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VIA E-MAIL and FEDERAL eRULEMAKING PORTAL

Director of CEPD
USDA FSA CEPD
Stop 0513
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RE: Proposed Biomass Crop Assistance Program Rule, 7 CFR Part 1450

The Natural Resources Defense Council ("NRDC") appreciates the opportunity to comment on the proposed regulations for implementing the Biomass Crop Assistance Program BCAP, P.L. 110-246, sec. 9011. NRDC is a non-profit public interest organization with over 1,200,000 members and online activists dedicated to protecting public health and the environment. NRDC has a deep interest in BCAP, and more broadly in how the United States promotes and develops biomass and other alternative energy sources. Along with energy conservation and efficiency, non-fossil-fuel energy sources must and will play an essential role in limiting the enormous threat of climate change. Done right, increasing alternative energy will not only blunt global warming, it will also reduce the collateral environmental impacts of fossil fuel extraction and help America create jobs and leadership in the shift to a green economy.

I. Introduction

BCAP was adopted, and must be implemented, to promote development of clean, efficient, environmentally-friendly alternative energy that meets very high standards. The conference committee managers made this clear by emphasizing that "the primary focus of BCAP will be promoting the cultivation of perennial bioenergy crops and annual bioenergy crops that show exceptional promise for producing highly energy-efficient bioenergy or biofuels, that preserve natural resources, and that are not primarily grown for food or animal feed." *See* Attachment A to these comments (Joint Explanatory Statement of the Committee of Conference), p. 233. This instruction sets a high bar. BCAP was enacted and needs to be implemented primarily to promote bioenergy *crops*, not other biomass sources. The crops must show *exceptional* promise as an energy source, not just good or high promise. The promised potential must be not just for energy-efficiency, but for *highly energy-efficient* bioenergy or biofuels. And program implementation must *preserve* natural resources, not merely limit damage to them.

This language reflects congressional desire to promote a very specific, carefully-circumscribed kind of biomass source. It signals that BCAP is to be a highly exclusive program, for which most kinds of biomass will not qualify. Nothing in BCAP indicates congressional hostility to other forms of biomass, and indeed other sections of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) promote other biomass sourcing or utilization. In BCAP, however, Congress directed that federal monies by spent very carefully to accelerate development of a very special kind of bioenergy.

To effectuate this specific and demanding goal, Congress vested broad discretion in the Secretary of Agriculture (Secretary), who has delegated it to the Farm Service Agency (FSA). Reminders of this discretion appear in numerous places in the statute. In picking project areas for BCAP implementation, the Secretary is to consider a list of factors, including "the impact on soil, water, and related resources … and … any additional information, as determined by the Secretary." P.L. 110-246, sec. 9011(c)(2)(B). Where the statute specifies certain protective standards that BCAP contracts must meet, it makes plain that these are only "a minimum" and that the contracts may also include "any additional requirements the Secretary considers appropriate. *Id.*, sec. 9011(c)(3)(B). The amount of crop subsidy payments "shall be determined by the Secretary." *Id.*, sec. 9011(c)(5)(C)(i). And the payments may be reduced "by an amount determined to be appropriate by the Secretary" for several enumerated reasons or "such other circumstances, as determined by the Secretary to be necessary to carry out this section." *Id.*, sec. 9011(c)(5)(C)(ii).

Less repeated but no less broad is the Secretary's discretion in implementing the "collection, harvest, storage, and transportation" (CHST) matching payments provisions of BCAP. The Secretary "*may* provide matching payments." *Id.*, sec. 9011(d)(2)(B) (emphasis added). Necessarily, he may therefore not provide such payments. Because the Secretary has discretion not to make payments, he has similar discretion not to pay for some or indeed most of the biomass in the entire universe for which the statute would allow payments. Although two other clauses in the brief CHST paragraph use the term "shall," they merely limit who can receive CHST payments, *id.*, sec. 9011(d)(1) and for what they may be made, *id.*, sec. 9011(d)(A). They therefore prohibit matching payments to anyone other than those receiving crop subsidies or those with the right to collect or harvest eligible material, and prohibit payments for anything other than collection, harvest, storage, and transportation to a qualifying biomass conversion facility. They do not, however, change the express language of the statute making discretionary the choice of whether to pay for otherwise qualifying material.

II. NEPA

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, requires that federal agencies prepare an environmental impact statement (EIS) prior to making major decisions significantly affecting the environment. 40 C.F.R. § 1502.4. In order to avoid the EIS process, agencies must be able to show affirmatively that a decision will not significantly affect the environment. *Id*. § 1508.13. Timing is essential to the NEPA process. "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." *Id.* § 1501.2. Before releasing final EISs (FEISs), they must first

prepare and circulate draft EISs (DEISs) that "fulfill and satisfy to the fullest extent possible the requirements established for final statements." *Id.* § 1502.9(a). Substantial changes to alternatives proposed in a DEIS need to be detailed in a supplemental draft. *Id.*

Under NEPA, agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed decision with potentially significant environmental consequences. 40 C.F.R. § 1502.14(a). The study of alternatives to an agency's proposed course of action is the "heart" of an EIS. 40 C.F.R. § 1502.14. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

FSA's proposed BCAP rule includes some conservation measures over and above the bare statutory minimum, including three options for structuring CHST payments. It also invites the public to suggest additional stewardship measures. These are important steps in formulating reasonable alternative approaches to administering BCAP, particularly given the criticism that the BCAP DEIS received for its lack of alternatives. However, the proposal falls far short of including all reasonable alternatives, as NEPA requires. Moreover, once alternatives are developed, they still need to be analyzed and circulated for comment in a DEIS. The BCAP DEIS from August, 2009 did not serve that function. Its only alternative to maximum, unconstrained implementation of BCAP was full implementation in five project areas. No alternatives considered how to tailor eligibility and implementation rules to reduce adverse impacts at any given scale. Worse, no alternatives at all, and no potential impacts, were studied for the CHST program (the DEIS described the proposed action as just "to establish and administer the Project Areas Program component of BCAP").

Because FSA has proposed only very limited alternatives for BCAP implementation, has not circulated an analysis of those – let alone other reasonable alternatives – in a DEIS, and has not included any CHST alternatives in a DEIS, it must produce a NEPA-compliant DEIS and consider public and sister agency comments on that draft, before it moves to an FEIS and a final rule. If FSA were to go from its current proposal to a final rule and an FEIS without correcting this problem, it would not have the necessary environmental information to make an informed decision, nor the required informed input from the public and sister agencies. Moreover, its decision would not pass legal muster. The result would be, at best, a significant waste of time while the agency went back to the NEPA drawing board and produced the needed DEIS for public review.

We strongly urge you to fix these problems now, by having the agency use public input to develop a series of reasonable alternative approaches to BCAP implementation (as specified in 40 C.F.R. § 1502.14) and then having them analyzed in a supplemental DEIS and circulated for informed comment. And, because the August, 2009 DEIS also ignored many categories of potential environmental impact, it would be important to have the effects analysis in the DEIS expanded even for the proposed action, as well as for other alternatives. Comments on the DEIS provide good input on the missing effects analyses. The remainder of these comments is devoted to discussion of reasonable implementation alternatives that should be considered in supplemental DEIS, that would promote BCAP's primary goals and have not been proposed by FSA.

III. CHST Alternatives

A. Special Considerations for CHST Payments

The CHST component of BCAP raises special considerations. First, whether by design or inadvertence, Congress referenced a definition of eligible material for CHST payments that includes material not eligible for establishment and annual crop subsidy payments. Moreover, BCAP can be read to extend CHST payments to material from outside of designated program areas. As a result, the potential exists that CHST payments would not further the articulated primary purpose of BCAP.

Moreover, CHST payments may, within the language of BCAP as drafted and subject to secretarial discretion, be extended woody biomass. Woody biomass can entail serious problems. Sourcing woody biomass can dramatically reduce sequestered carbon in several ways. Thinning or logging forests reduces carbon stores that are not recovered by regrowth for many decades if at all, even if the forest type remains unchanged. This problem is most serious if logging is not limited to small trees which contain less carbon and regrow quickly. Logging can also take the land out of forest cover, drastically reducing sequestration. Or it can result in type conversion to plantations or forests that have inherently lower carbon per acre, even when they reach maturity or rotation age.

Woody biomass sourcing also creates a set of non-carbon environmental risks not directly shared by agricultural sources. Forested land provides clean water, buffers against storms and other disturbances, wildlife habitat, and a host of other ecological services of great value to Americans. Even creating biomass demand for low grade wood competes with other forest product users, pushing their demand into forests different and perhaps distant from those where the biomass sourcing is taking place. And starting a new biomass market for logging by-products creates an induced logging effect, in which cutting that would not otherwise have been economic takes place because of the added revenue.

Another category of woody biomass that can create serious environmental concerns is thinning that is meant or purported to reduce fire hazards. Such logging in the immediate vicinity of homes and other structures is an important step towards safeguarding life and property. *See* Safe at Home (available at: http://www.nrdc.org/land/forests/safe/contents.asp[1]). However, thinning of the forest more generally can produce the opposite from the desired effect, increasing fire intensity and control difficulty, and at all events is appropriate only for limited geographic areas and forest types. *See* Testimony of Nathaniel Lawrence before the Senate Energy and Natural Resources Committee, April 1, 2008, pp. 2-6 (available at http://docs.nrdc.org/land/files/lan_08040101a.pdf). Such thinning is least likely to achieve its goals when it is not limited to small diameter trees. *See id.*, Attachment 1, p. 2 (letter of prominent forest ecologists to President George W. Bush).

[1] All references in this comment letter are available upon request from NRDC, if for some reason not readily available as indicated.

Unfortunately, in the brief paragraph of BCAP that authorizes CHST payments, virtually no guidance is provided for addressing these problems. Although the referenced definition of "eligible material" does incorporate some environmental sidebars, they are minimal and, as discussed below, inadequate. To some extent, the problems can be reduced by limiting eligible woody biomass to small diameter material, and by adopting rules that prohibit sourcing which converts forested land from one type to another, or takes it out of forest cover altogether. These preliminary measures should be applied to any implementation of CHST. In addition, rules restricting sourcing from reserve program lands, including conservation, wetland, and grassland reserves, need to apply to lands enrolled as of the date the rules are adopted (as well as those subsequently enrolled). Otherwise, the rules simply create an incentive to take lands out of the programs. This precaution should be applied to any final BCAP rule.

B. Alternative 1: End CHST Payments

CHST payments to date far exceed congressional estimates for the entire life of the 2008 Farm Bill. The Senate precursor to the CHST component was restricted to $30 million spread over three years. The Congressional Budget Office scored all of BCAP, including crop payments, at under $100 million for five years. By contrast, FSA has already spent or committed $165 million.

The federal government, unfortunately, does not have infinite resources to invest in any program. The CHST component of BCAP does not advance, or cannot be counted on to advance, the program's primary purpose. Because of the need to channel resources where they will best serve the program, and because of the special problems associated with CHST biomass sourcing, FSA should consider determining that the United States has spent more than a reasonable amount on CHST payments, and declare the program at an end.

Among other benefits, this approach would help address serious concerns about the air impacts of biomass incineration for energy or heat. Because such operations are thermally inefficient compared to biofuels – and other fuel sources – they pose air quality degradation threats. *See, e.g.,* Attachment B to these comments (American Lung Association letter to Senators Kerry, dated Nov. 16, 2009). Immediate demand for biomass from energy producers is almost all of this type. Focusing federal support on crop establishment and annual payments would create time for more efficient second generation biofuels facilities to become operational, and help avoid these impacts, in addition to advancing BCAP's primary purpose.

C. Alternative 2: Limit CHST Payments to BCAP Program Areas and Materials

One way to increase the chance that CHST payments could at least partly advance BCAP's primary purpose would be to limit their scope to the areas and types of materials supported by establishment and annual payments. Arguably that would help ensure that the capacity exists for newly established biomass crops when they come online. CHST payments would be continued only until those crops become available within the same BCAP program area. This approach would also reduce the potential for adverse environmental impacts from woody biomass sourcing.

D. Alternative 4: Apply biomass sourcing rules from EISA

The potential for environmental damage from the CHST component would be substantially lessened if FSA applied more developed sourcing rules that Congress adopted in Title II of the Energy Independence and Security Act of 2007 (EISA), P.L. 110-140. Because Congress in EISA directly considered in detail how to source woody biomass with limited threats to global climate and other environmental factors, it produced a reasonable set of sourcing rules for FSA to consider for CHST. Most relevant of these rules is EISA's definition of renewable biomass. *Id.* § 201(1)(I).

This alternative would substantially address deficiencies in BCAP's incorporation of the 2008 Farm Bill definition of renewable biomass.[2] *See* P.L. 110-246, sec. 9001(12). That definition draws from the Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6512, which is difficult to understand, interpret, or apply with confidence. This much is clear about the definition, however: the apparent limitation to "preventative treatments" is largely non-functional because so much logging of federal forests is now described in those terms, including logging that has been highly controversial for its environmental impacts. Additionally, whatever the limitation on logging of large trees means, it is intended to allow some such cutting: it restricts in complicated terms what large trees can be logged, but fails to make the simple straightforward statement that large trees shall not be cut.

FSA is proposing to require that biomass suppliers adhere to a conservation plan or forest stewardship plan in order to qualify for CHST payments. These programs, as administered by FSA may be helpful and appropriate for voluntary conservation purposes. They do not include binding safeguards, however, requiring only consideration of issues, or specification of how such issues as are identified could be addressed. They do not provide confidence that environmental problems are adequately avoided, and as such are not appropriate to qualify participants for matching payments.

E. Alternative 4: Limit stover utilization.

Currently, FSA imposes no direct limits on stover utilization. Recently, the Environmental Protection Agency (EPA) adopted rules for administering the Renewable Fuels Standard in EISA. EPA assumed that no stover would be used for renewable fuels from tilled agricultural lands, that only 35% stover removal would be allowed on partial till lands, and 50% on non-till lands. FSA should consider these or similar limits and analyze their environmental benefits in a DEIS.

F. Alternative 5: Restrict payments to deliveries to advanced biofuels facilities

FSA should consider limiting CHST matching payments to deliveries to second generation ethanol facilities. This would directly ensure that this program component helps to serve the primary goal of BCAP. Because the end use alone does not guard against collateral environmental problems, including aggravation of global climate change, this approach should

[2] However, because in EISA Congress did not look in depth at sidebars for agricultural biomass, FSA would need to consider additional safeguards for those sources, including some discussed below.

be combined with resource protections described above. That would, additionally, advance BCAP's goal of "preserv[ing] natural resources." Attachment A, p. 233.

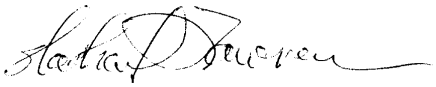
IV. Crop Subsidy Alternatives

Alternatives for the establishment and annual payments should consider the applicable measures discussed above for CHST payments. That would include a ban on including land that was in a reserve program on the date the final BCAP rule is adopted. It would also include stover removal restrictions. And it should include upgrading non-binding conservation plan requirements to ensure that they provide real protections.

V. Conclusion

Thank you for the opportunity to comment on this rulemaking. NRDC trusts that, in the interests of bringing this process to a successful and legal conclusion as expeditiously as possible, FSA will promptly produce a DEIS for BCAP that covers both the crop subsidy and CHST components of the program. A NEPA-compliant DEIS will consider the reasonable alternative approaches to exercising the discretion Congress created for the Secretary, analyze the significant environmental impacts of each alternative, and form the basis for informed input from sister agencies and the public, as FSA moves towards an FEIS and program implementation.

Respectfully submitted,



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Attachments