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Biomass Crop Assistance Program Summary of New Rules - October 24, 2010

The USDA Farm Service Agency is expected to release new rules for the Biomass Crop Assistance Program (BCAP) in the Federal Register later this week. When the rules are published in the Federal Register, they will be in effect immediately.

The following is a summary based upon a preliminary review of a discussion of the rules and associated Record of Decision made available on October 22, 2010; this is assumed to accurately describe the final rule. This summary is meant to provide general information and direction to clients and contacts of Innovative Natural Resource Solutions LLC (INRS, www.inrslc.com); it is not intended to provide legal advice or specific recommendations to an individual biomass facility, landowner, supplier or other party in a specific situation. In any case where this summary and the published rule disagree, the rule should be considered controlling.

The focus of this summary is on the “matching payments” for eligible biomass crops, with a particular focus on wood for energy applications. There are other portions of the rules, including establishment of new energy crops and rules regarding agricultural crops and residues that are not addressed in the following summary.

If you would like to receive updates, corrections, clarifications or other communication, please request such by emailing kingsley@inrslc.com. A request for an electronic copy of the rule as shared and the associated Record of Decision can be made to the same address.

Summary

The final rule is based significantly upon the previous program in existence during the 1st Quarter of 2010, with some modifications and restrictions that significantly impact what qualifies as eligible biomass material. Key comparisons to the previous program (authorized under the Notice of Funds Available, or NOFA), include but are not limited to:

1. Matching payments remain at a limit of \$45 per dry ton on a 1:1 matching level. There is *no ‘tiered’ payment* based upon the final product or based on an historic baseline, as was suggested in the proposed rule. In other words, the matching payment levels remain essentially as they were under the NOFA.
 - a. It appears that a full range of methodologies will be allowed to convert green tons to dry tons, though facilities will need to develop and apply a consistent protocol and have any necessary equipment for moisture testing.

2. For wood fuel or feedstock, BCAP now *requires* a conservation plan, forest stewardship plan, or equivalent plan as an eligibility requirement to receive matching payments. For wood harvested from private land, this likely means that the wood will need to come from a site that has some level of involvement with a professional forester who has developed a plan. INRS believes that what specific plans qualify will be determined at the state level in coordination with State Foresters, but this is not clear. *This could significantly limit BCAP eligible wood resources in some areas.*
3. Biomass conversion facilities (not suppliers) will be *required* to certify that eligible materials that are not crop residues (e.g., wood fuel or feedstock) are byproducts of preventative treatments that are:
 - a. Removed to reduce hazardous fuels,
 - b. To reduce or contain disease or insect infestation, or
 - c. To restore ecosystem health.*It is not clear how “restore ecosystem health” is defined or will be determined.*
4. Biomass conversion facilities will be required to treat all parties equally; this is intended to prevent biomass conversion facilities from paying different prices based on whether a person is receiving BCAP payments or not. In other words, a biomass conversion facility may not have one price for BCAP participating suppliers and another price for non-BCAP participating suppliers (though other distinctions may be allowable).
 - a. All references to ‘related party transactions’ are eliminated, and instead guided by the requirement to treat all parties equally.
5. Suppliers may receive payments for two years; beginning from the time of the first payment. The period a supplier received payments during the previous (NOFA) BCAP program counts against this total, but pauses at the date of the last payment made and does not re-start until a payment is made under the newly re-started program. In other words, the time between the last payment and the next payment (under a new program) does not count toward the two-year limit.
6. Wood direct from the forest (either as chips or as roundwood, in areas where there is not a higher value market for such products) is eligible only when provided directly; wood that requires further processing and separation from higher value products (away from the woods) is ineligible for BCAP.
 - a. INRS believes that this disqualifies sawmill residue (bark, sawdust, etc.) and bark separated from pulpwood at the mill or a wood yard.
 - b. Black liquor, a by-product of the pulping process, is clearly ineligible as a BCAP eligible fuel or feedstock.

INRS viewed a discussion and summary of the rule, which the above is based upon. The final rule, when published in the Federal Register, may contain additional information, including important definitions and procedures not discussed above. [INRS has worked with a range of Biomass Conversion Facilities and their suppliers to assure effective participation in the BCAP program; please let us know if you would like to discuss your particular situation.](#)

