



# FEDERAL REGISTER

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Vol. 76

Friday,

No. 29

February 11, 2011

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Part III

Department of Agriculture

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Rural Business-Cooperative Service  
Rural Utilities Service

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7 CFR Part 4288  
Advanced Biofuel Payment Program; Interim Rule

**DEPARTMENT OF AGRICULTURE****Rural Business-Cooperative Service****Rural Utilities Service****7 CFR Part 4288****RIN 0570-AA75****Advanced Biofuel Payment Program**

**AGENCY:** Rural Business-Cooperative Service and Rural Utilities Service, USDA.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Rural Business-Cooperative Service (Agency) is establishing the Advanced Biofuel Payment Program authorized under the Food, Conservation, and Energy Act of 2008. Under this Program, the Agency will enter into contracts with advanced biofuel producers to pay such producers for the production of eligible advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biofuel facility located in a State.

In addition, this interim rule establishes new program requirements for applicants to submit applications for Fiscal Year 2010 payments for the Advanced Biofuel Payment Program. These new program requirements supersede the Notice of Contract Proposal (NOCP) for Payments to Eligible Advanced Biofuel Producers in its entirety.

**DATES:** This interim rule is effective March 14, 2011. Written comments on this interim rule must be received on or before April 12, 2011.

See the **SUPPLEMENTARY INFORMATION** for application dates for Advanced Biofuel Payment Program Fiscal Year 2010 funds.

**ADDRESSES:** *Interim rule.* You may submit comments on this interim rule by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250-0742.

- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department

of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

See the **SUPPLEMENTARY INFORMATION** for addresses concerning applications for Advanced Biofuel Payment Program Fiscal Year 2010 funds.

**FOR FURTHER INFORMATION CONTACT:** For the Advanced Biofuel Payment Program, contact Diane Berger, USDA Rural Development, 1400 Independence Avenue, SW., Room 6865, STOP 3225, Washington, DC 20250. Telephone: (202) 260-1508. Fax: (202) 720-2213. E-mail: [diane.berger@wdc.usda.gov](mailto:diane.berger@wdc.usda.gov).

For information about the Fiscal Year 2010 applications and for Advanced Biofuel Payment Program assistance, please contact the applicable Rural Development Energy Coordinator, as provided in the **SUPPLEMENTARY INFORMATION** section of this preamble.

**SUPPLEMENTARY INFORMATION:****Fiscal Year 2010 Applications for the Advanced Biofuel Payment Program**

Applications for the Advanced Biofuel Payment Program Fiscal Year 2010 funds will be accepted from February 11, 2011 through April 12, 2011. Applications received after April 12, 2011 will not be considered for Fiscal Year 2010 payments. Application materials may be obtained by contacting one of Rural Development's Energy Coordinators or by downloading through <http://www.grants.gov>.

Submit electronic applications at <http://www.grants.gov>, following the instructions found on this Web site. To use Grants.gov, an applicant (unless the applicant is an individual) must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number, which can be obtained at no cost via a toll-free request line at 1-866-705-5711 or online at <http://fedgov.dnb.com/webform>. Submit completed paper applications to the Rural Development State Office in the State in which the producer's principal place of business is located.

*Rural Development Energy Coordinators*

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**Executive Order 12866**

This interim rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted benefit-cost analyses to fulfill the requirements of EO 12866. In the benefit-cost analysis, the Agency quantified the cost of the Advanced Biofuel Payment Program, but did not quantify its benefits. Costs were quantified for the burden of the Program to the public and to the Federal government, but its economic impacts were not quantified. Qualitative discussions of potential impacts of the Program on jobs, the environment, and energy are presented in the analysis. While unable to quantify the benefits associated with this rulemaking, the Agency believes that the overall effect of the rule will be beneficial.

**Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104-4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

**National Environmental Policy Act/ Environmental Impact Statement**

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the

issuance of a Notice of Contract Proposal (NOCP). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported. As expected, these applications were not from any concentrated grouping of applicant facilities, but represented a wide variety of applicants for a diverse range of renewable energy proposals. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency has prepared a programmatic environmental assessment (PEA), pursuant to 7 CFR part 1940, subpart G, analyzing the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Advanced Biofuel Payment Program rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the Congressional goals of advancing biofuels production for the purposes of energy independence and greenhouse gas emission reductions. The impact analyses are national in scope, but draw upon site-specific data from advanced biofuel facilities funded under Sections 9003 (Biorefinery Assistance Guaranteed Loans) and 9004 (Repowering Assistance Payments to Eligible Biorefineries), as reasonable assumptions for the types of facilities, feedstocks, and impacts likely to be funded under this rulemaking for FY 2010-2012. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 were utilized, as well, to forecast likely impacts under the interim rule. However, because there are no site-specific data on facilities funded under the Section 9003 program, the PEA discusses qualitatively the general processes, materials, and feedstocks used for the range of heterogeneous facilities in the U.S. eligible for producer payments under Section 9005. In addition, the PEA provides qualitative analyses of likely programmatic impacts beyond the FY 2012 program expiration date, as appropriate. The draft PEA was made available to the public for comment on the USDA Rural Business-Cooperative Service's Web site in May, 2010. No comments were received on the draft PEA and the Agency has issued a Finding of No Significant Impact (FONSI) for the program, which is available on the Agency Web site.

### **Executive Order 12988, Civil Justice Reform**

This interim rule has been reviewed under Executive Order 12988. In accordance with the rules: (1) All State and local laws and regulations that are in conflict with these rules will be preempted; (2) no retroactive effect will be given the rules; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

### **Executive Order 13132, Federalism**

It has been determined, under Executive Order 13132 that this interim rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities. Rural Development made this determination based on the fact that this regulation only impacts those who choose to participate in the Program. Small entity applicants will not be affected to a greater extent than large entity applicants.

For this Program, the Agency received approximately 180 applications in Fiscal Year 2009, and approved 160 entities for participation. In assessing whether these entities are small businesses, the Agency notes that there is no unique Small Business Administration (SBA) definition for biofuel facilities, including

biorefineries, because biofuel facilities and biorefineries are found in a number of North American Industry Classification System (NAICS) codes. The majority of existing biofuel facilities produce biodiesel, and for these facilities, the small business definition is 1,000 employees. Based on Agency experience and in-house knowledge of the Fiscal Year 2009 applicants and using 1,000 employees as the definition of small business, the majority of biofuel facilities applying in Fiscal Year 2009 would be classified as small businesses. The Agency expects this to continue to be true as the Program continues.

The average cost to a biofuel facility to participate in the Program is estimated to be approximately \$500. This cost is not expected to impose an economically significant impact on these small entities. Because of this minimal cost, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. Further, biofuel facilities are expected to realize more in payments than in costs for participating in the program. Thus, participating biofuel facilities will be able to recoup this expense, although small biofuel facilities are likely to take longer to recoup the expense because they will be producing less advanced biofuel.

This regulation only affects biofuel facilities that choose to participate in the programs. Lastly, the programs are open to all eligible producers, regardless of their size.

### **Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use**

The regulatory impact analyses conducted for this rule meet the requirements of Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. The analyses did not find that the rule will have any adverse impacts on energy supply, distribution or use.

### **Executive Order 12372, Intergovernmental Review of Federal Programs**

This Program is not subject to Executive Order 12372 because the Programs are not listed as covered programs on the Intergovernmental Consultation list.

### **Executive Order 13175**

USDA will undertake, within 6 months after this rule becomes effective, a series of regulation Tribal consultation

sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

The policies contained in this rule would not have Tribal implications that preempt Tribal law.

### **Programs Affected**

The Advanced Biofuel Payment Program is listed in the Catalog of Federal Domestic Assistance under Number 10.867.

### **Paperwork Reduction Act**

The information collection requirements contained in the Notice of Contract Proposal for the Section 9005 Advanced Biofuels Payments Program published on June 12, 2009, were approved by the Office of Management Budget under emergency clearance procedures and assigned OMB Control Number 0570–0057. As noted in the June 12, 2009 notice, the Agency sought emergency clearance to comply with the time frames mandated by a Presidential Memorandum in order to implement the Program as quickly as possible, and that providing for public comment under the normal procedure would unduly delay the provision of benefits associated with this Program and be contrary to the public interest. Now, however, in accordance with the Paperwork Reduction Act of 1995, the Agency is seeking standard OMB approval of the reporting and recordkeeping requirements contained in this interim rule. In the publication of the proposed rule on April 16, 2010, the Agency solicited comments on the estimated burden. The Agency received no comments in response to this solicitation. This information collection requirement will not become effective until approved by OMB. Upon approval of this information collection, the Agency will publish a rule in the **Federal Register**.

*Title:* Advanced Biofuels Producer Payment Program.

*OMB Number:* 0570–NEW.

*Type of Request:* New collection.

*Abstract:* The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of advanced biofuels producers and their products in order to ensure compliance with the provisions of this Program and to ensure that the payments are made to eligible producers and advanced biofuels and is necessary in order to implement this Program.

Advanced biofuel producers seeking to participate in the Program must enroll in the Program by submitting an Agency-approved application, including documentation to support the amount of eligible advanced biofuels reported in the application and biofuel certifications. Once approved for participation, the producer and the Agency enter into an Agency-approved contract. The advanced biofuel producer will then submit an Agency-approved form to request payment. These requirements are stated in the interim rule.

The estimated information collection burden hours has increased from the proposed rule by 426 hours from 2,273 to 2,699 for the interim rule. The majority of this increase is attributable to an increase in the number of expected applicants and participants, as the result of several factors including expanding the program to non-rural biofuel facilities and to foreign-owned biofuel facilities.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.8 hours per response.

*Respondents:* Advanced Biofuel Producers.

*Estimated Number of Respondents:* 393.

*Estimated Number of Responses per Respondent:* 9.4.

*Estimated Number of Responses:* 3,704.

*Estimated Total Annual Burden on Respondents:* 3,115.

## E–Government Act Compliance

Rural Development 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.

### I. Background

Rural Development administers a multitude of programs, ranging from housing and community facilities to infrastructure and business

development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing leadership, infrastructure, venture capital, and technical support that can support rural communities, helping them to prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, loan guarantees, and direct payments) and technical assistance to help enhance the quality of life and provide support for economic development in rural areas. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) contains several sections under which Rural Development provides financial assistance for the production and use of biofuels.

The Advanced Biofuel Payment Program addresses Section 9005 of the Farm Security and Rural Investment Act of 2002 as added by the Food, Conservation, and Energy Act of 2008, which authorizes the Secretary of Agriculture to “make payments to eligible producers to support and ensure an expanding production of advanced biofuels” by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production. To be eligible for payments, advanced biofuels produced must be derived from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

On April 16, 2010 [75 FR 20085], the Agency published a proposed rule for the Advanced Biofuel Payment Program. Comments were requested on the proposed rule, which are summarized in Section III of this preamble. Most of the proposed rule’s provisions have been carried forward into subpart B of this interim rule, although there have been several significant changes. Changes to the proposed rule are summarized in Section II of this preamble.

*Interim Rule.* USDA Rural Development is issuing this regulation as an interim rule, effective March 14, 2011. All provisions of this regulation are adopted on an interim final basis, are subject to a 60-day comment period, and will remain in effect until the Agency adopts the final rule.

### II. Summary of Changes to the Proposed Rule

This section presents changes from the April 16, 2010, proposed rule. Most of the changes were the result of the Agency’s consideration of public comments on the proposed rule. Some changes, however, are being made to clarify proposed provisions. Unless otherwise indicated, rule citations refer

to those in this interim rule. Changes to the proposed rule for the Advanced Biofuel Payment Program include:

1. Removing the citizenship requirement as an applicant eligibility requirement. In addition, the term “immediate family” was deleted because the term was only used in the context of the citizenship requirements.

2. Adding to the definition of “larger producer” and “smaller producer” provisions for determining whether an advanced biofuel producer of biogas or solid advanced biofuels is a “larger producer” or a “smaller producer.” For biogas and solid advanced biofuel, this determination will be based on the production of an amount of energy considered by the Agency to be equivalent to 150,000,000 gallons of liquid advanced biofuel (15,900,000 MMBTU) per year.

3. Using the term “biofuel facility” instead of “biorefinery” to clarify that eligible advanced biofuels may be produced at facilities other than biorefineries.

4. Replacing the provision that would have allowed payment for an advanced biofuel used onsite with a requirement that an advanced biofuel must be sold as an advanced biofuel to a third party through an arm’s length transaction in order to be eligible for payment (*see* § 4288.111(a)(4)).

5. Several revisions were made to application requirements in § 4288.120, most of which affect the certification provisions:

- Removing the supporting documentation requirements associated with the enrollment application;
- Removing the requirement for BQ–9000 certification;
- Clarifying the Renewable Identification Number (RIN) requirement;
- Revising “self-certify” to “certify” (*see* § 4288.120(a)(3)(iii));
- Revising the woody biomass documentation to apply to just National Forest system lands and public lands; and
- Revising the requirement for supporting documentation (§ 4288.120(a)(4)) to apply to all advanced biofuel producers, not just to those that project an increase in production and new producers.

6. Allowing the blender to issue a certificate of analysis (*see* § 4288.105(a)(3)), and adding a definition of the term “blender” to § 4288.102.

7. Changing the approach the Agency will use in making a Government payout to deferring payment pending resolution of the review rather than

making the payout prior to resolution of the review (see § 4288.135(b)(2)).

8. Revising the introductory text to § 4288.136 to reference §§ 4288.134 and 4288.135.

9. Numerous revisions were made to the payment provisions found in § 4288.131, including, but not limited to:

- Providing for payments for actual production and incremental production;
- Calculating actual production payment rates each quarter rather than on an annual basis;
- Determining payments each quarter based on the actual amount of advanced biofuel produced in the quarter;
- Requiring participating producers to submit payment applications each quarter such that if a producer does not submit a payment application by a quarter's due date, the producer will not receive payment for that quarter; and
- Adding payment limitations for advanced biofuels produced from forest biomass.

Several additional conforming changes were made in this section to reflect these changes, including deleting the definition for base production.

As summarized above, the Agency has significantly revised the payment provisions associated with the Advanced Biofuel Payment Program from the payment provisions that were proposed. The Agency received a number of comments that suggested different ways to balance competing concerns that arise in this program. The revisions made are intended to take into account a number of concerns, some of which are competing concerns, including:

- Whether we should offer additional payments for incremental over base production or offer a single payment approach that provides one payment rate for all production;
- Determination of base production amounts;
- Determination of incremental production amounts;
- Does this program distort the other markets for certain advanced biofuels feedstocks and if so, should the payment rates for biofuels using these feedstocks be adjusted;
- The importance of maintaining current production capacities verses encouraging incremental production and should the balance between these two program goals be adjusted over time.

The Agency further took into account a number of factors in responding to comments and making program adjustments including:

- The authorizing statute goal to support both existing and incremental production;

- Use incremental payments to encourage increases by producers that consistently produce advanced biofuels because such increases are likely to be sustained;

- The Managers' Conference Report in which the Managers encourage the Secretary to consider competing market outlets when establishing the payment rate for forest biomass feedstocks used to produce advanced biofuels;
- Aligning this program with other Federal programs addressing advanced biofuels consistent with the legislative authorization of this program;
- The current economic climate for advanced biofuels and how that climate may change over time;
- The administrative complexity of implementing a payment program; and
- The Agency experience and lessons learned from the existing implementation of the program under the Notices of Contract Proposal for fiscal years 2009 and 2010.

Based on the above concerns and factors, the revised payment provisions, as found in the interim rule, are summarized below.

*Two tier payments.* The Agency is retaining a two-tiered payment approach, but with changes from the proposed rule. By implementing this two-tiered approach, the Agency continues to encourage both existing and new advanced biofuel payments.

- *Actual Production Payments.* These payments would be made for actual production in the fiscal year for which payments are sought. These payments will be made on a quarterly basis.

- *Incremental Production Payments.* These payments would be made for incremental production. These payments will be made once, at the end of the fiscal year. In order to receive incremental production payments, the facility must have produced an eligible advanced biofuel in the year preceding the fiscal year in which payment is sought, the facility must have had fewer than 20 days (excluding weekends) of non-production of eligible advanced biofuels in the preceding year, and the quantity of eligible advanced biofuels in the fiscal year in which payment is sought must be greater than the actual quantity of eligible advanced biofuel produced in the preceding year. This requirement focuses the incremental payments on encouraging production increases from producers that are likely to sustain such increases over time instead of producers who widely vary production from year to year based on short term market conditions.

Incremental production is being defined as "The quantity of eligible advanced biofuel produced at an

advanced biofuel biorefinery in the fiscal year for which payment is sought that exceeds the quantity of advanced biofuel produced at the biorefinery over the prior fiscal year." For example, if a facility produced the equivalent of 100 million BTUs of eligible advanced biofuel in FY2010 and the equivalent of 120 million BTUs of eligible advanced biofuel in FY2011, 20 million BTUs would be eligible for incremental payment in FY2011.

By determining incremental production in this manner, the Agency is removing the need to project productions and the incentive to over-estimate production. These provisions will also address concerns about production manipulation to achieve higher payments (e.g., shut down one year and start up the next).

However, not all facilities and advanced biofuels would be eligible for incremental production payments. Specifically:

- If a facility did not produce any advanced biofuel in the year prior to the fiscal year in which payment is sought, it would not be eligible for incremental production, but would still be eligible for actual production payments.

- If a facility produced eligible advanced biofuel in the year prior to the fiscal year in which payment is sought, but the facility has 20 or more days (excluding weekends) of non-production, it would not be eligible for incremental production, but would still be eligible for actual production payments. For example, in the previous example, if the facility that produced the equivalent of 100 million BTUs in FY2010 has 40 days of non-production of eligible advanced biofuel, then the facility would not be eligible for incremental payments in FY2011 and all 120 million BTUs produced in FY2011 would be paid using the actual production payment provisions.

- If the advanced biofuel is a solid advanced biofuel produced from forest biomass, the advanced biofuel would not be eligible for incremental production, but would still be eligible for actual production payments.

*Level of available program funds.* The interim rule contains several provisions that identify the general amount of funds that will be available each fiscal year. Specifically:

- In FY2010, the Agency will allocate 80 percent of the available program funds to pay for actual production and 20 percent to pay for incremental production.

- In FY2011, the Agency will allocate 70 percent of the available program funds to pay for actual production and

30 percent to pay for incremental production.

- In FY2012, the Agency will allocate 60 percent of the available program funds to pay for actual production and 40 percent to pay for incremental production.

- In FY2013 and beyond, the Agency will allocate 50 percent of the available program funds to pay for actual production and 50 percent to pay for incremental production.

- Each fiscal year, not more than 5 percent of the available program funds will be paid to larger producers.

- Each fiscal year, not more than 5 percent of the program funds will be paid for solid advanced biofuels produced from forest biomass.

- All actual production payments and the incremental production payments will be made so as to expend all of the funds available to each.

The implementation of these provisions will result in calculating a single actual production payment rate each quarter that will be applied to all producers and a single incremental production rate at the end of each fiscal year that will be applied to all eligible producers with eligible incremental production. Either payment may need to be adjusted, however, if either the larger producer payment limit of 5 percent of available program funds or the solid advanced biofuel produced from forest biomass payment limit of 5 percent of available program funds is reached.

In developing this approach, the Agency determined that, for the next several years, a major focus of the program must be to assist the advanced biofuels industry in maintaining its production capacity while the economy recovers. As the economy improves over the next several years as the demand for energy in general increases, the Agency believes it is appropriate to shift the focus of the program to encourage new production. The payment formula in the interim rule reflects this view.

*Type of advanced biofuel produced.* While the authorizing statute does not limit the type of advanced biofuels eligible for payment under this program, there are two concerns that the Agency is addressing in the revised payment provisions that will affect payment based on the type of feedstock used and on the type of advanced biofuel.

First. As noted above, the Manager's Conference Report encourages the Secretary to consider competing market outlets when establishing the payment rate for forest biomass feedstocks used to produce advanced biofuels. To address this, the Agency is implementing the following provisions:

- For liquid and gaseous advanced biofuels made from forest biomass, the BTUs calculated from such advanced biofuels will be discounted by 10 percent. The effect of this will be to reduce payment that such advanced biofuels would receive compared to the same advanced biofuel made from a different feedstock.

- For solid advanced biofuels made from forest biomass, the BTUs calculated from such advanced biofuels will be discounted by 85 percent. The effect of this will be to reduce payment that such advanced biofuels would receive compared to the same advanced biofuel made from a different feedstock.

- As noted previously, any solid advanced biofuel produced from forest biomass would be ineligible for incremental production payments, but would still receive actual production payments.

- Each fiscal year, not more than 5 percent of the program funds will be paid for solid advanced biofuels produced from forest biomass.

In developing these BTU discounted rates for advanced biofuels produced from forest biomass, the Agency is encouraging the use of forest biomass for the creation of advanced biofuels consistent with Congress' concern that alternative uses of these feedstocks should be considered. Given that nearly all of the forest biomass feedstocks have alternative uses, the Agency has decided to focus the program on the encouragement of the creation of new biofuels from forest biomass as opposed to simply finding new ways to burn off the feedstock. In determining the relative BTU discount rates, the Agency does not want to discourage the use of forest biomass for new types of advanced biofuels and, thus, is setting a nominal discount rate for liquid and gaseous advanced biofuels produced from forest biomass. However, in the case of solid advanced biofuels produced from forest biomass, the Agency has determined that the goals of this program are not promoted by making substantial payments to such advanced biofuels. Therefore, the use of forest biomass as a feedstock that simply creates a solid fuel to be burned will receive a substantially higher BTU discount rate, which will result in a substantially smaller payment compared to other eligible advanced biofuels. In addition, such advanced biofuels will not be eligible for incremental payments and the total payments to these advanced biofuels will not exceed 5 percent of total available program funds in any one fiscal year.

Second. To encourage a more favorable environmental outcome of this

program, the Agency is providing an additional economic incentive for the production of advanced biofuels that use technologies and feedstocks that minimize greenhouse gas emissions and carbon usage. In order to carry this out, the Agency is providing an additional 10 percent BTU bonus if the advanced biofuel meets an applicable renewable fuel standard as identified by the U.S. Environmental Protection Agency (EPA). The Agency also believes that this change will better align this program with other Federal programs addressing advanced biofuels consistent with the legislative authorization of this program.

### III. Summary of Comments and Responses

The proposed rule was published in the **Federal Register** on April 16, 2010 (75 FR 20085), with a 60-day comment period that ended June 15, 2010. Comments were received from 1,090 commenters yielding over 165 individual comments, which have been grouped into similar categories. Commenters included members of Congress, Rural Development personnel, trade associations, State agencies, universities, environmental organizations, and individuals. As a result of some of the comments, the Agency made changes in the rule. The Agency sincerely appreciates the time and effort of all commenters. Responses to the comments on the proposed rule are discussed below.

#### *On-Site Use Eligibility*

*Comment:* Several commenters supported allowing advanced biofuels used for on-site purposes to be eligible for payments under this program. A number of different reasons were cited:

- Broadening payments to cover on-site usage of eligible advanced biofuels would encourage increasing production and use of advanced biofuels, which is exactly the goal of the program. The Advanced Biofuel Payment Program's goal of developing a stable renewable energy industry to supply increasing amounts of the country's energy needs, plus the implicit objective of reducing greenhouse gas ("GHG") emissions in the production and use of advanced biofuels is equally met whether the advanced biofuel is sold and used as a transportation fuel blend component, sold and used as non-transportation renewable energy, or is used on-site by the advanced biofuel producer to displace fossil fuel derived energy to meet process energy needs.

- One object of the program is to expand beyond transportation fuels. On-



site stationary fuel requirements are an appropriate use of funds.

- There are a number of ethanol biorefineries that have the potential to generate renewable biogas to offset up to 100 percent of current fossil fuel usage for process energy and/or electricity. It would be extremely difficult and impractical to require the biogas generated to be put into a commercial pipeline and utilized off-site. There would be unnecessary costs to further refine the gas to meet commercial natural gas line specifications and to pressurize the gas enough to put into the higher pressure commercial mains that have pressures as much as 600 psi or more. It would be more practical to utilize the biogas on-site as it can be generated and used without extensive refinement and pressurizing. Plus it can be consumed entirely for process energy demands at a typical ethanol biorefinery. However, the option for a facility to produce biogas that could be used commercially off-site or to an adjacent facility should remain open for those facilities and agreements that could be established to utilize the advanced biofuel elsewhere.

- The production of advanced biofuels should be encouraged whether the use is in transportation fuel or for internal use. For example, sweet sorghum to ethanol facilities will produce gaseous advanced biofuels via anaerobic digesters. This biogas will be used internally in the facility and should be eligible for payment.

These commenters recognize the need to be able to verify the on-site usage and made recommendations on how this could be done.

One commenter proposes that on-site usage of advanced biofuels by the advanced biofuel producer be monitored and verified with flow meters installed ahead of the point of usage on-site. Such flow meters can be totalized to properly account for quarterly usage rates.

Two commenters state that on-site usage should be monitored by installation of meters that have been verified for accuracy by an independent third party. The meters should be checked annually by an independent third party, and a report by the independent third party should be submitted along with the other necessary documentation to secure a payment under the program.

One commenter notes that all legitimate fuel manufacturers must record all inputs and outputs. A simple mass balance approach would verify the production of fuel. Use of the fuel is not a requirement for the program regardless of the kind of fuel produced. Thus, it is

the production of fuel that is verified by USDA not the use of fuel regardless of where or even if the fuel is ultimately used.

One commenter believes that entities that utilize the advanced biofuel produced for internal purposes should be entitled to Program payments. There are a number of ethanol biorefineries that have the potential to generate renewable biogas to offset up to 100 percent of current fossil fuel usage for process energy and/or electricity. It would be extremely difficult and impractical to require the biogas generated to be put into a commercial pipeline and utilized off-site. There would be unnecessary costs to further refine the gas to meet commercial natural gas line specifications and to pressurize the gas enough to put into the higher pressure commercial mains that have pressures as much as 600 psi or more. It would be more practical to utilize the biogas on-site as it can be generated and used without extensive refinement and pressurizing. Plus, it can be consumed entirely for process energy demands at a typical ethanol biorefinery. However, the option for a facility to produce biogas that could be used commercially off-site or to an adjacent facility should remain open for those facilities and agreements that could be established to utilize the advanced biofuel elsewhere.

Any on-site usage should be verified utilizing standard flow meter instruments that are commonly utilized by the natural gas industry. Calibration should be completed according to the manufacturer's recommendations or an equivalent method. An independent third party could be utilized for accuracy verification along with a letter sent to USDA that documents the meter accuracy and certifies the amount of biogas generated for payments. Any biogas amount sent to a flare should not be considered for payment as that amount is not offsetting fossil fuel usage.

*Response:* The Agency agrees the focus of the program is increasing the production of advanced biofuels, with the statute authorizing this program requiring that payment be made to encourage the support and expansion of production of advanced biofuels. The Agency has determined that the best way to implement the goals of this program is to provide funds to the production of advanced biofuels that enter the marketplace and are sold on the market for use as an advanced biofuel. Many entities may produce biofuels that qualify as an advanced biofuel, but do so with the intent to use the biofuel on-site to, for example, heat

or power their business. Most of these entities would not be considered advanced biofuel producers. Therefore, the Agency is not extending this program to pay for advanced biofuels that are used on-site.

*Comment:* One commenter recommends that advanced biofuel producers who do not sell to the public not be rewarded because the only ones benefiting are the ones making and using their own fuel, but it is the public's tax dollars paying for the program.

*Response:* For the reasons cited in the response to the previous comment, the Agency agrees with the commenter, and has revised the rule text to require that the advanced biofuel be sold to a third party through an arm's length transaction.

*Comment:* One commenter requests that biogas production by an ethanol plant be eligible for payment under this program. The commenter states that it plans to produce cellulosic ethanol and biogas for its cellulosic ethanol process. The ethanol will be marketed, and the commenter understands would be eligible for payments under this USDA program. The commenter believes that biogas production by an ethanol plant should also be eligible for payments under this program. According to the commenter, statistics on production, usage, and marketing of the biogas can be tracked and verified.

*Response:* If the biogas is produced from renewable eligible feedstock producing renewable energy, the Agency would pay on that biogas if it qualifies as an advanced biofuel and is sold in the marketplace as an advanced biofuel through an arm's length transaction to a third party. If the biogas, however, is used on-site, it is not eligible for payment under this program for the reasons discussed above.

#### *Follow Intent of Program*

*Comment:* One commenter, while noting that the proposed rule is clear in its intent to encourage both the introduction of incremental advanced biofuels into the marketplace and support of existing production, believes that the proposed rule needs to be more explicit with respect to enabling long term solutions that address our greatest energy policy need, which can be summed up as "low carbon transportation fuels." Specifically, the commenter suggests that, in developing renewable transportation fuels that will gain broad acceptance and avoid public and environmental scrutiny, it is important to consider the following:

(1) Establishing an inventory of truly sustainable biomass feedstock.

(2) The ability to integrate bioenergy crops into the agricultural sector as an incremental opportunity without social or environmental consequences.

(3) Creating fuels fungible to the marketplace that can displace imported sources and reduce energy dependence.

*Response:* The purpose of the program is to provide a payment to producers who produce advanced biofuel. With respect to comment #1 above, the Agency has determined that establishing an inventory of truly sustainable biomass is more appropriate for other energy programs. With respect to comments #2 and #3 above, the Agency is satisfied that the concerns expressed in those comments are reflected in the statutory definition of advanced biofuel and, therefore, these concerns do not need to be further considered by the Agency at this time.

*Comment:* One commenter believes that the proposed rule is following the intent of the program except that corn starch ethanol production should not be excluded as a potential advanced biofuel. The commenter recommends that it be classified as an advanced biofuel if the lifecycle GHG analysis meets the 50 percent GHG reduction requirement for an advanced biofuel. If the intent is to encourage the production of advanced biofuels and, if corn starch to ethanol facilities can meet the definition of an advanced biofuel by incorporating measures to reduce GHG emissions, then those facilities should not be excluded.

*Response:* The authorizing statute defines advanced biofuel, in part, as “fuel derived from renewable biomass other than corn kernel starch.” Because the authorizing statute specifically excludes corn kernel starch for the definition of advanced biofuel, the Agency cannot include it in this program.

#### *Payment Rates Appropriateness—Base Production Versus Incremental Production*

*Comment:* Commenters do not support different payments rates for base production and incremental production and recommend eliminating this differentiation. These commenters believe that providing different payments levels for base and incremental production makes the program more complex than necessary, and could create inequity among producers. According to the commenters, establishing a differential payment could potentially create an inequity between competitors by unfairly punishing a producer who maintained continuous production during difficult economic conditions,

while rewarding a producer who shut down and restarted. Two commenters are concerned that a higher payment for incremental production will create an incentive to produce for a year, shut down, and then return to production.

The differential payment and the calculations for producers based on the number of months in existence also creates an unnecessary complexity to the administration of the program. USDA’s method for calculating base and incremental production levels under the NOCP is convoluted and confusing. Providing equal payment levels for base and incremental production would result in a simpler, more efficient, fair and equitable program.

*Response:* The Agency appreciates the concerns raised by the commenters, which the revised payment provisions address, which are presented earlier in Section II of this preamble. Even though the Agency is retaining a two-tiered payment system, the provisions associated with the determination of production and the payment rate calculation process for actual production and incremental production have been simplified. The same actual production payment rate and the same incremental production payment rate would be calculated for all participants.

As described earlier in the preamble, under the new payment provisions, there is no longer a set payment differential between “base” production and “incremental” production, which was the source of concern to many of the commenters. Instead, one set of payments will be made (quarterly) based on actual production in the fiscal year for which payment is sought and the other set of payments will be made (at the end of the fiscal year) based on the production in the fiscal year that exceeds the quantity of actual production in the preceding fiscal year (referred to as “incremental” production). In addition, the funds available for actual production payments and for incremental production payments are identified each fiscal year.

The Agency acknowledges that the new provisions will also result in uncertainty as to how much a producer will receive from actual payment production and from incremental production, because there is no way to predict all of the variables that will affect payments, including how many producers will participate, how much will be produced, and how much production will be eligible for incremental production payments. However, by removing the defined payment differential, any “inequity” that might have existed under the proposed

payment provisions among producers who maintained continuous production and those who did not would be significantly reduced, if not eliminated.

*Comment:* Numerous commenters support replacing the proposed two-tier payment system with a single level of payment for all eligible fuel for the reasons discussed in the following paragraphs. One of the commenters noted that the two-tier payment system should be eliminated at least for the biodiesel producers, because, according to this commenter, there is no justification to incentivize new capacity in the biodiesel/renewable diesel industry where capacity dwarfs the feedstock availability and likely demand under the Renewable Fuel Standards 2 (RFS-2).

According to the commenters, there are several benefits to this approach. First, the commenters note that different payments for base and incremental production makes the program more complex than necessary and that a single level of payment will simplify administration of the program for both USDA and participants. This will also eliminate any potential incentive to engage in gaming of production totals to maximize incremental payments. One of the commenters notes that, based on this recommendation, for example, for the Fiscal Year 2010 program, one payment would be given for the gallons produced between October 1, 2009, and March 30, 2010, and second payment for production from April 1, 2010 to September 30, 2010 period without any incremental gallons changes.

Second and more importantly, the two-tier approach could create inequities among producers, while a single level of payment (combined with the removal of the rural area and domestic ownership requirements) will provide a level playing field for all advanced biofuels producers in the marketplace; a differential that provides 5 times greater payment for incremental production is very significant and would create an uneven playing field between competing plants. The five-to-one payment differential provided for in the proposed rule has the potential to put otherwise equivalent advanced biofuels of identical quality and cost at a significant disadvantage in the highly competitive, low margin, high volume fuels marketplace. Equitable treatment under the program is consistent with the goal established by Congress of supporting the existing production as well as new production of existing advanced biofuels.

Commenters note that the biodiesel industry has built significant capacity, much of which is not currently being

utilized. A differential that provides 5 times greater payment for incremental production is significant and would create an uneven playing field between competing plants.

A third commenter points to an approach that makes program payments based on total gallons produced rather than the "base production" versus "incremental production" payment method currently included in the proposed rule. As the biodiesel industry is still in the infant stages, the commenter maintains that it is just as important for this program to help ensure the continued operation of existing facilities as it is to encourage expanded production or new facilities. According to the commenter, elimination of the program's two-tiered payment structure would promote more equal treatment for each gallon of biodiesel produced in the U.S.

One commenter states that all advanced biofuels under this program should be treated similarly. According to the commenter, differentiated payments to certain advanced biofuels and not others will create artificial market distortions. These distortions are created because the Agency is picking winners and losers in the advanced biofuels arena based on arbitrary requirements. The market will then reward those who luckily meet the requirements or can adjust their production to meet the requirements. Some will be disadvantaged because the rules are changing after the plant has been built or commenced construction and cannot be changed (e.g., location). Advanced biofuel produced in the U.S. and its territories is considered biofuel by the marketplace. It does not depend on the amount of biofuel produced in the previous year at the production plant. For these reasons, the support differential between incremental and base production should be eliminated and there should be no prior year production restrictions on the payments.

One commenter understands the importance of enabling new production and the spirit of incentivizing incremental production and believes that this mechanism should work to incentivize additional production of advanced biofuels over current volumes. However, the commenter is concerned that the proposed rule seems to incentivize reduced production in the base year, so the facility can take advantage of a 5 times multiplier in the subsequent year. The commenter believes this would not be productive for the advanced biofuel industry. The proposal states that "for a biorefinery that has been in existence less than 12

months before October 1 of the sign-up fiscal year or that begins producing eligible advanced biofuels on or after October 1 of the sign-up fiscal year, there is no incremental production; all production for that sign-up fiscal year will be considered base production." The commenter does not believe this is, or should be, the intention of the program and recommends that the Agency revisit the definition of base production rate so that facilities coming online will be incentivized to bring as much capacity into production as early as possible.

One commenter believes that a two-tier system produces significant administrative problems especially regarding the issue of when the advanced biofuel is produced. According to the commenter, the proposed ability to claim a high tier payment rate versus a low tier payment rate simply encourages program participants to game the payment system. The commenter, therefore, encourages the Agency to replace the proposed two-tier payment rate with a single payment rate, which will allow easier and more accurate administration by all parties while at the same time discouraging gaming the program.

The commenter suggests that instituting a single payment rate helps level the playing field between competitive producers. The proposed two tier system will, at times, allow some producers to enjoy a five-to-one payment advantage over a competitor producing an identical fuel.

The commenter further states that a single payment level also delivers equal treatment under the program, which the enacting statute provides by supporting both existing and new production of advanced biofuels.

*Response:* The Agency is maintaining a two-tier system to support the authorizing statute's goal of supporting both existing and incremental production. However, the implementation of this two-tier system is significantly different from what was in the proposed rule and these changes address the concerns expressed by the commenters.

As discussed in the response to the previous comment, the new payment provisions make the calculation of payments easier than under the proposed payment provisions, make the calculation of incremental production more objective and easier to calculate, and eliminate the "5 times the base production rate" provision for incremental payments, which creates the more level playing field that the commenters are looking for.

With regard to concern over the potential gaming under the proposed payment provisions by under reporting production to maximize incremental production, the payment provisions have been revised to eliminate this. To receive incremental payments under the interim rule, an advanced biofuel facility must have produced an eligible advanced biofuel in the year preceding the fiscal year in which payment is sought and must not have had more than 20 days (excluding weekends) of non-production of eligible advanced biofuels. Further, any advanced biofuel facility that did not produce an eligible advanced biofuel in the year preceding the year in which payment is sought would not be eligible for incremental payments. These provisions will eliminate the "gaming" for reporting production and will eliminate the specific concern expressed about "unfairly punishing a producer who maintained continuous production during difficult economic conditions, while rewarding a producer who shut down and restarted."

The payment provisions in the interim rule divide the program funds between actual production and incremental production, with no pre-determined relationship between payment rates (\$/BTU). Thus, there is no pre-determined relationship between actual production payments and incremental production payments. Incremental production payments may be higher, lower, or the same as actual production payments. This further reduces any incentive to try to "game" payments under this program and results in a more equitable program to all participants as the economy seeks to recover.

Furthermore, as revised, the program provides more funds to actual production in the earlier years relative to incremental production in order to assist all facilities through the current economic difficulties facing the country, and provides more funds in the later years to encourage expansion.

With regard to the suggestion that a two-tiered system be eliminated at least for the biodiesel producers, the Agency disagrees with the commenter, because the rule needs to look at the long term and not at the short term market conditions, as the commenter is doing.

Finally, with regard to the comment that "all advanced biofuels under this program should be treated equally," the new payment provisions address the issues identified by the commenter by removing the location requirement and adjusting the calculations associated with actual production and incremental production. However, the Agency notes

that the new payment provisions adjust payments if the advanced biofuel is produced from forest biomass or if the advanced biofuel meets an applicable renewable fuel standard as identified by the EPA. The adjustment for using forest biomass is in response to the Managers Conference Report associated with the authorizing statute. The adjustment if the advanced biofuel meets an applicable renewable fuel standard as identified by EPA is in response to encouraging a more favorable environmental outcome of this program and aligning it with other Federal programs addressing advanced biofuels consistent with the legislative authorization of this program.

*Comment:* One commenter supports a revision to the application process that eliminates the projected incremental amount from the annual application (Form RD 4288-1) submission. While the commenter believes that the differential payment between base and incremental production should be eliminated from the program, even if the differential payment remains, the commenter believes that it is unnecessary to ask producers to attempt to project their production given the vast uncertainty that exists in the biofuels market today. Furthermore, the commenter claims that, as proposed, producers would be penalized if they underestimated their projected production, as any amount produced above the projected amount is not eligible for payment. According to the commenter, this incentive for applicants to vastly overestimate production is not useful to USDA in pre-determining the expected payment rates and could lead to under-subscription of the program funds when the final, actual production amounts are reported and verified.

Another commenter also believes that each producer will report the highest possible production for the upcoming fiscal year to ensure that all potential production from the production facility will be eligible to receive the subsidy. Therefore, the volumes used for the determination of the payment amounts by the USDA will be overstated. This will reduce the payout for all producers and result in funds being left over at the end of each fiscal year. This commenter suggests a solution to this problem would be to allow for the modification of the payment rate in the fourth fiscal quarter after the receipt of all production reported in Form RD 4288-3. This adjustment would only be made if the initial payment rate results in excess funds being available if the initial payment rate is used for fiscal year fourth quarter production. If excess funds are available, then the

modification would result in an increase in the payment rates to producers. The increased payment rate would be calculated similarly to the original determination, except that the total BTUs in the calculation would be based on actual production from the total fiscal year as reported on all Form RD 4288-3 submitted to the USDA for that fiscal year. After calculation of the increased rate for all production in the fiscal year, then each producer would be paid for their fourth quarter production at the new rate and for production in the first three quarters at the difference between their increased rate and the original rate. The advantages of this recalibration at the end of the fiscal year are to ensure that all funding allocated by Congress is used in the intended year and to eliminate the necessary bias to overstating production in the estimates submitted on Form RD 4288-1 at the beginning of the fiscal year.

One commenter also suggests that USDA remove the requirement from the current Form RD 4288-1 that participants estimate future incremental production. Because producers cannot receive payments for amounts beyond this estimate, the commenter believes that there is an incentive to overestimate future incremental production, which in turn makes it difficult for USDA to accurately determine payment rates.

As an alternative, several commenters support having producers report their previous year production on Form RD 4288-1 and actual production on Form RD 4288-3.

*Response:* The Agency agrees that initial projections for Form RD 4288-1 are difficult to make given the market forces in the biofuel industry and has eliminated the requirement to submit projections for this program. The Agency acknowledges having payments based on actual production will improve the program. Thus, under the interim rule, payments will be made, in part, quarterly on actual production.

*Comment:* One commenter recommends that, should the Agency retain the requirement on Form RD 4288-1 that participants project future production, the Agency should then utilize a reconciliation process at the end of the fiscal year that allows for modification of the payment rate in the fourth quarter after the receipt of all production reported on Form RD 4288-3. This adjustment would only be made if the initial payment rate utilized in the first three quarters of the year would result in excess funds being available if applied to actual fourth quarter production. If excess funds are available, then the modification would result in an increase in the payment

rates to producers. The increased payment rate would be calculated similarly to the original determination, except that the total BTUs in the calculation would be based on actual production from the total fiscal year as previously reported on Form RD 4288-3 in the preceding quarters. After calculation of the increased rate for all production in the fiscal year, each producer would be paid for their fourth quarter production at the new rate and for production in the first three quarters at the difference between their increased rate and the original rate. Providing for this sort of reconciliation in the fourth quarter will ensure that all funding allocated by Congress is utilized while minimizing the incentive to overstate estimated production at the beginning of the fiscal year.

*Response:* The Agency acknowledges that the payment methodology contained in the proposed rule may not utilize all funds and, therefore, revised the rule to ensure that all funds available to the program each fiscal year are expended for that fiscal year. Under the new payment provisions, participants will not be required to project future production. Payments for actual production will be distributed quarterly and payments for incremental production will be paid after the end of each fiscal year. There will be no "carry over" funds under the revised payment provisions.

*Comment:* One commenter states that, when signing up for the program, applicants have to identify their production estimates and that they will get paid off the estimates. If an advanced biofuel producer goes over the estimated production, the advanced biofuel producer will not get paid for the extra production. The commenter then asked: Isn't the purpose to have more production each year, to encourage new production, and pay a higher rate for incremental production? Thus, the commenter believes that advanced biofuel producers should be paid for all production, not just estimated.

Another commenter states that it appears that an advanced biofuels producer would be unable to predict its advance biofuels payment for a given year because the incentive is based on funds available and the number of eligible producers. The commenter, therefore, recommends that the Agency offer at least a range of incentive amounts per gallon so that biorefineries may plan.

*Response:* While the commenter seems to misunderstand the proposed payment provisions (payments will not be made based on estimated

production), the Agency acknowledges the comments and revised the payment methodology to clarify that payments will be made based on actual production and producers will be paid for all actual eligible advanced biofuel production.

The Agency disagrees with the comment to provide a range of incentive payment on a per gallon basis, because it is not possible to do so given the variables associated with making payments. Such variables include the number of producers participating in the program each year, the quantity of eligible advanced biofuels produced in the fiscal year, and the quantity of advanced biofuels eligible for incremental production payments. By specifying each fiscal year the level of funds that will be available for actual production payments and for incremental production payments, some additional information is provided to producers to assist in their planning.

#### *Alternate Approaches in a Tiered Approach*

Several commenters suggested possible modifications to the two-tiered approach.

*Comment:* One commenter suggests that, if there is to be a differential payment that applies to all eligible advanced biofuels, the commenter recommends that the base production be equal to each facility's peak production and never go lower. This would reduce the incentive for a producer to start up and shut down to take advantage of a higher Bioenergy Program payment.

*Response:* The Agency agrees that "base" production as it related to incremental production needs to be revised, but disagrees that it should be equal to a facility's peak production. As noted previously, the Agency has revised the payment provisions to provide payment for actual production and incremental production. Because incremental production is only paid for production over the previous year's actual production, provided the facility produces an advanced biofuel with no fewer than 20 days (excluding weekends) of non-production, any incentive for the producer to start-up and shut down is removed.

*Comment:* One commenter suggests that, if the Agency believes that incremental payments rates are necessary for new fuels such as cellulose ethanol, such payment differentials should be confined to such fuels. If the object of differential payments is to incent new technology such as cellulose ethanol, USDA could implement a two tier payment program for non-biodiesel and non-renewable

diesel. According to the commenter, biodiesel and renewable diesel have no need for incenting new capacity or new production when there is already in an excess capacity situation.

*Response:* As discussed in a previous response, the Agency has revised the payment provisions in the rule. Rather than including provisions that call out specific types of advanced biofuels for preference, the Agency has revised the payment provisions, as described earlier, to discount the BTUs associated with advanced biofuels produced from forest biomass and to provide "bonus" BTUs if an advanced biofuel meets an applicable renewable fuel standard as identified by the EPA. By doing so, the Agency is encouraging the production of all other types of advanced biofuels.

With regard to the commenter's concern about the excess capacity situation associated with biodiesel and renewable diesel, the phased in payment provisions to increase the percentage of funds for incremental production from 20 percent to 50 percent is designed to help address the current situation of over-capacity; that is, the Agency expects that as the economy improves, the over-capacity situation identified by the commenter will be significantly reduced.

*Comment:* Two commenters suggest that, if the differentiation of payments based on Base and Incremental Production is maintained, then a biorefinery that began production in the previous fiscal year, but not produced for all of that fiscal year, should not have all of its production count as base production. The goal of the program is to incentivize incremental production. The production from the previous fiscal year should be used as base production. Then the production above this base production would be incremental production because this volume is incremental to the marketplace and should be counted as such. One of the commenters also states that all volume from a new production facility is incremental production (0 production the year before) to the marketplace and should be counted as such.

Two other commenters believe that an incremental rate of three to five times is an appropriate stimulus for expanding production, while still allowing for a base payment rate that will provide stability to existing producers. These commenters do not support a larger incremental payment (as raising the incremental rate will lower the base rate) because a new producer will have his first year of production counted as base production. This seems to penalize new producers from entering into production versus existing producers

expanding their current production. The commenters believe that new production, whether from new or existing biorefineries, should be paid at the incremental rate. One of the commenters points out that the first sweet sorghum to ethanol facility that is proposed to come into production will begin producing advanced biofuels in December 2011. This will mean that three quarters in the 2012 fiscal year will be paid at base production instead of incremental production. A new facility has its greatest cash flow needs at the beginning of operation, not a year later. By providing incremental payments to this new production, USDA can help provide this needed first year cash flow.

One commenter supports the policy goal of promoting increased biofuel production through a tiered payment system. However, the commenter believes the program is inappropriately focused on incremental production from existing facilities rather than production from new facilities. Under the proposal, incremental production would receive a payment five times larger than "base" production and production from new facilities would be considered "base" production in its first year. The commenter does not believe this is responsive to the policy goal of encouraging increased biofuel production. Indeed, it will perversely favor increased production at existing facilities to the detriment of new facilities producing second and third generation advanced biofuels. The commenter suggests that new facilities be treated as incremental production for the first several years, after which they would establish their baseline. It is revenue in these first several years that will be most critical to the nascent advanced biofuels industry.

Several commenters express concern over the provision for when a facility would be paid for its incremental production.

One commenter believes that waiting until year 2 to receive the incremental production rate discourages rather than encourages maximum production of new, advanced biofuels as soon as possible and during the first year of production. The commenter recommends that all production be considered incremental production unless the biorefinery is in operation as of the time of the NOCP.

One commenter expresses similar concerns, that the current definition of incremental production does not encourage new capital investment to build new facilities or to increase the capacity at current facilities. The commenter recommends that base

production be identified as production from plants completed prior to October 1, 2010, and that incremental production be identified as production coming from new facilities or incremental capacity additions to current facilities completed after October 1, 2010.

One commenter also believes that as proposed the rule penalizes plants that expedite the introduction of new gallons to the market. The commenter states that new gallons should receive the incremental payment only once, but at least once, and should be eligible regardless of when the plant starts up. According to the commenter, facilities not in production for 12 months prior to the sign up period that come on line and quickly ramp up to capacity may be faced with a scenario where all of their capacity is base capacity. Thus, the rule seems to encourage reduced production in the base year, just so the facility can take advantage of a 5x multiplier in the subsequent year. In order to avoid discouraging rapid deployment, the commenter suggests that, for facilities not in production at least 12 months prior to the sign up period, base production should be calculated by dividing the amount of total volume produced up to the sign up period, by the number of months in operation, and multiplying by 12.

One commenter recommends revising the Agency's decision regarding the incremental production for biorefineries that have been in existence for less than 12 months. As proposed, such biorefineries will not be eligible for incremental payments. The commenter recommends reducing the timeline for incremental payments eligibility from 12 months to 6 months of production. According to the commenter, the first year of production is a critical time period for the biorefinery, such that financial support within this time period from this program will greatly increase the odds of commercialization success for the biorefinery. Recognition of the improvements in production through an increase in payment is an important step in that process.

*Response:* The Agency acknowledges the complexity of providing incentives to produce advanced biofuels in both the base and incremental scenario. As has been stated previously, the Agency has overhauled the payment provisions to provide for actual production and incremental production. Incremental production is paid only where a facility produced eligible advanced biofuels at an advanced biofuel facility that has no more than 20 days (excluding weekends) of non-production of eligible advanced biofuels in the year prior to

the fiscal year in which payment is sought. The Agency has determined that the revised payment provisions are easier to implement and remove the estimation of production, such that a more objective system is used.

The key revision in the payment program relative to these comments is the proportion of funds that will be paid for actual production relative to incremental production. For example, for fiscal year 2011, 70 percent of available program funds will be available to actual production and 30 percent will be available for incremental production. Thus, in the earlier years of the program, more funds will be available to help existing biorefineries and new biorefineries than will be available for increasing production at existing biorefineries.

While the Agency has not revised the provision that a new facility would not be eligible for incremental payments, there is no longer a defined relationship between the actual production payment rate and the incremental production payment rate and the amount of funds paid to facilities for actual production versus incremental production is unknown. Because more program funds will be made available in the earlier years of the program for actual production than for incremental production, it is likely that a new facility would benefit more under the revised payment provisions than under the proposed payment provisions. Once the new facility is established, it would be equally eligible for incremental production payments.

#### *Equivalent BTUs*

*Comment:* One commenter agrees with a per BTU payment method, but is concerned that equivalent BTU payments for solid fuels and liquid fuels will put liquid fuels at a significant disadvantage. The commenter provides the following reasons:

The fuel pellet industry is mature and enjoys significant market-driven growth potential. The advanced liquid fuel industry is very much in infancy and growth is limited due to challenging economics. This program should place priority on enabling early adopters in the advanced liquid fuel sector, which will help attract additional investment needed for growth. Having an equivalent BTU payment between fuel types dilutes the funding pool for liquid fuel producers and provides incentives for "business as usual" in the fuel pellet space. Placing priority on liquid fuels also helps solve the very important public policy issue of filling the advanced biofuel carve out in RFS-2.

The proposed rule includes restrictions on liquid fuel producers, but not solid fuel producers. Without restrictions, the commenter assumes that the existing wood pellet industry will draw from the same funding pool as the "small" liquid fuel producer. Up against an established industry, the predominance of funding will be awarded to existing solid fuel production and do little to enable new advanced liquid fuels.

The costs to construct and operate liquid fuel plants are significantly higher than that of solid fuels. Even corn ethanol capital costs can be 5 times higher per BTU than the costs associated with building a pellet plant and operational costs are over 2 times higher on a per BTU basis. These ratios could easily double for a cellulosic advanced biofuel facility where capital costs are being reported at well over twice that of a corn ethanol plant (or nearly 10 times that of a pellet plant).

To establish a level playing field, the commenter recommends that payments across fuel types should have some proportion to investment and should favor transportation fuels that displace imported fuels, and offers the following suggestions:

- Separate the funding into pools for the different fuel types.
- Include solid fuel producers in the "large" producer category.
- Include a multiplier for liquid fuel BTUs.

*Response:* The Agency has revised the payment provisions to discount the BTUs from eligible solid advanced biofuels produced from forest biomass and this revision addresses the commenter's concern.

In addition, the Agency added the following provision to the rule: A producer who has a production of 150 million gallons of liquid advanced biofuel or 15,900,000 MMBTU of biogas or solid biofuel will be considered a "larger producer." The following paragraph presents the assumptions and methodology used to derive the 15,900,000 MMBTU equivalent.

The Agency concluded that the most appropriate way to determine equivalency for biogas and solid advanced biofuels when comparing to liquid advanced biofuels was to establish an "average" heat content for advanced biobased liquid fuels that could be used as a benchmark. The Agency chose to use a 50-50 mixture of typical ethanol and biodiesel fuel as the benchmark liquid fuel for the equivalency determination. The heat content value for the benchmark liquid fuel was derived from information presented on Table 13.1 (U.S. Default

CO<sub>2</sub> Emission Factors for Transport Fuels) of The Climate Registry's "General Reporting Protocol" published in May, 2008. Table 13.1 lists the heat content of ethanol as 0.084 MMBTUs per gallon and the heat content of biodiesel as 0.128 MMBTU per gallon. These two values were averaged  $(0.084 + 0.128) / 2 = 0.106$  MMBTU per gallon and multiplied by 150,000,000 gallons (150,000,000 gallons \* 0.106 MMBTU/gallon = 15,900,000 MMBTU) to generate the BTU content of an amount of biogas and solid advanced biofuels that would be considered equivalent to the liquid advanced biofuels threshold for defining "larger producer."

Lastly, with regard to the suggestion that the program favor transportation fuels directly, the Agency has revised the rule to provide "bonus" BTUs to an advanced biofuel meets an applicable renewable fuel standard as identified by the EPA in order to achieve a more favorable environmental outcome of this program and to align it with other Federal programs addressing advanced biofuels consistent with the legislative authorization of this program. As a result of this provision, BTUs from such liquid advanced biofuels would receive a "multiplier" as suggested by the commenter.

*Comment:* Two commenters believe that, while the mechanism to develop a per BTU payment structure is sound, not all BTUs are created equal. According to the commenters, providing an equivalent BTU payment for woody biomass and liquid fuels products puts liquid fuels at a disadvantage. For example, the fuel pellet industry has reached a level of maturity that far surpasses the advanced liquid fuel industry.

The commenters believe that this program should place priority on enabling early adopters in the advanced liquid fuel sector because such priority may help the sector attract additional investment and provide for growth in the industry. Having an equivalent BTU payment dilutes the funding pool for liquid fuel producers and provides incentives for "business as usual" in the fuel pellet space. Placing priority on liquid fuels also helps solve the very important public policy issue of filling the advanced biofuel carve-out in RFS.

The rules as written establish clear restrictions on liquid fuel producers, but not solid or gaseous fuel producers. As such, the commenter assumes that all eligible solid fuel producers (*i.e.*, wood pellets) will draw from the same pool of funding as the "small" liquid fuel producer (less than 150 million gallons per year). Up against a mature industry,

the predominance of funding will be allocated to solid fuel production and do little to enable advanced liquid fuels. The capital costs and conversion costs for liquid fuels are significantly higher than that of solid fuels. When comparing fuel pellet costs to corn ethanol costs (the cheapest comparison possible and any eligible advanced liquid fuel will certainly cost more than corn ethanol), capital costs are 4–5 times higher per BTU for liquid, and operational costs are 2–3 times higher. Payment ratios should have some proportion to investment and should favor liquid fuels that displace imported fuel feedstock.

For these reasons, should USDA evaluate advanced biofuels applying for this program based on BTU content, they should evaluate BTU content against like fuel types only, *i.e.*, liquid fuels against liquid fuels, solid fuels against solid fuels and gaseous fuels against other gaseous fuels.

Another commenter, in referring to the determination of the equivalency values for payment, urges the Agency keep the final rule for this program as simple and streamlined as possible and place priority on liquid fuels as a non-mature industry that displaces imported fuel feedstock. In support of this, they included their opinions that were submitted to EPA during the RFS rulemaking process surrounding equivalency values on energy content of liquid biofuels as follows:

"[The commenter] supports EPA's approach on basing the equivalency values on the energy content and renewable content of each renewable liquid fuel in comparison to denatured ethanol, consistent with the approach under RFS-1. This would be consistent with other approaches such as non-liquid renewable fuels (biogas and renewable electricity) which continue to be valued based on the energy contained in one gallon of denatured ethanol and would not be changed under EISA. A straight volume approach would create a disincentive for the development of new renewable fuels that have higher energy content than ethanol because of the higher cost to incorporate more carbon into your base molecule. The use of energy-based equivalence values could thus provide a level playing field in terms of the RFS-2 program's incentives to produce different types of renewable fuel from the available feedstock. The commenter agrees that the existence of four standards under RFS-2 does not obviate the value of standardizing for energy content, which provides a level playing field under RFS-1 for various types of renewable fuels based on energy content."

*Response:* The purpose of the program is to support and ensure an expanding production of advanced biofuels. In addition, dividing funding among the different types of advanced biofuels (beyond the provisions associated with advanced biofuels produced from forest biomass and advanced biofuels meet applicable renewable fuel standards as identified by the EPA) as suggested by the commenter, would add complexity to both the calculation of payments under and the administration of the program. In the interim rule, however, the Agency has established a value of 15,900,000 MMBTU of biogas or solid biofuel as being equivalent to 150,000,000 gallons of liquid advanced biofuel. As the program matures, the Agency will continue to evaluate the use of the equivalent BTUs basis in making payments on the advanced biofuel industry as a whole.

*Comment:* One commenter notes that the difficulty in the economic decision to produce advanced biofuels is with the uncertainty of payment level from a competitive funding pool. Without knowing what the payment will be, facilities may be hesitant in moving forward with advanced biofuel related production especially if the economics are questionable. The commenter believes more consistent advanced biofuel production could occur if a payment rate structure and formula could be established to lessen the uncertainty so that biorefineries with operational flexibility in creating advanced biofuels would be encouraged to do so based on good economics. The appropriateness of the payment rates can be periodically evaluated and adjusted based on economic conditions and program results for expanding biofuel production.

*Response:* While the Agency acknowledges the commenter's concern over the uncertainty of payment level and economic decisions, there are too many variables outside the control of the Agency to reduce this uncertainty. Such variables include the number of applicants, the types of advanced biofuels, and the quantity of advanced biofuels seeking payment in any funding pool. The Agency notes that, by specifying each fiscal year the level of funds that will be available for actual production payments and for incremental production payments, some additional information is provided to producers to assist in their planning.

### Foreign Ownership

#### Comments in Support of Allowing Foreign Ownership

*Comments:* USDA received a large number of comments (over 1,000) related to the question of whether advanced biofuel biorefineries with foreign ownership should be allowed to participate in the program. Most of the commenters state their support for allowing foreign ownership (their opposition to the proposed 51 percent domestic ownership requirement). The commenters include U.S. Congressional Representatives, trade associations, industry representatives, and biorefinery employees. A large majority of the commenters supplied comments specifically related to one foreign-owned biorefinery, the Louis Dreyfus biorefinery in Claypool, Indiana. The key points offered by the commenters are summarized, as follows:

- Allow the Dreyfus facility to compete on a level playing field by revising the biofuel payment policy to allow the Claypool plant to be treated like the rest of the industry.
- The Dreyfus facility needs the payments to stay competitive with the other plants.
- Adverse local economic effects if plant is not included in payment program. This could lead to plant closure and a loss of jobs as well as income to local farmers and businesses.
- They are a positive influence on the local, regional, and National community.
- The plant meets the priorities associated with the payment program (incentivize increased U.S. production of biodiesel, creates jobs, boosts economic activity in rural areas).
- The biodiesel generated at this plant helps America break free of its dependence on foreign oil/provides a source of clean burning biofuel.
- Taking money away from Dreyfus would lower their bean price and raise our bottom line.
- Dreyfus has brought jobs to the U.S., while a lot of companies are taking jobs overseas (e.g., to China).
- The facility has boosted the local economy; created local jobs during construction, material acquisitions, direct jobs, supports dozens of jobs in related businesses.
- Increases economic opportunity for farmers through the purchase of local soybeans, increasing the farmer's basis and decreasing transportation costs. The facility's location allows more efficient transport of soybeans grown.
- The Company has improved/invested in local infrastructure.

- Provides an excellent market for soybeans and a positive impact on soybean prices.
  - Pays local, State, and Federal taxes; complies with U.S. laws and regulations.
  - Eliminating the 51 percent domestic ownership provision would send a strong message to other countries that the U.S. is a great place to locate their business.
  - Given the tough economic times, USDA should be encouraging as much investment in local communities as possible.
  - Investments made in biofuels extend beyond the producer by also supporting rural economies. The new generation of advanced biofuels is a critical next step in bolstering this industry and capitalizing on the investments already made. The development of advanced biofuels in this country cannot be accomplished without the contribution of major investments, including foreign investments.
  - The Dreyfus Company has made substantial investment in the U.S., locating its plant in the U.S., employing U.S. citizens, and using U.S. soybeans grown by American farmers to produce a renewable fuel. Dreyfus provides American jobs and pays American taxes the same as the other plants allowed to participate in the payment program and should not be left out.
  - The statute, as now written, does not have qualifiers or eligibility for payments; merely, provided payments to all producers of advanced biofuel. The statute only defines an eligible producer as a "producer of advanced biofuels" and contains no other conditions; it simply provides payments to all producers of advanced biofuel and defines advanced biofuel to include biodiesel.
- Numerous commenters believe that the Agency does not understand the financial benefits the Louis Dreyfus facility has on rural Indiana. The commenters point out that this company employs U.S. citizens, buys U.S. grown soybeans, and invests in U.S. rural infrastructure. The commenters state that this is the definition of rural development. Therefore, the commenters support changing the 51 percent U.S. ownership provision to include any facility included in the U.S., including the Louis Dreyfus facility, producing an advanced biofuel. The commenters believe that making this change would send a strong message to other countries that the U.S. is a great place to locate their business. Finally, these commenters suggest that, given these adverse economic times, we

should be encouraging as much investment in our rural communities as possible. The commenters point out that the Louis Dreyfus company has made that commitment to Indiana, its farmers, and its rural communities and we should applaud, not penalize them, for their investment.

Several commenters question whether the Agency is following the intent of the program by including the citizenship or eligibility requirements as part of the program. The commenters state that the Agency's decision to implement eligibility restrictions is a significant departure from Congressional intent and those restrictions should be eliminated from the program. The intent of the program (even as detailed by USDA in their NOCP for 2009) is to stimulate rural economies (provide jobs), and to promote the production of biofuels within the U.S. Neither of these goals is promoted by including a citizenship requirement in the rule.

#### Comments Opposed to Allowing Foreign Ownership

*Comment:* Six commenters do not support allowing advanced biofuel biorefineries with foreign ownership to participate in the program. These commenters generally expressed the concern that the money used to fund this program comes from American taxpayers and should not go to foreign companies.

One commenter believes that this program should promote American companies and states that foreign companies, even if they hire local people, have driven out other U.S. companies who also are hiring U.S. employees and keep profits at home in the U.S.

Another commenter understands a key to the Bioenergy Program for Advanced Biofuels is to promote a dynamic business environment in rural America. The commenter states that one way to continue that dynamic business environment is to promote U.S.-owned businesses. The commenter notes that the National Biodiesel Board (NBB) reports that more than 170 American companies have invested in production capacity that currently approaches 2.7 billion gallons nationwide. The commenter is owned directly and indirectly by nearly 5,000 Midwest investors who have helped build the U.S. biodiesel industry. An overwhelming majority of those investors are rural taxpayers who have invested in a U.S.-owned and operated company in order to promote our nation's energy goals and support U.S. agriculture. The U.S. biodiesel industry will spend about \$1.3 billion on raw



materials, goods and services to produce 475 million gallons of biodiesel this year. In doing so the biodiesel industry will add \$4.1 billion to GDP this year, increase household income by nearly \$1 billion, and support nearly 23,000 jobs in all sectors of the economy. In addition, the biodiesel industry will provide \$445 million of tax revenue to the Federal treasury and \$383 million to State and local governments.

Another commenter expressed concern that illegal immigrants might be taking jobs away from Americans if foreign-owned companies are allowed to participate.

One commenter further suggests that the program be restricted to only those producers that are 100 percent (rather than 51 percent) domestically owned.

One commenter is opposed to providing of any further tax relief to Louis Dreyfus' bio-fuels activities. According to the commenter, (1) the owners of this facility have already had years of tax relief, which they knew would run out at a specific time; (2) that they are foreign owned and received these tax breaks shows how the U.S. has helped them, so now they should be able to stand on their own without further hurting the tax base; and (3) they have publicly stated that if they do not get the continuation of the tax relief it will not alter their plans and they will continue to operate as they are now, so there would be no negative impact on the community.

*Response:* The Agency has reconsidered the citizenship requirement and has decided to eliminate this requirement from the rule. The Agency agrees that the beneficial impacts of the program will be at the local level regardless of ownership.

*Comment:* One commenter recommends that the program include a requirement that eligible facilities be located in the United States, the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, America Samoa and the Commonwealth of Puerto Rico. Focusing on the facility location rather than citizenship would alleviate the issue of disparate treatment based upon national origin. Furthermore, individual or entity eligibility requirements would reveal producers that were ineligible.

*Response:* As noted in the previous response, the citizenship requirement has been removed from the rule. Thus, this comment is moot.

#### *Non-Rural Eligibility*

Comments were received for allowing advanced biofuel biorefineries located in non-rural areas to participate in this

program and for disallowing such biorefineries from participating.

*Reasons cited by commenters for allowing non-rural advanced biofuel biorefineries to participate included:*

1. A rural area requirement unfairly excludes valuable biodiesel production facilities that make quality fuel, utilize domestic feedstock, and benefit American farmers and their communities. Biodiesel made from restaurant waste oil is a good example of a renewable biofuel currently sourced and produced most efficiently in urban areas. To exclude these producers seems to us contrary to the goals of the program.

2. For a biorefinery, the cost of feedstock can typically represent 80 percent of the total cost of finished product. A sustainable, reliable supply of feedstock is the centerpiece of a successful renewable fuel plant. These plants, regardless of where they are located, offer long-term opportunities for the feedstock producers in the rural agricultural community. The opportunities include those associated with employment of a local/rural labor force, seed sales, farm equipment, fertilizer sales, feedstock storage and trans-load terminals, and transport. One of the commenter's observes that the rural economic development potential resulting from a new biofuel facility far exceeds the potential of the community where the facility is actually located. As an example, the commenter's facility will result in 55 manufacturing jobs and a local tax revenue of approximately \$1.5 million.

An independent economic impact analysis found that for the rural communities where our barley will be grown, 450 farm jobs will be created and farmers will have access to a new winter barley market that will offer a \$100 million revenue opportunity. The rule, as proposed, allowing eligibility to facilities in non-rural communities is critical to the success of the Program and clearly maintains the spirit of enhancing rural development.

3. The rural area requirement was not contemplated in the statute or intended by Congress.

4. The Bioenergy Program was established under the Energy Title (Title IX) of the Farm Bill. It is not a Rural Development (Title VI) program; thus, the rural area requirement should not apply.

5. Regardless of whether or not an advanced biofuel production facility is located in a rural area, that facility will still be employing U.S. citizens, paying U.S. taxes, and creating demand for U.S. agricultural products and services by operating on feedstock produced by U.S.

farmers. Therefore, any "non-rural" facility's participation in the program will positively impact U.S. agriculture and rural development nearly as much as the participation of a "rural facility." In order to promote equitable as well as expanded U.S. biodiesel production, participation in this program should not be based on geography.

6. Exclusion of some production facilities located in the U.S. would create inequity in the advanced biofuels market. Those entities excluded from the program would be placed at a competitive disadvantage to other producers that are eligible. In some cases, there would be facilities located in the same State or region that would be treated differently.

7. In the case of the Bioenergy Program, the rural development benefits accrue from the significant use of renewable domestic agricultural feedstock. This benefit exists regardless of the location of the biofuel production facility.

8. Farmers, in particular, have realized significant economic benefits as a result of the expanded markets and increased demand for agricultural feedstock and co-products resulting from biodiesel production.

9. The possibility that the rural area requirement would be imposed was not raised by USDA during the public hearing on the Bioenergy Program or at any time prior to the release of the NOCP.

10. The previous version of this program was administered by the Farm Service Agency (FSA) with no rural area requirement. The rural area requirement was not included in the preceding Bioenergy Program and was never discussed publicly by USDA prior to issuance of the NOCPs. The arbitrary limitation on program eligibility is inconsistent with the policy objectives Congress sought to address when it enacted Section 9005 of Public Law 110-234.

11. Biodiesel producers operate in a high volume, low margin competitive fuels marketplace. Slight variations in pricing will impact a producer's ability to sell fuel. Disqualifying similarly situated producers from participating in the program based solely on their geographic location will create artificial market distortions and put some producers at a distinct economic disadvantage. In the interest of equity and promoting the expanded production of advanced biofuels, all biodiesel producers who manufacture fuel meeting the ASTM D6751 fuel specification should be permitted to receive program payments, regardless of their plant's physical location. It is

worthwhile to note that farmers and feedstock providers in rural areas accrue the economic benefits of increased demand for biomass feedstock, regardless of whether a plant is located in a rural or urban area. This is a result consistent with overall mission of USDA's Rural Business-Cooperative Service.

12. Including a rule based simply on population fails to fully recognize the contribution the commenter's business makes to farm families and the rural communities surrounding our city. While Owensboro's population slightly exceeds 50,000 people, our town and our region are predominately rural rather than urban.

13. The "Rural Area" requirement should not be included in the final rule. Domestic feedstock derived from plant or vegetative matter that is converted into advanced biofuels directly supports the U.S. rural agricultural model. The requirement of the facility to be located in a rural area minimizes the national effort to produce biofuels that support geographic fuel needs. In all aspects, rural agriculture is strongly supported by the production and use of feedstock grown in the United States.

14. Excluding plants in rural areas is inconsistent with the overall goals of USDA biofuels programs, which is to increase domestic, renewable energy sources and expand markets for farmers.

15. A rural area requirement unfairly excludes valuable biodiesel production facilities that make quality fuel, utilize domestic feedstock, and benefit American farmers and their communities. Rural development benefits accrue from the significant use of renewable domestic agricultural feedstock. This benefit exists regardless of the location of the biofuel production facility.

16. As a general rule, a majority of the feedstock will inherently come from the rural community, and be produced/collected/harvested by a local labor force. Similarly construction and operation workforces will be predominantly local. The rural economic development potential resulting from a new biofuel facility is substantial. One advantage of advanced biofuels is that they can be produced all over the country utilizing multiple feedstock. Projects should not be evaluated negatively on one of advanced biofuels industries greatest assets, flexibility. The rule, as proposed, allowing eligibility to facilities in non-rural communities is critical to the success of the program and clearly maintains the spirit of enhancing rural development.

17. Offering eligibility to facilities in non-rural communities is critical to the success of the program goals and the advanced biofuels industry. Restricting the location of these facilities is not necessary to maintain the spirit of enhancing rural development and the geographic diversity of advanced biofuels production. More flexibility of site selection, not less, should be installed in these programs.

18. Having a consistent, cost competitive regional supply of feedstock is key to the success of any project. Non rural plants that use agricultural feedstock will most certainly rely on the surrounding rural communities to produce, harvest, store, and handle feedstock needs. With feedstock cost representing the largest operational cost of a biorefinery, this in turn means that most of what the plant spends goes to the rural community in paying for that feedstock. This should demonstrate that the biorefinery does not need to be in a rural area to fulfill program goals. Excluding plants that are not in rural areas denies the supporting rural community significant opportunity.

19. Geographic requirements will not serve the goal of promoting a stable advanced biofuel industry in the U.S. Siting of biofuel facilities will be dependent on available feedstock, infrastructure, logistics, and other factors. Undoubtedly, many advanced biofuel facilities will be located in rural areas due to feedstock availability. However, to the extent that qualifying renewable biomass is located in other areas, the Agency should not discourage utilization of these resources and the development of the advanced biofuels industry by excluding non-rural facilities from eligibility for the payments program.

20. Advanced biofuel produced in the U.S. and its territories does not depend on the location of the production plant.

One commenter commends the proposed removal of a rural location requirement for advanced biofuel producers under this program. It is appropriate for USDA Rural Development to wish to see such facilities located in rural areas, but the very existence of this emerging sector will benefit rural areas generally, which are the source of most of the feedstock used for biofuels. In Oregon, one of the primary producers of biodiesel is located in Salem, Oregon, an urban area. Yet it provides an invaluable processing facility for vegetable oilseed raised in rural areas of the State. The past practice of disqualifying urban sites excluded Oregon's lead producer of advanced biofuels from the benefits of the program, and thus limited Oregon's

ability to expand its biofuel industry. In an emerging industry that is still attempting to establish itself, such disqualification is not helpful. The new approach found in the proposed rule should be retained in the final rule.

One commenter suggested that the Agency change the 50,000 population criterion to 500,000 to 1 million persons. Such a change would enable the commenter's facility, which is located next to two interconnected railroads, to easily bring in feedstock and ship out finished biodiesel, allowing the facility to build on the relationships with local/domestic farm institutions.

One commenter, a biofuel producer, notes that they are invested heavily in the future of agriculture in our region. There are more than 4,000 farm families who grow soybeans in our market area. Our presence in the market adds competition for the available soybeans and benefits all soybean farmers. Losing the eligibility of the Advanced Biofuel Payment Program takes away a portion of our ability to fairly compete in the marketplace and ultimately hurts soybean prices paid to farmers. This is especially true given the current economic conditions facing biodiesel.

Our eligibility in this program would allow us to maintain some level of production. The stated purpose of the Advanced Biofuels Program is to ensure expanded production of biofuels and promote sustainable economic development in rural America. Excluding our facility in this program creates a competitive disadvantage and inequity in the marketplace.

In fact, a competing biodiesel facility could locate less than five miles from our existing location and would be eligible for Rural Development programs that would assist in construction grants and loans. They would be eligible for:

- Biorefinery Assistance Loan Guarantees (section 9003).
- Rural Business Enterprise Grants (RBEG) Program.
- Rural Energy for America Program Grants (REAP Grants).
- REAP Energy Audit.
- REAP Renewable Energy Development Assist.

Based on the underlying law and the stated purpose of the program "to support and ensure an expanding production of Advanced Biofuels," the commenter believes it should be eligible for payments in this program and all other Rural Development programs.

The commenter also points out that the city of Owensboro and the surrounding rural areas are economically linked and interdependent. The commenter's

business is dependent on the farmers in our neighboring rural areas to supply our basic raw material. Furthermore, the commenter has made a significant investment in resources to produce biofuels and for more than 100 years have been a partner in building a more prosperous agricultural economy in our region. The commenter believes it is an example of the type of business the legislation intended to benefit and that if eligible, then thousands of soybean producers will also benefit.

One commenter uses used cooking oil (UCO) as a feedstock to produce UCO-based biodiesel, which advances the goals of this program. The commenter refers to studies in the State of California and the European Union that have demonstrated that UCO-based biodiesel has one of the lowest life cycle carbon footprints of any road ready fuel available on the worldwide market (<http://www.arb.ca.gov/fuels/lcfs/workgroups/workgroups.htm#pathways>). Using UCO as a feedstock poses significant challenges that require technologies not needed by producers that use virgin oils such as canola and soybean oil. The additional cost of obtaining this equipment to process this feedstock could be offset through funding from this program.

However, producing UCO-based biodiesel depends on being close to cities and population centers where large quantities of UCO are produced daily and where larger populations generate higher amounts of carbon and pollution. This fuel is not viably produced in a rural area where any significant quantity of UCO would, by necessity, require shipment from cities and large population centers. This shipment would raise both the cost of acquisition of feedstock and the life cycle carbon footprint of the fuel through its transportation. This cost would mitigate any benefit received through the program and the proceeds would be consumed through increased cost as opposed to being used for infrastructure upgrades.

As a result, if a rule is implemented with a rural production requirement, the commenter and other producers working on a similar business model will be unqualified to participate and the significance investments made to produce UCO-based fuel will go unsupported. Therefore, the commenter recommends that any requirement that biofuel production be in a rural area be removed from any final rule.

One commenter notes the importance of the applicability of the Bioenergy Program to all U.S.-based biodiesel facilities, especially those majority-

owned by U.S. farmers. The rural area requirement, as applied last year, eliminated much U.S.-based biodiesel production. It is particularly concerning that the program eliminated U.S.-based biodiesel facilities owned by U.S. farmers. The prior application of the rural area requirement unfairly excluded valuable biodiesel production facilities that make quality fuel, utilize domestic feedstock, and benefit American farmers and their communities. Rural development benefits accrue from the significant use of renewable domestic agricultural feedstock. This benefit exists regardless of the location of the biofuel production facility.

One commenter states that, if the final rule continues the rural area requirement, it would not be consistent with the intent of the program to “provide assistance to entities that create jobs and increase investment through the production of advanced bioenergy.”

*Reasons for disallowing non-rural advance biofuel facilities from participating included:*

1. This is a rural development program and it should be used in rural areas. Requiring a rural location for biorefineries is inherently consistent with the mission of USDA’s Rural Business-Cooperative Service and as such USDA should include the previous NOCP’s rural location as a requirement for this program.

2. In previous notices of contract proposal (Fiscal Year 2009 and Fiscal Year 2010), this program was restricted to facilities located in rural areas. In addition, the stated mission of Rural Development is to help improve the economy and quality of life in rural America. The Agency should continue to support economic development, biorefinery construction, and advanced biofuels production in rural areas through the Advanced Biofuel Payment Program. This will ensure that future NOCPs are consistent with the NOCPs already issued and achieve the mission of USDA.

3. While not specifically stated in the 2008 Farm Bill language, the program was created by the Farm Bill and should serve rural economies where farms are located. USDA has concentrated heavily on rural economic development over the last two years and has mentioned it as a cornerstone of the upcoming 2012 Farm Bill. This program can continue current economic activity and stimulate new activity by promoting the production of advanced biofuels in rural areas.

4. Most producers located in rural areas operate at smaller capacities as

compared to those in urban areas and, therefore, do not benefit from certain “economies-of-scale” that larger producers may be able to benefit from. This further reduces already thin margins that many rural producers are operating under, and the relief in feedstock pricing that would be provided under this rural program is critical to the rural producer’s ability to be competitive in the biodiesel marketplace.

5. The intent of the originating statute was to incent rural community economies and as such requests USDA to reinstate a rural location requirement as contained in previous NOCPs. Many non-rural located biodiesel refineries have the innate ability to import foreign feedstock for refining into biodiesel.

6. The intent of Congress was to not only incent rural located biorefineries, but to enhance the economics thru increased demand for U.S.-based biomass feedstock produced in the rural areas of the U.S.

*Response:* The Agency has reconsidered the proposed rural area requirement and agrees with the commenters that the beneficial impacts of the program will generally be in rural areas even if the biofuel facility is located in an area that does not meet the proposed rural area definition. Biomass production is expected to occur largely in rural areas and, thus, rural economies will benefit from the increased use of biomass. The Agency is, therefore, removing the proposed rural area requirement from the rule.

#### *Immediate Family Citizenship*

*Comment:* Several commenters disagree with the provision of the rule that would allow ownership by an entity composed of immediate family members where only one member of the family is a U.S. citizen. One commenter maintains this should not be allowed because the money used to fund this program is “U.S. money.” Commenters point out that, if the citizenship requirement is removed, then this requirement becomes moot.

Another commenter states that the Agency provided no rationale for why the citizenship requirement should be ignored if only one member of an immediate family owned even a fractional interest in a company otherwise owned by foreign investors.

*Response:* As noted in a response earlier in this preamble, the Agency is removing the citizenship requirement from the rule. Thus, as pointed out by the commenters, the immediate family citizenship requirement is also removed and these comments are moot.

### *Different Payment Rates Associated With Greenhouse Gases (GHG)*

Comments were received both for and against instituting different payment rates based on GHG emission reductions, including some comments suggesting that the Agency delay implementing a differentiation payment rate based on GHG emission reductions.

#### Comments in Favor

*Comment:* Four commenters support the concept of basing payments on GHG emissions. Three of the commenters believe that the Agency should implement such provisions now, while the fourth commenter suggests a more cautious approach.

One commenter supports payments based on GHG emissions because it would be consistent with Executive Order 12514 and RFS, and, by paying more for fuels that have a greater impact on GHG emissions reduction, the program will encourage the production of these fuels. The commenter recommends adding to the existing calculation a multiplier similar to Renewable Identification Numbers (RINs), but with broader applicability such as The General Reporting Protocol of The Climate Registry.

One commenter recommends that, in order to simplify the process, advanced biofuels producers have their fuels certified by the EPA for the purposes of the RFS to determine GHG reduction. The commenter proposes that advanced biofuels that achieve a minimum 60 percent reduction receive an incremental 5x payment rate compared to advanced biofuels that meet the 50 percent reduction threshold necessary to qualify as an advanced biofuel for the RFS. The RFS 2022 goal for cellulosic biofuel, which must attain a 60 percent GHG reduction, is 16 billion gallons. Cellulosic biofuel will make up the majority of the total RFS goal of 36 billion gallons by 2022 and yet currently there is no commercial production of this alternative transportation fuel. Therefore, USDA, in cooperation with the Department of Energy and EPA, should use the Advanced Biofuel Payment Program to spur the near-term production of cellulosic biofuels by distributing larger incentive payments than other advanced biofuels.

One commenter recommends that the calculation be higher by the percent of difference. The commenter illustrates this as follows: If one advanced biofuel is 20 percent and another advanced biofuel is 50 percent, there should be a 30 percent pay difference.

One commenter agrees that incentivizing GHG performance is

clearly important, but believes that establishing a healthy industry first is more important, noting that the advanced biofuel industry has to get good before it gets great and the push toward increasingly lower GHG numbers should not be done at the sake of discouraging commercial scale capacities of other, more competitive renewable fuels, and it should not be done at the sake of overlooking valuable feedstock options. If the Agency chooses this path, the commenter recommends that the Agency should also look to provide higher payments based on a reduced level of difficulty to grow, harvest, and transport feedstock to the facility because a reliable, competitively cost feedstock is critical to a successful, long term business plan. The commenter states that incentivizing a high GHG performing fuel that fails to offer a long-term, sustainable feedstock option is counterproductive and that fuels derived from recurring, sustainable crops that can be integrated into the agriculture sector offers greater benefit to an industry trying to establish itself. Based on this, the commenter offers the following suggestion:

Establish a schedule of payment multipliers based on impact of fulfilling program goals. As an example, annually recurring crops grown incremental to current crops on existing acres and perennial crops that can be grown on marginal acres should receive a multiplier. Fuels assigned an advanced "D code" by EPA's Renewable Fuel Standard should also be considered for a multiplier.

Lastly, the commenter assumes that solid fuels would be exempt (and, therefore, not disadvantage liquid fuels) because there is no established GHG benchmark for solid fuels.

One commenter supports the proposed approach to offer different payment rates based on the advanced biofuels' lifecycle GHG emissions. A workable approach would be use the EPA's categorization and registration of renewable fuels, *i.e.* advanced biofuels and cellulosic biofuels, with threshold GHG emission reductions of 50 percent and 60 percent, respectively, as the basis for this differential payment scheme. Under this approach, advanced biofuels designated as cellulosic biofuels by the EPA and registered as cellulosic biofuels with the EPA would receive a greater payment than those designated and registered as advanced biofuels.

One commenter supports a payment structure that is based on GHG emissions relative to petroleum as determined by EPA for the RFS. The commenter believes that this is a

preferable approach for biodiesel producers compared to a structure in which differential payments are made on base versus incremental production. According to the commenter, the GHG-based structure would avoid penalizing biodiesel plants that have kept producing during difficult economic times. The commenter recommends that a GHG-based program provide the same higher payment levels to all of the biofuels determined by EPA to exceed 50 percent GHG emissions reductions, with no differentiation between base and incremental production.

One commenter believes that the USDA Bioenergy Program regulations should be kept simple to encourage streamlined administration of the program. While we do not believe that the indirect land use change calculations included in the RFS regulation are mature or have been adequately vetted in the scientific community, if USDA does include lifecycle GHG emission reduction benchmarks as a way to reward lower emitting fuels with a higher payment rate, the commenter recommends:

(1) Relying on already established regulations instead of creating a new set of regulations for those calculations (*i.e.*, EPA RFS), and

(2) Not complicating the program with multiple payment levels USDA will need to create and monitor, simply create a higher payment rate for advanced biofuels, as defined in the Farm Bill, that meet the RFS lifecycle GHG emission reduction requirements.

The commenter also urges the Agency to make sure the program is flexible so that a producer can reapply in order to meet the higher payment criteria for the same project as it evolves. It should also be assumed that producers of advanced liquid biofuels would not produce fuels that do not meet the RFS qualifications; therefore, including lifecycle GHG emission reduction requirements in this program for liquid transportation fuels would be redundant and the commenter cautions against adding any unnecessary regulations to this program that could slow or complicate the process and therefore retard commercialization and production.

Once again, liquid biofuels are the only advanced biofuels that currently have a regulatory framework in place for measuring GHG emission reductions compared to their counterparts. Because the definition of advanced biofuels in this proposed rule applies to solid, liquid, or gaseous fuels, the Agency would need to determine how it will quantify gaseous and solid advanced biofuels emission reductions when compared to their counterparts. For

reference, the commenter submitted its opinions of land use change in the regulation in its comments to the proposed rule by EPA on the administration of the RFS. A relevant excerpt is below:

“RFS driven biofuels demand on global agricultural land are miniscule compared to other land use factors. This does not mean that we can ignore the indirect land use effects of biofuels, since the goal ultimately for biofuels would be to play an even larger role in the energy supply. It does suggest, however, that current policies can be designed in such a way that they encourage investment in biofuels without immediate risk of severe land impacts. In the mean time, further analysis can be done to determine how and if policies for large scale deployment can be implemented to safeguard land resources and prevent unintended carbon emissions.

Regulating land use related emissions of carbon through biofuels may result in the premature stifling of a potentially important sustainable energy resource for transportation, while doing nothing to address the serious problems of unsustainable global land management that continue to destroy valuable natural land resources and to contribute a tremendous amount of carbon to the atmosphere.

Unsustainable farm practices worldwide may be responsible for as much as 5 million hectares per year of lost agricultural land due to degradation and loss of performance. To put that number in context, this annual loss of land is equivalent to losing 1 to 2 billion gallons of annual ethanol production each year.

Given these considerations, the commenter urges EPA to fully acknowledge the extent of the uncertainty in estimation of emissions from land use change, and ensure that emerging biofuels technologies are not disqualified from participation in the RFS-2 program unless clearly demonstrated to be out of compliance with the program's GHG performance requirements under the full range of reasonable assumptions for the pertinent methodology, including assumptions that have not been adopted in EPA's proposed methodology.

Specifically, should a biofuel satisfy its GHG performance requirement under any reasonable set of assumptions under EPA's uncertainty analysis, it should be deemed to qualify.”

One commenter supports the proposal to link payments to the achievement of GHG reductions. However, the commenter encourages the Agency to maximize GHG reductions from biofuels by basing payments on the full lifecycle reductions actually achieved, not merely on achieving minimum thresholds. The existing RFS-2 program only requires that biofuels meet specific thresholds (such as a 60 percent reduction for cellulosic biofuels), but the program offers no incentives for producers to exceed those thresholds. Conversely, low-carbon fuel standards

being developed by California and the northeastern States encourage maximum reductions by fully crediting the reductions achieved. The latter approach will best help the Agency achieve incremental GHG reductions and support the Administration's goal of reducing GHGs.

One commenter states that, in the case of a biofuel (e.g., canola biodiesel) whose lifecycle analysis is still pending at EPA, the Agency should ensure that if it is subsequently determined to be eligible, then all such biofuel produced during that fiscal year would be eligible for Bioenergy Program payment, even if the production occurred before the EPA lifecycle analysis was concluded.

Another commenter provides similar, but more extensive comments. This commenter notes that EPA is currently conducting a lifecycle analysis on canola biodiesel to determine if it meets the 50 percent GHG emissions reduction threshold required for eligibility for the biomass-based diesel pool. The commenter and canola biodiesel stakeholders that are working with EPA on this process are confident that canola biodiesel will exceed the 50 percent threshold. EPA has determined that biodiesel produced from soybean oil, a vegetable oil similar to canola oil, exceeds the 50 percent threshold. The commenter believes that the lifecycle factors associated with canola will enable it to meet and exceed the required GHG emissions reductions. EPA has indicated its intention to have the canola lifecycle concluded in the next several months.

The fact that the canola lifecycle analysis has not been completed creates uncertainty for canola biodiesel producers and makes it difficult for the commenter to advocate using the EPA GHG emissions as a basis for the Bioenergy Program payments. A GHG emissions based payment structure could be preferable to the existing structure that provides a differential payment for incremental production. The GHG-based structure would avoid penalizing biodiesel plants that have kept producing during difficult economic times.

If the Agency utilizes a Bioenergy Program payment structure that is based on GHG emissions as determined by EPA for the RFS, then the Agency should ensure that if canola biodiesel is subsequently determined by EPA to exceed the 50 percent threshold, then all such biofuel produced during that fiscal year would be eligible for the higher Bioenergy Program payment, even if the production occurred before the EPA lifecycle analysis was concluded. A GHG-based program

should provide the same higher payment levels to all of the biofuels determined by EPA to exceed 50 percent GHG emissions reductions. The payment should not differentiate between base and incremental production.

Two commenters note that, if the Agency utilizes a program structure that provides a higher payment level based on GHG emission reductions, then the application process should not require significant revision. During step one, applicants can provide proof of their registration with EPA for participation in the RFS. During step three, producers can provide the actual amounts produced to qualify for the higher payment level and, according to one commenter, the RIN or appropriate proof of RFS eligibility to qualify for the higher payment level.

One commenter supports a Bioenergy Program payment structure that is based on the GHG emissions relative to petroleum as determined by EPA for the RFS. This would be a preferable approach for biodiesel producers compared to a structure in which differential payments is made on base versus incremental production. The GHG-based structure would avoid penalizing biodiesel plants that have kept producing during difficult economic times. A GHG-based program should provide higher payment levels to those biofuels determined by EPA to exceed 50 percent GHG emissions reductions. The payment should not differentiate between base and incremental production.

One commenter states that this program is intended to lower greenhouse gas emissions and reduce and replace the nation's current dependency on petroleum while creating green jobs. Biodiesel is one of the only EPA approved road ready biofuels that is capable of direct replacement of petroleum diesel without modifications in the vast majority of transportation applications. The proposed rule specifically states that, while accepting that not all biofuel produced under the program will be used in transportation, “the Agency expects the majority of advanced biofuels participating in the program will be used as transportation fuels to meet the mandates of the Renewable Fuel Standard.”

#### Comments Against

*Comment:* Two commenters state that all advanced biofuels should receive the same base and incremental payment regardless of classification by EPA under the RFS-2. According to the commenters, EPA is using unproven

combinations of models to calculate the GHG reduction for biofuels. Further, EPA's delay in qualifying existing and new feedstock and process pathways could lead to a situation where a biofuel could receive a lower payment under the proposed GHG tiers where it may be qualified by EPA at a much later date to the amount of its GHG reduction. Would this biorefinery be eligible for a "post" payment to get the amount it would have been eligible for under a tiered system with its new designation?

There could be instances where a feedstock could be under review until 2012 by EPA—the expiration of the current USDA program. Dependence by USDA on the RFS-2 definitions and delineations is premature. Once the science behind GHG emissions is more fully understood and defined, then the Agency may want to look at including some tiered system. The commenter suggests that this could be a much more appropriate discussion as the 2012 Farm Bill takes shape. Currently, EPA has certified very few gallons of advanced biofuels production. Development of payment tiers would result in very large payments going to very few biorefineries. Payment tiers would also be very difficult to establish for non-liquid biofuels since EPA is only certifying transportation fuels in regards to GHG reduction. Would non-liquid biofuels, which are currently eligible for payments at the same rate as liquid fuels, be at a different rate under the tiered system? Would non-liquid biofuels be responsible for supplying a complete lifecycle analysis to determine their GHG reduction?

Finally, the House of Representatives, in an amendment to the Waxman-Markey Climate Change Bill (H.R. 2454), put a moratorium on the inclusion of indirect land use calculations in determining the GHG reduction benefit of biofuels. If H.R. 2454 became law, how would USDA implement the proposed tiers? Would USDA use EPA's determined GHG reductions, and then add back the calculated indirect land use? The intent of the program is to promote the production and expansion of advanced biofuels. A tiered system of payments based on GHG reductions would not further the intent of the program, and would only complicate administration of the program and its understanding and use by biorefineries that can produce advanced biofuels. Complicating the program will lead to uncertainty among advanced biofuels producers. Uncertainty will not lead to expanded production of advanced biofuels in rural America.

One commenter states that all advanced biofuels under this program

should be treated similarly.

Differentiated payments to certain advanced biofuels and not others will create artificial market distortions. These distortions are created because the USDA is picking winners and losers in the advanced biofuels arena based on arbitrary requirements. The market will then reward those who luckily meet the requirements or can adjust their production to meet the requirements. Some will be disadvantaged because the rules are changing after the plant has been built or commenced construction and cannot be changed (*e.g.*, location). Advanced biofuel produced in the U.S. and its territories is considered biofuel by the marketplace. Therefore, it does not depend on the GHG emissions of the biofuel. Separate regulations (*e.g.*, RFS-2, CA LCFS, *etc.*) control the marketplace differentiation of biofuels based on their GHG emissions. A support differentiation based on the amount of GHG emissions of a particular biofuel should not be implemented.

#### Delay

*Comment:* One commenter suggests the decision to offer different payment rates based on advanced biofuels' lifecycle GHG emissions be delayed until the models utilized for the calculations are proven and validated. Currently, there is significant concern about the assumptions made in such models. Once the science is better understood and accepted, then using this payment approach is premature. In addition, there is concern on how gaseous or non-liquid advanced biofuels would fit into the payment scheme and how GHG reduction for these biofuels would be considered.

Another commenter states that, for Fiscal Year 2012, the comment would support providing a higher payment rate for transportation fuels that significantly reduce GHG emissions and meet an applicable ASTM fuel specification. RFS-2 provides a specific use requirement for advanced biofuels. Specifically, the RFS-2 advanced biofuels schedule requires the use of specific volumes of biomass-based diesel, cellulosic biofuels, and advanced biofuels. Biomass-based diesel and advanced biofuels must reduce GHG emissions by 50 percent compared to the conventional fuel it is replacing. Cellulosic biofuels must reduce GHG emissions by 60 percent. Under this approach, fuel that qualifies as an advanced biofuel under the RFS-2 program and that meets an applicable ASTM specification would qualify for a higher single payment rate. The per gallon payment would be based on the

BTU content of the fuel, as is the case in the previous NOCPs and the proposed rule.

Another commenter supports USDA's proposal in this rulemaking to provide funding on a more frequent basis providing biodiesel producers a more useful income stream. However, the commenter believes that, at this time, it is most important to quickly deliver Fiscal Year 2010 payments than to ruminate the concept of basing payments relative to lifecycle GHG emission reductions. The commenter, therefore, requests that the Agency revisit the issue of basing payments on greenhouse gas emissions in a separate rulemaking, which will allow more time for industry consideration and comments.

*Response:* In consideration of the comments received, the Agency has determined that it is not appropriate, at this time, to include a payment scheme based on GHG emission reduction, primarily because such calculations are not available for all types of advanced biofuels eligible for payments under this program. The Agency may reconsider this as the industry matures and as calculations become available for all types of advanced biofuels.

However, as noted in several previous responses, the Agency has revised the rule to award "bonus" BTUs to an advanced biofuel meets an applicable renewable fuel standard as identified by the EPA. This provision should result in a more favorable environmental result based on GHG emission reductions.

*Comment:* One commenter notes that Section 9005 of the Farm Bill grants the Secretary broad discretion to base payments on "appropriate factors." The commenter believes that it would be appropriate to structure the payments program to promote the best-performing biofuels to the maximum extent possible. The commenter strongly supports the proposal to base payments on the energy content of the fuel as well as the alternate proposal that would also consider lifecycle GHG emissions. In addition, the commenter encourages the Agency to link payments to the entire performance profile of an advanced biofuel, including energy content, lifecycle GHG performance, conventional pollutant emissions, compatibility with existing infrastructure and engines/equipment, impacts on water quality and quantity, and other factors. Some of these factors, including impacts on resource conservation, public health, and the environment, are already included as scoring criteria in the biorefinery loan guarantee program. The commenter recommends that the Agency use these

same metrics, as well as additional ones, in this program.

*Response:* While the Agency acknowledges the commenter's suggestion for incorporating additional metrics for environmental quality, there are too many variables outside the control of the Agency to establish quantitative values applicable to such environmental quality metrics to establish payments. Furthermore, calculating payments based on environmental quality metrics would add complexity to both the establishment of the payment rate and the administration of the program.

*Subpart B—Advanced Biofuel Payments Definitions—§ 4288.102*

**Advanced Biofuel**

*Comment:* One commenter recommends that the definition of "advanced biofuel" include the requirement that the fuel is produced in the United States of America and its territories. According to the commenter, the definition of "Advanced Biofuel" does not embrace the contents of other definitions such as biodiesel and ethanol. As such, a domestic producer could import commodities that meet the current definition and would potentially undermine the intent of the law. Therefore, the commenter supports the phrase either similar or exactly as used in § 4288.102 of the proposed rule "\* \* \* manufactured in the United States and its territories."

*Response:* The Agency agrees with the comment. The biofuel eligibility criteria (§ 4288.111) requires the biofuel to be produced in a State. The Agency is satisfied that this addresses the commenter's concerns.

*Comment:* One commenter is opposed to the use of any definition of a biofuel, qualification of a biofuel, or payment for a biofuel that is not based on the 2008 Farm Bill definition of an "advanced biofuel." The commenter points out that all types of sorghum—grain, sweet, and high-biomass energy—can play an important part in the production of advanced biofuels. However, the commenter is concerned that two of the largest processors of grain sorghum into advanced biofuels do not qualify for the program. According to the commenter, this has resulted in plants being shuttered and rural economies being stymied as jobs have been lost in rural America, and the commenter encourages USDA to fix this disparity.

Two commenters note that they worked with the Senate Energy and Natural Resources Committee during the creation of the Energy Independence and Security Act of 2007 to develop an

advanced biofuels definition and with the Agriculture Committees during the debate on the Food, Conservation and Energy Act of 2008 to clearly define all types of sorghum as advanced biofuels feedstock. Making this program work for the commenter's industry is a high priority.

Two commenters note that, currently, over 25 percent of the U.S. grain sorghum crop is processed through an ethanol facility. Ethanol biorefineries account for 43 percent of domestic grain sorghum usage. It is the most important value-added industry in the sorghum belt. This type of usage has resulted in increased rural economic growth and job creation. A sound advanced biofuels program can continue this impressive track record of rural economic activity. Sweet and energy sorghum biorefineries are also being planned. These new facilities will provide rural economic activity and can be supported by an advanced biofuels program.

*Response:* Grain sorghum is an eligible feedstock under the Section 9005 program.

*Comment:* One commenter states that the definition of advanced biofuels in the Food, Conservation, and Energy Act of 2008 leaves some ambiguity in regards to the inclusion of biofuels derived from sugar and starch. The commenter points out that the proposed rule states that "to be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States." The inclusions section of the advanced biofuel definition in the legislation specifically includes "(ii) biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch) and (vi) butanol or other alcohols produced through the conversion of organic matter from renewable biomass." The commenter, therefore, requests that the Agency clarify in the final rule that the only fuel produced from corn kernel starch excluded from this program is ethanol, per the legislation and that advanced biofuels other than ethanol, for example fuels with a different molecular structure such as biobutanol, produced from a corn starch feedstock, qualify for this program under the definition of advanced biofuel in the Food, Conservation, and Energy Act of 2008.

*Response:* The Agency disagrees with the commenter and any advanced biofuel produced from corn kernel starch is excluded. The statute defines advanced biofuels as "\* \* \* fuels derived from renewable biomass other than corn kernel starch."

*Comment:* One commenter recommends changing the current wording on exclusions to: "The only feedstock specifically excluded from the statutory definition of advanced biofuels is corn kernel starch and other biomass materials used in food production or consumption," because the intent of the proposed rule, according to the commenter, is to eliminate the use of food products to make fuel.

*Response:* The Agency does not agree with commenter's recommendation. The Agency is satisfied that the rule language is consistent with the statutory language (e.g., the definition of advanced biofuel is directly from the statute). Therefore, the Agency has not revised the rule as requested by the commenter.

*Comment:* One commenter is concerned about the use of food crops (i.e., corn) for the production of energy and such crops need to remain as food crops. According to the commenter, it takes more energy to turn corn into energy than you get out of the conversion process and that this is not reasonable. The commenter also believes that programs for converting corn to energy profits only big agribusinesses and not the small, individual farmer and therefore such programs should not be presented as helping the farmer. The commenter believes such programs need to be discontinued.

*Response:* This program does not allow for corn kernel starch biofuel producers. The focus of this program is "advanced biofuel," which are produced from non-corn kernel starch so the feedstocks are typically not in competition with food products.

*Comment:* One commenter is concerned with a reference in the preamble that indicates that the Agency has misconstrued congressional intent with regard to the definition of "advanced biofuel." The Agency states in the preamble that "The agency understands the definition to apply to solid, liquid, or gaseous fuels that are final products \* \* \*" (See proposed rule, April 16, 2010, 75 FR 20093.) The Agency made a similar statement regarding solid advanced biofuels in its BCAP proposal, where it stated that a biomass conversion facility includes a facility that 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. (See proposed rule, February 8, 2010 75 FR 6267.) As explained below, the commenter does not believe that any solid fuel qualifies as an advanced biofuel under the 2008 Farm Bill.

The definition of advanced biofuel in the Farm Bill closely tracks the definition included in the 2007 Energy Independence and Security Act ("EISA"), which mandated the production of 36 billion gallons of renewable transportation fuels by 2022. When Congress enacted the Farm Bill the next year, it is clear that it used the same definitional framework that it used in EISA. Like the definition in EISA, the Farm Bill Section 9001 definition of advanced biofuel includes seven qualifying types of fuel. These fuels are listed in the exact same order, except that the Farm Bill definition replaces references to "ethanol" with references to "biofuel." Congress also replaced the reference to "biomass-based diesel" in EISA to "diesel equivalent fuel." These changes did not evidence an intent to broaden the definition to include solid fuels, but rather indicated Congress' growing understanding that there were numerous kinds of advanced biofuels other than ethanol, including cellulosic diesel (e.g. BTL). Thus, it is clear that the Farm Bill definition builds upon and improves upon the EISA definition, but that in both cases Congress intended to include only liquid fuels and biogas.

According to the commenter, there is no indication that Congress ever intended to include products such as wood pellets, grass pellets, wood chips, or briquettes within the definition in either EISA or the Farm Bill. Rather, under the Farm Bill, these types of products are either a "biobased product" or simply renewable biomass. The mere act of chipping, pelletizing, or compressing renewable biomass does not convert it into an advanced biofuel. Therefore, the commenter encourages the Agency to clarify that advanced biofuels are liquid fuels (and biogas) as defined in the Farm Bill.

*Response:* The Agency disagrees with this comment. Advanced biofuel, as defined in the authorizing statute, is fuel derived from renewable biomass other than corn kernel starch including materials, pre-commercial thinning, or invasive species from National Forest System land or public land that meet certain conditions.

#### Larger Producer

*Comment:* One commenter supports the proposed rule's method for determining large producers whereby the Agency will determine the refining capacity of an advanced biofuel producer based on the production at all of the advanced biofuel refineries in which the producer has 50 percent or more ownership.

*Response:* The Agency agrees with the comment.

*Comment:* One commenter is opposed to the statutory requirement that caps payments to companies with total yearly capacity exceeding 150 million gallons at 5 percent of the program's funds for each fiscal year. While the commenter understands this language was included in the legislation as a way to limit the ability of large renewable diesel co-processors to claim program funds, the commenter believes that a more effective way to limit participation by co-processors could be modeled after the current IRS interpretation that forbids "any fuel made out of co-processing biomass with feedstock that is not biomass" from receiving the Federal biodiesel blenders tax credit. The commenter contends that biodiesel gallons should not be disadvantaged under this program because of the size of the company from which they are produced. Every gallon of biodiesel production should be rewarded equivalently under this program.

*Response:* The statute provides that, for each fiscal year, not more than 5 percent of the funds are made available to eligible producers for production at facilities with a total advanced biofuel refining capacity exceeding 150,000,000 gallons per year (or 15,900,000 MMBTU of biogas or solid advanced biofuel). It is the Agency's position that the requirement meets the intent of the originating language. The Agency does not have the authority to overwrite the original legislation.

*Comment:* Two commenters point out that the legislation for this program requires that not more than 5 percent of the funds be made available to eligible producers for production at facilities with capacity exceeding 150 million gallons per year. Both commenters believe this legislative provision requires the Agency to specify that this capacity calculation does not include a producer's non-advanced biofuel capacity, should it have facilities in the U.S. producing additional gallons that do not qualify for this program. Thus, the commenter recommends that the 150 million gallon limit should only include a producer's advanced biofuel capacity. Therefore, the commenter requests that the Agency specify in the final rule that the capacity calculation does not include a producer's non-advanced biofuel capacity, should it have facilities in the U.S. producing additional gallons that do not qualify for this program.

Another commenter supports the proposed rule's method for determining large producers, whereby the Agency will determine the refining capacity of an advanced biofuel producer based on the production at all of the advanced

biofuel refineries in which the producer has 50 percent or more ownership.

Another commenter recommends eliminating the 150 million gallon per year production per owner cap. The commenter states that the incentives in this program will assist the current infrastructure's transformation to the next generation of feedstock and next generation of biorefinery technology that will exceed reduced green house gas emissions levels. Transforming the biodiesel companies of today to the next generation of biorefinery production of tomorrow, this program will keep the pace moving forward. Removing the 150 million gallon cap will help accelerate this progress. Further, as the industry continues to consolidate to meet the needs of RFS2 obligated parties, removing the maximum production capacity per company will aid in more efficiently offering large volumes of biodiesel to these petroleum companies.

*Response:* With regard to eliminating the 150 million gallon cap, it is the Agency's position that the rule requirement meets the intent of the originating language. The Agency does not have the authority to overwrite the original legislation. In addition, the Agency agrees with the commenter that only the producer's advanced biofuel production counts towards the 150 million gallon cap (or the Agency defined equivalent of 15,900,000 MMBTU if the advanced biofuel is a biogas or solid) and the rule makes this clear.

*Comment:* Two commenters state that a per gallon limit for small and large producers is only applicable to liquid advanced biofuels producers. Because the definition of advanced biofuels in this proposed rule applies to solid, liquid, or gaseous fuels, the commenters state that the Agency needs to determine how it will define small and large producers of gaseous and solid advanced biofuels, should they qualify for this program.

*Response:* The Agency agrees with the commenter and has made provisions in the rule as to how biogas and solids producers are considered large or small. The Agency has added clarifying language in the definition of the term "larger producer" to account for producers of biogas and solid advanced biofuels. The definition in the interim rule now reads: "An eligible advanced biofuel producer with a refining capacity as determined for the prior fiscal year, based on all of the advanced biofuel facilities in which the producer has 50 percent or more ownership, exceeding: (1) 150,000,000 gallons of liquid advanced biofuel per year; or (2) 15,900,000 MMBTU of biogas and solid



advanced biofuel per year.” Also, a parallel change was made to the definition of the term “smaller producer.”

*Oversight and Monitoring—§ 4288.105*

*Comment:* One commenter believes that the proposed rule does not do enough in checking in on the progress of the biofuel. The commenter believes that, if the government is helping to fund the research, it should establish deadlines to ensure that progress is being made so that research does not become stagnant.

*Response:* The Agency disagrees that it does not provide sufficient oversight. The program does not provide payment for research and development activities.

*Applicant Eligibility—§ 4288.110*

*Comment:* One commenter requests that the Agency clearly state that advanced biofuels produced at a biorefinery producing multiple bioproducts are eligible for the program. According to the commenter, the future biorefinery will likely develop much like the typical oil refinery of today. In other words, one feedstock will be utilized to produce several products at one facility. In a biorefinery’s case, renewable biomass will be the feedstock and multiple biofuels, biobased products and specialty renewable chemicals could be produced at the same plant or industrial facility. The commenter believes that the Agency should encourage the concept of industrial ecology and collocation of diverse product manufacturing units. The final rule for the Bioenergy Program should not limit future biorefineries that use efficient and cost effective business models. It should be specifically stated in the final rule that advanced biofuels produced at a biorefinery producing multiple bioproducts should be eligible to qualify for the program.

*Response:* The Agency does not exclude biofuel facilities that produce multiple products. However, payments are made only for the eligible advanced biofuel produced.

*Comment:* One commenter suggests that the Agency consider limiting eligible biorefineries to those with a production capacity that exceeds a certain volume. The commenter maintains that including lab scale and small pilot scale facilities biorefineries may significantly increase administration and not achieve the desired effect of the program.

*Response:* The Agency disagrees and does not consider administering small volume producers a burden, and considers all eligible advance biofuel

producers if they provide the certifications as required in the rule.

*Comment:* One commenter has concerns regarding the proposed Advanced Biofuels Payments being applicable for plants only larger than 10 million gallons of production per year. In our rural communities, often times the feedstock that will be utilized may not support a plant that large. This does not mean the feedstock cannot make an impact on fuel production in the U.S.; rather, it may make more sense economically to produce this ethanol close to the fuel source. Smaller plants, with their potential to create employment and possibly reduce waste issues in small communities from waste paper, whey permeate, and other waste sources, can economically produce advanced biofuels. The commenter believes it is in the best interest of rural communities, and renewable fuel production as a whole, to allow smaller facilities such as 500,000 gallons per year or more, to qualify for these subsidies.

With producers of small amounts of waste that can be converted to advanced biofuels scattered throughout small communities in the Midwest, the Advanced Biofuels Payment can be a strong tool for economic growth in rural areas. Small plants, which are less capital intensive and require fewer infrastructures, could also be positively affected by this decision to allow smaller facilities to receive the subsidy.

*Response:* The proposed rule does not contain a size requirement for participation. The only size requirement pertains to the limitation of 5 percent of program funds that can be made available to advanced biofuel producers that have facilities whose combined total capacity is more than 150,000,000 gallons. As such, the proposed rule already directs the majority of the program benefits to smaller producers (*i.e.*, those with production capacities of less than 150,000,000 gallons).

*Biofuel Eligibility—§ 4288.111*

*Comment:* One commenter agrees that the program should only pay for the production of final advanced biofuel product and not to intermediary components or products that are used in the production of the final advanced biofuel product. This will significantly reduce fraudulent schemes that result in double payments for the same volume of fuel used by the market.

*Response:* The Agency agrees with the commenter. The program makes payments for final advanced biofuel. The components used in producing advanced biofuel are not eligible for payments.

*Comment:* One commenter would like to get clarity on the definition of an eligible advanced biofuel. Would an advanced biofuel be eligible if it can and is used for several potential applications, not all of which are fuel? If so, then is it necessary to demonstrate to the Agency that the volume being claimed is used as fuel? Specifically, for example, glycerin from a biodiesel facility can be used in many different applications; one of which is as fuel to generate energy. Would the production of glycerin be eligible if it can be shown that the downstream application is as a fuel?

*Response:* The Agency disagrees with the comment. The intent of the program is to make payments for production of advance biofuel and not for uses other than for fuel. For example, a producer produces a transportation fuel that also results in production of glycerin. If the glycerin is sold directly as a fuel, the producer would receive a payment. However, if the glycerin is sold for medical or other non-fuel sources, the producer would not receive a payment.

*Biofuel Eligibility—§ 4288.111*

Eligible Advanced Biofuel—Paragraph (a)

*Comment:* One commenter believes that, while Federal incentive programs should not choose technology winners or losers, the production of advanced biofuels for the transportation sector should be supported as much as possible to achieve the aggressive goals of the Renewable Fuels Standard (RFS). The commenter agrees that fuels eligible for the Section 9005 Program can be in the gaseous, liquid, or solid phases, but that those fuels should be used as transportation fuels, not for electricity production or other end uses. Further, if renewable electricity or gas is produced as a transportation fuel those fuels should qualify. However, if renewable feedstock is used to produce electricity or other non-mobile uses, the commenter believes that other Federal programs are in place to support such projects, including the Rural Energy for America Program. The commenter believes that advanced transportation biofuels should not have to compete against other end use products and, therefore, recommends that Advanced Biofuel Payments go toward transportation fuels only.

*Response:* The Agency disagrees with the commenter’s recommendation to limit this program to transportation fuels only. The Agency points out that the authorizing statute does not limit this program to transportation fuels. The purpose of the program is to provide

payment to eligible advanced biofuels producers producing liquid, biogas, or solid fuels, and not to the end use of such advanced biofuels. The Agency, therefore, has not revised the rule in response to these comments.

#### *Certification-Related Comments*

*Comment:* A number of commenters expressed concern over the certification requirement, with several suggesting alternatives.

One commenter believes a requirement for an independent third party certificate of analysis on every load is completely unworkable and extremely expensive. According to the commenter, the cost for a full ASTM battery of test can exceed \$6,000 per sample. The commenter points out that biodiesel plants perform a few indicator tests internally which suffice for the biodiesel market; to require otherwise would be cost prohibitive and unnecessary. The commenter, therefore, supports allowing biodiesel producers to provide self-certifications.

One commenter requests the Agency to clarify § 4288.105(a)(3), Certificate of Analysis. While the commenter supports that only biodiesel meeting ASTM specifications be allowed payment, the proposed rule seems to indicate that each certificate of analysis needs to be issued by a qualified, independent third party. According to the commenter, this is economically infeasible and unworkable. The commenter notes that it issues thousands of Certificate of Analysis (one must accompany each load of biodiesel loaded at the plant) and an independent third party certificate of analysis costs in the several hundred dollar range and takes several working days. The commenter, as a BQ-9000 certified plant, does receive independent third party analysis of its production on a time frame contained within its BQ-9000 certification, but is unable practically or financially to provide an independent third party certificate of analysis for every gallon of biodiesel produced, which this proposed rule seems to indicate will be required. Rather, the commenter is supportive of a requirement that a biodiesel producer self-certify that a quarterly, independent third party certificate of analysis showing ASTM standards being met is available for USDA inspection.

While not objecting to the requirement in the proposed rule that producers provide an independent certificate of analysis to verify that fuel produced in the facility meets the ASTM D6751 fuel specification, several commenters request that the Agency clarify in the final rule that an

independent certificate of analysis is not required for every gallon or batch of fuel produced in a facility, because such a requirement would be cost-prohibitive and impractical. The commenters would support requiring a biofuel producer to self-certify on a quarterly basis or on a once per payment period that an independent certificate of analysis verifying that fuel produced in the facility meets applicable ASTM standards is available for review by USDA personnel consistent with other self-certification requirements provided under the program.

*Response:* The Agency has clarified the requirements pertaining to the independent certificate of analysis. The Certification from a blender or a third party is acceptable certification to ensure the quality of an advanced biofuel. The requirement of receiving BQ-9000 Certification was eliminated from the interim rule.

*Comment:* One commenter supports requirements that ensure that only high quality fuel enters the market and supports requirements that participants in this program self-certify compliance with IRS, EPA, EISA, the Clean Air Act, and ASTM D6751 quality specifications. This commenter notes that these self-certification requirements for biodiesel producers are in addition to requirements for third party certificate analysis and are more than sufficient to ensure that the fuel placed in the market is of sufficiently high quality for use, distribution, and sale. The commenter points out that it has strict internal testing with its onsite laboratory and the commenter, and its customers, require that the fuel meets or exceeds ASTM specifications before sale.

The commenter recommends that the final rule include a similar requirement that other biomass-based diesel and fuels meet applicable ASTM or equivalent standards to receive payment under the program.

*Response:* The Agency agrees with the commenter that appropriate certifications, such as ASTM, BQ-9000, and D6751, are beneficial for producers, distributors, and consumers. Further, the Agency has determined that appropriate certification for pipeline quality for biogas is necessary. However, in cases where biogas is not injected into a pipeline distribution system, but is used on-site for electric generation, it is not eligible for payment under the program.

*Comment:* One commenter notes that it has an extensive in-house quality program that analyzes and ensures that the biodiesel produced meets or exceeds the current ASTM specifications before shipping to its customers. The

commenter uses round robin laboratory testing between biodiesel plants and its research group to ensure the accuracy of its lab results that the results fall under normal operating parameters. Thus, the commenter believes that its BQ-9000 certification and its strict internal quality control make an independent analysis unnecessary.

*Response:* The Agency disagrees with the comment regarding the independent analysis. The purpose of an independent analysis is to ensure the integrity of the advanced biofuel. The program no longer requires the BQ-9000 certification. The Agency considers certification by an independent third party to be the best way to accomplish this. The Agency has revised the requirement in the interim rule to allow the blender who purchases the advanced biofuel to provide the third-party certification quarterly only if the blender is not associated with the facility.

*Comment:* One commenter states that the requirement for biodiesel producers to self-certify compliance with IRS, EPA, EISA, Clean Air Act and applicable ASTM standards provides sufficient, overlapping enforcement mechanisms to ensure that the biodiesel being produced is of sufficient quality for sale and use in the marketplace. Further, the commenter does not object to the requirement that producers provide an independent certificate of analysis to verify that fuel produced in the facility meets the ASTM D6751 fuel specification. However, the commenter makes several suggestions.

First. The commenter recommends that the Agency clarify in the final rule that an independent certificate of analysis is not required for every gallon or batch of fuel produced in a facility, as this requirement would be cost-prohibitive and impractical. The commenter indicates that it would support requiring a biofuel producer to self-certify on a quarterly basis that an independent certificate of analysis verifying that fuel produced in the facility meets applicable ASTM standards is available for review by USDA personnel consistent with other self-certification requirements provided under the program.

Second. The commenter notes that, in some cases, requiring additional certifications from a third party is unnecessary, onerous, and costly for biodiesel producers. The additional cost would negate some of the benefits that the Bioenergy Program is intended to provide. Some biodiesel producers have their own in-house lab that performs their analysis for in-process work, as well as finished product and shipments.

These companies generate their own Certificates of Analysis as needed. While the commenter states that it appreciates the Agency's desire to ensure that advanced biofuels that are eligible for the Bioenergy Program are of sufficient quality, the commenter believes that, in most cases, this can be accomplished and verified without requiring the redundant use of an outside lab.

*Response:* The Agency's intent was not to have a certification on each gallon sold and the rule has been revised to clarify this. As discussed in a previous response, certification is to ensure the quality of the advanced biofuel produced is at standards to be used in the market. The Agency will accept a certification from the blender who purchases the advanced biofuel provided the blender is not associated with the facility.

*Comment:* One commenter recommends allowing self-certification using a combination of IRS, EPA, ASTM, and BQ-9000 documentation. While the commenter does not object to the requirement in the proposed rule that producers provide a combination of IRS, EPA, and quality certificates as documentation to meet program requirements, the commenter recommends that producers be able to self-certify their fuel quality specifications by offering internally-created Certificates of Analysis. The commenter is confident in its network's self-certification because the commenter is approved by the National Biodiesel Accreditation Committee's BQ-9000 Producer program. The commenter, thus, recommends that the Agency include this quality program in the requirements for program participation.

Other commenters state that, in some cases, requiring additional certifications from a third party is unnecessary, onerous, and costly for biodiesel producers. The additional cost would negate some of the benefits that the Bioenergy Program is intended to provide. Some biodiesel producers have their own in-house lab that performs their analysis for in-process work, as well as finished product and shipments and generate their own Certificates of Analysis as needed. While appreciating the Agency's desire to ensure that advanced biofuels that are eligible for the Bioenergy Program are of sufficient quality, the commenters believe in most cases this can be accomplished and verified without requiring the redundant use of an outside lab.

One commenter notes that this section states that the Agency will review the producer records to ensure that each certificate of analysis has been issued by

a qualified independent third party, but later the proposed rule, when detailing the certifications that are needed for biodiesel and biomass-based diesel producers, suggests that a self-certification is required. The commenter supports allowing biodiesel producers to provide self-certifications.

One commenter supports efforts to ensure that only fuel of appropriate quality is entered into commerce. The commenter, therefore, supports requiring participants to self-certify that biodiesel receiving payment under the program meets the ASTM D6751 fuel specification.

Another commenter states that the ASTM D6751 standard is an appropriate and sufficient means of ensuring that the biodiesel production supported by the Bioenergy Program meets the necessary quality standards and that biodiesel production supported under the Bioenergy Program should be required to meet ASTM D6751.

In addition, both commenters recommend that other biomass-based diesel and liquid hydrocarbons receiving payment under the program be similarly required in the final rule to meet an applicable ASTM fuel specification to receive payment under the program.

*Response:* The Agency disagrees with the comment regarding the independent analysis. The purpose of an independent analysis is to ensure the integrity of the advanced biofuel. The Agency's intent was not to have a certification on each gallon sold. The Agency will accept a certification from the blender who purchases the advanced biofuel only if the blender is not associated with the facility.

*Comment:* Many commenters express concern about the proposed requirement for BQ-9000 certification and each recommend that it be removed from the rule.

One commenter notes that BQ-9000 certification is a voluntary program and is used like a status symbol. According to the commenter, not many belong to this program and it is very expensive. The commenter states that, even though they do not participate in the BQ-9000 program, their biodiesel is as good as those who do participate. The commenter points out that they participated in the payment program last year, receiving \$1,700, but that it would cost the commenter 10's of thousands of dollars to belong to BQ-9000 program. Therefore, the commenter recommends that the BQ-9000 certification be taken out of the rule in order to be fair to all biodiesel producers.

One commenter makes similar comments, pointing out that the proposed rule already requires that ASTM D6751 standards be met. In the commenter's situation, the counterparties to our sales require a third party analysis of the fuel showing that it meets ASTM standards. Therefore, according to the commenter, a BQ-9000 certificate is meaningless and would impose additional recordkeeping burdens on the commenter's facility. Further, according to the commenter, the BQ-9000 certification does not guarantee compliance with ASTM standards.

One commenter notes that participation in the BQ-9000 program, which is set up by the National Biodiesel Board, is not required to be a biofuel producer. According to the commenter, they have ASTM testing that they must pass and that doing so qualifies the commenter as a producer. Therefore, the commenter believes that BQ-9000 certification should not be a requirement for this program.

One commenter does not think it necessary to require biodiesel producers provide BQ-9000 certification. According to the commenter, neither EPA nor the IRS require BQ-9000 for RFS-2 or the blender credit, but instead both require ASTM-6751-09, which the commenter thinks is appropriate. Because BQ-9000 is a costly requirement for small producers, the commenter believes requiring it will not encourage innovation. The commenter recommends using the same requirements as IRS and EPA as the easiest solution.

One commenter does not believe it is necessary to require the BQ-9000 certification for program eligibility under the proposed rule. The commenter notes that, while the BQ-9000 program is a valuable and effective tool for the biodiesel industry, it is not an appropriate enforcement tool and is not conducive to use as a requirement for eligibility under the Bioenergy Program.

One commenter also states that the BQ-9000 certification requirement provided for in the proposed rule is unnecessary and duplicative, and should not be included in the final rule. Though the commenter believes in the value of the BQ-9000 program, it was neither designed nor envisioned to serve as a regulatory enforcement tool. The commenter points out that the Agency, through the other certifications required under the program, has multiple reliable methods to ensure that fuel provided under this program meets the required ASTM D6751 specification.

One commenter points out the requirement for BQ-9000 is redundant and unnecessary. BQ-9000 is a voluntary and cooperative program for the accreditation of producers. Regardless, all biodiesel producers must conform to ASTM 6751-08 as amended in order for the fuel to be recognized and qualified for transportation use. The Agency has multiple reliable methods that are statutorily defined for its use to validate the claims of the producers.

Two commenters note that a biodiesel producer must be operational for 6 months before it can receive BQ-9000 certification. The USDA Bioenergy Program contemplates providing payments to entities that are new. Thus, requiring BQ-9000 certification would prevent any facilities that are less than 6 months old from participating. In all likelihood, it would make some biodiesel producers ineligible for even longer periods, as 6 months is the minimum time required to obtain BQ-9000 certification.

One commenter believes that the requirements for biodiesel producers to meet the registration requirements with EPA for the RFS, meet the quality requirements per ASTM D6751, and provide the RFS Renewable Identification Number (RIN) are sufficient to ensure that the biodiesel being produced is of sufficient quality for sale and use in the marketplace. The commenter is concerned with the inclusion of the BQ-9000 certification required for program eligibility under the proposed rule. However, while the BQ-9000 program is a valuable and effective tool for the biodiesel industry, it is not an appropriate enforcement tool and is not conducive to use as a requirement for eligibility under the Bioenergy Program.

The ASTM D6751 standard is a more appropriate and sufficient means of ensuring that the biodiesel production supported by the Bioenergy Program meets the necessary quality standards. Biodiesel production supported under the Bioenergy Program should be required to meet ASTM D6751.

One commenter points out that the BQ-9000 program is only for biodiesel production so biomass-based diesel and liquid hydrocarbons derived from biomass would not be able to meet this requirement. Further, the BQ-9000 is a voluntary program run by an industry-based organization; it is inappropriate to regulate this program as a requirement for producers. Finally, it discriminates against smaller plants who cannot afford to meet the recordkeeping requirements of this program.

One commenter, while a strong supporter of the BQ-9000 program,

believes the other quality assurance mechanisms contained in this rule—mandatory self-certification for compliance with IRS, EPA, EISA, CAA and relevant ASTM standards—are more than sufficient to allow only ASTM D6751 biodiesel to qualify for payment under this program. According to the commenter, maintaining the BQ-9000 certification requirement will be much more likely to prevent smaller producers and new facilities from participating in this program than to enhance the quality of eligible fuel.

One commenter questions the need for BQ-9000 certification as a requirement for program eligibility and believes it unnecessary. While acknowledging that BQ-9000 certification is an important and valuable tool for the biodiesel industry to consistently produce a high quality fuel, according to the commenter, BQ-9000 was set up as a best practices industry standard and is not designed for regulatory enforcement. The commenter believes that the certification requirements listed above make this requirement duplicative, unnecessary and it should be removed from the final rule.

One commenter provides extensive discussion as to why BQ-9000 certification is unnecessary and duplicative, and should not be included in the final rule. The commenter points out that BQ-9000 is a cooperative and voluntary program for the accreditation of producers and marketers of biodiesel. The program provides a set of best practices for biodiesel producers to utilize when monitoring important fuel production activities such as sampling, testing, storage, sample retention and shipping. Though the commenter believes in the value of this program, the BQ-9000 program was neither designed nor envisioned to serve as a regulatory enforcement tool. The commenter details the various requirements that biodiesel producers must address:

- Register with the Internal Revenue Service (IRS). The Internal Revenue Code specifically requires fuel to meet the ASTM D6751 fuel specification to qualify for the biodiesel tax incentive. Biodiesel producers are required to register with the IRS, and the fuel of both new applicants for registration as well as existing registrants is tested by the IRS at its independent laboratory to ensure that registrant produces a fuel meeting the ASTM D6751 fuel specification. In addition, IRS excise tax personnel periodically test fuel at various stages of the distribution chain to ensure it meets the ASTM D6751 fuel specification.

- Meet the Clean Air Act's Section 211 Fuel Registration Requirements. In general, fuel entered into commerce in the U.S. must be registered with the Environmental Protection Agency (EPA), consistent with Section 211 of the Clean Air Act. To comply with these registration requirements, a biodiesel producer's fuel must meet the ASTM D6751 fuel specification.

- RFS-2 EPA Registration. The Energy Independence and Security Act (EISA) significantly expanded the previous Renewable Fuel Standard and provides specific volume requirements for advanced biofuels, including biomass-based diesel. For fuel to qualify under the program and generate RINs, which are ultimately used by obligated parties to show compliance under the program, a biofuel producer must re-register with the EPA. As part of this registration process, a producer must provide, among other things:

- A description of the types of renewable fuels that the producer intends to produce at the facility;
- A list of all feedstock the facility is capable of utilizing to produce fuel;
- A description of the facility's renewable fuel production process;
- A list of the facility's process energy fuel types and location from which the fuel was produced or extracted; and
- An independent third party engineering review. Biofuel producers must also create a Central Data Exchange (CDX) Account that allows registrants to update facility and company information as well as file quarterly and annual reports required by EPA under the RFS-2 program.

In addition, the CDX Account allows a registrant to access the EPA Moderated Transaction System (EMTS), the automated system through which RIN generation and transactions are recorded. The requirement in the proposed rule that biodiesel producers self-certify compliance with IRS, EPA, EISA, Clean Air Act and applicable ASTM standards—as well as provide periodic independent third party certificate of analysis as supported by the commenter—provides redundant enforcement mechanisms to ensure that only biodiesel meeting the ASTM D6751 fuel specification receives payment under the program.

*Response:* The Agency agrees with the comments related to the BQ-9000 certification and has eliminated this requirement from the interim rule. The BQ-9000 certification, while considered a valuable program, is not necessary in order to produce quality advanced biofuels. Furthermore, this requirement

adds additional burden to only one industry segment.

#### *Renewable Identification Number (RIN)*

*Comment:* Several commenters question the need to supply the RIN.

One commenter states that the RIN number is not necessary, but that only the RIN type is needed, which is the D-Code for generating RINs, which are 3 through 7.

One commenter, pointing out that a RIN is EPA's 38-character number that is assigned to each gallon of biofuel, seeks clarification if the Agency wants all 30 million gallon RINs that the commenter assigns on a yearly basis or exactly what is being requested. The commenter states that, if the Agency is asking for proof that it can manufacture advanced biofuels, EPA requires all advanced biofuel producers to be registered with EPA as an advanced biofuel producer by using an independent third party engineering review. The commenter is supportive of providing the Agency a copy of this third party engineering review or self certifying that it has a third party engineering review of being an advanced biofuel producer.

One commenter does not understand the requirement for a RIN number, stating that that the Agency should rely on the IRS and the EPA requirements for fuel quality assurance. The RIN is used as a product tracking document for purposes of compliance with the RFS and not all fuel that meets the requirement for the USDA bioenergy program will necessarily have a RIN attached or assigned. USDA audited this program for several years and has not required RINs assigned to fuel. The commenter maintains that USDA's current audit is sufficient to determine if eligible fuel was produced and that no further requirements are needed. The commenter further believes that requiring participants to match RINs to the USDA program may result in complete confusion due to the different fuel eligibilities and the fact that some fuel may not have RINs assigned. Should further assurances be needed, the commenter believes that BQ-9000 certification is adequate for purposes of the program.

One commenter recommends eliminating the requirement to report the "RIN" because the commenter does not believe the RIN will be an accurate method to determine production for the following reasons.

1. The RIN as a 38-digit number will not exist as defined by RFS-2 EMTS reporting.

2. Each Advance Biofuel Producer will have either one or multiple RIN

generating values. For example a biodiesel producer may also produce a renewable diesel. Biodiesel has a RIN generation value of 1.5 while renewable diesel has a value range of 1.5 to 1.7 depending on process. The same scenario would also apply if a biodiesel facility were also an ethanol producer or vice versus. The Agency would be forced to mathematically prepare for the reverse computation to obtain the actual gallons produced. A RIN gallon is not the same as a produced gallon in the cases of biomass based diesels.

3. The commenter believes that access to the report is statutorily limited to use by the EPA for compliance purposes.

The commenter is also uncertain as to the use as proposed in the rule. The commenter notes that RINs can be generated as either sold or produced and in this case would further confuse attempts by the Agency to accurately determine production—a producer may report gallons sold versus gallons produced. The commenter still believes the use of production records as obtained from the producer similar to the Fiscal Year 2009 NOCP is valid and consistent with program goals.

*Response:* The Agency continues to believe that the reporting of the applicable RIN for each advanced biofuel documents compliance with EPA regulations. The Agency has revised the text of proposed § 4288.120(a)(3)(iii) to clarify the requirement to submit the Renewable Identification Number for the advanced biofuel, if a Renewable Identification Number has been established for the advanced biofuel. In the interim rule the text now reads: "If a Renewable Identification Number has been established, the advanced biofuel producer shall also provide documentation of the most recent Renewable Identification Number for a typical gallon of each type of advanced biofuel produced." The Agency requires that, if a RIN is available for an advanced biofuel, it is provided in the application. The BQ-9000 is not a mandatory certification for the producers of advanced biofuel and, therefore, not all biodiesel producers have this certification.

#### *Woody Biomass*

*Comment:* One commenter states that the intent of the language certifying that woody biomass could not be used as a higher value wood product is to ensure that wood that could be used for dimensional lumber is not used as biomass material for production of alternative fuels. However, according to the commenter, even existing forest thinning and slash could be used in

wood pellets or particle board, which would be "higher value." The commenter does not believe the intent is to eliminate all woody biomass as a feedstock. Therefore, the commenter suggests that the language be clarified as follows:

"In addition, for woody biomass feedstock, the applicant must submit documentation that the woody biomass feedstock cannot be used as higher value dimensional lumber."

Another commenter does not believe that the Agency has the statutory authority to require that applicants document that their woody biomass could not have been used in a higher-value product. According to this commenter, the Farm Bill definition makes clear that such a restriction could only apply to applicants seeking payment for advanced biofuels derived from woody biomass sourced from Federal land. The commenter, therefore, urges the Agency not to finalize a provision so clearly contrary to express statutory language.

In support of this position, the commenter reiterates comments it made on a similar restriction in the BCAP proposal that was inconsistent with the Farm Bill definition of biomass. Under Section 9001 of the Farm Bill, an advanced biofuel need only be derived from "renewable biomass other than corn kernel starch." Thus, a fuel is an advanced biofuel so long as it is produced from materials meeting the definition of renewable biomass. Looking to the definition of renewable biomass in the 2008 Farm Bill, the only restriction relating to higher value products can be found in Section 9001(12)(A)(ii), relating to Federal land. There, Congress included the higher-value product limitation with regard to "materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands." Section 9001(12)(B), governing the definition of renewable biomass as it relates to biomass derived from non-Federal land, contains no such value-added restriction. Indeed, this section refers to "any organic matter that is available on a renewable or recurring basis from non-Federal land" and explicitly includes "wood waste and wood residues." However, the definition contains no such restriction as it relates to non-Federal land, nor does it leave room for statutory interpretation. The failure of Congress to include the higher-value product restriction for biomass sourced from non-Federal lands should not be construed as Congressional "silence" on the issue, as the CCC erroneously argued in the BCAP proposal. Where Congress specifically speaks to an issue in one

section of a statute, and omits a similar restriction in a parallel section, it is not "silence," but rather an expression of Congressional intent through the creation of a clear statutory scheme. *See, e.g., Duncan v. Walker*, 533 U.S. 167 (2001). In this case, the statutory scheme provides for considerable restriction of biomass sourced from Federal land, while simultaneously not interfering with the rights of private landowners to utilize their biomass without additional Federal restrictions beyond otherwise applicable law.

Finally, the commenter states that if the Agency chooses to finalize such a scheme, statutory authority aside, the commenter suggests that it not categorically exclude biomass that could be used in higher-value products. The commenter believes there is some woody biomass that, while it could be used as a higher-value wood-based product, will not be for numerous reasons, including market access. The rule should allow for payments for advanced biofuels using renewable biomass that could be used as inputs for higher-value products, but that have not been previously utilized on a facility-specific or regional basis. Thus, if there is no historical usage of mill wastes for higher value products at a particular mill or region, the Agency should be willing to offer payments for biofuels derived from an underutilized resource.

*Response:* The Agency agrees with the comment that the proposed rule was inconsistent with the 2008 Farm Bill provision that limited the "higher-value products" requirement to "materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands." Therefore, the Agency has revised the rule accordingly.

With regard to the comment requesting that the Agency revise § 4280.120(a)(3)(v) to reference "higher value dimensional lumber," the Agency disagrees with this suggestion. The Agency is satisfied that the proposed language ("higher value wood based product") is consistent with the statutory language, which uses the phrase "higher value product." Thus, the Agency has not revised the rule in response to this suggestion.

The Agency has also not revised the rule with regard to the suggestion not to categorically exclude biomass that could be used in higher-value products, but to take into consideration whether the renewable biomass had not been previously utilized. While the Agency recognizes that the "higher value" provision as proposed might lead to such an outcome, the revision to the rule limiting the "higher value" provision to wood sources from Federal

Forest System land and public lands would likely reduce significantly the commenter's concern. For example, the rule would not affect the usage of mill wastes as cited in the commenter's example. Further, while the rule, as revised, would subject all wood sourced from Federal Forest System land and public lands to this "higher value" provision, the Agency is satisfied that the revised rule is consistent with the authorizing statute.

#### *Contract—§ 4288.121*

*Comment:* Three commenters believe that multi-year contracts are acceptable and desirable. One commenter points out that multi-year contracts result in less paperwork. One commenter suggests a minimum contract length of 10 years, pointing out that providing long term contracts would help with financing of additional advanced biofuel capacity.

The third commenter requests that the Agency consider allowing for five-year contracts with eligible advanced biofuels producers. The multi-year contracts should allow for an annual review of the baseline of production so that the producer has the opportunity to continue to demonstrate its incremental increase in production. The annual review of contracts should occur from October 1 through October 31 to stay consistent with the Federal fiscal year. The commenter believes that allowing multi-year contracts will assist USDA in stabilizing the biofuels industry. Advanced biofuels producers that are new to the commercialization process will greatly benefit from this as it will allow them to offset the ramp up costs associated with bringing a new plant online. In addition, this will meet the Federal government's goals in the reduction of paperwork.

*Response:* The Program is for the term of the 2008 Farm Bill and only has funding through 2012. The proposed rule allows for multi-year contract until either the producer or the Agency terminates the contract. The producer, once eligible for the program, must sign-up annually.

*Comment:* One commenter recommends that the contract used by the Agency, Form RD 4288-2, should not allow for a termination based on the Program being discontinued or not funded during a fiscal year. Instead, the commenter recommends that the termination due to either of these reasons should only be allowed from one fiscal year to the next during the application process, not at any time.

*Response:* This program is statutorily funded, providing mandatory funding through 2012. In the event there are no

funds available for the program, the contract would be terminated due to lack of appropriated funding. The Agency would not terminate the contract during a fiscal year due to the program being discontinued or lack of funding.

#### *Payment Applications—§ 4288.130*

##### Frequency of Submittal

*Comment:* Several commenters express support for submitting payment applications and receiving payments on a quarterly basis. One of the commenters notes that this will be beneficial to producers and to USDA in their administration of the program, including appropriate management of the program funds to ensure that all annual mandatory funding levels are met. Another commenter supports USDA's policy objective of providing payments on a more frequent basis to give producers a more reliable and useful income stream.

One commenter suggests that semi-annual payments be made, which allow producers to maintain an adequate cash flow balance throughout the entire year versus a once-a-year payment. According to the commenter, biodiesel producers historically utilize program payments to supplement their working capital. With the six-month lapse of the biodiesel blenders tax credit, biodiesel producers have an urgent need for working capital; specifically as the tax credit is reinstated and raw materials must be purchased before sales may be in place.

One commenter states that, ideally, payments could be made on a monthly basis, thereby providing the Agency a running total of obligations incurred as well as having an idea of total likely obligations as the year progresses. If adjustments need to be made due to under or over payment rates due to volume such adjustments in the payment rate can be made as the year unfolds.

One commenter, in support of quarterly payments, suggests that the total funding amounts to be provided during a fiscal year should be divided equally among the four quarters. The quarterly payments would be determined by dividing the amount of funding available for the quarter by the amount of actual production recorded that quarter.

*Response:* Requesting monthly payments would increase the paperwork burden for the producer and the administrative burden for the Agency. The Agency is satisfied that the quarterly payments will meet the industry's needs.

With regard to the suggestion on how to determine the quarterly payments, the Agency has changed the rule to make payments quarterly on actual production using the amounts allocated for each quarter.

#### *Payment Provisions—§ 4288.131*

*Comment:* One commenter supports that production switched between owned production locations is considered in aggregate.

*Response:* The interim rule does not allow for producers to switch production from one facility to another and aggregate production for the purpose of collecting payments under this program. The Agency requires producers to sign-up for each facility that produces an advanced biofuel for which they are requesting payment.

#### *Other Payment Provisions*

##### Paragraph (d)(1)

*Comment:* One commenter believes that the proposed language on renewable energy content could be interpreted to include a reduction for all energy used in the production process. According to the commenter, the intent of this language is to prevent advanced energy payments for the denaturant required by the ATF in ethanol production. However, because all production processes use energy in the many forms (e.g., electricity, natural gas), the commenter believes the language should be modified to specifically exclude energy used in the production process. Therefore, the commenter suggests the following language: “The renewable energy content of the final product will be adjusted for any blending of nonrenewable additives or products after the final production process.”

*Response:* The Agency agrees with the comment that the renewable energy content of the final product is eligible for payment when the producer provides sufficient documentation for the Agency to determine the quantity produced from records of sale of the advanced biofuel. The current language accurately reflects that only renewable energy content of the final product is eligible for payment.

#### *Remedies—§ 4288.136*

*Comment:* One commenter believes that the consequences for fraud in the proposed rule seem weak. According to the commenter, to simply take away funding is not enough because funds have already been spent. The commenter recommends including penalties such as repayment to prevent fraud.

*Response:* The Agency disagrees with the comment that the only remedy is taking away funding. Both §§ 4288.134 and 4288.135 contain provisions that provide the Agency additional remedies. To make this clearer, the Agency is revising the introductory text to § 4288.136 to make reference to these two sections.

#### *General—Agree*

*Comment:* One commenter supports the proposed rule, agreeing with the guidelines outline what qualifies as a biofuel and the process for maintaining grants is acceptable.

*Response:* The Agency acknowledges the commenter’s support, but notes that this program involves contracts and not grants.

#### *General—Disagree*

*Comment:* One commenter states that this program should not even be in place. The commenter believes that the very fact that a government agency has to purchase this fuel indicates that there is no demand for it and it is not economically viable and will not be supported by the market.

*Response:* The Agency disagrees with the comment. The program supports production of advanced biofuel as mandated by statute.

*Comment:* One commenter states that bio-fuels generally have been getting tax breaks for years now, which has allowed them to be “competitive” with other fuels and which have resulted in increased feedstock and food costs as the ‘raw materials’ for the fuel—corn, soybeans, etc.—have gone to fuel manufacture rather than feed for livestock and for human consumption. The continuation of these tax breaks will only further distort the supply and demand of these important agribusinesses.

*Response:* Advanced biofuel from corn kernel starch is not eligible under this program. Many advanced biofuels are produced from non-feed grains (e.g. soybean oil versus soybean meal) and from other waste products which are not normally considered as foods. The payments the producers received are reported to the IRS and they must claim the payment as income resulting in possible payment of taxes.

#### *Timing*

*Comment:* A number of commenters encourage the Agency to conclude the rulemaking process as soon as is possible and make the total \$80 million in mandatory funding provided by statute available in Fiscal Year 2010. Commenters make this request because the biodiesel industry is currently facing

significant economic challenges, including, as noted by one commenter, the uncertainty created by the December 31, 2009 expiration of the \$1 Federal biodiesel blending credit. This will provide needed financial support to maintain and bolster the domestic production of advanced biofuels, consistent with statute and the will of Congress. According to one commenter, for the past five and a half months, the biodiesel industry has been devastated by the expiration of the Federal biodiesel blenders tax credit. As a result of this lapse in the tax credit, many biodiesel plants have shut down and biodiesel production in the U.S. has been ground nearly to a halt.

*Response:* The Agency acknowledges the challenges faced by the entire biofuel industry and has expedited the rulemaking process.

#### *Funding*

*Comment:* Three commenters state that payments of the full Fiscal Year 2010 statutorily required funding (\$55 million) plus the funding rolled over from Fiscal Year 2009 funds (\$25 million) should be made to all eligible producers, as intended by Congress under the statute, under a final rule within Fiscal Year 2010. Similarly, another commenter, noting the amount of funds announced as being available in the NOFAs issued in Fiscal Year 2009 and Fiscal Year 2010 is only half of the funding that should be appropriated to the program via the statute, urges the Agency to increase the appropriation for this program to \$80 million for Fiscal Year 2010.

*Response:* The Agency acknowledges the challenges faced by the entire biofuel industry. The Agency published a Notice of Contract Proposal in the **Federal Register** of May 6, 2010 (75 FR 24865), and received an apportionment of \$40 million. With respect to increasing the appropriations for this program, that decision would be made by Congress.

*Comment:* One commenter does not support making further payments under the NOFA issued March 12, 2010 (75 FR 11840), or May 6. According to this commenter, it would be better to get the final rule completed and make payments under such rules than continue to make payments under the NOFA.

One commenter similarly suggests that the Agency terminate the Fiscal Year 2010 NOCP and make all Fiscal Year 2010 payments under the final version of the proposed rule. In support of this position, the commenter refers to the May 6, 2010, NOCP to eligible participants that produced advanced

biofuels in Fiscal Year 2010, which included the United States citizenship requirement for which the Agency provided no reasoning for incorporating this requirement and in which the Agency provided no justification for, in effect, abandoning the rulemaking process which it started less than a month before insofar as Fiscal Year 2010 payments under the program are concerned. According to the commenter, the passage of time since the relevant statute was passed in 2008 makes it untenable for anyone to argue that the “good cause” exception to the rulemaking requirements applies to decisions regarding Fiscal Year 2010 payments.

Another commenter states that, because money is still available for 2009 and 2010 production, new facilities and new production should be allowed to participate and that the rule prohibiting such production and such facilities be reconsidered.

*Response:* The Agency acknowledges the challenges faced by the entire biofuel industry and has expedited the rulemaking process. The Agency has canceled the Notice of Contract Proposal published on May 6, 2010 in the **Federal Register**. This interim rule provides producers who are foreign-owned or non-rural to apply for payments under this program.

#### **IV. Advanced Biofuel Payment Program Fiscal Year 2010 Applications**

In the interim rule for the Advanced Biofuel Payment Program, the Agency has revised the eligibility criteria such that non-rural biofuel facilities and foreign-owned biofuel facilities are eligible for the program. The Notice for Contract Proposal (NOCP) published on May 6, 2010 (75 FR 24865) excluded non-rural biofuel facilities and foreign-owned biofuel facilities from the program. To conform that Notice with this interim rule, the Agency is incorporating provisions in the interim rule for applicants to apply for Fiscal Year 2010 funds and these interim rule provisions supersede the provisions specified in the May 6, 2010 NOCP. The effect is to cancel the May 6, 2010 NOCP and replace it with the provisions found in this preamble and in this interim rule.

As noted under the **SUPPLEMENTARY INFORMATION** section of this preamble, the Agency will be accepting applications for participation in this program for Fiscal Year 2010 funding from the date of publication through 60 days after the date of publication of the interim rule. The Agency notes that this time period is the same as the comment period for the interim rule. The Agency

is accepting applications for Fiscal Year 2010 during the comment period for this interim rule in order to expedite the process for awarding Fiscal Year 2010 funds. While the Agency will be accepting applications during the interim’s rule comment period, it will not make any decisions on which applications will receive Fiscal Year funding until the interim rule is effective.

The Agency notes that it will provide funding information for Fiscal Year 2011 and subsequent fiscal years through notices of funding availability.

#### *A. Funding Information*

1. *Available funds.* The Agency is authorizing up to \$80 million in budget authority for this program in Fiscal Year 2010.

2. *Number of Payments.* Under § 4288.190, payments to participating advanced biofuel producers will be made for actual production produced from October 1, 2009 through September 30, 2010.

3. *Range of Amounts of Each Payment.* The amount of each payment will depend on the number of eligible advanced biofuel producers participating in the program for Fiscal Year 2010, the amount of advanced biofuels being produced by such advanced biofuel producers, and the amount of funds available.

4. *Contract length.* The contract will remain in effect until terminated, as provided for in 7 CFR 4280.121.

5. *Type of Instrument.* Payment.

#### *B. Eligibility Information*

The eligibility requirements for advanced biofuel producers seeking payments under this program for Fiscal Year 2010 are found in §§ 4288.110 through 4288.113.

#### *C. Application and Submission Information*

1. *Address to Request Applications.* Contract and Payment Application forms are available from the USDA, Rural Development State Office, Renewable Energy Coordinator. The list of Renewable Energy Coordinators is provided in the **SUPPLEMENTARY INFORMATION** section of this preamble.

2. *Content and Form of Submission.* The enrollment provisions, including application content and form of submission, are specified in §§ 4288.120 and 4288.121.

3. *Submission Dates and Times.*

(i) *Enrollment.* Advanced biofuel producers who had eligible production at any time during Fiscal Year 2010 must enroll in the program by April 12, 2011. Applications received after this

date will not be considered by the Agency for Fiscal Year 2010 payments. Applicants who submitted an application pursuant to the May 6, 2010 NOCP must submit a new application under this interim rule to be considered for a Fiscal Year 2010 payment.

(ii) *Payment applications.* Advanced biofuel producers must submit Form RD 4288–3 by 4:30 p.m. local time May 12, 2011. Payment will be made for the time period October 1, 2009 through September 30, 2010.

4. *Funding Restrictions.* For Fiscal Year 2010, not more than 5 percent of the funds shall be made available to eligible producers with a refining capacity exceeding 150,000,000 gallons of a liquid advanced biofuel per year or exceeding 15,900,000 million BTUs of biogas and solid advanced biofuel per year. In calculating whether a producer meets either of these capacities, production of all advanced biofuel facilities owned or operated by the producer will be totaled. In addition, not more than 5 percent of the funds shall be made available for the production of eligible solid advanced biofuels produced from forest biomass.

#### *D. Payment Provisions*

Fiscal Year 2010 payments will be made according to the provisions specified in § 4288.190.

#### *E. Environmental Review*

All recipients under this interim rule are subject to the requirements of 7 CFR part 1940, subpart G. However, 7 CFR 1940.310(c)(1) excludes this activity. In accordance with § 1940.310(c)(1), if a program provides assistance that is not related to the development of a specific site, it is excluded from conducting an environmental review. Rural Development’s compliance with the National Environmental Policy Act of 1969 (NEPA) is implemented in its regulations at 7 CFR part 1940, subpart G. Applicants whose proposal involves additional facility construction should provide Form RD 1940–20 as part of this application. RD will then determine whether the approval falls under § 1940.310(c)(1), which categorically excludes the action from NEPA compliance.

#### **List of Subjects in 7 CFR Part 4288**

Administrative practice and procedure, Energy—advanced biofuel, Renewable biomass, Reporting and recordkeeping.

For the reasons set forth in the preamble, title 7, chapter XLII of the Code of Federal Regulations, is amended as follows:



**CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

**PART 4288—PAYMENT PROGRAMS**

■ 1. The authority citation for part 4288 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

■ 2. Subpart B is added to part 4288 to read as follows:

**Subpart B—Advanced Biofuel Payment Program**

**General Provisions**

Sec.

- 4288.101 Purpose and scope.  
4288.102 Definitions.  
4288.103 Review or appeal rights.  
4288.104 Compliance with other laws and regulations.  
4288.105 Oversight and monitoring.  
4288.106 Forms, regulations, and instructions.  
4288.107 Exception authority.  
4288.108–4288.109 [Reserved]

**Eligibility Provisions**

- 4288.110 Applicant eligibility.  
4288.111 Biofuel eligibility.  
4288.112 Eligibility notifications.  
4288.113 Payment record requirements.  
4288.114–4288.119 [Reserved]

**Enrollment Provisions**

- 4288.120 Enrollment.  
4288.121 Contract.  
4288.122–4288.129 [Reserved]

**Payment Provisions**

- 4288.130 Payment applications.  
4288.131 Payment provisions.  
4288.132 Payment adjustments.  
4288.133 Payment liability.  
4288.134 Refunds and interest payments.  
4288.135 Unauthorized payments and offsets.  
4288.136 Remedies.  
4288.137 Succession and loss of control of advanced biofuel facilities and production.  
4288.138–4288.189 [Reserved]

**Fiscal Year 2010 Applications**

- 4288.190 Fiscal Year 2010 applications.  
4288.191–4288.200 [Reserved]

Authority: 5 U.S.C. 301.

**Subpart B—Advanced Biofuel Payment Program General Provisions**

**§ 4288.101 Purpose and scope.**

(a) *Purpose.* The purpose of this subpart is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers.

(b) *Scope.* This subpart sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions an advanced biofuel producer must meet to

obtain payments under this Program from the United States Department of Agriculture for eligible advanced biofuel production. Additional terms and conditions may be set forth in the Program contract and payment agreement prescribed by the Agency.

**§ 4288.102 Definitions.**

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

*Advanced biofuel.* A fuel that is derived from renewable biomass, other than corn kernel starch, to include:

- (1) Biofuel derived from cellulose, hemicellulose, or lignin;
- (2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
- (3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;
- (4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;
- (5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;
- (6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or
- (7) Other fuel derived from cellulosic biomass.

*Advanced biofuel producer.* An individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces and sells an advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this Program.

*Agency.* The USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

*Alcohol.* Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

- (1) For fuel use, rendered unfit for beverage use, produced at a biofuel facility and in a manner approved by the Bureau of Alcohol, Tobacco, Firearms, and Explosives for the production of alcohol for fuel; or
- (2) As denatured alcohol used by blenders and refiners and rendered unfit for beverage use.

*Alcohol producer.* An advanced biofuel producer authorized by ATF to produce alcohol.

*ATF.* The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

*Biodiesel.* A mono alkyl ester, manufactured in the United States and its territories, that meets the requirements of the appropriate ASTM International standard.

*Biofuel.* Fuel derived from renewable biomass.

*Biofuel facility.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

*Blender.* A blender is a processor of fuels who combines two or more fuels, one of which must be an advanced biofuel, for distribution and sale. Producers who blend one or more of their own fuels are not blenders under this definition.

*Certificate of analysis.* A document approved by the Agency that certifies the quality and purity of the advanced biofuel being produced. The document must be from a qualified, independent third party.

*Contract.* Form RD 4288–2, “Advanced Biofuel Payment Program Contract,” signed by the eligible advanced biofuel producer and the Agency, that defines the terms and conditions for participating in and receiving payment under this Program.

*Eligible advanced biofuel producer.* A producer of advanced biofuels that meets all requirements of § 4288.110 of this subpart.

*Eligible renewable biomass.* Renewable biomass, as defined in this section, excluding corn kernel starch.

*Eligible renewable energy content.* That portion of an advanced biofuel’s energy content derived from eligible renewable biomass feedstock. The energy content from any portion of the biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-eligible renewable biomass feedstock (e.g., corn kernel starch) is not eligible for payment under this Program.

*Enrollment application.* Form RD 4288–1, “Advanced Biofuel Payment Program Annual Application,” which is submitted by advanced biofuel producers for participation in this Program.

*Ethanol.* Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

- (1) For fuel use, and which has been rendered unfit for beverage use and produced at an advanced biofuel facility approved by the ATF for the production of ethanol for fuel, or

(2) As denatured ethanol used by blenders and energy refiners, which has been rendered unfit for beverage use.

*Ethanol producer.* An advanced biofuel producer authorized by ATF to produce ethanol.

*Fiscal Year.* A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

*Flared gas.* The burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when the operator cannot transport the gas to market or convert to electricity and cannot use the gas for any other purpose.

*Forest biomass.* Any plant or tree material produced by forest growth, such as trees, wood, brush, thinning, chips, and slash.

*Incremental production.* The quantity of eligible advanced biofuel produced at an advanced biofuel biorefinery in the fiscal year for which payment is sought that exceeds the quantity of advanced biofuel produced at the biorefinery over the prior fiscal year.

*Larger producer.* An eligible advanced biofuel producer with a refining capacity as determined for the prior fiscal year, based on all of the advanced biofuel facilities in which the producer has 50 percent or more ownership, exceeding:

- (1) 150,000,000 gallons of liquid advanced biofuel per year; or
- (2) 15,900,000 MMBTU of biogas and solid advanced biofuel per year.

*Payment application.* Form RD 4288-3, "Advanced Biofuel Payment Program—Payment Request," which is submitted by an eligible advance producer to the Agency in order to receive payment under this Program.

*Quarter.* The Federal fiscal time period for any fiscal year as follows:

- (1) 1st Quarter: October 1 through December 31;
- (2) 2nd Quarter: January 1 through March 31;
- (3) 3rd Quarter: April 1 through June 30; and
- (4) 4th Quarter: July 1 through September 30.

*Renewable biomass.*

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) 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 paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); 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; and algae; and
- (ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Sign-up period.* The time period during which the Agency will accept enrollment applications.

*Smaller producer.* An eligible advanced biofuel producer with a refining capacity as determined for the prior fiscal year, based on all of the advanced biofuel facilities in which the producer has 50 percent or more ownership, equal to or less than:

- (1) 150,000,000 gallons of liquid advanced biofuel per year; or
- (2) 15,900,000 MMBTU of biogas and solid advanced biofuel per year.

*State.* Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

*USDA.* The United States Department of Agriculture.

#### § 4288.103 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

#### § 4288.104 Compliance with other laws and regulations.

(a) Advanced biofuel producers must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age

Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

(b) Producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. Rural Development will not discriminate against an applicant on the bases of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

#### § 4288.105 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment applications and subsequent payments made under this subpart, as frequently as necessary, to ensure the integrity of the Program. The Agency will conduct site visits as necessary.

(1) *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of feedstocks used.

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records for quarterly payments to ensure that each certificate of analysis has been issued by a qualified, independent third party, which may include the blender only if the blender is not associated with the facility.

(b) *Records.* For the purpose of verifying compliance with the requirements of this subpart, each eligible advanced biofuel producer shall make available at one place at a reasonable time for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of such advanced biofuel producer for not less than 3 years from each Program payment date.

#### § 4288.106 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this Program may be obtained from the USDA Rural Development State

Office, Rural Energy Coordinator and the USDA Rural Development Web site at <http://www.rurdev.usda.gov>.

**§ 4288.107 Exception authority.**

The Administrator of the Agency (“Administrator”) may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government’s interest.

**§§ 4288.108–4288.109 [Reserved]**

**Eligibility Provisions**

**§ 4288.110 Applicant eligibility.**

Sections 4288.110 through 4288.119 present the requirements associated with advanced biofuel producer eligibility, biofuel eligibility, eligibility notifications, and payment record requirements. To be eligible for this Program, the applicant must meet the requirements specified in paragraph (a) of this section and must provide additional information as may be requested by the Agency under paragraph (b) of this section. Public bodies and educational institutions are not eligible for this Program.

(a) *Eligible producer.* The applicant must be an advanced biofuel producer, as defined in this subpart.

(b) *Eligibility determination.* The Agency will determine an applicant’s eligibility for participation in this Program. If an applicant’s original submittal is not sufficient to verify an applicant’s eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant’s eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the applicant’s eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the Agency will not consider the applicant any further for participation in the upcoming fiscal year. Such applicants may elect to enroll during the next sign-up period.

(c) *Ineligibility determination.* An otherwise eligible producer will be

determined to be ineligible if the producer:

(1) Refuses to allow the Agency to verify any information provided by the advanced biofuel producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;

(2) Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or

(3) Fails to comply with all applicable Federal, State, or local laws.

**§ 4288.111 Biofuel eligibility.**

To be eligible for this Program, a biofuel must meet the requirements specified in paragraph (a) of this section and the biofuel’s producer must provide additional information as may be requested by the Agency under paragraph (b) of this section. Notwithstanding the provisions of paragraph (a) of this section, for the purposes of this subpart, flared gases are not eligible.

(a) *Eligible advanced biofuel.* For an advanced biofuel to be eligible, each of the following conditions must be met, as applicable:

(1) The advanced biofuel must meet the definition of advanced biofuel and be produced in a State;

(2) The advanced biofuel must be a solid, liquid, or gaseous advanced biofuel;

(3) The advanced biofuel must be a final product; and

(4) The advanced biofuel must be sold as an advanced biofuel through an arm’s length transaction to a third party.

(b) *Eligibility determination.* The Agency will determine a biofuel’s eligibility for payment under this Program. If an applicant’s original submittal is not sufficient to verify a biofuel’s eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the biofuel’s eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel’s eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment under this Program in the upcoming fiscal year. Applicants may elect to include such biofuels in the application

form submitted during the next sign-up period.

**§ 4288.112 Eligibility notifications.**

(a) *Applicant eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

(b) *Ineligibility notifications.* If an applicant or a biofuel is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to the reason(s) the applicant or biofuel was determined to be ineligible. Such applicant will have appeal rights as specified in this subpart.

(c) *Subsequent ineligibility determinations.* If at any time a producer or an advanced biofuel is determined to be ineligible, the Agency will notify the producer in writing of its determination.

**§ 4288.113 Payment record requirements.**

To be eligible for Program payments, an advanced biofuel producer must maintain records for all relevant fiscal years and fiscal year quarters for each advanced biofuel facility indicating:

(a) The type of eligible renewable biomass used in the production of advanced biofuel;

(b) The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel facility;

(c) The quantity of eligible renewable biomass used at each advanced biofuel facility to produce the advanced biofuel; and

(d) All other records required to establish Program eligibility and compliance.

**§ 4288.114–4288.119 [Reserved]**

**Enrollment Provisions**

**§ 4288.120 Enrollment.**

In order to participate in the Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling in the Program is presented in this section. Advanced biofuel producers who expect to produce eligible advanced biofuels at any time during a fiscal year must enroll in the Program as described in this section.

(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. An

original, signed hard copy of the enrollment application must be submitted as specified in the annual **Federal Register** notice for this program. All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <http://fedgov.dnb.com/webform>.

(1) Eligible advanced biofuel producers must submit enrollment applications during each sign-up period in order to continue participating in this Program. If a participating producer fails to submit the enrollment application during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year. Such a producer must reapply, and sign a new contract, to participate in the Program for future fiscal years.

(2) Eligible advanced biofuel producers may submit an enrollment application during a fiscal year's sign-up period even if the advanced biofuel facility is not currently producing, but is scheduled to start producing advanced biofuel in that fiscal year.

(3) The producer must furnish the Agency all required certifications before acceptance into the Program, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with Program provisions. The required certifications depend on the type of biofuel produced. Certifications specified in paragraphs (a)(3)(i) through (a)(3)(iv) of this section are to be completed and provided by an accredited independent third party.

(i) *Alcohol*. For alcohol producers with authority from ATF to produce alcohol, copies of either

(A) The Alcohol Fuel Producers Permit (TTB F 5110.74) or

(B) The registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).

(ii) *Hydrous ethanol*. For hydrous ethanol that is upgraded by another distiller to anhydrous ethyl alcohol, the increased ethanol production is eligible for payment one time only. If the advanced biofuel producer entering into this agreement is:

(A) The hydrous ethanol producer, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(1) Applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(2) Distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.

(B) The distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.

(iii) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass*. For these fuels, the advanced biofuel producer shall certify that the producer, the advanced biofuel facility, and the biofuel meet the definitions of these terms as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act and under the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and the quality requirements per applicable ASTM International standards (e.g., ASTM D6751) and commercially acceptable quality standards of the local market. If a Renewable Identification Number has been established, the advanced biofuel producer shall also provide documentation of the most recent Renewable Identification Number for a typical gallon of each type of advanced biofuel produced.

(iv) *Gaseous advanced biofuel*. For gaseous advanced biofuel producers, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine the quantity of advanced biofuel produced are industry standard and properly calibrated by a third-party professional; and that the readings have been taken by a qualified individual.

(v) *Woody biomass feedstock*. If the feedstock is from National Forest system land or public lands, documentation must be provided that it cannot be used as a higher value wood-based product.

(4) *Supporting documentation*. Each advanced biofuel producer participating in this program for the first time must submit documentation to support the actual production and capacity reported in the enrollment application.

(5) *Additional forms*. Applicants must submit the forms specified in this paragraph with the enrollment application when applying for participation under this subpart and as needed when re-enrolling in the program.

(i) RD Instruction 1940-Q, Exhibit A-1, "Certification for Contracts, Grants and Loans."

(ii) SF-LLL, "Disclosure of Lobbying Activities."

(iii) Form RD 400-4, "Assurance Agreement."

(b) *Sign-up period*. The sign-up period is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice.

#### § 4288.121 Contract.

Advanced biofuel producers determined to be eligible to receive payments must then enter into a contract with the Agency in order to participate in this Program.

(a) *Contract*. The Agency will forward the contract to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

(b) *Length of contract*. Once signed, a contract will remain in effect until terminated as specified in paragraph (d) of this section.

(c) *Contract review*. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

(d) *Contract termination*. Contracts under this Program will be terminated in writing by the Agency. Contracts may be terminated under any one of the following conditions:

(1) At the mutual agreement of the parties;

(2) In accordance with applicable Program notices and regulations;

(3) The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;

(4) The advanced biofuel producer fails to submit the enrollment application during a sign-up period;

(5) The Program is discontinued or not funded;

(6) All of a participating advanced biofuel producer's advanced biofuel facilities no longer exist or no longer produce any eligible advanced biofuel; or

(7) The Agency determines that the advanced biofuel producer is ineligible for participation.

#### §§ 4288.122–4288.129 [Reserved]

#### Payment Provisions

##### § 4288.130 Payment applications.

Sections 4288.130 through 4288.189 identify the process and procedures the Agency will use to make payments to eligible advanced biofuel producers. In order to receive payments under this

Program, eligible advanced biofuel producers with valid contracts must submit a payment application, as required under paragraph (a) of this section. The Agency will review the payment application and, if necessary, may request additional information, as specified under paragraph (b) of this section.

(a) *Applying for payment.* To apply for payments under this subpart for a fiscal year, an eligible advanced biofuel producer must:

- (1) After a quarter has been completed, submit a payment application covering the quarter;
- (2) Certify that the request is accurate;
- (3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and
- (4) Provide documentation as requested by the Agency of the net production of advanced biofuel at all advanced biofuel facilities during the relevant quarter.

(b) *Review of payment applications.* The Agency will review each payment application it receives to determine if it is eligible for payment.

(1) *Review factors.* Factors that the Agency will consider in reviewing payments applications include, but are not necessarily limited to:

- (i) *Contract validity.* Whether the entity submitting the payment application has a valid contract with the Agency under this Program;
- (ii) *Biofuel eligibility.* Whether the biofuel for which payment is sought is an eligible advanced biofuel; and
- (iii) *Calculations.* Whether the calculations for determining the requested payment are complete and accurate.

(2) *Additional documentation.* If the Agency determines additional information is required for the Agency to complete its review of a payment application, eligible advanced biofuel producers shall submit such additional supporting documentation as requested by the Agency. If the producer does not provide the requested information within the required time period, the Agency will not make payment.

(c) *Payment application eligibility.* The Agency will notify the advanced biofuel producer, in writing, as soon as practicable after the payment application, whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment and the basis for the Agency's determination of ineligibility.

(d) *Submittal information.* Eligible advanced biofuel producers must submit payment applications as

specified in the annual **Federal Register** notice for this program no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. Neither complete nor incomplete payment applications received after this date and time will be considered, regardless of the postmark on the application.

(1) Any payment application form that is received by the Agency after October 31 of the calendar year for the preceding fiscal year is ineligible for payment.

(2) If the actual deadline falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

#### **§ 4288.131 Payment provisions.**

Payments to advanced biofuel producers for eligible advanced biofuel production will be determined in accordance with the provisions of this section.

(a) *Types of payments.* The Agency will make available each fiscal year an actual production payment and an incremental production payment to participating producers, as specified in paragraphs (a)(1) and (a)(2), respectively, of this section. As provided in paragraph (a)(2) of this section, not all participating producers will receive an incremental production payment.

(1) *Actual production.* Participating producers will be paid on a quarterly basis for the actual quantity of eligible advanced biofuel produced during the quarter. Payment for actual production will be determined according to paragraph (c) of this section.

(2) *Incremental production.* For each participating advanced biofuel facility, the Agency will make an end-of-the-year payment for that facility's incremental production, if any, during the fiscal year provided the advanced biofuel facility has fewer than 20 days (excluding weekends) of non-production of eligible advanced biofuels during the previous fiscal year. Payment for incremental production will be determined according to paragraph (d) of this section.

(b) *Amount of payment funds available.* Based on the amount of funds made available to this program each fiscal year, the Agency will allocate available program funds according to paragraphs (b)(1) and (b)(2) of this section.

(1) *Actual versus incremental production.* The Agency will determine the amount of funds for actual production payments and for

incremental production payment as follows:

(i) For fiscal year 2010, 80 percent of the funds will be allocated for actual production payments and 20 percent of the funds will be allocated for incremental production payments.

(ii) For fiscal year 2011, 70 percent of the funds will be allocated for actual production payments and 30 percent of the funds will be allocated for incremental production payments.

(iii) For fiscal year 2012, 60 percent of the funds will be allocated for actual production payments and 40 percent of the funds will be allocated for incremental production payments.

(iv) For fiscal year 2013 and beyond, 50 percent of the funds will be allocated for actual production payments and 50 percent of the funds will be allocated for incremental production payments.

(2) *Quarterly allocations.* For each fiscal year, the Agency will allocate in each quarter one-fourth of the funds allocated to actual production for the entire fiscal year.

(c) *Determination of payment for actual production.* Each quarter, the Agency will establish an actual production payment rate using the procedures specified in paragraphs (c)(1) through (c)(5) of this section. This rate will be applied to the actual quantity of eligible advanced biofuel produced to determine payments to eligible advanced biofuel producers, as described in paragraph (c)(6) of this section.

(1) Based on the information provided in each payment application, the Agency will determine the eligible advanced biofuel production. If the Agency determines that the amount of advanced biofuel production reported in a payment application is not supported by the documentation submitted with the payment application, the Agency may reduce the production reported in the payment application.

(2) For each producer, the Agency will convert the production determined to be eligible under paragraph (c)(1) of this section into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will, in consultation with other Federal agencies, establish and use a conversion formula as appropriate, that it publishes in the **Federal Register**, until such time as the Energy Information

Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(i) If the advanced biofuel is a liquid or gaseous advanced biofuel produced from forest biomass, the BTUs will be discounted 10 percent.

(ii) If the advanced biofuel is a solid advanced biofuel produced from forest biomass, the BTUs will be discounted 85 percent.

(iii) If the advanced biofuel meets an applicable renewable fuel standard, the BTUs will be increased by 10 percent.

(3) For each quarter, the Agency will determine the actual production payment rate (\$/BTU) based on paragraphs (b) and (c)(2) of this section. The rate will be calculated such that all of the quarterly funds for actual production will be distributed.

(4) Using the actual production payment rate determined above and the actual production for each type of advanced biofuel produced at an advanced biofuel facility, the Agency will calculate each quarter a payment for each eligible advanced biofuel producer for that quarter.

(d) *Determination of payment for incremental production.* At the end of each fiscal year, the Agency will establish incremental production payment rate using the procedures specified in paragraphs (d)(1) through (d)(6) of this section. This rate will be applied to the quantity of eligible incremental advanced biofuel produced to determine payments to eligible advanced biofuel producers, as described in paragraph (d)(7) of this section.

(1) For each participating advanced biofuel facility that produced eligible advanced biofuels during the fiscal year prior to the fiscal year for which payment is sought provided the advanced biofuel facility has fewer than 20 days (excluding weekends) of non-production of eligible advanced biofuels during that previous fiscal year, the Agency will determine the quantity of eligible advanced biofuel produced in that prior fiscal year based on information provided by the producer.

(2) Using the information in the payment applications submitted for the fiscal year for which payment is sought, the Agency will determine the actual amount of eligible advanced biofuel produced in the fiscal year for which payment is sought.

(3) Using the results from paragraphs (d)(1) and (d)(2) of this section, the Agency will determine the quantity of advanced biofuel produced in excess of

the previous year's advanced biofuel production.

(4) For each advanced biofuel facility that shows incremental production under paragraph (d)(3) of this section, the Agency will convert the production into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate, that it publishes in the **Federal Register**, until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(i) If the advanced biofuel is a liquid or gaseous advanced biofuel produced from forest biomass, the BTUs will be discounted 10 percent.

(ii) If the advanced biofuel is a solid advanced biofuel produced from forest biomass, the BTUs will be discounted 85 percent.

(iii) If the advanced biofuel meets an applicable renewable fuel standard, the BTUs will be increased by 10 percent.

(5) The Agency will sum all of the BTUs determined under paragraph (d)(4) of this section.

(6) Using the results from paragraph (d)(5) of this section and the amount of incremental funds available, the Agency will determine the incremental production payment rate (\$/BTU). The rate will be calculated such that all of the incremental production funds will be distributed.

(7) Using the incremental production payment rate determined above and the incremental production for each advanced biofuel facility eligible for an incremental production payment, the Agency will calculate an incremental production payment for each eligible advanced biofuel producer.

(e) *Other payment provisions.* The following provisions apply.

(1) Notwithstanding any other provision, the Agency will provide payments to larger producers of not more than 5 percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to larger producers would be reached, the Agency will pro-rate payments to larger producers based on the BTU content of their eligible

advanced biofuel production so as not to exceed the limit.

(2) Notwithstanding any other provision, the Agency will provide payments to solid eligible advanced biofuels produced from forest biomass of not more than 5 percent of available program funds in any fiscal year. At any time during the year, if the limit on payments to such advanced biofuels would be reached, the Agency will pro-rate payments for such advanced biofuels based on the BTU content of the quantity of such advanced biofuels produced so as not to exceed the limit.

(3) Advanced biofuel producers will be paid on the basis of the amount of eligible renewable energy content of the advanced biofuels only if the producer provides documentation sufficient, including a Certificate of Analysis, for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(4) Payment will be made to only one eligible advanced biofuel producer per advanced biofuel facility.

(5) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due subject to the requirements and refund provisions of this subpart.

(6) Advanced biofuels produced under the situations identified in paragraphs (e)(6)(i) through (e)(6)(iii) of this section are ineligible for incremental production payment, but are still eligible for actual production payment.

(i) Advanced biofuels produced at an advanced biofuel facility that did not produce any eligible advanced biofuel in year prior to the fiscal year in which payment is sought (*e.g.*, a new advanced biofuel facility).

(ii) Advanced biofuels produced at an advanced biofuel facility that had 20 or more days (excluding weekends) of non-production of eligible advanced biofuels during the fiscal year immediately prior to the fiscal year in which payment is sought.

(iii) Advanced biofuels produced from forest biomass.

(iv) For larger producers only, when all of the funds available to larger producers have been distributed based on actual production.

(7) If an advanced biofuel producer transfers any production capacity for one advanced biofuel facility to another, such transferred production capacity shall be considered production for the advanced biofuel facility to which the production was transferred.

(8) A producer will only be paid for the advanced biofuels identified in the enrollment application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

(9) When determining the quantity of eligible advanced biofuel, if an applicant is blending its advanced biofuel using ineligible feedstocks (*e.g.*, fossil gasoline or methanol, corn kernel starch), only the quantity of advanced biofuel being produced from eligible feedstocks will be used in determining the payment rates and for which payments will be made.

**§ 4288.132 Payment adjustments.**

The Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

**§ 4288.133 Payment liability.**

Any payment, or portion thereof, made under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

**§ 4288.134 Refunds and interest payments.**

An eligible advanced biofuel producer who receives payments under this subpart may be required to refund such payments as specified in this section. If the Agency suspects fraudulent representation through its site visits and records inspections under § 4288.105(b), it will be referred to the Office of Inspector General for appropriate action.

(a) An eligible advanced biofuel producer receiving payments under this subpart shall become ineligible if the Agency determines the advanced biofuel producer has:

(1) Made any fraudulent representation; or

(2) Misrepresented any material fact affecting a Program determination.

(b) If an Agency determination that a producer is not eligible for participation under this subpart is appealed and overturned, the Agency will make appropriate and applicable payments to the producer from Program funds, to the

extent such funds are available, that remain from the fiscal year in which the original adverse Agency decision was made.

(c) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

(d) When a refund is due, it shall be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice.

(e) Late payment interest shall be assessed on each refund in accordance with the provisions and rates as established by the United States Treasury.

(1) Interest charged by the Agency under this subpart shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made by the Agency to the date of repayment by the producer.

(2) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

(f) Any advanced biofuel producer or person engaged in an act prohibited by this section and any advanced biofuel producer or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this subpart and for related charges.

**§ 4288.135 Unauthorized payments and offsets.**

When unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency reserves the right to collect from the recipient the sum that is determined to be unauthorized. If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments.

(a) *Unauthorized assistance.* The Agency will seek to collect from recipients all unauthorized assistance made under this Program using the procedures specified in paragraphs (a)(1) through (a)(4) of this section.

(1) *Notification to the producer.* Upon determination that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a

demand letter to the producer. Unless the Agency modifies the original demand, it will remain in full force and effect. The demand letter will:

(i) Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;

(ii) State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;

(iii) Provide detailed reason(s) why the assistance was determined to be unauthorized;

(iv) State the amount is immediately due and payable to the Agency;

(v) Describe the rights the producer has for seeking review or appeal of the Agency's determination pursuant to 7 CFR part 11;

(vi) Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

(vii) Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

(A) If the producer meets with the Agency, the producer will be given an opportunity to provide information to refute the Agency's findings.

(B) When requested by the producer, the Agency may grant additional time for the producer to assemble documentation. Such extension of time for payment will be valid only if the Agency documents the extension in writing and specifies the period in days during which period the payment obligation created by the demand letter (but not the ongoing accrual of interest) will be suspended. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

(2) *Payment in full.* If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

(3) *Promissory note.* If the producer agrees with the Agency's determination

or is willing to pay the amount in question, but cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided all of the conditions specified in paragraphs (a)(3)(i) through (a)(3)(iii) of this section are met. Loans established under this paragraph will be at the Treasury interest rate in effect on the date the financial assistance was provided and that is consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner that will adequately protect the Agency's interest during the repayment period will be taken as security.

(i) The producer did not provide false information;

(ii) It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

(iii) Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

(4) *Appeals.* Appeals resulting from the demand letter prescribed in paragraph (a)(1) of this section will be handled according to the provisions of § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

(b) *Offsets.* Failure to make payment as determined under paragraph (a) of this section will be treated by the Agency as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer.

(1) Any debtor who wishes to reach a written agreement to repay the debt as an alternative to administrative offset must submit a written proposal for

repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

(2) When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the initial agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, payment will be deferred pending resolution of the review.

#### § 4288.136 Remedies.

In addition to the steps available under the provisions of §§ 4288.134 and 4288.135, if the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance to 7 CFR part 3017, Government-wide Debarment and Suspension:

(a) Suspend payments on the Contract until the violation has been reconciled;

(b) Terminate the Contract; or

(c) Debarment to participate in any Federal Government program.

#### § 4288.137 Succession and loss of control of advanced biofuel facilities and production.

(a) *Contract succession.* An entity who becomes the eligible advanced biofuel producer for an advanced biofuel facility that is under contract under this subpart must request permission from the Agency to succeed to the Program contract and the Agency may grant such request if it is determined that the entity is an eligible producer and permitting such succession would serve the purposes of the Program. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

(b) *Loss of control.* Payments will be made only for eligible advanced biofuels

produced at an advanced biofuel facility owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at an advanced biofuel facility no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

#### §§ 4288.138–4288.189 [Reserved]

#### Fiscal Year 2010 Applications

#### § 4288.190 Fiscal Year 2010 applications.

(a) *General.* This section provides the requirements associated with applying for funds under this subpart for Fiscal Year 2010.

(b) *Applicability.* The provisions specified in §§ 4288.101 through 4288.137 are applicable to applicants, applications, and awards made for Fiscal Year 2010, except as follows:

(1) Applications for participation in this program must be received by April 12, 2011. Applications received after this date will not be considered by the Agency for Fiscal Year 2010 funding.

(2) Payment applications for Fiscal Year 2010 funding are due by 4:30 p.m. local time May 12, 2011. Any application received after this date and time is ineligible for payment.

(3) Payment applications for Fiscal Year 2010 funding must contain actual production for October 1, 2009 through September 30, 2010.

(4) If an applicant has submitted an application for participation or payment in this program for Fiscal Year 2010 funding prior to March 14, 2011, the applicant must submit new applications in accordance with this subpart for Fiscal Year 2010 funding.

#### §§ 4288.191–4288.200 [Reserved]

Dated: January 31, 2011.

**Dallas Tonsager,**

*Under Secretary, Rural Development.*

[FR Doc. 2011-2476 Filed 2-10-11; 8:45 am]

BILLING CODE 3410-XY-P