requirements for the production of heat, power, biobased product, or advanced biofuels from renewable biomass. In addition, the project must demonstrate that sufficient quantity of eligible crops will be grown within an economically viable distance from the facility and that the crops can be grown in an environmentally acceptable manner as determined by CCC.

CCC requests comments on other types of information that should be required from project sponsors, including, but not limited, to a draft proposal. Proposed project area information that a sponsor considers appropriate or sufficient, may be included in a comment to this rule. We will review the information and use the analysis to make any required changes in the final rule. Information submitted as a proposal for a project area cannot be approved until implementation of the final rule. As with any comment, proposed project area information will become part of the public record and the public will be able to review it and comment on it. Because BCAP is a new program, information based on specific examples, projects, and situations will help improve the implementation and effectiveness of the program.

CCC proposes that a project area have specific geographic boundaries and be described in definite terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties. The project area would be physically located near a biomass conversion facility or facilities. Whether a project area is within an economically

viable distance from a biomass conversion facility will depend upon the eligible crops being established and produced, as well as other transportation and logistics matters, and thus must necessarily be determined on a case-by-case basis. The biomass conversion facility can be within the geographic boundary of the project area, or near it. The project area must also include potential or established producers that would supply either a portion or all of the renewable biomass needed by the biomass conversion facility.

### Project Area Selection Criteria

Consistent with the 2008 Farm Bill, CCC proposes to evaluate project area proposals that are submitted, according to these criteria:

(1) The volume of the eligible crops proposed to be produced in the proposed project area and the probability that such crops will be used for BCAP purposes;

(2) The volume of renewable biomass projected to be available from sources other than the eligible crops grown on contract acres;

(3) The anticipated economic impact in the proposed project area, such as the number of jobs created and retained;

(4) The opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed project area;

(5) The participation rate by beginning or socially disadvantaged farmers or ranchers;

(6) The impact on soil, water, and related resources, such as effect on nutrient loads, or soil erosion;

(7) The variety in biomass production approaches within a project area, including agronomic conditions, harvest and postharvest practices; and monoculture and polyculture crop mixes; and

(8) The range of eligible crops among project areas.

CCC proposes that all project proposals meeting these criteria would be considered acceptable for BCAP. The 2008 Farm Bill provides discretion for the Secretary to consider other information in evaluating project proposals. Given this discretion, CCC proposes that, in addition to the above criteria, proposals will also be evaluated based upon their ability to promote the cultivation of perennial bioenergy crops and annual bioenergy crops that show exceptional promise for producing highly energy-efficient renewable energy, advanced biofuels or biobased products, that preserve natural resources, and that are not primarily grown for food or animal feed. CCC

requests comments on whether additional criteria should be included for evaluating the capacity of the land in a project area to sustainably produce the proposed quantity of biomass. CCC requests comments on what other criteria or information we should use to evaluate project proposals.

Project sponsors that are biomass conversion facilities could be any size of operation including pilot facilities, research units, experimental or demonstration operations, or commercial operations. As proposed in this rule, a biomass conversion facility not yet in operation could be a project sponsor. In that case, the biomass conversion facility would have to provide evidence that it has sufficient equity available.

### Project Area Eligible Crops

As proposed in this rule, after CCC approves a project area, persons and legal entities within the specific geographic boundaries of that area could be eligible for payment for the establishment and production of eligible crops. To be eligible for payment, participants would need to enroll the land under BCAP contracts.

The 2008 Farm Bill defines an eligible crop as a crop of renewable biomass. The 2008 Farm Bill also includes a list of certain types of renewable biomass that are ineligible. Animal wastes, food and yard wastes, and algae are included in the definition of eligible crop in the 2008 Farm Bill and are therefore included in the definition in this proposed rule.

CCC proposes that biomass conversion facilities may suggest the exact species and varieties of eligible crops allowable in a BCAP project area, provided that the crops are included in the BCAP definition of eligible crop. Project area proposals may limit the nature and types of eligible crops to be planted within a project area.

The 2008 Farm Bill specifically excludes Title 1 crops and noxious or invasive plants as eligible crops. FSA State Committees will consult with the State Technical Committees for recommendations concerning the invasive and noxious status for otherwise eligible crops for the purposes of BCAP.

As specified in the 2008 Farm Bill, Federal or State-owned lands are not considered to be eligible lands for establishment and annual payments; therefore, CCC proposes to exclude all Federal and State-owned land from the establishment and annual payments component of BCAP.

### Project Area Eligible Producers

CCC proposes that within the project area, producers would enter into BCAP contracts and be eligible to receive establishment payments, as a form of cost-share, to convert agricultural lands or nonindustrial private forest lands to the production of eligible crops. In addition, producers could also be eligible for annual payments for the production of eligible crops used for conversion to renewable energy, advanced biofuels or biobased products. The details for what is required to qualify for the annual payments would be specified in the individual contract between CCC and a producer, as discussed further below, and would include provisions for the implementation of a conservation plan, forest stewardship plan, or equivalent plan, where required. The producer will demonstrate compliance with the conservation or forest stewardship plan through required self certification and FSA will ensure that normal spot check rules and methods are followed to ensure compliance with the plans. Producers that already have established BCAP eligible crops when this program starts may enter into a contract for annual payments to continue growing those crops; however, establishment payments would not be authorized.

CCC also proposes that project sponsors, regardless of whether they are a biomass conversion facility or a group of producers, could also be considered as a producer and be eligible to receive establishment and annual payments. However, the sponsor would have to own or operate eligible land to be eligible to enroll as a producer under a BCAP contract and be eligible to receive establishment and annual payments. State-owned biomass conversion facilities would not be eligible to be considered a producer for a BCAP contract because the 2008 Farm Bill specifies that State-owned land is ineligible for establishment and annual payments.

The agreement between the project sponsor and CCC is not a contract. A successful project sponsor is not paid by CCC for being a sponsor; the producers in the project area, who may also be the sponsor, are eligible for payment for the establishment and production of eligible crops. Therefore, biomass conversion facilities that act as project sponsors would not be subject to general Federal contracting requirements as a condition of a project area approval.

### Project Area Contract Acreage and Terms

CCC proposes that a producer within the project area would enter into a contract with CCC to commit acres, which would then be called contract acreage, to establish or produce eligible crops.

In accordance with the 2008 Farm Bill, CCC proposes that contract terms include:

(1) Compliance with highly erodible and wetland conservation requirements contained in the 2008 Farm Bill and in 7 CFR part 12;

(2) The implementation of conservation plan as defined in 7 CFR 1410.2, a forest stewardship plan as defined in 16 U.S.C. 2103(a), or an equivalent plan as determined by the Deputy Administrator;

(3) A commitment to provide information to promote the production of eligible crops and the development of biomass conversion technology; and

(4) Other information deemed appropriate by CCC, such as the preservation of cropland bases and yield history.

CCC invites comments on additional conservation or stewardship measures that could be included in a contract to provide incentives or otherwise encourage conservation, stewardship wildlife habitat or sustainability practices above the statutory requirements.

Contract durations may be up to 5 years for annual and non-woody perennial crops, and up to 15 years for woody perennial crops. CCC proposes flexibility to adjust the terms of the contract length on a per project basis in order to ensure the most efficient use of government funding. The establishment time period may vary due to: type of crop, agronomic conditions (establishment time frame, winter hardness, *etc*), and other factors. CCC would establish the time frame based on the recommendations received from the State Technical Committee.

CCC proposes that the contracts would take into account an establishment period appropriate for an existing crop's harvest or for the planting of a planned crop. BCAP contracts and conservation plans would be designed in an effort to promote the production of a long-term source of biomass feedstock that can be harvested and collected in a reasonable period of time. The expectation, which will be reflected in the contract, is that eligible crops funded under BCAP will produce at least one harvest for biomass within the period of the contract.

Contracts would be subject to modification and payment reductions if

any of the contract terms are violated. Participants that choose to voluntarily withdraw from BCAP before the duration of their contract has ended would be subject to early contract termination penalties and payment refunds.

In exchange for signing BCAP contracts, CCC will share not more than 75 percent of the cost with participants of establishing non-woody and woody perennial crops, pay an annual payment for enrolled land, and provide for the preservation of cropland base and yield history applicable to the land enrolled in the BCAP contract.

#### Eligible and Ineligible Land

The contract acreage would consist of only the eligible lands that are covered under the producer's contract with the CCC. The 2008 Farm Bill defines eligible land for project areas as agricultural land and nonindustrial private forest land, subject to certain exclusions.

CCC proposes, in accordance with exclusions in the 2008 Farm Bill, that land considered ineligible to be enrolled under a BCAP contract includes:

- (1) Federal lands;
- (2) State-owned, municipal, or other locally-owned lands;
- (3) Native sod; and
- (4) Land that is already enrolled in CCC's Conservation Reserve Program, Wetlands Reserve Program, or Grassland Reserve Program.

CCC proposes that eligible agricultural land includes:

- (1) Cropland;
- (2) Grassland;
- (3) Pastureland;
- (4) Rangeland;
- (5) Hayland; and
- (6) Other lands on which food, fiber, or other agricultural products are produced or capable of being produced for which a valid conservation plan exists or is implemented.

CCC proposes that agricultural lands with already established energy crops or already contracted for energy crops or planned energy crops would be eligible lands for contract acreage. In other words, as noted earlier, producers who started growing renewable biomass before BCAP was implemented may enter into a contract with CCC for annual payments. We do not intend to exclude "early adopters" of biomass crops.

Nonindustrial private forest land is defined in this rule, in accordance with the 2008 Farm Bill, as rural land with existing tree cover, or suitable for growing trees, owned by any private individual, group, association, corporation, Indian Tribe, or other

private legal entity. CCC proposes that this definition allows for the inclusion of properties such as a privately held tree farm or a private forest landowners' cooperative. This is consistent with the definitions of "landowner" and "nonindustrial private forest land" in 36 CFR 230.2 (the relevant Forest Service regulation), which includes private legal entities as landowners of such forest land but excludes corporations whose stocks are publicly traded or legal entities principally engaged in the production of wood products. CCC proposes that existing nonindustrial private forest land with existing tree cover can enter into contract acreage with an approved biomass conversion facility and be eligible for annual payments, subject to a forest stewardship plan. Establishment payments will only be made for woody perennial crops with a projected initial harvest time occurring within the length of the contract period.

As discussed earlier, contract acreage will be subject to minimum contract terms which include, but are not limited to, the implementation of a required conservation plan or forest stewardship plan (or the equivalent); and compliance with highly erodible and wetland conservation requirements of 7 CFR part 12. While land enrolled in other USDA programs could be eligible lands for contract acreage, the contracting producer could not receive multiple program benefits for purposes that are the same or substantially similar to the purposes of BCAP. A contracting producer must choose whether to receive BCAP payments or other USDA or Federal program benefits where those benefits are designed to achieve the same purposes as BCAP.

Land use restrictions would not apply to contract acreage provided that CCC determines that the land uses would be consistent with the conservation plans or forest stewardship plans (or the equivalent) and any other BCAP conservation requirements. CCC requests comments on other applicable contract terms concerning conservation requirements along with a justification for the contract term. For example, contracts may also contain biomass delivery or sale expectations or requirements to ensure the crops are not sold off into hay markets, or other non-BCAP uses.

#### Making Establishment Payments

Consistent with the 2008 Farm Bill, establishment payments of not more than 75 percent of the cost for establishing a perennial crop, which could include woody biomass, would include:

- (1) The costs of seed and stock for perennials;
- (2) The cost of planting the perennial crop;

(3) For non-industrial forest land, the costs of site preparation and tree planting;

(4) Other proposed establishment activities that could include, but would not be limited to, site preparation for non-tree planting and supplemental or temporary irrigation.

In addition, partial payments could be authorized when identifiable components of the contract are completed; and supplemental establishment payments may be authorized if necessary.

Consistent with the 2008 Farm Bill, CCC proposes that establishment payments would not be authorized for annual crops. In addition, prior to receiving establishment payments, producers must have planted their crops and must provide their FSA county office with copies of receipts and invoices related to the cost of establishing their crops.

#### Making Annual Payments

CCC proposes to calculate annual payments on a per acre basis and would use market-based rental rates, as determined by CCC. The payments are intended to support production of eligible crops. Annual payment rates will be established at levels required to ensure sufficient participation in a project area.

As specified in the regulations in 7 CFR 1410.42 and as determined by CCC, annual payments will include a payment based on:

- (1) A weighted average soil rental rate for cropland;

(2) The applicable marginal pastureland rental rate for all other land except for non-industrial private forest land; and

(3) For forest land, the average county rental rate for cropland as adjusted for forestland productivity for non-industrial private forest land.

This rate information is being posted at FSA county offices (as FSA posts information for CRP). There are site-specific factors including type of soil and land use. There is too much information to post it all on the Web. FSA can provide general information about rates.

CCC will post in FSA county offices the county specific base-line rental rates for cropland, marginal pastureland and forestland. In addition, the applicable additional incentive rates (premiams) will be posted for specific project area or specific crop mixes within the project area.

In determining the applicability of incentive payments (premiums) to the annual base-line soil rental rates the Deputy Administrator will consider the costs of establishing the crop, and the potential to establish perennial biomass crops that show exceptional promise to produce highly energy efficient bioenergy or biofuels, that preserve natural resources and are not primarily grown for food or animal feed or that also address specific resource conservation needs.

Annual payments would be reduced if:

- (1) An eligible crop is used for purposes other than the production of energy, then a dollar-for-dollar reduction would apply, not to exceed the total payment amount;
- (2) An eligible crop is delivered to the biomass conversion facility that is not within the project area;
- (3) The producer receives a matching payment;
- (4) The producer violates a term of the contract; or
- (5) Other circumstances as determined by CCC.

We must reduce payments to avoid duplicate benefits, but as described below, the annual payment reduction for delivery to a biomass facility or for matching payments will likely be less than a full, dollar-for-dollar reduction, because the purpose of BCAP is to encourage biomass energy production.

The 2008 Farm Bill authorizes agricultural land and non-industrial

private forest land for annual payments. Agricultural land consists of cropland, pastureland, rangeland, and grassland. CCC proposes to calculate market-based rental rates for cropland, consistent with the CRP regulations in 7 CFR part 1410; and for all other agricultural land at the rate that would be paid for pastureland, consistent with CRP.

CCC proposes to calculate the market-based payment rate for non-industrial forest land using the average county rental rate for cropland developed for CRP and adjusting that rate by comparing the average productivity of cropland compared to the average productivity of forestland.

If the crop is delivered to a biomass conversion facility, payment reductions would be applied in an amount equal to at least 25 percent of the authorized annual payment, but not a full dollar-for-dollar reduction, for each contract acre. If the harvested production is sold for any other reason, a dollar-for-dollar reduction would apply, not to exceed the total annual payment.

CCC proposes that half of the first year's annual payment would be made within 30 days of the date of contract approval and the balance paid on the annual contract enrollment anniversary. Subsequent annual payments would be made every year within 30 days after the contract anniversary date. Under the proposed rule, payments may cease and producers may be subject to contract termination for failure to plant eligible crops.

To be considered a biomass conversion facility, one of the criteria that may be met is whether the facility converts or proposes to convert a biobased product. The 2008 Farm Bill defined biobased products as a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is—“(A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock.” The NOFA excluded commercially-produced timber, lumber, wood pulp, or other finished wood products that otherwise could be used for higher-value products. CCC proposes to continue the exclusion of commercially-produced timber, lumber, wood or other finished products that otherwise would be used for higher value products. Additionally, CCC proposes to clarify that industrial or other process wastes or by-products, such as black liquor or pulp liquor that is a waste by-product of the pulp and kraft paper manufacturing process, are not included within the definition of biobased products because they are not significantly composed of organic or biological products collected or harvested from land.

**Key Provisions Comparison**

This table compares key provisions of matching payments versus establishment and annual payments:

	Matching payments	Establishment and annual payments
Geographic Eligibility ..... Project Sponsor .....	Not limited geographically ..... Not applicable .....	Limited to designated project area. A project sponsor proposes project areas and may be a: <ul style="list-style-type: none"> <li>• Biomass conversion facility, including facilities owned by Federal entities, State entities, local government entities, or privately or publicly held entities; or</li> <li>• Group of producers.</li> </ul>
Eligible Material Owner or Eligible Producer.	An eligible material owner may be: ..... <ul style="list-style-type: none"> <li>• A producer within a project area;</li> <li>• A biomass conversion facility;</li> <li>• A person or entity with the legal title to an intermediate ingredient or feedstock; or</li> <li>• A person or a non-Federal entity that has legal title to an eligible material, including Indian Tribes and Tribal members</li> </ul> An Eligible Material Owner cannot be a Federal government entity.	An eligible producer may be a: <ul style="list-style-type: none"> <li>• Biomass conversion facility that owns or operates eligible land or</li> <li>• Person or entity with the legal title to privately held lands or land held in trust by the Federal government.</li> </ul> An eligible producer cannot be a: <ul style="list-style-type: none"> <li>• Federal government entity, or</li> <li>• State or local government entity.</li> </ul>

	Matching payments	Establishment and annual payments
Land Limitations or Eligible Land.	<p>Eligible material must be harvested or collected from certain:</p> <ul style="list-style-type: none"> <li>• U.S. National Forest System and BLM lands,</li> <li>• Non-Federal lands, including State- and locally-held government lands, or</li> <li>• Tribal land held in trust by the Federal government</li> </ul>	<p>Eligible land is certain:</p> <ul style="list-style-type: none"> <li>• Agricultural land, such as cropland, pastureland, rangeland, grassland, or other lands on which food, fiber, or other agricultural products are produced or capable of being produced; or</li> <li>• Nonindustrial private forest lands that are:                             <ul style="list-style-type: none"> <li>○ Rural lands with existing tree cover, or are suitable for growing trees; and</li> <li>○ Owned by any private individual, group, or association.</li> </ul> </li> </ul> <p>Eligible land cannot be:</p> <ul style="list-style-type: none"> <li>• Federal- or State-owned land;</li> <li>• Land that is native sod; or</li> <li>• Land enrolled in the:                             <ul style="list-style-type: none"> <li>○ CRP;</li> <li>○ Wetlands Reserve Program; or</li> <li>○ Grassland Reserve Program.</li> </ul> </li> </ul>
Eligible Crop or Material .....	<p>Eligible material is certain:</p> <ul style="list-style-type: none"> <li>• Materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Bureau System land that:                             <ul style="list-style-type: none"> <li>○ Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;</li> <li>○ Would not otherwise be used for higher-value products; and</li> <li>○ Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of section 102 (e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f)</li> </ul> </li> <li>• Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:                             <ul style="list-style-type: none"> <li>○ Renewable plant materials such as feed grains, other agricultural commodities, and other plants and trees; and</li> <li>○ Waste materials including vegetative waste comprised of crop residues such as corn stover or wood wastes and wood residues that would not otherwise be used for higher-value products</li> </ul> </li> </ul> <p>Eligible material does not include:</p> <ul style="list-style-type: none"> <li>• Whole grain derived from any crop that is eligible to receive payments under Title I of the 2008 Farm Bill</li> <li>• Animal waste and byproducts (including fats, oils, greases, and manure);</li> <li>• Food waste and yard waste;</li> <li>• Algae.</li> </ul>	<p>Eligible crop is:</p> <ul style="list-style-type: none"> <li>• Renewable plant materials such as feed grains, other agricultural commodities, other plants and trees, and algae;</li> <li>• Waste materials including vegetative waste comprised of crop residues such as corn stover, woods wastes, and wood residues;</li> <li>• Animal waste and byproducts,</li> <li>• Food Waste; and</li> <li>• Yard waste.</li> </ul> <p>Ineligible crops include:</p> <ul style="list-style-type: none"> <li>• Any crops that is eligible to receive payments under Title I of the 2008 Farm Bill.</li> <li>• Any plant that is invasive or noxious or has the potential to become invasive or noxious.</li> </ul>
Authorized Payments .....	<p>A matching Payment at a rate of \$1 for each \$1 per dry ton equivalent paid by the qualified biomass conversion facility:</p> <ul style="list-style-type: none"> <li>• In an amount up to \$45 per dry ton but only for on-site heat or power production from wood wastes and residues above an historical baseline;</li> <li>• In an amount up to \$45 per dry ton for materials used to produce advanced biofuels and in an amount up to \$16 per dry ton for material used for renewable energy or biobased products; or</li> <li>• In an amount to be reduced in relation to increases in biofuel, renewable energy or biobased product production above a historical baseline</li> </ul>	<p>Establishment payments at a rate of not more than 75 percent of establishment costs based on:</p> <ul style="list-style-type: none"> <li>• The costs of seed and stock for perennials;</li> <li>• The cost of planting the perennial crop; and</li> <li>• For non-industrial forest land, the costs of site preparation and tree planting(s).</li> </ul> <p>Annual payments equal to the market rate plus any incentive as provided for in a specific project area.</p>

	Matching payments	Establishment and annual payments
Payment Reductions .....	There are no comparable payment reductions ..... If eligible and ineligible materials are comingled in the load, payment will only be made for eligible materials	Annual payments will be reduced if: <ul style="list-style-type: none"> <li>• An eligible crop is used for a purpose other than the production of energy at the biomass conversion facility;</li> <li>• An eligible crop is delivered to the biomass conversion facility outside of the project area;</li> <li>• The producer receives a payment for collection, harvest, storage, or transportation; or</li> <li>• The producer violates a term of the contract.</li> <li>• Under the proposed rule, payments may cease and producers may be subject to contract terminations for failure to establish eligible crops.</li> </ul>
Payment Timing .....	Matching payments are paid within 30 days after submission of sales invoice(s) from the qualified biomass conversion facility and completion of application for payment.	Establishment payments are paid when the perennial or tree crop practice or identifiable portion of the practice has been completed according to the BCAP conservation or forestry plan. Annual payments are paid: <ul style="list-style-type: none"> <li>• As an advance payment in an amount equal to 50 percent within 30 days of contract approval with the remaining 50 percent within 30 days of the first-year contract anniversary date, and</li> <li>• Within 30 days of the contract anniversary beginning with the second-year contract anniversary.</li> </ul>
Duration .....	Payment duration is two years from the date on which the first matching payment is issued to an eligible person or entity.	Contract duration is up to: <ul style="list-style-type: none"> <li>• Five years for annual and non-woody perennial crops, and</li> <li>• 15 years for woody perennial crops.</li> </ul>
Project Area Proposals or Matching Payment Applications.	An eligible material owner must apply for a matching payment at the FSA county office after delivery of eligible material to a qualified biomass conversion facility.	Project area proposals may be submitted under a continuous signup. After a project area has been approved, eligible persons and legal entities within that project area may enroll in a BCAP contract on a continuous basis at the FSA county office.

**Discussion of Transition From BCAP NOFA to BCAP Final Rule**

Under the NOFA, FSA is making CHST matching payments for eligible material delivered to qualified biomass conversion facilities.

When the final rule is published, conforming changes will be made to the matching payment component based on the proposed rule, public comments received, and input from the Programmatic Environmental Impact Statement and other sources. FSA will also implement the establishment and annual payments component by receiving project area proposals and entering into BCAP contracts with producers for the production of appropriate renewable biomass.

**Final Determination**

The Notice of Funds Notice of Funds Availability (NOFA) for the Collection, Harvest, Storage, and Transportation of Eligible Material published on June 11, 2009 (74 FR 27767–27772), is hereby terminated and rescinded, effective February 8, 2010. No additional payments will be made pursuant to the NOFA except as specifically approved

by the Executive Vice President, Commodity Credit Corporation.

**Notice and Comment**

The Administrative Procedures Act (5 U.S.C. 553) provides generally that before rules are issued by Government agencies, a proposed rule must be published in the **Federal Register**, and interested persons must be given an opportunity to participate in the rulemaking through submission of data, views, or arguments. The law exempts from this requirement rules, such as this one, relating to public property, loans, grants, benefits, and contracts. However, the Secretary of Agriculture published in the **Federal Register** on July 24, 1971 (36 FR 13804), a Statement of Policy that USDA would publish a notice of proposed rulemaking for such rules. USDA is committed to providing the public reasonable opportunity to participate in rulemaking. Therefore, this rule has a 60-day comment period.

**Executive Order 12866**

This rule has been determined to be economically significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Cost Benefit Analysis

is summarized below and is available from the contact information listed above.

**Cost Benefit Analysis Summary**

BCAP is intended to assist agricultural and forest land owners and operators with the collection, harvest, storage, and transportation (CHST) of eligible material for use in a biomass conversion facility and to support the establishment and production of eligible crops including woody biomass for conversion to bioenergy in selected project areas.

Establishment and Annual Payments are provided for eligible crops on eligible land within project areas that satisfy selection criteria. The strongest project proposals will be those associated with biomass conversion facilities already in operation or that are economically viable before the creation of BCAP. While early projects are not dependent solely on BCAP support, certainly BCAP may hasten early projects.

Matching payments will tend to go to eligible material owners experienced in the collection, harvest, storage and delivery of biomass feedstock. While matching payments are provided for

eligible materials delivered to qualifying biomass conversion facilities, opportunities to stimulate additional demand in this Farm Bill cycle, either in terms of increasing the construction of qualifying biomass conversion facilities or increasing the planting of biomass feedstock that qualifying biomass conversion facilities demand.

Qualifying biomass conversion facilities are expected to be those in operation by 2012 because it would be difficult for a biomass conversion facility to get on line by 2012 that is not already in the pipeline. Given the substantial capital costs associated with energy generation and fuel production, qualifying biomass conversion facilities in operation by

2012 are assumed to operate at capacity with or without BCAP.

Annual costs for the two parts of the program are presented in the following table. Establishment and annual payments total \$536 million, including technical assistance (TA),<sup>1</sup> and matching payments amount to \$2.1 billion.

TABLE 1—BCAP COSTS BY YEAR  
[2009 \$ millions]

Year	Establishment cost share	Annual payments	Technical assistance	Matching payments	Annual total
2010	78	4	3	392	435
2011	107	11	4	783	822
2012	121	17	5	783	844
2013		17		392	367
2014		17			
2015		16			
2016		16			
2017		15			
2018		14			
2019		13			
2020		13			
2021		12			
2022		13			
2023		13			
2024		13			
2025		9			
2026		5			
Subtotals	306	219	11		
			536	2,100	
Total				2,636	

**Note:** Due to rounding, the subtotals may not exactly match calculated estimates shown later in the CBA.

As explained in the analysis, the majority of BCAP matching payments are expected to go those eligible material owners who are delivering material predominantly to existing biomass conversion facilities that use woody biomass.

**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601, CCC has determined that there will not be a significant economic impact on a substantial number of small entities. Entities affected by this rule are producers of eligible crops, eligible biomass material owners, and biomass conversion facilities. The small business size standards for them are no more than:

- \$750,000 per year gross revenue for crop production (producers of eligible crops);

- \$7 million per year gross revenue for post harvest crop activities (eligible material owners); and
- 4 million megawatt hours per year for other electric power generation (biomass conversion facilities).

Given these size standards, it is reasonable to assume that many of businesses involved in BCAP will be small businesses.

We expect that approximately 7,500 producers of eligible crops and 50 biomass conversion facilities may receive establishment and annual payments and approximately 9,936 eligible material owners (that are not affiliated with a biomass conversion facility) and 701 biomass conversion facilities may be affected (which includes the 50, above) may receive matching payments.

However, in light of the ability of biomass conversion facilities to determine prices and receive program payments, producers of eligible crops and eligible biomass material owners are not expected to be significantly

impacted. And given the scale of BCF output, as well as the limited duration of the BCAP, biomass conversion facilities are also not expected to be significantly impacted by the program.

**Environmental Review**

Under the National Environmental Policy Act (NEPA), the Environmental Impact Statement (EIS) process provides a means for the public to provide input on program implementation, alternatives, and environmental concerns. CCC provided an amended notice of intent to prepare a programmatic EIS on BCAP in the **Federal Register** on May 13, 2009 (74 FR 22510–22511) and solicited public comment on the proposed alternatives to be examined in the programmatic EIS for BCAP. Six public scoping meetings were held in May and June 2009 to solicit comments for the development of alternatives and identify possible environmental concerns.

On August 10, 2009, a Notice of Availability was published in the

<sup>1</sup> All NPV calculations assume a 3% discount rate.

**Federal Register** (74 FR 39915) announcing the availability of a Draft Programmatic EIS (PEIS) for the administration and implementation of the BCAP. Comments on the Draft Programmatic EIS may be submitted until September 24, 2009.

The Draft PEIS has taken into consideration comments gathered during the scoping meetings to develop the alternatives proposed for the administration and implementation of BCAP. The Draft PEIS assesses the potential environmental impacts associated with the following three alternatives:

(1) *No Action Alternative*—Addresses the potential effects from not implementing BCAP. (This is considered the environmental baseline by which to compare the other alternatives against and is required by law.)

(2) *Action Alternative 1*—Addresses a targeted implementation of BCAP to specific areas or regions of the United States.

(3) *Action Alternative 2*—Addresses a broad national implementation of BCAP.

#### **Executive Order 12372**

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

#### **Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought regarding the provisions of this rule the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

#### **Executive Order 13132**

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

#### **Executive Order 13175**

The policies contained in this rule do not impose substantial unreimbursed direct compliance costs on Indian Tribal governments or have Tribal implications that preempt Tribal law.

#### **Unfunded Mandates**

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) (Pub. L. 104–4) establishes requirements for Federal agencies to assess the effects of their regulatory actions that impose “Federal Mandates” that may result in expenditures to State, local, or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or Tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### **Federal Assistance Programs**

The title and number of the Federal assistance program in the Catalog of Federal Domestic Assistance to which this proposed rule would apply is 10.087—Biomass Crop Assistance Program.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995, FSA is requesting comments from all interested individuals and organizations on a revision of new information collection activities associated with BCAP. FSA also included additional burden for the Emergency Conservation Program (ECP) in this proposed rule as described further below.

The approved burden hours will be eventually incorporated into the existing approval under OMB control number 0560–0082, which includes much of the same information for other conservation programs.

BCAP continues to provide financial assistance for collection, harvest, storage, and transportation of eligible material nationwide. BCAP also provides financial assistance establishment payments for perennial crops and annual production payments for perennial and annual crops in approved BCAP project areas. Support for both eligible material and eligible crops are intended to establish a long term feedstock for use in a biomass conversion facility in accordance with the 2008 Farm Bill.

Copies of all forms, regulations, and instructions referenced in this rule may be obtained from FSA. Data furnished by the applicants will be used to determine eligibility for program

benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

Additionally, the information collection request for the matching payment funds available for the collection, harvest, storage, and transportation of eligible material was approved under the OMB control number 0560–0263 under the emergency procedure in accordance with the Paperwork Reduction Act of 1995. That information collection was incorporated into the existing OMB control number 0560–0082. The 60-day comment period was also published in the **NOFA Federal Register** on June 11, 2009 (74 FR 27767–27772) to solicit public comments. The comment period ended on August 10, 2009. One comment was received on requesting to extend comment period on the information collection to implement BCAP. This proposed rule provides a 60-day comment period.

*Title:* BCAP.

*OMB Control Number:* 0560–NEW.

*Type of Request:* New.

*Abstract:* This information collection is needed to comply with section 9011 (b)(2) of Title IX of the Farm Security and Rural Investment Act of 2002 (U.S.C. 8101–8113), which was added by the 2008 Farm Bill.

For the administration of matching payments to be continued and expanded to more respondents in this information collection, FSA employees will enter the application information from completed paper forms into a Web based system that collects information categories similar to the electronic AD–245 application for cost-share form, which is currently approved under OMB control number 0560–0082 for other conservation programs. The Web based matching payment form, BCAP–5 form, will collect information about the owners of eligible material and estimated and actual biomass material sold and delivered to a qualified biomass conversion facility in order to approve applications for BCAP matching payments and to calculate matching payments after sale and delivery. BCAP will also have eligible material owners complete the CCC–901 form concerning members’ information or ownership. This form will enable the adherence to the arm’s length transaction requirement and the two year limit for eligibility to receive matching payments. BCAP will also use the existing AD–1047 certification regarding debarment, suspension, and other responsibility matters (primary covered transactions form). The AD–1047 form will help ensure that only

those owners and managers of qualified biomass conversion facilities and those owners of eligible material who have not been disbarred, suspended, or otherwise made ineligible for Federal transactions are qualified or determined eligible for BCAP. The AD-1047 form will require the owners to certify that they are in compliance and not subject to disbarment or suspension. The information collection activities for matching payments will include the following:

(1) Applicants will request to become a qualified biomass conversion facility or

(2) Applicants will register as an eligible material owner and then, after delivery of eligible material, request matching payments for the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility.

Specific descriptions of the information requirements were discussed in the NOFA under the application sections. Matching payments applicants submit estimates to register as eligible material owners and actual delivery information to request matching payments and biomass conversion facilities enter into an agreement giving a conversion facility overview. If the Deputy Administrator determines that additional information is necessary from an eligible material owner or a biomass conversion facility, it will be related information required to determine eligibility, ensure the ability to make proper payments, or to otherwise legally provide benefits to an eligible material owner, such as the FSA-211 form which provides power of attorney assignment.

For the administration of project areas, FSA employees will enter proposal information from project sponsors into an electronic format. The BCAP-4 form will be used to provide a summary of the project area proposal. The BCAP-4 form will provide project sponsors the ability to provide information overview for a variety of application factors which include: Documentation of sufficient equity for start-up biomass conversion facilities committed to the project area, land description in GIS shape file coordinates, transportation modes, distance of the biomass conversion facility in relation to eligible lands, job development and retention factors, and biomass conversion facility's production potentials or history. The information collection will be used to review project area criteria outlined by the 2008 Farm Bill. Categories expected on the proposals, consistent with the 2008 Farm Bill will include, but not be

limited to, volume of eligible crops, volume of renewable biomass, job creation projections, number of producers, number of biomass conversion facilities, projected participation rates for beginning and socially disadvantaged farmers or ranchers, projected environmental impacts, agronomic conditions, and range of crops. A BCAP worksheet will be required for environmental screening, similar to the existing FSA-850 form. This information will help facilitate the selection of BCAP project areas and allow producers in those BCAP project areas the opportunity to apply for establishment and annual production payments.

For the administration of BCAP project area establishment and annual production payments, FSA employees will first enter producer information into a Web based BCAP-2 producer worksheet and then, if eligible, may enter into a contract for annual production payments using the BCAP-3 form with appendix and continuation sheet for annual production payments. The BCAP producer forms and worksheets will be used for sign up, determining the offer soil rental rate, and contracting. The BCAP producer forms will capture the terms and conditions of the contract into electronic form, as well as be used to determine eligibility of the producer and the producer's contract acreage. The BCAP producer contract will also use the existing AD-1026 and BCAP-817U form. The AD-1026 form ensures that before producers clear, plow, or otherwise prepare areas not presently under crop production for planting, they certify that production will not violate either Highly Erodible Land Compliance (HELIC) or wetland conservation provisions. Most producers will already have existing AD-1026 forms. In addition we will also require producers to complete and submit the BCAP-817U form annually for the certification of compliance with BCAP. Annual payments to producers will be administered using a BCAP-3 contract, which is Web based and provides a payment calculation method that is similar to the existing AD-245 form. Other forms will be used as needed to facilitate payments for special circumstances, such as assignment of payment (CCC-36 form), joint payment authority (CCC-37 form), applicant's agreement to complete an uncompleted practice (FSA-18 form), application for payment of amounts due to persons who have died or disappeared (FSA-325 form), power of attorney (FSA-211); member's information (CCC-901); report

of acreage (FSA-578); and voluntary permanent direct and counter-cyclical program base reduction (CCC-505 form).

For establishment payments, FSA employees in addition to the BCAP producer form and worksheet and AD-1026 form, will use the new Web based conservation cost share forms (FSA-848, FSA-848A, FSA-848B, FSA-848-1, FSA-848A-1, and FSA-848B-1 forms). The FSA-848 form is a cost-share application used to document the producer's request for conservation cost share and the needs determination, which is completed to determine the actual amount of cost share that is needed, and to estimate and calculate the establishment costs for agricultural and nonindustrial private forest landowners that enter into BCAP and propose to convert land to renewable crops or establish renewable crops. The FSA-848A form is used to record the approval of a conservation cost share agreement (which when approved is a contract), the amount of cost share approved, and the producer's acknowledgement of the approval. FSA-848B form is used to record performance of conservation practices agreed to in the conservation cost share contract and cost share payments associated with that performance. The FSA-848, FSA-848A, and FSA-848B forms each include a continuation form (FSA-848-1, FSA-848A-1, and FSA-848B-1, respectively). Producers will be required to provide an annual report of acreage using the existing Web based FSA-578 form.

FSA is also adding burden for the use of some of the same forms for ECP into this proposed rule for public comment. ECP is one of the other conservation programs covered under OMB control number 0560-0082. ECP provides cost-share assistance to farmers and ranchers to rehabilitate farmland damaged by wind erosion, floods, hurricanes, or other natural disasters, and for carrying out emergency water conservation measures during periods of severe drought. ECP will use the FSA-848, FSA-848A, FSA-848B, FSA-848-1, FSA-848A-1 and FSA-848B-1 forms. These forms will be used to more efficiently collect information when Web-based conservation cost share software is fully implemented. The ECP burden in this proposed rule will also be rolled into the existing approval under the OMB control number 0560-0082.

*Estimate of Burden:* Public reporting burden for the collection of information is estimated to average 1 hour. The average travel time, which is included

below in the total burden, is estimated to be 1 hour per respondent.

*Respondents:* Individuals, Indian Tribes, units of State or local government, partnerships, corporations, farm cooperatives, farmer cooperative organizations, associations of agricultural producers, national laboratories, institutions of higher education, rural electric cooperatives, public power entities, consortia of any of these entities, biomass conversion facilities that own or operate eligible land, and any other legal entities.

*Estimated Number of Respondents:* 336,900.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Responses:* 681,900.

*Estimated Total Annual Burden on Respondents:* 265,233.

We are requesting comments on all aspects of the information collection to help us to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

#### E-Government Act Compliance

CCC is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### List of Subjects in 7 CFR Part 1450

Administrative practice and procedure, Agriculture, Energy, Environmental protection, Grant programs—agriculture, Natural resources, Reporting and recordkeeping requirements, Technical assistance.

For the reasons discussed in the preamble, the Commodity Credit Corporation (USDA) proposes to add 7 CFR part 1450 to read as follows:

### PART 1450—BIOMASS CROP ASSISTANCE PROGRAM (BCAP)

#### Subpart A—Common Provisions

Sec.

- 1450.1 Administration.
- 1450.2 Definitions.
- 1450.3 General description.
- 1450.4 Violations.
- 1450.5 Performance based on advice or action of USDA.
- 1450.6 Access to land.
- 1450.7 Division of payments and provisions about tenants and sharecroppers.
- 1450.8 Payments not subject to claims.
- 1450.9 Assignments.
- 1450.10 Appeals.
- 1450.11 Scheme or device.
- 1450.12 Filing of false claims.
- 1450.13 Miscellaneous.

#### Subpart B—Matching Payments

- 1450.101 Qualified biomass conversion facility.
- 1450.102 Eligible material owner.
- 1450.103 Eligible material.
- 1450.104 Signup.
- 1450.105 Obligations of participant.
- 1450.106 Payments.
- 1450.107–1450.199 [Reserved]

#### Subpart C—Establishment and Annual Payments

- 1450.200 General description.
- 1450.201 Project area submission requirements.
- 1450.202 Project area selection criteria.
- 1450.203 Eligible persons and legal entities.
- 1450.204 Eligible land.
- 1450.205 Duration of contracts.
- 1450.206 Obligations of participant.
- 1450.207 Conservation plans and forest stewardship plans.
- 1450.208 Eligible practices.
- 1450.209 Signup.
- 1450.210 Acceptability of offers.
- 1450.211 BCAP contract.
- 1450.212 Establishment payments.
- 1450.213 Levels and rates for cost-share payments.
- 1450.214 Annual payments.
- 1450.215 Transfer of land.

**Authority:** 7 U.S.C. 8111; 15 U.S.C. 714b and 714c.

#### Subpart A—Common Provisions

##### § 1450.1 Administration.

(a) The regulations in this part are administered under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), or a designee, or the Deputy Administrator, Farm Programs, Farm Service Agency (FSA), (Deputy Administrator). In the field, the regulations in this part will be implemented by the FSA State and county committees ("State committees" and "county committees," respectively).

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the

provisions in this part unless specifically authorized by the Deputy Administrator.

(c) The State committee may take any action authorized or required by this part to be taken by the county committee, but which has not been taken by such committee, such as:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation of authority herein to a State or county committee will preclude the Executive Vice President, CCC, or a designee, or the Deputy Administrator from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Data furnished by participants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

##### § 1450.2 Definitions.

(a) The definitions in part 718 of this chapter apply to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions will apply to this part:

*Advanced biofuel* means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass and other fuel derived from cellulosic biomass.

*Agricultural land* means cropland, grassland, pastureland, rangeland, hayland, and other land on which food, fiber, or other agricultural products are produced or capable of being produced.

*Animal waste* means waste associated with animal operations such as confined beef or dairy, poultry, or swine operations including manure,

contaminated runoff, milking house waste, dead poultry, bedding, and spilled feed. Depending on the poultry system, animal waste can also include litter, wash-flush water, and waste feed.

*Annual payment* means the annual payment specified in the BCAP contract that is made to a participant to compensate a participant for placing eligible land in BCAP.

*Beginning farmer or rancher* means, as determined by CCC, an individual or entity who:

(1) Has not operated a farm or ranch for more than 10 years,

(2) Materially and substantially participates in the operation of the farm or ranch, and

(3) If an entity, is an entity in which all members or stockholders of the entity meet the provisions in paragraphs (1) and (2) of this definition.

*Biobased product* means a product determined by CCC to be a commercial or industrial product (other than food or feed) that is:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) An intermediate ingredient or feedstock.

*Bioenergy* means renewable energy produced from organic matter. Organic matter may be used directly as a fuel, be processed into liquids and gases, or be a residual of processing and conversion.

*Biomass conversion facility* means a facility that converts or proposes to convert eligible material into heat, power, biobased products, or advanced biofuels.

*Conservation district* is as defined in part 1410 of this chapter.

*Conservation plan* means a record of the participant's decisions and supporting information for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures needed to solve identified natural resource problems by devoting eligible land to permanent vegetative cover, trees, water, or other comparable measures.

*Contract acreage* means eligible land that is covered by a BCAP contract between the producer and CCC.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, FSA, or a designee.

*Dry ton* means one U.S. ton measuring 2,000 pounds. One dry ton (ODT, sometimes termed as oven- or bone-dry ton) is the amount of renewable biomass that would weigh one U.S. ton at zero percent moisture content.

*Eligible crop* means a crop of renewable biomass as defined in this section excluding:

(1) Whole grain derived from a crop of barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber; and

(2) Any plant that CCC has determined to be either a noxious weed or an invasive species. With respect to noxious weeds and invasive species, a list of such plants will be available in the FSA county office.

*Eligible material* is renewable biomass as defined in this section excluding:

(1) Whole grain derived from a crop of barley, corn, grain sorghum, oats, rice, and wheat; oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts, pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and, cotton boll fiber;

(2) Animal waste and byproducts of animal waste including fats, oils, greases, and manure;

(3) Food waste and yard waste; and

(4) Algae.

*Eligible material owner*, for purposes of the matching payment, means a person or entity having the right to collect or harvest eligible material and who has delivered or intends to deliver the eligible material to a qualified biomass conversion facility, including:

(1) For eligible material harvested or collected from private lands, including cropland, the owner of the land, the operator or producer conducting farming operations on the land, or any other person designated by the owner of the land; and

(2) For eligible material harvested or collected from public lands, a person having the right to harvest or collect eligible material pursuant to a contract or permit with the Forest Service or other appropriate Federal agency, such as a timber sale contract, stewardship contract or agreement, service contract or permit, or related applicable Federal land permit or contract, and who has submitted a copy of the permit or contract authorizing such collection to CCC.

*Establishment payment* means the payment made by CCC to assist program participants in establishing the practices required for non-woody perennial crops and woody perennial crops, as specified in a producer contract.

*Food waste* means a material composed primarily of food items, or originating from food items, or

compounds from domestic, municipal, food service operations, or commercial sources, including food processing wastes, residues, or scraps.

*Forest stewardship plan* means a long-term, comprehensive, multi-resource forest management plan that is prepared by a professional resource manager and approved by the State Forester or equivalent State official. Forest Stewardship Plans address the following resource elements wherever present, in a manner that is compatible with landowner objectives concerning:

- (1) Soil and water;
- (2) Biological diversity;
- (3) Range;
- (4) Aesthetic quality;
- (5) Recreation;
- (6) Timber;
- (7) Fish and wildlife;
- (8) Threatened and endangered species;
- (9) Forest health;
- (10) Archeological, cultural and historic sites;
- (11) Wetlands;
- (12) Fire; and
- (13) Carbon cycle.

*Highly erodible land* means land determined as specified in part 12 of this title.

*Indian Tribe* has the same meaning as in 25 U.S.C. 450b (section 4 of the Indian Self-Determination and Education Assistance Act).

*Intermediate ingredient or feedstock* means an ingredient or compound made in whole or in significant part from biological products, including renewable agricultural material (including plant, animal, and marine material), or forestry material that is subsequently used to make a more complex compound or product.

*Institution of higher education* has the same meaning as in section 102(a) of the Higher Education Act of 1965 (20 U.S.C. 1002(a)).

*Matching payments* means those CCC payments provided to the owner of eligible material delivered to a qualified biomass conversion facility.

*Native sod* means land:

(1) On which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

(2) That has never been tilled for the production of an annual crop as of [DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

*Nonindustrial private forest land* means rural lands with existing tree cover, or that are suitable for growing trees, which are owned by any private individual, group, association, corporation, Indian Tribe, or other

private legal entity, consistent with the definitions of nonindustrial private forest land and landowner in 36 CFR 230.2, and the regulations in 36 CFR 230.31.

*Offer* means, unless otherwise indicated, the per-acre rental payment requested by the owner or operator in such owner's or operator's request to participate in the establishment and annual payment component of BCAP.

*Operator* means a person who is in general control of the land enrolled in BCAP, as determined by CCC.

*Payment period* means a contract period of either up to 5-years for annual and non-woody perennial crops, or up to 15 years for woody perennial crops during which the participant receives an annual payment under the establishment and annual payment component of BCAP.

*Producer* means an owner or operator of contract acreage that is physically located within a project area under the establishment and annual payment component of BCAP.

*Project area* means a geographic area with specified boundaries submitted by a project sponsor and approved by CCC under the establishment and annual payment component of BCAP.

*Project sponsor* means a group of producers or a biomass conversion facility who proposes a project area.

*Qualified biomass conversion facility* means a biomass conversion facility that meets all the requirements for BCAP qualification, and whose facility representatives enter into a BCAP agreement with CCC.

*Related-party transaction* means a transaction between two or more ready, willing, and able organizations, trades, or business (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) substantially owned or controlled directly or indirectly by the same interests, as determined by the Deputy Administrator.

*Renewable biomass* means the following:

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Department of the Interior Bureau of Land Management land that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and

management direction of sections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention provisions of subsection (f); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material (including feed grains, other agricultural commodities, other plants and trees, or algae);

(ii) Waste material, including

(A) Crop residue;

(B) Other vegetative waste material (including wood waste and wood residues that would not otherwise be used for higher-value products);

(C) Animal waste and byproducts (including fats, oils, greases, and manure); and

(D) Food waste and yard waste.

*Socially disadvantaged farmer or rancher* means, unless other classes of persons are approved by the Deputy Administrator in writing, persons who are:

(1) American Indians or Alaska Natives (that is, persons who are members of that class of persons who originally settled Alaska);

(2) Asian-Americans;

(3) African-Americans; or

(4) Hispanic-Americans.

*Technical assistance* means assistance in determining the eligibility of land and practices for BCAP, implementing and certifying practices, ensuring contract performance, and providing annual rental rate surveys. The technical assistance provided in connection with BCAP to owners or operators, as approved by CCC, includes, but is not limited to: Technical expertise, information, and tools necessary for the conservation of natural resources on land; technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and technical infrastructure, including activities, processes, tools, and functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Tribal government* means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or

village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*United States* means all fifty States of the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.

*Violation* means an act by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible to receive or retain all or a portion of BCAP payments.

*Yard waste* means a waste material derived from the urban environment including construction and demolition debris and municipal solid waste.

#### § 1450.3 General description.

(a) The objectives of BCAP are to:

(1) Support the establishment and production of eligible crops for conversion to bioenergy in selected project areas; and

(2) Assist agricultural and forest landowners and operators with matching payments to support the collection, harvest, storage, and transportation costs of eligible material for use in a biomass conversion facility.

(b) A participant must implement and adhere to a conservation plan prepared in accordance with BCAP guidelines, as established and determined by CCC. A conservation plan for contract acreage must be implemented by a participant and must be approved by the conservation district in which the lands are located. If the conservation district declines to review the plan, the provider of technical assistance may take such further action as is needed to account for lack of such review.

(c) Agricultural and forest landowners and operators must comply with any existing conservation plans, forest stewardship plans and any other applicable laws for any removal of eligible material for use in a biomass conversion facility to receive matching payments.

(d) Except as otherwise provided, a participant may receive, in addition to any payments under this part, cost-share assistance, rental or easement payments, tax benefits, or other payments from a State or a private organization in return for enrolling lands in BCAP, without any commensurate reduction in BCAP payments.

#### § 1450.4 Violations.

(a)(1) If a participant fails to carry out the terms and conditions of a BCAP

contract, CCC may terminate the BCAP contract.

(2) If the BCAP contract is terminated by CCC in accordance with this paragraph:

(i) The participant will forfeit all rights to further payments under such contract and must refund all payments previously received, plus interest; and

(ii) The participant must pay liquidated damages to CCC in an amount as specified in the contract.

(b) CCC may reduce a demand for a refund under this section to the extent CCC determines that such relief would be appropriate and would not deter the accomplishment of the goals of the program.

**§ 1450.5 Performance based on advice or action of USDA.**

(a) The provisions of § 718.303 of this title relating to performance based on the action or advice of an authorized representative of USDA applies to this part, and may be considered as a basis to provide relief to persons subject to sanctions under this part to the extent that relief is otherwise required by this part.

(b) [Reserved]

**§ 1450.6 Access to land.**

(a) For purposes related to this program, any representative of the U.S. Department of Agriculture, or designee thereof, must be provided with access to land that is:

(1) The subject of an application for a contract under this part; or

(2) Under contract or otherwise subject to this part.

(b) For land identified in paragraph (a) of this section, the participant must provide such representatives or designees with access to examine records for the land to determine land classification, eligibility, or for other purposes, and to determine whether the participant is in compliance with the terms and conditions of the BCAP contract.

**§ 1450.7 Division of payments and provisions about tenants and sharecroppers.**

(a) Payments received under this part will be divided as specified in the applicable contract. CCC may refuse to enter into a contract when there is a disagreement among persons or legal entities seeking enrollment as to a person's or legal entity's eligibility to participate in the contract as a tenant or sharecropper, and there is insufficient evidence, as determined by CCC, to indicate whether the person or legal entity seeking participation as a tenant or sharecropper has an interest in the

acreage offered for enrollment in the BCAP.

(b) CCC may remove an operator or tenant from a BCAP contract when:

(1) The operator or tenant requests in writing to be removed from the BCAP contract;

(2) The operator or tenant files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by applicable bankruptcy laws;

(3) The operator or tenant dies during the contract period and the administrator of the estate fails to succeed to the contract within a period of time determined appropriate by the Deputy Administrator; or

(4) A court of competent jurisdiction orders the removal of the operator or tenant from the BCAP contract and such order is received by CCC.

(c) Tenants who fail to maintain tenancy on the acreage under contract for any reason may be removed from a contract by CCC.

**§ 1450.8 Payments not subject to claims.**

(a) Subject to part 1403 of this chapter, any cost-share or annual payment or portion of the payment due any person or legal entity under this part will be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the U.S. Government.

(b) [Reserved]

**§ 1450.9 Assignments.**

(a) Participants may assign the right to receive such cash payments, in whole or in part, as provided in part 1404 of this chapter.

(b) [Reserved]

**§ 1450.10 Appeals.**

(a) Except as provided in paragraph (b) of this section, a person or legal entity applying for participation may appeal or request reconsideration of an adverse determination in accordance with the administrative appeal regulations at parts 11 and 780 of this title.

(b) Determinations by the Natural Resources Conservation Service may be appealed in accordance with procedures established under part 614 of this title or otherwise established by the Natural Resources Conservation Service.

**§ 1450.11 Scheme or device.**

(a) If CCC determines that a person or legal entity has employed a scheme or device to defeat the purposes of this part, or any part, of any USDA program, payment otherwise due or paid such person or legal entity during the

applicable period may be required to be refunded with interest, as determined appropriate by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or legal entity of cost-share assistance or annual payments, or obtaining a payment that otherwise would not be payable.

(c) A new owner or operator or tenant of land subject to this part who succeeds to the contract responsibilities must report in writing to CCC any interest of any kind in the land subject to this part that is retained by a previous participant. Such interest may include a present, future, or conditional interest, reversionary interest, or any option, future or present, on such land, and any interest of any lender in such land where the lender has, will, or can legally obtain, a right of occupancy to such land or an interest in the equity in such land other than an interest in the appreciation in the value of such land occurring after the loan was made. Failure to fully disclose such interest will be considered a scheme or device under this section.

**§ 1450.12 Filing of false claims.**

(a) If CCC determines that any participant has knowingly supplied false information or has knowingly filed a false claim, such participant will be ineligible for payments under this part with respect to the fiscal year in which the false information or claim was filed and the contract may be terminated, in which case CCC may demand a full refund of all prior payments.

(b) False information or false claims include, but are not limited to, claims for payment for practices that do not comply with the conservation plan. Any amounts paid under these circumstances must be refunded to CCC, together with interest as determined by CCC, and any amounts otherwise due the participant will be withheld.

(c) The remedies provided for in this section will be in addition to any other remedy available to CCC and in addition to any criminal penalty.

**§ 1450.13 Miscellaneous.**

(a) Except as otherwise provided in this part, in the case of death, incompetency, or disappearance of any participant, any payments due under this part will be paid to the participant's successor(s) in accordance with part 707 of this title.

(b) Unless otherwise specified in this part, payments under this part will be subject to the compliance requirements of part 12 of this title concerning highly

erodible land and wetland conservation and payments.

(c) Any remedies permitted CCC under this part will be in addition to any other remedy, including, but not limited to, criminal remedies or actions for damages in favor of CCC, or the United States, as may be permitted by law. The Deputy Administrator may add to the contract such additional terms as are needed to enforce these regulations, which will be binding on the parties and may be enforced to the same degree as the other provisions of these regulations.

(d) Absent a scheme or device to defeat the purposes of the program, when an owner loses control of BCAP acreage enrolled under Subpart C of this part due to foreclosure and the new owner chooses not to continue the contract in accordance with § 1450.215 refunds will not be required from any participant on the contract to the extent that the Deputy Administrator determines that forgiving such repayment is appropriate in order to provide fair and equitable treatment.

#### Subpart B—Matching Payments

##### § 1450.101 Qualified biomass conversion facility.

(a) To be considered a qualified biomass conversion facility, a biomass conversion facility must enter into an agreement with CCC and must:

(1) Meet all applicable regulatory and permitting requirements by applicable Federal, State, or local authorities;

(2) Agree in writing to:

(i) Maintain accurate records of all eligible material purchases and related documents regardless of whether matching payments will be sought; and

(ii) Make available at one place and at all reasonable times for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, or other documents related to the program for not less than 3 years from the date of application as a qualified biomass conversion facility;

(iii) Make information available to USDA and institutes of higher education and to allow general information about the facility and its eligible material to be made public by USDA and other entities after qualification is determined;

(iv) Clearly indicate on the scale ticket or equivalent the actual tonnage delivered, provide a copy of the scale ticket(s) or equivalent, and provide it to the eligible material owner;

(v) Calculate a total dry ton weight equivalent to the actual tonnage delivered and provide that measurement to the eligible material owner;

(vi) Use commercial weight scales that are certified for accuracy by applicable State or local authorities and accurate moisture measurement equipment to determine the dry ton weight equivalent of actual tonnage delivered; and

(vii) For those facilities that convert vegetative waste materials such as wood wastes and wood residues into heat or power for consumption at the facility, provide the Deputy Administrator with such information as needed to establish the historical baseline for heat or power production from wood wastes or residues.

(b) For a qualified biomass conversion facility, CCC will periodically inform the public that matching payments may be available for deliveries of eligible material to such qualified biomass conversion facility. CCC will maintain a listing of qualified biomass conversion facilities for general public access and distribution that may include general information about the facility and its eligible material needs.

##### § 1450.102 Eligible material owner.

(a) In order to be eligible for a BCAP matching payment, a person or legal entity must:

(1) Be a producer of an eligible crop that is produced on BCAP contract acreage authorized by this subpart.

(2) Have the right to collect or harvest eligible material.

(3) Not be a party to a related-party transaction.

(b) A qualified biomass conversion facility that meets the requirements of paragraph (a) of this section may be considered an eligible material owner if it otherwise meets the definition in this part.

##### § 1450.103 Eligible material.

(a) In order to be eligible for a matching payment, an eligible material owner must have harvested or collected eligible material that was delivered to a qualified biomass conversion facility.

(b) Eligible material must be a renewable biomass that, at a minimum, meets the definition in § 1450.3 or is listed as an eligible material on <http://www.fsa.usda.gov/energy>.

(c) Matching payments are not authorized for:

(1) Any eligible material delivered before [DATE OF PUBLICATION OF THE FINAL RULE IN THE *FEDERAL REGISTER*].

(2) Any eligible material for which payment is received before the application for payment is received and approved by the county FSA office, in accordance with § 1450.104 of this part.

(3) Eligible material delivered to a qualified Biomass Conversion facility

used to produce black liquor, an industrial waste by-product of the pulp and kraft paper manufacturing process which consists primarily of inorganic chemicals used in the pulping process, lignin, hemicellulose, and cellulose. In addition, black liquor is not an eligible material.

##### § 1450.104 Signup.

(a) Applications for matching payments will be accepted on a continuous basis.

(b) An eligible material owner must apply for matching payments at the FSA county office before payment for the eligible material from a qualified biomass conversion facility is received. "The request must be submitted and approved by CCC before any payment is made by the facility for the eligible material."

(c) Applications must include the following estimates based on information obtained from contracts, agreements, or letters of intent:

(1) An estimate of the total dry tons of eligible material expected to be sold to a qualified biomass conversion facility;

(2) The type(s) of eligible material that is expected to be sold;

(3) The name of the qualified biomass conversion facility that will purchase the eligible material;

(4) The expected per dry ton price the owner plans to receive for the delivery of the eligible material; and

(5) The date or dates the eligible material is expected to be delivered to the facility.

(d) Eligible material owners who deliver eligible material to more than one qualified biomass conversion facility must submit separate applications for each facility to which eligible material will be delivered.

(e) After delivery, eligible material owners must notify CCC and request the matching payment. Matching payments will be disbursed only after delivery is verified by FSA.

(f) Other information that must be submitted to FSA in order to receive matching payments includes settlement, summary, or other acceptable data that provide the:

(1) Total actual tonnage delivered and a total dry weight tonnage equivalent amount determined by the qualified biomass conversion facility using standard moisture determinations applicable to the eligible material;

(2) Total payment received, including the per-ton payment rate(s) matched with actual and dry weight tonnage delivered; and

(3) Qualified biomass conversion facility's certification as to the authenticity of the information.

**§ 1450.105 Obligations of participant.**

(a) All participants whose BCAP matching payment application was approved must agree to:

(1) Carry out the terms and conditions of such BCAP matching payment application; and

(2) Be jointly and severally responsible, if the participant has a share of the payment greater than zero, with the other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the BCAP contract and this part.

(b) [Reserved]

**§ 1450.106 Payments.****Option 1 for § 1450.106**

(a) Payments under this subpart will be for a term not to exceed two years beginning the date that the first matching payment to a person or entity is issued by CCC.

(b) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of eligible materials used to produce anything other than cellulosic ethanol (heat, power, or biobased products) in an amount up to \$16 per ton.

(c) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of materials used to produce cellulosic ethanol in an amount up to \$45 per ton.

**Option 2 for § 1450.106**

(a) Payments under this subpart will be for a term not to exceed two years beginning the date that the first matching payment to a person or entity is issued by CCC.

(b) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of eligible material in an amount up to \$45 per ton.

(c) For those biomass conversion facilities converting vegetative waste materials, such as wood waste and wood residues, to heat or power consumed by the facility, no payments may be made under this subpart for material unless the material is converted to heat or power above that facility's historical baseline for heat or power production from renewable biomass as established by the Deputy Administrator.

**Option 3 for § 1450.106**

(a) Payments under this subpart will be for a term not to exceed two years beginning the date that the first matching payment to a person or entity is issued by CCC.

(b) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of eligible material in an amount up to \$45 per ton to facilities that:

(1) Fully convert from fossil fuel consumption to renewable biomass feedstocks;

(2) For eligible material showing exceptional promise for producing innovative advanced biofuels, renewable energy, or biobased products; or

(3) For every ton of renewable biomass consumption above a facility's established historical baseline.

(c) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of eligible material in an amount up to \$16 per ton for those facilities that do not increase renewable biomass consumption over a historical baseline.

**§§ 1450.107–1450.199 [Reserved]****Subpart C—Establishment and Annual Payments****§ 1450.200 General description.**

As provided in this subpart, “establishment and annual payments” may be provided by CCC to producers of eligible crops in a project area.

**§ 1450.201 Project area submission requirements.**

(a) To be considered for selection as a project area, a project sponsor must submit a proposal to CCC that includes, at a minimum:

(1) A description of the eligible land and eligible crops of each producer that will participate in the proposed project area;

(2) A letter of commitment from a biomass conversion facility stating that the facility will use, for BCAP purposes, eligible crops intended to be produced in the proposed project area;

(3) Evidence that the biomass conversion facility has sufficient equity available to operate if the facility is not operational at the time the project area proposal is submitted; and

(4) Other information that gives CCC a reasonable assurance that the biomass conversion facility will be in operation by the time that the eligible crops are ready for harvest.

(b) The project area description required in paragraph (a) of this section

needs to specify geographic boundaries and be described in definite terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties.

(c) The project area needs to be physically located near a biomass conversion facility or facilities.

(d) Project area proposals may limit the nature and types of eligible crops to be planted within a project area.

**§ 1450.202 Project area selection criteria.**

In selecting project areas, CCC will consider:

(a) The dry tons of the eligible crops proposed to be produced in the proposed project area and the probability that such crops will be used for BCAP purposes;

(b) The dry tons of renewable biomass projected to be available from sources other than the eligible crops grown on contract acres;

(c) The anticipated economic impact in the proposed project area;

(d) The opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed project area;

(e) The participation rate by beginning or socially disadvantaged farmers or ranchers;

(f) The impact on soil, water, and related resources;

(g) The variety in biomass production approaches within a project area, including agronomic conditions, harvest and postharvest practices, and monoculture and polyculture crop mixes;

(h) The range of eligible crops among project areas; and

(i) Any other additional criteria, as determined by CCC.

**§ 1450.203 Eligible persons and legal entities.**

(a) In order to be eligible to enter into a BCAP contract in accordance with this subpart, a person or legal entity must be an owner, operator, or tenant of eligible land, as defined in § 1450.204.

(b) [Reserved]

**§ 1450.204 Eligible land.**

(a) For the purposes of this subpart, eligible land means agricultural land including cropland, grassland, pastureland, rangeland, hayland, or other lands on which food, fiber, or other agricultural products are produced or capable of being produced, or nonindustrial private forest lands.

(b) For the purposes of this subpart, eligible land is not:

(1) Federal- or State-owned land;

(2) Land that is native sod as of

[DATE OF PUBLICATION OF THE

FINAL RULE IN THE *FEDERAL REGISTER*;

(3) Land enrolled in the conservation reserve program authorized under the regulations at part 1410 of this chapter;

(4) Land enrolled in the wetlands reserve program authorized under the regulations at part 1467 of this chapter; or

(5) Land enrolled in the grassland reserve program authorized under the regulations at part 1415 of this chapter.

**§ 1450.205 Duration of contracts.**

(a) Contracts under this subpart will be for a term of up to:

(1) 5 years for annual and non-woody perennial crops; and

(2) 15 years for woody perennial crops.

(b) The establishment time period may vary due to: Type of crop, agronomic conditions (establishment time frame, winter hardiness, *etc*), and other factors.

**§ 1450.206 Obligations of participant.**

(a) All participants subject to a BCAP contract must:

(1) Carry out the terms and conditions of such BCAP contract;

(2) Make available to CCC or to an institution of higher education or other entity designated by CCC, such information as CCC determines to be appropriate to promote the production of eligible crops and the development of biomass conversion technology;

(3) Comply with the highly erodible land and wetland conservation requirements of part 12 of this chapter;

(4) Implement a:

(i) Conservation plan or

(ii) Forest stewardship plan or an equivalent plan.

(5) Implement the conservation plan, which is part of such contract, in accordance with the schedule of dates included in such conservation plan, unless both:

(i) The Deputy Administrator determines that the participant cannot fully implement the conservation plan for reasons beyond the producer's control, and

(ii) CCC agrees to a modified plan.

(6) The producer will demonstrate compliance with the conservation or forest stewardship plan through required self certification and FSA will spot check compliance with the plans.

(7) Establish temporary vegetative cover either within the timeframes required by the conservation plan or as determined by the Deputy Administrator, if the permanent vegetative cover cannot be timely established; and

(8) If the participant has a share of the payment greater than zero, be jointly

and severally responsible with the other contract participants for compliance with the provisions of such contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the BCAP contract and this part.

(b) Under the proposed rule, payments may cease and producers may be subject to contract termination for failure to plant eligible crops.

(c) A contract will not be terminated for failure by the participant to establish an approved cover on the land if, as determined by the Deputy Administrator:

(1) The failure to plant or establish such cover was due to excessive rainfall, flooding, or drought; and

(2) The land on which the participant was unable to plant or establish such cover is planted or established to such cover as soon as practicable after the wet or drought conditions that prevented the planting or establishment subside.

**§ 1450.207 Conservation plans and forest stewardship plans.**

(a) The producer must implement a conservation plan, forest stewardship plan or equivalent plan that complies with CCC guidelines and is approved by the appropriate conservation district for the land to be entered in BCAP. If the conservation district declines to review the conservation plan, or disapproves the conservation plan, such approval may be waived by CCC.

(b) The practices and management activities included in a conservation plan, forest stewardship plan or equivalent plan, and agreed to by the producer, must be implemented in a cost-effective manner that meets BCAP goals and purposes.

(c) If applicable, a tree planting plan must be developed and included in the conservation plan, forest stewardship plan or equivalent plan. Such tree planting plan may allow a reasonable time to complete plantings, as determined by CCC.

(d) All conservation plans, forest stewardship plans or equivalent plans, and revisions of such plans, will be subject to approval by CCC.

**§ 1450.208 Eligible practices.**

Eligible practices are those practices specified in the conservation or forestry plan that meet all standards needed to cost-effectively establish:

(a) Annual crops;

(b) Non-woody perennial crops; and

(c) Woody perennial crops.

**§ 1450.209 Signup.**

(a) Offers for contracts may be submitted on a continuous basis to FSA as determined by the Deputy Administrator.

(b) [Reserved]

**§ 1450.210 Acceptability of offers.**

(a) Acceptance or rejection of any contract offered will be at the sole discretion of CCC, and offers may be rejected for any reason as determined to accomplish the goals of the program.

(b) An offer to enroll land in BCAP will be irrevocable for such period as is determined and announced by CCC. The producer will be liable to CCC for liquidated damages if the applicant revokes an offer during the period in which the offer is irrevocable as determined by the Deputy Administrator. CCC may waive payment of such liquidated damages if CCC determines that the assessment of such damages, in a particular case, is not in the best interest of CCC and the program.

**§ 1450.211 BCAP contract.**

(a) In order to enroll land in BCAP, the participant must enter into a contract with CCC.

(b) The BCAP contract is comprised of:

(1) The terms and conditions for participation in BCAP;

(2) The conservation plan, forest stewardship plan or equivalent plan; and

(3) Any other materials or agreements determined necessary by CCC.

(c) In order to enter into a BCAP contract, the producer must submit an offer to participate as specified in § 1450.209;

(d) The BCAP contract must, within the dates established by CCC, be signed by:

(1) The producer; and

(2) The owners of the eligible land to be placed in the BCAP and other eligible participants, if applicable.

(e) The Deputy Administrator is authorized to approve BCAP contracts on behalf of CCC.

(f) CCC will honor BCAP contracts even in the event that a project area biomass conversion facility does not become fully or partially operational.

(g) BCAP contracts may be terminated by CCC before the full term of the contract has expired if:

(1) The owner loses control of or transfers all or part of the acreage under contract and the new owner does not wish to continue the contract;

(2) The participant voluntarily requests in writing to terminate the contract and obtains the approval of

CCC according to terms and conditions as determined by CCC;

(3) The participant is not in compliance with the terms and conditions of the contract;

(4) The BCAP practice fails or is not established after a certain time period, as determined by the Deputy Administrator, and the cost of restoring the practice outweighs the benefits received from the restoration;

(5) The BCAP contract was approved based on erroneous eligibility determinations; or

(6) CCC determines that such a termination is needed in the public interest.

(h) Except as allowed and approved by CCC where the new owner of land enrolled in BCAP is a Federal agency that agrees to abide by the terms and conditions of the terminated contract, the participant in a contract that has been terminated must refund all or part of the payments made with respect to the contract plus interest, as determined by CCC, and must pay liquidated damages as provided for in the contract and this part. CCC may permit the amount(s) to be repaid to be reduced to the extent that such a reduction will not impair the purposes of the program. Further, a refund of all payments need not be required from a participant who is otherwise in full compliance with the BCAP contract when the land is purchased by or for the United States, as determined appropriate by CCC.

**§ 1450.212 Establishment payments.**

(a) Establishment payments will be made available upon a determination by CCC that an eligible practice, or an identifiable portion of a practice, has been established in compliance with the appropriate standards and specifications.

(b) Except as otherwise provided for in this part, such payments will be made only for the cost-effective establishment or installation of an eligible practice, as determined by CCC.

(c) Except as provided in paragraph (d) of this section, such payments will not be made to the same owner or operator on the same acreage for any eligible practices that have been previously established, or for which such owner or operator has received cost-share assistance from any Federal agency.

(d) Establishment payments may be authorized for the replacement or restoration of practices on land for which assistance has been previously allowed under BCAP, only if:

(1) Replacement or restoration of the practice is needed to achieve adequate erosion control, enhance water quality,

wildlife habitat, or increase protection of public wellheads; and

(2) The failure of the original practice was due to reasons beyond the control of the participant, as determined by the CCC.

(e) In addition, CCC may make partial payments when the producer completes identifiable components of the contract. CCC may make supplemental establishment payments, if necessary.

**§ 1450.213 Levels and rates for cost-share payments.**

(a) CCC will pay not more than 75 percent of the actual or average cost (whichever is lower) of establishing non-woody perennial crops and woody perennial crops specified in the BCAP conservation or forestry plan.

(b) The average cost of performing a practice may be determined by CCC based on recommendations from the State Technical Committee. Such cost may be the average cost in a State, a county, or a part of a State or county, as determined by the Deputy Administrator. The calculated 75 percent of the average cost may represent less than 75 percent of the actual cost for an individual participant.

(c) Except as otherwise provided for in this part, a participant may receive, in addition to any payment under this part, cost-share assistance, rental payments, or tax benefits from a State or a private organization in return for enrolling lands in BCAP without a commensurate reduction in BCAP payments.

**§ 1450.214 Annual payments.**

(a) Annual payments will be made in such amount and in accordance with such time schedule as may be agreed upon and specified in the BCAP contract.

(b) Based on the regulations at § 1410.42 of this chapter and as determined by CCC, annual payments include a payment based on:

(i) A weighted average soil rental rate for cropland;

(ii) The applicable marginal pastureland rental rate for all other land except for non-industrial private forest land; and

(iii) For forest land, the average county rental rate for cropland as adjusted for forestland productivity for non-industrial private forest land.

(c) The annual payment will be divided among the participants on a single contract as agreed to in such contract, as determined by CCC.

(d) A participant that has an established eligible crop and is therefore not eligible for establishment payments under § 1450.213 may be eligible for

annual payments under the provisions of this section.

(e) In the case of a contract succession, annual payments will be divided between the predecessor and the successor participants as agreed to among the participants and approved by CCC. If there is no agreement among the participants, annual payments will be divided in such manner deemed appropriate by the Deputy Administrator and such distribution may be prorated based on the actual days of ownership of the property by each party.

(f) Annual payments will be reduced:

(1) By 25 percent if an eligible crop is delivered to the biomass conversion facility; or

(2) On a dollar-for-dollar basis if:

(i) An eligible crop is used for a purpose other than the production of energy at the biomass conversion facility;

(ii) The producer receives a matching payment under subpart B of this part;

(iii) The producer violates a term of the contract; or

(iv) Other circumstances necessary to carry out BCAP, as determined by CCC.

**§ 1450.215 Transfer of land.**

(a)(1) If a new owner or operator purchases or obtains the right and interest in, or right to occupancy of, the land subject to a BCAP contract, such new owner or operator, upon the approval of CCC, may become a participant to a new BCAP contract with CCC for the transferred land.

(2) For the transferred land, if the new owner or operator becomes a successor to the existing BCAP contract, the new owner or operator will assume all obligations of the BCAP contract of the previous participant.

(3) If the new owner or operator is approved as a successor to a BCAP contract with CCC, then, except as otherwise determined by the Deputy Administrator:

(i) Cost-share payments will be made to the past or present participant who established the practice; and

(ii) Annual payments to be paid during the fiscal year when the land was transferred will be divided between the new participant and the previous participant in the manner specified in § 1450.214(c).

(b) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a BCAP contract and the new owner or operator does not become a successor to such contract within 60 days of such transfer, or such other time as the Deputy Administrator determines to be appropriate, such contract will be

terminated with respect to the affected portion of such land, and the original participant:

(1) Forfeits all rights to any future payments for that acreage;

(2) Must refund all previous payments received under the contract by the participant or prior participants, plus interest, except as otherwise specified by the Deputy Administrator. The provisions of § 1450.211(g) will apply.

(c) Federal agencies acquiring property, by foreclosure or otherwise,

that contains BCAP contract acreage cannot be a party to the contract by succession. However, through an addendum to the BCAP contract, if the current operator of the property is one of the contract participants, the contract may remain in effect and, as permitted by CCC, such operator may continue to receive payments under such contract if:

(1) The property is maintained in accordance with the terms of the contract;

(2) Such operator continues to be the operator of the property; and

(3) Ownership of the property remains with such Federal agency.

Signed at Washington, DC, on February 2, 2010.

**Jonathan W. Coppess,**

*Executive Vice President, Commodity Credit Corporation, and Administrator, Farm Service Agency.*

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