

equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. Appraisals on the collateral being released will be required on all transactions exceeding \$250,000 and will be at the expense of the borrower. The appraisal must meet the requirements of § 4279.244. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

(1) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to pay down secured debt in order of lien priority or to buy replacement collateral.

(2) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to pay down secured debt or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(3) Lenders may not release collateral with a value of more than 10 percent of the original loan amount at any one time and within any one calendar year without Agency concurrence.

(4) Any release of collateral must not adversely affect the project's operation or financial condition.

(f) *Transfers and assumptions.* Transfers and assumptions shall comply with § 4287.134 and with paragraphs (f)(1) through (3) of this section.

(1) The Agency may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability.

(2) Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(3) The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(g) *Substitution of lender after issuance of the Loan Note Guarantee.* All substitutions of lenders must comply with § 4287.135 except that, instead of approving a new lender as a

substitute lender using the provisions of § 4287.135(a), the Agency may approve the substitution of a new lender if the proposed substitute lender:

(1) Is an eligible lender in accordance with § 4279.202(b);

(2) Is able to service the loan in accordance with the original loan documents; and

(3) Acquires title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(h) *Default by borrower.* In addition to complying with § 4287.145, if a loan goes into default, the lender must provide the notification required under § 4287.145(a) to the Agency within 15 calendar days of when a borrower is 30 days past due on a payment or is otherwise in default of the Loan Agreement.

(i) *Protective advances.* All protective advances made by the lender must comply with § 4287.156 and the provisions of paragraphs (i)(1) and (2) of this section.

(1) Instead of the \$5,000 specified in § 4279.156(c), Agency written authorization is required when cumulative protective advances exceed \$100,000, unless otherwise specified by the Agency at a lesser amount.

(2) The lender must obtain written Agency approval for any protective advance that will singularly or cumulatively amount to more than \$100,000 or 10% of the guaranteed loan, whichever is less.

(j) *Determination of loss and payment.* In addition to complying with § 4279.158, if a lender receives a final loss payment, the lender must submit to the Agency an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

#### §§ 4287.308–4287.400 [Reserved]

Dated: April 5, 2010.

**Judith A. Canales,**

*Administrator, Rural Business-Cooperative Service.*

[FR Doc. 2010–8274 Filed 4–15–10; 8:45 am]

**BILLING CODE 3410–XY–P**

## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

#### 7 CFR Part 4288

RIN 0570–AA74

#### Repowering Assistance Payments to Eligible Biorefineries

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Business-Cooperative Service, an agency of the U.S. Department of Agriculture, proposes a program to make payments to eligible biorefineries. These payments would be to encourage the use of renewable biomass as a replacement fuel source for fossil fuels used to provide process heat or power in the operation of these eligible biorefineries. This program is authorized under Title IX, Section 9001, of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246).

**DATES:** Comments on the proposed rule must be received on or before June 15, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

**ADDRESSES:** You may submit comments to this proposed rule by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* For paper, disk, or CD-ROM submissions, mail comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Stop 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.

- *Hand Delivery/Courier:* Submit your comments via Federal Express mail, or other courier service requiring a street address, to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

*Instructions:* All submissions received must include the agency name and the docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comments” heading of the

**SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>, and/or Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** USDA, Rural Development-Energy Division, Program Branch, Attention: Frederick Petok, Stop 3225, Room 6870, 1400 Independence Avenue, SW., Washington, DC 20250-3225. Telephone: (202) 690-0784.

**SUPPLEMENTARY INFORMATION:** The information presented in this preamble is organized as follows:

- I. Administrative Requirements
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Unfunded Mandates Reform Act
  - C. Environmental Impact Statement
  - D. Executive Order 13132: Federalism
  - E. Regulatory Flexibility Act
  - F. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - G. Executive Order 12372: Intergovernmental Review of Federal Programs
  - H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - I. Executive Order 12988, Civil Justice Reform
  - J. Programs Affected
  - K. Paperwork Reduction Act
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  - J. Ineligible Project Costs
  - K. Payment Information
  - L. Submittal of Applications
  - M. Application Review and Scoring
  - N. Ranking of Applications
  - O. Program Payment Provisions
  - P. Succession and Control of Facilities and Production
- IV. Request for Comments

#### **I. Administrative Requirements**

##### *A. Executive Order 12866: Regulatory Planning and Review*

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a

“significant regulatory action” as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. While unable to quantify any costs or benefits associated with this rulemaking, the Agency believes that the overall effect of the rule may be beneficial.

##### *B. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104-4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

##### *C. Environmental Impact Statement*

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Funds Availability (NOFA). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each

individual application for funding. No significant environmental impacts were reported, and Findings of No Significant Impact (FONSI) were issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940-G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9004 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the goals of the Administration for advancing biofuels production for the purposes of energy independence and green house gas emission reductions. The environmental analyses will be national in scope and will be supported by site by site analysis per each application to the program. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, to forecast likely environmental impacts under the proposed rules. The draft PEA will be made available to the public for comment on the USDA Rural Business Service’s Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

##### *D. Executive Order 13132: Federalism*

It has been determined, under Executive Order 13132, Federalism, that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

##### *E. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601-602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses,

small organizations, and small governmental jurisdictions.

In accordance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities for the reasons discussed below. Regardless of whether the participating biorefinery is a small or large business, the average cost to a biorefinery to participate is estimated to be approximately \$16,400. Because the major factor in determining whether a biorefinery, small or large, will participate in this program is likely to be whether the biorefinery has the capital, or access to the capital, for the repowering project, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. For example, this average cost represents less than 0.5 percent of the maximum \$5 million that a biorefinery could receive under this program. Further, biorefineries are expected to realize a reduction in the costs to power their operations once the repowering project is in place. Thus, participating biorefineries will be able to recoup this expense, although small biorefineries are likely to take longer to recoup the expense because they are likely to have smaller power usage than large biorefineries. Finally, this regulation only affects biorefineries that choose to participate in the program.

*F. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

The regulatory impact analysis conducted for this proposed rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply Distribution and Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution, or use.

*G. Executive Order 12372: Intergovernmental Review of Federal Programs*

This Program is not subject to Executive Order 12372, Intergovernmental Review of Federal Programs, because the Program is not listed as a covered program on the Intergovernmental Consultation list.

*H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This executive order imposes requirements on Rural Development in the development of regulatory policies that have Tribal implications or preempt Tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175.

*I. Executive Order 12988: Civil Justice Reform*

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

*J. Programs Affected*

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.866.

*K. Paperwork Reduction Act*

The information collection requirements contained in the Notice of Funding Availability (NOFA) for the Section 9004 Repowering Assistance Payments to Eligible Biorefineries program published on June 12, 2009, were approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control Number 0570-0058. As discussed in the associated "Request for Emergency Review and Approval for a New Information Collection Request," expedited publication of the NOFA was mandated by Congress under the 2008 Farm Bill. Further, the Agency has made the 9004 program and the other Farm Bill energy titles a top priority for implementation as soon as possible, in order to implement all of the similar biorefinery programs at or very near the same time. Therefore, Rural Development requested emergency approval of the information collection so that the Agency could begin accepting applications and

making payments. In accordance with the Paperwork Reduction Act of 1995, the Agency is now seeking standard OMB approval of the reporting requirements contained in this proposed rule and hereby opens a 60-day public comment period.

*Title:* Repowering Assistance.

*Type of Request:* New collection.

*Abstract:* Under this proposed rule, the Agency is providing payments to eligible biorefineries to support and encourage the use of renewable biomass to replace fossil fuels in the production of heat or power that fuel the energy requirements of these biorefineries.

The collection of information is vital to the Agency to make decisions regarding the eligibility of biorefineries to participate in this program, to ensure compliance with the provisions of this proposed rule and to ensure that the payments are made to eligible biorefineries.

Biorefineries seeking funding under this program will have to submit applications that include specified information, certifications, and agreements. This information will be used to determine applicant eligibility, to prioritize applications for award, and to determine the amount of payments for which the applicants are eligible.

Applicants must submit an application that includes relevant data to allow for technical analysis of the existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants must also submit evidence that the biorefinery was in existence on or before June 18, 2008. In addition to the information specified on the standard application form, applicants must submit a feasibility study, performed by an independent qualified consultant, that demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system.

Once a biorefinery has been accepted into the repowering program and the repowering project has been completed, the biorefinery must submit a request for initial payment. Subsequent payments will be made on a semiannual basis and each will require a request for payment supported by data documenting the actual displacement of fossil fuel use from the conversion to renewable biomass.

Participating biorefineries must keep records, and make them available to USDA upon request, documenting the ongoing displacement of fossil fuel usage resulting from the repowering project. The biorefinery must provide

for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass.

In summary, the collection of information is necessary in order to implement this program.

The following estimates are based on the average over the first three years the program is in place.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 18.4 hours per response.

*Respondents:* Liquid transportation biofuel producers.

*Estimated Number of Respondents:* 15.

*Estimated Number of Responses per Respondent:* 15.9.

*Estimated Number of Responses:* 238.

*Estimated Total Annual Burden (hours) on Respondents:* 4,390.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, at (202) 692-0043.

#### Comments

*Comments are invited regarding:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of Rural Development's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, USDA, Rural Development, Stop 0742, 1400 Independence Ave., SW., Washington, DC 20250-0742. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

#### L. E-Government Act Compliance

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

information and services, and for other purposes.

#### II. Background

Rural Development administers a multitude of programs, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing leadership, infrastructure, venture capital, and technical support that can support rural communities, helping them to prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, loan guarantees, and direct payments) and technical assistance to help enhance the quality of life and provide support for economic development in rural areas. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) contains several sections under which Rural Development provides financial assistance for the production and use of biofuels. This proposed rule addresses Section 9004 of the 2008 Farm Bill, which authorizes the Secretary of Agriculture to "carry out a program to encourage biorefineries in existence on the date of enactment of the Food, Conservation, and Energy Act of 2008 to replace fossil fuels used to produce heat or power to operate the biorefineries" by making payments to assist in the installation of new systems that use renewable biomass.

Section 9004 of the Farm Security and Rural Investment Act of 2002, as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to carry out the Repowering Assistance Payments to Eligible Biorefineries Program to encourage biorefineries to replace fossil fuels used to produce heat or power to operate the biorefineries with new systems that use renewable biomass or the new production of energy from renewable biomass.

Under the proposed rule, the Agency will establish an annual sign-up period for biorefineries. Under this program a biorefinery will be eligible to receive a payment equal to 50 percent of the costs of installing eligible systems up to \$5 million. The first payment to a biorefinery awardee will be equal to 20 percent of the total amount of the award. The remainder of the award will be paid to the awardee at a rate of \$0.50 per million British thermal units of energy produced from renewable biomass.

Consistent with the authorizing legislation, the primary goal of this program is to replace fossil fuels with

energy derived from renewable biomass for the operation of biorefineries. To help meet this goal, the program proposes to provide awardees with an incentive to use their own renewable biomass energy systems by tying the payment of 80 percent of the award to the actual production of energy from renewable biomass. The more energy from renewable biomass the awardee produces for use in the biorefinery, the faster the awardee will receive the remaining 80 percent of the award. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country's energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country's energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Repowering Assistance Payments to Eligible Biorefineries Program is one part of Rural Development's contribution to the Department of Agriculture's renewable energy efforts that support the overall Federal renewable energy strategy. This program will encourage biorefineries to reduce their reliance on fossil fuels in their operations. This will help these biorefineries by reducing the carbon attributed to the bioenergy and biobased products they produce. Such reductions could improve the marketability of their bioenergy and biobased products. This program will help the overall development of bioenergy industries in the United States by encouraging the use of development of biomass energy systems. The Agency believes that systems designed for biorefineries could be easily adapted for use by a wide variety of other industries and thus could further encourage the replacement of fossil fuels for renewable energy across the U.S. economy.

The development of the renewable energy industries will take a strong partnership between the Federal government and the private sector to generate the capital needed. This

program provides incentives for more carbon efficient biorefineries and for the development of more effective renewable biomass based energy systems that could be adapted for use in a wide variety of industries.

### III. Discussion of the Proposed Rule

On June 12, 2009, the Agency published a Notice of Funding Availability (NOFA) for Repowering Assistance Payments to Eligible Biorefineries (74 FR 28009). (This Notice is referred to in this preamble as the Section 9004 NOFA.) While the Section 9004 NOFA provided requirements for participation in Fiscal Year 2009, most of its provisions are applicable to fiscal year 2010 and beyond and, thus, have been carried forward into this proposed rule.

This section of this preamble discusses the proposed Repowering Assistance payment program in detail. This discussion follows the order of the proposed rule. Where needed, the Agency discusses the provision of each paragraph and why it is being proposed.

#### A. Purpose and Scope (§ 4288.1)

This section describes the purpose, scope and applicability of the program and includes a brief description of the criteria to be used to select biorefineries for assistance and the limits of the assistance that USDA will provide under the program.

#### B. Definitions (§ 4288.2)

This section presents the definitions specific to the Repowering Assistance program as they are being used in the proposed rule in order to implement the program more clearly. Definitions are provided for the following terms:

- Application period.
- Base energy use.
- Biobased products.
- Biofuel.
- Biorefinery.
- Eligible biorefinery.
- Eligible renewable biomass.
- Energy Information Agency.
- Feasibility study.
- Feedstock unit.
- Financial interest.
- Fiscal year.
- Fossil fuel.
- Renewable biomass.
- Rural or rural area.

#### C. Review or Appeal Rights (§ 4288.3)

This paragraph provides the legal basis by which an unsuccessful applicant may request an Agency review or file an appeal with the USDA National Appeals Division, in accordance with 7 CFR part 11.

#### D. Compliance With Other Laws and Regulations (§ 4288.4)

This section states that applicants must comply with other applicable Federal laws including, but not limited to, Equal Employment Opportunities, Equal Credit Opportunity Act, and the Civil Rights Act of 1964.

#### E. Oversight and Monitoring (§ 4288.5)

This section states that the Agency reserves the right to verify all payment requests and subsequent payments made under this program, including conducting field visits, as frequently as necessary to ensure the integrity of the program. The documentation required to verify, reconcile, and enforce the payment terms of the agreement along with any potential refunds that the recipient will be required to make should they fail to adequately document their request is presented in this section.

Additionally, reporting requirements and supporting documentation which each biorefinery must make available and provide to the Agency is explained in this section. Records must be held and made available for Agency examination for a period of not less than three years from each payment date.

#### F. Forms, Regulations, and Instructions (§ 4288.6)

This section describes how copies of all forms, regulations, instructions, and other materials related to this program may be obtained.

#### G. Exception Authority (§ 4288.7)

This section identifies that condition under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR 4280, subpart B, for the renewable energy systems and energy efficiency improvements program.

#### H. Applicant Eligibility (§ 4288.10)

This section states the eligibility requirements that an applicant must meet to participate in the program. All applicants must be an eligible biorefinery, as defined in § 4288.2 of this subpart, and must meet the citizenship requirements specified in this section, which are:

- If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.
- If the applicant is an entity other than an individual, the applicant must

be at least 51 percent owned by persons who are either citizens or nationals of the U.S., the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. However, this requirement is not applicable if the entity is composed solely of members of an immediate family. In such instances, if at least one of the immediate family members is a citizen or national as described above, then the entity is eligible to participate in this program. Immediate family is being defined as: Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

If an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section IV of this preamble, the Agency is seeking comment on this requirement.

In addition, to be eligible for program payments, a biorefinery must be located in a rural area. If the biorefinery is not located in a rural area, such biorefinery is not eligible for this program. While not statutorily required, the Agency is proposing this rural area requirement for consistency with its other programs and its mission to improve the economic conditions of rural America. Lastly, as found in Section IV of this preamble, the Agency is seeking comment on this requirement.

Corporations and entities with more than one biorefinery location may not submit multiple applications. However, a project that serves multiple biorefineries located at the same location is an eligible project provided the heat and power are centrally produced.

#### I. Eligible Project Costs (§ 4288.11)

This section describes eligible project costs. Eligible project costs are only those incurred in the construction of program repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

#### J. Ineligible Project Costs (§ 4288.12)

This section states that project costs not directly associated with the repowering project and system incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment

assistance. Project costs for projects for repowering using feedstocks that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008, are not eligible. For example, gas that was produced from the waste product from corn milling fermentation would be eligible under section 9004 as it is also a secondary product and not the underlying commodity that received a benefit under Title I.

#### *K. Payment Information (§ 4288.13)*

This section describes the number and amount of payments that will be made to eligible applicants. Payments will be based on the number of applicants selected for award in the program in addition to other award criteria. These criteria will include the amount of fossil fuel replaced, the cost-effectiveness of the system, and the percentage reduction in fossil fuel use. The maximum payment an applicant may receive will be 50 percent of total eligible project costs up to \$5 million. As proposed, there is no minimum payment that an applicant may receive.

#### *L. Submittal of Applications (§ 4288.20)*

This section describes where and how to make application for the Repowering Assistance program. The applicant must furnish the Agency the required forms and documentation identified in this section. Applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). In addition to a feasibility study, applicants must submit to the Agency the documents specified in this section and furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions.

Applicants are required to provide relevant data to allow for technical analysis of their facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies and, where applicable, to document that woody biomass feedstock cannot be used as a higher value wood-based product. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

#### *M. Application Review and Scoring (§ 4288.21)*

This section describes the Application review process and presents the scoring criteria and point values assigned to each of the criteria. The Agency will evaluate projects based on the cost-effectiveness, capacity of projects to reduce fossil fuel usage, and whether the biorefinery primarily produces liquid transportation fuels. The focus of this program on liquid transportation fuels is a reflection of the intent of Congress as stated in the Managers Report for this program. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

Submission of an application neither reserves payments nor ensures payments. The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be based on the information provided by the applicant and on other sources of information, such as recognized industry experts. The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are cost, cost-effectiveness, reduction of fossil fuel use, type of fossil fuel displaced, renewable biomass factors, and technical review factors.

#### *N. Ranking of Applications (§ 4288.22)*

This section describes the process by which the Agency will rank scored applications for determination of eligibility and consideration for payment. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments. The Agency will notify all applicants of their decision on each application. It is possible that a lower scoring application may receive funding before a higher scoring application if insufficient funds remain to pay the higher scoring application and the higher scoring

application chooses not to accept the lower funding level. The higher scoring applicant will have the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

#### *O. Program Payment Provisions (§ 4288.23)*

This section describes the procedure the Agency will use to make payments to eligible biorefineries. To request payments under this program during a FY, an eligible biorefinery must submit the required application form. Upon completion of the project or project improvements, the first payment will not exceed 20 percent of the project award. Subsequent semiannual payments will be paid based on actual measured renewable biomass energy production at a rate of 50 cents per million British thermal units (MMBTUs), up to the limit of the award.

In developing the proposed payment rate of 50 cents per MMBTUs, the Agency considered what payment rate should be used to pay out the remaining funds once the upfront payment was made. In general, a lower payout rate means that it would take longer for the total award to be paid, which would be less attractive to the facility. A higher payout rate means that a biorefinery would receive the total award amount sooner, which could put Agency funding more at risk. That is, if a biorefinery received a large award, collected all of the money within a short period of time, and then the repowering project was discontinued (e.g., the biorefinery closed), Agency funds were much less productively used than intended. Spreading these payments out over a reasonably long period should help ensure that facilities continue to operate and to use biomass to replace fossil fuels. Given these considerations, the Agency is proposing a payment rate of \$0.50 per MMBTU of fossil fuel energy use that is replaced with biomass derived energy. Based on what it expects to be the average total payout, the Agency believes that this rate is reasonable in that a typical biorefinery should be able to collect all of the payment within 3 to 5 years.

Biorefineries will be required to furnish the Agency such certifications and access to records that verify compliance with program provisions and provide documentation, as requested by the Agency, regarding the production of usable energy at the

biorefinery during the relevant payment period. After semiannual payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment. Biorefineries will be notified in writing whenever the Agency determines that a payment application is ineligible and why the application was determined ineligible. Adjustments to payments otherwise payable to the biorefinery will be made if the Agency finds there is a difference between the quantity of fossil fuel actually replaced by renewable biomass and the quantity certified to in a payment application. An eligible biorefinery that has received a payment under this program may be required to refund such payment if the Agency determines the producer has made any material fraudulent representation; or misrepresented any material fact affecting a program determination. Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, or the date of an interest increase, as determined in accordance with applicable regulations. However, the Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any improper action of the biorefinery. Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

*P. Succession and Control of Facilities and Production (§ 4288.24)*

In this section, the Agency states the conditions under which any party obtaining a biorefinery that is under this program must request permission to participate in this program as a successor. The Agency may grant such request if it determines that the party is eligible and permitting such succession would serve the purposes of the program. The Agency may require the consent of the previous party to such succession. Additionally, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

#### IV. Request for Comments

The Agency is requesting comments on the overall program being proposed. The Agency is especially interested in comments on the following areas:

1. Whether the proposed eligibility requirements are reasonable and appropriate.
2. Ways in which the application process could be simplified or streamlined.
3. Whether the proposed scoring criteria will result in fair and equitable distribution of funds.
4. The appropriateness of the proposed payment rate and term.
5. Whether the payment amount is aligned with the estimated fossil fuel reduction in terms of incentives and enforcement mechanisms.
6. Should the program allow entities that do not meet the proposed citizenship requirement (§ 4288.10(a)) of at least 51 percent domestic ownership to participate, including those entities owned entirely by immediate family members where only one of the family members meets citizenship requirements? Please be sure to provide rationale for your position.
7. As proposed, only biorefineries located in rural areas will be eligible for payments. The Agency is requesting comment on whether biorefineries located in non-rural areas should also be eligible for a payment under this program. Please be sure to provide rationale for your position.
8. As proposed, the scoring criterion on renewable biomass requires an applicant to demonstrate control of the feedstock for the repowering project for at least 3 years in order to receive points. The Agency is requesting comment on the appropriate timeframe that the applicant must demonstrate access to the feedstock for the project. Please be sure to provide rationale for your position.
9. The Agency is requesting comment on whether a scoring criterion should be developed to give preference to biorefineries that have closed systems or that can use their own waste streams in the repowering project. Please be sure to provide rationale for your position.
10. The Agency is considering an approach to score applications on not only the percentage, but also the type of fossil fuel displaced. Under this approach, applicants would receive a higher score if they reduce a larger amount of fossil fuels. They would also receive a higher score for reducing the amount of higher GHG emitting fuels. The agency requests comment on this or other approaches to incentivize GHG reductions within the scope of this program.

The Agency is particularly interested in the views of program applicants and interested stakeholders.

Submit comments as indicated in the **DATES** and **ADDRESSES** sections above.

#### List of Subjects in 7 CFR Part 4288

Administrative practice and procedure, Energy—biofuel, Renewable biomass, Reporting and recordkeeping.

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 8105, Chapter XLII is proposed to be amended by adding a new part 4288 to read as follows:

#### CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

#### PART 4288—PAYMENT PROGRAMS

##### Subpart A—Repowering Assistance Payments to Eligible Biorefineries

Sec.

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- 4288.24 Succession and control of facilities and production.
- 4288.25–4288.100 [Reserved]

Authority: 7 U.S.C. 1989.

##### Subpart A—Repowering Assistance Payments to Eligible Biorefineries

#### § 4288.1 Purpose and scope.

(a) *Purpose.* The purpose of this program is to provide financial incentives to biorefineries in existence on June 18, 2008, the date of the enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) (Pub. L. 110–246), to replace the use of fossil fuels used to produce heat or power at their facilities by installing new systems that use renewable biomass, or to produce new energy from renewable biomass.

(b) *Scope.* The Agency may make payments under this program to any biorefinery that meets the requirements of the program up to the limits established for the program. Based on our research and survey of medium-

sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

(1) The Agency will determine the amount of payments to be made to a biorefinery based on the quantity of fossil fuel a renewable biomass system is replacing, the percentage reduction in fossil fuel used by the biorefinery, and the cost and cost-effectiveness of the renewable biomass system.

(2) The Agency will determine who receives payment under this program based on the percentage reduction in fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system; the cost and cost-effectiveness of the renewable biomass system; and other scoring criteria identified in § 4288.21 "Application review and scoring." The above criteria will be used to determine priority for awards of 50 percent of total eligible project costs up to \$5 million.

#### § 4288.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

*Agency* means the USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

*Application period* means the time period announced by the Agency during which the Agency will accept applications.

*Base energy use* means the amount of documented fossil fuel energy use over an extended operating period.

(1) The extended operating period must be at least 24 months of recorded usage, and requires metered utility records for electric energy, natural gas consumption, fuel oil, coal shipments and propane use, as applicable for providing heat or power for the operation of the biorefinery.

(2) Utility billing, oil and coal shipments must be actual bills, with meter readings, applicable rates and tariffs, costs and usage. Billing must be complete, without gaps and arranged in chronological order. Drop shipments of coal or oil can be substituted for metered readings, provided the biorefinery documents the usage and its relationship to providing heat or power to the biorefinery.

(3) A biorefinery in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

*Biobased products* means products determined by the Secretary to be commercial or industrial products (other than food or feed) that are:

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

(2) Intermediate ingredients or feedstocks.

*Biofuel* means fuel derived from renewable biomass.

*Biorefinery* means a facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products, and may produce electricity.

*Eligible biorefinery* means a biorefinery that has been in existence on or before June 18, 2008.

*Eligible renewable biomass* means renewable biomass as defined in this proposed rule.

*Energy Information Agency (EIA)* means the statistical agency of the Department of Energy and source of official energy statistics from the U.S. Government.

*Feasibility study* means an Agency-acceptable analysis of the economic, environmental, technical, financial, and management capabilities of a proposed project or business in terms of its expected success. A list of items that must be included in a feasibility study is presented in § 4288.20(c)(9) of this subpart.

*Feedstock unit* means a bushel, hundredweight, pound, or other unit of measure, as applicable, for the renewable biomass feedstock used in liquid transportation biofuel production.

*Financial interest* means, for the purposes of this notice, any ownership, creditor, or management interest in the biorefinery.

*Fiscal year* means the 12-month period beginning each October 1 and ending September 30 of the following calendar year.

*Fossil fuel* means fuels derived from coal, oil, propane, and natural gas.

*Immediate family*. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

*Renewable biomass* means:

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce

hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health; and

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

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

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

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Rural or rural area* means any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, and the contiguous and adjacent urbanized area, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition. In determining which census blocks in an urbanized area are not in a rural area, the Agency will exclude any cluster of census blocks that would otherwise be considered not in a Rural Area only because the cluster is adjacent to not more than two census blocks that are otherwise considered not in a rural area under this definition.

(1) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(2) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in

character.” Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is “not urban in character” for review, analysis, and decision by the Rural Development Under Secretary.

(3) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(4) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(5) The determination that an area is “rural in character” under this definition will be to areas that are within:

(i) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city town; or

(ii) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 population that is within one-quarter mile of a rural area.

#### **§ 4288.3 Review or appeal rights.**

A person may seek a review of an Agency decision under this subpart from the appropriate Agency official that oversees the program in question or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

#### **§ 4288.4 Compliance with other laws and regulations.**

Participating biorefineries must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunities Act, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, 7 CFR Part 1901 Subpart E, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Applicants must submit and will be subject to pre-award and post award compliance reviews with the terms and conditions set forth in RD Form 400-1, “Equal Opportunity Agreement” and RD Form 400-4, “Assurance Agreement.”

#### **§ 4288.5 Oversight and monitoring.**

(a) *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made under this program, including field visits, as frequently as necessary to ensure the integrity of the program. Documentation

provided will be used to verify, reconcile, and enforce the payment terms of the agreement along with any potential refunds that the recipient will be required to make should they fail to adequately document their request. The required documentation is given in RD Form 4288-6, the Repowering Program Payment Request, which details and provides that the requester demonstrate a reduction in fossil fuel use by providing concurrent readings from their previously metered usage, along with the readings from the metered, measured, and verifiable production of renewable energy from renewable biomass.

(b) *Records.* For the purpose of verifying compliance with the requirements of this proposed rule, each biorefinery must make available and provide for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass. These records must be held in one place and be available at all reasonable times for examination by the Agency. Such records include all books, papers, contracts, scale tickets, settlement sheets, invoices, written price quotations, and any other documents related to the program that are within the control of the biorefinery. These records must be held and made available for Agency examination for a period of not less than three years from each payment date.

#### **§ 4288.6 Forms, regulations, and instructions.**

Copies of all forms, regulations, instructions, and other materials related to this program may be obtained from the USDA Rural Development State Office, Renewable Energy Coordinator and the USDA Rural Development Web site at <http://www.rurdev.usda.gov/regs/formstoc.html#9>.

#### **§ 4288.7 Exception authority.**

The Administrator may, on a case-by-case basis, make an exception to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the USDA’s interest.

#### **§ 4288.8–4288.9 [Reserved]**

#### **§ 4288.10 Applicant eligibility.**

To be eligible for this program, the applicant must be an eligible biorefinery, as defined in § 4288.2 of this subpart, and must meet the

requirements specified in paragraphs (a) through (d) of this section.

(a) *Citizenship requirement.* The applicant must meet the requirements in paragraphs (a)(1) or (2), as applicable, of this section.

(1) If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the U.S., the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, as defined in paragraph (a)(1) of this section, then the entity is eligible.

(b) *Rural area requirement.* To be eligible for program payments, biorefinery must be located in a rural area.

(c) *Multiple submissions.* Only one application from corporations and entities with more than one biorefinery location will be eligible. A project that serves multiple biorefineries located at the same location is an eligible project provided the heat and power are centrally produced.

(d) *Payment eligibility.* To be eligible for program payments, an applicant must submit a complete application for consideration of payment. Payments will be made based on ranking of applicants in relation to project cost, cost-effectiveness, the quantity of fossil fuels the renewable biomass system is replacing, and the reduction of fossil fuel usage resulting from the installation of a renewable biomass system.

#### **§ 4288.11 Eligible project costs.**

Eligible project costs will be only for project related construction costs for repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

#### **§ 4288.12 Ineligible project costs.**

(a) Any project costs incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment assistance.

(b) A project is not eligible under this program if it is using feedstocks for repowering that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008.

#### § 4288.13 Payment information.

(a) At the time the project is built and commissioned, the applicant can request payment for 20 percent of eligible project cost. Subsequent payments shall be based on the measurable and verifiable production of energy from renewable biomass produced from the Repowering Project, and will be paid semiannually when submitted on form RD 4288-6.

(b) *Payment limitations.* For the purposes of this program, the maximum payment an applicant may receive will be 50 percent of total eligible project costs up to \$5 million. There is no minimum payment to an applicant.

(c) *Type of instrument.* Payments to an eligible biorefinery will be made through a signed Payment Agreement.

#### §§ 4288.14–4288.19 [Reserved]

#### § 4288.20 Submittal of applications.

(a) *Address to make application.* Application must be made to USDA, Rural Development-Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250-3225.

(b) *Content and form of submission.* Applicants must submit a signed original and one copy of an application containing the information specified in this section. The applicant must also furnish the Agency the required documentation identified in Form RD 4288-4 to verify compliance with program provisions before acceptance into the program. Note that applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1-866-705-5711, or online at <http://fedgov.dnb.com/webform>. Applicants must submit to the Agency the documents specified in paragraphs (b)(1) through (7) of this section.

(1) Form RD 4288-4, “Repowering Assistance Program Application.” Applicants must submit this form and all necessary attachments providing project information on the biorefinery; the facility at which the biorefinery operates, including location and products produced; and the types and

quantities of renewable biomass feedstock being proposed to produce heat or power. This form requires the applicant to provide relevant data to allow for technical analysis of their existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicant must also submit evidence that the biorefinery was in existence on or before June 18, 2008. The applicant is required to certify the information provided.

(2) Form RD 4288-5, “Repowering Assistance Program Agreement”. A signed copy of this form will be required prior to receiving payments under this program.

(3) RD Instruction 1940-Q, Exhibit A-1, “Restriction on Lobbying (if over \$100,000)”.

(4) Form RD 400-1, “Equal Opportunity Agreement”.

(5) Form RD 400-4, “Assurance Agreement”.

(6) Form RD 1940-20, “Request for Environmental Information” (first page only). Note, however, that applicants must substitute the narrative outlined in RD Instruction 1940-G, Exhibit H in place of the narrative attachment specified in the instructions to Form RD 1940-20.

(7) *Certifications.* The applicant must furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions. Applicant must submit forms or other written documentation certifying to the following:

(i) AD-1047, “Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions” or other written documentation.

(ii) AD-1048, “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions” or other written documentation.

(iii) SF-LLL, “Disclosure of Lobbying Activities”.

(c) *Application package contents.*

Applicants are required to provide relevant data to allow for technical analysis of their existing facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by

engineering and design calculations, and site plans, prepared by the construction engineering firm. All applicants must submit the information specified in paragraphs (c)(1) through (9) of this section as part of their application package.

(1) *Contact data.* Contact information for the primary technical contact for the biorefinery.

(2) *Biorefinery data.* Basic information on facility operations over time (hours/day, days/year).

(3) *Electric use data.* Information on existing electric service to the facility, data on consumption, peak and average demand, and monthly/seasonal use patterns.

(4) *Fuel use data.* Information on natural gas and current fuel use for boilers and heaters, including fuel type, costs, and use patterns.

(5) *Thermal loads.* Information on existing thermal loads, including type (steam, hot water, direct heat), conditions (temperature, pressure) and use patterns.

(6) *Existing equipment.* Information on existing heating and cooling equipment, including type, capacities, efficiencies and emissions.

(7) *Site-specific data.* Information on other site-specific issues, such as expansion plans or neighborhood considerations that might impact the proposed new system design or operation; or environmental impacts.

(8) *Biofuel production.* Information on liquid biofuel production (gallons/year).

(9) *Feasibility study.* The applicant must submit a feasibility study by an independent qualified consultant, which has no financial interest in the biorefinery, and demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system. The feasibility study must include the components specified in paragraphs (c)(9)(i) through (x) of this section.

(i) An executive summary, including resume of the consultant, and an introduction/project overview (brief general overview of project location, size, etc.).

(ii) An economic feasibility determination, including:

(A) Information regarding the project site;

(B) Information on the availability of trained or trainable labor; and

(C) Information on the availability of infrastructure and rail and road service to the site.

(iii) A technical feasibility determination, including a report that:

(A) Is based upon verifiable data and contains sufficient information and

analysis so that a determination may be made on the technical feasibility of achieving the levels of energy production that are projected in the statements. The report must provide the information in a format that is responsive to the scoring criteria specified in § 4288.21(b)(1) through (5) and applicants should identify in their report the information that corresponds to each of the scoring criteria; and

(B) Identifies and estimates project operation and development costs and specifies the level of accuracy of these estimates and the assumptions on which these estimates have been based.

(iv) A financial feasibility determination that discusses the following:

(A) The reliability of the financial projections and assumptions on which the project is based including all sources of project capital, both private and public, such as Federal funds;

(B) Projected balance sheets and costs associated with project operations;

(C) Cash flow projections for 3 years;

(D) The adequacy of raw materials and supplies;

(E) A sensitivity analysis, including feedstock and energy costs, product/co-product prices;

(F) Risks related to the project; and

(G) The continuity, maintenance and availability of records.

(v) A management feasibility determination.

(vi) Recommendations for implementation.

(vii) The environmental concerns and issues of the system.

(viii) The availability of feedstock, including discussions of:

(A) Feedstock source management;

(B) Estimates of feedstock volumes and costs;

(C) Collection, pre-treatment, transportation, and storage; and

(D) Impacts on existing manufacturing plants or other facilities that use similar feedstock.

(ix) The feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock from those entities.

(x) Documentation that any and all woody biomass feedstock cannot be used as a higher value wood-based product.

#### § 4288.21 Application review and scoring.

The Agency will evaluate projects based on the cost, cost-effectiveness, and capacity of projects to reduce fossil fuels. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass

to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

(a) *Review.* The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be conducted by experts in the Agency and other Federal agencies, including the U.S. Department of Energy based on the information provided by the applicant. Submission of an application neither reserves nor ensures payments.

(b) *Scoring.* The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are specified in paragraphs (b)(1) through (5) of this section.

(1) *Cost-effectiveness.* Cost-effectiveness will be scored based on the anticipated return on investment (ROI). Anticipated ROI will be demonstrated by calculating documented base energy use costs for the 24-month period prior to submission of the application or at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

(i) ROI is equal to the simple payback period.

•  $ROI = C/S$ ; where C = capital expenses; and S = savings in annual operating costs.

*Example:* Capital expenses, including handling equipment, biomass boiler, piping improvements and plant modifications, are equal to \$5,300,500. The annual difference in fossil fuel cost versus the cost for renewable biomass is \$990,500. Assume these costs and uses are based on a yearly operating cycle, which may include handling, storage and treatment costs. In this example, C = \$5,300,500; S = \$990,500; ROI = 5.35 years (C/S = ROI).

(ii) A maximum of 20 points will be awarded as follows:

(A) If the anticipated ROI is more than two years, but less than or equal to four years, award up to 20 points.

(B) If the anticipated ROI is greater than four years but less than or equal to six years, award up to 10 points.

(C) If the anticipated ROI will be greater than six years, award 0 points.

(2) *Percentage of reduction of fossil fuel use.* The anticipated percent reduction in the use of fossil fuels will

be measured using the same evidence provided by the applicant for measuring cost-effectiveness. However, this set of criteria will measure actual fossil fuel use for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

**Note:** The intent of this program is to assist eligible biorefineries to use renewable biomass and move away from fossil fuels including but not limited to: propane, coal, oil, and natural gas. Most sources of electric generation are derived from fossil fuel, and the program takes that into account in evaluating the content of electric power consumed by an applicant. All fossil fuel use, for thermal loads as well as for electric use, will be evaluated by using information provided by the Energy Information Agency (EIA). The Agency will determine the percentage reduction of fossil fuel use based on and in cooperation with the applicant's submission of electric power provider contracts, power agreements, and utility billings in relation to available information from the EIA. A maximum of 35 points will be awarded as follows:

(i) Applicant demonstrates an anticipated reduction in fossil fuel use of 100 percent, award 35 points.

(ii) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 80 percent but less than 100 percent, award 25 points.

(iii) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 60 percent but less than 80 percent, award 15 points.

(iv) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 40 percent but less than 60 percent, award 5 points.

(v) Applicant demonstrates an anticipated reduction in fossil fuel use of less than 40 percent, award 0 points.

(3) *Renewable biomass factors.* If an applicant demonstrates that it has 100 percent control, via on-site or contractual commitments, over its feedstock at the time of application for the repowering project for at least 3 years, 10 points will be awarded. If an applicant cannot demonstrate this, no points will be awarded.

(4) *Technical review factors.* Technical reviews will be conducted by a team of experts, including rural energy coordinators and State engineers. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. Each section of the technical review will be scored within a range of possible points available within that section. A maximum of 25 points will be awarded as follows:

(i) *Qualifications of the applicant's project team.* The applicant must describe the qualifications of those individuals who will be essential to successful performance of the proposed project. This will include information regarding professional credentials, relevant experience, and education, and must be supported with documentation of service capabilities, professional credentials, licenses, certifications, and resumes, as applicable. Award 0–5 points.

(ii) *Agreements and permits.* The applicant must describe the agreements and permits necessary for project implementation. An Agency-acceptable schedule for securing the required documents and permits must be provided. Award 0–3 points.

(iii) *Design and engineering.* The applicant must describe the design, engineering, and testing needed for the proposed project. The Design and Engineering documents shall demonstrate that they meet the intended purpose, ensure public safety, and comply with all applicable laws, regulations, agreements, permits, codes, and standards. Award 0–5 points.

(iv) *Project development schedule.* The applicant must provide a detailed plan for project development including a proposed schedule of activities, a description of each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. This description must address the applicant's project development cash flow requirements. Award 0–3 points.

(v) *Equipment procurement.* The applicant must describe the equipment needed, and the availability of the equipment needed, to complete installation and activation of the new system. The description supports that the required equipment is available, and can be procured and delivered within the proposed project development schedule. Award 0–3 points.

(vi) *Equipment installation.* The applicant must provide a satisfactory description of the plan for site development and system installation that reflects the soundness of the project plan. Award 0–3 points.

(vii) *Operations and maintenance.* The applicant must describe the operations and maintenance requirements of the system necessary for the system to operate as designed and provide the savings and efficiencies as described. The description and requirements noted must be supportable by the technical review. Award 0–3 points.

(5) *Liquid transportation fuels.* If the biorefinery primarily produces liquid transportation fuels, award 10 points.

#### **§ 4288.22 Ranking of applications.**

All scored applications will be ranked by the Agency as soon after the application deadline as possible. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments.

(a) *Selection of applications for payments.* Using the application scoring criteria point values specified in § 4288.21 of this subpart, the Agency will select applications for payments. The Agency will notify, in writing, all applicants whose applications have been selected for payments. Applicants whose applications have not been selected for payments will be notified in writing, with a brief explanation as to why.

(b) *Availability of funds.* If, after the majority of applications have been considered, insufficient funds remain to pay the next highest scoring application, the Agency may elect to pay a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

#### **§ 4288.23 Program payment provisions.**

The procedure the Agency will use to make payments to eligible biorefineries is specified in paragraphs (a) through (f) of this section.

(a) *Payment applications.* To request payments under this program during a FY, an eligible biorefinery must:

(1) Submit Form RD 4288–6, “Repowering Assistance Program-Payment Request.”

(i) Upon completion of the project or project improvements, the first payment will not exceed 20 percent of the project award. Subsequent semiannual payments will be paid based on actual measured renewable biomass energy production at a rate of 50 cents per million British thermal units (MMBTUs), up to the limit of the award.

(ii) After processing an initial payment, additional payments may be processed semiannually with the submission of Form RD 4288–6. This form must be accompanied by measurement and verification records

including metered data demonstrating displacement of fossil fuel use from the conversion to renewable biomass. Payment will be at the rate of 50 cents per MMBTU up to and until the project payment limit has been reached.

(2) Certify that the request is accurate.

(3) Furnish the Agency such certifications as required in RD Form 4288–4 Part C, and access to records that verify compliance with program provisions.

(4) Provide documentation, as requested by the Agency, regarding the production of usable energy at the biorefinery during the relevant payment period. Approved documentation for payment and verification of energy production from renewable biomass must include the following:

(i) Metered data documenting the production of heat, gas and power must be obtained utilizing an Agency approved measurement device.

(ii) Metered data must be verifiable and subject to independent calibration testing.

(iii) Receipts for drop shipments of and use of renewable biomass on RD Form 4288–6 Part C(3) for the corresponding period in which payments are requested. Payment requests must also present the current utility billing data from the same utilities used in the base energy use period for the corresponding payment request period.

(b) *Clarifying information.* After semiannual payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment.

(c) *Notification.* The Agency will notify the biorefinery, in writing, whenever the Agency determines that a payment request is ineligible and why the request was determined ineligible.

(d) *Payment adjustments.* The Agency may make adjustments to payments otherwise payable to the biorefinery if it finds there is a difference between the quantity of fossil fuel actually replaced by renewable biomass and the quantity certified to in a payment request.

(e) *Refunds and interest payments.* An eligible biorefinery that has received a payment under this program may be required to refund such payment as specified in paragraphs (e)(1) through (5) of this section.

(1) An eligible biorefinery receiving payment under this program will become ineligible for payments if the Agency determines the producer has:

(i) Made any material fraudulent representation; or

(ii) Misrepresented any material fact affecting a program determination.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs, as determined appropriate under 31 CFR 901.9.

(3) When a refund is due, it must be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the biorefinery, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, and the rate will adjust in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any fraudulent action of the biorefinery.

(5) Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

(f) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

#### **§ 4288.24 Succession and control of facilities and production.**

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

#### **§§ 4288.25–4288.100 [Reserved]**

Dated: April 5, 2010.

**Judith A. Canales,**

*Administrator, Rural Business-Cooperative Service.*

[FR Doc. 2010–8283 Filed 4–15–10; 8:45 am]

**BILLING CODE 3410–XY–P**

### **DEPARTMENT OF AGRICULTURE**

#### **Rural Business-Cooperative Service**

#### **7 CFR Part 4288**

**RIN 0570–AA75**

#### **Subpart B—Advanced Biofuel Payment Program**

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Business-Cooperative Service (Agency) is proposing to establish a payment program for producers of advanced biofuels to support existing advanced biofuel production and to encourage new production of advanced biofuels. The Agency would enter into contracts with advanced biofuel producers to pay such producers for the production of eligible advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

**DATES:** Written comments on the proposed rule must be received on or before May 17, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

**ADDRESSES:** You may submit comments to this proposed rule by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.

- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during

regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

#### **FOR FURTHER INFORMATION CONTACT:**

Diane Berger, USDA Rural Development, 1400 Independence Ave., SW., Room 6865, STOP 3225, Washington, DC 20250. Telephone: (202) 260–1508. Fax: (202) 720–2213. E-mail: [diane.berger@wdc.usda.gov](mailto:diane.berger@wdc.usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

#### **Executive Order 12866**

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a “significant regulatory action” as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. The Agency has identified potential benefits to the advanced biofuel producer and to the Agency. While unable to quantify any costs or benefits associated with this rulemaking, the Agency believes that the overall effect of the rule may be beneficial.

#### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104–4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of