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United States Government Accountability Office
Washington, DC 20548

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November 10, 2009

The Honorable Jeff Bingaman
Chairman
The Honorable Lisa Murkowski
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe L. Barton
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Energy, Office of Energy Efficiency and Renewable Energy:
Production Incentives for Cellulosic Biofuels; Reverse Auction Procedures
and Standards*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Energy (DOE), Office of Energy Efficiency and Renewable Energy, entitled “Production Incentives for Cellulosic Biofuels; Reverse Auction Procedures and Standards” (RIN: 1904-AB73). It was published in the *Federal Register* as a final rule on October 15, 2009. 74 Fed. Reg. 52,867. It was effectively received as a major rule on October 26, 2009.

The final rule establishes the procedures and standards for reverse auctions of production incentives for cellulosic biofuels.

The final rule has an announced effective date of November 16, 2009. The Congressional Review Act requires 60 days between the effective date of a major rule and the later of the publication of the rule in the *Federal Register* or receipt by Congress of a report containing a copy of the final rule, a concise general statement, including whether or not the rule is a major rule, and the proposed effective date of the rule. 5 U.S.C. § 802(a)(3)(A). GAO received a copy of the rule identified as non-major on October 15, 2009. However, on October 26, 2009, DOE notified GAO that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) had determined that the final rule was likely to result in an

annual effect on the economy of \$100 million or more, and therefore, the final rule is a “major rule” under the Congressional Review Act. 5 U.S.C. § 804(2). Consequently, DOE’s major rule was effectively received on October 26, 2009, for purposes of our reporting requirements under 5 U.S.C. § 801(a)(2)(A). Therefore, this final rule does not have the required 60-day period prior to its effective date.

Enclosed is our assessment of the DOE’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that, with the exception of the 60-day period prior to the effective date, DOE complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Daniel Cohen
Assistant General Counsel for
Legislation and Regulatory Law
Department of Energy

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF ENERGY,
OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY
ENTITLED
"PRODUCTION INCENTIVES FOR CELLULOSIC BIOFUELS;
REVERSE AUCTION PROCEDURES AND STANDARDS"
(RIN: 1904-AB73)

(i) Cost-benefit analysis

The incentives awarded for the production of cellulosic biofuels under the program will constitute a transfer payment from the government to private entities, which means they will not affect total resources available to society. These transfers do not involve costs and benefits, and therefore DOE did not prepare an assessment of the costs and benefits of the final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

DOE certified that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, DOE did not prepare a regulatory flexibility analysis for the final rule.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DOE determined that the final rule will not impose a federal mandate on state, local, or tribal governments or on the private sector. Therefore, DOE did not prepare an analysis under the Unfunded Mandates Reform Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DOE published a notice of proposed rulemaking on December 23, 2008. 73 Fed. Reg. 78,663. DOE received one comment on the proposed rule, and DOE responded to that comment in the final rule. 74 Fed. Reg. 52,867.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule requires that entities that intend to participate in a reverse auction must file a pre-auction eligibility submission and that a bidder submits a progress

report. DOE estimates that the annual recordkeeping burden for this collection of information will be 30 hours per year at a total annual cost of \$2250. DOE has submitted this collection of information to OMB for approval.

Statutory authorization for the rule

The final rule is authorized by section 942 of the Energy Policy Act of 2005, Pub. L. 109-58, codified at 42 U.S.C. § 16251.

Executive Order No. 12,866 (Regulatory Planning and Review)

The final rule was determined to be a significant regulatory action under the Order, and reviewed by OMB. The authorizing statute provides that awards under the program shall be limited to not more than \$100 million in any one year. 42 U.S.C. 16251(d). OMB determined the rule was economically significant because of the possibility of awards at the \$100 million level. DOE notes, however, that the level of funding provided for the program thus far suggests that it is unlikely that DOE will award \$100 million in any one year.

Executive Order No. 13,132 (Federalism)

DOE determined that the final rule will not preempt state laws and will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.