

**DEPARTMENT OF AGRICULTURE****Commodity Credit Corporation****7 CFR Part 1450****RIN 0560-AH92****Biomass Crop Assistance Program****AGENCY:** Commodity Credit Corporation and Farm Service Agency, USDA.**ACTION:** Final rule.

**SUMMARY:** This rule implements the new Biomass Crop Assistance Program (BCAP) authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). BCAP is intended to assist agricultural and forest land owners and operators with the establishment and production of eligible crops in selected project areas for conversion to bioenergy, and the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. This rule specifies the requirements for eligible producers and participants, biomass conversion facilities, and eligible renewable biomass crops and materials.

**DATES:** *Effective Date:* October 27, 2010.**FOR FURTHER INFORMATION CONTACT:**

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

In 2005, Congress enacted the Renewable Fuel Standard that requires 7.5 billion gallons of corn starch ethanol in the national fuel supply by 2012. In 2008, Congress revised these goals by requiring 36 billion gallons of advanced biofuels in our national fuel pool by the year 2022. At present, stakeholders have far exceeded the earlier Congressional goals, producing approximately 10 billion gallons of corn starch ethanol at present, but the affordable production of next-generation advanced biofuels has not yet kept pace with the revised targets. These next-generation fuels require next-generation crops, and these unconventional crops typically require several years to become established. This is the principal goal of BCAP.

BCAP is a primary component of the domestic agriculture, energy, and

environmental strategy to reduce U.S. reliance on foreign oil, improve domestic energy security, reduce carbon pollution, and spur rural economic development and job creation. While there are many complexities in the development of a national strategy for biofuels—the pursuit of more economical conversion technologies, transportation infrastructure upgrades, expanded and affordable consumer access, financial risk mitigation tools—the success of all of these efforts ultimately must rest upon a foundation of a strong biomass feedstock source.

The creation of that source, however, faces the classic chicken-and-egg challenge. An established, large-scale energy crop source must exist if commercial-scale biomass facilities are to have sufficient feedstock supplies. Conversely, a strong consumer base to purchase the crop must exist if profitable feedstock production is to occur. Also just as many such crop types need several years to become established, many promising biomass conversion technologies require similar time before proceeding to commercial scale. BCAP is designed to serve as catalyst to unite these multiple dynamics. By providing risk mitigation and production incentives, BCAP will encourage landowners to consider switching from familiar, revenue-generating crops to new, unconventional, non-food, non-feed crops that must be ready for a nascent marketplace.

Because BCAP is a voluntary program, its enrollment requirements cannot have such hurdles beyond standard practice so that interested participants would not instead choose to remain in conventional crop production. While BCAP is fundamentally a crop cultivation program, other considerations such as wildlife and conservation protection are nevertheless important parts of BCAP.

As BCAP is implemented, the public debate will continue on what may be the best approach for meeting our national energy strategy. There are no perfect solutions in the pursuit of these goals, no single feedstock that offers the affordability, reliability, regionality, and sensitivity to the environment, and transportability, in equal ways. It is not the feedstock, nor the technology, but the ability of both to meet the standards of our national strategy that is paramount. And as we pursue the best course of action for energy independence and environmental improvement, actions must begin today to forge a new path forward, accompanied by concurrent preparations for second and third

generation choices built upon the experiences of the first-generation achievements in the cultivation of biomass crops.

Section 9001 of the 2008 Farm Bill (Pub. L. 110-246) authorizes BCAP to assist agricultural and forest land owners and operators with the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility and to support the establishment and production of eligible crops for conversion to bioenergy in selected project areas. The 2008 Farm Bill authorizes such sums as are necessary to carry out BCAP. However, the 2010 Supplemental Appropriations Act (Pub. L. 111-212) limited BCAP funding to \$552 million in fiscal year 2010 and \$432 million in fiscal year 2011. This final rule, which implements BCAP, reflects comments received on previous notices and on a proposed rule, as described below. FSA will administer this program on behalf of the Commodity Credit Corporation (CCC).

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

On June 11, 2009 (74 FR 27767-27772), CCC published a BCAP notice of funds availability (NOFA) in the **Federal Register** for the collection, harvest, storage, and transportation of eligible materials. On February 8, 2010, (75 FR 6264-6288), CCC published the BCAP proposed rule. The proposed rule terminated the BCAP NOFA.

FSA also held a series of public meetings, as described in the notice published on May 13, 2009 (74 FR 22510-22511) and solicited comments, to collect public input needed to prepare an environmental impact statement (EIS) for BCAP. Specifically, CCC published four specific National Environmental Policy Act (NEPA)-related notices on BCAP in the **Federal Register**. A notice of intent (NOI) to prepare a programmatic EIS (PEIS) was published on October 1, 2008 (73 FR

57047–57048) to solicit public input on program implementation alternatives to be analyzed in the document; approximately 100 comments were received. CCC published an amended NOI on May 13, 2009 that identified the alternatives to be analyzed in the PEIS based on the input received on the previous NOI and announced six public scoping meetings around the country that began on May 29, 2009, and ended on June 11, 2009. CCC published a notice of availability of the draft PEIS on August 10, 2009 (74 FR 39915) or a 30-day public comment period; over 600 comments were received from environmental groups, Federal agencies, organizations, and the general public. The Environmental Protection Agency announced the availability of the final EIS on June 25, 2010 (75 FR 36386–36387) for public comment.

Comments from the public meetings and BCAP environmental notices were reflected in the BCAP proposed rule and in this final rule.

The BCAP proposed rule and this final rule cover the whole BCAP, including both the provisions that provide matching payments for collection, harvest, storage, and transportation of materials and the provisions that provide payment for the establishment and production of biomass crops in selected project areas.

The core structure and purposes of BCAP in this final rule are largely unchanged from those stated in the proposed rule. In response to comments received on the proposed rule, this final rule makes minor amendments to BCAP, as it was described in the proposed rule. This rule clarifies definitions and eligibility requirements and adds new provisions to enhance program integrity. Specific changes include:

- Biomass conversion facilities will be required to certify that eligible materials that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

- Related party transactions may be eligible for matching payments.

- Biomass conversion facilities will be required to treat all parties equally and pay fair market rates; this is intended to prevent biomass conversion facilities from paying different prices based on whether a person is receiving BCAP payments or not.

- BCAP requires a conservation plan, forest stewardship plan, or equivalent plan as an eligibility requirement to receive matching payments. Equivalent plans were previously included in some but not all references to plans in the

proposed rule. In the proposed rule, compliance with existing plans was required for matching payments; however, a plan was not required if one did not already exist. Now conservation plan, forest stewardship plan, or equivalent plans are required for all BCAP payments.

- As specified in the 2008 Farm Bill, BCAP participants may receive matching payments for a maximum of 2 years; this rule specifies that CCC will take into account the NOFA period in an equitable manner consistent with the 2008 Farm Bill.

- Although, the proposed rule provided alternatives for different payment rates based on type of material, BCAP will provide a single rate of \$1 for each \$1 per dry ton provided by the biomass conversion facility, up to \$45 per dry ton, with no “tiered” payments for different types of biomass. Similarly, provisions in the proposed rule for payments for wood wastes and wood residues converted to heat or power only above historical usage baselines cannot be implemented.

- This rule clarifies that to qualify for payment, that eligible materials and renewable biomass must be organic materials that are harvested or collected from the land, which was in the proposed rule. Specific references to vegetative and woody waste products that would not meet those requirements are not included. This rule clarifies the section on eligible materials to include specific requirements that are also clearly defined in the definitions section.

- Reductions to annual payments for sale of eligible crops and materials will be tiered based on the use for which the material or crops from the contract acres was sold and matching payments were paid. Conversion to advanced biofuels will result in the smallest reduction, while uses for purposes other than conversion to heat, power, biobased products, or advanced biofuels will result in the highest reduction.

- This rule also makes technical corrections and editorial changes that reflect both comments received and FSA’s review of the rule.

This document describes BCAP in detail, then provides a detailed discussion of comments received on the proposed rule and FSA’s response to those comments, and then a list of specific section-by-section changes made to the regulatory provisions in response to the comments received.

#### **BCAP Overview**

BCAP supports two main types of activities. First, it provides funding for agricultural and forest land owners and

operators to receive matching payments for certain eligible material sold to qualified biomass conversion facilities for conversion to heat, power, biobased products, or advanced biofuels. These payments are referred to as “matching payments.” Matching payments will assist producers with the cost of collection, harvest, storage, and transportation of certain eligible material to a qualified biomass conversion facility. Such payments to a particular participant can continue for up to 2 years after the first payment is issued. Second, BCAP provides funding for producers of eligible crops of renewable biomass within specified project areas to receive establishment payments of not more than 75 percent of the cost of establishment of eligible woody and non-woody perennial crops, and annual payments for up to 5 years for the production of eligible annual and non-woody perennial renewable biomass crops and for up to 15 years for the production of eligible woody perennial renewable biomass crops. These are referred to as “establishment payments and annual payments,” respectively. To be eligible for payment, the establishment and production activities must take place in designated project areas, which may be proposed to CCC by biomass conversion facilities or by groups of producers. Producers in project areas may be eligible for both types of payments; producers outside the project areas are only eligible for matching payments. A table is provided later in this document summarizing the major eligibility requirements for both types of payments.

#### **Definitions and Terms Used in This Rule**

As defined in this rule, “advanced biofuel” means fuel derived from renewable biomass other than corn kernel starch, including biofuels derived from cellulose, hemicellulose, or lignin; biofuels derived from sugar and starch (other than ethanol derived from corn kernel starch); biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; diesel-equivalent fuel derived from renewable biomass including vegetable oil and animal fat; biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass; and butanol or other alcohols produced through the conversion of organic matter from renewable biomass and other fuel derived from cellulosic biomass. That definition, which is specified in the 2008 Farm Bill, did not change from the proposed rule.

To be considered a qualified biomass conversion facility, one of the activities that meets the criteria for qualification is converting eligible renewable biomass material to a biobased product. The 2008 Farm Bill defined biobased products as a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is—“(A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock.” CCC will administer BCAP consistent with USDA’s standards for biobased products specified in the BioPreferred Procurement Program, which establishes a minimum biobased content for specific items and generic groupings of biobased products and excludes certain biobased products including (1) motor vehicle fuels (biofuels) and electricity (heat and power); and (2) products with significant national market penetration as of 1972 (7 CFR 2902.5(c)).

This final rule also adds a definition of “biofuel” to mean “a fuel derived from renewable biomass.” Corn ethanol would be included in the definition of biofuel, but not the definition of advanced biofuel.

This rule uses the terms “contract acreage” and “contract acres” to mean land that is eligible for establishment payments and annual payments under Subpart C of the regulation. Some eligible materials only qualify for matching payments under Subpart B if they are grown on contract acres.

This rule uses the term “eligible material” for renewable biomass that may qualify for the matching payment component of BCAP and “eligible crop” for renewable biomass that may be eligible for the establishment payments and annual payments component of BCAP. The 2008 Farm Bill uses these two terms in this way and defines them as including different kinds of renewable biomass.

The purpose of this regulation is to provide incentives for the cultivation of new biomass for new markets rather than divert biomass from existing markets. This rule clarifies the definition of “higher-value product” as an existing market product that is comprised principally of an eligible material or materials and, in some distinct local regions outside of project areas, as determined by CCC, has an existing market as of the date of publication of this rule in the **Federal Register**. Higher-value products may include, but are not limited to, products such as mulch, fiberboard, nursery

media, lumber, or paper, or a product manufactured from eligible materials from which eligible materials must be separated in order to be used for heat, power, biobased products, or advanced biofuels. Eligible materials that are considered to be used for a higher value product may differ according to region and may qualify for matching payments if no higher value product market exists in that region. Higher-value products may include products such as mulch, fiberboard, nursery media, lumber, paper, or other materials.

As specified in the 2008 Farm Bill and in this rule, the eligible material owner may be a person or legal entity who is (1) a producer of an eligible crop or (2) has the right to collect or harvest eligible material. A qualified biomass conversion facility that meets those requirements may be an eligible material owner and receive BCAP payments under subpart B of the regulation.

The term “conservation district” is used as defined in 7 CFR part 1410, the regulations for the Conservation Reserve Program (CRP).

This rule uses the term “participant” for the matching payments component of BCAP and the terms “producer” and “participant” for the establishment payments and annual payments component of BCAP. The distinction is an eligible participant for matching payments is not necessarily the person or legal entity who produced the material but may be the person who owns it or has the authority to collect or harvest and sell it to the biomass conversion facility. However, in all cases there may only be one BCAP payment made for any base material and the person claiming the BCAP payment must be the person who was entitled to receive and negotiate the payment being matched. In other words, all BCAP producers are participants, but not all BCAP participants are producers. Participants are those individuals or entities who have been approved and are bound to perform under a contract for matching payments, establishment payments, or annual payments. The term “producer” means either an owner or operator of BCAP project acreage that is physically located in a BCAP project area, or a producer of an eligible crop produced on that acreage.

This rule uses the term “contract” and “agreement.” A contract is between CCC and the participant for BCAP payments. The contract is legally binding on the participants in BCAP and specifies what the producer must do and the resulting payments that CCC will make to the producer or other BCAP participant entitled to receive a payment. An

“agreement” is between CCC and a qualified biomass conversion facility or a project area sponsor. The agreement specifies what the qualified biomass conversion facility or the project area sponsor plans to do and how it will support the establishment and production of eligible crops for conversion to bioenergy in the BCAP project areas including the type of renewable biomass that will be used and the planned conversion methods of renewable biomass. In addition, there may be agreements between CCC and a qualified biomass conversion facility for the matching payments, which include items such as obligations of the facility to provide a purchase list, receipts and scale tickets for the eligible material owners and agreement to provide facility address and contact information to the general public.

### Matching Payments

Matching payments will be available for the delivery of certain eligible material to qualified biomass conversion facilities to a producer of an eligible crop or a person with the right to collect or harvest eligible material.

The 2008 Farm Bill provides for matching payments at a rate of \$1 for each \$1 per dry ton paid by the qualified biomass conversion facility, in an amount up to \$45 per dry ton, for a period of 2 years. The 2008 Farm Bill also provides that biomass conversion facilities are those that convert, or propose to convert, renewable biomass into heat, power biobased products, or advanced biofuels.

For the matching payment calculations, CCC proposed three options. As discussed in the Summary of Comments section below, after consideration of comments received, an amended version of the first option was selected, and is the one specified in this final rule.

CCC will provide matching payments at the rate of \$1 for each \$1 per dry ton paid by the qualified biomass conversion facility to the eligible material owner for delivery of eligible material that qualify for payment to the facility in an amount not to exceed \$45 per dry ton. Participants will be eligible for payments for a period of 2 years beginning from the date of their first matching payment is made after the effective date of this rule. CCC will determine how to take into account participation in the NOFA period. At the least, the 2-year period will be considered stopped during the period between the end of matching payments received during the operation of the NOFA and the beginning of CCC matching payments for new deliveries

by the participant. If title to the material from a particular farm or locale is transferred to another party, the rule provides that the successor is subject to the 2-year requirement applicable to the previous participation at that locale. Otherwise, the 2-year requirement could be easily avoided contrary to the 2008 Farm Bill. Generally, however, the 2-year period is producer specific. If, for example, the producer changes delivery points after a year, the time period does not start anew.

#### Qualified Biomass Conversion Facility

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

For BCAP, a biomass conversion facility is a facility that converts or proposes to convert renewable biomass into heat, power, biobased products, or advanced biofuels. For the purposes of BCAP, advanced biofuels do not include ethanol derived from corn kernel starch, because the 2008 Farm Bill specifically excludes it.

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

Each biomass conversion facility must enter into a separate agreement with CCC regardless of whether a single owner has multiple facilities. CCC will issue a unique facility identification number to each qualifying biomass conversion facility. In addition, when a biomass conversion facility agrees to become "qualified," CCC will make general contact information available to the public through FSA county offices and on the FSA Web site.

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

To be eligible for matching payments, the eligible material owner must apply at an FSA county office and receive approval for that application before delivering the eligible material to the qualified biomass conversion facility. The qualified biomass conversion facility must issue a receipt or invoice on the date of delivery to the eligible material owner. The receipt will be the basis for the matching payment calculation.

The material owner will be eligible for the payment if the owner had the legal title to the material for collection or harvest, such as the operator or producer conducting farming operations on private land, or any other person designated by the owner of the private land. Consistent with the 2008 Farm Bill, the eligible material owner does not have to own the land where the eligible material was collected or harvested as a condition of eligibility. The eligible material owner may be a person with the right to collect or harvest eligible material, and who has the risk of loss with respect to that material, on certain Federal lands pursuant to a contract or permit with the U.S. Forest Service or Bureau of Land Management, such as a timber sale contract.

Eligible material owners must submit the documentation from the qualified biomass conversion facility to the FSA county office to be eligible for matching payments. The measure for the eligible material weight is a "dry ton," the weight at zero percent moisture content. The facility is required to have the necessary equipment (such as a moisture meter) to calculate the equivalent dry ton weight of the delivered material.

Eligible material owners may also be eligible to participate under the "establishment payments and annual payments" component of BCAP; however, eligible materials may differ from eligible crops and the annual payment that is received by a participant in that component will be reduced when a matching payment is issued. The "establishment payments and annual payments" component of BCAP is discussed later in this rule. If an eligible material owner or producer wishes to avoid the reduction in annual payment(s), the owner or producer must decline the matching payment(s).

The NOFA imposed an "arm's length transaction" requirement to be eligible for a matching payment. As discussed below in the Summary of Comments section, based on comments received,

those provisions have been removed from this final rule. To achieve a fair price for all participants, provisions have been added requiring biomass conversion facilities to pay a fair market value to all participants, regardless of whether the participant is receiving BCAP payments or is a related party.

An eligible material owner needs to meet the following requirements to be eligible for a matching payment:

An eligible material owner must be one or more of the following:

- A producer within a project area; or
- A person or a non-Federal entity that has legal title to an eligible material, including Indian tribes and tribal members.

An eligible material owner may request a matching payment at the FSA county office after being approved to participate in the program and after delivery of eligible material to a qualified biomass conversion facility and receiving payment for that delivery.

However, eligible material owner(s) who meet the requirements listed above are not eligible for a matching payment if:

- Delivery is made or payment received for delivery before the biomass conversion facility is qualified by CCC;
- The eligible material owner did not receive approval from CCC to be considered an eligible material owner for matching payment from the FSA county office before delivery to the biomass conversion facility;
- The delivery contained ineligible material (for deliveries of otherwise eligible material, none of the eligible material will qualify for payment if it must be separated from other material which may be the higher-value product after delivery to the biomass conversion facility);
- The eligible material owner that collects or harvests the eligible material directly from the land sells the eligible material to any other entity other than the qualified biomass conversion facility;
- The eligible material owner does not present proof of payment and proof of delivery date for delivery of the eligible material;
- The eligible material was collected or harvested from the land not in accordance with the conservation plan, forest stewardship plan, or equivalent plan;
- The eligible material produced outside a project area may be used to produce higher-value products;
- The eligible material owner violates Executive Order 13112, "Invasive Species;"
- The eligible material owner knowingly supplied false information;

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

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

#### Eligible Materials

In general, eligible material is renewable biomass that qualifies for the matching payment component of BCAP. For guidance to potential eligible material owners and biomass

conversion facilities, CCC will provide a chart of eligible materials that qualify for matching payments. The chart of eligible materials that qualify for matching payments will be provided to the public via the FSA Web site at <http://www.fsa.usda.gov/energy>; an example of the chart is included below. The chart is not exhaustive and will be periodically updated on the FSA Web site by CCC—in accordance with the parameters established by the 2008 Farm Bill. Because the contents of the eligible material list that qualify for payments are expected to change periodically, the list is not included in the BCAP regulations. When there is

recommendation for an addition to the list of eligible materials that qualify for payments, CCC will review the material to make determinations. The review may include a site visit and comparison to related materials or uses. CCC will review the recommendation to ensure that the new material meets the requirements of the 2008 Farm Bill and the provisions in this final rule. As described later in this rule, eligible crops for the establishment payments and annual payment provisions will include some additional crops not eligible for matching payments and therefore not considered to be eligible materials.

#### CONDITIONS WHERE ELIGIBLE MATERIALS WILL QUALIFY FOR MATCHING PAYMENTS

Eligible material	Qualifies for matching payment?		
	<i>If collected or harvested directly from the land before transport and delivery to the biomass conversion facility</i>	<i>If collected or harvested by separation from a higher-value product collected or harvested directly from the land</i>	
		before transport and delivery to the biomass conversion facility	after transport and delivery to the biomass conversion facility
Forest thinnings .....	Y*	Y*	N
Post-disaster debris .....	Y*	Y*	N
Hardwood chips .....	Y*	Y*	N
Softwood chips .....	Y*	Y*	N
Cutofts .....	Y*	Y*	N
Bark .....	Y*	Y*	N
Trees and shrubs without timber, lumber or wood pulp value	Y*	Y*	N
Trees and shrubs with timber, lumber or wood pulp value ....	Y* non-Federal land (N Federal land) .....	N	N
Forbs such as sunflower and clover .....	Y*	Y*	N
Legumes .....	Y*	Y*	N
Non yard waste grasses .....	Y*	Y*	N
Non yard waste vines .....	Y*	Y*	N
Mosses .....	Y*	Y*	N
Crop residues, including Title I crop residues .....	Y*	Y*	N
Corn cobs .....	Y*	Y*	N
Corn stover .....	Y*	Y*	N
Sugarcane bagasse .....	Y*	Y*	N
Rice hulls .....	Y*	Y*	N
Nut hulls .....	Y*	Y*	N
Rice straw .....	Y*	Y*	N
Wheat straw .....	Y*	Y*	N
Orchard waste and vineyard waste .....	Y*	Y*	N
Excluded from eligibility:			
Title I crops .....			
Algae .....			
Animal waste and byproducts (including fats, oils, greases, and manure).			
Food waste .....			
Yard waste .....			

“Yes” means material has been collected or harvested directly from the land in compliance with an approved conservation plan, forest stewardship plan, or equivalent plan, and in compliance with that plan, and, that eligible materials that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

\*“Yes” becomes “no” if CCC rules that, within that distinct local market, the product is being diverted from higher-value (existing) markets.

There has been interest in and discussion about various materials and

whether or not they are considered to be eligible materials and specifically

whether they qualify to receive matching payments for BCAP. For

example bagasse, rice hulls, nut hulls, corn cobs, whole trees, bark, wood chips, sawdust, and black liquor. For some materials there is an important distinction as to whether they meet the basic definition of eligible material or whether they are a product versus a feedstock. A determination about whether a material qualifies for matching payments requires the item to be an eligible material and to meet the other requirements of the BCAP regulations, for example the collection, harvest, storage, transportation, and delivery requirements. Each of the example materials listed in this paragraph are discussed below.

Bagasse has been discussed above. It is the fibrous residue that remains after sugarcane stalks are crushed, is an eligible material, but cannot qualify for matching payments because it is not collected directly from the land, but rather it is separated from a higher-value product, such as a Title I crop (sugar extraction) after delivery to the facility, cannot qualify for a matching payment.

Hulls are eligible materials, but qualify for matching payments only if it is collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation or equivalent plan, before delivery to a biomass conversion facility. Hulls separated from whole grain or nuts after delivery to the processing facility cannot qualify for a matching payment. Where they have not been separated by the farmer, the delivery of the hulls is merely incidental to the normal marketing of the crop. It is not a new collection or harvesting of the biomass at all. Changing practices to merely separate the hulls, for example, early (at the farm) will not, however lead to payment as that could itself be a scheme or device in violation of BCAP if the only purpose was to generate a BCAP payment.

Corn cobs are crop residues, and are eligible materials, but qualify for matching payments only if they are collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation plan or equivalent plan, before delivery to a biomass conversion facility. Cobs collected not directly from the land, but rather separated from a higher-value product, such as a Title I crop (corn kernels) after delivery to a biomass conversion facility, cannot qualify for a matching payment for the reason we give above.

The same concerns apply with respect to forest matters. Under this rule, whole trees or logs are eligible materials that

qualify for matching payments only if collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan; are diseased, such as trees infested by the bark beetle; are byproducts of preventative treatments that are removed to reduce hazardous fuels; are removed to restore ecosystem health; and have not been determined by the CCC as a higher-value product in that market. The provisions of the 2008 Farm Bill provided for the preventative treatment qualification with respect to government land. However, that qualification is extended to trees or logs on private land in this rule so as, consistent with the 2008 Farm Bill, to avoid undue disturbance of forest lands consistent with the positive environmental intent of BCAP and consistent with other determinations specified in this final rule. This also reflects the concept that BCAP is for the use of materials that would otherwise be waste materials and that would go uncollected or unharvested. It is not intended to upset existing market relationship. It is for these reasons, on consideration of the comments, and further consideration of the operation of the portion of BCAP under the NOFA, that CCC determined that it is appropriate to apply this qualification to trees or logs on private lands as well.

Whole trees that CCC has determined have a higher value, such as for lumber or wood pulp, or have been removed without an approved forest stewardship plan or equivalent plan, cannot qualify for matching payments even if part of the tree is separated from the bulk of the tree and burned or otherwise used for biofuel—see the explanation given with respect to bagasse.

Accordingly, under this rule, bark is an eligible material that qualifies for matching payments only if it is (1) collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, (2) separated from a higher-value product, and (3) has not been determined by CCC as having a higher-value product in that local market. The applicable provisions of the 2008 Farm Bill relative to the third of these qualifications are designed to generate new activities that will create biomass and not disturb existing markets that rely on biomass and may have beneficial effects of their own—such as the use of bark for mulch. This follows that view to assure a genuine biomass oriented collection and harvesting (one that would otherwise not occur) and also serves to assure that

BCAP stays within the dollar limits set by Congress. If CCC determines that in a distinct local market, the bark is used for mulch, or nursery media, the bark will not qualify for matching payments in that market. Bark collected from processed trees after the trees are delivered to pulp and paper facilities cannot qualify for matching payments.

Wood chips are eligible materials that qualify for matching payments only if collected or harvested directly from the land, or separated from a higher-value product, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, and have not been determined by CCC as a higher-value product in that local market. If CCC determines that in distinct local markets, the wood chips are used for products such as particle board, the chips cannot qualify for matching payments in that market. Chips collected from delivered and processed trees after the trees are delivered to pulp and paper facilities cannot qualify for matching payments. Chips created in the field from diseased trees for ease of transport of that biomass to a conversion facility qualify for matching payments.

Sawdust is an eligible material that qualifies for matching payments only if it is (1) collected or harvested directly from the land, in accordance with an approved conservation plan, forest stewardship plan, or equivalent plan, before delivery to a biomass conversion facility, (2) separated from a higher-value product, and (3) has not been determined by CCC as having a higher-value product in that local market. Sawdust collected from processed trees after the trees are delivered to a wood products facility cannot qualify for matching payments under this rule. Sawdust collected directly from the forestland before delivery to a facility may qualify for matching payments. If CCC determines that in distinct local markets, the sawdust can be used for higher-value products such as particle board, the sawdust cannot qualify for matching payments in that market.

Black liquor, or pulp liquor, is an aqueous waste by-product of the kraft process of pulp manufacturing that is comprised of lignin, hemicellulose, and inorganic chemicals and used as fuel at these facilities. Any eligible material used in the manufacturing process that can be attributed to the creation of black liquor cannot qualify for matching payment because the eligible materials (non-Federal pulpwood trees) immediate, principal higher-value purpose is wood pulp for paper manufacturing and the creation of the

black liquor is a byproduct of the production process.

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

- Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;
- Would not otherwise be used for higher-value products; and
- Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of subsections 102(e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention provisions of subsection (f).

In other words, renewable biomass harvested on National Forest System and BLM land would be biomass removed for fire prevention purposes, biomass unsuitable for commercial timber harvest, invasive plant removal for treatment and control purposes, and diseased, damaged, or immature biomass culled in accordance with appropriate forest management practices. As discussed below in the Summary of Comments section, in response to the comments, this rule requires a conservation plan, forest stewardship plan, or equivalent plan for all eligible materials that qualify for payment.

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

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

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

Crops that are eligible to receive payments under Title I of the 2008 Farm Bill would therefore not be included as eligible materials or crops for BCAP. Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill or an amendment made by that Title includes a crop of barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts, pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber.

In accordance with the 2008 Farm Bill, crop residue or other similar byproducts of crop production and harvesting, such as stover, straw, or hulls, are considered eligible materials that qualify for payments under subpart B of the regulation provided that they are collected, harvested, transported, and delivered as required by the regulation. For such eligible material to qualify for payment, conservation plans must be updated or created to address the removal of the material.

The 2008 Farm Bill specifies that material removed from Federal land is not eligible if it would otherwise be used for higher-value products. Because the intent of BCAP is to spur new biomass for new markets rather than divert biomass from existing markets, and in response to comments, this rule extends the higher-value qualification to material from all land not under a BCAP contract (including non-Federal lands). The exemption for the BCAP contracts reflects that market displacement issues should be taken into account in the BCAP approval process.

The 2008 Farm Bill does not specifically exclude invasive or noxious species in the definition of “eligible material” which is the key term for the matching payment part of BCAP. After consideration of this issue, those materials are eligible materials that qualify for payment if collected, harvested, stored, transported, and delivered as specified in all applicable local, State, and Federal requirements on invasive and noxious species.

Accordingly, this rule includes invasive and noxious species as eligible materials that qualify for BCAP matching payment purposes; however, such eligible materials must be collected or harvested according to a new or amended conservation plan, forest stewardship plan, or equivalent plan and must not be collected, harvested, or transported during reproductive or other phases that may propagate the spread or establishment of those species. Eligible

material owners must contact State and local weed boards or authorities and their local USDA Service Center staff about collecting, harvesting, storing, or transporting invasive or noxious species to ensure compliance with Executive Order 13112 (which addresses noxious weeds), USDA guidelines, and other requirements. Eligible material owners that violate Executive Order 13112 while carrying out activities related to receiving a matching payment will be in violation of the BCAP regulations and will be required to return all matching payments, as determined by the Deputy Administrator.

As required by the 2008 Farm Bill, the following materials are excluded from being considered eligible materials for BCAP, although they are eligible crops for BCAP establishment payments and annual payments:

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

Consistent with the 2008 Farm Bill, this rule specifies that for eligible materials to qualify for a matching payment, they must be collected and harvested directly from lands including:

- (1) U.S. National Forest System lands;
- (2) BLM lands;
- (3) All Non-Federal lands in the United States; and
- (4) Land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. In other words, most publicly- and privately-held land is eligible to produce material for the BCAP matching payments program, except for certain Federal lands.

In accordance with the 2008 Farm Bill, matching payments may be made for all eligible materials, including those derived outside BCAP project areas. Advanced biofuels and intermediate ingredients or feedstock are not collected or harvested directly from the land, therefore, they do not qualify to receive matching payments. CCC recognizes that the production of some advanced biofuels and biobased products requires intermediate ingredients and intermediate feedstocks, such as chopped grasses or wood chips. As specified in this rule, the source material and the intermediate ingredient or feedstock are considered separate eligible materials; however, only the source material qualifies for a matching payment because intermediate



ingredients or feedstock are not collected or harvested directly from the land. Advanced biofuels and intermediate ingredients or feedstock are not collected or harvested directly from the land, therefore, they do not qualify to receive matching payments. The intent of BCAP is to provide matching payments for actual collections and harvestings not incidences to normal industrial processes.

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

BCAP establishment payments and annual payments will be available for persons and legal entities with eligible land that is located within a project area designated by CCC. CCC will consider project area proposals from project sponsors on a continuous basis. Unlike the matching payments component of BCAP, where any owner of eligible materials can be eligible for BCAP, under the establishment payments and annual payments component, only producers in a designated project area may be eligible for payment. The establishment payments will cover not more than 75 percent of the cost of establishment of eligible woody and non-woody perennial crops, and annual payments for up to 5 years for the production of eligible annual and non-woody perennial renewable biomass crops and for up to 15 years for the production of eligible woody perennial renewable biomass crops. In response to comments received, this rule includes algae specifically as a non-woody perennial crop. By designating project areas, BCAP will support the development of renewable biomass production near biomass conversion facilities.

#### **Proposing Project Areas**

Project areas must be proposed by project sponsors, which could be groups of producers or biomass conversion facilities. There is no restriction in this rule on who can own or operate a biomass conversion facility, or sponsor a project area. Various parties may own a biomass conversion facility such as Federal entities, private entities, State or local government agencies, schools, or non-government organizations, provided that these parties have legal title to the facility.

CCC will accept project area proposals on a continuous basis. A complete proposal must include, at a minimum:

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

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

(3) Information demonstrating that the biomass conversion facility has sufficient equity available to operate by the harvest of a crop in the project area if the facility is not operational at the time the project area proposal is submitted.

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

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

For item 3 above, evidence of sufficient equity must include documentation of the projected construction, start-up, operation, and maintenance costs.

The project sponsors must document the estimated cash-flow of the project (including assumptions on the production outputs and expected market prices for the products produced). In addition, the project sponsor must document its existing resources and short term and long term financing. The information provided to CCC as proof of sufficient equity will be confidential to the extent allowed by law and CCC will only use it to determine if sufficient equity is available for the facility and the project.

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

At a minimum, projects must demonstrate the ability to support the development and production of heat, power, biobased products, or advanced biofuels from renewable biomass production. The facility must

demonstrate long-term economic viability and ability to comply with all environmental and regulatory requirements for the production of heat, power, biobased products, or advanced biofuels from renewable biomass. In addition, the project must demonstrate that sufficient quantity of eligible crops will be grown within an economically viable distance from the facility.

A project area must have specific geographic boundaries that are described in specific terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties. The project area must be physically located near a biomass conversion facility or multiple biomass conversion facilities. What constitutes an appropriate location will be determined on a case-by-case basis. Whether a project area is within an economically viable distance from a biomass conversion facility depends on the eligible crops being established and produced, as well as other transportation and logistics matters, and therefore these determinations will be made on a case-by-case basis. The biomass conversion facility or facilities may be within the geographic boundary of the project area, or near it. The project area must also include potential or established producers that would supply a portion or all of the renewable biomass needed by the biomass conversion facility or facilities.

#### **Project Area Selection Criteria**

CCC will evaluate project area proposals using these criteria:

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

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

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

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

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

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

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



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

Project sponsors that are biomass conversion facilities may be any size of operation including pilot facilities, research units, experimental or demonstration operations, or commercial operations. A biomass conversion facility not yet in operation can be a project sponsor. In that case, the biomass conversion facility must provide evidence that it has sufficient equity available.

#### Project Area Eligible Crops

After CCC approves a project area, persons and legal entities within the specific geographic boundaries of that area may be eligible for payment for the establishment and production of eligible crops.

An eligible crop is a crop of renewable biomass. Animal wastes, food and yard wastes, and algae are not excluded from the definition of eligible crop unlike the definition of eligible material; therefore, those categories of renewable biomass will be considered eligible crops. The 2008 Farm Bill specifies certain types of eligible crops that are excluded, including any crop that is eligible to receive payments under Title I of the 2008 Farm Bill, noxious weeds, and invasive species. For the invasive species or noxious weeds exclusion, the determination of whether a species is either invasive or noxious varies by State; therefore, if the crop is neither invasive nor noxious in a State, it would be eligible in that State for BCAP establishment payments and annual payments. FSA State committees will consult with the State technical committees for recommendations concerning the invasive and noxious status for otherwise eligible crops for the purposes of BCAP. Information on ineligible species will be available in FSA county offices.

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

Federal- and State-owned land, including land owned by local governments or municipalities, is excluded from the definition of eligible land in the 2008 Farm Bill and therefore is not eligible for the establishment payments and annual payments component of BCAP. The specification about the exclusion for land owned by local governments or municipalities is for consistency with other CCC programs; the terms "State" and "State

government" mean any State or local government, including, but not limited to State, city, town, or county government, State Universities, and other units of State government.

#### Project Area Eligible Producers

Within the project area, to be eligible to receive establishment payments to convert agricultural lands or nonindustrial private forest lands to the production of eligible crops producers must enter into BCAP contracts enrolling their land as contract acreage. In addition, producers may also be eligible for annual payments for the production of eligible crops used for conversion to renewable energy, including advanced biofuels, or biobased products. The details for what is required to qualify for the annual payments will be specified in the individual contract between CCC and a producer, as discussed further below, and will include provisions for the implementation of a conservation plan, forest stewardship plan, or equivalent plan. The producer must demonstrate compliance with the plan through required self-certification and FSA will ensure that normal spot check rules and methods are followed to ensure compliance with the plan. Producers with previously established eligible crops as of the date this rule is effective may enter into a contract for annual payments to continue growing those crops; however, establishment payments will not be authorized in that case.

Project sponsors, regardless of whether they are a biomass conversion facility or a group of producers, may also be considered as a producer and be eligible to receive establishment payments and annual payments. The sponsor must own or operate eligible land to be eligible to enroll as a producer under a BCAP contract and be eligible to receive establishment payments and annual payments. Federal- or State-owned biomass conversion facilities may be project sponsors, but will not be eligible to enter into a BCAP contract with CCC because neither Federal- nor State-owned land is ineligible for establishment payments and annual payments.

The agreement between the project sponsor and CCC is not a contract in the sense that in return for some action a payment is made by CCC. A successful project sponsor is not paid by CCC for being a sponsor; the producers in the project area, who may also be the sponsor, are eligible for payment for the establishment and production of eligible crops. Because this arrangement with sponsors produces no payment as such,

and is not a procurement of a good or service, biomass conversion facilities that are also project sponsors are not be subject to general Federal contracting requirements as a condition of a project area approval.

#### Project Area Contract Acreage and Terms

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

Contract terms include:

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

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

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

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

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

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

Contracts are subject to modification and payment reductions if any of the contract terms are violated. Participants that chose to voluntarily withdraw from BCAP before the duration of their contract has ended will be subject to

early contract termination penalties and may be required to refund payments.

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

#### Eligible and Ineligible Land

The contract acreage will consist of only the eligible lands that are covered under the producer's contract with CCC. A producer may own land outside the project boundary area, or choose not to sign up all their acreage for BCAP, in which case the contract provisions will only apply to the contract acreage. Eligible land for project areas is agricultural land and nonindustrial private forest land, subject to certain exclusions.

As specified in this rule, eligible agricultural land includes:

- (1) Cropland;
- (2) Grassland;
- (3) Pastureland;
- (4) Rangeland;
- (5) Hayland; and
- (6) Other lands on which food, fiber,

or other agricultural products are produced or capable of being legally produced for which a valid conservation plan exists or is implemented.

Land considered ineligible to be enrolled under a BCAP contract includes:

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

Agricultural lands with previously established eligible crops or previously contracted for eligible crops or planned eligible crops are eligible lands for contract acreage. In other words, as noted earlier, producers who started growing renewable biomass before BCAP was implemented may enter into a contract with CCC for annual payments. There is no intent to exclude "early adopters" producing biomass crops.

"Nonindustrial private forest land" is defined in this rule as rural land with existing tree cover, or suitable for growing trees, owned by any private individual, group, association, corporation, Indian Tribe, or other private legal entity. This definition allows for the inclusion of properties such as a privately held tree farm or a private forest landowners' cooperative.

This is consistent with the definitions of "landowner" and "nonindustrial private forest land" in the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a), which includes private legal entities as landowners of such forest land. Existing nonindustrial private forest land with existing tree cover can be entered into contract acreage within an approved project area and be eligible for annual payments, subject to a forest stewardship plan or equivalent plan. Establishment payments will only be made for woody perennial crops with a projected initial harvest time occurring within the length of the contract period.

While land enrolled in other USDA programs may be eligible lands for contract acreage, the contracting producer may not receive multiple program benefits for purposes that are the same or substantially similar to the purposes of BCAP. While there are currently no other Federal programs incentivizing biomass, if in the future there are, duplicate payments will be prohibited. A contracting producer must choose whether to receive BCAP payments or other USDA or Federal program benefits where those benefits are designed to achieve the same purposes as BCAP.

BCAP contracts will not restrict uses of contract acres other than to require the production of eligible crops provided that CCC determines that the land uses would be consistent with the conservation plan, forest stewardship plan, or equivalent plan and any other BCAP conservation requirements.

#### Making Establishment Payments

Establishment payments of not more than 75 percent of the cost for establishing a perennial crop, which could include woody biomass, will include:

- (1) The costs of seed and stock for perennials;
- (2) The cost of planting the perennial crop;
- (3) For non-industrial forest land, the costs of site preparation and tree planting; and
- (4) Other proposed establishment activities that could include, but would not be limited to, site preparation for non-tree planting and supplemental or temporary irrigation.

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

Establishment payments will not be authorized for annual crops. In addition, prior to receiving establishment

payments, producers must have planted their eligible crops and must provide their FSA county office with copies of receipts and invoices related to the cost of establishing such crops.

#### Making Annual Payments

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

As specified in the regulations in 7 CFR 1410.42, which set the rental payment rate procedures for land in CRP, and as determined by CCC, annual payments will include a payment based on:

- (1) A weighted average soil rental rate for cropland;
- (2) The applicable marginal pastureland rental rate for all other agricultural land; and
- (3) For forest land, the average county rental rate for cropland as adjusted for forest land productivity for nonindustrial private forest land.

This rate information will be posted at FSA county offices (as FSA posts information for CRP). There are site-specific factors including type of soil and land use that determine the exact rate. CCC will post in FSA county offices the county-specific base-line rental rates for cropland, marginal pastureland, and forest land. In addition, the applicable additional incentive payments (premiums) will be posted for the project area or specific crop mixes within the project area. The large number of factors used to determine the rates for specific crops, land uses, soil types, counties, and project areas preclude this information being suitable for posting on the FSA Web site.

In determining the applicability of incentive payments (premiums) to the annual base-line soil rental rates, the Deputy Administrator will consider the costs of establishing the crop, and the potential of specific perennial eligible crops that are not primarily grown for food or animal feed.

CCC must reduce payments to avoid duplicate benefits, but the annual payment reduction for delivery to a biomass conversion facility will be a percentage of the payments received (not dollar-for-dollar) if the crop is converted to heat, power, biobased products, or advanced fuels, because the purpose of BCAP is to encourage biomass energy production. The reduction will be relatively small if the crop is converted to cellulosic biofuels

or advanced biofuels, in order to encourage the production of fuels that meet the National renewable fuel standard. If the harvested production is sold for any reason other than conversion to heat, power, biobased products, or advanced biofuel, a dollar-for-dollar reduction for each dollar received for the sale will apply, not to exceed the total annual payment.

Specifically, annual payments will be reduced:

(1) By 1 percent if the eligible crop is delivered to a biomass conversion facility for conversion to cellulosic biofuels as defined in 40 CFR 80.1401;

(2) By 10 percent of the total of the sales price and matching payment if the eligible crop is delivered to a biomass conversion facility for conversion to advanced biofuels, as determined by CCC;

(3) By 25 percent of the total of the sales price and matching payment if the eligible crop is delivered to a biomass conversion facility for conversion to

heat, power, or biobased products, as determined by CCC;

(4) By 100 percent of the sales price and matching payment if the eligible crop is used for a purpose other than conversion to heat, power, biobased products, or advanced biofuels, as determined by CCC;

(4) If the producer violates a term of the contract; or

(5) In other circumstances necessary to carry out BCAP, as determined by CCC.

Annual payments will be made for agricultural land and nonindustrial private forest land. CCC will calculate market-based rental rates for cropland consistent with the CRP regulations in 7 CFR part 1410; and for all other agricultural land at the rate that would be paid for pastureland, consistent with CRP.

CCC will calculate the market-based payment rate for nonindustrial private forest land using the average county rental rate for cropland developed for

CRP and adjusting that rate by comparing the average productivity of cropland compared to the average productivity of forest land.

Half of the first year's annual payment will be made, if practicable, to the producer within 30 days of the date of contract approval and the balance will be paid on the annual contract enrollment anniversary. Subsequent annual payments, if practicable, will be made every year within 30 days after the contract anniversary date. Payments may cease and producers may be subject to contract termination and associated penalties for failure to establish eligible crops.

#### Key Provisions Comparison of BCAP Matching Payment Versus Establishment Payment and Annual Payment Provisions

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

	Matching payments	Establishment payments and annual payments
Geographic Eligibility .....	Not limited .....	Limited to geographically designated project area.
Project Sponsor .....	Not applicable .....	A project sponsor proposes project areas and may be a: <ul style="list-style-type: none"> <li>• Biomass conversion facility, including facilities owned by Federal entities, State entities, local government entities, or privately or publicly held entities; or</li> <li>• Group of producers.</li> </ul>
Eligible Material Owner or Eligible Producer.	An eligible material owner may be: <ul style="list-style-type: none"> <li>• A producer within a project area;</li> <li>• A biomass conversion facility; or</li> <li>• A person or a non-Federal entity that has legal title to eligible material, including Indian Tribes and Tribal members.</li> <li>• An eligible material owner cannot be a Federal government entity.</li> </ul>	An eligible producer may be a: <ul style="list-style-type: none"> <li>• Biomass conversion facility that owns or operates eligible land and produces an eligible crop; or</li> <li>• Person or entity with the legal title to privately held lands or land held in trust by the Federal government (but only one person in any case for any material on any land can qualify for the matching payment).</li> </ul> An eligible producer cannot be a: <ul style="list-style-type: none"> <li>• Federal government entity, or State or local government entity.</li> </ul>
Land Limitations or Eligible Land.	To qualify for payments, eligible material must be collected or harvested directly from certain: <ul style="list-style-type: none"> <li>• U.S. National Forest System and BLM lands,</li> <li>• Non-government lands including non-Federal lands, and State- and locally-held government lands, or</li> <li>• Tribal land held in trust by the Federal government.</li> </ul>	Eligible land is certain: <ul style="list-style-type: none"> <li>• Agricultural land, such as cropland, pastureland, rangeland, grassland, or other lands on which food, fiber, or other agricultural products are produced or capable of being produced; or</li> <li>• Nonindustrial private forest lands that are: <ul style="list-style-type: none"> <li>○ Rural lands with existing tree cover, or are suitable for growing trees; and</li> <li>○ Owned by any private individual, group, or association.</li> </ul> </li> <li>• Eligible land cannot be: <ul style="list-style-type: none"> <li>• Federal- or State-owned land;</li> <li>• Land that is native sod; or</li> <li>• Land enrolled in: <ul style="list-style-type: none"> <li>○ CRP;</li> <li>○ Wetlands Reserve Program; or</li> <li>○ Grassland Reserve Program.</li> </ul> </li> </ul> </li> </ul>

	Matching payments	Establishment payments and annual payments
Eligible Crop or Material .....	<p>To qualify for payments, eligible material is certain:</p> <ul style="list-style-type: none"> <li>• Materials, pre-commercial thinnings, or invasive species from National Forest System land and U.S. Bureau System land that: <ul style="list-style-type: none"> <li>○ Are byproducts of preventive treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health;</li> <li>○ Would not otherwise be used for higher-value products; and</li> <li>○ If from Federal lands, are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of section 102 (e)(2), (3), and (4) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f).</li> </ul> </li> <li>• Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including: <ul style="list-style-type: none"> <li>○ Renewable plant materials such as feed grains, other agricultural commodities, and other plants and trees; and</li> <li>○ Waste materials including vegetative waste including crop residues and Title I crop residues, and other vegetative waste materials including wood wastes and wood residues.</li> </ul> </li> </ul> <p>Eligible material does not include:</p> <ul style="list-style-type: none"> <li>• Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill or an amendment made by that Title including a crop of barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber Animal waste and animal waste byproducts (including fats, oils, greases, and manure);</li> <li>• Food waste and yard waste;</li> <li>• Algae</li> </ul>	<p>Eligible crop is:</p> <ul style="list-style-type: none"> <li>• Renewable plant materials such as feed grains, other agricultural commodities, other plants and trees, and algae;</li> <li>• Waste materials including vegetative waste, such as crop residues, other vegetative waste materials, such as wood wastes and wood residues, animal waste and byproducts, such as fats, oils, greases, and manure, food waste, and yard waste;</li> </ul> <p>Ineligible crops include:</p> <ul style="list-style-type: none"> <li>• Any crop that is eligible to receive payments under Title I of the 2008 Farm Bill.</li> <li>• Any plant that is invasive or noxious or has the potential to become invasive or noxious.</li> </ul>
Authorized Payments .....	<p>A matching payment at a rate of \$1 for each \$1 per dry ton equivalent paid by the qualified biomass conversion facility in an amount up to \$45 per dry ton.</p>	<p>Establishment payments at a rate of not more than 75 percent of establishment costs based on:</p> <ul style="list-style-type: none"> <li>• The costs of seed and stock for perennials;</li> <li>• The cost of planting the perennial crop; and</li> <li>• For non-industrial forest land, the costs of site preparation and tree planting(s).</li> </ul> <p>Annual payments equal to the market rate plus any incentive as provided for in a specific project area.</p>
Payment Reductions .....	<p>Matching payments must be refunded to CCC if an eligible material owner violates the terms of their contract with CCC including, but not limited to:</p> <ul style="list-style-type: none"> <li>• Not adhering to the provisions in the conservation plan, forest stewardship plan, or equivalent plan including establishing or spreading noxious or invasive species, as determined by the Deputy Administrator;</li> <li>• Delivering eligible material not harvested directly from the land by the eligible material owner;</li> <li>• Delivering eligible material prior to COC application approval;</li> <li>• Delivering eligible materials that would otherwise be used to produce higher-value products; or</li> <li>• Delivering otherwise eligible material that must be separated from materials used to produce higher-value products.</li> </ul>	<p>Annual payments will be reduced if:</p> <ul style="list-style-type: none"> <li>• An eligible crop is sold for any purpose, including a matching payment for collection, harvest, storage, or transportation; or</li> <li>• The producer violates a term of the contract.</li> </ul> <p>Payments may cease and producers may be subject to contract terminations for failure to establish eligible crops.</p>

	Matching payments	Establishment payments and annual payments
Payment Timing .....	Matching payments are paid within 30 days after the request for payment by the eligible material owner is submitted at the FSA county office, including submission of sales invoice(s) issued by the qualified biomass conversion facility.	Establishment payments are paid when the perennial eligible crop practice or identifiable portion of the practice has been completed according to the BCAP conservation plan, forest stewardship plan, or equivalent plan. Annual payments are paid: <ul style="list-style-type: none"> <li>• As an advance payment in an amount equal to 50 percent within 30 days of contract approval with the remaining 50 percent within 30 days of the first-year contract anniversary date, and</li> <li>• Within 30 days of the contract anniversary beginning with the second-year contract anniversary.</li> </ul>
Duration .....	Payment duration is 2 years from the date on which the first matching payment is issued to an eligible person or entity taking in account the NOFA period as determined appropriate by the Deputy Administrator.	Contract duration is up to: <ul style="list-style-type: none"> <li>• 5 years for annual and non-woody perennial crops, and</li> <li>• 15 years for woody perennial crops.</li> </ul>
Project Area Proposals or Matching Payment Applications.	Applications for matching payments will be accepted on a continuous basis. To apply for a matching payment an eligible material owner must submit an application to the FSA county office prior to the delivery of the eligible material and then submit the request for payment at the FSA county office after delivery of eligible material is made to the qualified biomass conversion facility.	Project area proposals may be submitted at any time. After a project area has been approved, eligible persons and legal entities within that project area may enroll in a BCAP contract at the FSA county office.

### Summary of Comments

CCC received 24,008 comments on the proposed rule from all States, the District of Columbia, the Virgin Islands, Puerto Rico, Northern Mariana Islands, U.S. Minor Islands, and 88 other countries.

We received comments from individuals, trade groups and other organizations, State and local government entities, Federal entities, Tribes, and Alaska native corporations. The majority of the comments were submitted as one of 4 different form letters. One form letter dominated the comments, although many commenters edited the form letter for their personal submission. The letters represented the comments of associations, a corporation, and another interested organization.

This final rule is based on consideration of the comments received and on CCC's experience in implementing matching payments under the NOFA. In addition to the substantive comments discussed below, minor editorial and technical changes have been made to the regulations for clarity and to facilitate implementation. Comments that addressed issues outside the scope of BCAP were not addressed in this rule because CCC does not have the authority to address those issues in this rule. Similarly, CCC does not have the authority to limit the scope of BCAP to a smaller or more restrictive program than the 2008 Farm Bill authorizes, or to expand it beyond our authority except as may be needed to keep BCAP within spending limits specified in the 2010 Supplemental Appropriations Act.

There were general comments both supporting and opposing BCAP that did not provide specific suggestions for changes to a specific section or subpart of the proposed rule. General comments are discussed below followed by a section-by-section analysis of comments in order by the section number of the regulations. Out of scope comments, such as those about solar and wind technology, on-farm storage costs, and other issues outside of the authority for BCAP are not included in the discussion and no change was made based on those comments.

*Comment:* BCAP is necessary beyond 2012.

*Response:* The 2008 Farm Bill does not authorize this program beyond 2012. Contracts for establishment payments entered into before 2012 may continue beyond 2012. Accordingly, no change was made to the rule in response to this comment.

*Comment:* BCAP project areas should be the top priority for BCAP and matching payments spending should be significantly reduced to 20–50 percent of BCAP expenditures, perhaps in conjunction with an annual cap for matching payments above which no additional applications will be accepted.

*Response:* The 2008 Farm Bill provides such CCC funds “as are necessary” to carry out BCAP. However, the 2010 Supplemental Appropriations Act effectively caps BCAP funding at \$552,000,000 and \$432,000,000 in FY 2010 and FY 2011, respectively. CCC is required to administer the program within these limits. No change was

made to the rule in response to this comment.

*Comment:* More emphasis should be placed on forest land ownership and more resources should be spent on creating harvesting opportunities on national forests.

*Response:* Land devoted to forest and trees may be eligible for matching payments and for establishment payments to establish trees and other woody perennials. CCC believes that significant opportunities for eligible materials exist on private as well as public land and will administer the program accordingly. No change to the rule was made in response to this comment.

*Comment:* The proposed budget is inadequate considering the size of the renewable biomass markets.

*Response:* The 2010 Supplemental Appropriations Act establishes the funding to carry out the program.

*Comment:* BCAP will create an oversupply of biomass products, distorting prices for biomass. Biomass conversion facilities are able to pay less than market value for participants' biomass due to having a captive market. BCAP distorts markets and costs too much in a time of deficits.

*Response:* The purpose of the BCAP program is to encourage the development of commercial demand and supply where none currently exists for non-traditional biomass crops used for heat, power, biobased producers and biofuels. This rule was changed in response to this comment and requires that biomass conversion facilities pay a fair market rate for biomass and that they do not have a different rate for

BCAP participants than for other biomass suppliers.

*Comment:* Limit payments to foreign-owned companies.

*Response:* The 2008 Farm Bill does not prohibit enrollment by otherwise eligible foreign citizens or foreign-owned entities. Therefore, no change to the rule was made in response to this comment.

*Comment:* There is a need for intermediate facilities to receive, process, store, and disburse raw biomass fuel feedstock.

*Response:* Intermediate facilities may be a critical part of the biomass feedstock supply chain. However, in order for material to be eligible for BCAP matching payments, an eligible material owner must retain beneficial interest in that material until it is delivered to a qualified biomass conversion facility. No change to the rule was made in response to this comment.

*Comment:* Coupling BCAP with other FSA programs, such as CRP, may support efforts to promote additional tree plantings and may support acres that need to be thinned to improve their quality for wildlife habitat.

*Response:* FSA implements a number of programs that assist farmers and ranchers in managing risk levels. We agree that producers may want to enroll in multiple FSA programs, including BCAP and CRP, to meet a particular farming operation's goals. We are not changing the regulations to specifically link requirements for the two programs, because we do not have authority to do so—the 2008 Farm Bill specifically excludes CRP land from eligible land for BCAP establishment payments and annual payments. Where possible, efforts will be made to coordinate FSA and CCC programs with complementary goals. Although land in CRP is not eligible for BCAP establishment payments and annual payments, production on such land, if consistent with the CRP contract, may be eligible for matching payments.

*Comment:* The structure of other FSA programs prohibits producer participation in BCAP and imposes hurdles or provides incentives against producer participation in BCAP. The public needs further guidance on participation in multiple FSA programs and on how BCAP may impact base acres.

*Response:* BCAP is being implemented with the intent to minimize conflicts between programs. For instance, the 2008 Farm Bill provides for the preservation of base acres and yield history for land enrolled under a BCAP contract. Participation in

BCAP will not preclude eligibility for the direct and counter-cyclical payment program (DCP) or the average crop revenue election program (ACRE). No change to the rule was made in response to this comment.

*Comment:* Complete this rulemaking expeditiously and resume payments under BCAP immediately.

*Response:* Payments will start after this final rule becomes effective, which is after the date this rule is published in the **Federal Register**. No change to the rule was made in response to this comment.

*Comment:* The NOFA stimulated a considerable amount of capital investments by both eligible material owners and biomass conversion facilities. The temporary termination of matching payments under the NOFA and the potential changes in BCAP may result in a loss of their ability to participate and loss of capital investments.

*Response:* We are aware of the concerns regarding continuity between the NOFA and this final rule. We have made adjustments to the final BCAP rule that are consistent with BCAP purposes, maintain continuity, and meet the overall program objectives of supporting the long-term supply of renewable biomass.

*Comment:* FSA should provide adequate training and support for FSA State and county staff that will be implementing BCAP.

*Response:* As we do with other FSA and CCC programs, we will be providing training to the field staff that will implement BCAP.

### Common Provisions in Subpart A

#### Administration (§ 1450.1)

*Comment:* Provide sufficient personnel to expeditiously support project area sponsors in developing project area proposals and quantitatively monitor BCAP's productivity for both matching payments and establishment payments and annual payments.

*Response:* FSA has more than 2,200 county offices serving rural America. FSA county offices are available to assist in the development of project proposals. Performance indicators will be developed to document and monitor BCAP's benefits, ultimately enhancing delivery of BCAP by identifying those practices and locations that provide the greatest benefits per dollar invested. No change to the rule was made in response to this comment.

#### Definitions—General, New Terms (§ 1450.2)

*Comment:* Create a glossary of terms that accurately and clearly defines terms based on their use in industry and the academic community.

*Response:* BCAP definitions are based on the 2008 Farm Bill, where applicable, or other regulations, as appropriate. In other cases, the terms are a result of consultation and collaboration with Federal experts and other stakeholders. Terms not specifically defined in this rule have their common dictionary meaning and are not used in a specialized way in this rule. No change to the rule was made in response to this comment.

*Comment:* Clearly define “aggregator of eligible material,” “algae,” “biofuel,” “biofuel refinery,” “biomass,” “biomass processor,” “cellulosic biofuel,” “Federal land,” “landowner,” “sustainably managed forest land,” and “wood.”

*Response:* We made changes to the definitions section of the rule in response to comments. We have added a definition of “biofuel,” consistent with Sec. 9001 of the 2008 Farm Bill, to provide clarity to the related definition of “advanced biofuel.” The terms “aggregator,” “aggregator of eligible material,” “biofuel refinery,” “biomass,” “biomass processor,” “cellulosic biofuel,” and “sustainably managed forest land” were not included in the proposed or final rule and, therefore, do not require a definition for BCAP. The definition of “landowner” is synonymous to the definition of “owner” in 7 CFR part 718 that also applies to 7 CFR part 1410. Finally, the meaning of “algae,” “Federal land,” and “wood” are commonly understood terms that do not need further definition because they are not used in a special way in this rule.

*Comment:* Define “substantial” as it relates to the related-party transaction, “ownership,” and “opportunity” as they relate to ownership and levels of biomass conversion facility ownership.

*Response:* The term substantial does not need to be defined in this rule because the prohibition on related-party transactions has been removed from matching payments.

*Comment:* Define “invasive species” and “noxious weed,” and reference definitions in Executive Order 13112 and the Plant Protection Act, respectively.

*Response:* The rule does reference Executive Order 13112 specifically. Since these terms are defined in the Executive Order and the Plant Protection Act, this rule will not re-define them. CCC will use those

definitions in determining the list of invasive species and noxious weeds for each applicable area. As specified in this rule, the list will be available at the FSA county office.

*Comment:* Clarify the terms “eligible persons” and “legal entities.”

*Response:* We agree the terms “person” and “legal entity” need to be defined. For ease of administration and consistency with other CCC programs, a reference to the definitions in 7 CFR part 1400 was added to this rule.

*Definitions—Advanced Biofuel*  
(§ 1450.2)

*Comment:* Do not include pellets, wood chips, and briquettes as advanced biofuels.

*Response:* Although pellets and briquettes would be considered to be advanced biofuels under the 2008 Farm Bill definition if comprised of eligible materials under BCAP, as wood chips would be considered an eligible material, such eligible materials may only qualify for matching payments if these materials meet other qualifications for payment as specified in this rule. However, if these materials have a higher value (existing market) in a distinct region, they would not qualify for matching payments.

*Definitions—Biobased Product*  
(§ 1450.2)

*Comment:* Include pulp and paper as a biobased product.

*Response:* CCC will use a number of criteria in determining whether a particular product will be considered a biobased product. Products that have a mature market, such commercially produced timber, lumber, wood pulp, paper or other finished wood products, will not be considered to be biobased products for the purposes of BCAP. This is consistent with the general intent to stimulate the production of new biobased products and to energize emerging markets for those products. In making the determination, we will administer BCAP consistent with the standards of the BioPreferred Procurement Program, as authorized by section 9001 of the 2008 Farm Bill.

*Comment:* The definition of biobased products may cause unintended issues or may allow products not oriented toward renewable energy to be included in BCAP.

*Response:* The definition of “biobased product” in the 2008 Farm Bill gave the Secretary of Agriculture discretion to determine which products could be considered “a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including

renewable domestic agricultural materials and forestry materials or an intermediate ingredient or feedstock.” In determining whether a commercial or industrial product will be considered “biobased” for BCAP, CCC will use the standards set by USDA’s BioPreferred Procurement Program under the regulations at 7 CFR part 2902.

*Definitions—Biomass Conversion Facility* (§ 1450.2)

*Comment:* Keep the definition of biomass conversion facility as it appears in the proposed rule.

*Response:* In response to other comments (discussed in other sections), the definition of biomass conversion facility was amended in this final rule to replace the term “eligible material” with “renewable biomass,” to clarify that a qualified biomass conversion facility is not restricted to only using eligible material, but may also process other types of renewable biomass that are not eligible for BCAP matching payments.

*Definitions—Conservation Plan*  
(§ 1450.2)

*Comment:* Define “conservation plans,” “forest stewardship plans,” and “equivalent plans.” Make the requirements for all such plans consistent.

*Response:* The rule defines “conservation plan” and “forest stewardship plan.” The definitions have been amended slightly to be consistent with the relevant authorizing legislation for each while also being specific to BCAP. The term “conservation plan” is generally consistent with the definition applicable to Title II conservation programs in the 2008 Farm Bill, modified slightly to apply to eligible crops and eligible material, as appropriate. The definition for “forest stewardship plan” is consistent with the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a). There may be land eligible for BCAP with similar plans approved by States or other agencies that serve the same purpose and have similar goals, objectives, and terms. A definition for “equivalent plan” is included in the regulation as a result of the comments. Our intention is to review those situations and determine whether they are consistent and, if so, permit those equivalent plans to be used. References to “equivalent plan” were added throughout the rule.

*Definitions—Eligible Crop* (§ 1450.2)

*Comment:* Do not consider trees as a form of renewable biomass.

*Response:* The definition of renewable biomass is specified by the 2008 Farm

Bill and includes trees. Therefore, no change to the rule was made in response to this comment.

*Comment:* Use the IRS definition of closed-loop biomass for the definition of eligible crops.

*Response:* CCC understands that the IRS definition of “closed loop biomass” is inconsistent with the 2008 Farm Bill’s definition of “eligible crop” that, among other things, permits eligible crops to be converted to heat, biobased products, and advanced biofuels as well as electricity. Therefore, no change to the rule was made in response to this comment.

*Comment:* Sugarcane should be considered as an eligible crop.

*Response:* The 2008 Farm Bill specifically excludes from the definition of eligible crops or eligible materials any crop that is eligible to receive payments under Title I of the 2008 Farm Bill. “Payments” are not made under Title I of the 2008 Farm Bill with respect to sugarcane, but rather, nonrecourse loans are made to eligible entities. Therefore sugarcane is not excluded from BCAP. Crops eligible for Title I payments for which producers have elected not to enroll those crops in Title I programs remain ineligible for BCAP.

*Comment:* Exclude all Title I crops and crop residues from being considered as eligible crops.

*Response:* Title I crops are explicitly excluded as eligible crops; however, Title I crop residues may qualify for matching payments so long as they meet all other requirements for collection, harvest, storage, and delivery.

*Comment:* Exclude noxious or invasive species as eligible crops.

*Response:* Under the 2008 Farm Bill’s definition of “eligible crop,” any plant that is noxious or invasive or has the potential to become noxious or invasive is excluded. Noxious or invasive status is generally established at the State level. No change to the rule was made in response to this comment.

*Comment:* Eligible crops should include giant miscanthus, pennycress, black locust, guayule, hemp, high-biomass sorghum, and energy cane.

*Response:* Project sponsors must specify eligible crops for the project area; those crops cannot include plants that are considered noxious or invasive or have the potential to become noxious or invasive in the State. Therefore these crops may be eligible crops in some States, but not in others. No change to the rule was made in response to this comment.

*Comment:* Expand the definition of eligible crop and renewable biomass to include crops cultivated on Federal property.



*Response:* The 2008 Farm Bill excludes Federal- or State-owned land from eligibility for the establishment payments and annual payments portion of BCAP, so crops from that land, including privately owned biomass, cannot be eligible crops. Privately owned biomass grown on Federal- or State-owned land is ineligible for BCAP project areas. No change to the rule was made in response to this comment.

**Definitions—Eligible Material (§ 1450.2)**

*Comment:* Include Title I grains and oilseeds as eligible for matching payments if the farmer does not receive Title I subsidies for these crops. Barley dockage, which may include barley grain, should also be eligible for matching payments.

*Response:* As specified in the 2008 Farm Bill, the definition of “eligible material” excludes, among other things, any crop eligible to receive payments under Title I of the 2008 Farm Bill. The definition in the 2008 Farm Bill does not include an option for a producer to choose between BCAP matching payments or Title I benefits. Crops eligible for Title I programs where producers have elected to not enroll those crops in Title I programs are ineligible under BCAP. Likewise, any dockage or foreign material from non-contract acreage would be ineligible if it is comingled with ineligible Title I commodities. No change to the rule was made in response to this comment.

*Comment:* CCC should remove the 20 percent cap on payments for Title I residues that was in the NOFA.

*Response:* The rule was changed and the cap is not included in the regulation.

**Definitions—Eligible Material Owner (§ 1450.2)**

*Comment:* Clarify the definition of eligible material owner, particularly with regard to stumpage.

*Response:* “Owner” or “ownership” are commonly understood terms that do not need further definition and are not used in a special way in this rule. In the case of stumpage, the person who has purchased the right to harvest timber on the land clearly meets the definition of “a person or entity having the right to collect or harvest eligible material.” No change to the rule was made in response to this comment.

**Definitions—Native Sod (§ 1450.2)**

*Comment:* Clarify the definition of “native sod,” refer to the 2008 Farm Bill definition, and be explicit in its relation to eligible lands such as grasslands, rangelands, and pasturelands.

*Response:* Under BCAP, land that is “native sod” as of the date of the 2008 Farm Bill’s enactment is excluded from eligible land. This rule uses the 2008 Farm Bill’s definition of native sod found at section 12020 of the 2008 Farm Bill, which amends the Federal Crop Insurance Act (7 U.S.C. 1508) to add that definition. Native sod determinations must be made on a case-by-case basis because all three land uses (grasslands, rangelands, and pasturelands) may have been plowed at some point prior to the date of enactment of the 2008 Farm Bill; therefore, the rule does not clarify a specific relationship between native sod and grasslands, rangelands, and pasturelands. No change to the rule was made in response to this comment.

*Comment:* Include “native sod” as eligible land.

*Response:* The 2008 Farm Bill explicitly excludes “native sod” from the definition of eligible land. Therefore, no change to the rule was made in response to this comment.

**Definitions—Nonindustrial Private Forest Land (§ 1450.2)**

*Comment:* Clarify the definition of nonindustrial private forest land and reference language in the Cooperative Forestry Assistance Act.

*Response:* We corrected to the definition to refer to section 5(c) of the Cooperative Forestry Assistance Act of 1978, as amended (16 U.S.C. 2103a), as required by the 2008 Farm Bill definition of eligible land.

*Comment:* Replace the “publicly traded corporations” exclusion in the definition of nonindustrial private forest land with a per producer acreage limit. Include publicly traded land as nonindustrial private forest land and limit the number of nonindustrial private forest land acres a producer may enroll in contract acreage.

*Response:* The definition for nonindustrial private forest land in the proposed rule incorrectly excluded publicly traded corporations and accordingly has been revised in this final rule to remove that exclusion. That is consistent with the 2008 Farm Bill. However, implementing a contract acreage limit is not consistent with the 2008 Farm Bill. Therefore, that suggestion was not adopted. Project area applications, however, may propose the geographic boundaries within which contract acreage may be offered, will limit contract acreage for some producers.

**Definitions—Producer (§ 1450.2)**

*Comment:* Be consistent with the use of “participant” and “producer” throughout the rule.

*Response:* The terms “participant” and “producer” are not synonymous. The term “producer” is a generic reference to those individuals and entities who are owners, operators, and tenants who may or may not be enrolled in an FSA program. A “participant” is an individual or entity who is an owner, operator, or tenant who is enrolled in an FSA program. No change to the rule was made in response to this comment. A “producer” is an owner or operator of contract acreage that is physically located within a BCAP project area so long as the person or entity has a risk of loss in the crop.

**Definitions—Related-Party Transaction (§ 1450.2)**

*Comment:* The provisions on related-party transactions are inappropriate because of the vertically, geographically, and otherwise integrated nature of the forestry products industry. Add provisions to the definition of related-party transactions to encourage cooperatives.

*Response:* We have removed “related-party transactions” as a limitation under the matching payments. However, to ensure fair and consistent implementation, in becoming “qualified” as described under § 1450.101, a biomass conversion facility must agree, among other things, that all transactions will be market based regardless of whether an individual or entity will receive a matching payment. If it is determined by CCC that a person or business has restructured or engaged in related party transactions for the purpose of defeating the intent of BCAP, or to circumvent the provisions of this rule and its related requirements, or to obtain payment not otherwise entitled, then any part of any program payment otherwise due or paid to such person during the applicable period may be required to be refunded with interest as determined appropriate by CCC. Any eligibility determination that was based, in whole or part, on a scheme or device will be rescinded. A scheme or device includes, but is not limited to coercion, fraud, misrepresentation, depriving any other person of a payment, or obtaining a payment that otherwise would not be payable.

**Definitions—Socially Disadvantaged Farmer or Rancher (§ 1450.2)**

*Comment:* Include Native Hawaiians in the definition of socially disadvantaged.

*Response:* The definition has been corrected to include Native Hawaiians.

#### *Definitions—Yard Waste (§ 1450.2)*

*Comment:* For yard waste, include brush and chips, construction and demolition and municipal solid wastes, and material generated as planned management or urban forests.

*Response:* The 2008 Farm Bill does not explicitly define yard waste. CCC considers yard waste to be any renewable biomass generated from municipal or residential land, such as urban forestry materials, construction or demolition materials, trimmings from grasses and trees, or biomass removed due to invasive species or weather-related disaster, that can be separated from and has low potential (such as contamination with plastics, metals, chemicals or other toxic compounds that cannot be removed) for the generation of toxic byproducts resulting from conversion, and that otherwise cannot be recycled for other purposes (such as post-consumer waste paper).

#### *General (§ 1450.3)*

*Comment:* There should be stringent guidelines to biomass production to promote environmental and climate sustainability, including provisions to prevent over-harvesting, guidelines being developed by the Council of Sustainable Biomass Production, favoring harvesting practices that have been recognized as sustainable.

*Response:* Eligible material owners must obtain conservation plan, forest stewardship plan, or equivalent plan in order to receive a matching payment. The establishment payments and annual payments part of BCAP already required such plans. These plans address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

*Comment:* Matching payments should be targeted to certain businesses (for example, those with less than 60 employees) where local ownership and local economic benefits are involved, to help small town economies and encourage investment in infrastructure and equipment, so resources can be directed to increase plantings of biomass crops.

*Response:* The 2008 Farm Bill does not authorize limiting payments to any subset of eligible participants except as might be produced by a cap on the funding for BCAP or other restrictions that flow from the 2008 Farm Bill. The statute, however, does require the Secretary to consider the opportunity for producers and local investors to participate in the ownership of the

biomass conversion facility when selecting BCAP project areas. No change to the rule was made in response to this comment.

*Comment:* Target payments to aid the development of new sustainable biomass used for approved facilities such as for newly emerging biomass resources that require development of specialized equipment for harvest.

*Response:* A project sponsor may propose a project area to develop new sustainable biomass that will be considered according to § 1450.202. However, BCAP funding is not authorized to develop specialized harvesting equipment under either the matching or establishment and annual parts of BCAP. No change to the rule was made in response to this comment.

*Comment:* The proposed options for matching payments would penalize early adopters by tying those payments to a historical baseline of biomass consumption or biomass conversion facility output.

*Response:* The options in the proposed rule that required documentation of a historical baseline, and paid only for the amount above that baseline, were not adopted in this final rule. Therefore, we believe that the matching payments provisions in this rule will not penalize early adopters.

#### *Violations (§ 1450.4)*

*Comment:* Strengthen or increase penalties for violations.

*Response:* This rule has similar violation provisions to other CCC and FSA programs. The section on violations provides remedies up to termination of the contract. Other civil and criminal actions may also apply as they generally apply for other CCC and USDA programs. No change to the rule was made in response to this comment.

#### *Scheme or Device (§ 1450.11)*

*Comments:* Clarify what constitutes a “scheme or device.”

*Response:* A “scheme or device” is generally an action that tends to defeat the purpose of a program. As specified in the regulation, “A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or legal entity of any payments, or obtaining a payment that otherwise would not be payable.” Scheme or device determinations are made on a case-by-case basis due to the unique nature and circumstances surrounding specific scenarios or actions. BCAP participants who think that a particular activity might be considered a “scheme or device” should seek an official clarification from FSA.

No change to the rule was made in response to this comment.

#### *Filing of False Claims (§ 1450.12)*

*Comments:* Establish a formal reporting mechanism to report when a false claim has been filed.

*Response:* There are established reporting options. Violations of laws and regulations relating to USDA programs that may include criminal activity such as bribery, smuggling, theft, fraud, endangerment of public health or safety; mismanagement or waste of funds; workplace violence; employee misconduct; and conflict of interest may be reported by calling (800) 424-9121, (202) 690-1622, or (202) 690-1202 (TDD), by writing to USDA, Office of Inspector General, P.O. Box 23399, Washington, DC 20026-3399, or by e-mailing usda-hotline@oil.usda.gov. No change to the rule was made in response to this comment.

#### **Matching Payments in Subpart B**

*Comment:* Matching payments create an uneven playing field for producers and consumers of renewable biomass by subsidizing existing renewable biomass in a way that may delay expansions of new biomass crops.

*Response:* BCAP provides funding for both existing renewable biomass and for the establishment of new biomass crops. The BCAP regulation requires that qualified biomass conversion facilities pay a fair market price for biomass.

*Comment:* Biomass conversion facilities should be eligible material owners.

*Response:* Biomass conversion facilities may be eligible material owners if they meet all other requirements.

*Comment:* Only provide matching payments for eligible materials converted to advanced biofuels that support the Renewable Fuel Standard Program of the Energy Independence and Security Act of 2007.

*Response:* For BCAP, the 2008 Farm Bill includes renewable biomass to be converted to advanced biofuels as well as to be converted to heat, power, and biobased products. Where appropriate, BCAP is intended to work in harmony with other legislation and other Federal government programs. The programmatic outcomes of BCAP will help ensure that the goals of the Renewable Fuel Standard Program of the Energy Independence and Security Act of 2007 are met. No change to the rule was made in response to this comment.

*Comment:* There are ways to limit and target the matching payments portion, including a national approach where all

eligible material owners would be eligible to receive matching payments regardless of project area boundaries, a regional approach that recognizes regional differences in renewable biomass markets, a local approach that limits matching payments to eligible material owners within project areas, and an eligible material owner cap approach that would limit the total amount of matching payment funds an eligible material owner may receive in order to ensure a fair distribution of funds among all eligible material owners.

*Response:* Matching payments are available nation-wide regardless of project area boundaries. Regional markets will be taken into consideration when determining if there is the potential for eligible material to be used to produce a higher-value product. Other than the 2-year duration limit on payment availability for an eligible material owner, there is no authority under the 2008 Farm Bill to limit BCAP matching payments as the commenters suggest.

*Comment:* Base matching payments language on industry standards, refer to and address the major biofuels currently in production including ethanol, biodiesel, and biojetfuel, and adopt standard industry language when discussing advanced biofuels.

*Response:* The language in this final rule is generally based on the 2008 Farm Bill language and definitions. The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The manufacture of biofuels in accordance with industry standards is outside the scope and authority of this rule. No change to the rule was made in response to this comment.

With regards to units of measurement, BCAP is a biomass feedstock supply program, so it is appropriate for the operational units of the program to be tons rather than gallons as is more common for biofuel programs. For example, forest trimmings are not conventionally measured in gallons.

*Comment:* Is BCAP meeting its stated purpose to assist agricultural and forest landowners, given the long chain of actors (landowners, harvesters, aggregators, and facilities) involved in the matching payments?

*Response:* This rule clarifies § 1450.103 requiring that the eligible material must be harvested or collected directly from the land by the eligible material owner and provides that BCAP participants receive a fair market price for all eligible material delivered to qualified biomass conversion facility.

*Comment:* There is not enough information collected regarding eligible

material point-of-origin. The administrative burden associated with BCAP should be reduced to the extent practicable.

*Response:* Our goal is only to collect the information that is necessary for the proper operation and oversight of BCAP and to ensure that BCAP payments are proper. Therefore, required information includes identifying appropriate farm and tract information related to the source of the eligible material.

*Comment:* The matching payments should be distributed to all renewable biomass producers and consumers, maintaining fairness and competition in the renewable biomass markets, and encouraging long-term investments.

*Response:* This rule, which implements the authority in the 2008 Farm Bill, is structured to provide all eligible material owners equal opportunities to receive matching payments, maintain fairness and competition, and encourage long-term investments in renewable biomass markets. No change to the rule was made in response to this comment.

*Comment:* Redirect the funding for matching payments to biomass conversion facility equipment investments, tax credits, conversion processes that show potential in the long run, and for upgrading existing biomass conversion facilities.

*Response:* BCAP funding for those activities are not authorized by the 2008 Farm Bill.

*Comment:* Matching payments will not be effective in achieving program purposes unless new or additional activities by existing biomass conversion facilities are supported. Existing biomass conversion facilities will be placed at an unfair disadvantage if matching payments support new or additional activities rather than all activities equally.

*Response:* All biomass conversion facilities meeting the qualification requirements will be approved. No change to the rule was made in response to this comment.

*Comment:* There may be adverse environmental impacts of matching payments because there is not an enforcement mechanism to ensure that agricultural and forest resources are sustainably harvested on a renewable or recurring basis.

*Response:* Under this final rule, eligible material owners will be required to obtain a conservation plan, forest stewardship plan, or equivalent plan as a condition of receiving a matching payment. These plans generally address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-

specific needs of the landowner. The plan must include the purpose of the harvest, the volume of eligible materials to be harvested, the total number of acres harvested, and the name of the eligible material owner.

*Comments:* Woody eligible materials should be harvested according to a plan supported by the American Loggers Council's Certified Master Logger Program.

*Response:* Under this final rule, eligible material owners will be required to obtain a conservation plan, forest stewardship plan, or equivalent plan as a condition of receiving a matching payment.

#### *Qualified Biomass Conversion Facility (§ 1450.101)*

*Comment:* Why are matching payments made to eligible material owners rather than to qualified biomass conversion facilities?

*Response:* The 2008 Farm Bill specifies that matching payments be made to eligible material owners for the collection, harvest, storage, and transportation of eligible material to a biomass conversion facility. No change to the rule was made in response to this comment.

*Comment:* Favor more efficient or advanced conversion processes over less efficient or advanced conversion processes.

*Response:* The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The manufacture of biofuels in accordance with varying degrees of conversion efficiency is outside the scope and authority of this rule. No change to the rule was made in response to this comment.

*Comment:* Some conversion processes that qualified under the NOFA should not be allowed to qualify under the final rule. Specifically, facilities generating power as a byproduct or in support of their normal operations or facilities that directly convert renewable biomass into power should not qualify under the final rule.

*Response:* The definition of biomass conversion facility as specified in the 2008 Farm Bill specifically includes a facility that converts renewable biomass into power, so we cannot exclude those facilities. Any biomass conversion facility that qualified under the NOFA will be required to enter into a new agreement with CCC that contains provisions based on this final rule, which reflects changes made in response to these and other comments. The major changes that will impact the agreement include clarifications to the collection, harvest, storage, transportation and delivery

requirements in § 1450.103 and removal of the “related-party transaction.” Also, biomass conversion facilities will be required to certify that the eligible material for which BCAP payment was issued that are not crop residues are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

*Comment:* All renewable biomass consuming facilities should qualify under the final rule, specifically including plant nurseries, sawmills, anaerobic digesters, particleboard facilities, composting facilities, and briquette, wood pellet, wood shaving, wood chipping, and charcoal producing facilities.

*Response:* Based on the definition specified in the BioPreferred Procurement Program, which states that products with significant market penetration as of 1972 are not considered biobased products, then plant nurseries, sawmills, particleboard, facility, composing facilities, and charcoal facilities may not qualify as biomass conversion facilities because these products do not meet the definition. The facilities, however, can qualify as biomass conversion facilities for purposes of heat, power or biofuels generation provided that the eligible materials meet the specifications of § 1450.103. No change to the rule was made in response to this comment.

*Comment:* Provide assistance to facilities for marketing biomass conversion facility products.

*Response:* The 2008 Farm Bill does not authorize such assistance. No change to the rule was made in response to this comment.

*Comment:* Biomass conversion facilities should offer investment opportunity to local producers to help keep more of the funding within the community.

*Response:* There is no requirement in the 2008 Farm Bill, and therefore no requirement in the rule, to require local investment opportunities as a condition to become a qualified biomass conversion facility. The 2008 Farm Bill, however, does require the Secretary to consider the opportunity for producers and local investors to participate in the ownership of the biomass conversion facility when selecting BCAP project areas. Project proposals submitted under Subpart C for the establishment payments and annual payments must address criteria that consider the opportunity for producers and local investors to participate in the ownership of the biomass conversion facility in the proposed BCAP project area. No change

to the rule was made in response to this comment.

*Comment:* Legally-binding contracts should be required between eligible material owners and biomass conversion facilities.

*Response:* We amended the final rule to require a contract, agreement, or legally binding letter of intent with an application for a matching payment.

*Comment:* Verify biomass conversion facility procurement practices to ensure that biomass conversion facilities allow all eligible material owners the opportunity to sell eligible material. There are concerns due to the “captive market” nature of renewable biomass supply chains.

*Response:* The final rule adds a provision that requires biomass conversion facilities to pay fair market value for eligible material regardless of whether the seller has applied for or receives a BCAP matching payment.

*Comment:* Biomass conversion facilities should be allowed to charge a BCAP administrative or service fee.

*Response:* Charging an administrative, service, processing or similar fee because an eligible material owner is a BCAP participant is not authorized by the 2008 Farm Bill. The payment being matched should reflect the net output of the facility. A payment by the facility of \$20 with a return of a \$5 fee should only produce a \$15 match since that was the actual net outlay to be matched. CCC has no authority over the private contractual arrangements between an eligible material owner and a biomass conversion facility. Because the intent of BCAP matching payments to eligible material owners also provides an indirect incentive to facilities to consider biomass as an option for heat, power, biobased products, or biofuels, it is presumed that eligible material owners would be disinclined to increase the indirect benefit to the facility by the payment of an administrative fee. Such instances are encouraged to be reported to the FSA county office for evaluation. Should any arrangement between the eligible material owner and the biomass conversion facility, however, comprise any portion of BCAP matching payment, or its equivalent, as determined by CCC, it may be considered a scheme or device to circumvent the BCAP program and all appropriate penalties will ensue.

*Comment:* Require a chain-of-custody certification using the Forest Stewardship Council, Sustainable Forestry Initiative Program, or other mechanism to demonstrate the reliability of the biomass source.

*Response:* Establishing chain-of-custody that would ensure that the identity of eligible material would be

preserved would be overly burdensome. Accordingly, this comment was not adopted. However, CCC will collect farm and tract data through FSA’s farm records system to identify the source of the eligible material for which a matching payment is requested. No change to the rule was made in response to this comment.

*Comment:* Make the biomass conversion facility qualification process more flexible. For example, reduce permit requirements to allow a facility to apply for qualification before it is operational and when permits are only applied for, because feedstock development may require several years.

*Response:* A biomass conversion facility may become qualified before it is operational, but only after it obtains all necessary permits. No change to the rule was made in response to this comment.

*Comment:* Biofuel companies may require farmers to sign long-term contracts to ensure low-cost feedstock supply. Mills may be dropping payment rates due to BCAP matching payments by as much as 40 percent while landowners are simultaneously raising stumpage prices.

*Response:* A producers’ decision whether to enter into a long-term contract with a biofuel company does not involve CCC and is outside the scope of BCAP. Such a contract between a farmer or landowner and a biofuel company is a private transaction that is separate and distinct from the activities and authority of CCC.

*Comment:* Biomass conversion facilities with gross sales values exceeding \$25 million should be ineligible.

*Response:* That restriction on eligibility is not authorized by the 2008 Farm Bill. No change to the rule was made in response to this comment.

*Comment:* There were many comments about the standards for moisture content and measurement that did not represent a consensus. Suggested approaches included adopting industry standards for moisture content, adopting standard moisture contents of 45–50 percent, real-time moisture testing, testing of every load, and randomly testing moisture contents. Recommendations on measuring moisture content included taking regional, weekly, monthly, quarterly, bi-annual, and annual moisture averages.

*Response:* The proposed rule and this final rule include provisions for matching payments to be adjusted to a “dry ton” basis. This ensures that the many different kinds of eligible material are treated similarly. Because of the

significant differences between types of eligible materials, industry practices, and the potential for technological change, specific moisture measurement protocols are not specified in the BCAP regulation. No change was made to the final rule as a result of this comment. CCC believes that specifying the technology or methods used to measure dry tons is unnecessarily limiting and not required.

*Comment:* The exclusion of satellite delivery sites or biomass conversion operations from BCAP participation creates a competitive disadvantage for biomass conversion facilities with off-site chipping facilities.

*Response:* Satellite delivery sites may be an important component of certain biomass conversion facilities and we will consider materials delivered to a satellite facility of a conversion facility as delivered to the facility. All other eligibility conditions for eligible material will continue to apply.

#### *Eligible Material Owner (§ 1450.102)*

*Comment:* Loggers who are not BCAP participants need a way to recover lost revenue if the market responds to BCAP by lowering the cost of biomass feedstock.

*Response:* The requirements in this section for eligible material owner are specified in the 2008 Farm Bill. If loggers meet the definition of eligible material owner, they are eligible for BCAP. The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. The revenue of participants and non-participants is outside the scope and authority of this rule.

*Comment:* The eligibility of eligible material owners should be tied to the person that can present legal title for harvest and transport of material.

*Response:* An eligible material owner is one who has the right to collect or harvest the eligible material, as specified in this rule with the risk of loss in the product. As specified further in § 1450.3, "Eligible Material," the material must have been harvested or collected directly from the land. Language about risk of loss has been added.

*Comment:* There should be a definition for "related-parties." The restrictions on related party transactions are not authorized by the 2008 Farm Bill. Some commenters provided alternative definitions for "related party" and "related party transaction." Others suggested exceptions that should apply to the "related parties" provisions.

*Response:* This rule removes all references to "related-party transactions." CCC has replaced

references to "related-party transactions" with a requirement at § 1450.103 for market-based transactions to provide that a facility may not pay different rates for the same product based on whether the seller is participating in BCAP or pay inflated rates for whatever reason.

#### *Eligible Material (§ 1450.103)*

*Comment:* Oppose CCC discretion to modify the definition of eligible material when determining whether specific materials are eligible for matching payments and subsequent placement on the eligible materials list.

*Response:* Determining whether a specific material is on the eligible materials list is not a modification of the definition. CCC does not have the discretion to modify the 2008 Farm Bill definition of eligible material. The 2008 Farm Bill defines eligible material as renewable biomass, with a number of exceptions. As we did for the NOFA, we intend to continue consulting with USDA experts and other stakeholders when evaluating whether a specific material should be considered an eligible material, within the 2008 Farm Bill definition.

*Comments:* Commenters had various suggestions for eligible materials.

Include Title I crop residues as eligible for matching payments.

Corn stover and sugarcane bagasse should be eligible for matching payments.

Corn stover, wheat straw, and rice hulls should not be eligible for matching payments.

*Response:* The 2008 Farm Bill excludes from eligible material those crops that are eligible for assistance under Title I; however, this exclusion applies only to the commodity itself and not to any crop residue associated with producing that commodity. For example, corn grain is excluded from receiving matching payments, but, provided that it is otherwise eligible, other parts of the corn plant may be eligible for a BCAP matching payment. Title I crop residues that are separated from the Title I grain, kernel, or oilseed at the point of collection or harvest are eligible for matching payments; however, crop residues that are separated from the Title I grain, kernel, or oilseed after the crop is collected or harvested are not eligible for matching payments. No change to the rule was made in response to this comment. Bagasse, corn stover, wheat straw, and rice hulls are eligible if they are collected, harvested, transported, and delivered as specified in the BCAP regulations; see the table above for details about when these materials may be eligible versus ineligible. The

separation must have occurred on the land and not occurred because the material would normally have been delivered along with the higher valued parts of the plant.

*Comment:* CCC should consider non-Title I materials as eligible for matching payments including dried distillers grains, nut shells, energy cane, and sweet or high-biomass sorghum.

CCC should propose a formal process for determining which eligible materials may otherwise be used for higher-value products and the processes would include consultation with State Foresters.

*Response:* The 2008 Farm Bill provides the definition for eligible material. CCC will provide a public list of eligible materials that meet the 2008 Farm Bill definition of eligible material, specifying which qualify for BCAP payments, and will make that list available electronically and through FSA field offices. When new materials are proposed, such as, nut shells, energy cane, and sweet or high-biomass sorghum, FSA will consult other USDA and Federal agency experts to determine whether the new materials are additions to the eligible materials list and whether or not they qualify for BCAP payment. No change to the rule was made in response to this comment.

*Comment:* Materials from urban sources should not be considered yard waste including: tree trimmings, disaster debris, and pallets.

*Response:* BCAP's purpose is generally limited to agricultural and forest land owners and operators for matching payment purposes. No change to the rule was made in response to this comment, because the rule already excludes yard waste from any source as an eligible material.

*Comment:* Need clarification on eligible materials that may otherwise be used for higher-value products, such as forest thinning materials, bark, slash, wood chips (hard and soft), wood waste, and wood residues (including sawdust), some of which should be eligible to receive a matching payment.

*Response:* We expanded and clarified the provisions in § 1450.103 in response to this comment. Otherwise eligible materials that may be used to produce higher-value products do not qualify for matching payments under the final rule regardless of whether the material comes from Federal or non-Federal land. Payments are not authorized for otherwise eligible materials if they must be separated from a higher-value product after delivery to the biomass conversion facility. In many cases, wood waste materials would not be eligible because they could be used for higher-

value products or are included with non-organic industrial materials. Local or regional markets will be used to determine if particular deliveries will be eligible for BCAP matching payments.

*Comment:* There should be partial payments for eligible materials that are comingled with ineligible material. How will partial payments for comingled loads be verified?

*Response:* This rule adds a requirement to § 1450.103 that payments are not authorized for otherwise eligible material that must be separated from a higher-value product after delivery to a biomass conversion facility.

*Comment:* Eligible material owners that violate Executive Order 13112 on Invasive Species should not be responsible for the removal costs associated with the spread or establishment of noxious or invasive species as a result of activities related to receiving matching payments.

*Response:* As a condition of applying for a matching payment, an eligible material owner must obtain a conservation plan, forest stewardship plan, or equivalent plan. Violation of Executive Order 13112 would be considered a violation of the plan. No change to the rule was made in response to this comment. The issue of removal costs is outside the scope of BCAP; material owners who violate Executive Order 13112 may be subject to penalties under State or other Federal laws.

*Comment:* The eligible materials list should be published in the final rule.

*Response:* We included an example list of how eligible materials qualify for payment. As discussed above, the up to date list will be publicly available through the FSA Web site and at FSA county offices. Instead, this rule provides the criteria upon which decisions will be made to determine whether a material is an eligible material and whether or not it qualifies for BCAP payments and the responses to comments in this final rule clarify examples already determined to be eligible or ineligible. No change to the rule was made in response to this comment.

*Comments:* Include black liquor as an eligible material and as an advanced biofuel.

*Response:* Black liquor, an inorganic waste industrial by-product of the kraft process used in pulp manufacturing, is a product that historically was discharged into waterways, and today is processed through recovery boilers to retrieve chemicals for cost-efficiency purposes, with the process generating heat for power. The establishment of BCAP in the 2008 Farm Bill was

designed to cultivate a new nationwide crop base of non-food, non-feed biomass for new uses of energy. Black liquor is not an eligible or ineligible material, it is not a feedstock, but rather a product of feedstocks. Eligible materials that can be attributed to the creation of black liquor are materials that were delivered principally for the manufacture of a higher-value product that is not heat, power, biobased products, or biofuels, not for the recovery of chemicals where energy is an ancillary side effect and therefore do not qualify for matching payments.

#### *Signup (§ 1450.104)*

*Comments:* Use qualified biomass conversion facility settlement sheets to issue matching payments rather than documents provided by the eligible material owner.

*Response:* As with other FSA and CCC programs, the recipient of the payment is responsible for the accuracy and completeness of the information on the application for payment. As specified in this rule, a settlement sheet is one of the pieces of documentation that an eligible material owner must provide to FSA to receive payment. Qualified biomass conversion facilities are required to retain all documentation for a period of 3 years from the date of delivery should it become necessary for auditing or other purposes to validate data. No change to the rule was made in response to this comment.

*Comments:* There should be a 2 week signup period each quarter for matching payments.

*Response:* Having a continuous signup is more flexible for eligible material owners accommodates seasonal and geographic differences in the local marketplace and permits county offices to better manage heavy workloads. No change to the rule was made in response to this comment.

#### *Payments (§ 1450.106)*

*Comment:* Spatial distance should be considered when determining matching payment rates.

*Response:* The 2008 Farm Bill requires that payment be made based on the payment made by the biomass conversion facility, with no provision for an additional requirement that the material be harvested within a certain distance of the facility. No change to the rule was made in response to this comment.

*Comment:* Allocate funds quarterly to ensure equal distribution of funds across all quarters. Only approve requests for payments for sales receipts within one year from the date the receipt was issued. Extensions should

be considered for contracts when delivery was delayed at no fault of the eligible material owner.

*Response:* When the final rule becomes effective, FSA intends to begin regular allocations of funding to meet local needs. When an application is submitted, the approval will provide a reasonable period of time for biomass deliveries, after which, the approval may be withdrawn and the funds de-obligated. Where appropriate, FSA county offices will consider extension requests to the dates of delivery that were included in the application. No change to the rule was made in response to this comment.

*Comment:* CCC should issue early partial payments for large volume contracts.

*Response:* Partial payments will be authorized for discrete, segregable deliveries that are part of a single application. Payments, or payment advances, are prohibited before the delivery period starts, or before proof of payment for delivery is presented to the FSA county office. No change to the rule was made in response to this comment.

*Comments:* Commenters had various suggestions related to the 2-year payment period for matching payments.

CCC should address an eligible material owner's lost time due to the NOFA termination.

CCC should start the 2-year clock of all eligible material owners, or at least stop the clock on the date the proposed rule was published or the last date of performance, whichever was later.

CCC should make the 2-year period shorter. CCC should extend the time period to 3 to 7 years.

*Response:* The 2008 Farm Bill requires a payment limit of 2 years, which is not changing with this rule. Payments will be for a term not to exceed 2 years beginning from the date that CCC issues the first payment. New participants will be eligible for payments for a period of 2 years beginning from the date their first matching payment is made after the effective date of this rule. CCC will determine how to take into account participants during the NOFA period. At the least, the 2-year period will be considered stopped during the period between the end of matching payments received during the NOFA and the beginning of CCC matching payments for new deliveries by the participant.

Anyone who wants to participate in BCAP, including eligible material owners and biomass conversion facility owners, will need to apply under the BCAP regulations, no one will be grandfathered in based on applications approved under the NOFA.

The authorizing statute provides for a 2-year limitation on matching payments; no additional limitations are authorized.

Efforts by BCAP participants to restructure after the 2-year limitation expires in order to obtain additional matching payments may be considered a scheme or device and may result in permanent debarment from BCAP. If it is determined by CCC that a person or business has restructured or engaged in related party transactions for the purpose of, or having the effect of, defeating the intent of BCAP (including an action to defeat the 2-year limit on payments), or to circumvent the provisions of this rule and its related requirements, or to obtain payment not otherwise entitled, then any part of any program payment otherwise due or paid to such person during the applicable period may be required to be refunded with interest as determined appropriate by CCC. Any eligibility determination that was based, in whole or part, on a scheme or device will be rescinded. A scheme or device includes, but is not limited to coercion, fraud, misrepresentation, depriving any other person of a payment, or obtaining a payment that otherwise would not be payable.

*Comment:* Reduce the \$45 per dry ton payment limit to \$30 per dry ton.

*Response:* The 2008 Farm Bill provides that the upper limit on matching payments be “\* \* \* equal to not more than \$45 per ton.” CCC will issue payments at rates lower than \$45 per ton where local market prices reflect lower rates—hence the term “matching payments.” No change to the rule was made in response to this comment.

*Comment:* The proposed rule included several options for calculating payments. Commenters had various suggestions for all three options, as well as suggestions for alternative rate structures including structures to favor dedicated energy crops, based on greenhouse gas reductions, fossil fuel displacement, whether the materials were derived from land with a conservation plan, forest stewardship plan, or equivalent plan and based on biomass conversion facility output. Some commenters suggested giving “bonus payments” for eligible materials that are carbon neutral or negative. Commenters also suggested implementing a price floor or minimum that biomass conversion facilities must pay to eligible material owners.

*Response:* The rule reflects that the 2008 Farm Bill provides for matching payments to be paid at a rate of \$1 for each \$1 per dry ton provided by a qualified biomass conversion facility for the market-based sale of eligible

material in an amount not to exceed up to \$45 per dry ton. There are no tiered payments based on type of biomass or on use above a historical baseline.

*Comment:* Matching payments should be based on the actual “collection, harvest, storage and transportation costs” of eligible materials rather than the biomass conversion facility gate price of eligible materials.

*Response:* The 2008 Farm Bill requires that payments be based on matching the amount paid by a qualified biomass conversion facility. No change to the rule was made in response to this comment.

#### **Establishment Payments and Annual Payments in Subpart C**

##### *General (§ 1450.200)*

*Comment:* Please clarify the time frame in which contract acreage is expected to become enrolled in BCAP.

*Response:* Eligible persons may sign up eligible land into contract acreage once a project area is approved. The exact time frame for when sign up will occur will vary based on the amount of time project sponsors need to submit a project area proposal and the level of technical and environmental review required for the project area proposal.

*Comment:* Clarify whether land enrolled in contract acreage will be eligible to receive base-acre payments under the Direct and Counter-Cyclical Payment Program (DCP).

*Response:* BCAP does not prohibit participation in other programs; however, requirements of other programs may apply. In the case of DCP, contract acreage is considered to be an acceptable agricultural use of DCP cropland.

*Comment:* CCC should discuss the process for determining the appropriate number of project areas that will be selected and how that process relates to the findings of the PEIS.

*Response:* As indicated in the preamble to the proposed rule, we indicated that all project proposals would be considered acceptable provided those proposals met the selection criteria outlined in § 1450.202. The PEIS included an in-depth discussion of the selection criteria and can be located at this Web address: [http://www.fsa.usda.gov/Internet/FSA\\_File/bcapfinalpeis062510.pdf](http://www.fsa.usda.gov/Internet/FSA_File/bcapfinalpeis062510.pdf).

*Comment:* BCAP project areas should have additional goals, including providing additional wildlife habitat, increasing resources and opportunities to small- and mid-sized farms, and encouraging the establishment of several categories of potential eligible crops

including native grasses and trees, dedicated annual and perennial energy crops, only dedicated perennial crops, short-rotation woody crops, and crops that are ecologically appropriate based on the geographic location of the project area.

*Response:* These additional goals are largely compatible with the BCAP as specified in this final rule. Land enrolled under a BCAP contract may be capable of producing multiple benefits including additional wildlife habitat and additional resources and opportunities to agricultural and forest land owners. BCAP, however, is not a wildlife or conservation program as is CRP, rather BCAP is to promote the establishment and cultivation of new biomass crops.

*Comment:* Apply the project area selection criteria to evaluate offers to enroll land into BCAP contracts.

*Response:* We expect project areas to cover all or parts of multiple counties. Applying potentially multi-county project area criteria to individual offers from the farm level would impose an undue administrative burden on USDA as well as individual farmers and ranchers. Therefore, this suggestion was not adopted.

*Comment:* There are better ways to select project proposals. Some alternatives include: (1) First-come, first-serve; (2) all eligible land within 100 miles of a qualified biomass conversion facility; (3) a regional approach to ensure an even distribution of project areas across the country; (4) a competitive approach to ensure the best project areas are selected; and (5) a nation-wide project area that allows all eligible producers to enter into a BCAP contract.

*Response:* The first approach, first-come first-serve, is similar to the approach as described in the proposed rule except that project area proposals would also be required to meet the requirements of the selection criteria as provided in § 1450.202.

Requiring a distance-based model arbitrarily limits enrollment even if there were potential participants beyond that distance who wanted to participate. It is not clear if the comment intended to address what seems to be a natural barrier due to the transportation costs involved. However, setting an arbitrary distance may work well in some regions, but preclude promising technologies and feedstocks elsewhere.

With respect to the regional approach to ensure an “even distribution,” this would only be an issue if there was a competitive evaluation comparing merits of all project area proposals.



It is also important to note that the key criteria for a project area proposal is having an established or planned biomass conversion facility in or near the area. It is not clear how having a nation-wide project is compatible with this criteria. No change to the rule was made in response to this comment.

*Comment:* Contract acreage will compete for land that produces food and feed. It will also compete with land that is native wildlife habitat, specifically land enrolled or potentially enrolled in CRP (7 CFR part 1410).

*Response:* While BCAP-eligible land within project areas could conceivably be used to grow food or used for wildlife habitat, growing dedicated energy crops instead, is unlikely to have a discernable adverse impact on food markets or the environment for several reasons. First, dedicated energy crops are relatively well suited for cultivation on marginal crop and pasturelands, which, by definition, do not significantly contribute to food production. Second, recent trends in grain supplies suggest that they are not being driven primarily by biomass feedstock production. Third, U.S. food prices are only marginally impacted by changes in grain prices when they do occur. Fourth, BCAP may motivate a shift away from fossil fuels, as well as from corn-based ethanol as a means by which to satisfy the standards referenced above that will favorably impact environmental quality. Fifth, it is true that some marginal land that could otherwise be enrolled in CRP may be enrolled in BCAP instead. However, research has shown actively managed dedicated energy crops also confer significant wildlife benefits. Further, the conservation, forest, or equivalent plans required for BCAP-eligible land will serve to mitigate any adverse impacts from dedicated energy crop production. Each project will be reviewed individually to provide maximum consideration of the costs and effects, including environmental effects, of the project. No change to the rule was made in response to this comment.

*Comment:* BCAP may cause shortages of seed stock necessary to establish dedicated energy crops.

*Response:* Under CRP, early enrollments created a demand for vegetative and tree covers that exceeded the available supply. Then, the seed trade mobilized to develop, market, and sell seed to meet the demand. We expect a similar response under BCAP.

*Comment:* There is a difficult, expensive time-lag associated with establishing and harvesting dedicated energy crops.

*Response:* Yes, there will be a period of time before eligible crops can be harvested according to a conservation plan, forest stewardship plan, or equivalent plan. That is why there are annual payments. However, fundamentally, establishing a renewable energy crop is as much subject to conditions beyond farmers' control as establishing any other vegetative or tree cover; the risks of growing crops are not unique to BCAP.

*Comment:* Will matching payments be available to producers with land enrolled under a BCAP contract at time of harvest?

*Response:* As provided in this rule, matching payments are available for eligible materials harvested from land enrolled under a BCAP contract after the materials have been delivered to the biomass conversion facility. There will be a reduction to the annual payment based on a percentage (1 percent to 100 percent) of the matching payment and sale price received, as specified in this rule. In no case will the reduction be greater than the annual payment.

#### *Project Area Submission Requirements (§ 1450.201)*

*Comment:* We oppose the sufficient equity requirement for project areas. Provide more clarification about it.

*Response:* The 2008 Farm Bill states that sufficient equity must be demonstrated by a biomass conversion facility that is not operational at the time the project area proposal is submitted, so this rule includes the provision. Demonstration of sufficient equity can be included in the project area proposal as part of the business feasibility description, which may include items such as an outline of efforts made toward securing financing, facility specifications, or projected operating costs. For further clarification on specific cases, please contact your FSA county office.

*Comment:* An FSA representative should be available to provide support for groups intending to sponsor a project area because the proposed language is unclear and would be difficult to consistently implement.

*Response:* The commenters did not provide detailed information describing how the proposed rule was unclear. FSA county office employees will be available to assist project sponsors in developing proposals.

*Comment:* Include the production of eligible material as selection criteria for project areas.

*Response:* It is unclear what purpose this would serve, except to promote only establishment of eligible materials, rather than the wider group of

renewable biomass. The 2008 Farm Bill is clear that one purpose of the establishment payments part of BCAP is to promote the establishment of the wider group of renewable biomass.

*Comment:* There should be a longer plant establishment timeframe.

*Response:* CCC has extensive experience with establishing vegetative and tree covers under CRP, which we used in developing BCAP. Under CRP, as well as BCAP, CCC requires that practices be established within 3 years for longer-term practices. Under BCAP, the establishment time for annual and non-woody perennial crops is reduced because the contract duration is significantly less than CRP. In all cases, CCC takes into consideration the circumstances where cover establishment is delayed through no fault of the contract participant. No change to the rule was made in response to this comment.

*Comment:* Project sponsors should identify other potential local sources of biomass so that proposals could be evaluated in the context of local biomass availability and demand.

*Response:* We amended the regulation in § 1450.201(a)(1) to clarify that it is required.

*Comment:* Project sponsors should identify proposed feedstocks (including crop mixes) they plan to use, what land types biomass will be sourced from, and expected production.

*Response:* Under § 1450.201(a), project sponsors must provide a description of the eligible land and eligible crops with a proposed project area.

*Comment:* Only require general information about acres targeted for planting, such as general region, land history, current use and acres that will not be planted. Project area boundaries should be used to document current land use, eligible crops, and cropland and projected land use change, rather than on a more detailed producer basis.

*Response:* The 2008 Farm Bill requires a description of the eligible land and eligible crops "of each producer" that will participate in the proposed project area. However, we recognize that a project proposal cannot assume future participation. CCC will only require a generalized assessment of eligible land and eligible crops in project area proposals.

Further, project sponsors must provide sufficient information for us to determine whether the requirements of §§ 1450.201 and 1450.202 have been met. Incomplete proposals will be returned to the project sponsor, but may be resubmitted. No change to the rule was made in response to this comment.

*Comment:* Project sponsors should provide information on conservation plans, forest stewardship plans, or equivalent plans and should consult with State Forester to determine scope and scale of the plan needed.

*Response:* Project sponsors are not required to do so, but all producers who have a BCAP contract in the project area will be required to have such a plan. It is not reasonable to require project sponsors to develop such a plan for the large geographic area covered by the project area, much of which may not be under BCAP contracts. One of the criteria used to select project areas, as specified in this rule, is the impact on soil, water, and related resources.

*Comment:* Project sponsors should have a business plan and an economic feasibility study and a summary of where and how the energy will be marketed. Add a selection criterion to show that the business plan is sustainable. Project sponsors should consult with State sustainable biomass planting and harvesting guidelines.

*Response:* The purpose of BCAP is to develop a non-traditional crop base of biomass feedstocks. Project area proposals require a business feasibility description. Requiring project sponsors to submit economic feasibility studies, marketing plans and business plans does not appear necessary and could add an undue burden of cost which could discourage worthwhile participation in BCAP. No change to the rule was made in response to this comment. Producers in BCAP project areas, however, are required to have conservation plan, forest stewardship plan, or equivalent plan, and one of the criteria used to select project areas, as required by statute, is the impact on soil, water, and related resources.

*Comment:* Long-term should be defined as a 7-year minimum, to support biomass conversion facility viability.

*Response:* Defining what would be considered "long term" with a specific time would arbitrarily disadvantage some proposals that may otherwise have promising technological or feedstock viability. The viability of the conversion facilities will be reviewed on a case-by-case basis. No change to the rule was made in response to this comment.

*Comment:* Project sponsors should lead information gathering and communication with CCC.

*Response:* After approval of a project area, FSA county offices will work directly with farmers and ranchers to enter into contracts, make payments, ensure contract terms are followed, and other duties similar to the other programs that FSA provides to farmers.

No change to the rule was made in response to this comment.

*Comment:* Proposals should include protocols to be used by the facility in verification and audits of plan compliance.

*Response:* There were no detailed recommendations accompanying this suggestion; however, biomass conversion facilities that become qualified under Subpart B and producers enrolling in BCAP contract may be reviewed or audited by FSA as appropriate. No change to the rule was made in response to this comment.

*Comment:* Additional information should be provided to outline and simplify project area submission requirements. This may include information regarding acceptable project area sizes, how a proposal may "demonstrate" each submission requirement, and requiring a description of eligible land and eligible crops.

*Response:* Project area proposals will inherently be unique depending on what the project sponsor chooses to propose. Providing a template that applies to all potential issues and variability across the country will arbitrarily exclude proposals for technologies and feedstocks that could delay achieving the goals of the renewable fuel standard. No change to the rule was made in response to this comment.

*Comment:* Simplify proposal criteria to facilitate a single facility or group of facilities (with no intention of farming crop), to organize and submit a proposal, without which such groups may be unable to submit project area proposals.

*Response:* The submission requirements in this rule do not prohibit a proposal submitted by multiple facilities. There is no restriction on project area proposals by groups or for groups of facilities. FSA designed the proposal criteria to meet the requirements of the 2008 Farm Bill, for the effective implementation of BCAP, and to minimize the burden on respondents.

*Comment:* There should be a "conditional approval" status for potential BCAP project areas that meet the basic requirements for a project area, with final approval being contingent upon requirements to fund the projects, obtain contracts, and other provisions.

*Response:* FSA's intention is to approve project areas that meet the requirements of § 1450.202 and to provide additional support and guidance at the FSA county office level so that contracts can be entered into at the appropriate time. No change to the

rule was made in response to this comment.

#### *Project Area Selection Criteria (§ 1450.202)*

*Comment:* All alternative energy programs should target local ownership.

*Response:* The establishment payments and annual payments part of BCAP will target local ownership. Opportunity for local investors to participate in ownership of the biomass conversion facility will be considered in evaluating project area proposals. No change to the rule was made in response to this comment.

*Comment:* The selection criteria regarding the "variety of biomass production approaches within a project area" may negatively impact biomass conversion facilities using a single eligible crop for conversion to bioenergy.

*Response:* The 2008 Farm Bill specifies this criteria; it requires consideration of proposals using this criteria, in addition to the other criteria. A project area proposal that is strong on the other criteria, but only proposes a single eligible crop should not be negatively impacted.

*Comment:* Clarify the weighting and evaluating of the project area selection criteria.

*Response:* The 2008 Farm Bill specifies the criteria that will be used to select project proposals. CCC will evaluate the proposals in coordination with technical experts based on relevant technical standards. The weighting of the factors will vary over time as BCAP matures. No change to the rule was made in response to this comment.

*Comment:* Clarify how the definition of a BCAP project area is related to the project area selection criteria and specifically what distance is considered "economically viable."

*Response:* Delineating the project area is one of the project area submission requirements under § 1450.202. A geographic delineation outlines the eligible area for enrollment in a BCAP contract and provides the basis for performance reporting, monitoring, and evaluation. The distance for "economic viability" will vary depending on local conditions. Absent geography, the distance is generally set by transportation costs to move eligible material from the farm to the biomass conversion facilities. This distance may also vary over time depending on the relative costs of transportation. Also, natural formations such as rivers, lakes, and mountains also serve as geographic barriers. There is no specific distance that will automatically be considered to represent the limit for economically

viable. No change to the rule was made in response to this comment. The project sponsor will propose what will be economically viable based on their geographic location, their proposal, and the eligible crops.

*Comment:* Consider the following environmental impacts as project area selection criteria: positive and negative indirect impacts such as land-use change and landscape fragmentation, long-term impacts on natural resources such as water, carbon, and wildlife, agronomic considerations such as genetic diversity of crops, sustainability of annual versus perennial crops, and whether or not the crops are native or are ecologically appropriate to the project area.

*Response:* The purpose of BCAP is to promote the cultivation of annual and perennial crops that are not primarily grown for food or animal feed. The proposed rule and the final PEIS listed the minimum selection criteria developed for participation in the BCAP project area. The selection criteria seek to address: (1) The amount of feedstock available from multiple sources and grown through multiple techniques to supply a biomass conversion facility; (2) the potential economic impact within the project area; (3) the potential for local investment in the biomass conversion facility; and (4) participation by socially disadvantaged producers. We also must assess the impact on soil, water, and related resources. We may also take into account other selection criteria, as appropriate. Additional selection criteria may be developed, if necessary, at the national level or on a region-by-region basis, depending on the need and flexibility of specific areas to change.

The cumulative effects within each project area would be addressed through the site-specific environmental screening and resulting NEPA analysis at the appropriate level (that is, categorical exclusion, environmental assessment, or environmental impact statement). The appropriate level of NEPA analysis would include an assessment of the potential effects to wildlife, including landscape or habitat fragmentation; water quality and quantity; and soil carbon. Some of the potential impacts cannot be fully assessed due to conflicting methodologies for the assessment of some areas or lack of sufficient data to make appropriate determinations, such as indirect land-use changes and life-cycle analysis of new crop types. The genetic diversity of crop types is primarily assessed through USDA's Animal and Plant Health Inspection Service on-going testing, field trials, and

NEPA analyses of new crop varieties and introduced plant species for commercial uses. Also, local State technical committees, in association with State-level agencies that regulate invasive species will have input on the plant species that would be considered invasive or noxious within each State, limiting the overall pool of potential candidate species for dedicated energy crop production. Therefore, BCAP as specified in the final rule addresses this comment. No change to the rule was made in response to this comment.

*Comment:* Target local ownership and economic benefits and benefits to socially disadvantaged and beginning farmers and ranchers as project selection criteria.

*Response:* These selection criteria are specifically included in the rule.

*Comment:* Allow BCAP project area boundaries to be modified to allow additional producers to enter into BCAP contracts after a project area has been selected.

*Response:* BCAP project area boundaries may be modified by the project sponsor post-project area approval; however, additional environmental review may be necessary if such modifications significantly deviate from the initial scope of the original approved BCAP project area.

#### *Eligible Persons and Legal Entities (§ 1450.203)*

*Comment:* Use the NOFA definition of "foreign entity."

*Response:* The 2008 Farm Bill does not preclude participation in BCAP by foreign entities. Accordingly, foreign entities may participate in BCAP provided they are otherwise eligible. No change to the rule was made in response to this comment.

*Comment:* Clarify the terms "eligible persons" and "legal entities."

*Response:* The terms "person" and "legal entity" are defined in 7 CFR part 1400. For ease of administration and consistency with other CCC programs, a reference to the definitions found at 7 CFR part 1400 was added to this rule in the Definitions section.

#### *Eligible Land (§ 1450.204)*

*Comments:* Is native sod ever eligible land?

*Response:* CCC has offered greater clarification in this rule to identify native sod as ineligible land for contract acreage in project areas. "Native sod" is defined in this rule as land that has never been tilled for the production of an annual crop as of June 18, 2008, which was the date of enactment of the 2008 Farm Bill. This definition of native sod may affect large portions of

rangelands that have never been tilled and on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing. This rule corrects the date for native sod from the effective date of this rule to the date of the enactment of the 2008 Farm Bill.

*Comments:* Consider land not in agricultural production to be eligible land.

*Response:* For BCAP, the 2008 Farm Bill specifies that nonindustrial private forests and agricultural lands are considered to be eligible lands for establishment payments and annual payments. Agricultural lands include cropland, grassland, pastureland, rangeland, hayland, and other land on which food, fiber, or other agricultural products are produced or capable of being produced. "Or capable of being produced" would include lands not in current agricultural production, so long as they are not native sod. However, these lands must meet the environmental review requirements and, as a condition of enrollment, must comply with conservation plans, forest stewardship plans, or equivalent plans. No change to the rule was made in response to this comment.

*Comments:* There should be a "crop history requirement" for eligible land.

*Response:* A crop history requirement is an eligibility requirement for CRP; the 2008 Farm Bill included no such crop history requirement for BCAP. FSA will track information of the land use for BCAP contracts.

*Comments:* Only marginal cropland should be considered as eligible land.

*Response:* The 2008 Farm Bill included a definition of "eligible land" that includes agricultural land and nonindustrial private forest land. Targeting only marginal land is contrary to the purpose of BCAP, which includes promoting diversification of dedicated energy feedstock. One of the purposes of BCAP is to encourage the production of bioenergy crops on otherwise marginal land that is poorly suited to other agricultural uses. No change to the rule was made in response to this comment.

*Comments:* Nonindustrial private forest land should not be eligible land due to concerns over converting native forests and savannahs to commercial-production plantations.

*Response:* BCAP will not incentivize the conversion of old growth, other natural forests, or savannahs to biomass plantings. The majority of old growth forest that exists in the United States is located on Federal land, managed predominantly as part of the National Forest System and by the Bureau of Land Management. The laws,

regulations, and procedures that govern the management of these lands preclude the liquidation of old growth as well as the establishment of non-native forests. While the same laws and other restrictions do not generally apply to privately held land, the BCAP regulation provides that provisions of the Healthy Forests Restoration Act (16 U.S.C. 6512), must be followed on private land in order for material harvested from that land to qualify for a BCAP matching payment. Therefore, BCAP does not provide an incentive to harvest old growth forest for conversion to energy. Further, under the BCAP regulation, only woody biomass outside contract acreage that is removed as a preventative treatment to address fire danger, insect or disease outbreaks, or ecosystem health, and has no other higher-value purpose, is eligible for matching payments. In addition to legal restriction, analysis of forest product markets show that prices of saw logs and other timber is significantly higher than wood for energy, even with matching payments up to \$45 per dry ton. Little economic reason exists to convert a forest producing hard or softwood timber to an energy plantation. This assessment by forestry experts agrees with the BCAP PEIS analysis that shows that land conversion driven by BCAP would happen primarily on marginal cropland and pastureland. Also, the 2008 Farm Bill does not authorize the conversion of savannahs to commercial production plantations for purposes of BCAP; native sod is explicitly excluded from eligibility for BCAP project areas.

*Comments:* Land enrolled in CRP should be eligible to enroll in BCAP once the CRP contract has expired and the land meets all other eligible land requirements.

*Response:* Under CRP, when a contract nears expiration, CCC notifies the CRP participant of the pending expiration and that the land may be eligible to be re-enrolled in CRP or enrolled under the Direct and Counter-Cyclical Program. CCC will add BCAP as a potential use for the land, too. No change was required to the rule to implement this comment.

*Comments:* Abandoned and reclaimed mine land should be considered as eligible land for establishment payments and annual payments.

*Response:* The 2008 Farm Bill does not exclude abandoned or reclaimed mine land from contract acreage under a project area, so it could be eligible land under this rule. However, the land must meet all the contractual obligations, including environmental screening and planning. Establishment

payments cannot be used for the cleanup of contamination and related remediation that are not a part of the BCAP conservation plan, forest stewardship plan, or equivalent plan. No change to the rule was made in response to this comment.

*Comments:* Clarify the eligibility of non-Federal lands including whether State and other local-government lands are eligible land.

*Response:* The 2008 Farm Bill does not allow for Federal- or State-owned lands to be eligible land for contract acreage within project areas. Local governments are considered a subdivision of the State, and therefore local government-owned land is ineligible for enrollment as BCAP contract acreage.

#### *Duration of Contracts (§ 1450.205)*

*Comment:* BCAP contracts should be renewable.

*Response:* The 2008 Farm Bill does not provide authority to renew contracts after 2012. No change to the rule was made in response to this comment.

*Comment:* BCAP contracts should use a delayed effective date in order to accommodate the time it may take for eligible crops to become established.

*Response:* Because BCAP is designed to promote the cultivation of unconventional biomass crops where a market to purchase those crops does not yet exist, or is at its earliest stages of development, providing a delay in BCAP contracts until the non-conventional crops become established would result in little incentive for landowners to switch from known, revenue-generating conventional crops; this lead time is also necessary so that the required base of non-conventional crops is established to coincide with the operations of biomass conversion facilities. For more than a quarter of a century, CCC has managed long-term contracts for CRP; the annual income of CRP contracts provides a distinct, but equitable incentive to conventional crop revenues so as to recognize an important value of land unrecognized by the conventional crop marketplace. By delaying the annual income of the BCAP contract, it is unlikely the non-conventional BCAP crop would be established. This comment was not adopted.

*Comments:* Duration of contract should consider geographic and environmental factors.

*Response:* The duration of contracts is limited by the 2008 Farm Bill to no more than 5 years for herbaceous crops and no more than 15 years for woody crops. No change to the rule was made in response to this comment.

*Comments:* Non-woody perennial crops should have contract durations between 7 to 10 years.

*Response:* The contract duration for non-woody perennial crops is specified as up to 5 years in the 2008 Farm Bill. No change to the rule was made in response to this comment.

#### *Obligations of Participant (§ 1450.206)*

*Comments:* Producers should not be required to implement a conservation plan, forest stewardship plan, or equivalent plan on all contract acreage regardless of the number of acres enrolled or the amount of eligible crops produced by the producer(s).

*Response:* The 2008 Farm Bill requires that any eligible land within the project area that is enrolled under the contract must include a conservation plan, forest stewardship plan, or equivalent plan. We do not have discretion to remove this requirement. In addition, eligible land within a proposed project area will be included in the environmental screening and must comply with the prescribed environmental requirements. No change to the rule was made in response to this comment.

*Comments:* While we generally support the requirements for producers to make information available to CCC or institutions of higher education concerning the production of eligible crops and the development of biomass conversion technology, we are concerned about the release of proprietary information.

*Response:* The 2008 Farm Bill requires that BCAP contracts include terms that require participants to make available information to the Secretary, to institutions of higher education, or any other entity designated by the Secretary, such information as the Secretary considers to be appropriate to promote the production of eligible crops and the development of biomass conversion technology. CCC will comply with all applicable transparency and privacy laws, regulations, or Executive Orders, for example, the Freedom of Information Act. No change to the rule was made in response to this comment.

#### *Conservation Plan, Forest Stewardship Plan, or Equivalent Plan (§ 1450.207)*

*Comments:* There were many comments suggesting alternatives and additions to the requirements for conservation plans and forest stewardship plans. Commenters made a number of related recommendations including:

- Do not require anything beyond what may be required for an annual crop such as wheat or corn;

- Following sustainable biomass establishment and harvesting guidelines including harvesting strategies that allow for the producer to determine the exact area for harvest each year as a part of the conservation plan, forest stewardship plan, or equivalent plan;

- Expedite the approval of plans for the first fiscal year;

- Make plan requirements voluntary;

- Make plan requirements consistent;

- Propose third-party verification, re-establishment of grasses or trees post-harvest, harvest timing, residual height, crop diversity, greenhouse gas life-cycle assessments, standard soil erosion rates, and considerations for threatened and endangered species, pollinators, nesting birds, buffers, and pests;

- Use the State of Minnesota standards, the Forest Stewardship Council standards, and standards sets by the respective State, and National standards;

- Use the NRCS Soil Conditioning Index to evaluate the impacts to soil resources; and

- Consider the costs of conservation plan, forest stewardship plan, or equivalent plans, specifically in relation to the size of the tract of land.

*Response:* CCC will use technical assistance providers such as NRCS and State Foresters to provide assistance with conservation plan, forest stewardship plan, and equivalent plans. Non-government private providers of technical assistance may also be used. These technical assistance providers will use the most appropriate data and standards for harvesting to conduct the planning for contract acreage within the context of the applicable geography.

Implementing conservation plans, forest stewardship plans, or equivalent plans for all land involved in BCAP is a critical factor in conserving natural resources, regardless of the size of particular tracts of land.

The BCAP regulations provide general requirements, including the requirements for the plans. The required plans will be site specific plans and will vary based on the specific location and eligible crops. Specific standards suggested by the commenters may make sense in a specific location, but may not fit for another location. For example, requiring particular harvesting practices may not be suitable for all eligible land. Therefore, we will work with technical assistance providers to ensure that applicable BCAP practices are applied on a case-by-case basis for contract acreage in the project areas. The determination regarding harvesting will

be executed in compliance with environmental review and planning. No change to the rule was made in response to this comment.

*Comments:* There may be impacts to threatened and endangered species if potentially noxious and invasive species are considered as eligible crops.

*Response:* No species that is noxious or invasive in that State will be considered as an eligible crop. No change to the rule was made in response to this comment.

*Comments:* Do not waive the requirement for a conservation plan if the conservation district declines to review or approve a conservation plan.

*Response:* CCC will not waive the requirement for a conservation plan, forest stewardship plan, or equivalent plan. However, in the case where the conservation district declines to review or approve a conservation plan, then CCC retains the authority to waive the requirement for conservation district review—this does not waive the requirement for the plan. If a conservation district declines to review a conservation plan, farmers and ranchers should not be harmed by precluding enrollment. No change to the rule was made in response to this comment.

*Comments:* Do not use local soil and water conservation districts; such districts are not funded for work on BCAP.

*Response:* FSA has a long and valued partnership with the conservation districts for implementation of CRP, and expects BCAP to be one of many continued partnership opportunities. No change to the rule was made in response to this comment.

*Comments:* Consider the following to be “equivalent plans:” the American Tree Farm Program, the Sustainable Forestry Plan, plans created by foresters or third-party forester licensed by the State, and the State Best Management Practices Program.

*Response:* CCC works with the U.S. Forest Service and State Foresters to ensure that equivalent plans meet the criteria outlined in this rule and with applicable State law. The determination of the applicability of certain plan types for BCAP will be made at a local level. No change to the rule was required in response to this comment.

#### *Eligible Practices (§ 1450.208)*

*Comments:* Provide examples of the eligible practices for annual crops, non-woody perennial crops, and woody perennial crops.

*Response:* Eligible practices will be developed in consultation with the U.S. Forest Service and the Natural

Resources Conservation Service. Actual practice standards may vary by region due to climatic conditions, moisture, elevation, and other technical considerations. No change to the rule was made in response to this comment. For more information on appropriate practices for a particular crop in a particular area, please contact your FSA county office.

*Comments:* Land rental payments, equipment purchases, general maintenance, chemical inputs, weed and pest control, and inter-planting costs should be considered reimbursable under eligible practices.

*Response:* Rental payments and equipment will not be reimbursable. Some of the other items may be reimbursable, depending on the specific practice. CCC and FSA will draw on our long experience with establishing practices under CRP, the Emergency Conservation Program, and other programs to determine eligible costs and the reimbursement rate for these costs. Generally, the practice standards for those programs provide funding to establish a practice, which in some cases may include the suggested items. BCAP does not include funding for land rental payments as such, but the BCAP annual payments provide a similar support. Equipment purchases are not authorized by the 2008 Farm Bill. Generally, weed and pest control, chemical inputs, and inter-planting costs are authorized under the contract. In summary, many of the suggested items could be funded if appropriate as part of a particular establishment practice. No change to the rule was made in response to this comment.

*Comments:* Conversion of existing covers including non-native vegetative cover to eligible crops should be considered eligible for enrollment.

*Response:* Where suited for the area, this would be consistent with BCAP purposes. In general, that would be an acceptable practice so long as all other eligibility requirements are met.

*Comments:* Algae production should specifically be included as a non-woody perennial eligible practice.

*Response:* Because algae does not have to be established on an annual basis or shorter time period, CCC anticipates treating it as a perennial crop. However, because this is an emerging crop, CCC will make this determination based on project proposals and technical practices as they become available. No change to the rule was made in response to this comment.

### *Acceptability of Offers (§ 1450.210)*

*Comments:* CCC should use the environmental benefits index (EBI) tool under CRP to score BCAP contract offers and to favor marginally-productive land.

*Response:* This is unworkable for BCAP. CRP enrolls land through two ways: a competitive or “general” sign-up and a non-competitive or “continuous” sign-up. BCAP is analogous to CRP continuous sign-up, where all eligible offers will be accepted, rather than the competitive “general” sign-up. Under CRP general sign-up, offers for CRP are ranked according to an EBI. FSA collects data for a number of factors based on the relative environmental benefits for the land offered. EBI rankings are unique for each piece of ground offered into CRP. Each offer is assigned a point score based on its relative environmental factors and competes with all other offers. Offer acceptability is determined based on the ranking results. Under CRP continuous sign-up, FSA accepts all offers of certain high priority practices including grass waterways, riparian buffers, and filter strips. CCC will accept land to be enrolled under BCAP under a similar “continuous” approach that provides flexibility for farmers and ranchers and biomass conversion facilities to manage their respective operations. No change to the rule was made in response to this comment.

### *BCAP Contract (§ 1450.211)*

*Comments:* Producers should retain the right to determine what section of land to harvest each year.

*Response:* Contract participants will work closely with technical service providers to develop a conservation plan, forest stewardship plan, or equivalent plan that will include harvesting provisions. Producers will have the right to determine which section of land to harvest, as long as that is compliant with the plan. No change to the rule was made in response to this comment.

*Comments:* Producers should be afforded maximum establishment payments, but not be required to harvest all eligible crops for BCAP purposes. Clarify the annual payment reductions when eligible crops are not harvested or not harvested for BCAP purposes within the contract period.

*Response:* For BCAP, the 2008 Farm Bill sets the maximum establishment payment rate at 75 percent of the costs of establishing an eligible perennial crop. With respect to annual payment reductions, one of BCAP’s purposes is to support the production of eligible crops for conversion to energy. However, the

2008 Farm Bill also provides for instances where an eligible crop may be used for other purposes. As specified in the rule, annual payments will be reduced by a percentage of the sale price and matching payments received if an eligible crop is converted to heat, power, biobased products, or advanced biofuels. Payments will be reduced on a dollar-for-dollar basis if an eligible crop is used for a purpose other than conversion to heat, power, biobased products. No change to the rule was made in response to this comment.

*Comments:* The use of eligible crops should be contractually restricted to producing bioenergy.

*Response:* BCAP was designed to provide incentives to farmers and forest landowners to establish a non-traditional biomass crop base that can be used for heat, power, biobased products, and biofuels. No change was made to the rule in response to this comment.

*Comment:* The BCAP contract should include a mutually-agreeable withdrawal clause that allows producers to terminate their BCAP contract early.

*Response:* The BCAP contract will include a provision for contract termination before the scheduled expiration of the contract if the participant(s) under the BCAP contract fully refunds CCC for all payments plus interest from date of disbursement and liquidated damages equal to 25 percent of one year’s annual payment to reflect the administrative costs associated with a termination and to reflect that the termination may, even with a full refund, undermine the accomplishment of the goals of BCAP in a way that may otherwise be difficult to convert to dollars and cents. This is similar to CCC’s CRP contract. No change to the rule was made in response to this comment, but the provision for contract termination will be in the contract.

### *Establishment Payments (§ 1450.212)*

*Comment:* The subsidy process for establishment should be expedited since it can take up to 3 years to achieve a marketable feedstock.

*Response:* CCC will expedite establishment payments for contract acreage, following compliance with establishment of BCAP practice standards and related conservation plans, forest stewardship plans, or equivalent plans.

*Comments:* Previously established crops and annual crops should be eligible for establishment payments.

*Response:* The 2008 Farm Bill does not provide for making establishment payments for pre-existing eligible crops

or for annual crops. Accordingly, this comment was not adopted.

*Comment:* Clarify whether animal waste, food waste, and yard waste will be eligible for establishment payments.

*Response:* Animal waste, food waste, and yard waste are all considered renewable biomass and a crop of any of these waste materials would by definition be eligible for establishment payments. At this time, there are no technical standards for establishing these “crops” so it is not known what if any establishment costs would be eligible for an establishment payment.

### *Levels and Rates for Establishment Payments (§ 1450.213)*

*Comments:* Under what circumstances would a producer receive less than 75 percent of the establishment costs?

*Response:* Establishment payments may be less than 75 percent of the producer’s costs when, for example, an unapproved component was used or the producer’s actual costs were greater than average costs. CCC will establish market-based rates for standard components of practices such as land preparation, seed, and chemicals. No change to the rule was made in response to this comment.

*Comments:* CCC should provide higher establishment payments for native grasses and forbs.

*Response:* Establishment payment is limited to 75 percent by the 2008 Farm Bill. There may be annual payment incentives for certain practices.

*Comments:* There should be per acre limitations for establishment payments.

*Response:* CCC intends to adopt its long-standing practice that has been used for CRP to apply market-based limits to individual practices, seed varieties, and other components. This approach ensures that establishment costs meet the needs of BCAP and are not excessive. No change to the rule was made in response to this comment, but BCAP will implement such limitations.

### *Annual Payments (§ 1450.214)*

*Comments:* Annual payments based on soil rental rates will create competition between BCAP and CRP.

*Response:* CRP and BCAP are more directly competing with other land uses than with each other. BCAP and CRP must compete in the open market with other land uses including production of food and feed. The CRP’s soil rental rates are intended to be market-based rates for a particular area of land that is offered. CRP and BCAP both provide for making incentive payments to meet targeted goals. No change to the rule was made in response to this comment.

*Comments:* Annual payments based on CRP's soil rental rates, as proposed, are insufficient.

*Response:* Where appropriate, CCC will authorize the use of incentive payments to offset the uncertainty associated with adding production of renewable biomass to a farming operation. CCC's intent is to authorize incentive payments only as proposed in a particular project area and only after the project area proposal includes sufficient analysis to justify authorizing the additional expense. No change to the rule was made in response to this comment, but we believe that the rule already addresses this comment.

*Comments:* Annual payments should be based on the remaining costs of establishment and maintenance amortized over the life of the contract.

*Response:* Not all eligible crops for annual payments will also be eligible for establishment payments. Only perennial crops can receive establishment payments, and existing "early adopter" biomass crops cannot receive establishment payments. As a result, implementing payments with an amortized methodology would not meet BCAP purposes, unfairly advantage certain crops, and add considerable administrative burden. Accordingly, this suggestion was not adopted.

*Comments:* There should be a uniform annual payment rate across the Nation.

*Response:* This would only work well if in all markets the national rate was similar to the otherwise applicable market rate. Where there are lands with market rates above the national rate, BCAP could not compete with other purposes and there would be little renewable biomass crops produced. Accordingly, this comment was not adopted.

*Comments:* Annual payments should end after the first harvest.

*Response:* Contract termination after first harvest would not provide sufficient market certainty or incentivize long-term energy feedstock supply in a nascent bioenergy market. Therefore, this comment was not adopted. This alternative is, however, analyzed in the cost benefit analysis for this final rule. Also, some crops will take the entire period of the contract to be ready for a single harvest, so in those cases, the annual payments effectively end after the first harvest.

*Comments:* Annual payments should be dependent on geographic and environmental factors.

*Response:* There may be such a relationship between the payments and other factors to the extent that other factors affect local market conditions given that the soil rental rates may be

based on local market conditions. No change to the rule was made in response to this comment.

*Comments:* Annual payments should be tiered based on the type and variety of crops established.

*Response:* BCAP will contribute to the local crop mix by providing opportunities for a nonconventional biomass crop base along with existing conventional crops. Also, using the CRP soil rental rates will ensure market-based rental rates. However, a project sponsor may propose using incentive payments with appropriate justification. No change to the rule was made in response to this comment.

*Comments:* Annual payments for nonindustrial private forest land should be equal to the tax value of the land.

*Response:* The tax value could approximate the purchase value (or significant percentage) of the land, which would be inconsistent with an annual payment based on the annual rental value of the land. Accordingly, this comment was not adopted.

*Comments:* Offer incentives on annual payments to encourage certain crops, management activities, and locations. Offer incentives for the level of conservation practices established, crops that would receive higher carbon credits, mixtures of native perennials, leaving environmentally sensitive areas unharvested, and implementing practices that improve forest ecosystem health.

*Response:* CCC will authorize an incentive for annual payments for certain contract acreage when appropriate and justified to meet enrollment and feedstock production costs on a project area basis. No change to the rule was made in response to this comment, but we believe that the final rule does address this comment.

*Comments:* Reduce annual payments if any use occurs on contract acreage during the primary nesting season.

*Response:* All BCAP participants will be required to adopt a conservation plan, forest stewardship plan, or equivalent plan as a condition of enrollment. Use restrictions during primary nesting season may be addressed in the plan, and failure to comply with such plan will result in a contract violation, which will reduce annual payments. No change to the rule was made in response to this comment.

*Comments:* Do not reduce annual payments beyond a certain level (suggestions ranged from 20 percent to 100 percent).

*Response:* CCC has further clarified the terms of reduction in this final rule. Reductions will be made when biomass is harvested or collected from contract

acreage. Biomass that is converted to heat, power, biobased products, or advanced biofuels at a biomass conversion facility will receive a payment reduction of 10 to 25 percent. If the biomass is used for another purpose the payment reduction will be based on a dollar-for-dollar reduction from the annual payment. In no case, except contract violation, in which case liquidated damages may apply, will the reduction be greater than dollar for dollar.

*Comment:* Commenters suggested that annual payments should not be reduced in the cases when: (1) Eligible crops are delivered to an intermediate biomass conversion facility that delivers the processed biomass to a project area biomass conversion facility or (2) eligible crops are harvested for seeds.

*Response:* Reduction of annual payments will occur when renewable biomass is harvested and collected from contract acreage and then sold and delivered to any biomass conversion facility. Annual payments will be reduced by a percentage of the total of the sale price and matching payments based on the use of the eligible crop, including harvest for seed. It is permissible, and would not be a violation of the BCAP contract, to harvest eligible crops for uses other than conversion to heat, power, advanced biofuels, or biobased products; however, producers who do so will forfeit payments as a result. This provision will adequately address the issue raised in the comment.

#### **Substantive Changes and Corrections in This Final Rule as Versus the Proposed Rule**

This section lists the substantive changes made in this final rule to the regulatory language in response to comments on the proposed rule. The list also includes technical corrections that will have little or no impact on program implementation.

Throughout all three subparts, this rule clarifies the requirement for conservation plans to include forest stewardship plans or equivalent plans, as specified in the 2008 Farm Bill.

Substantive changes and technical corrections in subpart A for common provisions include:

- Adding a definition for "biofuel" to clarify the distinction between "biofuels" and "advanced biofuels." The distinction is that biofuels include corn ethanol.
- Correcting the definition of "biomass conversion facility" by removing "eligible material" and inserting "renewable biomass." This clarifies that qualified biomass



conversion facilities may accept for processing renewable biomass that is not eligible material for BCAP matching payments.

- Amending the definition of “conservation plan” to remove general conservation provisions that are relevant to conservation plans developed for other FSA and CCC programs such as CRP and to add instead specific references to BCAP eligible crops and eligible material.

- Adding a definition of “legal entity” that references the definition in 7 CFR part 1400 used for other FSA and CCC programs.

- Correcting the date applicable to the definition of “native sod” from the date of publication of the final rule in the **Federal Register** to the date of enactment of the 2008 Farm Bill, which was June 18, 2008.

- Correcting the definition of “nonindustrial private forest land,” by replacing a reference to an applicable US Forest Service regulation that defines that term to the authorizing legislation for that definition, which is the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103(a), as amended).

- Adding a definition of “person” that references the definition in 7 CFR part 1400 used for other FSA and CCC programs.

- Removing the definition of “related-party transaction” because this rule also removes all the provisions using that term.

- Clarifying the definition of “renewable biomass” by removing the phrase “that would not otherwise be used for higher-value products” from the parenthetical remark describing vegetative waste as “(including wood waste and wood residues that would not otherwise be used for higher-value products).” The higher-value product limitation on matching payments applies to all woody biomass, not just waste and residues. In addition, it is a regulatory requirement and was incorrectly included in the definition. Also, this rule clarifies that payment is not authorized for otherwise eligible material that must be separated from higher-value products after delivery to a biomass conversion facility.

- Correcting the definition of socially-disadvantaged farmer or rancher to conform to section 2501(e) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(e)).

- Removing the definition of “United States” because no such definition is required in the BCAP regulations,

- In § 1450.3, “General,” in the paragraph on the objectives of BCAP, adding a reference to the establishment

of crops for conversion to biobased products.

Substantive changes in subpart B for matching payments include:

- Adding a new § 1451.100 to provide a general description of subpart B.

- Amending § 1450.101(a)(2)(ii) to clarify that a qualified biomass conversion facility must retain all records for a period of 3 years after delivery of the eligible material (rather than 3 years after the application).

- Amending § 1450.101(a)(2)(vii) to remove provisions related to vegetative waste and historical baselines, and to add a new provision requiring that the biomass conversion facility pay fair market value for the eligible material regardless of whether the seller has applied for or will receive a BCAP matching payment.

- Adding a new § 1450.101(a)(2)(viii) to require a certification that eligible material will be converted into heat, power, biobased products, or advanced biofuels.

- Removing the reference to “related-party transaction” in § 1450.102.

- Revising § 1450.103, “Eligible Material,” to remove references to black liquor, and to clarify that the material owner must have harvested the material directly from the land in accordance with a conservation plan, forest stewardship plan, or other equivalent plan.

- Revising § 1450.103, “Eligible Material,” to remove the provisions allowing partial payment for comingled materials on non-contract land. Payment is not authorized for any otherwise eligible material that must be separated from higher-value product after delivery to a biomass conversion facility.

- Revising § 1450.103, “Eligible Material,” to clarify that in order to qualify for a matching payment, woody biomass harvested or collected from non-Federal land outside of BCAP contract acreage (acreage under an establishment payments and annual payments contract) must be by-products of preventative treatments, must not have a higher value use, and must meet the other requirements for renewable biomass obtained from Federal land.

- Amending § 1450.104 to require that letters of intent be binding.

- Revising § 1450.106, “Payments,” to provide that the 2-year payment period is for BCAP as implemented through the regulation and to address the BCAP NOFA, and that payments will be paid at a rate of \$1 for each \$1 per dry ton provided by a qualified biomass conversion facility for the market-based sale of eligible material in an amount up to \$45 per dry ton. The “fair market value” is a new requirement that

biomass conversion facilities not have a different payment rate for BCAP participants than for other biomass sellers. Options discussed in the proposed rule for tiered payment rates and for biomass production above a historical baseline are not included in this final rule.

Substantive changes in subpart C for establishment payments and annual payments include:

- Amending § 1450.201 to clarify that a project area proposal must include a description of the sources of the renewable biomass within the project area. Adding a provision to § 1450.204 that eligible land must be physically and legally capable of producing an eligible crop to be considered eligible land.

- Removing specific references to types of agricultural land in § 1450.204 because the list of the types of land included in the term “agricultural land” is specified in the definitions section.

- Removing a specific date that eligible land must not be native sod, because that date is provided in the definitions section.

- In § 1450.212, removing a reference to specific reasons that establishment payments may be authorized for practices that have previously been paid for, to give CCC more flexibility for funding replacement or restoration practices.

- In § 1450.214, adding a reference to incentive payments, to give CCC flexibility to implement such payments as needed for specific priority biomass crops.

- In § 1450.214, clarifying the amount of reduction in payment for delivery of eligible crops to a biomass conversion facility and for other uses.

#### Executive Order 12866

This rule has been determined to be economically significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The Cost Benefit Analysis is summarized below and is available from the contact information listed above.

#### Cost Benefit Analysis Summary

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

BCAP is authorized through fiscal year (FY) 2012. The limited time remaining in the 2008 Farm Bill cycle,

the specific provisions in the 2008 Farm Bill on materials and crops eligible to receive payments, and the short time window for developing and submitting project proposals associated with establishment and annual payments essentially limits the impact of BCAP to that of a transfer payment to biomass producers who deliver their materials and crops to existing biomass conversion facilities. Establishment payments and annual payments are provided for eligible crops on eligible land within project areas that satisfy selection criteria. Based on USDA and Department of Energy data on existing facilities and facilities nearing operational status, we assume that 32 project areas will be approved. All of these project areas are assumed to be associated with acreage that receives annual payments and most of these acres—those growing perennial energy

crops—will also receive support to defray establishment costs. A small amount of technical assistance will be provided to assist producers in establishing biomass crops. Matching payments are provided to assist producers with the collection, harvest, storage, and transportation costs of biomass feedstock delivered to qualifying biomass conversion facilities, which may or may not be associated with project areas. Eligible material that qualifies for payment is specified in the rule as material that is collected directly from the land, is harvested and transported solely for bioenergy and biobased products purposes, and would not otherwise be used to produce higher-value products. Further, qualified biomass conversion facilities must pay fair market value for eligible material.

BCAP will help to sustain and accelerate the development of the

renewable energy sector. In conjunction with other Federal and State government policies, BCAP will facilitate the transition to renewable energy by helping to produce and supply feedstock for the conversion to bioenergy and biobased products. In the short term, establishment, annual, and matching payments can contribute to the financial viability of BCFs, providing them greater opportunity to innovate and mature sufficiently so that they might compete with fossil fuels.

Annual and total costs for BCAP are presented in Table 1. Total outlays are \$461 million in constant (2011) dollars and \$442 million in Net Present Value (NPV) terms.<sup>1</sup> Because BCAP benefits are essentially transfer payments to BCAP producers and indirectly to BCFs, the costs to the government (outlays) equal the benefits to those producers and BCFs.

TABLE 1—BCAP COSTS AND BENEFITS BY YEAR  
[2011 \$ millions]

Fiscal Year	Establishment Cost Share	Annual Payments	Matching Payments	Technical Assistance	Annual Total
2011 .....	61	4	132	3	199
2012 .....	61	6	132	3	201
2013 .....	.....	6	—	.....	6
2014 .....	.....	5	.....	.....	5
2015 .....	.....	5	.....	.....	5
2016 .....	.....	6	.....	.....	6
2017 .....	.....	4	.....	.....	4
2018 .....	.....	4	.....	.....	4
2019 .....	.....	5	.....	.....	5
2020 .....	.....	3	.....	.....	3
2021 .....	.....	3	.....	.....	3
2022 .....	.....	5	.....	.....	5
2023 .....	.....	4	.....	.....	4
2024 .....	.....	4	.....	.....	4
2025 .....	.....	5	.....	.....	5
2026 .....	.....	3	.....	.....	3
Totals .....	122	71	264	5	461

**Note:** Due to rounding, the sum of reported figures may not equal totals.

### Regulatory Flexibility Act

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

- \$750,000 per year gross revenue for crop production (producers of eligible crops—NIACS 111);

- \$7 million per year gross revenue for post harvest crop activities (eligible material owners—NIACS 115114); and
- 4 million megawatt hours per year for other electric power generation (biomass conversion facilities—NIACS 221119).

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

We expect that approximately 5,000 producers of eligible crops and 32 biomass conversion facilities may receive establishment payments and annual payments and approximately

975 eligible material owners (that are not affiliated with a biomass conversion facility) may deliver biomass that qualifies for a matching payment and 87 biomass conversion facilities may be affected (which includes the 32, above) may receive biomass for which a matching payment was made. However, since the final rule requires that biomass conversion facilities pay producers for deliveries of eligible material based on fair market value, producers of eligible crops and materials and eligible biomass material owners are not expected to be significantly impacted. And given the scale of biomass conversion facility

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

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

#### Environmental Review

FSA prepared a Final Programmatic Environmental Impact Statement (PEIS) for BCAP and the NOFA was published in the **Federal Register** on June 25, 2010 (75 FR 36386). The Record of Decision (ROD) regarding FSA implementation of BCAP according to the provisions of the 2008 Farm Bill is being published in today's **Federal Register**. The BCAP PEIS is being completed in accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347) and FSA regulations (7 CFR part 799). The decision record summarizes the reasons for FSA selecting the proposed action alternatives based on the program's expected environmental and socioeconomic impacts and benefits as documented in the PEIS, all of which were considered in the decision.

#### Executive Order 12372

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

#### Executive Order 12988

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

#### Executive Order 13132

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

#### Executive Order 13175

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

FSA conducted two formal consultations with Tribal governments

on BCAP prior to the publication of this final rule. Both of the Tribal consultations were conducted through teleconferences. All Federally recognized Tribes were invited to the first consultation, which was held on July 21, 2010. A transcript of the teleconference call is available upon request (see **FOR FURTHER INFORMATION CONTACT** above or contact Ben Horter, USDA FSA, Federal Preservation Officer, (202) 690–1164). The Forest County Potawatomi Community requested a separate government-to-government consultation on BCAP, which was held on July 22, 2010. Each of the Tribal consultations was led by the FSA Deputy Administrator for Farm Programs with representation from the FSA Administrator's office as well as the USDA Office of Tribal Relations.

During the Tribal consultations, Tribes commented on aspects of BCAP that they support and other aspects that they oppose. The full discussion of the issues presented during the Tribal consultations and the FSA responses are included above as the issues were also raised by other commenters and each of the Tribes had submitted in written comments including the same issues during the comment period for the proposed rule.

Positions and issues presented during the Tribal consultations included:

- Support for the establishment payment and annual payment provisions of the proposed rule.
- Support for the use of soil rental rates similar to those used under CRP for determining annual payments.
- Support for the proposed rule and the definition of eligible material owner.
- Opposition to the baseline concept in the proposed rule matching payment options.
- Concern about and request for clarification on the restriction on related-party transactions.
- Suggestion that biomass conversion facilities producing wood chips and wood pellets should be eligible to become a qualified biomass conversion facility for converting renewable biomass to advanced biofuels.
- Request for confirmation that a biomass conversion facility may be an eligible material owner.
- Request for confirmation that only wood waste and wood residues could not be used for higher-value products.
- Opposition to the matching payment options that favored advanced biofuels over heat, power, and biobased products.

For the full discussion of these issues, see the comments and responses sections above for §§ 1450.101,

1450.102, 1450.103, 1450.106, 1450.200 and 1450.214.

#### Unfunded Mandates

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

#### Small Business Regulatory Enforcement Fairness Act of 1996

This rule has been determined to be Major under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA). SBREFA requires that an agency delay the effective date of a major rule for 60 days from the date of publication to allow for Congressional review. CCC finds that it is contrary to the public interest to delay the effective date of this final rule pending a 60-day Congressional review period. Because the program is tied to the agricultural production cycle, a 60-day delay risks deferring the establishment of biomass crops by an additional crop year, significantly diminishing the prospects of the public to obtain both critical information for the reauthorization of this program as well as physical feedstocks for meeting national energy goals.

The purpose of BCAP is to begin the cultivation of unconventional, non-food non-feed biomass crops for energy. The planting season for many promising herbaceous biomass feedstock crops, including switchgrass and miscanthus, begins in the early spring. Most woody biomass crops, such as hybrid poplar and willow, are established in the fall. Because of the new and voluntary nature of BCAP, producers must know well in advance the details of the final BCAP regulation in order to evaluate the risk of participating in a BCAP project area, compared with the revenue security of maintaining conventional practices. Allowing the rule to become effective immediately provides the opportunity for FSA to immediately evaluate proposals submitted by the public and for project sponsors to initiate environmental assessments that may take from 3 to 6 months to complete. If this is the case, project

areas may be approved with sufficient time for producers to establish biomass crops for the upcoming growing season.

Additionally, with the enactment of the updated Renewable Fuel Standard Program in 2008, the affordable production of next-generation advance biofuels has not yet kept pace with the revised Federal targets. The success of these next-generation fuels requires a sufficient base of next-generation crops—crops that typically requires several years to become established. Should the BCAP rule not take effect in time for the 2011 crop year, insufficient information will exist for Congress to evaluate this program during its reauthorization in 2012, further delaying any contributions BCAP can make to national Renewable Fuel Standard Program targets.

#### Federal Assistance Programs

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

#### Paperwork Reduction Act

In general, FSA will use information submitted for BCAP to determine program eligibility, qualifications for payments, and calculate the amount of payments. For the matching payments, applicants will request to become a qualified biomass conversion facility, applicants will register as an eligible material owner and then, after delivery of eligible material, provide actual delivery information to request matching payments for the collection, harvest, storage, and transportation of eligible material for use in a biomass conversion facility. For the administration of project areas, FSA will use proposal information from project sponsors to review project area criteria for the selection of BCAP project areas. After the selection of project areas, FSA will use information submitted by producers to determine eligibility, award contracts for establishment and annual production payments, and determine the need for an amount of the payments. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

In accordance with the Paperwork Reduction Act of 1995, FSA requested comments from all interested individuals and organizations on a revision of new information collection activities associated with BCAP. Several comments included issues concerning information collection. Detailed discussion of all comments and

responses are provided earlier in this document. Comments specific to the information collection requirements associated with this rule are highlighted here, and all of the comments and responses related to information collection are included in the full information collection request submitted for OMB approval.

One comment (*see* § 1450.201 comments and responses above) suggested that general information rather than producer specific information should be required as part of the information collected for project area proposals. FSA had intended to collect general information in the project area proposal under the proposed rule, but clarified the language in this rule.

One comment (*see* § 1450.100 comments and responses above) was concerned that FSA should collect information concerning the point-of-origin of eligible materials while minimizing the administrative burden of participating in the program. FSA modified the forms (BCAP–10A and BCAP–10B) to record farm and tract data for all land producing eligible materials.

One comment (*see* § 1450.201 comments and responses above) suggested that FSA provide a template project area proposal that outlines an acceptable proposal. Project area proposals will inherently be unique depending on what the project sponsor chooses to propose. It would be administratively infeasible to provide a template that applies to all potential issues and variability across the country.

BCAP will provide financial assistance for collection, harvest, storage, and transportation of eligible material nationwide. BCAP will provide financial assistance in the form of establishment payments for perennial crops and annual rental payments for perennial and annual crops in approved BCAP project areas.

Copies of all forms, regulations, and instructions referenced in this rule may be obtained from FSA. Data furnished by the applicants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

In addition to requesting comments on the information collection included in the proposed rule, FSA also had a 60-day comment period for the BCAP NOFA that was published in the **Federal Register** on June 11, 2009 (74 FR 27767–27772) to solicit public for the information collection request for

the matching payment funds available for the collection, harvest, storage, and transportation of eligible material.

The information collection required by this rule has been approved by OMB under the Paperwork Reduction Act of 1995. The approved burden hours will be incorporated into the existing approval under OMB control number 0560–0082, which includes much of the same information for other conservation programs.

#### E-Government Act Compliance

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

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

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

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

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

#### Subpart A—Common Provisions

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

#### Subpart B—Matching Payments

- 1450.100 General.
- 1450.101 Qualified biomass conversion facility.
- 1450.102 Eligible material owner.
- 1450.103 Eligible material.
- 1450.104 Signup.
- 1450.105 Obligations of participant.
- 1450.106 Payments.

#### Subpart C—Establishment Payments and Annual Payments

- 1450.200 General.
- 1450.201 Project area proposal submission requirements.
- 1450.202 Project area selection criteria.

- 1450.203 Eligible persons and legal entities.
- 1450.204 Eligible land.
- 1450.205 Duration of contracts.
- 1450.206 Obligations of participant.
- 1450.207 Conservation plan, forest stewardship plan, or equivalent plan.
- 1450.208 Eligible practices.
- 1450.209 Signup.
- 1450.210 Acceptability of offers.
- 1450.211 BCAP contract.
- 1450.212 Establishment payments.
- 1450.213 Levels and rates for establishment payments.
- 1450.214 Annual payments.
- 1450.215 Transfer of land.

Authority: 7 U.S.C. 8111.

## Subpart A—Common Provisions

### § 1450.1 Administration.

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

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the provisions in this part unless specifically authorized by the FSA Deputy Administrator for Farm Program (Deputy Administrator).

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

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

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

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

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

### § 1450.2 Definitions.

(a) The definitions in part 718 of this chapter apply to this part and all documents issued in accordance with

this part, except as otherwise provided in this section.

(b) The following definitions apply to this part:

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

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

*Animal waste* means the organic animal waste of animal operations such as confined beef or dairy, poultry, or swine operations including manure, contaminated runoff, milking house waste, dead poultry, bedding, and spilled feed. Depending on the poultry system, animal waste can also include litter, wash-flush water, and waste feed.

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

*Beginning farmer or rancher* means, as determined by CCC, a person or entity who:

(1) Has not been a farm or ranch operator or owner for more than 10 years,

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

(3) If an entity, is an entity in which at least 50 percent of the members or stockholders of the entity meet the first two requirements of this definition.

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

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

(2) An intermediate ingredient or feedstock.

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

*Biofuel* means a fuel derived from renewable biomass.

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

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

*Conservation plan* means a schedule and record of the participant's decisions and supporting information for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures for eligible crops and the collection or harvesting of eligible material, as appropriate, and addresses natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

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

*Delivery* means the point of delivery of an eligible crop or eligible material, as determined by the CCC.

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

*Dry ton* means one U.S. ton measuring 2,000 pounds. One dry ton is the amount of renewable biomass that would weigh one U.S. ton at zero percent moisture content.

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

(1) Any crop that is eligible to receive payments under Title I, "Commodity Programs," of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246) or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber; and

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

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

(1) Material that is whole grain from any crop that is eligible to receive

payments under Title I of the Food, Conservation, and Energy Act of 2008 or an amendment made by that title, including, but not limited to, barley, corn, grain sorghum, oats, rice, or wheat; honey; or material that is mohair; certain oilseeds such as canola, crambe, flaxseed, mustard seed, rapeseed, safflower seed, soybeans, sesame seed, and sunflower seeds; peanuts; pulse crops such as small chickpeas, lentils, and dry peas; dairy products; sugar; wool; and cotton boll fiber;

(2) Animal waste and by-products of animal waste including fats, oils, greases, and manure;

(3) Food waste and yard waste; and

(4) Algae.

*Eligible material owner*, for purposes of the matching payment, means a person or entity having the right to collect or harvest eligible material, who has the risk of loss in the material that is delivered to an eligible facility and who has directly or by agent delivered or intends to deliver the eligible material to a qualified biomass conversion facility, including:

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

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

*Equivalent plan* means a plan approved by a State or other State agency or government entity that is similar to and serves the same purpose as a forest stewardship plan and has similar goals, objectives, and terms. These plans generally address natural resource concerns including the sustainable harvesting of biomass, when appropriate, by addressing the site-specific needs of the landowner.

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

*Food waste* means, as determined by CCC, a material composed primarily of food items, or originating from food

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

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

(1) Soil and water;

(2) Biological diversity;

(3) Range;

(4) Aesthetic quality;

(5) Recreation;

(6) Timber;

(7) Fish and wildlife;

(8) Threatened and endangered species;

(9) Forest health;

(10) Archeological, cultural and historic sites;

(11) Wetlands;

(12) Fire; and

(13) Carbon cycle.

*Higher-value product* means an existing market product that is comprised principally of an eligible material or materials and, in some distinct local regions, as determined by the CCC, has an existing market as of October 27, 2010. Higher-value products may include, but are not limited to, products such as mulch, fiberboard, nursery media, lumber, or paper.

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

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

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

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

*Legal entity* has the same meaning as in the regulations in § 1400.3 of this chapter.

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

*Native sod* means land:

(1) On which the plant cover is composed principally of native grasses,

grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

(2) That had never been tilled for the production of an annual crop as of June 18, 2008.

*Nonindustrial private forest land* means, as defined in 16 U.S.C. 2103a (the Cooperative Forestry Assistance Act of 1978, as amended), rural lands with existing tree cover, or suitable for growing trees, where the land is owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity.

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

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

*Participant* means a person who is participating in BCAP—either as a person who has applied for and is eligible to receive payments, has a BCAP contract, or is a project sponsor.

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

*Person* has the same meaning as in the regulations in § 1400.3 of this chapter. In addition, for BCAP, the term “producer” means either an owner or operator of BCAP project acreage that is physically located in a BCAP project area, or a producer of an eligible crop produced on that acreage.

*Producer* means, with respect to subpart B of this part, a person who had the risk of loss in the production of the material that is the subject of the BCAP payment; and with respect to subpart C of this part, an owner or operator of contract acreage that is physically located within a BCAP project area or a producer of an eligible crop produced on that acreage and who has the risk of loss in the relevant crop at the relevant period of time or who will have the risk of loss in crops required to be produced.

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

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

*Qualified biomass conversion facility* means a biomass conversion facility that meets all the requirements for BCAP

qualification, and whose facility representatives enter into a BCAP agreement with CCC.

*Renewable biomass* means:

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

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

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

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

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

(i) Renewable plant material, including:

(A) Feed grains;

(B) Other agricultural commodities;

(C) Other plants and trees; or

(D) Algae;

(ii) Waste material, including:

(A) Crop residue;

(B) Other vegetative waste material (including wood waste and wood residues);

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

(D) Food waste and yard waste.

*Socially disadvantaged farmer or rancher* means, unless other classes of persons are approved by CCC in writing, a farmer or rancher who is a member of a group whose members have been subject to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Groups include:

(1) American Indians or Alaskan Natives;

(2) Asians or Asian Americans;

(3) Blacks or African Americans;

(4) Native Hawaiians or other Pacific Islanders; and

(5) Hispanics.

*Technical assistance* means assistance in determining the eligibility of land and practices for BCAP, implementing and certifying practices, ensuring

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

*Tribal government* means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to 43 U.S.C. 1601–1629h (the Alaska Native Claims Settlement Act), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

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

*Yard waste* means any renewable biomass generated from municipal or residential land, such as urban forestry materials, construction or demolition materials, trimmings from grasses and trees, or biomass removed due to invasive species or weather-related disaster, that can be separated from and has low potential (such as contamination with plastics, metals, chemicals, or other toxic compounds that cannot be removed) for the generation of toxic byproducts resulting from conversion, and that otherwise cannot be recycled for other purposes (such as post-consumer waste paper).

#### **§ 1450.3 General.**

(a) The objectives of BCAP are to:

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

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

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

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

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

#### **§ 1450.4 Violations.**

(a)(1) If a participant fails to carry out the terms and conditions of a BCAP contract, CCC may terminate the BCAP contract.

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

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

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

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

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

(a) The provisions of § 718.303 of this title relating to performance based on the action or advice of an authorized representative of USDA applies to this part, and may be considered as a basis



to provide relief to persons subject to sanctions under this part to the extent that relief is otherwise permitted by this part.

(b) [Reserved]

#### **§ 1450.6 Access to land.**

(a) For purposes related to this program, the participant must upon request provide any representative of USDA, or designee thereof, with access to land that is:

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) [Reserved]

#### **§ 1450.9 Assignments.**

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

(b) [Reserved]

#### **§ 1450.10 Appeals.**

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

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

#### **§ 1450.11 Scheme or device.**

(a) If CCC determines that a person or legal entity has employed a scheme or device to defeat the purposes of this part, or any part, of any USDA program, payment otherwise due or paid such person or legal entity during the applicable period may be required to be refunded, with interest calculated from the date of disbursement of the funds by CCC, as determined appropriate by CCC.

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

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

will be considered a scheme or device under this section.

#### **§ 1450.12 Filing of false claims.**

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

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

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

#### **§ 1450.13 Miscellaneous.**

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

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

(c) Any remedies permitted CCC under this part will be in addition to any other remedy, including, but not limited to, criminal remedies or actions for damages in favor of CCC, or the United States as may be permitted by law.

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

### **Subpart B—Matching Payments**

#### **§ 1450.100 General.**

(a) A person or legal entity with the right to collect or harvest eligible

material for the sale and delivery of such eligible material to a qualified biomass conversion facility, may be eligible for payment under the provisions of this subpart.

(b) [Reserved]

**§ 1450.101 Qualified biomass conversion facility.**

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

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

(2) Agree in writing to:

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

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

(iii) Clearly indicate the actual tonnage delivered on the scale ticket or equivalent to be provided to the eligible material owner;

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

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

(vi) Pay fair market value for eligible material regardless of whether the seller has applied for or receives a matching payment authorized by this subpart.

(b) For a qualified biomass conversion facility, CCC can:

(1) Periodically inform the public that payments may be available for deliveries of eligible material to such qualified biomass conversion facility;

(2) Maintain a listing of qualified biomass conversion facilities for general public access and distribution that may include general information about the facility and its eligible material needs; and

(3) Suspend, terminate, or take other actions as appropriate when CCC determines a qualified biomass conversion facility fails to comply with the agreement.

**§ 1450.102 Eligible material owner.**

(a) In order to be eligible for a payment under this subpart, a person or legal entity must:

(1) Be a producer of an eligible crop that is produced on contract acreage authorized by subpart C of this part; or

(2) Have the right to collect or harvest eligible material and such person may only receive payment if the risk of loss for the material transferred to that person occurred prior to the time the payment is made that will be used to determine the matching payment that is requested under this subpart; and

(3) Certify that the eligible material for which a payment may be issued according to § 1450.106 has been harvested according to a conservation plan, forest stewardship plan, or equivalent plan, and, if not crop residues, are byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health.

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

**§ 1450.103 Eligible material that qualifies for payment.**

(a) Except for paragraph (b) of this section, in order to qualify, as determined by CCC, for a payment under this subpart:

(1) Eligible material must be renewable biomass that, at a minimum, meets the definition in § 1450.2 and is listed on the official Web site for BCAP as an eligible material at <http://www.fsa.usda.gov/energy>;

(2) Eligible material must be collected or harvested by the eligible material owner:

(i) Directly from:

(A) National Forest System land, Bureau of Land Management land;

(B) Non-Federal land; or

(C) 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;

(ii) Consistent with a conservation plan, forest stewardship plan, or plan that CCC determined to be an equivalent plan, that provides the following:

(A) The purpose of the harvest of the eligible material;

(B) The expected volume of the harvest;

(C) The total number of acres to be harvested;

(D) The name of the eligible material owner(s); and

(E) Any additional information, as determined by CCC; and

(iii) Consistent with Executive Order 13112, "Invasive Species."

(3) Woody eligible material produced on land other than contract acreage must be:

(i) Byproducts of preventative treatments that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health; and

(ii) If harvested from Federal lands then done so in accordance with the requirements for old-growth maintenance, restoration, and management direction provided by 16 U.S.C. 6512 for Federal lands; and

(4) Eligible material must be delivered to a qualified biomass conversion facility (as specified in § 1450.101 and other provisions of these regulations).

(b) Notwithstanding paragraph (a) of this section, payments under this subpart are not authorized for:

(1) Any eligible material delivered before October 27, 2010;

(2) Any eligible material for which payment from a biomass conversion facility was received before the application for payment under this subpart is received and approved by the FSA county office, as specified in § 1450.104;

(3) Any woody eligible material collected or harvested outside contract acreage that would otherwise be used for higher-value products; or

(4) Any otherwise eligible material collected or harvested outside contract acreage that, after delivery to a biomass conversion facility, its campus, or its affiliated facilities, must be separated from an eligible material used for a higher-value market product in order to be used for heat, power, biobased products, or advanced biofuels.

**§ 1450.104 Signup.**

(a) Applications for participation and requests for payments under this subpart will be accepted on a continuous basis.

(b) An eligible material owner must apply to participate in the matching payments component of BCAP before payment for the eligible material is received from a qualified biomass conversion facility. The application must be submitted to the FSA county office and approved by CCC before any payment is made by the qualified biomass conversion facility for the eligible material.

(c) Applications must include the following:

(1) Based on information obtained from contracts, agreements, or binding letters of intent:

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

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

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

(iv) The expected, fair market, per dry ton payment rate the owner plans to receive for the delivery of the eligible material; and

(v) The date or dates the eligible material is expected to be delivered to the qualified biomass conversion facility.

(2) A new or amended conservation plan, forest stewardship plan, or equivalent plan, as specified in § 1450.103.

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

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

(f) Information that must be submitted to CCC in order to request payments includes settlement, summary, or other acceptable data that provide:

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

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

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

#### **§ 1450.105 Obligations of participant.**

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

(1) Carry out and certify compliance with the terms and conditions of the payment application including adherence to a conservation plan, forest stewardship plan, or equivalent plan, as appropriate; and

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

(b) [Reserved]

#### **§ 1450.106 Payments.**

(a) Payments under this subpart will be for a term not to exceed 2 years beginning the date that CCC issues the first payment, under this subpart to the participant and for each participant runs from the date that the participant receives a matching payment from CCC even though the participant may over time change facilities. The Deputy Administrator may further limit the period to reflect participation in BCAP for any time prior to October 27, 2010 as the Deputy Administrator deems appropriate. In addition, where ownership of a source of material has changed, or where it is deemed that other circumstances warrant, the Deputy Administrator may apply the time limit applicable to a person or entity or to another person or entity to assure that the 2-year limit is not avoided by private arrangement or other circumstance.

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

#### **Subpart C—Establishment Payments and Annual Payments**

##### **§ 1450.200 General.**

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

(b) [Reserved]

##### **§ 1450.201 Project area proposal submission requirements.**

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

(1) A description of the sources of renewable biomass, eligible land, and eligible crops that may be enrolled within the proposed project area;

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

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

(4) Other information that gives CCC a reasonable assurance that the biomass conversion facility will be in operation in a timely manner so that it will utilize

the eligible crops, as determined by CCC.

(b) The project area description required in paragraph (a) of this section needs to specify geographic boundaries and be described in definite terms such as acres, watershed boundaries, mapped longitude and latitude coordinates, or counties.

(c) The project area needs to be physically located near a biomass conversion facility or facilities, as determined by CCC.

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

##### **§ 1450.202 Project area selection criteria.**

(a) In selecting project areas, CCC will consider:

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

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

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

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

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

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

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

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

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

(b) [Reserved]

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

(a) In order to be eligible to enter into a BCAP contract for this subpart, a person or legal entity must be an owner, operator, or tenant of eligible land within a project area, as defined in § 1450.204 and be the person or entity with the ability to perform under the terms of the contract.

(b) [Reserved]

##### **§ 1450.204 Eligible land.**

(a) For the purposes of this subpart, eligible land must be physically and legally capable of producing an eligible crop and must be:

(1) Agricultural land; or  
 (2) Nonindustrial private forest land.  
 (b) For the purposes of this subpart, eligible land is not:

- (1) Federal- or State-owned land, including land owned by local governments or municipalities;
- (2) Land that is native sod;
- (3) Land enrolled in the Conservation Reserve Program operated under part 1410 of this chapter;
- (4) Land enrolled in the Wetlands Reserve Program operated under part 1467 of this chapter; or
- (5) Land enrolled in the Grassland Reserve Program operated under part 1415 of this chapter.

#### **§ 1450.205 Duration of contracts.**

- (a) Contracts under this subpart will be for a term of up to:
- (1) 5 years for annual and non-woody perennial crops; and
  - (2) 15 years for woody perennial crops.
- (b) The establishment time period may vary due to: Type of crop, agronomic conditions (for example, establishment time frame, winter hardiness), and other factors.

#### **§ 1450.206 Obligations of participant.**

- (a) All participants subject to a BCAP contract must:
- (1) Carry out the terms and conditions of the contract;
  - (2) Make available to CCC or to an institution of higher education or other entity designated by CCC, such information as CCC determines to be appropriate to promote the production of eligible crops and the development of renewable biomass conversion technology;
  - (3) Comply with the highly erodible land and wetland conservation requirements of part 12 of this chapter;
  - (4) Implement a:
    - (i) Conservation plan,
    - (ii) Forest stewardship plan, or
    - (iii) Equivalent plan.
  - (5) Implement the conservation plan, forest stewardship plan, or equivalent plan which is part of such contract, in accordance with the schedule of dates included in such conservation plan, forest stewardship plan, or equivalent plan, unless CCC determines that the participant cannot fully implement the conservation plan, forest stewardship plan, or equivalent plan for reasons beyond the producer's control and CCC and the participant agree to a modified plan.
  - (6) Demonstrate compliance with the conservation plan, forest stewardship plan, or equivalent plan through required self-certification subject to compliance spot checks, as determined by CCC.

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

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

(b) Payments may cease and producers may be subject to contract termination for failure to establish eligible crops.

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

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

(2) The participant establishes the approved cover as soon as practicable after the wet or drought conditions that prevented the establishment of such cover subside.

#### **§ 1450.207 Conservation plan, forest stewardship plan, or equivalent plan.**

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

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

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

(d) Each conservation plan, forest stewardship plan, or equivalent plan, and any revision of the plan, will be subject to approval by CCC.

#### **1450.208 Eligible practices.**

(a) Eligible practices are those practices specified in the conservation plan, forest stewardship plan, or equivalent plan that meet all standards needed to cost-effectively establish:

- (1) Annual crops;
- (2) Non-woody perennial crops; and
- (3) Woody perennial crops.

(b) [Reserved]

#### **§ 1450.209 Signup.**

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

(b) [Reserved]

#### **§ 1450.210 Acceptability of offers.**

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

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

#### **§ 1450.211 BCAP contract.**

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

(b) The contract is comprised of:

- (1) The terms and conditions for participation in BCAP;
  - (2) The conservation plan, forest stewardship plan, or equivalent plan; and
  - (3) Any other materials or agreements determined necessary by CCC.
- (c) In order to enter into a contract, the producer must submit an offer to participate as specified in § 1450.209;
- (d) The contract must, within the dates established by CCC, be signed by:
- (1) The producer; and
  - (2) The owners of the eligible land to be placed in the BCAP and other eligible participants, if applicable.
- (e) The Deputy Administrator is authorized to approve contracts on behalf of CCC.

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

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

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

(2) The participant voluntarily requests in writing to terminate the contract and obtains the approval of CCC according to terms and conditions as determined by CCC;

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

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

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

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

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

#### **§ 1450.212 Establishment payments.**

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

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

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

(d) Establishment payments may be authorized for the replacement or restoration of practices on land for which assistance has been previously allowed under BCAP, only if the failure of the original practice was due to reasons beyond the control of the participant, as agreed to by CCC.

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

#### **§ 1450.213 Levels and rates for establishment payments.**

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

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

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

#### **§ 1450.214 Annual payments.**

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

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

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

(2) The applicable marginal pastureland rental rate for all other land except for nonindustrial private forest land;

(3) For forest land, the average county rental rate for cropland as adjusted for forest land productivity for nonindustrial private forest land; and

(4) Any incentive payment as determined by CCC.

(c) The annual payment will be divided among the participants on a

single contract as agreed to in such contract, as determined by CCC.

(d) A participant that has an established eligible crop and is therefore not eligible for establishment payments under § 1450.212 may be eligible for annual payments under the provisions of this section.

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

(f) Annual payments will be reduced, as determined by CCC:

(1) By a percentage of the sum of the sale price and payments under subpart B of this part for the crop collected or harvested from the contract acreage as follows:

(i) By 1 percent if the eligible crop is delivered to a biomass conversion facility for conversion to cellulosic biofuels as defined by 40 CFR 80.1401;

(ii) By 10 percent if the eligible crop is delivered to a biomass conversion facility for conversion to advanced biofuels;

(iii) By 25 percent if the eligible crop is delivered to a biomass conversion facility for conversion to heat, power, or biobased products;

(iv) By 100 percent if the eligible crop is used for a purpose other than conversion to heat, power, biobased products, or advanced biofuels;

(2) If the producer violates a term of the contract; or

(3) In other circumstances deemed necessary or appropriate to carry out BCAP.

#### **§ 1450.215 Transfer of land.**

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

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

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

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

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

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

portion of such land, and the original participant:

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

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

(c) Federal agencies acquiring property, by foreclosure or otherwise, that contains BCAP contract acreage cannot be a party to the contract by succession. However, through an addendum to the contract, if the current operator of the property is one of the contract participants, the contract may remain in effect and, as permitted by

CCC, such operator may continue to receive payments under such contract if CCC determines that such allowance is in the public interest and:

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

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

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

Signed at Washington, DC, on October 19, 2010.

**Jonathan W. Coppess,**

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[FR Doc. 2010-26871 Filed 10-22-10; 11:15 am]

**BILLING CODE 3410-05-P**