

PART 4288 - PAYMENT PROGRAMS
Subpart A - Repowering Assistance Payments to Eligible Biorefineries

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PART 4288 - PAYMENT PROGRAMS

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. *Any portion of this Instruction appearing in italicized type is considered by the Agency to be administrative procedure and has not been published as part of the regulation in the Federal Register.*

(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 taking into consideration the percentage reduction in fossil fuel used by the biorefinery (including the quantity of fossil fuels a renewable biomass system is replacing), 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. The above criteria will be used to determine priority for awards of 50 percent of total eligible project costs, up to the maximum award applicable for the fiscal year.

§ 4288.2 Definitions.

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

Agency. The USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

Application period. The time period announced by the Agency during which the Agency will accept applications. *Announced through a Notice published in the Federal Register.*

Base energy use. 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. 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. Fuel derived from renewable biomass.

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

Eligible biorefinery. A biorefinery that has been in existence on or before June 18, 2008.

§ 4288.2 (Con.)

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

Feasibility study. 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.

Financial interest. Any ownership, creditor, or management interest in the biorefinery.

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

Fossil fuel. Coal, oil, propane, and natural gas.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land or 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. Any area of a State not in a city or town that has a population of more than 50,000 inhabitants according to the most recent decennial Census of the United States, not in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and which excludes certain populations pursuant to 7 U.S.C. 1991(a)(13)(H) and (I), as well as 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. (Revised 07-11-22, SPECIAL PN.)

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) 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.

(3) 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."

(4) 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.

(5) 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.

§ 4288.2 (Con.)

(6) The determination that an area is "rural in character" will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is "rural in character" under this definition will apply to areas that are within:

(A) 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 or town; or

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

(ii) Units of local government may petition the Under Secretary of Rural Development for a "rural in character" designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (6)(i)(A) or (6)(i)(B) of this definition and discuss why the petitioner believes the area is "rural in character," including, but not limited to, the area's population density, demographics, and topography and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency's Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

§ 4288.3 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title. All appeal provisions will be concluded before proceeding with further actions.

§ 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. Also applicable is Executive Order 12898 "Environmental Justice." Applicants must submit and will be subject to pre-award and post award compliance reviews with the terms and conditions set forth in Form RD 400-1, "Equal Opportunity Agreement" and Form RD 400-4, "Assurance Agreement." The State Office where the facility is located will perform the compliance review in accordance with applicable compliance procedure using Form RD 400-8 and "Compliance Review and Environmental Justice and Civil Impact Certification" Form RD 2006-38.

§ 4288.5 Oversight, monitoring, and reporting requirements.

State offices will assist in monitoring the construction, commissioning, and payment approval for Repowering Projects. State offices should perform such tasks as: verifying the date when projects are completed; verifying which feedstocks are being used; and reviewing metered data to verify the amount of utility and bulk fuel used before the Repowering Project was installed and after the Repowering Project is operating and the actual production of energy from biomass used in the Repowering Project.

(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 Form RD 4288-5, "Repowering Assistance Program - Agreement," along with any potential refunds that the recipient will be required to make should they fail to adequately document their request. Verify the meters are the same as identified in their application.

§ 4288.5 (Con.)

(b) Records.

(1) For purposes of verifying the eligible project costs supporting payments under this subpart, each biorefinery must maintain in one place such books, documents, papers, receipts, payroll records and bills of sale adequate to identify the purposes for which, and the manner in which funds were expended for eligible project costs. The biorefinery must maintain copies of all documents submitted to the Agency in connection with payments made hereunder. These records must be available at all reasonable times for examination by the Agency and must be held and be available for Agency examination for a period of not less than 3 years from the final payment date. *The Agency construction inspection will be documented using form RD 1924-12 "Inspection Report." Field visits will be documented using Form RD 4279-15 "Business and Industry Visit Review Report."*

(2) For the purpose of verifying compliance with the fossil fuel reduction and energy production requirements of this subpart, 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, 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 3 years from the date the repowering project becomes operational. *Verify the accuracy of metered records and drop shipments.*

(c) Reporting. Upon completion of the repowering project, the biorefinery must submit a report using Form RD 4288-6, "Repowering Assistance Programs - Reporting Form," to the Agency annually for the first 3 years after completion of the project. The reports are to be submitted as of October 1 of each year. The report must include the items specified in paragraphs (c)(1) and (c)(2) of this section.

(1) Documentation regarding the usage and production of energy at the biorefinery during the previous year, including both the previous and current fossil fuel load and the renewable biomass energy production.

RD Instruction 4288-A
§ 4288.5(c) (1) (Con.)

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

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

(2) Current utility billing data, indentifying metered loads, from the base energy use period.

§ 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/RegulationsandGuidance.html/>.

§ 4288.7 Exception authority.

The Administrator of the Agency ("Administrator") may, with the concurrence of the Secretary of Agricultural, make an exception, on a case-by-case basis, 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 Federal government's interest.

§§ 4288.8 - 4288.9 [Reserved]

§ 4288.10 Applicant eligibility.

(a) Eligible projects. To be eligible for this program, the applicant must be an eligible biorefinery utilizing only renewable biomass for replacement fuel, and must meet the requirements specified in paragraphs (a) (1) through (a) (5) of this section.

(1) Timely complete application submission. To be eligible for this program, the applicant must submit a complete application within the application period. Projects will be selected based on ranking which is derived from the application of the selection criteria stated in § 4288.21.

§ 4288.10(a) (Con.)

(2) Multiple biorefineries. Corporations and entities with more than one biorefinery can submit an application for only one of their biorefineries. However, if a corporation or entity has multiple biorefineries located at the same location, the entity may submit an application that covers such biorefineries provided the heat and power used in the multiple biorefineries are centrally produced. *A corporation or entity may make one application, that includes multiple projects, so long as they are served by one repowering project. Example of an acceptable application: Three plants use process heat from a single Repowering Project located on the plant site. Example of an unacceptable application: Two plants owned by the same entity are located ten miles apart and each is powered by a different system in which the applicant proposes two separate Repowering Projects to replace the two existing systems.*

(3) Cost-effectiveness. The application must be awarded at least minimum points for cost-effectiveness under § 4288.21(b) (1).

(4) Percentage of reduction of fossil fuel use. The application must be awarded at least minimum points for percentage of reduction of fossil fuel use under § 4288.21(b) (2).

(5) Full project financing. The applicant must demonstrate that it has sufficient funds or has obtained commitments for sufficient funds to complete the repowering project taking into account the amount of the payment request in the application.

(b) Ineligible projects. A project is not eligible under this subpart 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.

§ 4288.11 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.

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

§ 4288.13 Payment information.

(a) Maximum payment. For purposes of this program, the maximum payment an applicant may receive will be 50 percent of total eligible project costs up to the applicable fiscal year's maximum award as announced in an annual Federal Register notice. There is no minimum payment to an applicant.

(b) Reimbursement payments. The Agency shall only make payments based on the biorefinery's expenditures on eligible project costs. Payments shall be determined by multiplying the amount of eligible expenditures stated on the payment request by a percentage obtained by dividing the aggregate payment award by total eligible project costs.

(c) Timing of payments. The Applicant may request payments not more frequently than once a month by submitting an original, completed, validly signed Standard Form (SF) 271, "Outlay Report and Request for Reimbursement for Construction Programs" including the supporting documentation identified in § 4288.23, to reimburse the applicant for the Agency's pro rata share of funds expended on eligible project costs. The Agency shall make such payments until 90 percent of the total payment award has been expended. The final 10 percent of the payment award will be paid upon completion of the repowering project and satisfactory evidence has been received by the Agency demonstrating that the biorefinery is operating as described in the Agency approved application. *Evidence that the project is operational is usually found in a commissioning report, which will note the status of the project and will list the consumption rate of biomass and production of energy. Operational projects will confirm test results, have air quality permits, manuals, and warranties. At this stage, evidence of changes in utility accounts, installation of meters and measurement capabilities are required observations and should be documented.*

§§ 4288.14 - 4288.19 [Reserved]

§ 4288.20 Submittal of applications.

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

§ 4288.20 (Con.)

(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, "Repowering Assistance Program Application," 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 (b) (6) of this section.

(1) Form RD 4288-4. 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. The 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) RD Instruction 1940-Q, Exhibit A-1, "Certification for Contracts, Grants and Loans."

(3) Form RD 400-1, *Equal Opportunity Agreement*.

(4) Form RD 400-4, *Assurance Agreement*. The Agency will complete Form RD 2006-38, *Environmental Justice and Civil Rights Impact Certification*.

(5) Environmental documentation in accordance with 7 CFR part 1970. (Revised 04-01-16, SPECIAL PN.)

(6) **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. The 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. *This document applies to the contractor and other lower tier transactions the applicant is contracting with for the project. All contracts in excess of \$25,000 will require the applicable contractor to sign the form.*

(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 (c)(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.

§ 4288.20(c) (Con.)

- (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 and biobased product production. Information on biofuel and biobased product production, including quantity and units of production.
- (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 (c) (9) (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) Describes the repowering project, including:

(1) Information on heating and cooling equipment, including type, capacities, efficiencies and emissions;

(2) Anticipated impacts of the repowering project on the information requested above relating to electric use data, fuel use data, thermal loads and biofuel and biobased product production; and

(3) A project development schedule as more fully described in § 4288.21(b) (4) (iv);

(B) 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

(C) 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) Repowering project construction funding, including repayment terms and security arrangements. Attach any documents relating to the project financing;

(B) 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;

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

(D) Cash flow projections for 3 years;

(E) The adequacy of raw materials and supplies;

§ 4288.20(c) (9) (iv) (Con.)

- (F) A sensitivity analysis, including feedstock and energy costs, product/co-product prices;
- (G) Risks related to the project; and
- (H) 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) If woody biomass from National forest system lands or public lands is proposed as the feedstock, documentation must be provided that it 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.

(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 (b) (6) of this section.

(1) Cost-effectiveness. Cost-effectiveness will be scored based on the anticipated simple payback period, or "simple payback." Anticipated simple payback 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) The simple payback period is calculated as follows:
- Simple payback = C/S
where: C = eligible capital expenses of the repowering project
S = savings in annual operating costs.

Example: Eligible capital expenses of the repowering project, 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; simple payback = 5.35 years (C/S = simple payback).

- (ii) A maximum of 20 points will be awarded as follows:
- (A) If the anticipated simple payback is less than or equal to 4 years, award 20 points.
- (B) If the anticipated simple payback is greater than 4 years but less than or equal to 6 years, award 10 points.

§ 4288.21(b)1) (ii) (Con.)

(C) If the anticipated simple payback will be greater than 6 years but less than or equal to 10 years, award 5 points.

(D) If the anticipated simple payback will be greater than 10 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. 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 annual reduction in fossil fuel use of 100 percent, award 35 points.

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

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

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

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

(vi) If any of the fossil fuel being replaced is natural gas, deduct 5 points.

(3) Renewable biomass factors. If an applicant demonstrates at the time of application that it has on site available access to renewable biomass or enforceable third party commitments to supply renewable biomass for the repowering project for at least 3 years, 5 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 0-4 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 0-4 points.

§ 4288.21(b) (4) (Con.)

(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.

(6) Rural area. If the biorefinery is located in a Rural Area, award 5 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.

(b) Availability of funds. As applications are funded, if 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.

(c) Applications deemed not feasible. If an application is deemed not feasible, the applicant will be informed the application is not being considered for payments. A brief description of the reasons shall be provided. Applicants may seek a review of the Agency decision under the provisions of § 4288.3. Applicants requesting an Appeal shall be granted due process through the National Appeals Division.

§ 4288.23 Notifications.

(a) Successful applicants. Successful applicants will receive an award letter notifying them of the award, including the terms and conditions, and Form RD 4288-5. Each funded project is unique, and, therefore, conditions of Form RD 4288-5 may vary among projects. Successful applicants must execute and return the Form RD 4288-5, accompanied by any additional items identified in the award letter.

(b) Unsuccessful applicants. Unsuccessful applicants will receive a letter notifying them of their application score and ranking and the score necessary to qualify for payments. Include in the letter a brief description of the reason(s) why the application was not funded. Applicants may seek a review of the Agency decision under the provisions of § 4288.3. Applicants requesting an Appeal shall be granted due process through the National Appeals Division.

§ 4288.24 Program payment provisions.

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

(a) Payment applications. The Agency shall make payments based on the biorefinery's expenditures on eligible project costs. To request payments under this program during a fiscal year, an eligible biorefinery must:

§ 4288.24(a) (Con.)

(1) Submit an original, validly signed and completed SF 271 to the Agency not more frequently than once a month with the following supporting documentation:

(i) Evidence of expenditure of funds on eligible project costs which shall include paid third party invoices, receipts, bills of sale, and/or payroll records. Such records must be adequate to identify that funds to be reimbursed were spent on eligible project costs; and

(ii) Evidence that construction of the repowering project is in compliance with the project development schedule.

(2) Certify that the request is accurate.

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

(b) Clarifying information. After 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. *Items that may require clarification include, but are not limited to: receipts, legibility, invoices, payments to contractors, advances of loans including construction loans may be requested, construction management fees, progress of the construction project, equipment orders, and deliveries.*

(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. *Applicable appeal rights will be included.*

(d) 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 (d) (1) through (d) (5) of this section.

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

(i) Made any material fraudulent representation;

(ii) Misrepresented any material fact affecting a program determination; or

(iii) Upon completion of the repowering project, failed to reduce its fossil fuel consumption, produce energy from renewal biomass or otherwise operate as described in its Agency approved application.

(A) Failure to: (1) reduce fossil fuel consumption; (2) produce energy from renewable biomass; or (3) otherwise operate as described shall be construed as a significant difference. An example of significant difference is: projected reduction of 58 percent use of fossil fuel when the actual reduction in fossil fuel is 39 percent.

(B) In measuring reductions in fossil fuel use, a plant may not be penalized because they have increased other processes that use fossil fuel as the result of adding new equipment, which would not have been in their baseline documentation.

(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 or negligent action of the biorefinery.

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(5) A biorefinery or person receiving payment under this program will be liable for any refund or related charges associated with their project due under this program.

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

§ 4288.25 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. *Succession may be accomplished through a transfer of government contracts to a third party through an agreement in which the government approves the transfer of the contract and related interests.*

§ 4288.26 Fiscal Year 2009 and Fiscal Year 2010 applications.

Any entity that submitted an application for payment to the Agency under this program prior to March 13, 2011 will have their payments made and serviced in accordance with the provisions specified in this subpart.

§§ 4288.27 - 4288.100 [Reserved]

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