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7 CFR Part 4288

Repowering Assistance Payments to Eligible Biorefineries; Interim Rule

DEPARTMENT OF AGRICULTURE**Rural Business-Cooperative Service****Rural Utilities Service****7 CFR Part 4288**

RIN 0570-AA74

Repowering Assistance Payments to Eligible Biorefineries

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 Repowering Assistance Program authorized under the Food, Conservation, and Energy Act of 2008. Under this Program, the Agency will make payments to eligible biorefineries to encourage the use of renewable biomass as a replacement fuel source for fossil fuels used to provide process heat or power in the operation of eligible biorefineries.

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

ADDRESSES: 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.

FOR FURTHER INFORMATION CONTACT: Contact Frederick Petok, USDA Rural Development, Business Programs Energy Division, 1400 Independence Avenue, SW., Room 6870, STOP 3225, Washington, DC 20250-3225. Telephone: (202) 690-0784. E-mail: frederick.petok@wdc.usda.gov.

SUPPLEMENTARY INFORMATION:**Executive Order 12866**

This interim rule has been reviewed under Executive Order (EO) 12866 and has been determined to be 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 a benefit-cost analysis to fulfill the requirements of EO 12866. In the benefit-cost analysis, the Agency quantified the cost of the Repowering Assistance 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

These renewable energy programs under Title IX of the 2008 Farm Bill have been operated on an interim basis through the issuance of a Notice of Contract Proposal (NOCP) or Notice of Funds Availability (NOFA). 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. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency has prepared programmatic environmental assessments (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 Repowering Assistance Program. 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 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. Qualitative analyses of likely programmatic impacts beyond the FY 2012 program expiration date are provided, 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 two programs that 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.

The entities affected by the Program are biorefineries. Regardless of whether the participating biorefinery is a small or large business, the average cost to a biorefinery to participate in the Repowering Assistance Program is estimated to be approximately \$16,400. Because the major factor in determining whether a biorefinery, small or large,

will participate in this program is likely to be whether the biorefinery has the capital, or access to the capital, for the repowering project, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. For example, this average cost represents less than 0.5 percent of the proposed rule maximum of \$5 million that a biorefinery could receive under this program. Further, biorefineries are expected to realize a reduction in the costs to power their operations once the repowering project is in place. Thus, participating biorefineries will be able to recoup this expense, although small biorefineries are likely to take longer to recoup the expense because they are likely to have smaller power usage than large biorefineries.

This regulation only affects biorefineries that choose to participate in the programs. Lastly, the program is 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 analysis conducted for this rule meets 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 analysis 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 Program is not listed as a covered program 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 Repowering Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.866.

Paperwork Reduction Act

The information collection requirements contained in the Notice of Funding Availability for the Section 9004 Repowering Assistance Payments to Eligible Biorefineries program published on June 12, 2009, were approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control Number 0570–0058. In accordance with the Paperwork Reduction Act of 1995, the Agency is now seeking standard OMB approval of the reporting 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: Repowering Assistance.

OMB Number: 0570–NEW.

Type of Request: New collection.

Abstract: The collection of information is vital to the Agency to make decisions regarding the eligibility of biorefineries to participate in this program, to ensure compliance with the provisions of this proposed rule and to ensure that the payments are made to eligible biorefineries.

Biorefineries seeking funding under this program will have to submit applications that include specified information, a feasibility study, certifications, and agreements. Once a biorefinery has been accepted into the repowering program and the repowering project has been completed, the biorefinery must submit reports documenting their renewable energy production. Participating biorefineries must keep records, and make them available to USDA upon request, documenting the ongoing displacement

of fossil fuel usage resulting from the repowering project. These requirements are stated in the interim rule.

The estimated information collection burden hours has increased from the proposed rule by 8,728 hours, from 4,390 to 13,118 for the interim rule. This increase is attributable to the Agency's reassessing the potential number of applicants who would be interested in applying for this Program. At proposal, the burden estimate was based on assuming that only facilities that primarily produced liquid transportation biofuels would apply. The rule, however, allows facilities producing biofuels and biobased products from renewable biomass to apply. This increases the potential pool of applicants significantly.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 23 hours per response.

Respondents: Biofuel Producers.

Estimated Number of Respondents: 67.

Estimated Number of Responses per Respondent: 9.

Estimated Number of Responses: 581.

Estimated Total Annual Burden on Respondents: 13,118.

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 Repowering Assistance Program interim rule addresses Section 9004 of the 2008 Farm Bill, which authorizes the Secretary of Agriculture to “* * * carry out a program to encourage biorefineries in existence on the date of enactment of the Food, Conservation, and Energy Act of 2008, to replace fossil fuels used to produce heat or power to operate the biorefineries. * * *” by making payments to assist in the installation of new systems that use renewable biomass.

On April 16, 2010 (75 FR 20073), the Agency published a proposed rule for Repowering Assistance Payments to Eligible Biorefineries. 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 A of this interim rule. 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, and will remain in effect until the Agency adopts the final rule.

II. Summary of Changes to the Proposed Rules

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 rules. Some changes, however, are being made to clarify proposed provisions. Unless otherwise indicated, rule citations refer to those in this interim rule. Significant changes made to the proposed rule for the Repowering Assistance Program include:

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

2. The requirement that a biorefinery must be located in a rural area was removed as an eligibility criterion, and has been replaced with a scoring criterion that awards points if the biorefinery is located in a rural area.

3. The payment provisions of the rule were revised to allow participating biorefineries to request and receive reimbursement payments for eligible project costs no more often than monthly during the construction of the repowering project. Up to 90 percent of the total award may be dispersed prior to completion of the repowering project

with the remaining 10 percent to be paid upon successful completion of the project.

4. The name of the methodology for measuring the cost effectiveness of a project was revised from “return on investment (ROI)” to “Simple Payback.”

5. The scoring for the percentage of reduction of fossil fuel was modified by adding a provision that deducts 5 points when any of the fossil fuel being replaced is natural gas.

6. The renewable biomass scoring criterion was revised by decreasing the points awarded from 10 to 5 (in order to provide points for the new scoring criterion of rural area location) and by changing the proposed requirement that an applicant demonstrate 100 percent control over its feedstock for a period of 3 years to the requirement that the applicant demonstrate at the time of application that it has on site available access to biomass or enforceable third party commitments to supply biomass for the repowering project for at least 3 years.

7. The applicant eligibility criteria were revised to require that successful applicants must be awarded at least minimum points for cost-effectiveness and for percentage of reduction of fossil fuel use under § 4288.21(b).

8. The scoring for “cost effectiveness” was revised to add a fourth level to the estimated simple payback period. For applicants projecting a simple payback period of between 6 and 10 years, the maximum points to be awarded was changed from 0 points to 5 points. This change allows applicants with a projected payback period of up to 10 years to meet the minimum criteria for applicant eligibility, as discussed in item 6.

9. The definitions of “eligible renewable biomass” and “feedstock unit” were deleted as these terms are no longer used in the rule.

10. In addition to providing information on the biofuel production as part of the application contents, information is now required for any biobased product produced at the facility.

11. The Agency removed the requirement to provide receipts for drop shipments of and use of renewable biomass from the application content requirements under § 4288.23(a)(5)(iii).

12. The Agency has added a requirement to submit annual reports for the first 3 years after completion of the repowering project. These reports must include documentation regarding the usage and production of energy at the biorefinery during the previous year, including both the previous and current

fossil fuel load and the renewable biomass energy production.

13. The Agency has added a provision giving it the right to disqualify payments made to a biorefinery if, upon completion of the repowering project, the biorefinery fails to reduce its fossil fuel consumption, produce energy from renewable biomass, or otherwise operate as described in its Agency approved application.

14. A new section (§ 4288.26) was added such that an entity that submitted an application for payment to the Agency under this program prior to the effective date of this rule will have their payments made and serviced in accordance with the provisions specified in this subpart.

III. Summary of Comments and Responses

The proposed rule was published in the **Federal Register** on April 16, 2010 (75 FR 20073), with a 60-day comment period that ended June 15, 2010. Comments were received from 8 commenters yielding 30 individual comments, which have been grouped into similar categories. Commenters included biorefinery owner/operators, Rural Development personnel, trade associations, 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.

Eligibility Requirements

Comment: One commenter suggests the proposed eligibility requirements remain open to ethanol biorefineries to be able to use any process stream that would be capable of generating a renewable biogas to replace fossil fuel related energy usage. The commenter states that process streams typically considered for biogas generation are the whole stillage, thin stillage, or syrup streams and that these streams contain renewable biomass at various solids concentrations that could be used in biogas generation technologies.

Response: Ethanol biorefineries are eligible under the Repowering Assistance program. The byproducts from the production of ethanol, whole stillage, thin stillage, or syrup streams are eligible biomass which can be used to replace fossil fuels.

Scoring Criteria

Comment: One commenter states that the scoring criteria are good. The commenter further states that the criteria promote projects that have a major repowering impact on the facility,

give preference to technologies that can have an immediate/near-term impact, and credit companies that have a firm handle on the biomass supply aspect.

Response: The scoring criteria have remained substantially the same since the inception of this program. The Agency agrees with the commenter that they have worked well. However, based on experience with the first round of applications, the Agency believes that improvements can be made.

The revised scoring criteria are not substantially different from those in the Notice of Funding Availability (2010 NOFA) published in the **Federal Register** on May 6, 2010. The scoring criteria have been revised to better effect the program's purpose, and to encourage the use of biomass to replace fossil fuels.

For cost effectiveness, a fourth level was added to the scoring for the estimated simple payback period. For applicants projecting a simple payback period of between 6 and 10 years, the maximum points to be awarded was changed from 0 points to 5 points and for applicants projecting a simple payback period of 10 years or more, no points would be awarded. This change allows applicants with a projected payback period of up to 10 years to be awarded points and, thus, meet the minimum criteria for applicant eligibility.

In addition, a provision was added to the percentage of reduction of fossil fuel use scoring criterion to deduct 5 points when any of the fossil fuel being replaced is natural gas. As discussed below, this provision was added to in recognition of the greater emission reductions to be achieved under this program when renewable biomass is used to replace coal compared to natural gas.

Lastly, a new scoring criterion was added that awards 5 points to biorefineries located in a rural area. This scoring criterion replaces the proposed rule's eligibility criterion that the biorefinery be located in a rural area in order to be eligible for the program.

Payment Rate and Terms

Comment: One commenter states that most qualifying projects will likely exceed the \$10 million threshold. Based on the anticipated amount of fossil fuel replaced by such projects, it appears the maximum award level will never be reached under the current payout system proposed. The commenter recommends increasing the initial payment amount received and/or increasing the amount per fossil fuel MMBTU replaced so that the maximum award level may be reached. The

commenter provided an example where 50 percent or \$2.5 million of the maximum award of the proposed rule's \$5 million cap could be included in the first payment with payments of \$1.00 per MMBTU replaced. The commenter states that under this payment structure the intended maximum award level should be achieved within 3 years after operation. To further ensure the award level is reached, an allowance can be made to extend the payment term for longer than 3 years or until the award level is reached. The commenter also proposes payments be extended 3 years or otherwise determined from the beginning date of biogas production not the award date as there could be a significant amount of time before production begins due to project permitting and construction.

The commenter further states that, at current payment levels and economic parameters, there seems to be no incentive for larger repowering projects at ethanol biorefineries. Repowering projects will be downsized from their potential size to make the economics favorable when considering the present payment structure of only 3 years of payments and the proposed rule's \$5 million maximum award that appears will never be realized for some projects. The commenter recommends higher award amounts be considered to allow the economic analysis for larger projects be favorable enough to encourage even more reduction in fossil fuel usage. The commenter also requests that any potential changes in payment structure that further encourages completion projects be retroactive. This will help fulfill the intent of the program and payment structure to reach the current maximum award levels of 50 percent of the project up to the proposed rule's \$5 million maximum award.

Response: The purpose of the Repowering Program is to incentivize the switch to renewable biomass fuels, not to be the major source of project funding. There is a relatively small amount of money available in this program given the capital cost of the projects. The Agency wanted to maximize the number of award recipients while still providing a meaningful financial incentive. While the proposed rule's \$5 million cap would have achieved this objective, the Agency has determined that it is better for the Repowering Program to determine the cap each year because the funding available for the program could change in the future. Therefore, the Agency will announce in a **Federal Register** notice the maximum award for the Repowering Program each year.

The Agency has revised the payment structure to provide reimbursement payments for eligible project costs during the construction phase of the repowering project. Payments will be made no more often than monthly and participating biorefineries must submit a request for payment with proper documentation of the incurred costs to be considered for payment. The Agency has determined that this payment structure will better enable biorefineries to obtain financing for repowering projects.

The commenter's reference to a \$10 million threshold is incorrect. There is no cap on the cost of projects eligible for the Repowering Program. The cap will apply to the amount awarded to individual applicants.

Comment: Another commenter states that the \$0.50/MMBTU production payment with 20 percent project cost share after completion of the project does not share enough financial burden/risk in today's economy and bank financing scarcity. The commenter states that project financing, not technology, is the show stopper on building capital intensive repowering projects and that a more appropriate approach might be a simple, low interest Federal loan to finance the project with 50 percent loan forgiveness after a demonstration of system performance. The commenter states that, under such an approach, the owner will be motivated to operate the repowering equipment to achieve a return on the investment and make payments on the loan balance.

Response: The Agency acknowledges the burden on the applicant seeking credit to fund projects, and has revised the payment method. However, the Repowering Assistance rule implements the terms of Title IX of the Food, Conservation and Energy Act of 2008 (Pub. L. 110-246) which provides for payments to biorefineries based upon the extent of the replacement of fossil fuels with renewable biomass and the cost effectiveness of the renewable biomass system. The statute does not provide for a loan program. As noted above, the purpose of the Repowering Program is to incentivize the switch to renewable biomass fuels, not to be the major source of project funding.

Payment Amount Alignment

Comment: One commenter states that, based on the current estimated fossil fuel reduction and the capital costs likely needed for such reduction, the payment amount should be increased in order to reach the incentive levels defined as the maximum award level in the proposed program. The commenter

states that the potential for up to 100 percent fossil fuel reduction exists at many ethanol biorefineries, but to achieve that level or very high levels of reduction the amount of capital needed in relation to the amount of the current incentives would unlikely provide the necessary payback or return on investment needed to move the larger projects forward at this time. The commenter states that a thorough economic analysis would need to be completed to determine the necessary incentive level to achieve the necessary return on investment to complete the larger project scenarios.

Response: The purpose of the Repowering Program is to incentivize the switch to renewable biomass fuels, not to be the major source of project funding. There is a relatively small amount of money available in this program given the capital cost of the projects. The Agency wanted to maximize the number of award recipients while still providing a meaningful financial incentive. As noted in a previous response, because funding for the Repowering Program could change in the future, the Agency has determined that it is better to determine the cap each year and will announce the cap in an annual **Federal Register** notice. Therefore, the Agency has revised the rule accordingly. In addition, the Agency revised the payment method to address commenters' concerns about biofineries having to fully fund a project. Payments will now be made during the construction phase of a project.

Citizenship Requirements

Comment: One commenter states that funding should be carefully restricted to promote domestic owners efforts to reduce fossil fuel use. The commenter states that domestic derived energy needs to have domestic owners to deepen the roots of domestic energy security and promote the movement (and pride) by domestic companies to take ownership of the movement to reduce greenhouse gas (GHG) emissions.

One commenter states that USDA's citizenship requirements are hurting rural America. The commenter believes the policy is delaying the Administration's ability to reach its economic goals for rural America and energy independence goals for the country. The citizenship status of the applicant should not be an eligibility requirement of a facility as it has no effect on the program goal of encouraging the development of commercial scale biorefineries that produce advanced biofuels. The commenter states that the rural

economic development potential resulting from the local construction and operation of a biorefinery is substantial and these facilities use local feedstocks and employ U.S. workers. Therefore, the ability for a biorefinery to provide substantial local economic development opportunities is directly related to the location of the facility, not the citizenship of the owner.

The commenter further states that biorefineries need government grants, loans and loan guarantees to attract investors who understand green investment and that investors who understand a green investment framework are often foreign, where the clean technology investment framework is readily understood. The commenter states that, in the age of a global economy, this citizenship requirement is impractical and ineffective and it inhibits the purpose of the program to incentivize private equity investment in the sector.

The commenter also states that, as a regulatory matter, a 51 percent determination of domestic investors is untenable. An investor's domicile often cannot be discerned as foreign or domestic. A successful, ready to scale biochemical company is usually funded by a number of sources, both foreign and domestic, often made up of venture funds with investment from around the world, funds of funds, and independent investors alike. To discern whether or not the fund that owns a fund, that is invested in a particular portfolio company has 51 percent U.S. ownership, is not only impractical, it is impossible. The commenter states that, as green technology companies struggle to find funding from U.S. and foreign investors alike, the U.S. government clings to an outmoded policy that limits the substantial investment incentives of grants, loans and loan guarantees that will bring the U.S. green economy to scale.

Another commenter supports the position of the previous commenter and adds that the U.S. clean tech sector will need \$10 trillion of capital in the next ten years if we expect to reach climate change goals. The commenter states that this sector struggles to shift from research and development to large-scale deployment in an uncertain economic and regulatory environment. Private equity investors readily recognize the investment risk of bringing these technologies across the commercialization gap. Many U.S. private equity investors are simply unwilling to take on the burden of helping green tech companies to cross into full-scale commercialization without the same regulatory certainty

that exists today in China and Europe. The commenter also added that U.S. equity investment incentives, already limited in scope by government programs, are cut down further by a 10 percent reduction in the capital costs of new technology deployed on foreign soil (*i.e.*, the Middle East, China, Malaysia). In addition, as technology deployment costs are lower overseas, foreign governments have gone far and beyond U.S. government commitments to clean technology. The China Development Bank has allocated \$11.7 billion for solar production alone over the next ten years with regulatory certainty in place for the next ten years. These are the competitive realities of the clean tech sector on a global scale.

One commenter states that the proposed "citizenship requirement" discriminates in favor of some U.S. companies and workers while disadvantaging other U.S. companies and workers. Under the proposed test of at least 50 percent domestic ownership, numerous U.S.-incorporated companies would be excluded from participation. As currently drafted, significant USDA partners would be excluded. Such companies employ tens of thousands of American workers in research, production and manufacturing facilities throughout the United States.

The commenter states that restricting certain U.S.-incorporated companies and their American workers from access to the program undermines U.S. goals of job creation and undermines the effectiveness of the program in its goal of encouraging the use of renewable biomass as a replacement fuel source for fossil fuels. The important goals laid out by President Obama in his May 5th Presidential Directive—to increase America's energy independence and spur rural economic development while encouraging production of the next generation of biofuels—are unlikely to be achieved without allowing U.S. subsidiaries, some of the most innovative and successful companies in the world, to fully participate.

The commenter states that U.S. subsidiaries can make important contributions to the USDA and their participation would be of significant benefit to the Rural Business-Cooperative Service and to the United States. The Department of Energy's Advanced Research Project Agency-Energy (ARPA-E) recognized the benefits of such participation when it lifted similar eligibility requirements in December 2009. ARPA-E now fully permits entities incorporated in the United States to apply for funding, regardless of whether they are ultimately foreign-owned or U.S.-

owned. The commenter urges similar equal treatment by the Department and equal access for U.S. subsidiaries to the Repowering Assistance Payments to Eligible Biorefineries program.

The commenter also states that the proposed "citizenship requirement" calls into question the U.S. commitment to a nondiscriminatory environment for foreign investment, and invites similar protectionist retribution from other countries. Setting aside any questions the restrictions raise under U.S. international agreements, they are also inconsistent with the longstanding and explicit U.S. policy to encourage foreign investment in the United States and accord nondiscriminatory treatment. The commenter further states that the proposed rule invites discrimination against U.S. companies abroad, which is exactly what President Obama and the other G20 Leaders have pledged to avoid through their commitment to "promote global trade and investment and reject protectionism."

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.

Rural Area Limitation

Comment: One commenter requests that USDA expand the boundaries that define the location population to define a city as a populous of over 500,000 to 1,000,000 persons versus 50,000 persons. The commenter explains that they are not qualified to apply for any USDA funding programs (grants or loans) because their facility is located in an area that encompasses the City of Erie (population about 102,036) and its outlining areas, even though they have low population. The commenter's facility has the versatility to run on various feedstocks from non-vegetable oils to animal fats to agricultural feedstocks such as soy. It is also located on Lake Erie where it has access to shipping, two interconnected railroads (CSX and Norfolk Southern), I-90 and I-79. Thus, it can easily bring in feedstock and ship out finished biodiesel. If they could be deemed located in an applicable area then they could apply for USDA funding and build on relationships with local/domestic farm institutions.

Two commenters caution against defining "Rural Area" with too much restriction, potentially disqualifying ideal sites for biorefineries that would, in fact, meet the program goals and increase economic opportunity in rural

communities, but may be located in areas that do not fit the program definition. The commenters explain that, for a biorefinery, the cost of feedstock can typically represent 80 percent of the total cost of finished product. 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 biorefinery is substantial. One advantage of advanced biofuels is that they can be produced all over the country utilizing multiple feedstocks. Projects should not be evaluated negatively on one of the advanced biofuels industry's greatest assets, flexibility. 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.

The commenters further state that having a consistent, cost competitive regional supply of feedstock is key to the success of any project. Non-rural plants that use agricultural feedstocks 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.

Another commenter disagrees with the rural area proposal because the Repowering Assistance section in the Farm Bill does not restrict applicants to only those in rural areas. "Repowering Assistance", by its terms, applies to any biorefinery, regardless of location. Further, this proposed restriction would narrow the pool of eligible applicants beyond Congressional intent. In so doing, the rural restriction will reduce the overall effectiveness of the program. The commenter states that when Congress authorized the Repowering Assistance program and established the eligibility requirements, it did not limit the Repowering Assistance program to

only biorefineries located in rural areas. This rural restriction is not supported in either the Manager's Report or the legislation. The authorizing legislation very clearly states eligibility includes "any biorefinery that meets the requirements of this section." The statute's sole discussion of "eligibility" is the following:

Eligibility—To be eligible to receive a payment under this section, a biorefinery shall demonstrate to the Secretary that the renewable biomass system of the biorefinery is feasible based on an independent feasibility study that takes into account the economic, technical and environmental aspects of the system.

The commenter states that an example of a similarly clear Congressional rural restriction may be found under Section 9007, the Rural Energy for America Program (REAP). The eligible recipients for REAP are "agricultural producers and rural small businesses." The second part, "rural small businesses," clearly limits eligible businesses to only those in rural areas. As REAP shows, Congress knows how to include a rural restriction when it wants to do so.

Notably, the mission for the USDA Rural Business-Cooperative Service can be served without a rural restriction, and without conflicting with public policy goals. When facilities in non-rural areas use biomass—whether as a feedstock to produce final products or as fuel—they increase demand for materials produced mostly in rural areas. When public investments build a larger bioeconomy, rural residents benefit from increased rural income from biomass sales and wages. Prohibiting participation by non-rural biorefineries would have the effect of reducing benefits to rural citizens.

The commenter states that by restricting the pool of eligible applicants, the proposal violates the plain language of the statutory authorization, and elevates agency interest over clear Federal policy goals.

Response: The Agency has reconsidered the proposed rural area requirement. The beneficial impacts of the program will generally be in rural areas even if the biorefinery is located in an area that does not meet the proposed rural area definition, because 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 as an eligibility criterion. However, as has been stated previously, the biorefinery must be located in a rural area in order

to receive 5 points under the revised scoring criteria.

Timeframe for Control of Feedstock

Comment: Two commenters oppose the scoring criteria that reward maximum points to applicants who demonstrate control of the repowering project feedstock for at least 3 years. One of the commenters states that at an ethanol biorefinery this demonstration is impractical and unnecessary. Typical feedstock contracts at many ethanol biorefineries do not extend out to this duration of time. The repowering feedstock is readily available after the production of ethanol and so many ethanol biorefineries are already controlling feedstocks as necessary according to existing market and plant operating conditions. The commenter recommends removal of this scoring criteria as it discriminates unfairly against those who do not need to control feedstock 3 years out and already have a repowering feedstock available in their current process.

The other commenter states that many firms operate biomass facilities without long-term contracts for their biomass supply. This is a strategic business decision and does not necessarily determine success or failure. Biomass plants often procure materials on a mixed basis, sometimes by long-term contract and other times by simply procuring on the spot market or on short-term contract. For example, a firm may purchase wood from the spot market while also having contracts for biomass from private forests and/or for residues from wood products manufacturers. The term for the contracts can vary and the supply of biomass for a plant will change over time in response to market conditions.

The commenter states that it is possible that USDA included these points as a way of assuring a longer-term supply of biomass. Private investors often require a demonstration of the availability of 3–10 times the annual biomass requirement within a reasonable shipping distance as a part of their due diligence. The commenter recommends that, since sufficiency of supply, rather than control of the supply, is the crucial question, USDA should require as a threshold criterion that applicants demonstrate an adequate supply of biomass for the plant. Doing so will address the real issue (feedstock supply) without limiting the refinery's flexibility in managing their fuel supply.

Response: While many of the repowering applications proposed to use feedstock produced from their own process, such as stillage or syrup, many others proposed to purchase biomass.

Control and availability of biomass are crucial to a project's viability. The rule does not make the control of biomass mandatory, rather a scoring element. The Agency revised the scoring criteria to include on site availability of renewable biomass or enforceable third party commitments to supply renewable biomass, similar to the Fiscal Year 2010 NOFA.

Closed System Use of Own Waste Streams

Comment: One commenter recommends developing a scoring criterion that would give preference to biorefineries that have closed systems or that can use their own waste or process streams in the repowering project. Preference should be given to these types of projects that utilize an already available biomass feedstock on-site. By using the available biomass feedstock in existing process streams, the carbon intensity associated with operations is further minimized by not having to include the carbon emissions associated with the processing and transportation of biomass feedstock from off-site sources as well as the amount attributed to the current transportation of the waste or process streams constituents off-site.

Another commenter noted that the meaning of the term "closed system" in this request for comment is not clear. Thus, the commenter recommends not including a scoring criterion for "closed systems" without clearly defining the term.

Response: Title IX of the Food, Conservation and Energy Act of 2008 (Pub. L. 110–246) provides for payments to biorefineries based upon the extent of the replacement of fossil fuels with renewable biomass and the cost effectiveness of the renewable biomass system. The statute contains no other criterion for awarding payments. The Agency believes it has effectively implemented the intent of the statute in the current rule.

Type of Fossil Fuel Displaced Payment

Comment: One commenter agrees with the concept of scoring an application higher for replacing certain types of fossil fuels that are the higher GHG emitting fuels. The commenter also states, however, that unless there are additional incentives for those fuels or the cost of those fuels significantly changes, it is likely the economic analysis will tend to favor replacement of natural gas based fossil fuel usage.

Response: The statute does not make the distinction among fossil fuels that the commenter proposes and does not specifically address emissions. While

the majority of facilities that have applied to date use natural gas, emissions from coal are more significant than from natural gas. The Agency recognizes that reductions of greenhouse gas emissions and hazardous air pollutant emissions will be greater under this program when coal is replaced than when natural gas is replaced. Therefore, in recognition of this, the Agency has revised the cost-effectiveness scoring criterion to include a provision that deducts 5 points when any portion of the fossil fuel being replaced is natural gas.

Purpose and Scope—§ 4288.1

Comment: Two commenters state that the rules as proposed exclude future advanced biofuels and biobased products facilities which hold great promise in achieving the program goal of incentivizing the replacement of fossil fuels by including the requirement that the incentives can only be awarded to biorefineries in existence on June 18, 2008. The commenters recommend that USDA use a broad definition of “in existence” when evaluating the eligibility of a biorefinery based on the requirement that the facility must be in existence on June 18, 2008 to be eligible for the program so that the maximum number of facilities qualify.

The commenters state that, while there are significant benefits to incentivizing biopower at biorefineries in existence on June 18, 2008, there are equal if not greater benefits to opening eligibility to new, more efficient technologies as well. Allowing this incentive to only be available to facilities in existence before June 2008 gives an advantage to existing technologies and biorefineries over new technologies and facilities, thereby threatening to stifle innovation in commercialization of biotechnologies such as advanced biofuels, biobased products, and renewable specialty chemicals that will be produced collectively at modern biorefineries. Incentivizing conventional technologies over advanced technologies in this manner will have significant effects on other programs such as renewable and low carbon fuel standards by giving these technologies an incentive to improve their lifecycle GHG emission reductions while not providing the same incentives to advanced technologies to do the same.

The second commenter adds that biorefineries that use energy efficient and cost effective business models, like producing multiple bioproducts at one facility, should not be disadvantaged.

Response: The statute only authorizes biorefineries in existence as of the date

the Food, Conservation, and Energy Act of 2008 was passed (June 18, 2008) as eligible for participation in the program. This is not a matter within the discretion of the Agency.

Definitions—§ 4288.2

Comment: One commenter requests that USDA clarify that projects that retrofit biorefineries in existence prior to June 18, 2008 with additional equipment are eligible for this program provided the heat and power are centrally produced.

Response: The Agency’s understands this comment to inquire whether retrofits made prior to the inception of the program are eligible for payments. Section 4288.12 specifically provides that project costs incurred prior to submitting an application to the Repowering Assistance Program are ineligible.

Applicant Eligibility—§ 4288.10

Comment: One commenter states that, while the Department is right to take steps to avoid the program disproportionately benefitting one company, many companies or entities own more than one plant. USDA’s proposed “one company, one plant” rule might prevent conversion of more energy systems, thereby limiting program success, if funds would otherwise go unused as a result. The commenter suggests that, to avoid this potential unintended consequence, companies with more than one plant should be allowed up to two applications. Once a firm’s highest scoring submission wins an award, the lower scoring of the two proposals would be set aside for a second round pool. The second round pool would only be considered if sufficient funds remain available from the first round. If sufficient funding is available, these second round submissions would be ranked according to point scores and selected until available funding is awarded. This approach will allow the Department to accomplish more in the event a smaller number of firms demonstrate interest in repowering and the program. By limiting the awards to two, USDA will largely preserve its goal of avoiding unfair benefits to one firm, while allowing potentially more use of program funds in some circumstances.

Response: The Agency’s intent is to maximize the number of projects funded by limited resources, \$35 million. The Agency wants to ensure that small- to medium-sized companies have an opportunity to compete for payments. Limiting applicants to one application achieves this objective.

Comment: One commenter would like USDA to clarify that energy integration synergies from co-locating a cellulosic ethanol plant with an existing starch-based plant will qualify for this program in the final rulemaking. The commenter states that certain technologies for production of cellulosic biofuels, will have substantial excess steam energy available for co-located users. When a cellulosic ethanol facility is co-located with an existing corn ethanol plant, it has the opportunity to reduce the natural gas requirement for the corn plant and allow it to qualify for this program.

Another commenter also asked for a similar clarification, pointing out that co-location is another way companies intend to participate in improving the economic viability and environmental sustainability of biofuel production facilities.

Response: An existing ethanol facility would be eligible for Repowering Assistance payments, and co-locating a project would not be a problem as long as the scope of the project would be limited to the existing ethanol facility. That portion of the project which served the cellulosic plant would be ineligible unless that cellulosic plant was in existence as of the date of passage of the Farm Bill (June 18, 2008).

Payment Info—§ 4288.13

Paragraph (a)

Comment: One commenter expressed concern with the realistic opportunity for a biorefinery to qualify due to all of the stipulations outlined in the program while making the changes in an economically feasible manner. The commenter states that the majority (80 percent) of the payment in this program is made after the project is in place and producing energy so the money to install these systems must be fronted by the biorefinery in hopes of recouping the costs in the future. There are very few funding sources in today’s economic environment that will take the risk of installing a fairly new and unproven system at an existing biorefinery with the plan of collecting the funds once the system is producing energy. The commenter states that the other issue is that the return on investment must happen very quickly (<4 years), yet the costs of implementing many of the systems and acquiring the feedstocks heavily outweighs the current costs of the rural fossil fuel derived utilities to the facility. The commenter states that they have a strong desire to offset fossil fuel derived utility usage but it must make good economic sense in order to allow the biorefinery

to thrive during already extremely difficult market and economic conditions.

Response: The Agency acknowledges the burden on the applicant and has changed the payment method to provide an expedited incentive intended to lower barriers for applicants seeking to use the program to repower facilities. The program seeks to encourage and incentivize sustainable, long term biomass projects.

Application Review and Scoring—
§ 4288.21

Cost-Effectiveness—Paragraph (b)(1)

Comment: One commenter states that USDA proposes the cost-effectiveness metric to implement the legislative requirement for cost effectiveness. The commenter states that while USDA refers to it as ROI, it actually appears to be a formula commonly understood as “simple payback” to represent the time necessary to pay off the investment through savings or other measurable benefits. The commenter states that “return on investment” is widely understood to represent a different calculation (*see below*) that measures in terms of percent or rate, not years, and believes that USDA’s proposed measure should be referred to as the “payback period” or “simple payback.”

ROI = (gain from investment – cost of investment) – cost of investment

The commenter further states that, regardless of its name, USDA’s proposed approach to implementing this requirement has drawbacks, primarily by boosting the eligibility of projects that need the least funding. The commenter questions whether, if the payback is under 3 years, the incentive is really necessary, or perhaps if only a smaller incentive is needed to lower the payback to levels warranting investment. Increasing the incentive based on lower payback period may also increase the numbers of “free riders” who do not need an incentive to invest in the plant but can get a grant anyway.

The commenter further explains that payback and return on investment performance measures are appropriate for a private investor, but can easily lead a public agency astray from implementing the clear goals of the legislation. The measure employed for cost-effectiveness should focus on the effectiveness in accomplishing the legislative intent and goals, rather than short-term profitability. When a public agency cost-shares projects, such as under Repowering Assistance, the decision should be based on measures related to the public policy, not to profit

maximization (which is the concern of the private partner).

Payback analysis outcomes will often skew from policy outcomes due to the very factors which make the policy necessary in the first place, such as the failure of energy project evaluation to include the costs of carbon pollution. Payback can also differ between candidate submissions based on factors such as differences in local economics, fuel costs or plant layouts. For example, some facilities may require more costly modifications to adapt to biomass power given their existing plant layout or access to fuel yards. Or, different biomass energy technologies may result in longer payback periods yet higher carbon pollution reductions. A payback focus might diminish the chances at funding for projects that are cost-effective at reaching the public policy goals.

The commenter proposes that the criteria for cost-effectiveness be based not on the private sector’s measure of payback but, instead, on a measure related to the public policy goals. In this case the primary policy goal is carbon reduction; therefore, the appropriate criterion is the cost per ton of fossil CO₂ emissions displaced. By using this measure the USDA would more effectively address cost-effectiveness as required in the legislation through using the policy goal itself.

Response: The ROI methodology used was intentionally selected because of its simplicity; it is a simple return on investment calculation, also known as simple payback. The Agency agrees with the commenter that the methodology is more commonly known as Simple Payback and has changed its name in the rule from ROI to Simple Payback.

Title IX of the Food, Conservation, and Energy Act of 2008 sets forth specific criteria to determine the amount of payments. The criteria include: (1) The quantity of fossil fuels replaced by biomass, (2) the percentage reduction in fossil fuel, and (3) the cost and cost effectiveness of the biomass system.

The rule has been written to implement the statute. The cost effectiveness of the biomass system is not only a statutorily mandated criterion, but one which is essential for a project to provide a realistic cost competitive alternative to fossil fuels, such as natural gas and coal. The operation of a biorefinery is, ultimately, a business, and must achieve cost effectiveness to be viable over the long term.

Application Review and Scoring—
§ 4288.21

Percentage of Reduction of Fossil Fuel Use—Paragraph (b)(2)

Comment: One commenter believes this is a very appropriate criterion that the Agency should use with the strong weighting factor proposed, because the goal of reducing carbon pollution is central to the purpose for Section 9004. The legislation states, in Section (b)(2), that the Agency should consider “the percentage reduction in fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system.” The commenter recommends that the scoring on this point should be calculated as proportional to the percent of fossil fuel displacement. So, for example, displacement of 100 percent of the fossil fuels results in 35 points. All lower point scores should be proportional to the percentage fossil fuel reduction—for example, 80 percent of the total 35 points is 28 points. This linear scale rewards more fossil fuel displacement. There should be a minimum floor of at least 50 percent displacement. This scoring plan, however, does not account for the most efficient resource use, which will be the most environmentally beneficial utilization strategy. Combined heat and power has approximately twice the efficiency of standalone uses of either heat or power. The commenter proposes that the Agency recognize the value of this approach by awarding under this category 10 points for projects employing combined heat and power technologies, or otherwise demonstrating at least 50 percent efficiency. The 10 points would be in addition to the criteria of “percent displaced fossil fuels,” which maximum can simply be reduced by 10 (from 35 to 25), maintaining the category’s point totals. The following table shows how points vary by the percent of fossil fuels displaced for the proposed rule, a proportional level based on a 35 point maximum and a proportional level based on a 25 point maximum.

Proposed Point Scoring Proportionate Points According to Fossil Fuel Displacement:

(a) 100%	(b) 35	(c) 35	(d) 25.
(a) 80%	(b) 25	(c) 28	(d) 20.
(a) 60%	(b) 15	(c) 21	(d) 15.
(a) 40%	(b) 5	(c) 14	(d) 10.

(a) = Percent Displaced Fossil Fuels.
(b) = Points Proposed by USDA.
(c) = Proportional displacement points with 35 point maximum.
(d) = Proportional displacement points with 25 point maximum.

The commenter further recommends that there should be bonus points scored

for plants that exceed 100 percent displacement, but only from combined heat and power systems. This can happen if biorefineries become net power, and/or heat, exporters. In most cases, they would displace fossil fuels used for other purposes by customers beyond the host plant. This approach would more fully utilize the plant investment, reducing unit costs and potentially increasing project feasibility. The commenter recommends, for simplicity, using a single threshold for exported power and recommends an extra 10 points for power and/or heat exports above 10 percent of plant demand.

The commenter states that USDA should implement a single methodology to estimate the level of CO₂ reductions under the various submissions. Otherwise, a wide range of approaches may be used by applicants, making fair comparison and submission processing very difficult. The commenter recommends that this would be the point to implement the approach using emissions factors for different fossil fuels, as described in Section IV, "Request for Comments," item 10, of the proposed rule. By using emission factors established by the Energy Information Administration or the U.S. EPA for fossil and biomass fuels, the applicants and USDA can use standard and uniform emissions factors and formulae for estimating carbon pollution reductions.

Response: The intent of this program is to assist eligible biorefineries to use renewable biomass and move away from fossil fuels including, but not limited to: Propane, coal, oil, and natural gas. Most sources of electric generation are derived from fossil fuel, and the program takes that into account in evaluating the content of electric power consumed by an applicant.

Because the intent of the program is to encourage and reward the greatest displacement of fossil fuels with biomass, scoring is not proportional. The Act restricts the eligible project costs to repowering the facility. The program does not prevent an applicant from becoming a net power producer, it merely prevents the public from providing payments for that purpose. Based on applicant experience to date, more definition in scoring criteria has not been needed as a selection factor in the program.

Application Review and Scoring— § 4288.21

Renewable Biomass Factors—Paragraph (b)(3)

Comment: One commenter has concerns regarding the scoring criteria for "renewable biomass factors." The "renewable biomass factors" seem to be better described as "biomass supply arrangements." The proposed "factors" do not address whether or not the material is "renewable." The commenter proposes, as an alternative scoring approach for "renewable biomass factors," added points based on certain factors which reflect the greatest carbon pollution reduction benefits, and best environmental outcomes. The commenter states that the best proposals will maximize the realistic potential for a carbon-neutral, or carbon-negative, project. The goal for these criteria should be to maximize program success by rewarding the submissions with well-grounded and feasible plans for maximum sustainability. Points awarded based on viable practices and plans will allow the USDA to reward submissions that are most likely to accomplish program goals. The commenter suggests the following:

10 points: Project uses crops planted for energy use (such as perennial grasses or fast-growing trees) that are replanted after harvest with procurement plans that demonstrate harvest is accomplished in a sustainable manner. The project uses segregated and uncontaminated residues from the biorefinery process, such as stillage.

Response: The commenter points out that the criteria scored in the Renewable Biomass Factors section of the rule are the "biomass supply arrangements." The commenter advocates changing the criteria to award points based on the greatest carbon pollution reduction benefits and best environmental outcomes. The Agency believes that the criteria as written are essential to select sustainable projects which demonstrate access to an adequate supply of renewable biomass. The Repowering Assistance Program is designed to reduce carbon emission by the replacement of fossil fuel with renewable biomass. Title IX of the Food, Conservation and Energy Act of 2008 does not make the distinctions among fossil fuels that the commenter proposes. Environmental criteria are not part of the scoring elements. Mitigation of adverse environmental impacts is mandatory. Environmental requirements for the Repowering Assistance Program can be found in the rule and the National Environmental Policy Act.

Application Review and Scoring— § 4288.21

Liquid Transportation Fuels—Paragraph (b)(5)

Comment: Two commenters disagree with the Agency's proposal to score projects on the basis of whether the biorefinery primarily produces liquid transportation fuels.

These two commenters caution the Agency against implementing a sole-use requirement for biorefinery eligibility. 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 would be the feedstock and multiple biofuels, biobased products, and specialty renewable chemicals could be produced at the same plant or industrial facility. The commenters believe that the Agency should encourage the concept of industrial ecology and collocation of diverse product manufacturing units.

Response: The Repowering Program is statutorily required to provide payments for biorefineries in existence as of the passage of the Farm Bill (June 18, 2008). The program was designed to work with facilities that primarily produce transportation fuels based on the direction given in the manager's report. Still, there is nothing in the rule that prohibits applicants from applying for payments if they do not produce transportation fuels. Future biorefineries are not the focus of the Repowering Assistance Program, they are addressed by research programs and fall into the province of the Biorefinery Assistance Program or possibly the Rural Energy for America Program.

General—Benefits of the Program

Comment: One commenter states that the program has the potential to provide a significant number of operational, environmental, and economic benefits that would improve existing biorefinery operations, reduce the amount of emissions and carbon intensity associated with fossil fuel energy use, and promote the sustainability of rural communities by providing economic benefits, while decreasing the country's dependence on fossil fuel based energy. The commenter also states, however, that the amount of capital needed to realize these benefits fully is prohibitive in an economic analysis. The Section 9004 program can provide the assistance needed to help projects come to fruition by making the economic analysis become more favorable with the proper financial incentives.

The commenter explains that repowering with the renewable biomass associated with existing process streams at ethanol facilities will improve operations by increasing plant efficiencies and production capabilities. Many ethanol biorefineries already have available the necessary process streams to integrate into the technologies that would generate biogas. After ethanol is produced and separated there remains whole and thin stillage streams with various solids concentrations that could be utilized in anaerobic digestion processes to generate biogas. The biogas could then be used to generate electricity or burned in a boiler for process heat. The commenter states that there is enough biomass in the stillage process streams after ethanol production to generate enough renewable biogas to offset up to 100 percent of all the fossil fuel usage needed for process heat and electricity generation at ethanol biorefineries. Incorporating biogas generation will help plants improve energy efficiencies by not having to use energy to concentrate up the stillage stream solids content through evaporation or other processes that are done currently. Biogas generation will improve operations by removing any of the undesirable constituents in the portion of recycled process water or thin stillage typically sent back through the ethanol production process. Decreasing the amount of undesirable constituents will create the potential for higher ethanol production capabilities or improvement in ethanol yields.

The commenter also explains that the program has the potential to significantly decrease emissions and the carbon intensity associated with ethanol production to make it substantially lower than the carbon intensity of conventional gasoline. A significant portion of the carbon intensity at ethanol plants are those associated with the greenhouse gases generated from fossil fuel energy usage to create process heat and electricity. If facilities are repowered with existing renewable biomass feedstock sources that are already available in the process streams, the carbon intensity will be greatly reduced by lowering fossil fuels consumed making it an even more valuable low carbon fuel. By using the available biomass feedstock in existing process streams the carbon intensity is further minimized by not having to include the carbon emissions associated with the processing and transportation of biomass feedstock from offsite sources as well as the amount attributed to the current transportation of the waste or process streams constituents

off-site. Potentially it could create a distinct advantage on the world markets by lowering the carbon intensity of home grown ethanol below that of the current Brazilian sugar based ethanol carbon intensity values. In the U.S. there are approximately 190 ethanol biorefineries and a majority of these facilities could incorporate renewable fuel generation technologies if the economics were favorable to do so. This program, if structured properly to make it economical, could help the U.S. ethanol industry become even more environmentally friendly than it already is by reducing significant amounts of fossil fuel usage and carbon intensity.

The commenter also states that the program has the potential to provide a significant number of economic benefits and opportunities to the existing biorefineries and the rural communities typically around them. This program could support potentially large capital projects that provide and support numerous jobs associated with the equipment, construction, and continuing operation of the improved facilities. The economic benefit could have a far reaching impact beyond the rural area to providing additional economic stimulus to the country. Another economic benefit is the protection it provides to future costs associated with fossil fuel derived energy due to fluctuations in the market or to national or State legislation on low carbon fuel standards, carbon taxes, or cap and trade programs. Incorporation of these types of repowering projects into existing biorefineries helps promote economic sustainability of the facility operation as it will allow for more operational flexibility by having more options for different fuel sources and by-product pathways to respond to market conditions.

Response: The Agency thanks the commenter for their comments. A significant share of the applications submitted under the Repowering Assistance Program have utilized just such strategy and many of the applicants that may have chosen other resource streams will undoubtedly make use of low carbon fuel standards as an increased value stream.

General—Sustainable Fuels

Comment: One commenter states that the Congressional intent for the program was to displace fossil fuels in a manner that reduces carbon emissions at biorefineries. The USDA should take steps to ensure that taxpayer funding is not used in ways that could increase carbon pollution, or otherwise harm the environment. This approach is good policy and is also important to maintain

public support for this type of program, and biofuels in general. If the public perceives their tax dollars being used to support projects that harm the environment, a public opinion backlash is likely. The Repowering Assistance program can and should result in beneficial use of biomass energy crops and residues from farms and forests for fuel. However, USDA should ensure that the development, removal and use of this biomass is done sustainably, by which we mean preserving soil integrity and avoiding erosion, surface water pollution, sedimentation, soil carbon depletion or other negative environmental and natural resource impacts. Some purchasers of crops residues for bioenergy production, like Show Me Energy in Missouri, already require their suppliers to demonstrate removal of residues is done in a sustainable manner. The fact that these purchasers already require a sustainability demonstration indicates both a desire to minimize environmental harm and the ability to do so. The commenter recommends that, to avoid potential harm, the Repowering Assistance rule require safeguards be put into place to ensure that fuels and practices are environmentally beneficial. The commenter states that, on the energy conversion side, a focus on combined heat and power with appropriate fuels has been found to be the best biomass energy pathway toward net reductions in carbon pollution.

Response: The intent of Congress was to replace fossil fuels with biomass. The Agency agrees that this approach is good policy and good for rural America. We also agree that the program should consider the overall impacts on the environment. In fact, we believe that the information that is requested in the application addresses environmental concerns. The program is subject to the National Environmental Policy Act (NEPA) and both the definition of "biomass" and the scoring criteria are already designed to safeguard the environment. Thus, we believe that the commenter's concerns have already been addressed in the rule as proposed.

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 by adding a new part 4288 to read as follows:

PART 4288—PAYMENT PROGRAMS**Subpart A—Repowering Assistance Payments to Eligible Biorefineries**

Sec.

- 4288.1 Purpose and scope.
- 4288.2 Definitions.
- 4288.3 Review or appeal rights.
- 4288.4 Compliance with other laws and regulations.
- 4288.5 Oversight, monitoring, and reporting requirements.
- 4288.6 Forms, regulations, and instructions.
- 4288.7 Exception authority.
- 4288.8–4288.9 [Reserved]
- 4288.10 Applicant eligibility.
- 4288.11 Eligible project costs.
- 4288.12 Ineligible project costs.
- 4288.13 Payment information.
- 4288.14–4288.19 [Reserved]
- 4288.20 Submittal of applications.
- 4288.21 Application review and scoring.
- 4288.22 Ranking of applications.
- 4288.23 Notifications.
- 4288.24 Program payment provisions.
- 4288.25 Succession and control of facilities and production.
- 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.
- 4288.27–4288.100 [Reserved]

Subpart B—[Reserved]

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

Subpart A—Repowering Assistance Payments to Eligible Biorefineries**§ 4288.1 Purpose and scope.**

(a) *Purpose.* The purpose of this program is to provide financial incentives to biorefineries in existence on June 18, 2008, the date of the enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) (Pub. L. 110–246), to replace the use of fossil fuels used to produce heat or power at their facilities by installing new systems that use renewable biomass, or to produce new energy from renewable biomass.

(b) *Scope.* The Agency may make payments under this program to any biorefinery that meets the requirements of the program up to the limits established for the program. Based on our research and survey of medium-sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

(1) The Agency will determine the amount of payments to be made to a biorefinery taking into consideration the percentage reduction in fossil fuel used by the biorefinery (including the quantity of fossil fuels a renewable biomass system is replacing), and the cost and cost-effectiveness of the renewable biomass system.

(2) The Agency will determine who receives payment under this program based on the percentage reduction in

fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system; the cost and cost-effectiveness of the renewable biomass system; and other scoring criteria identified in § 4288.21. The above criteria will be used to determine priority for awards of 50 percent of total eligible project costs, up to the maximum award applicable for the fiscal year.

§ 4288.2 Definitions.

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

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

Application period. The time period announced by the Agency during which the Agency will accept applications.

Base energy use. The amount of documented fossil fuel energy use over an extended operating period.

(1) The extended operating period must be at least 24 months of recorded usage, and requires metered utility records for electric energy, natural gas consumption, fuel oil, coal shipments and propane use, as applicable for providing heat or power for the operation of the biorefinery.

(2) Utility billing, oil and coal shipments must be actual bills, with meter readings, applicable rates and tariffs, costs and usage. Billing must be complete, without gaps and arranged in chronological order. Drop shipments of coal or oil can be substituted for metered readings, provided the biorefinery documents the usage and its relationship to providing heat or power to the biorefinery.

(3) A biorefinery in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

Biobased products. Products determined by the Secretary to be commercial or industrial products (other than food or feed) that are:

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

(2) Intermediate ingredients or feedstocks.

Biofuel. Fuel derived from renewable biomass.

Biorefinery. A facility (including equipment and processes) that converts renewable biomass into biofuels and

biobased products, and may produce electricity.

Eligible biorefinery. A biorefinery that has been in existence on or before June 18, 2008.

Energy Information Agency (EIA). The statistical agency of the Department of Energy and source of official energy statistics from the U.S. Government.

Feasibility study. An Agency-acceptable analysis of the economic, environmental, technical, financial, and management capabilities of a proposed project or business in terms of its expected success. A list of items that must be included in a feasibility study is presented in § 4288.20(c)(9) of this subpart.

Financial interest. Any ownership, creditor, or management interest in the biorefinery.

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

Fossil fuel. Coal, oil, propane, and natural gas.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land or 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; and

(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 as per paragraphs (e)(2), (e)(3), and (e)(4), and large tree retention as per 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.

Rural or rural area. Any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, or in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and any area that has been determined to be “rural in character” by the Under Secretary for Rural Development, or as otherwise identified in this definition.

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(3) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are “not urban in character.”

(4) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(5) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(6) The determination that an area is “rural in character” will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is “rural in character” under this definition will apply to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within one-quarter mile of a rural area.

(ii) Units of local government may petition the Under Secretary of Rural Development for a “rural in character” designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (6)(i)(A) or (6)(i)(B) of this definition and discuss why the petitioner believes the area is “rural in character,” including, but not limited to, the area’s population density, demographics, and topography and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency’s Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

§ 4288.3 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.

§ 4288.4 Compliance with other laws and regulations.

Participating biorefineries must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunities Act, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, 7 CFR Part 1901, subpart E, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Applicants must submit and will be subject to pre-award and post award compliance reviews with the terms and conditions set forth in Form RD 400-1, “Equal

Opportunity Agreement” and Form RD 400-4, “Assurance Agreement.”

§ 4288.5 Oversight, monitoring, and reporting requirements.

(a) *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made under this program, including field visits, as frequently as necessary to ensure the integrity of the program. Documentation provided will be used to verify, reconcile, and enforce the payment terms of Form RD 4288-5, “Repowering Assistance Program—Agreement,” along with any potential refunds that the recipient will be required to make should they fail to adequately document their request.

(b) *Records.* (1) For purposes of verifying the eligible project costs supporting payments under this subpart, each biorefinery must maintain in one place such books, documents, papers, receipts, payroll records and bills of sale adequate to identify the purposes for which, and the manner in which funds were expended for eligible project costs. The biorefinery must maintain copies of all documents submitted to the Agency in connection with payments made hereunder. These records must be available at all reasonable times for examination by the Agency and must be held and be available for Agency examination for a period of not less than 3 years from the final payment date.

(2) For the purpose of verifying compliance with the fossil fuel reduction and energy production requirements of this subpart, each biorefinery must make available and provide for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass. These records must be held in one place and be available at all reasonable times for examination by the Agency. Such records include all books, papers, contracts, scale tickets, settlement sheets, invoices, and any other documents related to the program that are within the control of the biorefinery. These records must be held and made available for Agency examination for a period of not less than 3 years from the date the repowering project becomes operational.

(c) *Reporting.* Upon completion of the repowering project, the biorefinery must submit a report using Form RD 4288-6, “Repowering Assistance Programs—Reporting Form,” to the Agency annually for the first 3 years after completion of the project. The reports

are to be submitted as of October 1 of each year. The report must include the items specified in paragraphs (c)(1) and (c)(2) of this section.

(1) Documentation regarding the usage and production of energy at the biorefinery during the previous year, including both the previous and current fossil fuel load and the renewable biomass energy production.

(i) Metered data documenting the production of heat, steam, gas and power must be obtained utilizing an Agency approved measurement device.

(ii) Metered data must be verifiable and subject to independent calibration testing.

(2) Current utility billing data, indentifying metered loads, from the base energy use period.

§ 4288.6 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, Renewable Energy Coordinator and the USDA Rural Development Web site at <http://www.rurdev.usda.gov/regs/>.

§ 4288.7 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.

§§ 4288.8–4288.9 [Reserved]

§ 4288.10 Applicant eligibility.

(a) *Eligible projects.* To be eligible for this program, the applicant must be an eligible biorefinery utilizing only renewable biomass for replacement fuel, and must meet the requirements specified in paragraphs (a)(1) through (a)(5) of this section.

(1) *Timely complete application submission.* To be eligible for this program, the applicant must submit a complete application within the application period. Projects will be selected based on ranking which is derived from the application of the selection criteria stated in § 4288.21.

(2) *Multiple biorefineries.* Corporations and entities with more than one biorefinery can submit an application for only one of their biorefineries. However, if a corporation or entity has multiple biorefineries

located at the same location, the entity may submit an application that covers such biorefineries provided the heat and power used in the multiple biorefineries are centrally produced.

(3) *Cost-effectiveness.* The application must be awarded at least minimum points for cost-effectiveness under § 4288.21(b)(1).

(4) *Percentage of reduction of fossil fuel use.* The application must be awarded at least minimum points for percentage of reduction of fossil fuel use under § 4288.21(b)(2).

(5) *Full project financing.* The applicant must demonstrate that it has sufficient funds or has obtained commitments for sufficient funds to complete the repowering project taking into account the amount of the payment request in the application.

(b) *Ineligible projects.* A project is not eligible under this subpart if it is using feedstocks for repowering that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008.

§ 4288.11 Eligible project costs.

Eligible project costs will be only for project related construction costs for repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

§ 4288.12 Ineligible project costs.

Any project costs incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment assistance.

§ 4288.13 Payment information.

(a) *Maximum payment.* For purposes of this program, the maximum payment an applicant may receive will be 50 percent of total eligible project costs up to the applicable fiscal year's maximum award as announced in an annual **Federal Register** notice. There is no minimum payment to an applicant.

(b) *Reimbursement payments.* The Agency shall only make payments based on the biorefinery's expenditures on eligible project costs. Payments shall be determined by multiplying the amount of eligible expenditures stated on the payment request by a percentage obtained by dividing the aggregate payment award by total eligible project costs.

(c) *Timing of payments.* The Applicant may request payments not more frequently than once a month by submitting an original, completed, validly signed Standard Form (SF) 271, "Outlay Report and Request for

Reimbursement for Construction Programs" including the supporting documentation identified in § 4288.23, to reimburse the applicant for the Agency's pro rata share of funds expended on eligible project costs. The Agency shall make such payments until 90 percent of the total payment award has been expended. The final 10 percent of the payment award will be paid upon completion of the repowering project and satisfactory evidence has been received by the Agency demonstrating that the biorefinery is operating as described in the Agency approved application.

§§ 4288.14–4288.19 [Reserved]

§ 4288.20 Submittal of applications.

(a) *Address to make application.* Application must be submitted to USDA, Rural Development-Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225.

(b) *Content and form of submission.* Applicants must submit a signed original and one copy of an application containing the information specified in this section. The applicant must also furnish the Agency the required documentation identified in Form RD 4288–4, "Repowering Assistance Program Application," to verify compliance with program provisions before acceptance into the program. Note that applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number 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>. Applicants must submit to the Agency the documents specified in paragraphs (b)(1) through (b)(6) of this section.

(1) *Form RD 4288–4.* Applicants must submit this form and all necessary attachments providing project information on the biorefinery; the facility at which the biorefinery operates, including location and products produced; and the types and quantities of renewable biomass feedstock being proposed to produce heat or power. This form requires the applicant to provide relevant data to allow for technical analysis of their existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. The applicant must also submit evidence that the

biorefinery was in existence on or before June 18, 2008. The applicant is required to certify the information provided.

(2) RD Instruction 1940–Q, Exhibit A–1, “Certification for Contracts, Grants and Loans.”

(3) Form RD 400–1.

(4) Form RD 400–4.

(5) Form RD 1940–20, “Request for Environmental Information” (first page only). Note, however, that applicants must substitute the narrative outlined in RD Instruction 1940–G, Exhibit H, in place of the narrative attachment specified in the instructions to Form RD 1940–20.

(6) Certifications. The applicant must furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions. The applicant must submit forms or other written documentation certifying to the following:

(i) AD–1047, “Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions” or other written documentation.

(ii) AD–1048, “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions” or other written documentation.

(iii) SF–LLL, “Disclosure of Lobbying Activities.”

(c) *Application package contents.* Applicants are required to provide relevant data to allow for technical analysis of their existing facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm. All applicants must submit the information specified in paragraphs (c)(1) through (c)(9) of this section as part of their application package.

(1) *Contact data.* Contact information for the primary technical contact for the biorefinery.

(2) *Biorefinery data.* Basic information on facility operations over time (hours/day, days/year).

(3) *Electric use data.* Information on existing electric service to the facility, data on consumption, peak and average

demand, and monthly/seasonal use patterns.

(4) *Fuel use data.* Information on natural gas and current fuel use for boilers and heaters, including fuel type, costs, and use patterns.

(5) *Thermal loads.* Information on existing thermal loads, including type (steam, hot water, direct heat), conditions (temperature, pressure) and use patterns.

(6) *Existing equipment.* Information on existing heating and cooling equipment, including type, capacities, efficiencies and emissions.

(7) *Site-specific data.* Information on other site-specific issues, such as expansion plans or neighborhood considerations that might impact the proposed new system design or operation; or environmental impacts.

(8) *Biofuel and biobased product production.* Information on biofuel and biobased product production, including quantity and units of production.

(9) *Feasibility study.* The applicant must submit a feasibility study by an independent qualified consultant, which has no financial interest in the biorefinery, and demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system. The feasibility study must include the components specified in paragraphs (c)(9)(i) through (c)(9)(x) of this section.

(i) An executive summary, including resume of the consultant, and an introduction/project overview (brief general overview of project location, size, etc.).

(ii) An economic feasibility determination, including:

(A) Information regarding the project site;

(B) Information on the availability of trained or trainable labor; and

(C) Information on the availability of infrastructure and rail and road service to the site.

(iii) A technical feasibility determination, including a report that:

(A) Describes the repowering project, including:

(1) Information on heating and cooling equipment, including type, capacities, efficiencies and emissions;

(2) Anticipated impacts of the repowering project on the information requested above relating to electric use data, fuel use data, thermal loads and biofuel and biobased product production; and

(3) A project development schedule as more fully described in § 4288.21(b)(4)(iv);

(B) Is based upon verifiable data and contains sufficient information and

analysis so that a determination may be made on the technical feasibility of achieving the levels of energy production that are projected in the statements. The report must provide the information in a format that is responsive to the scoring criteria specified in § 4288.21(b)(1) through (5) and applicants should identify in their report the information that corresponds to each of the scoring criteria; and

(C) Identifies and estimates project operation and development costs and specifies the level of accuracy of these estimates and the assumptions on which these estimates have been based.

(iv) A financial feasibility determination that discusses the following:

(A) Repowering project construction funding, including repayment terms and security arrangements. Attach any documents relating to the project financing;

(B) The reliability of the financial projections and assumptions on which the project is based including all sources of project capital, both private and public, such as Federal funds;

(C) Projected balance sheets and costs associated with project operations;

(D) Cash flow projections for 3 years;

(E) The adequacy of raw materials and supplies;

(F) A sensitivity analysis, including feedstock and energy costs, product/co-product prices;

(G) Risks related to the project; and

(H) The continuity, maintenance and availability of records.

(v) A management feasibility determination.

(vi) Recommendations for implementation.

(vii) The environmental concerns and issues of the system.

(viii) The availability of feedstock, including discussions of:

(A) Feedstock source management;

(B) Estimates of feedstock volumes and costs;

(C) Collection, pre-treatment, transportation, and storage; and

(D) Impacts on existing manufacturing plants or other facilities that use similar feedstock.

(ix) The feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock from those entities.

(x) If woody biomass from National forest system lands or public lands is proposed as the feedstock, documentation must be provided that it cannot be used as a higher value wood-based product.

§ 4288.21 Application review and scoring.

The Agency will evaluate projects based on the cost, cost-effectiveness, and capacity of projects to reduce fossil fuels. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

(a) *Review.* The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be conducted by experts in the Agency and other Federal agencies, including the U.S. Department of Energy based on the information provided by the applicant.

(b) *Scoring.* The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are specified in paragraphs (b)(1) through (b)(6) of this section.

(1) *Cost-effectiveness.* Cost-effectiveness will be scored based on the anticipated simple payback period, or "simple payback." Anticipated simple payback will be demonstrated by calculating documented base energy use costs for the 24-month period prior to submission of the application or at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

(i) The simple payback period is calculated as follows:

- Simple payback = C/S

Where:

C = eligible capital expenses of the repowering project

S = savings in annual operating costs.

Example: Eligible capital expenses of the repowering project, including handling equipment, biomass boiler, piping improvements and plant modifications, are equal to \$5,300,500. The annual difference in fossil fuel cost versus the cost for renewable biomass is \$990,500. Assume these costs and uses are based on a yearly operating cycle, which may include handling, storage and treatment costs. In this example, C = \$5,300,500; S = \$990,500; simple payback = 5.35 years (C/S = simple payback).

(ii) A maximum of 20 points will be awarded as follows:

(A) If the anticipated simple payback is less than or equal to 4 years, award 20 points.

(B) If the anticipated simple payback is greater than 4 years but less than or equal to 6 years, award 10 points.

(C) If the anticipated simple payback will be greater than 6 years but less than or equal to 10 years, award 5 points.

(D) If the anticipated simple payback will be greater than 10 years, award 0 points.

(2) *Percentage of reduction of fossil fuel use.* The anticipated percent reduction in the use of fossil fuels will be measured using the same evidence provided by the applicant for measuring cost-effectiveness. However, this set of criteria will measure actual fossil fuel use for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm. All fossil fuel use, for thermal loads as well as for electric use, will be evaluated by using information provided by the Energy Information Agency (EIA). The Agency will determine the percentage reduction of fossil fuel use based on and in cooperation with the applicant's submission of electric power provider contracts, power agreements, and utility billings in relation to available information from the EIA. A maximum of 35 points will be awarded as follows:

(i) Applicant demonstrates an anticipated annual reduction in fossil fuel use of 100 percent, award 35 points.

(ii) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 80 percent but less than 100 percent, award 25 points.

(iii) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 60 percent but less than 80 percent, award 15 points.

(iv) Applicant demonstrates an anticipated annual reduction in fossil fuel use of at least 40 percent but less than 60 percent, award 5 points.

(v) Applicant demonstrates an anticipated annual reduction in fossil fuel use of less than 40 percent, award 0 points.

(vi) If any of the fossil fuel being replaced is natural gas, deduct 5 points.

(3) *Renewable biomass factors.* If an applicant demonstrates at the time of application that it has on site available access to renewable biomass or enforceable third party commitments to supply renewable biomass for the repowering project for at least 3 years, 5 points will be awarded. If an applicant cannot demonstrate this, no points will be awarded.

(4) *Technical review factors.*

Technical reviews will be conducted by a team of experts, including rural energy coordinators and State engineers. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. Each section of the technical review will be scored within a range of possible points available within that section. A maximum of 25 points will be awarded as follows:

(i) *Qualifications of the applicant's project team.* The applicant must describe the qualifications of those individuals who will be essential to successful performance of the proposed project. This will include information regarding professional credentials, relevant experience, and education, and must be supported with documentation of service capabilities, professional credentials, licenses, certifications, and resumes, as applicable. Award 0–5 points.

(ii) *Agreements and permits.* The applicant must describe the agreements and permits necessary for project implementation. An Agency-acceptable schedule for securing the required documents and permits must be provided. Award 0–4 points.

(iii) *Design and engineering.* The applicant must describe the design, engineering, and testing needed for the proposed project. The Design and Engineering documents shall demonstrate that they meet the intended purpose, ensure public safety, and comply with all applicable laws, regulations, agreements, permits, codes, and standards. Award 0–4 points.

(iv) *Project development schedule.* The applicant must provide a detailed plan for project development including a proposed schedule of activities, a description of each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. This description must address the applicant's project development cash flow requirements. Award 0–3 points.

(v) *Equipment procurement.* The applicant must describe the equipment needed, and the availability of the equipment needed, to complete installation and activation of the new system. The description supports that the required equipment is available, and can be procured and delivered within the proposed project development schedule. Award 0–3 points.

(vi) *Equipment installation.* The applicant must provide a satisfactory description of the plan for site

development and system installation that reflects the soundness of the project plan. Award 0–3 points.

(vii) *Operations and maintenance.* The applicant must describe the operations and maintenance requirements of the system necessary for the system to operate as designed and provide the savings and efficiencies as described. The description and requirements noted must be supportable by the technical review. Award 0–3 points.

(5) *Liquid transportation fuels.* If the biorefinery primarily produces liquid transportation fuels, award 10 points.

(6) *Rural area.* If the biorefinery is located in a Rural Area, award 5 points.

§ 4288.22 Ranking of applications.

All scored applications will be ranked by the Agency as soon after the application deadline as possible. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments.

(a) *Selection of applications for payments.* Using the application scoring criteria point values specified in § 4288.21 of this subpart, the Agency will select applications for payments.

(b) *Availability of funds.* As applications are funded, if insufficient funds remain to pay the next highest scoring application, the Agency may elect to pay a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

§ 4288.23 Notifications.

(a) *Successful applicants.* Successful applicants will receive an award letter notifying them of the award, including the terms and conditions, and Form RD 4288–5. Each funded project is unique, and, therefore, conditions of Form RD 4288–5 may vary among projects. Successful applicants must execute and return the Form RD 4288–5, accompanied by any additional items identified in the award letter.

(b) *Unsuccessful applicants.* Unsuccessful applicants will receive a letter notifying them of their application score and ranking and the score necessary to qualify for payments.

§ 4288.24 Program payment provisions.

The procedure the Agency will use to make payments to eligible biorefineries is specified in paragraphs (a) through (e) of this section.

(a) *Payment applications.* The Agency shall make payments based on the biorefinery's expenditures on eligible project costs. To request payments under this program during a fiscal year, an eligible biorefinery must:

(1) Submit an original, validly signed and completed SF 271 to the Agency not more frequently than once a month with the following supporting documentation:

(i) Evidence of expenditure of funds on eligible project costs which shall include paid third party invoices, receipts, bills of sale, and/or payroll records. Such records must be adequate to identify that funds to be reimbursed were spent on eligible project costs; and

(ii) Evidence that construction of the repowering project is in compliance with the project development schedule.

(2) Certify that the request is accurate.

(3) Furnish the Agency such certifications as required in Form RD 4288–4, Part C, and access to records that verify compliance with program provisions.

(b) *Clarifying information.* After payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment.

(c) *Notification.* The Agency will notify the biorefinery, in writing, whenever the Agency determines that a payment request is ineligible and why the request was determined ineligible.

(d) *Refunds and interest payments.* An eligible biorefinery that has received a payment under this program may be required to refund such payment as specified in paragraphs (d)(1) through (d)(5) of this section.

(1) An eligible biorefinery receiving payment under this program will become ineligible for payments if the Agency determines the biorefinery has:

(i) Made any material fraudulent representation;

(ii) Misrepresented any material fact affecting a program determination; or

(iii) Upon completion of the repowering project, failed to reduce its fossil fuel consumption, produce energy from renewal biomass or otherwise operate as described in its Agency approved application.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must 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.

(3) When a refund is due, it must 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 biorefinery, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, and the rate will adjust in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any fraudulent or negligent action of the biorefinery.

(5) A biorefinery or person receiving payment under this program will be liable for any refund or related charges associated with their project due under this program.

(e) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 4288.25 Succession and control of facilities and production.

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

§ 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.

Any entity that submitted an application for payment to the Agency under this program prior to March 14,

2011 will have their payments made and serviced in accordance with the provisions specified in this subpart.

§§ 4288.27–4288.100 [Reserved]

Dated: January 31, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

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