



National Alliance of Forest Owners
Investing in the Future of America's Forests

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BCAP Final PEIS
c/o Geo-Marine, Inc.
2713 Magruder Blvd., Suite D
Hampton, VA 23666

**Re: Biomass Crop Assistance Program Final Programmatic
Environmental Impact Statement (PEIS)**

To Whom It May Concern:

The National Alliance of Forest Owners (“NAFO”) submits the following comments on the Biomass Crop Assistance Program Final Programmatic Environmental Impact Statement (PEIS) (June 2010).

NAFO strongly supports the BCAP program’s goal of promoting the development of renewable energy sources by assisting forest land owners with the production of renewable biomass feedstock and supporting the collection, harvest, storage and transportation (“CHST”) of forest-derived biomass. The program will be able to increase the nation’s renewable energy capability over the long-term and satisfy existing and potential future renewable energy mandates. Below, NAFO respectfully recommends that USDA’s Record of Decision include certain elements that will help realize the goals of the program and the nation’s renewable energy agenda. These recommendations will assist USDA in finalizing a program that maintains a level playing field for all potential sources of biomass, takes full opportunity of the multifaceted advantages provided by utilizing renewable forest biomass, and complies with the directives of Congress in section 9011 of Title IX of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), the legislation which authorized BCAP.

NAFO’s mission is to protect and enhance the economic and environmental values of private forests through targeted policy advocacy at the national level. At the time of this submission, NAFO’s members represent 75 million acres of private forests in 47 states. NAFO was incorporated in March 2008 and has been working aggressively since to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations. NAFO’s members are the nation’s leaders in sustainable forest stewardship and the leading experts on that part of the forest products supply chain nearest to the forest. For this reason, NAFO is uniquely positioned to provide insight into how the BCAP program can effectively utilize forest biomass to develop and strengthen the biomass renewable energy sector.

NAFO members recognize the fundamental role they play in achieving the nation's renewable energy goals. NAFO members are capable of generating large quantities of forest-derived biomass for use in biomass conversion facilities and growing trees, woody crops, and other plants qualifying as eligible materials in BCAP project areas. NAFO's members thus are poised to be important participants and stakeholders in BCAP and significant suppliers of the biomass our nation will need to realize its renewable energy potential. In addition, because forest biomass is recognized in objective science and policy as a carbon neutral energy source, the contributions of NAFO members to achieving national renewable energy objectives will also help address the nation's climate change priorities.

Summary

NAFO's comments are divided into three sections. First we provide background on the fundamental role of forests in achieving the goal of low-carbon renewable energy.

Second, we recommend that in the Record of Decision USDA select "Alternative 2 – Broad BCAP Implementation" and ensure that the final regulations for the BCAP program are a logical outgrowth of the proposed rule. Any effort to implement "Alternative 1 – Targeted BCAP Implementation (Preferred Alternative; Environmentally Preferred Alternative)" will cause further delay in implementation of BCAP, a program enacted over two years ago.

Third, to be consistent with the 2008 Farm Bill, the PEIS Glossary's definition of "Nonindustrial private forest land" must be amended so that certain private landowners are not arbitrarily excluded from participating in the BCAP program.

I. Forests Play a Critical Role in Achieving the Goal of Low Carbon Energy

At the outset, NAFO believes BCAP can provide a critical and necessary tool in achieving the nation's low carbon renewable energy objectives. Forests can provide ample, sustainable, domestic supplies of biomass to produce low-carbon liquid transportation fuels, low-carbon sourced electricity, efficient low carbon combined heat and power for manufacturing and other industrial uses, and ultra-low carbon synthetic natural gas that can be substituted for higher carbon sources of electricity and fuels.

A. Forest Biomass Yields Significant Lifecycle GHG Reductions

Using forest biomass to produce liquid fuels, electricity, thermal energy and synthetic gases has significant carbon benefits. In evaluating the GHG emissions associated with fuels, a lifecycle analysis ("LCA") incorporates all steps in a "product system" to evaluate broader environmental impacts of products and processes. For example, the EPA, in its final rulemaking adopting changes to the Renewable Fuel Standard Program, recognized the GHG emissions reductions of greater than 60% that

would result from the use of cellulosic biofuels compared to petroleum. Using the “displacement index” approach, EPA determined that every BTU of gasoline replaced by cellulosic ethanol will produce lifecycle GHG emission reductions of 92.7 percent. See EPA, EPA420-D-06-008, *Renewable Fuel Standard Program: Draft Regulatory Impact Analysis* at 191 (September 2006). (Note this is a reference to how another program analyzed forest biomass; that does not mean that USDA should incorporate portions of the statutory scheme for that program into BCAP.)

B. The Combustion of Forest Biomass Is Carbon Neutral

Objective science acknowledges the significant carbon benefits of electrical and thermal energy produced using renewable biomass from managed forests, and there has long been a consensus that wood and wood residues used to produce such energy in the United States have a neutral effect on atmospheric carbon. The international greenhouse gas accounting methods developed by the Intergovernmental Panel on Climate Change (“IPCC”) and the domestic greenhouse gas reporting program administered by the Energy Information Administration, for example, recognize that “biogenic” carbon such as the carbon contained in wood and wood residues, is part of the natural carbon balance and will not add to atmospheric concentrations of carbon dioxide. The EPA has also concluded that there is “‘scientific consensus’... that the carbon dioxide emitted from burning biomass will not increase CO₂ in the air if it is done on a sustainable basis.”¹

C. The Benefits of Utilizing Forest Biomass Have Been Demonstrated

Recent studies have documented the GHG benefits of electricity produced from forest biomass. One study² released by the Green Power Institute, which is the renewable energy program of the Pacific Institute, has found that biomass energy production in California over the last 30 years has provided two kinds of greenhouse gas benefits. First, it has avoided the GHG emissions associated with the production of fossil fuels. Second, biomass energy production has avoided the biogenic greenhouse gas emissions (mainly methane) of the various alternative disposal fates of biomass residues, replacing them with the lower potency greenhouse gas emissions of energy production. As the study observes:

The modern California biomass power industry has operated for almost 30 years. The figure below shows the cumulative greenhouse-gas benefits that have already been provided by the California biomass power industry since its

¹Environmental Protection Agency Combined Heat and Power Partnership, *Biomass Combined Heat and Power Catalog of Technologies*, 96 (Sept. 2007), available at www.epa.gov/chp/documents/biomass_chp_catalog.pdf.

²Gregory Morris, Ph.D. *Bioenergy and Greenhouse Gasses* (2008).

inception through 2006. The chart does not show 2007 or later operations of the industry, which are additive to the curves in the figure. Atmospheric greenhouse-gas levels in 2006 were lower by 70 million tons of CO₂ equiv. of fossil greenhouse gases and by 62.5 million tons of CO₂ equiv. of biogenic greenhouse gases as a result of solid-fuel biomass power production in California during 1980-2006. The greenhouse-gas reductions already in the books will continue to provide benefits well into the future.”³

GHG Benefit from Operations of the CA Biomass Industry



President Obama recently emphasized that renewable energy derived from feedstocks such as forest biomass hold the key to transitioning the nation to a “sustainable, low carbon energy future,” and that it is necessary to remove “artificial barriers to market expansion” for advanced biofuels. Letter from President Barack Obama to Governors John Hoeven and Chet Culver (May 27, 2009). As stated by the President:

In the Nation’s ongoing efforts to achieve energy independence, biomass and biofuels promise to play a key role by providing the Nation with homegrown sustainable energy options and energizing our economy with new industries and jobs.

President Barack Obama, *Memorandum for the Secretary of Agriculture, the Secretary of Energy, and the Administrator of the Environmental Protection Agency*, 74 Fed. Reg. 21531-32 (May 5, 2009). BCAP provides one essential mechanism of achieving these renewable energy policy objectives.

³ *Id.* at 4.

D. Forest Biomass Can Be Produced In A Sustainable And Environmentally Responsible Manner.

NAFO's members are committed to sustaining ecological, economic and social values over the long term by acting responsibly to assure an abundance of healthy and productive forest resources for present and future generations. Private forest landowners demonstrate sustainable forest management and through a variety of established methods, including reforestation of harvested sites to maintain the forest cycle and using best management practices ("BMPs") defined through voluntary and regulatory forestry programs and forest certification standards. See NAFO, *NAFO Advocacy Position on Sustainability*, available at www.nafoalliance.org/sustainability_advocacy-position.

Sustainable forest management is also achieved through private forest landowner's compliance with the existing laws governing forest practices and environmental quality. Private forestry operations are regulated by a fairly complex set of laws, regulations, and non-regulatory policies at the federal, state and local level. See NAFO, *Environmental Regulation of Private Forests in the U.S.*, available at <http://nafoalliance.org/environmental-regulation-of-private-forests/>. There is considerable evidence that this complex framework of regulatory and non-regulatory requirements has substantially reduced adverse environmental impacts from forestry, and will continue to do so in the future. See *id.* Because working forests are an important potential source of renewable biomass, some have expressed concerns that increased demand for biomass might result in adverse environmental effects. However, while it is difficult to speculate beyond broad generalizations, the removal of additional biomass from working forests is not likely to have negative environmental impacts and, in many instances, will be beneficial. See *id.* A robust yet flexible array of tools, in the form of federal, state and local laws, regulations, programs and BMPs have measurably improved the environmental performance of forest operations in the United States, and can be expected to continue to do so going forward.

II. To Avoid Further Delays in the Implementation of the BCAP Program, the Record of Decision Should Not Include Elements that Were Not Contained in the Proposed Rulemaking

In section 2.3.2.1, USDA identifies "Alternative 1 – Targeted BCAP Implementation" as the "Preferred Alternative." As in the Draft PEIS, Alternative 1 would require participating BCFs producing advanced biofuels to ensure the fuel meets the greenhouse gas test included in the Energy Independence and Security Act of 2007 and would then impose five additional conditions on participation in the program. We believe that adoption of the Alternative 1 would result in extensive delays on implementation of the BCAP program.

The six conditions in Alternative 1 would create limitations and prerequisites on the public's eligibility for and participation in the establishment and production program beyond those specified in Title IX of the 2008 Farm Bill. These conditions include new policies created for BCAP by USDA and a provision grafted onto BCAP from a completely different renewable energy program under a different statute.

The six conditions are not part of the statutory scheme enacted by Congress but are an exercise of administrative authority granted to USDA by Congress to carry out the statutory scheme. In order to adopt these conditions, USDA must comply with various components of the Administrative Procedure Act (APA). Thus, USDA must avoid decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). USDA must also meet the rulemaking requirements of the APA, 5 U.S.C. § 553. This means that USDA cannot simply announce its Record of Decision and put the six conditions into effect independent of the final rulemaking on the BCAP program. It will have to initiate or complete a rulemaking process to carry out the Decision.

A critical component of the APA rulemaking process is a "notice" of proposed rulemaking that includes either "the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Of course, an agency "is not required to adopt a final rule that is identical to the proposed rule." *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004). To maintain compliance with the APA where a final rule is different than the proposed version, "[a]n agency's final rule need only be a 'logical outgrowth' of its notice." *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). A final rule fails the "logical outgrowth" test and thus violates the APA's notice requirement where "interested parties would have had to 'divine [the agency's] unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule." *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005). The District of Columbia Circuit has further elaborated that the rule exists because the public "must be able to trust an agency's representations about which particular aspects of its proposal are up for consideration. ... [Consequently, courts will strike down that agency action that seeks to] "use the rulemaking process to pull a surprise switcheroo on regulated entities." *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

A review of USDA development of the BCAP program to date indicates that the agency has not met the APA notice requirement with respect to the six conditions. As noted above, the six conditions were set out in Alternative 1 in the draft PEIS published in August 2009. The preamble to the February rulemaking stated that USDA took into account comments submitted on the draft PEIS in developing the proposal. 75 Fed. Reg. 6264 (Feb. 8, 2010). However, the six conditions in Alternative 1 were neither included within the text of the proposed regulations nor discussed in any way in the

preamble to the proposed rulemaking. In other words, there was absolutely no indication in the proposed rulemaking that the USDA was still considering imposing the six conditions on the establishment and production program. It was clear to members of the public that USDA had moved beyond the alternatives in the draft PEIS and was seeking public comment now on the program as set out in the proposed rulemaking.

For the first time, the proposed rulemaking allowed the public to consider both funding programs of BCAP simultaneously. The proposed rulemaking asked for public comment on options for various components of the matching payment program, but, as noted, contained no indication that the six conditions remained an option for the establishment and production program. As set out in the proposed rulemaking, the structure of BCAP and the interrelationship of the two funding programs would have a definite influence on the manner of analysis and comment by members of the public. For example, commenters' concerns about proposed limitations to the matching payment program could be offset somewhat by the lack of proposed limitations on the establishment and production program. A Record of Decision selecting Alternative 1 and the six conditions that is then implemented in the final rule would not be a "logical outgrowth" of the proposed rulemaking, but rather would be a prohibited "switcheroo." Such a decision would also be vulnerable to a charge of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Having moved beyond Alternative 1 in the proposed rulemaking, USDA cannot now go back to it without incurring extensive further delays in implementation of BCAP, which Congress enacted over two years ago in June 2008. If USDA were to select Alternative 1 in its Record of Decision, USDA would be required to re-issue the proposed rulemaking and ask for comment in accordance with the APA on the new conditions. The failure to provide an additional opportunity for comment would make the final regulations vulnerable to legal challenge and likely result in an injunction against implementation until USDA completed proper notice and comment under the APA. Either path would result in further delay of BCAP implementation and further frustrate this renewable energy policy enacted by Congress. Both the public and USDA would be better served by a viable BCAP and USDA would avoid the unenviable position of having to testify on the upcoming Farm Bill while explaining its failure to implement the last Farm Bill. For these reasons, NAFO recommends that USDA select "Alternative 2 – Broad BCAP Implementation" in the Record of Decision and ensure that the final regulations for the BCAP program are a logical outgrowth of the proposed rule. This would bring a degree of certainty to a program that has been rife with confusion.

III. The Record of Decision Should Not Exclude Categories of Private Forest Landowners from the Establishment and Annual Payments Program

In the PEIS Glossary (page 11-5), "Nonindustrial private forest land" (NIPF) is defined, consistent with the definition in section 9011(a)(5)(A), 7 U.S.C. § 8111(a)(5)(A),

as “Rural lands with existing tree cover, or that are suitable for growing trees, which are owned by any private individual, group, association, corporation, Indian Tribe, or other private legal entity.” However, the PEIS description of “eligible lands” states:

NIPF is defined, in accordance with the 2008 Farm Bill, as rural land with existing tree cover, or suitable for growing trees, owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity. This definition includes properties such as privately held tree farms or private forest landowners’ cooperatives *but excludes corporations whose stocks are publicly traded or legal entities principally engaged in the production of woody products.*

PEIS section 2.1.5, p. 2-7 (emphasis added).

Contrary to the PEIS’ statement, the NIPF definition’s exclusion of land owned by publicly-traded companies and lands associated with manufacturing from participation in the BCAP program is not in accordance with the 2008 Farm Bill. Because this exclusion is inconsistent with the language of the 2008 Farm Bill, it should be clarified in the final BCAP programmatic Record of Decision, and then revised in the final rule. Specifically, the “eligible land” definition should allow land owned by publicly-traded companies and lands associated with manufacturing to participate in the BCAP program.

The 2008 Farm Bill definition states “[t]he term ‘eligible land’ includes agricultural and nonindustrial private forest lands (*as defined in section 2103a(c) of Title 16*).” 7 U.S.C. § 8111 (emphasis added). In turn, section 2103a(c) defines “nonindustrial private forest lands” as “rural, as determined by the Secretary, lands with existing tree cover, or suitable for growing trees, and owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity.” 16 U.S.C. § 2103a(c). The Secretary has not further modified this statutory definition by regulation. This is the definition set out in the PEIS Glossary.

Thus, the 2008 Farm Bill expressly identifies the statutory definition of “nonindustrial private forest lands” that should be applied in BCAP. Because Congress has spoken directly to this issue, USDA must give effect to Congress’s intent. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). Because the statutory definition referenced in the 2008 Farm Bill—16 U.S.C. § 2103a(c)—does not exclude corporations whose stocks are publically traded or legal entities principally engaged in the production of wood products, it would be contrary to Congressional intent to finalize regulations that include such a restriction. A final rule that does not allow these landowners’ participation in the program would create significant legal uncertainty as to potentially frustrate the implementation of the BCAP program.

In addition to being contrary to Congressional intent, there is no logical reason to exclude lands owned by publicly-traded companies and lands associated with manufacturing. This exclusion would unnecessarily exclude millions of acres of land from the crop assistance portion of the BCAP program that could otherwise make a positive contribution to the program's objectives. As a general matter, NAFO is unaware of any common difference in the size or management of such lands as compared to other nonindustrial private forest lands. The proposed limitation is also inconsistent with the purposes of the BCAP program to support the establishment and production of bioenergy feedstocks in an environmentally sound and sustainable manner. While there may be specific substantive reasons why certain project areas might be eliminated from consideration based on environmental or other attributes of the land, the fact that a corporation's stock is publicly traded or that the entity is principally engaged in the production of wood products has no bearing or relationship on the suitability of such land for consideration of this land for the program.

Conclusion

NAFO appreciates the opportunity to comment on the PEIS and looks forward to working with USDA to realize the contributions our private forests can make to achieve the goals of the BCAP program.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'David P. Tenny', with a long horizontal flourish extending to the right.

David P. Tenny
President and CEO