

October 31, 2008

To whom it may concern:

The Biotechnology Industry Organization (BIO) appreciates the opportunity to respond to the Community Credit Corporation's (CCC's) request for comments (Fed. Reg. 73:57047) regarding its Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for the Biomass Crop Assistance Program (BCAP). CCC also asked for public input regarding alternatives for BCAP program implementation. BIO would like to provide the following comments regarding the NOI.

## **Background**

BIO is the world's largest biotechnology organization, providing advocacy, business development and communications services for more than 1,200 members worldwide. BIO members are involved in the research and development of innovative healthcare, agricultural, industrial, and environmental biotechnology technologies. Corporate members range from entrepreneurial companies developing their first product to Fortune 100 multinationals. We also represent state and regional biotechnology-derived associations, service providers to the industry and academic centers.

BIO members are actively involved in the development, testing, and deployment of biotech-derived crops for energy production. Several BIO members are developing multi-use crops, with the potential to provide food, feed, and biomass, while other members are developing dedicated biomass crops for biofuels production. Responsible, sustainable biofuels production will be an increasingly critical component of global security in the coming century, expanding global energy supplies, reducing dependence on petroleum, cutting greenhouse gas emissions, and creating economic opportunity in rural and developing regions. Biotechnology is already playing a role in helping to meet growing demand for biofuels through increased yields of corn and soybeans. Biotechnology-derived, dedicated energy crops will also play an important role in sustainable energy production because these crops can grow well in poorer soils and do not require fertilizer or mechanized tillage.

The BCAP program can foster a more rapid development and adoption of all dedicated energy crops, and biotech-derived crops specifically. BIO respectfully submits the following comments.



## **FSA Does Not Need to Prepare an EIS to Meet Its NEPA Obligations**

Under 7 CFR 799.10 FSA must “for each of its legislative proposals, initial program implementations, program changes or any actions under its ongoing programs make a determination by the use of an environmental evaluation as to whether or not an environmental assessment or EIS is required.” The NOI does not make reference to the environmental evaluation that was done regarding proposed regulations under BCAP nor to the findings from any evaluation indicating that significant environmental impacts may result from the implementation of BCAP regulations. Instead, FSA has made an extraordinary decision in this case to forego any type of preliminary environmental evaluation and proceed directly to the preparation of an EIS.

Long experience with similar specialty agricultural projects has demonstrated to the agency and the public that these types of projects rarely result in significant environmental impacts. To undertake the effort of preparing an EIS without first determining, via an environmental evaluation, whether significant impacts are likely to occur, is bound to result in the agency needlessly analyzing projects that in its own experience should be categorically excluded from the need to prepare a NEPA document. This needless analysis will result in wasted agency resources and delay the implementation of the BCAP program. NEPA does not require Herculean efforts from the government—it only requires that the agency identify the likelihood of significant environmental impacts, and if such impacts are likely, NEPA requires the agency adequately analyze those impacts. It is unlikely that any of the BCAP projects will result in significant environmental impacts, but the question can be answered by the agency one project at a time. Preparing a EIS will be less efficient and less effective than simply identifying those projects where there is a potential for environmental impacts and focusing agency efforts and resources on those few projects.

In the implementation of other FSA programs similar to the one it plans to implement under BCAP, the agency has successfully met its NEPA obligations without jumping immediately to the preparation of an EIS. For example, the Conservation Innovation Grants (CIG) program, like BCAP, involves a number of individual project proposals funded through FSA. The FSA rules governing the CIG program do not authorize any activities that will affect the human environment—they merely establish the policies and procedures that will be used to award grants. The grants awarded under CIG, like BCAP, can be for a wide range of diverse and innovative projects, the specifics of which cannot be predicted in advance. Any attempt to analyze the effects of proposed actions under a project before its submission would be speculative.

To deal with this uncertainty, the agency did not prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) at the time the FSA rules were promulgated. Instead, the environmental effects of each CIG proposal are to be evaluated on a case-by-case basis. As a part of the

evaluation, CIG applicants are required to submit an environmental profile as part of their application. These profiles are used to determine whether an EA or EIS is needed for any given project, prior to the awarding of grant funds. We request that FSA provide project applicants with guidance towards preparation of an environmental profile to assist in determination under the BCAP. Typically, the agency puts the onus on the applicant to determine whether impacts may occur and to prepare the appropriate NEPA document.

Given the range of prospective BCAP projects that may be approved under the program, it seems likely that an EIS might identify environmental impacts from some projects but not others, wasting agency resources and potentially delaying the implementation of the BCAP program. Accordingly, we suggest that the agency forego preparing an EIS—just as it did for the CIG rules—and instead require each proposal for BCAP funding to include an environmental evaluation prepared by the applicant, and, if necessary, an appropriate NEPA document.

If, the agency nonetheless decides to complete an EIS despite these uncertainties, it should seek an extension of time for the implementation of the BCAP program at least as long as the delay due to EIS preparation. Moreover, while the preparation of any such EIS is underway, BIO strongly encourages the agency to allow small-scale projects (e.g., “demonstration-scale” biorefineries, as defined elsewhere in the energy title; or 5,000 acres), since such projects would, because of their modest size, have limited environmental impact, but could have considerable developmental and research value.

### **Implementation of the BCAP Program**

BIO recommends that the agency create a broad definition of “eligible crops.” The definition as it stands is fairly broad, but does require that any crop be evaluated in terms of invasive or noxious weed potential. BIO encourages the adoption of national standards for these analyses, rather than relying on state or local approaches. APHIS is the USDA agency charged with the identification and control of noxious weeds, and APHIS has many years of experience managing noxious weeds at the national level. The agency should therefore rely on APHIS’ expertise regarding the determination of whether a biomass crop has any noxious weed potential.

Similarly, although many different jurisdictions may identify and regulate invasive species, there is one national authority, the National Invasive Species Council (NISC), responsible for coordinating efforts to identify and manage invasive species at the federal level. Over twenty federal agencies have some responsibility for invasive species, and all these agencies use NISC guidance to determine which plant species are truly invasive. For example, one key determinant for an invasive species is whether it causes more harm than the benefits it provides. To address this question when it arises in the administration of the BCAP program, BIO asks the agency to consistently incorporate NISC principles in its rules.

Several BIO members are actively engaged in the development of biotech-derived biomass crops, specifically for their conversion to advanced biofuels. These crops are being safely developed under the regulatory supervision of the USDA, through its Biotechnology Regulatory Service. These crops can be grown on marginal lands, unsuitable for conventional commodity crops production, and they are being developed with traits that minimize costly inputs from farmers. Together, these properties ensure the most efficient and greatest possible biomass yields while at the same time reducing the need to take land out of food and feed production. BIO encourages the agency to ensure that production of these crops will be eligible for full participation in the BCAP program.

To avoid converting crop land to biomass land, and to encourage additional lands in production, the government should encourage producers to grow biomass crops on appropriate lands currently in Conservation Reserve Programs (CRP's). BIO would like the rules to enable and encourage landowners to plant CRP lands in purpose-grown trees and other biomass crops. To that end, the rule should include incentives for planting biomass crops that exceed those to encourage the conservation reserve. BIO's understanding is that CRP was originally intended to encourage producers to take land out of production because U.S. agricultural crop productivity was so high.

BIO is concerned that rules promulgated under BCAP may unnecessarily restrict participation in the program. Provisions under "BCAP Project Area Selection Criteria" could be interpreted to limit participation to a very small number of individuals. Participation from local ownership and by "beginning or socially disadvantaged" farmers or ranchers is a laudable goal and should be encouraged by the agency. However Congress' intent clearly was not to limit participation to only these groups, and BIO encourages the agency to promulgate rules enabling all qualified individuals to apply for BCAP assistance.

BIO encourages the agency to adopt a definition of "Producer" that does not needlessly restrict those who may enter into a contract with the Secretary for BCAP payments. A narrow definition could make the administration of these contracts very cumbersome. Instead the agency should adopt a definition broad enough to cover, for example, an aggregator to function as representative of individual producers (e.g., farmer coop).

BIO notes that concepts of sustainable agriculture appear several times in the statute, and these practices are often required. Because other agencies and multi-stakeholder organizations are developing sustainability standards already, BIO encourages the agency to work with these entities to develop consistent, broadly applicable sustainable agriculture practices.

Among the specific criteria the Secretary is to consider in selecting BCAP project areas is “(ii) the volume of renewable biomass projected to be available [in the project area] from sources other than the eligible crops grown on contract acres”. BIO would like clarification as to what this factor is directed towards (e.g., disfavoring projects where there are no significant existing biomass sources, but would require conversion of other land use). BIO encourages the agency to interpret this provision to mean availability of additional land that can be put into production for energy crops.

Section 9011(c)(5)(B) of BCAP’s authorizing legislation says that establishment payments shall be made to cover the costs of the establishing eligible perennial crops. However, given the broad definition for eligible crops, many producers may elect to establish annual biomass crops. The agency’s rules should acknowledge the wide range of dedicated energy crops that are likely to enter the marketplace. All these crops should be eligible for program participation, and if establishment payments cannot be made for annual crops because of the legislation, then CCC’s rules governing annual payments, made under section 9011(c)(5)(C), should recognize and provide compensation for costs unique to the production of annual biomass crops.

BIO appreciates the opportunity to provide the perspective of its members on these important issues. If you have any questions related to these comments, please contact me at 202-962-6645.

Sincerely,

A handwritten signature in black ink that reads "Michael Wach". The signature is written in a cursive, flowing style.

Michael Wach

Managing Director, Science and Regulatory Affairs

Food and Agriculture Department

Biotechnology Industry Organization