



April 9, 2009

Director of CEPD  
 USDA FSA CEPD  
 Stop 0513  
 1400 Independence Ave., SW  
 Washington, D.C. 20250-0513

Dear Director:

The National Association of State Foresters (NASF) is a non-profit organization comprised of the directors of all of the nation's state and territorial forestry agencies. Our members have a public trust responsibility for managing and protecting two-thirds of the nation's forestland, which is held in private or non-federal public ownership. We greatly appreciate the opportunity to provide the following comments regarding the Biomass Crop Assistance Program (BCAP) as contained in the *Federal Register* on February 8, 2010 (Vol. 75, No. 25, Page 6264).

#### **SUBPART A—COMMON PROVISIONS**

##### **§ 1450.2 Definitions**

NASF supports forest stewardship plans that are developed by a professional resource manager and *approved* by the state forester. We strongly recommend the CCC clarify that the definition for forest stewardship plans (and equivalent plans) is consistently applied in the final rule to both the Matching Payments and Establishment and Annual Payments programs.

Technical Assistance is defined in the regulations on page 6282. It is not clear how technical assistance will be delivered to private forest landowners. State forestry agencies are the primary deliverers of technical assistance to private forest landowners and should be reimbursed for any and all assistance they provide through BCAP. Reimbursement to state foresters may be addressed in other existing regulations, but if it is not, this aspect should be clarified in the regulations.

##### **§ 1450.3 General Description**

On p. 6282 of the proposed rule - § 1450.3 General Description: Part (b) it says, "*A participant must implement and adhere to a conservation plan, prepared in accordance with BCAP guidelines, as established and determined by CCC.*"

We recommend that this language is changed to add clarity and mirror language used throughout the rule. NASF believes "conservation plans, forest stewardship plans or equivalent plans" should be used wherever there are references to these plans throughout the rule. We recommend that conservation standards for forestlands be consistent with forest stewardship plans or "equivalent plans" or other standards prepared in accordance with BCAP guidelines, as established and determined by CCC. As

**Executive Director**  
 Jay Farrell

#### **2010 Executive Committee**

*President* Steven W. Koehn, Maryland  
*Vice President* Jeff Jahnke, Colorado  
*Treasurer* John Shannon, Arkansas  
*Past President* Leah W. MacSwords, Kentucky

*Northeastern Representative*  
*Western Representative*  
*Southern Representative*

Jim Barresi, New Jersey  
 Arthur "Butch" Blazer, New Mexico  
 Carl E. Garrison III, Virginia

implemented under the NOFA, the BCAP guidelines should recognize biomass collected and harvested from non-industrial private forests with a forest stewardship plan, described in section 5 of the Cooperative Forestry Assistance Act, or another practice plan approved by the State Forester. Plans such as (but not limited to) those carried out under state biomass harvesting guidelines (where they exist), forest harvest plans association with state forest harvest regulations (where they exist), the American Tree Farm Program, The Sustainable Forestry Initiative, the Forest Stewardship Council, and master logger certification programs should be considered as “equivalent” plans under both the Establishment and Annual Payments Program and the Matching Payments Program on a state by state basis. NASF notes that State Best Management Programs are typically limited to operational standards that protect water quality and do not address other aspects of site management.

## **SUBPART B—MATCHING PAYMENTS**

### **§ 1450.103 Qualified Biomass Conversion Facility**

In the same way qualified biomass conversion facilities provide information about the facility to the CCC and institutions of higher education, it would be helpful if the biomass conversion facility also provided the same information to the State Forester. While not required by the 2008 Farm Bill, information would guide the State Forester in providing assistance and other services as might be useful within the project area.

### **§ 1450.102 Eligible Material Owner**

The required provisions of a legal title “instrument” are unclear in the proposed rule. FSA needs to specify that a written contract or agreement is required between the owner and buyer(s) of the material that complies with state laws or statutes that cover the sale of forest products (including biomass).

As presently structured, an eligible material owner (EMO) must obtain written advice and consent from a qualified biomass conversion facility before delivery of materials. In part, this advice contains tentative price and volume information that is used as part of the initial FSA application process for obtaining matching payments. FSA should include safeguards in the Final Rule to help ensure that all eligible material owners have equal access for consideration by a qualified biomass conversion facility.

### **§ 1450.103 Eligible Material**

The CCC should clarify the proposed rule to explicitly indicate that in order to be eligible for a matching payment, an EMO must demonstrate compliance with the conservation or forest stewardship plan through required self certification. As laid out in the NOFA, private landowners could escape the conservation standards put into place by the State Forester if an intermediary was used to harvest eligible material. Since nearly all private forest landowners go through an intermediary to conduct a harvest, many private lands often escaped the identified conservation standards. NASF suggests that future language regarding necessary conservation standards apply to all NIPF lands; regardless of whether an intermediary harvests the material or not. It should be FSA’s responsibility to spot check compliance with the plans in consultation with the state foresters to help ensure compliance to forest-related requirements of BCAP.

NASF strongly encourages the CCC to modify its requirement for moisture testing to accommodate the industry-wide practice which generally assumes a moisture level of 45 to 50 percent. We recommend the CCC adopt the industry-wide standard for measuring moisture content in woody-biomass. We support the use of random sampling methodologies and historical data to determine conversion factors for eligible material and that moisture analysis follow standard test methods for wood fuels. Resource type specific conversion factors could initially be developed on a quarterly basis but we would suggest

annual review of this process in order to determine if an alternate time period for the development of the conversion factors would be more appropriate.

NASF suggests that references to terms such as precommercial operations, slash and wet cordwood are ambiguous. Any operation that harvests material potentially destined for a BCAP facility is technically “commercial,” thus the term “precommercial” is a misnomer. NASF suggests that terminology such as “logging residue” and references to “smaller diameter material not otherwise available for higher value products” more clearly articulates what is intended as eligible material. Setting log diameter limitations for eligibility will vary from state to state depending on available local timber markets and should be established by FSA state offices in consultation with the state forester. This does raise the question as to how chipped material that is delivered to a facility can be verified as in fact originating from material that did not have higher product value potential, e.g., roundwood prior to chipping may have exceeded a specified diameter limit.

NASF concurs with standards that promote equity in the marketplace and assure perpetuation and growth of higher value-added forest products industries. We agree with the proposed provision to limit the use of wood waste and wood residue only to those that would not otherwise be used for higher value products. Procedures to assure that such product substitution does not occur will be difficult to achieve as markets vary by location for all forest resource-based products. The Farm Bill through BCAP has the opportunity to produce renewable energy and to improve the economics of forest and agricultural products in currently distressed market areas. BCAP should allow the use of chipped trees that do not qualify for the local markets for other higher value products. This is in addition to the use of chipped logging residues and vegetation in the forest understory. We recommend that the CCC adjust the incentive rate to a value that avoids diverting material from higher value markets, but also provides needed incentive for harvest and transport of lower value residues. NASF offers recommendations under § 1450.106 which will help set prices in a way that encourages the movement of woody biomass and avoids creating distortions in the market place.

Additional conservation or stewardship measures are unnecessary on National Forest System (NFS) and Bureau of Land Management (BLM) lands. Projects on NFS and BLM lands are already subject to the National Environmental Policy Act (NEPA) process and are required to comply with a complex network of federal environmental laws including the Endangered Species Act, National Forest Management Act, Clean Water Act, Clean Air Act and numerous others.

NASF concurs with the proposed rationale for use of invasive species as eligible material. In our view, the benefits of inclusion far outweigh the potential harm that may result from not including them as eligible material. Their inclusion appears consistent with the broad aim of BCAP to make use of underused materials and their use could potentially lead to advanced biofuels/bioenergy production. NASF does not agree that a landowner should be responsible for removal costs of invasive or noxious species that became established as a consequence of matching payment activities. The requirement for the work to be done under the auspices of a stewardship plan or other system, like FSC, SFI, Tree Farm, etc. should address activities that would contribute to the spread or establishment of noxious/invasive species. The potential for inadvertent spread and the difficulty of corroborating source and circumstance suggests that such a penalty would be excessive. At most, if a case can be made for establishment or spread, the material owner should surrender the matching payments.

NASF suggests that matching payments be available to all EMOs delivering eligible material to registered Biomass Conversion Facilities; matching payments should not be limited to the types of biomass

outlined within project area proposals. Restricting eligible biomass to project areas would not allow all purchasers equal access to BCAP supplies.

While yard waste is considered 'renewable' biomass in Sec. 9001 of the 2008 Farm Bill, it has been excluded from BCAP matching payments. The definition for 'yard waste' on page 6282 of the Proposed Rule includes Construction and Demolition (C&D) waste and municipal solid waste. The basis for the definition for 'yard waste' used and the rationale for excluding C&D waste and solid municipal waste for eligibility in the matching payment program is unclear in the proposed rule. We would support measures that promote the responsible use of this traditionally underused resource particularly materials sourced from urban settings where pressure on landfills is greatest.

#### **§ 1450.106 Payments**

NASF believes the key to the CHST matching payments is setting a price that encourages the movement of material that is not currently used, but is not a price so large as to dramatically distort the marketplace. The highest value for forest materials varies across the nation and a blanket restriction on the use of mill residues and wood wastes would prohibit growth of renewable energy industries on a local scale. The following comments respond to the three payment options identified in the proposed rule. We offer a fourth option for payments, as we believe the three options do not adequately address the "chain of custody" issue and the appropriate balance of incentive.

**Option 1.** NASF concurs with the CCC's proposal to begin the two-year period for matching payment eligibility on the date of issue of the first matching payment. We agree that having the start date coincide with the payment date (as opposed to the approval date) will help avoid unnecessary penalties related to adverse weather or other conditions that could delay delivery of eligible material to a qualified facility.

We find the two-tiered pricing approach found in option 1 as undesirable. Biomass delivered to existing or new non-ethanol energy plants should be allowed full access to the \$45/ton matching payment. Thermal and combined heat and power (CHP) applications--in most cases--are more energy efficient than advanced biofuels production facilities. Placing non-ethanol producing facilities at a disadvantage by capping the matching payments at \$16/ton for biomass delivered to their gates will threaten the competitiveness of existing businesses and the jobs they provide.

**Option 2.** NASF recommends the CCC maintain their proposal to begin the two-year period for matching payment eligibility on the date of issue of the first matching payment (see comments in Option 1). NASF would strongly encourage FSA to provide matching payments for biomass delivered to existing and new CHP and thermal facilities regardless of their historical baseline production. The use of a historic baseline places early adopters (e.g., existing pellet manufacturers and CHP facilities) at a competitive disadvantage as biomass delivered to new facilities will have full access to the matching payments whereas biomass to existing facilities will not.

**Option 3.** NASF agrees with the CCC's proposal to begin the two-year period for matching payment eligibility on the date of issue of the first matching payment (see comments in Option 1). In Option 3 the phrase "Fully convert" is used. We assume this means the facility cannot use any fossil fuel. NASF recommends the matching payment should be based on the percentage of a co-fired facility's overall energy budget that is produced from renewable biomass (per the definition in 2008 Farm Bill).

The use of the terms "exceptional promise" and "innovative" are very vague and open to wide interpretation. CCC has not defined these terms and would likely be problematic in implementation of the rule. This section should be removed from the rule in our view.

As in Option 2 above we think the use of a baseline punishes the early adopters and puts them at a severe disadvantage in the market place for purchasing biomass feedstock and is unwarranted. The inclusion of some payment for existing energy producers attempts to ameliorate the problems with payment discrepancies for early adopters but is still inadequate in our view.

**Option 4.** NASF sees significant problems with each of the first three options. Given the diversity of economic conditions and existing industry across the country a more flexible system is needed to fit the circumstances unique to a given geographic area. Therefore we suggest the following Option 4 for your consideration:

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

*(b) Payments under this subpart will be paid at a rate of \$1 for each \$1 per ton received from a qualified biomass conversion facility for the commercial sale of eligible material in an amount up to maximum of \$45 per ton to existing and new facilities but the rate will be capped at varying levels to minimize the potential for diverting material away from higher value products, therefore:*

*(1) CCC will set the price in each state after consulting with the state forester, who will conduct an assessment of prices for alternative products (pulp logs, posts and rails, shavings, etc.) and set the price to avoid the diversion of feedstock from higher value products;*

*(2) CCC may have different payment prices for agricultural biomass and woody biomass if the market assessment indicates it would be appropriate.*

*(3) CCC will review this price on a periodic basis, at least annually to assess whether market prices have changed enough to warrant an adjustment of the payment rate.*

## **SUBPART C—ESTABLISHMENT AND ANNUAL PAYMENTS**

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

NASF suggests that the project proposal include consultation with the respective State Forester to determine the scope and scale of plan content to be required in contracts with the producers.

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

The CCC proposes that within the project area, producers would enter into BCAP contracts and be eligible to receive establishment payments, as a form of cost-share, to "convert" agricultural lands or nonindustrial private forest lands to the production of eligible crops (pg. 6272 of FR Notice). NASF would caution against use of the term "convert" regarding qualification to receive establishment payments. The language equates "establishment" with "land conversion" which potentially eliminates what would seem to be acceptable management opportunities. The replacement of an agronomic crop such as tobacco with a biomass crop such as switchgrass would appear to be acceptable. In this case agricultural land conversion has not occurred; rather, a cropping system has been changed or modified. Similarly, fallow or bareland may not be considered "agricultural," but may become "established" in a biomass crop (agronomic or forest). As proposed, the language would apparently disqualify the reclamation of abandoned mine land with trees, yet NASF would assume that is not the intention. This assumes of course that a biomass crop could be generated within a 15-year contract period. Since the

apparent intent is to provide cost-share for the establishment of eligible crops regardless of current land use condition, it is suggested that references to conversion be avoided.

#### **§1450.204. Eligible Land**

NASF would re-iterate that abandoned and reclaimed mine land qualify for BCAP establishment and annual payment participation if the respective conservation plan certifies that reforestation of the site is feasible and can produce renewable biomass material within the 15-year contract period.

The preamble (Page 6273) describes nonindustrial private forest land as “rural land with existing tree cover, or suitable for growing of trees, owned by any private individual, group, association, corporation, Indian Tribe, or other private legal entity. The definition in the regulations also references the definition of a private forest land and landowner in 36 CFR 230.2 and regulations at 36 CFR 230.31. If privately held timberlands with associated mills are not part of the definition, several large timberland ownerships would not be eligible to participate in the Establishment and Annual payment portion of the proposed program. In many areas this would effectively eliminate BCAP as a viable option for a large part of the supply. That said, in many instances lands and processing facilities are established as separate entities. We wonder if this separation would allow those large ownerships to participate.

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

NASF recommends that the requirements for conservation plans and forest stewardship plans be consistently applied in the Matching Payments Program and the Establishment and Annual Payments Program. Please see NASF’s comments as they pertain to section **§ 1450.3 General Description**. Any tree planting plans developed as an addendum to conservation plans or forest stewardship plans should include standards as may be identified by the state forester in each state.

#### **§1450.212 Establishment Payments**

NASF suggests §1450.212 be clarified to allow establishment payments on non-industrial forest land to cover the cost of tree seedlings.

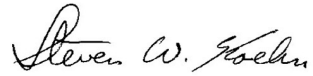
Landowners having lands within a project area may wish to establish silvicultural systems that would produce timber to support both an energy plant and a value-added plant such as a sawmill. Standard thinning of a pine plantation before age 15 or a plantation planted with pine (for sawlog) and hardwood (for energy) in alternate rows are examples. We propose that establishing trees as energy crops in managed forests is dissimilar to establishing a short-rotation woody energy crop. We recommend that CCC clearly indicate how procedures and payments will be managed for forest biomass energy crop growers. NASF believes that the best balance for natural resource conservation and biomass production is an integration of biomass production within longer rotations of planted and naturally regenerated tree stands. The proposed rule should be clarified to allow for the establishment payment of forest stands, and annual payments within a contract period, without requiring that all the forest biomass be harvested and utilized within that contract period. Simply stated, BCAP should assist landowners with reforestation that leads to partial harvests of their forests for energy, but not complete utilization for energy; if the landowner desires. In addition, the rules should state clearly how the payments would work in this circumstance.

#### **§1450.214 Annual Payments**

NASF recommends that any forest management cost that occurs within a 15-year contract period that contributes to improved forest ecosystem services be eligible for a payment premium. One approach would be to amortize the one-time cost on an annual basis over the remainder of the contract period.

We greatly appreciate your consideration of our recommendations and look forward to working with FSA as the agency moves forward with program implementation. Please do not hesitate to contact us in the event you have questions as you move forwards in finalizing program rules.

Sincerely,

A handwritten signature in black ink that reads "Steven W. Koehn". The signature is written in a cursive style with a large initial 'S'.

Steven W. Koehn  
NASF President