April 9, 2010

Robert Stephenson, Director
Conservation and Environmental Programs Division
Farm Service Agency, Stop 0513
1400 Independence Ave., SW
Washington. D.C. 20250-00513

Re: Comments on the Proposed Rule for the Biomass Crop Assistance Program, 75 Fed. Reg. 6264-6288 (Feb. 8, 2010).

Dear Director Stephenson:

On behalf of the National Sustainable Agriculture Coalition (NSAC), I am submitting these comments on the Proposed Rule for the Biomass Crop Assistance Program (BCAP). NSAC represents 40 family farm, rural development, conservation and environmental organizations from around the U.S. that share a commitment to federal policy that promotes sustainable agriculture production systems, family-based farms and ranches, and healthy, vibrant rural communities. A list of represented member organizations is attached to these comments.

For over twenty years, NSAC has been a leader in the development and implementation of farm bill programs that enable U.S. farmers and ranchers to provide food and fiber in farming systems that reduce potential adverse impacts on the nation's natural resources, including the quality of our agricultural soils. With BCAP, the 2008 Farm Bill provided an incentive for farmers to produce a new second generation of crops and trees that can be used as feedstocks for bioenergy. NSAC members supported the inclusion of BCAP in the 2008 Farm Bill with its statutory safeguards that require the USDA Secretary to ensure that farmers and others who receive BCAP funding -- for the collection, harvest, storage and transportation of biomass and for BCAP projects -- meet standards sufficient to protect soil quality, water quality, air quality, wildlife habitat and other natural resources. We also supported the emphasis placed by Congress on BCAP projects that could help jumpstart a second generation of biomass from perennial crops and trees produced in sustainable systems.

Overall, we find that the BCAP proposed rule fails to meet many of the statutory requirements of the 2008 Farm Bill for BCAP. In addition, we are concerned that USDA has failed to use its administrative discretion to ensure that BCAP is implemented in a manner to provide effective measures to protect soil health, water quality, wildlife habitat and other natural resources. Our recommendations for revising the BCAP proposed rule are aimed at having BCAP help improve, rather than further degrade, our nation's agricultural and natural resource base.

Thank you for considering our comments.

Sincerely,

Martha L. Noble

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NATIONAL SUSTAINABLE AGRICULTURE COALITION COMMENTS ON THE BIOMASS CROP ASSISTANCE PROGRAM (BCAP) PROPOSED RULE

I. OVERVIEW

The Conference Report for the 2008 Farm Bill states the clear intent of Congress that the new Biomass Crop Assistance Program (BCAP) should focus primarily on assisting farmers and foresters to participate in projects to establish new bioenergy crops and trees, especially *perennial crops* that:

> *(a) show exceptional promise for producing highly energy-efficient bioenergy or biofuels;*
> *(b) preserve natural resources; and*
> *(c) are not primarily grown for food or animal feed.*[1]

BCAP also includes a Collection, Harvest, Storage and Transportation (CHST) subsidy provision that gives the USDA Secretary the discretion to make short-term matching payments to those who deliver specified agricultural or forest biomass to a biomass conversion facility. BCAP authorizes the Secretary to provide $1 per ton matching payments, for no more than two years, in an amount that can range from $0 to $45 per ton.

Nothing in the BCAP statutory language prohibits the USDA from exercising its general authority and its responsibility under the National Environmental Policy Act to administer BCAP in a manner that minimizes harm to natural resources and the environment. Indeed, the USDA should use BCAP funding to improve the environmental and conservation performance of agricultural and forest systems.

Congress did not make a specific amount of funding available to BCAP each year. Instead, Congress authorized the USDA Secretary to exercise discretion in determining the sums as necessary to implement BCAP. In implementing BCAP, the Secretary is charged with application of basic tenets of fiscal responsibility to ensure that BCAP is implemented in an orderly fashion that allows for adequate USDA oversight of the program and ensures that public funding is used to promote new activities and uses for biomass. The Secretary should also ensure that BCAP subsidies do not interfere with existing enterprises that provide jobs and income in rural areas. Based on the assumption that USDA would exercise its discretion wisely, the Congressional Budget Office estimated that BCAP would require $70 million over the life of the 2008 Farm Bill.

In 2009, however, the Farm Service Agency (FSA) started BCAP off on the wrong foot by issuing a Notice of Funds Availability (NOFA) for the CHST component of BCAP that provided CHST payments without a regulation, cost-benefit analysis, or environmental review.[2] FSA deemed more than 300 facilities eligible for subsidized delivery of forest and agricultural biomass without regard to the economic effects on other existing users of the biomass, especially forest biomass, or the environmental impacts of the subsidization of biomass removal. More than $500 million in USDA funding was reserved for CHST payments for deliveries just for June 2009 through March 2010, with estimates in the BCAP proposed rule for total CHST payout as high as $2.1 billion.[3] Many forest product businesses that depend on

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[1] Joint Explanatory Statement of the Committee of the Conference, House Conference Report No. 110-627 (110th Cong. 2d Sess.) at p. 919.

[2] Commodity Credit Corporation, Notice of Funds Availability (NOFA) for the Collection, Harvest, Storage, and Transport of Eligible Material, 74 Fed. Reg. 27767 (June 11, 2009)(hereinafter BCAP CHST NOFA).

[3] See Commodity Credit Corporation, Biomass Crop Assistance Program, 75 Fed. Reg. 6264 (BCAP Proposed Rule) at p. 6277.

biomass as feedstock for their products protested that the CHST subsidies are distorting biomass markets by diverting biomass to energy production. These businesses are concerned that they must now compete with a short-term federal government subsidy and that the resulting higher price they must pay for biomass could put them out of business with the loss of thousands of existing jobs. For example, in March 2010, a plant manager with the Flakeboard Company Limited, the largest U.S. producer of particleboard, noted that the plant had already lost a biomass supplier who decided to sell to a biomass conversion facility to collect the federal subsidy.[4]

Sustainable agriculture and conservation groups are concerned that USDA failed utterly to do perform its legal duty under the National Environmental Policy Act to undertake environmental review of the CHST component to determine limits on biomass removal needed to protect the quality and health of agricultural soils, forest ecosystems, water quality, and other natural resources before its implementation with the NOFA. An additional environmental issue, as well as a priority of the Obama Administration, is that of climate change. USDA should consider the impact of biomass removal on the ability of agricultural and forest systems to sequester carbon and also promote the development of biomass production, harvest, collection, storage and transportation systems that can with reduce GHG emssions.

Based on the concerns outlined in this overview, NSAC makes the following recommendations for revision of the BCAP Proposed Rule.

II. SPECIFIC COMMENTS ON THE BCAP PROPOSED RULE

A. NSAC recommends that USDA make permanent the current moratorium on new applications for CHST payments for delivery of biomass, except for CHST payments for eligible biomass from BCAP projects for new bioenergy crops and trees.

On April 5, USDA's Farm Service Agency (FSA) announced that it had already paid $165,274,695 for matching payments for the CHST component of BCAP for just the first nine months of CHST deliveries (June 2009 –March 2010).[5] That amount is more than 2x the CBO score for BCAP in the 2008 Farm Bill. Over $500 million has been allocated by OMB for the first nine months of payments, an amount more than 7x the entire Farm Bill cost estimate. ***And FSA estimates that under the BCAP Proposed Rule the CHST component of BCAP will cost about $2.1 billion, more than 30x the Farm Bill cost estimate.***[6]

Clearly the spending on the BCAP CHST component has spiraled out of control. With more than 2x the expenditure expected in the 2008 Farm Bill budget estimates for the entire life of the program already out the door, it is time that USDA use the discretion provided in the 2008 Farm Bill to limit public funding going to CHST payments by ceasing new contractual obligations for CHST payments that are not linked to BCAP projects.

Many sectors of the forest product industry have sounded the alarm that the BCAP CHST subsidy is being used to divert the biomass feedstock on which they depend for manufacturing products to combustion for energy production. It is absurd to see short-term BCAP subsidies for biomass delivery used to distort the biomass markets, put existing enterprises at risk, and threaten the replacement of long-

[4] See, e.g., Amy Hsuan, *Biomass Subsidies Threaten Oregon Wood Plants' Supplies* (March 22, 2010)(available at http://bioenergy.checkbiotech.org/news/biomass_subsidies_threaten_oregon_wood_plants_supplies).

[5] USDA Farm Service Agency, *USDA Highlights Early Successes in Biomass Crop Assistance Program* (Release. No. 0165.10)(Apr. 5, 2010).

[6] BCAP Proposed Rule at 6277.

term employment in rural areas with short-term federally subsidized employment. Even FSA realized that the CHST payments were being applied destructively when it announced in the Federal Register notice for the BCAP proposed rule that it was temporarily terminating the NOFA for CHST payments issued on June 11, 2009 and no longer accepting applications for matching payments.

FSA has attempted to address the problem of short-term BCAP CHST payments diverting biomass from higher value to lower value use with the definition of "renewable biomass" in Section 1450.2 of the BCAP Proposed Rule. The definition excludes biomass from the National Forest System Land or U.S. Department of the Interior Bureau of Land Management that could otherwise be used for higher-value products. The definition also excludes vegetative waste material from non-Federal Land or land belonging to an Indian or Indian Tribe that would otherwise be used for higher-value products. A commentary by published by Resources Information Systems Inc., however, indicates why this tweaking of the definition will not solve the market distortion problem. The commentary notes that the composite panel industry does not see that FSA has done anything in the BCAP Proposed Rule to deal with vague enforcement and a poorly crafted eligibility list. The commentary also notes that timber mills that would clearly be eligible for BCAP subsidized deliveries are avoiding the Program because they are not sure how to avoid receiving questionable materials.[7]

NSAC recommends that any future CHST payments be limited to the delivery of biomass from BCAP project areas to biomass conversion facilities participating in the projects. Using BCAP funding for this purpose will provide for circumscribed CHST payments that focus on providing critical stimulus and information on handling and storage of new bioenergy crops and trees.

We recommend that all the CHST payments be targeted to participants in BCAP projects. The primary purpose of the BCAP is to jumpstart the next generation of perennial bioenergy crops and trees and annual bioenergy crops that show exceptional promise for producing highly energy-efficient bioenergy or biofuels. Farmers and forest landowners participating in BCAP projects not only have to meet resource protection requirements, they must also agree to make available to the USDA Secretary, or institutions designated by the Secretary, information to promote the production of eligible crops and the development of biomass conversion technology.

The most efficient use of BCAP funding, including funding for the CHST provisions, will be to target funding to BCAP projects in order to provide complete and comprehensive information about establishing a bioenergy/biomass crop or tree and the steps needed to bring the feedstock to a biomass conversion facility. In combination with the resource protection requirements and priorities for awarding BCAP projects, this targeted approach will best meet the intent of Congress that BCAP be used to provide the groundwork and information needed to establish the next generation of bioenergy crops and trees with attention to natural resource protection.

Note: If USDA should decide unwisely to restart the CHST payments, NSAC recommends the following:

(1) CHST payments, except for those related to BCAP projects, should be delayed until after preparation of an Environmental Impact Statement that adequately addresses the impacts of the removal of biomass from forest and agricultural systems, including degradation of agricultural soil health, impacts on long-term health of forest ecosystems, and impacts on water quality, air quality, wildlife habitat, and other natural resources.

[7] William Perritt, *RISI ECONOMISTS; Draft BCAP Rule Angles to Protect Higher Value Wood Markets (Feb. 8, 2010),* available at http://www.woodbiomass.com/news/wood/news/RISI-ECONOMISTS-Draft-BCAP-rule-angles-to-protect-higher-value-wood-markets.html#.

(2) CHST payments, except for those related to BCAP projects, should be delayed until after the preparation of comprehensive cost-benefit analysis that assesses the potential for BCAP payments to distort biomass markets, especially the adverse impacts on existing forest product businesses and long-term jobs dependent on those businesses.

(3) CHST payments should be limited to suppliers of biomass conversion facilities that are producing additional renewable energy beyond their baseline prior to delivery of CHST materials. Biomass conversion facilities must have demonstrable proof of renewable energy production prior to delivery.

(4) FSA should limit CHST payments for BCAP bioenergy crop and tree projects only to projects in which participants have agricultural conservation plans or forest stewardship plans that provide for required measures to protect soil health, water quality, wildlife habitat and other natural resources that could be harmed by biomass collection, harvest, storage and transportation. The conservation plans should also include measures to increase carbon sequestration and reduce GHG emissions.

(5) CHST payments should not be made for the removal of crop residue. The eminent soil scientist Rattan Lal has raised concerns about the use of crop residues as biomass feedstock, observing:

> *This is a dangerous trend because crop residue is not a waste. It is a precious commodity and essential to preserving soil quality. In addition to controlling erosion and conserving soil water in the root zone, retaining crop residues on the soil is also necessary for recycling nutrients, improving activity and species diversity of soil micro- and macro-fauna, maintaining soil structure and tilth, reducing nonpoint source pollution and decreasing the risks of hypoxia in the coastal regions, increasing use efficiency of fertilizers and other inputs, sustaining biomass/agronomic yield, and improving/maintaining soil organic matter content . . . . In view of its numerous environmental and agronomic benefits, there is a strong justification for adopting the slogan "grains for people, residues for the soil." This equity is essential to maintaining soil quality at a level at which it can provide all ecosystem services and functions essential to sustainable use of soils for generations to come. Use of biofuels could substantially reduce gaseous emissions, provided that appropriate sources of feedstock are identified, especially those which do not degrade soil and environment quality.*[8]

NSAC opposes the use of the BCAP subsidy to encourage the removal of crop residues. But, if USDA should decide unwisely to provide BCAP CHST subsidies for the removal of crop residues, NSAC recommends that the removal be conducted subject to a BCAP conservation plan overseen and enforced by USDA Natural Resources Conservation Service that will require consideration of the following:

- **Impact on wind and water erosion, runoff, and residue cover needed to comply with conservation compliance and any other applicable conservation programs;**

- **Value of nutrients removed in crop residue and impact on fertilizer and lime requirements;**

[8] Lal, Rattan. 2007. *There Is No Such Thing as Free Biofuel from Crop Residues.* Soil Science Society of America. Past President's Message. Available at: https://www.soils.org/about-society/presidentsmessage/archive/2.

- **Need of crops residues to maintain soil organic matter and sequester carbon;**

- **Effect of reduced ground cover of soil water availability;**

- **Impact of residue harvest on soil compaction from additional field operations;**

- **Need to use cover crops ground cover and control erosion and runoff plus provide additional carbon to the system; and**

- **Effect on yield. (This list of considerations is taken from the University of Nebraska-Lincoln's guide *Harvesting Crop Residues (2008)).*[9]**

NSAC is particularly troubled by FSA's lack of concern over subsidizing the removal of biomass from agricultural soils. In the preamble to the Proposed Rule, FSA brushed off the concern of NSAC and others, in comments on the BCAP CHST NOFA, that the only limit imposed by the NOFA on agricultural residue removal for the BCAP CHST component is the conservation compliance for highly erodible land defined in 7 C.F.R. Section 12.[10] This barebones conservation compliance requirement will not ensure that BCAP funding is being used in a manner that preserves agricultural soil and protects natural resources.

The standard for conservation compliance for erosion is simply not sufficient to protect soil quality and other resources. For example, recent research by a team of USDA Agricultural Research Service scientists led by Wally Wilhelm, a scientist with the Agroecosystems Management Research Unit in Nebraska, indicates that the corn stover needed to replenish soil organic matter was greater than that required to control either water or wind erosion in the ten counties investigated (including nine counties of the top eleven corn producing states in the U.S.).[11] Another recent study examined the impacts of corn stover removal over a 4-year period from sites with different soils in Ohio. The study showed that removal above 25 percent of the stover resulted in adverse impacts on soil quality. In addition, this and other studies indicate that removal of the corn stover has the most adverse impacts on sloping or erosion prone soils.[12]

This research calls into question the estimates of biomass available in the U.S. for biomass-based energy production provided in the 2005 *Billion Ton Annual-Supply Study*.[13] Before major decisions are made about the percent of corn biomass or other crop residue that can be designated for energy production,

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[9] Charles Wortmann et al., Harvesting Crop Residues (University of Nebraska-Lincoln Extension, Institute of Agriculture and Natural Resources (Publication GL846)(2008).

[10] BCAP Proposed Rule at p. 6265.

[11] W. W. Wilhelm, J. M. F. Johnson, D. L. Karlen & D. T. Lightle. 2007. *Corn Stover to Sustain Soil Organic Carbon Further Constrains Biomass Supply,* Agronomy Journal 99: 165-1667.

[12] Blanco-Conqui, H. & R. Lal. 2009. *Corn Stover Removal for Expanded Uses Reduces Soil Fertility and Structural Stability,* Soil Sci. Soc. Am. J. 73:418-426.

[13] Perlack, R.D., L.L. Wright, A. Turhollow, R.L. Graham, B. Stokes, & D. Erbach. 2005. Biomass as Feedstock for a Bioenergy and Bioproducts Industry: The Technical Feasibility of a Billion-Ton Annual Supply. U.S. Department of Energy; U.S. Department of Agriculture, Report No. ORNL/TM-2005/66.

efforts will be needed to explore less conventional perennial crops that could supply a more sustainable supply of cellulosic feedstock without reducing soil organic matter and undermining the productive capacity of the soil.

In 2008, the Institute of Agriculture and Natural Resources of the Extension Service at University of Nebraska-Lincoln issued the *Harvesting Crop Residues* referenced above. The Guide concluded that crop residue should not be harvested every year for most soils in Nebraska and provided a list of concerns that must be addressed before crop residues are harvested. In addition, the USDA agency charged with expertise in conservation issues – the Natural Resources Conservation Service - has concluded that even moderate erosion rates can harm air quality, water quality and wildlife habitat and that improving soil organic matter levels can further stabilize soil within fields and protect environmental quality. Increased organic matter in the soil holds nitrogen, phosphorus, and pesticides in place and keeps them out of surface water. Soil with higher organic matter can better provide nutrients and water to crops and also minimize the effects of floods and droughts.[14]

Our basic recommendation is that if USDA determines to continue the BCAP CHST payments for delivery of agricultural biomass these payments not be provided for the delivery of crop residue biomass. The Biomass Crop Assistance Program, including its CHST provisions, was not intended by Congress to be just another simple commodity payment program for biomass crops. Any program for obtaining more production from our agricultural soils for bioenergy and other biomass products must include critical protections for soil quality and other natural resources and must be based on comprehensive farming ***systems***. Otherwise, the BCAP CHST subsidy to increase the use of biomass from agricultural land could result in a significant decrease in the ability of the land to produce food, fiber and energy including biomass.

B. The Proposed Rule should clearly provide that Farm Bill Title I commodity crops are ineligible for CHST payments. The 2008 Farm Bill clearly excluded Title I commodity crops from participation in the BCAP program. The BCAP Proposed Rule is beyond the authority of USDA as a matter of law, and therefore in violation of the law, because it provides funding for the collection, harvest, storage and transportation of material from commodity crops eligible to receive payments under Title I of the 2008 Farm Bill. These crops are expressly excluded from the Biomass Crop Assistance Program CHST component under Section 9011(a)(4) and Section 9011(a)(6) of the 2008 Farm Bill.

Section 9011(a)(4) and Section 9011(a)(6) of the BCAP legislation provide statutory exceptions to the definition of "renewable biomass" for purposes of the entire BCAP, including the CHST provisions in Section 9011(d).

Specifically, Section 9011 (a)(4) defines "eligible crop" for the entirety of Section 9011, including Section 9011(d) as:

``(4) Eligible crop.—

``(A) In general.--The term `eligible crop' means a crop of renewable biomass.

``(B) Exclusions.--The term `eligible crop' does not include—

[14] See e.g., NRCS, Soil Organic Matter: Go Beyond T – Manage for C. Available on the web at http://soils.usda.gov/SQI/concepts/soil_organic_matter/som_manage.html; see also NRCS Nebraska Fact Sheet, Harvesting Crop Residue: What's It Worth (Sept. 2008).

> ``***(i) 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;*** or
>
> ``(ii) any plant that is invasive or noxious or has the potential to become invasive or noxious, as determined by the Secretary, in consultation with other appropriate Federal or State departments and agencies.

Section 9011(a)(6) defines "eligible material" for the entirety of Section 9011, including Section 9011(d) as:

``(6) Eligible material.--

> ``(A) In general.--The term `eligible material' means renewable biomass.
>
> "(B) Exclusions.--The term `eligible material' does not include—
>
> ``***(i) 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;***
>
> ``(ii) animal waste and byproducts (including fats, oils, greases, and manure);
> ``(iii) food waste and yard waste; or
> ``(iv) algae.

Section 9011(d) "Assistance with Collection, Harvest, Storage and Transportation" incorporates these terms, without modification of their definitions in Section 9011(a), providing that:

> ``(1) In general.--The Secretary shall make a payment for the delivery of eligible material to a biomass conversion facility to—
>
> ``(A) a producer of an eligible crop that is produced on BCAP contract acreage; or
>
> ``(B) a person with the right to collect or harvest eligible material.

Despite these clear statutory restrictions on eligible crops and eligible material for CHST funding, the FSA has decided to provide its own rewrite of the statute by providing in the BCAP Proposed Rule Section 1405.3 that "eligible material" excludes only the whole grains, seeds, cotton boll fibers and other harvested products of commodity crops. FSA then makes quite clear in the Preamble to the Proposed Rule that intends to continue making CHST payments for delivery of corn stover, corn cobs, rice hulls, wheat straw, and any other material from a commodity crop except that which "is harvested from the plant." [15]

This strained administrative definition is an attempt to make an *ultra vires* end run around the statutory restrictions on the use of the BCAP for providing financial incentives to crops already receiving incentives under the Farm Bill's Commodity Title. The administrative definition also directly contradicts the intent of the Congress in the Manager's statement to the 2008 Farm Bill which provides that " . . . the primary focus of the BCAP will be promoting perennial bioenergy crops and annual bioenergy crops that

[15] BCAP Proposed Rule at p. 6269.

show exceptional promise for producing highly energy-efficient bioenergy or biofuels, that preserve natural resources, and ***that are not grown primarily for food or animal feed***." [16]

C. The Preamble to the FSA Proposed Rule provides a definition for "eligible crop" which is nonsensical by including animal waste and byproducts, food waste, yard waste, and Title I commodity crop residues within the category of eligible crops. NSAC recommends that the BCAP Preamble and Proposed Rule clearly limit eligible crops to the statutory definition of *crops* that are planted in BCAP project areas and that crops eligible to receive Title I commodity payments and invasive or noxious species cannot be BCAP "eligible crops."

Section 9011(a)(4) provides that eligible crop means "a crop of renewable biomass," with the exclusion of Title I commodity crops and invasive and obnoxious plants. FSA takes this statutory definition and makes nonsense of it in the Proposed Rule Preamble at p. 6275 by inventing new categories of "crops of renewable biomass" that completely ignore the word ***crop.*** As a result, the Preamble includes within "eligible crops" animal waste and byproducts, food waste, and yard waste, as well as Title I crop residues.

When applied to the BCAP project provision for bioenergy crops and trees the inclusion of animal waste, food waste, yard waste and crop residues from commodity crops in the term "eligible crop" is simply foolish. NSAC is also concerned that this absurd definition of eligible crop is the prelude to FSA's creating categories of "crops" of animal waste and byproducts, food waste and yard waste that will be added to the list of eligible crops that can be provided with CHST payments. FSA should eliminate these categories from the eligible crop definition in the table provided at p. 6275 of the Proposed Rule and make clear within the Proposed Rule that eligible crops are indeed "crops" with the specific exclusions provided in the BCAP authorizing legislation.

D. BCAP Conservation Plans and Forest Stewardship Plans: NSAC recommends that the BCAP Proposed Rule be revised to require participants in both the BCAP CHST component and BCAP projects to have a conservation plan for activities on agricultural land or a forest stewardship plan for activities on forest land, which must be reviewed and approved by NRCS, with continued NRCS oversight to ensure compliance with the plan.

Section 1450.3(b) of the Proposed Rule states that a BCAP participant must implement and adhere to a conservation plan " . . . prepared in accordance with BCAP guidelines, as established and determined by CCC." But the Proposed Rule does not provide for approval or oversight of implementation of conservation plans or forest stewardship plans. The subsection states that a conservation plan " . . . must be approved by the conservation district in which the lands are located." But goes on to say that if the conservation district declines to review the plan that the provider of technical assistance – who is not identified any where in the Proposed Rule - may take further action as is needed to account for such lack of review. In other words, there is no requirement that a BCAP conservation plan be reviewed by any entity and there is no assurance of implementation of the plan.

The Proposed Rule also fails to provide for sufficient rigor and oversight of forest stewardship plans for BCAP activities. The definition of "forest stewardship plan" in Section 1450.2 does call for approval by a professional resource manager or State Forester and includes numerous specific resource elements. But it also states that the plan should address resource concerns " . . . in a manner that is compatible with the landowner objectives concerning the resources." This may suffice for a plan for totally voluntary activities by a landowner who is receiving no public benefits. But it does not pass muster as a forest stewardship plan for a USDA program that provides public subsidies for the removal of biomass or

[16] Food, Conservation, and Energy Act of 2008, House Report 110-627 at p. 918.

establishment of trees destined for bioenergy production. USDA should ensure that BCAP's public funding is used in a manner that does not degrade forest soil, water quality, air quality or other natural resources.

Therefore, NSAC recommends that the BCAP Final Rule provide that BCAP conservation plans and forest stewardship plans must be approved by NRCS and that NRCS be authorized to conduct continuing oversight to ensure that these plans are implemented. FSA and NRCS should enter into a BCAP Memorandum of Understanding, similar to that for the Conservation Reserve Program, which provides for NRCS technical assistance to ensure that conservation plans are implemented to meet the requirements of Field Office Technical Guides and other appropriate conservation standards. NRCS should be allowed to authorize partners such as conservation districts or certified technical service providers to deal directly with BCAP participants in the same manner as allowed under Farm Bill conservation programs. USDA should provide NRCS with sufficient resources, as needed, to conduct this BCAP oversight activity.

E. BCAP conservation plans and forest stewardship plans should specifically address environmental and conservation issues arising from removal or harvest of biomass from the land and set restrictions and requirements for biomass removal or harvest that ensure long-term soil health in agricultural and forest systems and protection of water quality, wildlife and other resources. These plans should also address carbon sequestration and reduction of GHG emissions.

Section 1405.2 of the Proposed Rule provides the following definition for "conservation plan":

"Conservation plan means a 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 needed to solve identified natural resource problems by devoting eligible land to permanent vegetative cover, trees, water, or other comparable measures."

This definition is identical to that of "conservation plan' for the Conservation Reserve Program, which addresses the conversion of land from intensive agricultural use to conserving uses and the establishment of permanent vegetative cover or trees, as well as occasional or incidental haying and grazing activities. Clearly, this definition of conservation plan is not appropriate or fully adequate for either the BCAP CHST component or BCAP projects.

The Proposed Rule should include, at a minimum, requirements for a BCAP CHST conservation plan or forest stewardship plan for that focuses on the biomass removal activities and potential adverse consequences and includes the following:

(a) conservation practices and systems that will avoid degradation and compaction of soils;

(b) conservation practices and systems that will avoid the degradation of water quality arising from activities for the removal of biomass and that ensure sufficient cover remains on agricultural or forest land to avoid runoff sediment, nutrient, pesticides or other pollutants;

(c) conservation practices and systems that avoid destruction of wildlife habitat, including avoidance of biomass removal during nesting seasons and other critical life cycle periods for local wildlife and that minimize loss of wildlife habitat in biomass harvest or collection activities; and

(d) conservation practices and systems that will increase carbon sequestration and reduce GHG emissions.

The definition for a BCAP project area conservation plan or forest stewardship plan should assess these

same conservation practices and systems in the context of mitigating the potential adverse consequences from activities in establishing, growing and harvesting of a bioenergy crop or bioenergy trees.

NSAC recommends that FSA consult with NRCS as to conservation measures and indices that are appropriate for BCAP conservation plans and consult with NRCS and appropriate state or regional forestry agencies and organizations for appropriate measures in forest stewardship plans.

F. The BCAP proposed rule at Section 1450.106 provides three Options for BCAP CHST payments. NSAC recommends against the continuation of BCAP CHST payments but if CHST payments are continued, NSAC recommends that the following elements and improvements be drawn from the 3 Options to create a 4th Option as follows:

(1) Payments should be for a term that will not exceed one year from the beginning date that the first matching payment to a person or entity is issued by CCC.

(2) No payments will be made unless the biomass conversion facility to which the biomass is delivered increases its renewable biomass over a historical level.

(3) No payments will be made for the delivery of biomass for conversion to heat or power unless the material is converted to heat or power about the facility's historical baseline for heat or power production.

(4) No payment will exceed $16 per ton.

G. NSAC recommendations for BCAP Projects.

(1) The centerpiece of BCAP is projects that help establish new bioenergy crops, particularly perennials and bioenergy trees. The emphasis and funding in the BCAP Proposed Rule should be reversed so that funding for the projects is the focus of the BCAP from this point forward.

(2) NSAC recommends that the BCAP Proposed Rule give the highest priority to BCAP projects that establish perennial crops and trees, with participating farmers or forest landowners who have a conservation plan approved by NRCS that protects soil quality, including adequate soil carbon levels, and that protects water quality, air quality, wildlife habitat and other natural resources. The conservation plan should mitigate the impacts of collection, harvest, storage and transport of the biomass harvested from the BCAP project areas.

Research by David Tilman and colleagues have shown that the best overall systems for bioenergy production are mixtures of native perennial grasses and flowering plants. These systems provide more usable energy per acre than corn grain ethanol or soybean biodiesel and are far better for the environment. The GHG performance of these systems can be improved even more if they are established on degraded or abandoned agricultural land which can result in a significant increase in soil carbon sequestration. In addition, the establishment of a perennial crop such as switchgrass may require less synthetic fertilizer and pesticides than corn. Perennials crops are the best, a win-win situation for crop productivity and for the environment.

The second priority for BCAP project funding should be annual biofuel crops that can clearly be demonstrated to improve the conservation performance of an existing annual crop production system. A prime example is camelina, an oil crop with yields about 2x the oil of soy. Camelina has been grown for years in Montana and a number of land-grant colleges around the country have conducted research and

field trials on camelina. It can be incorporated into northern Plains wheat-fallow rotations and can help break up pest cycles and increase wheat productivity, with an overall reduction in pesticide use in the crop rotation system. Camelina also contains sufficient concentration of omega-3 fatty acids to make camelina meal a good candidate for livestock feed, which is a by-product of crushing camelina for oil. Camelina and similar new bioenergy crops that can improve annual crop production systems should be considered for participation in BCAP projects. This priority should include annual crops that serve as cover crops.

BCAP Project funding should not be provided to an annual crop that will be grown in a monoculture or a simple rotation system. BCAP Project funding for annual crops should be limited to projects in which the bioenergy annual crop is part of a resource-conserving crop rotation.

(3) Seed production for native plants that would be used in BCAP crop establishment should be considered eligible for BCAP projects based on seed availability and demand.

(4) Applications for BCAP Projects should be evaluated in a competitive selection process, with selection based on environment, energy and economic performance as well as the other BCAP Project area selection criteria listed in the 2008 Farm Bill provision for BCAP at Section 9011(c)(2)(B). This section requires FSA to give a higher priority to BCAP Projects that include local ownership of the biomass facility using the crops or trees, generate local economic benefits, and involve the participation of beginning or socially disadvantaged farmers, as well other specific elements.

(5) Section 1450.213(a) of the BCAP Proposed Rule should be amended so that the 75 percent cost share is the cost share of the actual cost of establishing non-woody perennial crops and woody perennial crops in accordance with the BCAP conservation or forestry plan.

NSAC disagrees with providing an "average cost" for the establishment of new bioenergy perennial crops or trees if it is lower than the actual cost. BCAP projects are intended to provide an incentive for farmers and foresters to try out the production of new crops and trees. It would be a disincentive for many to take the risk of trying out a new crop where they may loss significant costs of expenditure and perhaps, not even have a good crop to take to market.

(6) NSAC recommends that the provision for reducing annual payments for BCAP Projects, at Section 1450.214(f), be deleted from the BCAP Proposed Rule except for the provision that the annual payment may be reduced if the producer violates a substantial term of the contract.

The annual payments are an incentive for farmers and foresters to try out new crops, to implement adequate conservation plans, to provide follow-up information to USDA, researchers and others, and to forgo the income for a crop they know to try out a new crop. It seems like "bait and switch" to offer the inducement of the annual payment and then withdraw it if the BCAP project is successful and the crop is delivered to the biomass conversion facility that is the focus of the project, if the producer receives a CHST payment to address the additional costs of collection, harvest, storage and transportation, or if producer sells the crop for purposes other than the production of energy at the biomass conversion facility – unless the sale violates a term of the BCAP project contract.

Even more troubling is Section 1450.214(iv), which would allow USDA to withhold payment for any reason whatsoever, without any advanced notice to the BCAP participant.

(7) The BCAP Proposed Rule should clearly provide that BCAP project payments will not

be made for projects that involve the conversion of forests, wetlands or prairie lands to biomass crops or trees.

(8) The 2008 Farm Bill provision for BCAP provides a definition for "eligible land" for BCAP projects which include an exclusion for "land that is native sod as of the date of enactment of the Food, Conservation, and Energy Act of 2008." The Food, Conservation, and Energy Act was enacted on June 18, 2008. Therefore, Section 1450.204 of the BCAP Proposed Rule, which defines eligible land for BCAP projects, should be revised to read at Section 1450.204(b)(2) as follows: "Land that is native sod as of June 18, 2008."

III. ADDITIONAL SECTION-BY-SECTION COMMENTS ON THE BCAP PROPOSED RULE

1. Sections 1450.1(a) – (d). Role of FSA State and County Committees: Sections 1450.1(a)-(d) appear to delegate authority over BCAP to FSA County Committees and State Committees. But nowhere else in the proposed rule is a specific role for these entities in administering BCAP spelled out, even in the Section 1450.104 sign up provisions for CHST matching payments. NSAC recommends that the FSA State and County Committees not be given any role in the administration of BCAP and that the BCAP Proposed Rule be amended to exclude references to the FSA State and County Committees.

2. Section 1450.1(e). Data Required from Participants: This subsection would authorize FSA to provide BCAP benefits, including BCAP project payments and matching payments under the BCAP CHST component, to participants who do not provide data to determine their eligibility for BCAP benefits. NSAC agrees that participation BCAP is essentially voluntary in the sense that no agricultural producer or deliverer of biomass or any other entity is required to participate in BCAP. But those who do participate in BCAP and receive payments from the public should be required to make available to USDA any data that is required to establish their eligibility to participate or is required as a condition of their participation. NSAC recommends that Section 1450.1(e) be deleted from the BCAP Proposed Rule.

3. ***Section 1450.103(b). Eligible material:*** As emphasized elsewhere in these comments, the BCAP statute excludes the residues of Farm Bill Title I commodity crops from BCAP "eligible material" and BCAP "eligible crops." Therefore, we object to the use in Section 1450.103(b) of the eligible material list posted by FSA on the BCAP webpage http://www.fsa.usda./energy/ as defining "eligible material" because the list contains residues of Title I commodity crops, which are excluded by statute from "eligible material." We also object in general to having such an important element of BCAP as the "eligible material" definition governed by a sub-regulatory, informal document that can be amended with no notice and opportunity for public comment.

Thank you for considering these comments of the National Sustainable Agriculture Coalition.

NATIONAL SUSTAINABLE AGRICULTURE COALITION

Represented Member (April 9, 2010)

Agriculture and Land Based Training Association (ALBA) Salinas, CA

Alternative Energy Resources Organization (AERO) Helena, MT

California Certified Organic Farmers (CCOF) Santa Cruz, CA

California Farmlink Sebastapol, CA

C.A.S.A. del Llano (Communities Assuring a Sustainable Agriculture), Hereford, TX

Center for Rural Affairs Lyons, NE

Clagett Farm/Chesapeake Bay Foundation, Upper Marlboro, MD

Community Alliance with Family Farmers Davis, CA

Dakota Rural Action Brookings, SD

Delta Land and Community, Inc. Almyra, AR

Ecological Farming Association Watsonville, CA

Flats Mentor Farm Lancaster, MA

Florida Organic Growers Gainesville, FL

Food Animal Concerns Trust Chicago, IL

Georgia Organics Atlanta, GA

Grassworks Wausau, WI

Illinois Stewardship Alliance Springfield, IL

Iowa Natural Heritage Foundation Des Moines, IA

Island Grown Initiative Vineyard Haven, MA

Izaak Walton League St. Paul, MN

Kansas Rural Center Whiting, KS

Kerr Center for Sustainable Agriculture Poteau, OK

Land Stewardship Project White Bear Lake, MN

Michael Fields Agricultural Institute East Troy, WI

Michigan Integrated Food and Farming System East Lansing, MI

Michigan Organic Food and Farm Alliance Lansing, MI

Midwest Organic and Sustainable Education Service (MOSES) Spring Valley, WI

National Catholic Rural Life Conference (NCRLC) Des Moines, IA

National Center for Appropriate Technology Butte, MT; Fayetteville, AR; Davis, CA

Northeast Organic Dairy Producers Alliance (NODPA) Deerfield, MA

Northern Plains Sustainable Agriculture Society Fullerton, ND

Northwest Coalition for Alternatives to Pesticides Eugene, OR

Ohio Ecological Food and Farm Association (OEFFA) Columbus, OH

Organic Farming Research Foundation (OFRF) Santa Cruz, CA

Rural Advancement Foundation International, USA (RAFI-USA) Pittsboro, NC

Sierra Club Agriculture Committee

Union of Concerned Scientists Food and Environment Program, Washington, DC

Virginia Association for Biological Farming Lexington, VA

Wild Farm Alliance Watsonville, CA