DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503–AA30

Designation of Biobased Items for Federal Procurement

AGENCY: Office of Energy Policy and New Uses, USDA.

ACTION: Final Rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending the guidelines for designating biobased products for Federal procurement, to add nine sections to designate items, including subcategories, within which biobased products will be afforded Federal procurement preference. USDA also is establishing minimum biobased content for each of these items and subcategories.

In addition, USDA is amending the guidelines by providing exemptions to the Department of Defense and the National Aeronautic and Space Administration from the preferred procurement requirements. USDA is also making minor technical amendments to several sections of the guidelines to update information on the applicable Web site citation and to provide additional information on products that may overlap with products designated for preferred procurement under the U.S. Environmental Protection Agency's Comprehensive Procurement Guideline for Products Containing Recovered Materials.

DATES: This rule is effective June 13, 2008.

FOR FURTHER INFORMATION CONTACT: Marvin Duncan, USDA, Office of the Chief Economist, Office of Energy Policy and New Uses, Room 4059, South Building, 1400 Independence Avenue, SW., MS–3815 Washington, DC 20250–3815; e-mail: *mduncan@oce.usda.gov*; phone (202) 401–0461. Information regarding the Federal Procurement of Biobased Products (one part of the BioPreferred Program) is available on the Internet at *http://www.biopreferred.gov*.

SUPPLEMENTARY INFORMATION:

The information presented in this preamble is organized as follows:

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I. Authority

These items, including their subcategories, are designated under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102 (referred to in this document as ''section 9002'').

II. Background

As part of the Federal Procurement of Biobased Products, USDA published on August 17, 2006, two proposed rules in the **Federal Register** (FR) for the purposes of designating a total of 20 items for the preferred procurement of biobased products by Federal agencies (referred hereafter in this FR notice as the ''preferred procurement program''). One of the proposed rules, RIN 0503–AA30, can be found at 71 FR 47566. The other proposed rule, RIN 0503–AA31, can be found at 71 FR 47590. This FR notice addresses the RIN 0503–AA30 proposed rule. The other proposed rule is addressed in a separate FR notice. These two rulemakings are referred to in the preamble and on the BioPreferred Web site as Round 2 (RIN 0503–AA30) and Round 3 (RIN 0503–AA31).

The Round 2 proposed rule proposed designating the following items for the preferred procurement program: Adhesive and mastic removers; plastic insulating foam for residential and commercial construction; [1] hand cleaners and sanitizers; composite panels; fluid-filled transformers; disposable containers; [2] fertilizers; metalworking fluids; [3] sorbents; and graffiti and grease remover products.

Today's final rule designates the following nine items, including subcategories, within which biobased products will be afforded Federal procurement preference: Adhesive and mastic removers; plastic insulating foam for residential and commercial construction; hand cleaners and sanitizers, including hand cleaners and hand sanitizers as subcategories; composite panels, including plastic lumber composite panels, acoustical composite panels, interior panels, structural interior panels, and structural wall panels as subcategories; fluid-filled transformers, including synthetic ester-based transformer fluids and vegetable oil-based transformer fluids as subcategories; disposable containers; fertilizers; sorbents; and graffiti and grease removers. USDA has determined that each of these items meets the necessary statutory requirements; that they are being produced with biobased products; and that their procurement will carry out the following objectives of section 9002: To improve demand for biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

When USDA designates by rulemaking an item (a generic grouping of products) for preferred procurement under the BioPreferred Program, manufacturers of all products under the umbrella of that item that meet the requirements to qualify for preferred procurement can claim that status for their products. To qualify for preferred procurement, a product must be within a designated item and must contain at least the minimum biobased content established for the designated item. When the designation of specific items is finalized, USDA will invite the manufacturers of these qualifying products to post information on the product, contacts, and performance testing on its BioPreferred Web site, *http://www.biopreferred.gov*. Procuring agencies will be able to utilize this Web site as one tool to determine the availability of qualifying biobased products under a designated item. Once USDA designates an item, procuring agencies are required generally to purchase biobased products within these designated items, including their

[1] At proposal, this item was identified as ''insulating foam for wall construction.'' Based on comments received, and as explained in this preamble, USDA has renamed this item as ''plastic insulating foam for residential and commercial construction.''

[2] At proposal, this item was identified as ''biodegradable containers.'' Based on comments received, and as explained in this preamble, USDA has renamed this item as ''disposable containers.''

[3] Based on comments received, and on additional data obtained, USDA has combined the proposed ''metalworking fluids'' item with the ''cutting, drilling, and tapping oils'' item that was proposed for designation on October 11, 2006 (71 FR 59862). The combined item is designated as ''metalworking fluids'' and is included in the Round 4 final rulemaking.

subcategories, where the purchase price of the procurement item exceeds $10,000 or where the quantity of such items or of functionally equivalent items purchased over the preceding fiscal year equaled $10,000 or more.

Subcategorization. Most of the items USDA is considering for designation for preferred procurement cover a wide range of products. For some items, there are groups of products within the item that meet different markets and uses and/or different performance specifications. For example, within the item ''hand cleaners and sanitizers,'' some products are required to meet performance specifications for sanitizing, while other products do not need to meet these specifications. Where such subgroups, or subcategories, exist, USDA intends to create subcategories. Thus, for example, for the item ''hand cleaners and sanitizers,'' USDA has determined it is reasonable to create a ''hand cleaner'' subcategory and a ''hand sanitizer'' subcategory. Sanitizing specifications would be applicable to the latter subcategory, but not the former. In sum, USDA looks at the products within each item to evaluate whether there are groups of products within the item that meet different performance specifications and, where USDA finds this type of difference, it intends to create subcategories.

For some items, however, USDA may not have sufficient information at the time of proposal to create subcategories within an item. For example, USDA may know that there are different performance specifications that de-icing products are required to meet, but it has only information on one type of de-icing product. In such instances, USDA may either designate the item without creating subcategories (i.e., defer the creation of subcategories) or designate one subcategory and defer designation of other subcategories within the item until additional information is obtained on products within these other subcategories.

Within today's rulemaking, USDA has created subcategories within three items. These items are: Hand cleaners and sanitizers (i.e., hand cleaners, hand sanitizers); composite panels (i.e., plastic lumber composite panels, acoustical composite panels, interior panels, structural interior panels, and structural wall panels); and fluid-filled transformers (i.e., synthetic ester-based fluids and vegetable oil-based fluids).

Minimum Biobased Contents. The minimum biobased contents being established with today's rulemaking are based on products for which USDA has biobased content test data. In addition to considering the biobased content test data for each item, USDA also considers other factors when establishing the minimum biobased content. These other factors include: Public comments received on the proposed minimum biobased contents; product performance information to justify the inclusion of products at lower levels of biobased content; and the range, groupings, and breaks in the biobased content test data array. Consideration of this information allows USDA to establish minimum biobased contents on a broad set of factors to assist the Federal procurement community in its decision to purchase biobased products.

USDA makes every effort to obtain biobased content test data on multiple products within each item. For most designated items, USDA has biobased content test data on more than one product within a designated item. However, in some cases, USDA has been able to obtain biobased content data for a single product within a designated item. As USDA obtains additional data on the biobased contents for products within these nine designated items and their subcategories, USDA will evaluate whether the minimum biobased content for a designated item or subcategory will be revised.

USDA anticipates that the minimum biobased content of an item or subcategory that is based on a single product is more likely to change as additional products in those items and subcategories are identified and tested. In today's rulemaking, the synthetic ester-based subcategory under the fluid-filled transformers designated item and the acoustical composite panels subcategory under the composite panels designated item are based on a single tested product.

For all items and subcategories where additional information indicates that it is appropriate to revise a minimum biobased content established under today's rulemaking, USDA will propose the change in a notice in the **Federal Register** to allow public comment on the proposed revised minimum biobased content. USDA will then consider the public comments and issue a final rulemaking on the minimum biobased content.

Biodegradability. Many of the products within items being designated for the preferred procurement program are designed to be disposed of after a single use and/or used in environmentally sensitive applications. USDA believes that biodegradability is an important feature that should be considered when purchasing, using, and disposing of these products.

In simple terms, biodegradability measures the ability of microorganisms present in the disposal environment to completely consume the biobased carbon product within a reasonable time frame and in the specified environment.

Composting is one such environment under which biodegradability occurs. In that composting environment, the explanation of the environment, the degree of microbial utilization (biodegradation), and the time frame within which it occurs are specified through established standards. Composting is but one environment under which biodegradability occurs. For example, non-floating biodegradable plastics can also biodegrade in a marine environment.

For some designated items and subcategories, USDA is requiring biodegradability as a prerequisite for receiving preferred procurement status under the BioPreferred Program. For most items and subcategories, however, USDA has decided not to require biodegradability as a prerequisite for receiving preferred procurement status. For products within a designated item for which USDA will require biodegradability, USDA will specify the appropriate ASTM standards.

USDA believes that the relationship between the performance and the biodegradability of products within an item (or subcategory) must be considered before biodegradability is included as a prerequisite for a designated item. For some designated items, product performance is the critical factor in a purchaser's decision as to which product to purchase. Within other designated items, especially those designed for one-time use, disposal considerations may be equally important as performance considerations.

Where USDA judges product performance to be the key decision-making factor for purchasers, USDA will not require biodegradability as a prerequisite for designation of items to participation in the preferred procurement program. In those cases where disposal considerations are believed to be as important as performance, however, USDA will require biodegradability for products within the designated item (or subcategory) if there are established biodegradability standards.

In this rulemaking, products that fall within the disposable containers designated item are required to meet biodegradability standards to receive preferred procurement under the BioPreferred Program. For the remaining items in this rulemaking, USDA believes that the product performance

considerations outweigh biodegradability. USDA does, however, encourage procuring agencies to purchase biodegradable products in any case where they meet the agencies' performance needs.

USDA will continue to gather additional information on the relationship between performance and biodegradability of products within designated items and may add biodegradability as a prerequisite for other items at a later date. USDA will also make information regarding biodegradability of items available on the BioPreferred Web site.

Preference compliance date. Because USDA has identified only one manufacturer of products within the synthetic ester-based fluid-filled transformers subcategory, the preference compliance date is deferred until USDA identifies two or more manufacturers of products in this subcategory. When it identifies two or more manufacturers, USDA will publish a document in the **Federal Register** announcing that Federal agencies will have one year from the date of publication of that announcement to give procurement preference to biobased synthetic ester-based fluid-filled transformers.

USDA notes that although only one product from the acoustical composite panels subcategory has been tested for biobased content, nine manufacturers of products in this subcategory have been identified. Thus, USDA is not deferring the preference compliance date for this subcategory.

Overlap with EPA's Comprehensive Procurement Guideline program for recovered content products. Some of the products that are biobased items designated for preferred procurement may also be items the Environmental Protection Agency (EPA) has designated under the EPA's Comprehensive Procurement Guideline (CPG) for Products Containing Recovered Materials. Where that occurs, an EPA-designated recovered content product (also known as ''recycled content products'' or ''EPA-designated products'') has priority in Federal procurement over the qualifying biobased product as identified in 7 CFR 2902.2. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to provide additional product and performance information to Federal agencies to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products. As this information becomes available, USDA will place it on the BioPreferred Web site with its catalog of qualifying biobased products.

In cases where USDA believes an overlap with EPA-designated recovered content products may occur, manufacturers are being asked to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains petroleum-based components and whether the product contains recovered materials. Federal agencies may also ask manufacturers for information on a product's biobased content and its profile against environmental and health measures and life-cycle costs (the Building for Environmental and Economic Sustainability (BEES) analysis or ASTM Standard D7075 for evaluating and reporting on environmental performance of biobased products). Such information will permit agencies to determine whether or not an overlap occurs.

Section 6002 of RCRA requires a procuring agency procuring an item designated by EPA generally to procure such items composed of the highest percentage of recovered materials content practicable. However, a procuring agency may decide not to procure such an item based on a determination that the item fails to meet the reasonable performance standards or specifications of the procuring agency. An item with recovered materials content may not meet reasonable performance standards or specifications, for example, if the use of the item with recovered materials content would jeopardize the intended end use of the item.

Where a biobased item is used for the same purposes and to meet the same Federal agency performance requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product. For example, if a biobased hydraulic fluid is to be used as a fluid in hydraulic systems and because ''lubricating oils containing re-refined oil'' has already been designated by EPA for that purpose, then the Federal agency must purchase the EPA-designated recovered content product, ''lubricating oils containing re-refined oil,'' assuming such oil is available. If, on the other hand, that biobased hydraulic fluid is to be used to address a Federal agency's certain environmental or health performance requirements that the EPA-designated recovered content product would not meet, then the biobased product should be given preference, subject to cost, availability, and performance.

This final rule designates five items for preferred procurement for which there may be overlap with EPA-designated recovered content products. These items are: (1) Plastic insulating foam for residential and commercial construction, (2) composite panels, (3) disposable containers, (4) sorbents, and (5) fertilizer. Depending on how they are to be used, qualifying biobased products under these five items may overlap, respectively, with building insulation; laminated paperboard and structural fiberboard, shower and restroom dividers, or signage; paper and paper products; sorbents; and fertilizer made from recovered organic material. EPA provides recovered materials content recommendations for these five recovered content products in various Recovered Materials Advisory Notices (RMAN), including RMAN I, RMAN II, RMAN III, and RMAN V. The RMAN recommendations for each of these CPG products can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

Future designations. In making future designations, USDA will continue to conduct market searches to identify manufacturers of biobased products within designated items. USDA will then contact the identified manufacturers to solicit samples of their products for voluntary submission for biobased content testing and for the BEES analytical tool. Based on these results, USDA will then propose new items for designation for preferred procurement.

As stated in the preamble to the first six items designated for preferred procurement (71 FR 13686, March 16, 2006), USDA plans to identify approximately 10 items in each future rulemaking. USDA has developed a preliminary list of items for future designation. This list is available on the BioPreferred Web site. While this list presents an initial prioritization of items for designation, USDA cannot identify with any certainty which items will be presented in each of the future rulemakings. Items may be added or dropped and the information necessary to designate an item may take more time to obtain than an item lower on the prioritization list.

Exemptions. In an earlier item designation rule (71 FR 13686), USDA created exemptions from the preferred procurement program's requirements for procurements involving combat or combat-related missions and for

spacecraft systems and launch support equipment. Since publication of that final rule in the **Federal Register**, and in response to comments from the Department of Defense (DoD) and NASA (see General Comments, below), USDA has decided to create ''blanket'' exemptions for all items used in products or systems designed or procured for combat or combat-related missions and for spacecraft systems and launch support equipment, which will apply to all items designated for the procurement preference. Accordingly, in order to avoid repetition, this final rule removes all the exemption references contained in individual item designations and adds the identical language, as a blanket exemption, to the Guidelines, in subpart A.

III. Summary of Changes

As the result of comments received on the proposed rule (see Section IV), USDA made changes to the rule, which are summarized below.

Items combined. The proposed ''metalworking fluids'' item has been combined with the ''cutting, drilling, and tapping oils'' item that was proposed for designation on October 11, 2006 (71 FR 59862). The combined item is now known as ''metalworking fluids'' and includes three subcategories: straight oils; high performance soluble, semi-synthetic, and synthetic metalworking fluids; and general purpose soluble, semi-synthetic, and synthetic metalworking fluids. The ''metalworking fluids'' item is now included in the Round 4 final rulemaking replacing the proposed ''cutting, drilling, and tapping oils'' item.

Item names. The names for two of the remaining nine items were revised. ''Insulating foam for wall construction'' is now ''plastic insulating foam for residential and commercial construction.'' ''Biodegradable containers'' is now ''disposable containers.''

Item definitions. The definitions for six of the remaining nine items were modified to varying degrees. These six items are: Adhesive and mastic removers; plastic insulating foam for residential and commercial construction; hand cleaners and sanitizers; composite panels; disposable containers; and fertilizers. Some definitions were modified and/or added in order to address the addition of subcategories (as discussed in the following paragraph).

Subcategories. Subcategories were created for three items to reflect the different use applications where information was available. Hand cleaners and sanitizers were subcategorized into (1) hand cleaners and (2) hand sanitizers. Composite panels were subcategorized into (1) plastic lumber composite panels, (2) acoustical composite panels, (3) interior panels, (4) structural interior panels, and (5) structural wall panels. Fluid-filled transformers were subcategorized into (1) synthetic ester-based fluid-filled transformers and (2) vegetable oil-based fluid-filled transformers.

Minimum biobased contents. Several of the proposed minimum biobased contents for the designated items have changed for the final rule in response to public comments and in consideration of available product performance information. As a result of the comments received regarding the proposed minimum biobased contents and the availability of additional biobased content tests for several items, USDA re-evaluated the proposed minimum biobased contents of all of the items.

Items for which the minimum biobased content was changed from the proposed level are presented here and the rationale for the changes is discussed in the section of this preamble presenting the item-specific comments and responses.

For plastic insulating foam, the proposed minimum biobased content of 8 percent was changed to 7 percent.

For the proposed hand cleaner item the proposed minimum biobased content of 18 percent was changed to 64 percent for the hand cleaners subcategory and 73 percent for the hand sanitizers subcategory.

For the proposed composite panels item the proposed minimum biobased content of 26 percent was changed for each of the newly established subcategories. In this final rule, minimum biobased contents were set for each subcategory, as follows: Plastic lumber composite panels—23 percent, acoustical composite panels—37 percent, interior panels—55 percent, structural interior panels—89 percent, and structural wall panels—94 percent.

For the proposed fluid-filled transformers item the proposed minimum biobased content of 66 percent was retained for the synthetic ester-based subcategory and the minimum biobased content for the vegetable oil-based subcategory was set at 95 percent.

For the proposed biodegradable containers item (now disposable containers), the proposed minimum biobased content of 96 percent was changed to 72 percent.

For sorbents, the proposed minimum biobased content of 52 percent was changed to 89 percent.

For graffiti and grease removers, the proposed minimum biobased content of 21 percent was changed to 34 percent.

Preference compliance date. For the synthetic ester-based fluid-filled transformers subcategory, the preference compliance date is deferred until USDA identifies two or more manufacturers in this subcategory. When it identifies two or more manufacturers in this subcategory, USDA will publish a document in the **Federal Register** announcing that Federal agencies will have one year from the date of publication of that announcement to give procurement preference to biobased synthetic ester-based fluid-filled transformers.

Overlap with EPA CPG products. For composite panels, potential overlap with EPA CPG products was added to the final rule. Then, for all items that may overlap with EPA CPG products (plastic insulating foam for residential and commercial construction; composite panels; disposable containers; sorbents; and fertilizer), a note was added to facilitate finding information on the EPA CPG products.

Biodegradability. For disposable containers, a biodegradability requirement was added.

Exemptions. Exemptions from the preferred procurement requirements were added for all items, including their subcategories, used in certain applications within DoD and NASA. For DoD, exemptions were provided for ''products or systems designed or procured for combat or combat-related missions.'' For NASA, exemptions were provided for ''spacecraft systems and launch support equipment.'' These exemptions were added in the Guidelines for the procurement program (subpart A) rather than under each item designation. At proposal, this exemption was proposed only for the fluid filled transformer item. Additional discussion of this decision is presented in the responses to comments later in this Preamble.

IV. Discussion of Comments

USDA solicited comments on the proposed rule for 60 days ending on October 16, 2006. USDA received comments from 29 commenters by that date. The comments were from individual manufacturers, trade organizations, private groups, and Federal agencies.

The comments contained in this **Federal Register** (FR) notice address general and specific comments related to Round 2 items. In addition to the

information provided in the responses to public comments presented in this preamble, USDA has prepared a technical support document titled ''Technical Support for Final Rule—Round 2 Designated Items,'' which contains documentation of USDA's efforts to research and respond to public comments. The technical support document is available on the BioPreferred Web site. The technical support document can be located by clicking on the Proposed and Final Regulations link on the left side of the BioPreferred Web site's home page (*http://www.biopreferred.gov*). Click on Supporting Documentation under Round 2 Designation under Final Rules. This will bring you to the link to the technical support document.

Several of the commenters expressed appreciation for USDA's effort in designating items for preferred procurement. While these comments are not presented within this preamble, USDA thanks the commenters for such comments.

Following the comments and responses, USDA discusses the amendments being made to various sections of 7 CFR part 2902 regarding reference to the Web site and the provision of additional information on products that may overlap with products designated for preferred procurement under EPA's CPG program.

General Comments

Reporting of Biobased Purchases

Comment: One commenter suggested that USDA consider the method that is least burdensome to Federal agencies when the agencies are required, per Executive Order 13101, to estimate their purchases of products placed on the USDA Biobased Products List and report on their estimated purchases of such products to the Secretary of Agriculture.

Response: Under FSRIA, the Office of Federal Procurement Policy (OFPP) reports to Congress biennially about Federal agency progress in implementing the section 9002 purchasing requirements. Under E.O. 13423, the Federal Environmental Executive reports to the President biennially about Federal agency progress in implementing the purchasing requirements of the E.O., including the purchase of biobased products. OFPP and the Office of the Federal Environmental Executive (OFEE) jointly send a data questionnaire to the agencies to gather information for these reports. As a member of the inter-agency Reporting Workgroup that makes recommendations to OFPP and OFEE about reporting mechanisms, USDA will work with the other members to recommend the least burdensome mechanisms for tracking and reporting on purchases of the designated biobased items.

Warranties

Comment: Two commenters expressed concern about a biobased product's effects on warranties. One commenter stated that USDA should consider creating a fact sheet about warranty myths and realities, including the type of questions buyers should ask Original Equipment Manufacturers (OEMs) and contractors to make sure that the warranty issue is real and not just an excuse to avoid purchasing a biobased product.

The second commenter recommended that USDA fully address the effect of biobased product usage on equipment warranties (i.e., such use as might void equipment warranties) prior to final item designation.

Response: USDA shares the commenters' concerns about the potential effect of biobased products on warranties. As noted in the response to a similar comment on the first designated item rule (see 71 FR 13702), USDA is working with manufacturers on the issue of maintenance warranties as time and resources allow. USDA is contacting manufacturers, industry associations, and service professionals to request information about warranty issues. About 200 different contacts have been made, but the results have been inconclusive. Many of the contacts have been reluctant to discuss warranty issues related to either their products or to biobased components. Additional information on the results of USDA's information gathering efforts are available on the BioPreferred Web site.

At this time, USDA does not have sufficient information to determine whether or not the manufacturers of biobased products will state that the use of these products will void maintenance warranties. This does not mean that the use of such products will void warranties, only that USDA does not currently have such information. As additional information becomes available on warranties, USDA will make such information available on the BioPreferred Web site.

Because it is difficult for USDA to fully address the warranty concern for each product within each item designated for preferred procurement, USDA continues to encourage manufacturers of biobased products to test their products against all relevant standards, including those that would affect warranties, and to work with OEMs to ensure that the biobased products will not void maintenance warranties when used. Whenever manufacturers of biobased products find that existing performance standards for maintenance warranties are not relevant or appropriate for biobased products, USDA is willing to assist them in working with the appropriate OEMs to develop tests that are relevant and appropriate for the end uses in which biobased products are intended. If, in spite of these efforts, there is insufficient information regarding the performance of a biobased product and its effect on equipment maintenance warranties, USDA notes that the procurement agent would not be required to buy such a product.

Industry and Agency Meeting/Forum

Comment: One commenter suggested that USDA consider sponsoring an industry and government forum or meeting to discuss program implementation issues. Topics identified by the commenter included how best to identify and communicate performance standard information and warranty issues associated with biobased products and original equipment manufacturers.

Response: USDA agrees with the commenter that a forum-type meeting to address implementation issues, including those identified by the commenter, has merit and will consider hosting such a forum as time and resources allow.

Supporting Documentation—Performance Standards

Comment: Two commenters stated that the background information for the proposed designated items did not distinguish between test methods and performance standards. One commenter stated that the entry in the column ''Standard Title'' under Performance Standards (as found in the Supporting Documentation on the BioPreferred Web site) does not appear to have much to do with performance. The commenter pointed, as an example, to the OSHA Hazard Communication Standard as not providing information as to whether the biobased adhesive or grease remover will work as intended. The second commenter stated that most of the ''performance standards'' listed by USDA are not really performance standards but are rather ''test methods.'' This commenter noted that while some test methods listed are relevant to meeting performance standards for some applications, others are not. The second commenter recommended that test methods be differentiated from performance standards.

The second commenter also stated that end users are well aware of these performance standards because the operating manuals for their equipment will list the standards and that end-users will want to know from a manufacturer if its product meets that performance standard. For products that do not have recognized performance standards, such as glass cleaners, the commenter stated that users may have to try a sample to determine if the product meets their needs. The commenter also stated that in other cases, such as carpets or insulation, specifications for purchase will be set by designers, architects, and/or engineers based on a specific project's needs, and manufacturers would have to show the buyers that they can meet the specification. For these reasons, the commenter recommended that, rather than providing a list of test methods, USDA should offer manufacturers the opportunity to provide as much performance data as possible on the BioPreferred Web site when they list their products. By doing so, the commenter continued, information will be provided to potential buyers and users so that they can compare the performance data with the particular performance requirements they need for the product.

Response: USDA agrees with the commenters that many of the standards listed under ''Standard Title'' in the background information are test methods and not performance standards. USDA further agrees that such distinctions should be made in the background document. USDA believes that it is necessary to continue to report both test methods and performance standards because it is very important that consistent test methods are used when measuring the performance of a product. USDA will, therefore, update the background information on the BioPreferred Web site to reflect the distinction between test methods and performance standards. Further, as additional information on performance standards is obtained, USDA will update the BioPreferred Web site to include such information. The results of the effort to distinguish between test methods and performance standards for the designated items in this final rule can be found in Chapter 1.0 of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

USDA also agrees that manufacturers need to provide as much information as possible on the performance of their products, especially as measured against recognized performance standards. USDA is working with manufacturers to make this information available by posting on the BioPreferred Web site links to the manufacturer's Web site for additional information on biobased product performance.

Reduced Greenhouse Gases

Comment: Three commenters recommended that USDA continue to emphasize the potential of biobased products to reduce greenhouse gas emissions as part of the preferred procurement program.

Response: USDA agrees with the commenters that the potential for biobased products to reduce greenhouse gas emissions is an important attribute of which purchasers and others need to be aware. USDA will continue to identify this potential in preambles and in the background information on the BioPreferred Web site. USDA welcomes the commenters, and others, to provide USDA with ''cradle-to-grave'' studies that demonstrate this potential attribute. USDA would then consider putting such results on the BioPreferred Web site.

Biobased Materials—Prequalify

Comment: Three commenters recommended that USDA develop a program for prequalifying the biobased material that will form the basis of biobased products. The commenters point out that biobased products are made from biobased materials. According to the commenters, testing and qualifying biobased materials will greatly accelerate the designation process for preferred procurement—if a product is made from a prequalifed biobased material, it is then a simple matter for the manufacturer of the bioproduct to provide information to USDA on its biobased composition and, if verification of manufacturer supplied compositional information is needed, the ASTM biobased content test can always be conducted as needed.

The commenters also suggested making prequalified biobased materials part of the ''U.S.D.A. Certified'' labeling program. When part of the labeling program, manufacturers would be able, according to the commenter, to contact biomaterial suppliers for information on the performance and other characteristics to determine the most appropriate biomaterials for their particular application. According to the commenters, this would expedite the development of biobased products consistent with the Congressional intent of FSRIA.

Response: USDA agrees that there is merit in the concept of prequalifying biobased materials that are used to manufacture biobased products for preferred procurement. However, as noted in a response to public comments on the first six items designated for preferred procurement (71 FR 13702), section 9002 of FSRIA requires USDA to designated ''products'' for preferred procurement. Section 9001 of FSRIA defines ''biobased products'' as ''a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials * * * or forestry materials.'' Based on this definition, USDA does not believe it has the authority to consider ''biobased material used in the manufacture of biobased products'' to be ''products.'' USDA is, however, gathering information on biobased intermediate feedstocks and developing a list of these materials. USDA will provide this information on the BioPreferred Web site. USDA also notes that NIST currently includes soybeans, corn, wheat, rice, cotton, canola, potatoes, and wool as feedstocks when conducting the BEES life cycle analysis for biobased products.

USDA has considered the commenter's recommendation to make prequalified biobased materials part of the ''U.S.D.A. Certified'' labeling program in developing the proposed rule for that program.

Recycled vs. Biobased Products

Comment: Three commenters agreed with USDA that additional information should be sought first from manufacturers prior to procurement decisions where recycled content and biobased materials products are both being considered for the same application. Two of the commenters went on to recommend that USDA's Preferential Procurement Guidelines for Biobased Products be upgraded to include the proposal in this rulemaking for handling the ''overlap'' between the recycled content and biobased content programs.

Response: While USDA appreciates the commenters' suggestion on revising the Guidelines to reflect the overlap potential between biobased products and products with recycled content, USDA will continue to discuss such overlap within each of the designated item rulemakings on an item-by-item basis.

Mature Markets

Comment: Three commenters urged USDA to not exclude natural fiber and other biobased products with mature markets in 1972. The commenters felt

that by doing so petroleum plastic blends (such as in leaf collection bags) would get an unfair advantage over entirely natural fiber biobased products (e.g., a Kraft paper leaf collection bag made from 100 percent plant matter).

Response: USDA extensively addressed the issue of mature markets in the final rule for the Guidelines for Designating Biobased Products for Federal Procurement (70 FR 1792). In that notice, USDA explained the rationale for excluding products that had mature markets in 1972 from the preferred procurement program—''The intent of section 9002, as described in the conference report accompanying FSRIA, is to stimulate the production of new biobased products and to energize emerging markets for those products. Given that, USDA finds that it is entirely appropriate for the guidelines to exclude products having mature markets from the program.'' (see 70 FR 1802). This was finalized in paragraph 2902.5(c)(2). USDA reiterated its position in the final rule for the first six items designated for preferred procurement and explained further on its reasons for excluding mature market products (see 71 FR 13701).

For the reasons stated in these two FR notices, the USDA will continue to exclude mature market products as they are identified within items designated for preferred procurement.

In addition, in its response to comments on the first six items proposed for designation for preferred procurement, USDA stated: ''As USDA designates additional items for preferred procurement, USDA will make determinations of whether mature markets existed in 1972 and, if so, identify those materials that do not qualify as biobased material. Unless a material is specifically identified as a material not qualifying as a biobased feedstock, such as cotton fiber has been for bedding, bed linens, and towels, the material may be used in any designated item and will be considered a qualifying biobased feedstock.'' (see 71 FR 13702). None of the 20 items proposed for preferred procurement in the two proposed rules were identified as having mature markets for which preferred procurement would not be given. Therefore, the specific example of Kraft paper leaf collection bags made from 100 percent plant matter provided by the commenters would qualify for preferred procurement under this program.

Sustainability Guidelines for Biopolymers

Comment: One commenter noted that biobased products are not automatically better for the environment than the items they replace, depending upon the way the feedstock is grown, how the product is manufactured, and how the product is handled at the end of its life.

The commenter further noted that a group of non-government organizations are working with companies interested in manufacturing and using biobased products to develop sustainability guidelines for biopolymers and urged the federal government to engage in this process and consider how it can in future rulemakings encourage the biopolymer industry to move toward truly sustainable products.

Response: USDA agrees with the commenter that biobased products are not necessarily better for the environment than the items that they replace. This emphasizes the need for life-cycle analyses (LCAs), which is the type of information generated under the BEES analysis. USDA welcomes additional information on biobased products, including aspects concerning sustainability, and urges the commenter and the non-governmental organizations to provide the results of their sustainability guidelines to USDA and other Federal agencies. USDA will then consider posting validated information on the BioPreferred Web site as additional information available to Federal purchasing agencies.

Life-Cycle Analysis (LCA)

Comment: One commenter commended USDA for considering LCAs and the use of the BEES as a tool for LCA and urged USDA to be cautious in its endorsement of Green Seal, stating that some Green Seal standards are several years old and were not developed using a true consensus based approach.

Response: USDA appreciates the commenter's recognition of the use of BEES as a tool for LCA. With regard to Green Seal standards, it is USDA's intent to provide information on all standards that are being used for products within items being proposed for designation. The identification of such standards, however, does not represent an endorsement on the part of USDA of any standard, including any Green Seal standard. Because the programs provide information that many prospective purchasers of biobased products may find useful, however, USDA will continue to identify and post information concerning these programs on the BioPreferred Web site.

For the designated items in this final rule, USDA identified two relevant Green Seal standards. These are GS–34, Cleaning/Degreasing Agents, and GS–41, Hand Cleaners and Hand Soaps Used for Industrial and Institutional Cleaners. These two GS standards are relevant, respectively, to graffiti and grease removers and to hand cleaners and sanitizers. These standards can be accessed through the Green Seal Web site at *http://www.greenseal.org/certification/standards.cfm*

Leadership in Energy and Environmental Design (LEED)

Comment: One commenter requested that USDA remove references to the LEED green building rating system in the final rule because, according to the commenter, (1) the LEED system was not developed using an LCA, (2) the organization that developed it (US Green Building Council) recognizes that the rapidly renewable credit is flawed and is not supportable, based on an LCA, and (3) there are other green building rating systems (such as Green Globes, which is being examined by several U.S. Federal agencies) that already incorporate aspects of life-cycle assessment. However, if USDA retains the reference, the commenter recommended that USDA indicate the lack of an LCA approach in LEED, and that USGBC has proposed to its membership that the rapidly renewable credit be removed.

The commenter further suggested that USDA discuss and incorporate Green Globes into the rule, based on the fact that it already incorporates aspects of LCA.

Response: USDA appreciates the information provided by the commenter on the LEED. USDA's identification of the LEED rating system does not represent an endorsement of LEED, but simply acknowledges its existence and use. USDA will consider further clarification of LEED if and when it is referenced in future rulemakings for the BioPreferred Program, as well as considering mentioning Green Globes, where appropriate.

Exemptions

Comment: One commenter requested that the rule reflect exemptions for all items used in products and systems designed or procured for combat or combat-related missions and that this exemption be extended to all services and products contracted for combat or combat-related missions. The commenter pointed out that USDA has stated that it is inappropriate to apply the preferred procurement requirement unless the DoD has documented that such products can meet the performance requirements for such equipment and are available in sufficient supply to meet domestic and overseas deployment

needs. According to the commenter, their experiences to date have reinforced that it is not practical at this time to conduct the testing and evaluation necessary for such performance documentation for all products used in combat.

Response: USDA has discussed, at length, with DoD the need for exempting from preferred procurement items whose products are used in combat or combat-related situations. USDA has also had similar discussions with NASA regarding products used in space and critical mission areas. These discussions have included whether there is a need for exemptions and, if so, whether exemptions should be on an item-by-item basis or whether a ''blanket'' exemption should be implemented for these two agencies. As a result of these discussions, USDA is exempting from preferred procurement all items used in products or systems designed or procured for combat or combat-related missions and for spacecraft systems and launch support equipment. The exemption is stated in the Guidelines (subpart A) rather than under each item designation. USDA believes it is inappropriate to apply the biobased purchasing requirement to DoD tactical equipment and NASA mission-critical equipment at this time. However, USDA reserves the right to withdraw such exemptions, on an item-by-item basis, as biobased products are demonstrated to meet all of the performance requirements of these applications.

Comment: One commenter stated that the proposed exemptions for critical applications are unnecessary given the provisions of the Guidelines, noting that no product, biobased or not, should be used in any critical application if it does not meet performance requirements. The commenter is concerned that proposing an exemption that limits the use of biobased products to ''more conventional applications'' implies that biobased products are inferior in their performance characteristics to the incumbent product. According to the commenter, not only is this not the case, but it sends the wrong message regarding the potential benefits of and uses for biobased products.

Response: USDA agrees with the commenter that providing exemptions could imply that biobased products are inferior to non-biobased products. USDA can only emphasize that these exemptions are not intended to convey such meaning. USDA points out, however, that the statute does allow agencies the ability to not purchase a biobased product if it does not meet applicable performance standards. Because so many biobased products are in their infancy, more effort is required on the part of their manufacturers to demonstrate that the biobased products perform as well as their non-biobased counterparts, whether in conventional or non-conventional applications.

USDA also agrees that all Federal agencies have the same ''off ramps'' available to them in determining whether or not to purchase biobased products within a designated item. USDA has received repeated requests from both DoD and NASA for exemptions. DoD is particularly concerned about the use of biobased products in combat or combat-related situations and NASA about the use of any biobased product in critical mission areas. USDA has reached agreement with these agencies to provide ''blanket'' exemptions for both NASA and DoD. Providing this blanket exemption will allow these agencies the flexibility to choose how they utilize their resources in evaluating various biobased products and determining which products meet their critical requirements.

USDA recognizes that such blanket exemptions could discourage manufacturers from developing biobased products for these two ''markets.'' However, if manufacturers of biobased products can demonstrate to the satisfaction of these two agencies that biobased products can meet all of their concerns, USDA would reconsider such exemptions on an item-by-item basis.

Item Designations

Comment: Two commenters requested that USDA not designate items for preferred procurement where the products within the item contain nanoparticles because of the many outstanding public and environmental health issues surrounding the use of nanotechnology. According to the commenters, there are no manufacturing standards, labeling regulations, or safety guidelines for nanoparticle use and the effect of nanoparticles on health and the environment are not yet *understood.*

Response: At this time, the statute for designating biobased products for preferred procurement does not address the issue of products made with nanoparticles. Congress would need to change the statute in order for USDA to consider it within the BioPreferred program. Therefore, USDA does not address the issue in this rulemaking.

USDA points out that EPA is conducting several major activities with respect to nanotechnology including, but not limited to, initiating the development of a voluntary pilot program for the evaluation of nanomaterials and reviewing nanomaterial new chemical submissions in the Office of Pollution Prevention and Toxics. For additional information on the work EPA is pursuing with regard to nanomaterials, access the Web site *http://www.epa.gov/oppt/nano/.*

Environmental and Health information

Comment: One commenter stated that providing agencies with tables summarizing BEES analyses does not satisfy the statutory requirement that USDA provide agencies with information on the public health and environmental benefits of biobased products. According to the commenter, the summary tables included in the preamble to the proposed products designation rule do not provide useful information to agencies, because the information is not provided in the context of comparisons with non-biobased products. The commenter, therefore, recommended that USDA provide narrative information and comparative reference points on the environmental and public health benefits of the designated products by placing this information in the technical background documents or in case studies on the BioPreferred Web site. The commenter then provided examples of information that could help agencies make a ''best value'' determination.

Another commenter provided a list of some of the benefits associated with using soy in industrial products.

Response: The BEES analysis provides a factual review of environmental and health effects of products. The results of the BEES analysis allow the comparison of similar products that have undergone the analysis. For example, one can compare the relative environmental and health effects between two biobased disposable containers. In addition, the BEES analysis provides information on the carbon cycle, which is being acknowledged as an increasingly important environmental effect. Thus, the BEES analysis provides important and relevant information on the environmental and health effects of biobased products.

USDA agrees with the commenter that providing additional information on manufacturers' claims regarding the public health and environmental effects of their biobased products on the BioPreferred Web site is useful, and has begun posting such information. As more information on the public health and environmental effects of biobased products is obtained, USDA will continue to post such information. If the

information is anecdotal, it will be so indicated.

USDA also agrees that quantitative, science-based, comparative reference points on the environmental and public health benefits of the designated products would be useful. USDA, therefore, encourages procurement officials to request this information from manufacturers of biobased products and from manufactures of nonbiobased products to facilitate the comparison of products. Until then, BEES results for both biobased and traditional products, covering a handful of proposed and designated items, are available through the free BEES 4.0 tool published by NIST in May 2007 (*http://www.bfrl.nist.gov/oae/bees.html*).

USDA thanks the other commenter for its information on using soy in industrial products and will post such information, as appropriate, on the BioPreferred Web site.

Purchasing Analysis

Comment: One commenter stated that biobased products should be fully tested to determine if they meet performance specifications before requiring Federal agency purchase. According to the commenter, there are many products in the marketplace that do not work as advertised. Because there are numerous industry and other recognized standard-setting groups that are responsible for setting standards for products used in various applications, the commenter felt that it would be prudent for Federal agencies to purchase biobased products that have been determined by an outside organization to meet minimal performance standards.

Two commenters stated that USDA needs to make available information on the availability, economic and technical feasibility, environmental and public health benefits, and life-cycle costs for each of the designated items and the name of each of the product's manufacturer in order to enable Federal agencies to determine whether they are buying a product that will perform as intended at a reasonable cost and to prevent an incorrect assessment of a product's attributes, which may led to unintended consequences.

One of the commenters recognized that to provide complete information is a challenge given that a biobased product market is still in its infancy. However, the commenter believes that it is ill-advised to proceed with designating products for which ''information on the availability, relative price, performance, and environmental and public health benefits of individual products within each of these 10 items is not presented'' (71 FR 47568).

Response: In designating items for preferred procurement, USDA is responsible for designating those items which are or can be produced with biobased products and to provide, in part, information on their performance. Further, USDA is responsible for considering the technological feasibility of using products within such items. Finally, the statute allows a Federal agency not to purchase a product if, in part, it fails to meet the reasonable performance standards of the procuring agency. USDA believes that its process for designating items meets the intent and requirements of the authorizing statute and results in items that generally meet performance standards applicable to products within those items.

USDA does not believe it is reasonable, nor statutorily required, to conduct full testing of every product within every item (or even the full testing of a single product within every item) in order to list an item for preferred procurement. To grant the commenter's request that biobased products be fully tested would result in an essentially insurmountable obstacle to implementing the program. USDA has improved the process for making available information on products within items proposed and promulgated for designation. USDA is continually working to upgrade the amount and quality of such information, which can be found on the BioPreferred Web site.

As stated in the final **Federal Register** notice for the first set of designated items, USDA reached an agreement with manufacturers not to publish their names in the **Federal Register** when designating items. This agreement was reached to encourage manufacturers to submit products for testing to support the designation of an item. Once an item has been designated, the manufacturers of products within the designated item may elect to post their names and other contact information on the BioPreferred Web site.

USDA has linked the BioPreferred Web site to Defense Standardization Program and GSA-related standards lists used as guidance when procuring products, which can be accessed through the ''Selling to the Federal Government'' link on the BioPreferred Web site. To access the DoD list, go to the BioPreferred Web site and click on the ''Selling to Federal Government'' tab and look for the DoD Specifications link. To access the GSA-related standards list, click on the GSA Schedule Suppliers link under ''Selling to the Federal Government.'' Once at the GSA Web site, search for ''Global Supply Standards'' and then follow the appropriate links. Instructions on accessing these lists from the BioPreferred Web site will also be included in all future **Federal Register** notices for USDA's designated item rules. Further, USDA also will invite and actively encourage manufacturers of qualifying products within a designated item to post, on USDA's password-protected Web site, performance standards by which a qualifying product's performance has been evaluated.

Minimum Biobased Content

Four commenters felt that USDA was proposing minimum biobased contents that were too low for many of the products. These, and other, commenters also provided specific comments on the proposed minimum biobased contents for specific items. Those specific comments are addressed later in the preamble under Item Specific Comments. Here, USDA is responding to the comments that more generally address the procedure USDA uses in proposing minimum biobased contents.

Approach Used

Comment: Several commenters were concerned about the approach USDA used to determine minimum biobased contents. One commenter recommended that, rather than setting the threshold level below the lowest percentage observed in the lowest end product in the survey, USDA reward the top half or top two thirds of the respondents, at least where the spread is more than 20 percentage points. Two other commenters recommended that USDA consider a minimum threshold of 50 percent biobased content given that products with biobased contents above 50 percent are available in all categories.

Response: In response to these public comments and ongoing discussions with other Federal agencies, and because several additional biobased content test results were obtained after proposal, USDA re-evaluated the proposed minimum biobased contents for each of the proposed items. In re-evaluating the minimum biobased contents, USDA considered factors including the number of, and the distribution of, the test data points as well as the product manufacturer's claims related to performance, biodegradability, and range of applicability.

In those cases where all of the products' biobased contents were within a narrow range and no data were available to distinguish significant performance differences among the products, USDA set the minimum biobased content at the level that would allow preferred procurement for all of

the products for which data were available.

For items where the products' biobased contents showed a wider range and included one or more significant breaks in the range, USDA reviewed the product information to determine if there were performance or applicability differences among the products that could be used for creating subcategories based on the groups of products that have similar biobased contents. For example, if the biobased contents of half of the products within an item were in the 30 to 50 percent range and the other half were in the 80 to 95 percent range, USDA considered whether the product information supported the creation of two subcategories. Information that was considered to be supportive of subcategorization were claims of product features such as ''special applications,'' ''high temperature applications,'' or ''single-use versus multiple-use.'' In those cases where the biobased content and other product information supported subcategorization, USDA has created subcategories in this final rule.

In other cases, USDA has considered subcategorization for an item based upon initial performance information, but USDA does not currently have sufficient data to justify creating subcategories. Where that is the case, USDA has generally set the minimum biobased content based on the group of products with the higher biobased contents. For these items, USDA will continue to gather data on products within the item and will create subcategories in a future rulemaking if sufficient data are obtained.

For some items, there was a significant range in the reported biobased contents but the data points were evenly spread over the entire range. In those cases, if there were no data to distinguish the features of any grouping or subset of the products, USDA has generally set the minimum biobased content based on the product with the lowest biobased content in order to allow procuring agencies the widest selection of products from which to select those that best meet their needs. As additional product performance information becomes available and as additional products within these items become available with higher biobased contents, USDA will consider increasing the minimum biobased content or creating subcategories where performance characteristics or application use justify subcategorizing.

As a result of the re-evaluation, many of the proposed minimum biobased contents have been revised for the final rule. These revisions will be presented and discussed in the item specific sections later in this preamble. For two items, USDA reviewed the biobased content data but did not find sufficient justification through specific public comments, performance information, or additional biobased content data points for revising the proposed minimum biobased content level. For the adhesive and mastic removers item, 12 biobased content test results were available (44, 61, 73, 79, 81, 83, 83, 84, 85, 89, 89, 95, and 99). There was a significant break in the data points between the product with 44 percent biobased content and the product with the next higher value of 61 percent. USDA could find no justification, based on the products' performance information, to either subcategorize this item or to set the minimum biobased content at a level based on the 44 percent biobased content product. Information available for the remaining 11 products did not support the creation of subcategories or provide any rationale for setting the minimum biobased content at any specific point with the range. Also, the proposed minimum biobased content for this item was 58 percent and no public comments or additional data were received to support changing the proposed level. As a result, the proposed minimum biobased content of 58 percent was retained for the final rule.

For the fertilizers item, the proposed minimum biobased content was 71 percent. There is a significant break in the tested biobased content levels, with three products at or below 26 percent and 10 products at or above 74 percent. USDA has retained the proposed 71 percent minimum biobased content for the final rule because no justification was found to subcategorize the item, no public comments or additional data were received, and USDA knows of no unique performance claims that are offered by the three products with biobased contents below this level.

USDA also notes that as additional biobased content data become available for designated items, the minimum biobased content will be re-evaluated periodically and revised as appropriate, based on all available data.

One commenter is concerned, in part, about proposing a minimum biobased content at a level lower than the lowest tested biobased content. This does occur, but it occurs because of the test method used to determine a product's biobased content. The test method has a ''margin of error'' associated with it. This margin of error is a plus or minus three percentage points. For example, if Product A has a tested biobased content of 75 percent, its actually biobased content could be from 72 to 78 percent. Thus, it is statistically appropriate to reduce the tested biobased content 3 percentage points in order to ensure that the product on which the item's minimum biobased content was based still be qualified if re-tested.

Comment: Two commenters stated that, if the lower biobased content products cannot prove they offer better performance properties or meet certain application requirements, USDA should recommend higher biobased content products to stimulate product innovations that contain higher biobased levels. The commenters then stated that this holds particularly true for: Hand cleaners and sanitizers, composite panels, graffiti and grease removers, metalworking fluids, glass cleaners, food grade greases, and biodegradable cutlery. Given the lack of information on exceptional performance properties of the lower biobased content products in these categories, the commenters recommended establishing a minimum biobased content at 50 percent for these products.

Response: As discussed in the previous response, USDA has re-evaluated the proposed minimum biobased contents for all of the proposed items and has revised the minimum biobased contents for several items. In its re-evaluation, USDA considered product performance information to justify the inclusion of products at lower levels of biobased content in addition to considering the range, groupings, and breaks in the biobased content test data array.

With regard to the items specifically identified by the commenter, USDA has created subcategories for three of the items (hand cleaners and sanitizers, composite panels, and metalworking fluids [4]), which has resulted in establishing higher biobased contents for some of the newly created subcategories. In addition, based on the re-evaluation of the data, the minimum biobased contents were also raised for graffiti and grease removers in this final rulemaking and for the disposable cutlery and glass cleaners items in the Round 3 final rulemaking. USDA does not believe, however, that setting the minimum biobased contents for items at a predetermined level (such as 50 percent) is appropriate without consideration of performance and applicability, as well as other factors, on an item-by-item basis. Please see the Item Specific Comments section of the preamble for discussion on all of these

[4] This item is now included in the Round 4 final rulemaking.

items and their minimum biobased content.

Effect of Lower vs. Higher Biobased Contents

Comment: Several commenters expressed concern about the effect of ''lower rather than higher'' biobased contents. Two commenters believe that setting the biobased content too low for many of the 20 designated items in Rounds 2 and 3 will undermine motivation to produce products with higher levels of biobased content. Similarly, a third commenter stated that it believes higher biobased contents would encourage development by the private sector of higher biobased content products, which in turn would have a multiplier effect on biobased input use even larger than the government purchases themselves.

Response: For the reasons stated in response to other comments in this FR notice, USDA believes the procedure it uses meets the goals of the statute and opens the door for more biobased products to be purchased by Federal agencies. In response to comments, USDA re-evaluated the proposed minimum biobased content for all items in this regulation. This re-evaluation resulted in a revised minimum biobased content for several items based upon product performance information and the range, groupings, and breaks of biobased content data.

Designating biobased products for preferred procurement will increase the demand for such products and will encourage more manufacturers to develop biobased products. As items are designated for preferred procurement, it is then the Federal agencies' responsibility to purchase those biobased products with the highest biobased contents that meet their performance specifications. Therefore, to sell more of their biobased products under the preferred procurement program, manufacturers will be motivated to develop products with higher biobased contents than their competitors.

USDA agrees that setting higher minimum biobased content requirements would provide a higher target for manufacturers and may result in manufacturers developing higher biobased content products. However, USDA believes that to do so without regard to the current status of development of biobased products would delay the purchase of many biobased products. USDA believes its responsibility is to implement a preferred procurement program on the basis of products currently available in the marketplace and then to depend upon the statutory requirement for purchasing agencies to buy those qualifying products with the highest biobased contents available that meet their performance requirements at a reasonable cost. In setting the minimum biobased content, USDA also seeks to avoid situations where the minimum biobased content is set at such a high level that it can currently be met by only one manufacturer's product(s), thus creating a ''single provider'' situation which would delay implementation of the program for these products.

USDA believes the approach it is taking in setting minimum biobased contents is appropriate. In instances where performance requirements vary significantly for products within an item and where sufficient data are available, USDA has created subcategories with different minimum biobased content requirements within a single designated item. Discussions of these changes are included in the section of this preamble that presents comments and response related to specific designated items.

Meeting the Goals of the Statute

Comment: Two commenters stated that the goals of the preferred procurement program (increasing demand for biobased products; spurring rural economic development through value-added agricultural products; and enhancing the nation's energy security by substituting biobased products for products derived from imported oil and natural gas) would be better met by substantially increasing the minimum biobased content level for many of the 20 items proposed for designation in the two **Federal Register** notices. A third commenter referred to section 9002(e) of FSRIA as the basis for USDA setting minimum biobased contents at the highest level practicable.

Response: USDA believes there are various ways to achieve the goals of the BioPreferred Program, including the commenters' suggestion of ''substantially increasing the minimum biobased content level'' for many of the items. Because many biobased products are in their infancy, however, USDA believes that the best way to make inroads in their purchase by Federal agencies and to increase market interest in the production of biobased products, including those manufacturers who may otherwise not be interested, is to set minimum biobased contents that reflect the array of biobased content data and product performance characteristics to meet the needs of the Federal procurement community. For this final rule, USDA re-evaluated each of the item's minimum biobased contents considering the biobased content data and performance characteristics and subcategorized and revised several items' minimum biobased contents, as appropriate. The minimum biobased contents established by this rule allow the purchasing agencies to select biobased products with higher biobased contents in conformance with paragraph (c) of section 9002, which states that procuring agencies shall ''give preference to such items composed of the highest percentage of biobased products practicable * * *.'' that meet the performance, price, and availability requirements of the statute. USDA will continue to provide information on the full range of biobased contents found among products within designated items, which will assist procuring agencies in purchasing those products that have the highest biobased content.

Information

Comment: Two commenters suggested that USDA make available more information on the biobased content for each product tested, rather than providing a range of biobased contents. The commenters stated, as an example, if the biobased content of ten of the 30 biobased fertilizers ranged from 74 to 100 percent and if nine of these tested at 100 percent, USDA should consider setting the minimum content close to 100 percent rather then near the lowest biobased content tested product.

Response: USDA posts on the BioPreferred Web site all of the biobased content data received. This information can be accessed by going to the BioPreferred Web site (*http://www.biopreferred.gov*) and then clicking on the ''Proposed and Final Regulations'' link and then the supporting documentation link for the applicable round of designations. USDA's goal is to provide enough specific information on biobased contents in preambles so that reviewers will have sufficient data to adequately comment on a proposed minimum biobased content. If readers feel that they need more detailed information, they can access all of the data as indicated above.

Subcategorization

Comment: One commenter stated that USDA should consider the precedence in EPA's recycled content products program for setting several content levels based on different applications and apply that principle to some of the items being proposed for designation for which USDA's data indicate that multiple minimum biobased contents are appropriate.

Response: USDA agrees with the commenter that each designated item

should be examined to determine whether or not it is reasonable to create subcategories within an item. As discussed in the Background section of this preamble, USDA intends to create subcategories in those items where there are groups of products within the item that meet different markets, uses, and/or performance specifications. For some items, however, USDA may not have sufficient information at the time of proposal to create subcategories within an item. In such instances, USDA may either designate the item without creating subcategories (i.e., defer the creation of subcategories) or designate one subcategory and defer designation of other subcategories within the item until additional information is obtained on products within these other subcategories.

Where USDA has sufficient information on products within an item to justify creating subcategories, USDA will do so. With regard to the 20 items proposed for designation under Rounds 2 and 3, USDA has re-evaluated individual items when requested by the commenters and has created subcategories for six items (hand cleaners and sanitizers; composite panels; fluid-filled transformers; metalworking fluids; [5] greases; and carpet and upholstery cleaners).

Overlap With EPA's Comprehensive Procurement Guideline (CPG)

Comment: One commenter, in considering the potential for overlap between biobased products and recycled content products, noted the decision-making process and the information to be provided to assist in making the purchase decision and concluded that there may be less overlap between CPG items and designated biobased items than there appears to be at first glance.

Response: USDA agrees with the commenter that there may be the appearance of an overlap in many cases where, after all of the required performance characteristics of the products are evaluated, an actual overlap does not exist. Federal agencies should evaluate the performance needs of the products when deciding whether there is an actual overlap between the preferred procurement programs.

For the items within this rulemaking, USDA has identified products within insulating foam, composite panels, disposable containers, sorbents, and fertilizer as potentially overlapping with EPA-designated recovered content products. Where their products compete directly with EPA-designated recovered content products, the Federal agency must purchase the recovered content product.

In some cases, however, there may be factors that would give purchase preference to the biobased product. For example, a disposable container may be required to be biodegradable. If the EPA-designated recovered content product is not biodegradable, preference would be given to the biobased container, subject to cost, availability, and performance. Similarly, a biobased sorbent may be given preference over an EPA-designated recycled content sorbent if the biobased content product addresses a Federal agency's certain environmental or health performance requirements that the EPA-designated recovered content product would not meet.

Finally, there may be instances where products within these items may be able to meet both sets of procurement preferences. For example, almost all of the biobased sorbents are produced from waste streams of paper, corn processing, or fabric processing, which could be considered recycled. Composite panels made with embedded fibers may be made with recycled plastic materials. For these and other such products, there may be no conflict between these two programs as the product may satisfy both.

BEES Analytical Tool

Comment: One commenter stated that the BEES scores may be difficult for many users to grasp and suggested that USDA consider additional or alternative approaches (e.g., graphical representation) for presenting the information. The commenter also suggested that users may find the actual impact values easier to understand than the scaled values used for scoring (e.g., grams of CO_2 equivalents per functional unit of product (global warming), grams of N equivalents per functional unit (eutrophication), etc.). The commenter believes that some users may also find the actual impact values useful in compiling environmental impact data for reporting under OMB scorecards, GPRA results, EMS reports, etc. The commenter provided an example table of how such information could be presented.

Response: USDA agrees with the commenter that the BEES impact values are useful. The BEES impact values for the designated items in this final rule can be found in Appendix A of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site. USDA will provide the BEES impact values in all future proposed rulemakings for designated items.

With regard to alternative presentations of the data, USDA has discussed with the commenter various methods of supplementing the tabular display with a graphical representation of BEES environmental performance score results. USDA will add a graphical presentation of these BEES results in subsequent proposed rulemakings. A graphical presentation of the BEES environmental performance scores for the designated items in this final rule can be found in Appendix B of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

Compostability

Comment: One commenter requested that USDA emphasize the compostability of products within item designations for biodegradable films, containers, and cutlery in order to better qualify with the Federal Trade Commission's (FTC) Guides on Environmental Labeling. The commenter believes that consumers may mistakenly think that biodegradable products should be landfilled rather than recovered and recycled via composting. The commenter stated that by labeling these items as compostable, USDA is providing direction on the proper disposal and recovery for disposable biobased products.

Response: Although USDA is not requiring films or cutlery to be biodegradable in order to receive preferred procurement, USDA agrees with the commenter that biodegradable products within these (and other) items need to be composted rather than landfilled in order for the products to biodegrade. USDA points out that these products need to be composted in commercial composting facilities in order to be exposed to the proper temperature and moisture requirements for composting. Composting these products in a ''backyard'' compost pile will not necessarily result in the complete biodegradation of the product. Finally, all container products identified have been indicated by their manufacturers as meeting compostability requirements.

Terminology

Comment: One commenter recommended that USDA clarify the use of the terms ''biobased,'' ''biodegradable,'' and ''compostability'' within the biobased preferred procurement program. According to the commenter, these terms are at times used interchangeably, creating a

[5] This item is now included in the Round 4 final rulemaking.

confusing picture of what the program is intended to cover. The commenter also inquired as to why some of the items proposed for preferred procurement were designated as ''biodegradable'' and others were not.

Response: USDA agrees that there can be confusion with regard to the three terms mentioned by the commenter. A ''biobased'' product is a product that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials or forestry materials. A biobased product may or may not be biodegradable and/or compostable. As noted earlier in the preamble, ''biodegradability,'' in simple terms, measures the ability of microorganisms present in the disposal environment to completely consume the biobased carbon product within a reasonable time frame and in the specified environment, with composting being one such environment under which biodegradability occurs. ''Compostable'' generally means a product is capable of biological decomposition under controlled aerobic conditions, such as found in a compost pile or compost bin, by microorganisms or soil invertebrates. As noted in a previous response to a comment on compostability, however, some designated products may not fully degrade (i.e., biodegrade) in a ''backyard'' compost pile.

Of the twenty items proposed for designation for preferred procurement under Rounds 2 and 3, three items—films, containers, and cutlery—were designated as ''biodegradable.'' In the final rule, USDA has revised these item descriptions to eliminate the term ''biodegradable'' from the item being designated and has instead made biodegradability, where appropriate, a requirement for a biobased product to receive preferred procurement. To illustrate, USDA proposed ''biodegradable containers'' as an item for preferred procurement. This would have meant that only biodegradable containers currently being purchased would be considered for replacement by biobased biodegradable containers under the preferred procurement program. This is not what USDA intended. The item that should have been proposed was ''disposable containers'' so that all disposable containers would be considered for replacement under the preferred procurement program with biobased biodegradable containers.

This same situation also existed for the other two items—biodegradable films and biodegradable cutlery. For those two items, the item designation should have been for nondurable films and disposal cutlery, respectively. USDA has modified the item designations as indicated and has included a biodegradable criterion only for the biobased versions of containers. As explained in a separate **Federal Register** notice for Round 3 designated items, USDA is not making biodegradability a requirement for films or for cutlery.

USDA notes that not all biobased containers are biodegradable or are not known whether or not they are biodegradable because they have not yet been tested for biodegradability. All of the container products listed on the BioPreferred Web site, however, have been verified by their manufacturer as being biodegradable. Further, USDA will only post on the BioPreferred Web site information on biobased container products that are biodegradable.

Biodegradability Requirements

Comment: One commenter stated that the biodegradability requirements for the three items (cutlery, films, and containers) should be identical, and should (1) meet ASTM D6400 ''Specification for Compostable Plastics'', (2) meet European Norm 13432, or (3) be approved by the BPI. The commenter provided suggested wording.

Response: Notwithstanding the fact that USDA is not requiring films to be biodegradable (as explained in a separate **Federal Register** notice for Round 3 designated items), USDA agrees with the commenter that the requirements for all three items should have been the same, including referring to ASTM D6400 for cutlery rather than ASTM D5338. Because ASTM D6400 may not be applicable to all biobased products to demonstrate biodegradability, manufacturers may claim biodegradability using other acceptable methods. In addition, if a product is disposed of in a marine environment, the applicable ASTM method is ASTM D7081.

General Comments

Comment: One commenter requested that USDA clarify the relationship between biobased products and recycled content products to assist in the purchase decision. The commenter made the following three recommendations:

1. On page 47567 of the FR notice, bottom of left column, the commenter recommended inserting the following sentences before the sentence beginning with ''Where a biobased item * * *,'': ''Section 6002 of RCRA requires a procuring agency procuring an item designated by EPA generally to procure such items composed of the highest percentage of recovered materials content practicable. However, a procuring agency may decide not to procure such an item based on a determination that the item fails to meet the reasonable performance standards or specifications of the procuring agency. An item with recovered materials content may not meet reasonable performance standards or specifications, for example, if the use of the item with recovered materials content would jeopardize the intended end use of the item.''

2. On page 47567 of the FR notice, the bottom of left column reads: ''Where a biobased item is used for the same purposes and to meet the same requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product.'' The commenter requested that USDA clarify the type of requirements and whose they are. For example, the commenter suggested that the words ''Federal agency performance'' (or something similar) could be inserted before ''requirements.''

3. On page 47567 of the FR notice, at the top of middle column, the commenter recommended inserting ''a Federal agency's'' before ''certain'' and inserting ''performance'' before ''requirements'' to ensure that the reader understands which and whose requirements USDA is referring to.

Response: USDA agrees that the recommended revisions add clarity to the discussion of the relationship between the two preferred procurement programs. These suggestions have been incorporated into the preamble of this final rule and will be incorporated into future rulemaking packages.

Comment: One commenter suggested that the first sentence in the preamble under ''Overlap with EPA Comprehensive Procurement Guideline program for recovered content products'' be changed to read ''Some of the products that are bio-based items designated for preferred procurement may also be items EPA has designated under the Environmental * * *.''

Response: USDA agrees that this editorial change provides additional clarity to the sentence. This suggested change has been incorporated into the preamble of this final rule and will be incorporated into future rulemaking packages.

Comment: One commenter recommended that USDA consider an item designation for ''engineered wood products,'' pointing out that there are many other biobased products in addition to composite panels.

Response: USDA appreciates the comment, and understands that composite panels are but one of a larger category of engineered wood products. USDA is already considering specific engineered wood products for future designation for preferred products.

Comment: One commenter recommended that USDA re-evaluate the BEES weighting standards because it is concerned that applying weighting factors to the proposed designated products consistently can lead to counter-intuitive conclusions and believes that, in some situations, a differentiation of weighting factors needs to be considered. The commenter was also concerned about how the BEES weighting factors were selected, as they seem to be the same for all products. Finally, the commenter is concerned about the utility of the BEES analysis results, which seem to be unaffected by such a broad range of unit prices (e.g., $17.64 and $132 for fertilizers; $89.06 and $983 for glass cleaners). The commenter then recommended that more information about the supporting analysis be disclosed before items are designated for procurement.

Response: The BEES analytical tool, including its factors and their weightings, was developed by a scientific board and, as such, it is beyond USDA's ability to modify the tool. It is true that the BEES weighting factors are the same for all products. USDA does not agree, however, that differentiation of weighting factors is desirable. Weighting factors indicate the relative ''importance'' of the BEES impact categories (e.g., global warming) to the Nation, which should not be confused with the relative ''performance'' of specific products with respect to those impact categories. Product performance is captured by the life-cycle data underlying each product's BEES results, and will vary with differences in raw material feedstocks and cultivation practices and in life-cycle energy and water use. A single product's poor performance with respect to global warming, which will worsen its BEES global warming score, does not necessarily imply that global warming should be more important to the Nation as a result.

The broad range of unit prices for some items, pointed out by the commenter, simply indicates that biobased alternatives for some can be produced using different biobased feedstocks and manufacturing processes, leading to different unit prices. The fact that the two examples noted by the commenter show a wide range in unit prices is, in the opinion of the USDA, exactly the type of useful information the BEES provides. It would be extremely difficult to disclose more information about the sample products without revealing specific manufacturers' names and proprietary information. USDA points out that the BEES analytical tool provides information and that it is up to the purchasing agency to decide how to use that information. For more information on the BEES analytical tool, users should access the BEES Web site at *http://www.bfrl.nist.gov/oae/software/bees.html*.

Labeling Program

Comment: One commenter recommended that USDA either reserve the label for higher-content products or require manufacturers to specify the biobased content of the product on the label. According to the commenter, this will encourage the purchase of products with higher biobased contents, which would be consistent with Congress' intent. The commenter was especially concerned about composite panels.

Response: USDA thanks the commenter for its comment. USDA has considered this comment in developing the proposed rule for the voluntary labeling program.

Item Specific Comments

Adhesive and Mastic Removers

Comment: One commenter recommended that adhesive removers be grouped with graffiti and grease removers based on formulation and functionality. The commenter stated that products designed to remove asbestos, carpet and tile mastics can be formulated differently from products designed to remove glue, tape, gums and other adhesive materials. Further, products designed to remove adhesive can also be formulated to remove greases and tars, graffiti paints, magic permanent marker ink, and crayon. To reflect various formulations in the marketplace, the commenter suggested that the designated item could be graffiti, adhesive and grease removers with the following revised definition: Industrial solvent products formulated to remove automotive, industrial, or kitchen soils and oils, including grease, paint, and other coatings, from hard surfaces or to remove adhesive materials, including glue, tape, and gum, from various surface types.

Response: USDA appreciates the commenter's suggestion. After reviewing the product information upon which this item was based, USDA believes that the products are formulated to remove a range of both adhesives and mastics. It is true that these, or similar, products may also perform the function of a grease or graffiti remover. USDA has already established a ''graffiti and grease removers'' item, and the manufacturers of products that are capable of performing multiple functions may market their products under either, or both, designated items as long as the products meet the required minimum biobased contents for the items. Because the products USDA evaluated as adhesive and mastic removers are marketed as such, USDA believes it is appropriate to maintain the item name as proposed. The definition was not changed as the result of this comment, but it has been slightly modified in two ways. First, the definition was changed to read ''solvent products'' rather than ''industrial cleaning solvent products'' in order to reflect the broader nature of products than can be included in this item. Second, and as discussed in the response to the following comment, the word ''ceramic'' was removed from the definition.

Comment: One commenter recommended that this designated item be revised to focus just on mastic removers (see previous comment) and recommended the following definition for mastic removers: Industrial cleaning solvent products formulated for use in removing asbestos, carpet, and tile mastics. The commenter also recommended that the qualifier ''ceramic'' tile be dropped in the definition of mastic remover because mastics are used to lay down tiles made of a variety of materials.

Response: As noted in the previous response, USDA is retaining this item designation to include both adhesive and mastic removers. However, USDA agrees with the commenter that the word ''ceramic'' should be dropped from the definition as it is unnecessarily limiting. Therefore, USDA has removed the word ''ceramic'' from the definition.

Plastic Insulating Foam for Residential and Commercial Construction (Formerly Insulating Foam for Wall Construction)

Comment: One commenter proposed the following definition for this item: Foam insulating products designed to provide a sealed thermal barrier for residential or commercial building construction applications, including walls, ceilings, attics and crawl spaces. The commenter recommended this definition because biobased spray foam can and is used in more than just walls, including floors and ceilings.

Response: USDA agrees that the various applications referenced by the commenter should be included in the item designation. The definition of this

item was intended to be broad so that products such as those identified by the commenter would be included. The definition of the item was also intended to reflect the products that were evaluated for the item. Upon review of the products that were evaluated, USDA has determined that the item definition needs to be revised to specifically apply to plastic insulating spray foam products. This revision aligns the definition more appropriately to the products that were evaluated. At proposal, one rigid panel product with 65 percent biobased content was considered to be a product in this item. However, because information was available for only a single rigid panel product, USDA has decided to limit the current designation to spray foam products and to attempt to gather sufficient data to designate rigid foam insulating panels as a subcategory of this item at a later date. Therefore, the one rigid foam product was removed from the data set for this item.

In addition, USDA has determined that the name of this designated item needed to be revised. First, the proposed item's name gives the impression of a much more narrow range of products (i.e., wall construction) than appropriate. Second, the item's name should help the user understand that products within this item are plastic insulating foam products. Therefore, USDA has changed the name of this designated item in the final rule from ''Insulating Foam for Wall Construction'' to ''Plastic Insulating Foam for Residential and Commercial Construction.''

Comment: One commenter recommended that the minimum biobased content be raised from 8 percent to 10 percent. According to the commenter, their first efforts at creating a biobased foam came in above 10 percent and the commenter feels anyone who is truly interested in manufacturing biobased foam insulations should be able to reach the 10 percent mark.

Response: The biobased content of the product that set the proposed minimum biobased content for this item was 11 percent, higher than that reported by the commenter. Because of the margin of error in the test method, which is plus/minus three percentage points, USDA proposed a minimum biobased content of 8 percent (11 percent minus 3 percentage points). However, since proposal USDA has received two additional biobased content test results for this item. These two tested samples contained 10 percent and 13 percent biobased material. As discussed in the previous response, USDA has also dropped from consideration the one rigid foam product whose biobased content was 65 percent. The biobased contents of the 5 tested products within this item are now 10, 11, 11, 13, and 29 percent. Because 4 of the 5 data points are within a 3 percentage point range, USDA considers these products to be representative of the biobased products for which we have biobased content information. While the remaining product offers a significant increase in biobased content from the other products (29 percent versus about 10 percent), USDA decided not to set the minimum biobased content based on this single product. Therefore, the product with the 10 percent biobased content was determined to be the product upon which the minimum biobased content based. Subtracting the three percentage points to allow for testing variability results in a minimum biobased content of 7 percent for this item. USDA will continue to gather data on this item and, if sufficient data are obtained to justify subcategorization or a revision in the minimum biobased content, such change will be made in a future rulemaking.

Comment: One commenter believes that there is no overlap or conflict between biobased spray foam insulation and EPA's CPG guidance for foam-in-place insulation. The commenter stated that they had searched EPA's on-line CPG supplier database and did not find any listings for foam-in-place insulation with a recycled content. The commenter then conducted a broader general Web-based search, which also did not reveal any companies that indicated they are making spray foam insulation that contains a recycled or recovered material. Therefore, the commenter concluded that if there are no commercially available spray foam products that meet the CPG definition, then in reality there will be no overlap or conflict with biobased spray foam insulation.

Response: USDA has conducted additional research into whether there were any plastic spray-in-place insulating foams that were being manufactured with recycled materials. USDA contacted 13 insulation manufacturers and trade associations regarding spray-in-place insulation foams. None of the contacts identified a plastic spray-in-place insulating foam product with recycled content. USDA did identify spray-in-place products with recycled cellulose content. To the extent that such recycled content products and biobased spray-in-place products can perform the same job, there may be an overlap. Overall, however, if a purchasing agent requires a plastic spray-in-place insulating foam, there should be no overlap between biobased spray-in-placed products and CPG products.

While there is unlikely to be an overlap with regard to spray-in-place products, there is still a potential overlap between products within this designated item and products within the CPG's building insulation products group because products within this designated item include preformed products such as foam board. Polyisocyanurate (polyiso) materials, which are used to make insulating foam boards, almost always contain recycled content (see Appendix D in the document Technical Support for Final Rule—Round 2 Designated Items, which can be obtained from the BioPreferred Web site). Thus, while there may be no overlap with plastic spray-in-place insulating foam products, there is the potential for overlap between biobased foam board products and similar CPG products.

In conclusion, USDA points out that potential overlap can occur between biobased products and CPG products when they are used for the same purpose and when both can meet the required performance specifications. The key consideration in determining if there is an overlap between a biobased product and a CPG product is whether a purchaser can select either product for a specific job. USDA does not expect this to occur, on the basis of currently available products, for spray-in-place insulation products, but it could occur for preformed insulation products, such as foam board, which may be designated at a later date.

Comment: One commenter asked why it was necessary to conduct both E84–05 and E84–05e1 for insulating foam. According to the commenter, they have never seen anyone test 05e1 and were wondering if it can not be required or what the reasoning behind the extra requirement is.

Response: It is not necessary to test an insulating foam using test methods E84–05 and E84–05e1. The lists presented in the preamble for each of the designated items are compilations of test methods and performance standards that manufacturers have reported and are not lists of standards against which products within an item must be tested. The rule does not require an insulating foam to be tested against one or more particular standards, let alone against both standards identified by the commenter. It is up to the manufacturer of the product to determine the appropriate standard(s) against which to test their products. If a standard must be used to qualify a product for preferred

procurement, it will be identified in the rule and not in the preamble.

To avoid confusion and to better present standards in future proposals, USDA is refining the presentation of the ASTM standards to present only the standard number (in this case, E84) and not the year in which it was adopted (in this case, –05 and 05–e1).

Comment: One commenter questioned the use of a square foot as the unit of measure for the BEES analysis. According to the commenter, foam insulation is measured in board feet, which is 1-foot by 1-foot at a 1-inch depth. The commenter pointed out that this is important because $1.10 a square foot is hard to measure without knowing the depth of this insulation. For example, the commenter's foam installed runs about 40 cents a board foot, so at 3 inches deep your costs are $1.20 for every square inch at 3 inch depth.

Response: USDA agrees with the commenter that the functional unit for this item, as presented in the proposal, was incorrect. The functional unit for this item should have been reported as ''one-square foot that is 3.5 inches deep.'' USDA has updated this information on the BioPreferred Web site.

Hand Cleaners and Sanitizers

Comment: One commenter recommended adding skin surface removal standards to the rulemaking for hand cleaners and sanitizers, noting that the three performance standards (ATCC 11229, ATCC 6358, and ATCC 6539) identified measuring the sanitizing action of disinfectants and do not address removal, which is what hand cleaners are designed to do.

Response: USDA has searched the list of performance standards posted by the National Science Foundation, the EPA, the Food and Drug Administration, and the National Institute of Health to investigate whether any of these organizations have performance standards for hand cleaners. The search of these organizations' sites did not identify any performance standards for hand cleaners.

USDA also contacted the commenter to determine if the commenter has any information on specifications for hand cleaners. The commenter provided USDA information on food safety, which included hand washing requirements. The commenter also provided a link to hand hygiene in health care settings. This information is available on the BioPreferred Web site.

USDA would appreciate any additional information on hand cleaning performance standards that the commenter, or others, could provide. Any information received by USDA will be made available on the BioPreferred Web site.

Comment: One commenter stated that some of the hand cleaner products in the technical information did not seem accurate to the proposed definition, pointing to one product described as a ''whole body shampoo'' for skin and hair. The commenter recommended that the category be restricted to hand cleaners and sanitizers and that the definition be refined based on their input.

Response: USDA agrees that products within the technical documents and those used to define an item need to be consistent with the definition of the designated item. USDA evaluated the product described by the commenter and decided, because the product could be used as a hand cleaner, to leave the information about this product on the BioPreferred Web site with the other hand cleaners and sanitizers products. USDA's decision is based on the idea that as long as a product is marketed within a designated item, it should not matter if the product is also capable of performing in another designated item. The fact that this cleaning product can also be used as a shampoo should not eliminate it from being considered as a hand cleaner if it can perform that function and if it meets the minimum biobased content required of a hand cleaner. USDA notes that this particular product was not used in either developing the minimum biobased content or for the BEES analysis.

Comment: Two commenters recommended creating subcategories for hand cleaners. Both commenters suggested at minimum recognizing hand cleaners that are designed to remove soil, grease, etc., and those that are designed to kill microorganisms (antimicrobial). One of the commenters suggested following FDA formulation specifications to help develop subcategories. The other commenter suggested addressing hand cleaners and sanitizers in the same manner as was done for greases by providing a general category definition and then listing and defining subcategories as follows:

Hand Cleaners and Sanitizers—Personal care products formulated for use in removing a variety of different soils, greases, and similar substances, or bacteria from human hands with or without the use of water.

Hand Cleaners—Personal care products formulated for use in removing a variety of different soils, greases, and similar substances from human hands with or without the use of water.

Hand Sanitizers—Personal care products formulated for use in removing bacteria from human hands with or without the use of water.

Hand Cleaners and Sanitizers—Personal care products formulated for use in removing a variety of different soils, greases and bacteria from human hands with or without the use of water.

This commenter also suggested that, if USDA wants to retain a single item designation for hand cleaners and sanitizers, the definition be modified to read: Hand Cleaners and Sanitizers—Personal care products formulated for use in removing a variety of different soils, greases, and similar substances, and/or bacteria from human hands with or without the use of water.

Response: USDA agrees with the commenters that hand cleaners and sanitizers should be subcategorized because these two types of products meet very different performance specifications; that is, the sanitizing aspect requires those products to meet a performance level not required of hand cleaners. In the final rule, USDA is subcategorizing this designated item into two subcategories—(1) hand cleaners and (2) hand sanitizers, which includes cleaners that are formulated to be both a hand cleaner and sanitizer. USDA does not believe that a third separate subcategory for cleaners formulated to be both a hand cleaner and sanitizer is needed. A product that meets the minimum biobased content level and the sanitizing requirements to qualify as a hand sanitizer will also meet the minimum biobased content for a hand cleaner, which is lower than for a hand sanitizer.

USDA separated the products within this item into each of the two subcategories and then identified the biobased contents for the products within each subcategory. For hand cleaners, the biobased contents of the 21 tested hand cleaners are 21, 23, 33, 42, 42, 44, 45, 67, 70, 78, 80, 82, 83, 84, 84, 85, 86, 92, 95, 96, and 100 percent. Because there is a significant break between the 45 percent product and the 67 percent product, USDA reviewed the available product information to determine if there was any justification for creating two subcategories within this item. USDA's review of the information available for the products within these two groups did not identify any performance claims or other features that would justify further subcategorization. Because there are a significant number of products within the group with biobased contents above 67 percent, and because USDA could not identify any unique performance features within products in the other

group, the minimum biobased content has been set based on the product with 67 percent biobased content. Reducing the 67 percent by 3 percentage points to account for testing variability results in a minimum biobased content of 64 for this subcategory. In addition, the biobased contents of available products will be posted on the BioPreferred Web site, which will allow purchasing agencies the opportunity to review the biobased contents of available products and select those with higher biobased contents.

For hand sanitizers (and hand cleaners and sanitizers), the biobased contents of the 14 tested hand sanitizers are 3, 24, 76, 76, 80, 80, 88, 89, 90, 91, 94, 95, 95, and 96 percent. Within this data set, there is a significant break between the 24 percent product and the 76 percent products. USDA investigated the products below this break in the data but could not identify any performance claims or other unique features that justified creating a subcategory or setting the minimum biobased content on either of the two products below the 76 percent level. USDA is, therefore, setting the minimum biobased content for the hand sanitizer subcategory at 73 percent, based on the product with a tested biobased content of 76 percent.

Additional details on the subcategorization and establishment of their minimum biobased contents for products within this item can be found in Chapter 2 of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

Finally, USDA has generally adopted the commenter's suggested definitions, with the exception of hand sanitizers, where USDA has combined the commenter's suggested definition for hand sanitizers with the suggested definition of hand cleaners and sanitizers.

Comment: One commenter recommended that the minimum biobased content for hand cleaners be set closer to 67 percent, based on the data in the background information, rather than at the proposed 18 percent. The commenter stated that, if the differences in content levels reflect differences in use or consistency (e.g., gel vs. liquid), then USDA should provide separate content levels for the various uses or consistencies.

Response: As noted in the previous response, USDA is breaking this item into two subcategories—hand cleaners and hand sanitizers. Based on the data available for both subcategories, USDA is setting the minimum biobased content for hand cleaners at 64 percent and for hand sanitizers at 73 percent.

Comment: One commenter recommended that, in the absence of extensive testing to determine the efficacy of hand cleaner and sanitizer products in their use in the health care industry, USDA exempt the health care industry from the preferred procurement requirement for hand cleaners and sanitizers. The commenter stated that doing so will ensure that health care professionals will be able to obtain products that meet patient safety needs. The commenter pointed out that EPA is responsible for determining whether or not a product can be considered a disinfectant and asked whether this had been considered in the development of requirements to procure biobased hand cleaners and sanitizers.

Response: The commenter is seeking a categorical exemption from the preferred procurement program for these products when used in healthcare facilities because there is an absence of testing to demonstrate the efficacy of these products in a healthcare setting. USDA does not believe that a categorical exemption for these products is warranted for the reasons discussed in the following paragraphs.

USDA has met with various Federal agencies during the development of the designation rules and, as discussed earlier in this preamble, has worked with DoD and NASA to develop an exemption for all items when used in products or systems designed or procured for combat or combat-related missions and for spacecraft systems and launch support equipment. However, an exemption for the hand cleaners and sanitizers designated item has not been requested by other Federal agencies that use these products in healthcare settings (such as the VA hospitals). While USDA values and considers the opinion of individual commenters in the rulemaking process, the concerns raised by this commenter do not provide sufficient support, in USDA's opinion, to justify an exemption for this item when other significant users of products within the item have not requested an exemption.

The statutory requirements of FSRIA require USDA to designate items for preferred procurement and to make available to the procurement agencies information on the designated items, including information on the performance characteristics of products offered within a designated item. It is still the responsibility of the procurement agent to determine whether a biobased product, or any other product, meets the performance requirements of the procuring agency for which the product is being bought and its intended use.

The statute requires procuring agencies to give preference to biobased products in designated items, but does not require the agency to purchase biobased products if one of three conditions exist, one of which addresses the performance, or lack thereof, of the biobased product. Specifically, the statute allows a procuring agency not to buy a biobased product within a designated item if the biobased product fails to meet the performance standards set forth in the applicable specifications or fails to meet the reasonable performance standards of the procuring agencies (see section 9002(c)(2)(B)). Because the statute already provides the relief sought by the commenters, there is no need to include such exemptions in the rule.

Providing a categorical exemption could have the effect of discouraging manufacturers from developing biobased products within a designated item. USDA believes this would have an unnecessary dampening effect on potential markets for acceptable biobased products in the future.

Finally, USDA urges manufacturers to note the concerns raised by this commenter and recognize that extra effort on the part of manufacturers may be necessary to provide procurement agents with evidence that the manufacturer's products meet the agency's requirements. This may require manufacturers to test their products against all applicable standards and requirements for the markets (e.g., healthcare facilities) in which they wish to market their products. In addition, because procuring agencies are not required to purchase biobased products if they fail any one of the criteria that allow an agency to not purchase a biobased product within a designated item, USDA is actively working to identify and publicize relevant performance standards so that manufacturers can understand how to make their products more desirable. To make information on the performance characteristics of biobased products more accessible to the procuring agencies, USDA is working with manufacturers to post product performance information on the BioPreferred Web site or to provide a link to the manufacturer's Web page where such information can readily be obtained. While manufacturers have the responsibility to test their products against applicable agency performance requirements and specifications, in order to comply with section 2902.4 of the Guidelines, procuring agencies will have to reexamine their performance

requirements and specifications to ensure that they are not biased against biobased products, that they are still necessary and relevant, and that they are not redundant.

With regard to the commenter's question as to whether the Agency had considered EPA's responsibility for determining whether a product can be considered a disinfectant, USDA contacted EPA and was informed that EPA does not regulate hand sanitizers. While EPA regulates a wide range of antimicrobial products, it does not regulate products used directly on humans or animals. Topical antimicrobial products are regulated by the Food and Drug Administration (FDA). FDA published a proposed rule on topical antimicrobial drug products for human use in the form of a ''Tentative Final Monograph'' in 1994. At that time, FDA requested comments on the use of topical antimicrobials as hand sanitizers or dips. The monograph contains the various testing and labeling requirements for these products. A representative of the Soap and Detergent Association indicated that, in practice, manufacturers follow the guidance in the Tentative Final Monograph.

USDA reviewed the June 17, 1994, **Federal Register** notice and determined that the definition of hand sanitizer in this final rule is consistent with FDA's discussion on health-care personnel handwash or antiseptic handwash, which are the equivalent categories to hand sanitizers. In that notice, FDA indicated that labeling of such product could be phrased as ''handwashing to decrease bacteria on the skin.'' See Appendix E of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site, for the relevant portion of the June 17, 1994, FR notice.

Comment: One commenter recommended that a more thorough industry investigation be conducted prior to the publication of a final rule by conducting more analyses on products not found in the initial investigation. The commenter stated that they were concerned that USDA's collection methods were deficient because so few of products formed the basis of the proposed rule. The commenter referred to a California Air Resources Board survey which identified 291 antimicrobial hand or body cleaners or soaps, 43 antimicrobial dry hand washes, 497 general hand or body cleaners or soaps, 26 hand wipe towelettes, and 87 products in a category of other hand cleaners, sanitizers, and soaps sold in the state of California alone. The commenter therefore recommended that USDA conduct a very thorough evaluation of both hand cleaners and sanitizers. The commenter also stated that the BEES and biobased contents obtained may not be representative of all products on the market, representing instead only a small subset of products. The commenter recommended that the rulemaking demonstrate that the products evaluated are representative of the market.

Response: USDA appreciates the information concerning the CARB study, which covered both biobased and non-biobased products. Because the purpose of the BioPreferred Program is to identify biobased products for potential preferred procurement, USDA's product investigation efforts did not seek out non-biobased products. USDA identified 36 manufacturers of biobased products within this item (including both subcategories), with 73 biobased products being marketed. The range of biobased contents among the 35 tested products is from 3 percent to 100 percent.

While USDA has in place a rigorous procedure for identifying products that are biobased, USDA recognizes that its procedure will not uncover all possible biobased products. Based on available data, USDA cannot determine if the samples that were voluntarily submitted by manufacturers are representative of all biobased products within this item. Regardless, USDA believes that it is reasonable to set minimum biobased contents based on the information it does have. If the commenter or others have additional information on the biobased content of other biobased products within this item, USDA encourages the commenter and others to submit that information to USDA. USDA will evaluate the additional information in relationship to the minimum biobased content for this designated item.

For this and all other items, USDA welcomes assistance in identifying manufacturers and their biobased products for the preferred procurement program. A list of such items can be found on the BioPreferred Web site.

Composite Panels

Comment: Two commenters recommended that the description of composite panel be expanded to recognize that other materials, such as wheat or rice straw, wood, and wood fibers, may be used in the manufacture of composite panels. One of the commenters also recommended that, if the description continues to include reference to recycled or recovered wood, the EPPS CPA 2–06 standard should be referenced with its thorough reference list of recycled/recovered fibers sources used in composites.

Response: The commenters suggested expanding the description of what composite panels may be made from (see 71 FR 47574) to include ''wood and wood fibers.'' The description provided on page 47574 of the August 17, 2006, preamble is intended to be illustrative of types of materials used to manufacture composite panels; it does not exclude composite panels engineered from wood or wood fibers. Further, the definition of this designated item does not limit the types of materials that can be used to create a biobased composite panel. Therefore, USDA has not changed the definition of this item with regard to the commenter's recommendation. As discussed in the next response, however, USDA has created subcategories within this item.

Comment: One commenter identified the potential applications in which biobased composite panels may overlap with EPA designated recovered content products and stated that it is unclear whether the preferred procurement of composite panels was confined to these very narrow applications. The commenter pointed out that composite panels are used in a wide variety of products that may be specified and purchased by the government including furniture, office and kitchen cabinets, exterior siding, laminate flooring, shelving, moldings, mill work, doors, paneling, floor underlayment, stair treads. The commenter, therefore, recommended that the purchasing applications need to be expanded to include these categories.

Response: USDA agrees with the commenter that composite panels can be used in many different applications. As a result of this and other comments, USDA has re-evaluated the product data for this proposed item and has created five subcategories, as follows: (1) Plastic lumber composite panels, (2) acoustical composite panels, (3) interior panels, (4) structural interior panels, and (5) structural wall panels. Definitions were developed for each subcategory based on the typical applications for products with the subcategory. The definitions, as presented in the rule, provide examples of the types of applications for the subcategories but are not intended to be all inclusive of the variety of applications that exist.

These subcategories were developed based on the range of applications as well as the biobased content range among the tested products. The biobased content data for the subcategories were as follows:

(1) Plastic lumber composite panels—26 and 29 percent.

(2) Acoustical composite panels—40 percent.

(3) Interior panels—58, 60, 61, 62, 64, 65, and 66 percent.

(4) Structural interior panels—92, 92, and 92 percent.

(5) Structural wall panels—97 and 100 percent.

Based on the narrow range of biobased contents within each of the subcategories, the minimum biobased contents were set at: Plastic lumber composite panels—23 percent, acoustical composite panels—37 percent, interior panels—55 percent, structural interior panels—89 percent, and structural wall panels—94 percent.

Comment: One commenter recommended that additional standards be referenced for composite panels. These standards are: ANSI A208.1–1999 for Particleboard, ANSI A208.2–2002 for MDF, ANSI A1 35.4–2004 for Basic Hardboard, ANSI A135.5–2004 for Prefinished Hardboard Paneling and ANSI/AHA A135.6–1998 for Hardboard Siding. The commenter also recommended that the final rule reference the Environmentally Preferable Product Standard, EPPS 2–06, which specifies recycled/recovered fiber content. For composite panel purchases linked to kitchen cabinets, the commenter recommended referencing the Kitchen Cabinets Manufacturers Association program.

Response: USDA thanks the commenter for identifying these ANSI and NSIIAHA standards. USDA has added these standards for composite panels to the BioPreferred Web site. However, USDA does not see the need to make reference to the other standards as they do not apply to the designation of composite panels for preferred procurement of biobased products. Those wanting to learn about the standards for recycled/recovered content should consult EPA's EPPS Web site. In addition, the designation of composite panels is for the purchase of the panels and not for the end product, such as kitchen cabinets (i.e., kitchen cabinets are not a biobased product being designated for preferred procurement).

Comment: One commenter requested that the final rule for composite panels indicate that the Composite Panel Association has adopted a Grademark Certification Program for Environmentally Preferable Products as defined by Federal Executive Order 13101. The EPP certification program covers particleboard, medium density fiberboard and hardboard and requires that 100 percent of the content of the product is recycled/recovered fiber. The commenter recommended that the description of composite panel constituents in the proposed rule be modified to become inclusive of this standard.

Response: USDA thanks the commenter for identifying the Grademark Certification Program, which contains information on products within this designated item. USDA has referenced this program on the BioPreferred Web site. This will provide additional information on these products to those who purchase such products. However, there is no need to include this certification program into these standards as they do not affect determining whether a product qualifies as a biobased product eligible for preferred procurement.

Comment: Three commenters stated that the proposed minimum biobased content was too low.

One of the commenters stated that, based on the data in the background information, the level should be set at 60 percent or higher. The commenter then stated that, if the lower content levels reflect products used for different applications than those with higher content levels, USDA should provide separate content recommendations.

The second commenter stated that the proposed minimum biobased content of 26 percent was apparently based on the biobased content of the lowest performing product tested. The commenter felt that this was a rather lenient way to set a standard, particularly when most composite products are 100 percent biobased when the metric includes the raw materials referenced in EPPS CPA 2–06. The commenter then suggested that the standard be set to give preference to the highest biobased content products.

The third commenter stated that they believe that the proposed minimum biobased content falls below the minimum goals set for the preferred procurement program and actually could create a disincentive for expanding biobased product use. Based on the available data in the rulemaking and their experience with their own product, the commenter recommended setting the minimum content standard at a higher level. The commenter pointed out that a 26 percent standard was proposed in spite of the test results showing a mean content of all products tested of 71 percent and reflects the content of the lowest 12 percent of the products tested. The commenter points out that only 8 of 51 products were tested, less than 16 percent of all products considered. The commenter then stated that with the median of tested products at 71 percent content, and 4 products testing at greater than 90 percent content, it is realistic to expect that other products, if tested, would provide important additional support for setting the content standard at a higher level than the product with the lowest content. The commenter felt that setting the standard below the level of content of the product with the lowest biobased content is inconsistent with the goal of discouraging the use of products with de minimums biobased content to satisfy the requirements of Section 9002. Rather, according to the commenter, setting a higher level truly would encourage expended use of agricultural products in biobased products and would have a greater positive impact on rural communities by providing new and expanded markets for agricultural producers and expanding the manufacturing base in those communities. Finally, the fact that 75 percent of the products tested at greater than 50 percent content clearly demonstrates, according to the commenter, that products with the necessary performance-based characteristics can be developed and procured for the stated Federal purposes with a level of biobased content substantially higher than 26 percent.

Response: As discussed in a previous response, USDA has re-evaluated the proposed designated item and has determined that it is reasonable to create subcategories for this item based upon application use. USDA believes that the creation of the five subcategories, with a separate minimum biobased content for each, adequately addresses the commenters' concerns. Additional details on the subcategorization and establishment of their minimum biobased contents for products within this item can be found in Chapter 3.0 of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

Comment: One commenter pointed out that the Composite Panel Association (CPA) has commissioned the Consortium for Research on Renewable Industrial Materials to conduct life-cycle inventory and LCA on particleboard, medium density fiberboard, and hardboard, the results of which are expected to be available in February 2007. The commenter encouraged the USDA to contact CPA about the CORRIM study. The commenter pointed out that, as just one important consideration that will influence the LCA report, wood is neutral with regard to carbon emission to the atmosphere, unlike petroleum-based products.

Response: USDA thanks the commenter for the information concerning the CORRIM and its ongoing life-cycle inventory and analysis. USDA has contacted the Composite Panel Association and requested that a copy of the study be sent to USDA once it is completed. USDA will then forward the results to NIST for review. If NIST validates the results, USDA will post the results on the BioPreferred Web site in order to provide the information to purchasers.

Fluid-Filled Transformers

Comment: One commenter stated that their Master Specifications requires transformer fluids to meet ASTM D3487–00, which was not listed among the standards for transformer fluids in the proposed rule. According to the commenter, in order for their facilities to use biobased products in lieu of traditional dielectric, the biobased fluid must meet original equipment manufacturer's specifications for existing equipment or performance standards related to electrical power generation and transmission for new transformers.

Response: USDA thanks the commenter for identifying this standard. USDA has included this standard in the technical information on this item on the BioPreferred Web site.

Comment: Three commenters stated that the proposed minimum biobased content of 66 percent for transformer fluids is too low. Two of the commenters recommended a minimum biobased content of 90 percent. One of the commenters pointed out that there are currently over 20,000 functioning transformers, produced by more than two dozen domestic manufacturers in at least 100 domestic electric utilities, filled with more than 95 percent vegetable oil-based dielectric coolants from at least two fluid manufacturers. According to this commenter, there are no technical reasons to reduce the minimum content to such a low value. The commenter suggested using a minimum biobased carbon content of 90 percent, stating that anything lower could be an incentive for suppliers to dilute the more expensive biobased base oil with cheaper petroleum oils. By such a dilution, the result would be using less biobased oils, increasing the fire hazard, and reducing the environmental benefits.

The second commenter stated that there are two basic chemistries used to make biobased transformer fluids—vegetable oil and synthetic esters. According to this commenter, the vegetable oil-based fluids are typically in the 95 percent biobased content range, while synthetic esters are in the 70 percent range. The commenter stated that synthetic ester-based transformer fluids are twice the cost of vegetable oil-based transformer fluids and are only used in very extreme applications, such as arctic conditions. The commenter then stated that by adopting a 66 percent minimum, USDA is setting the threshold at a level to include rare specialty applications rather than focus on the mainstream market, and it would not likely result in much biobased purchase volume anyway due to very high price of the synthetic ester-based transformer fluids. The commenter also felt that USDA may be creating an incentive for the introduction of ''vegetable oil—mineral oil blends'' that would unnecessarily use less biobased raw materials, thereby opposing the intent of BioPreferred Program. For these reasons, the commenter recommended a minimum biobased content for fluid-filled transformers of 90 percent.

The third commenter stated that based on the limited data in the background document, the level should be higher, but given the very limited data, the commenter recommended that USDA re-consider the content levels if comments received from product manufacturers and vendors support a higher content recommendation.

Response: USDA has re-evaluated the data for products within this item and has concluded that because there are two distinct types of formulations of transformer fluids, and because the ester-based fluids appear to be used primarily in severe weather applications, there is sufficient reason to subcategorize the item. Therefore, the fluid-filled transformers item has been divided into two subcategories: (1) Synthetic ester-based fluid-filled transformers and (2) vegetable oil-based fluid-filled transformers.

Based on data available at proposal, USDA had biobased content information on one synthetic ester-based transformer fluid and one vegetable oil-based transformer fluid. The biobased contents of these two products were, respectively, 69 percent and 98 percent. Since proposal, USDA has obtained biobased content data on an additional vegetable oil-based transformer fluid. The tested biobased content of this product is 100 percent.

For the synthetic ester-based fluid-filled transformers subcategory, USDA is establishing a minimum biobased content of 66 percent based on the single product for which biobased content was tested. For the vegetable oil-based fluid-filled transformers subcategory, USDA is establishing a minimum biobased content of 95 percent based on the two products tested.

As pointed out by the commenter, the cost of the synthetic ester-based product is sufficiently higher than the vegetable oil-based products to discourage their use, except in extreme applications. Thus, most purchasers are expected to buy the higher biobased content vegetable oil-based products regardless of the specified minimum biobased content. As pointed out elsewhere in this preamble, Federal agencies are expected under section 9002 to purchase products with the highest biobased content, as long as the products meet their performance needs and are available at an acceptable cost. To help purchasing agencies identify the biobased contents of available products and select those with higher biobased contents, the biobased contents of available products will be posted on the BioPreferred Web site.

Additional details on the subcategorization and the establishment of the minimum biobased contents for this item can be found in Chapter 5 of the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

Disposable Containers (Formerly Biodegradable Containers)

Comment: One commenter stated that the definition of containers is vague and needs clarification. The commenter recommended that this item be retitled ''disposable food service ware'' because ''biodegradable containers'' could be defined as encompassing boxes, pallets and packaging used to transport and store food products.

Response: USDA agrees with this commenter that this item should be focused on disposable containers and, as noted in a response to a previous comment, has renamed this designated item as ''disposable containers.'' It is USDA's intent for this item to include products in addition to disposable food service ware. Such additional products include containers that may take the form of boxes and packaging. However, pallets are not containers and would not be included under this item. Therefore, USDA has not limited this item to products that are only in the food service arena as requested by the commenter.

USDA notes that the products within this designated item may overlap with the EPA-designated recovered content product ''Paper and Paper Products.'' This EPA-designated recovered content product covers a wide range of paper products, including ''paperboard and

packaging.'' This subcategory, in turn, covers a variety of products, including corrugated shipping containers and industrial paperboard (e.g., mailing tubes). Additional information on this EPA-designated recovered content item, including the recommended recovered content levels for these products, can be found at *http://www.epa.gov/epaoswer/non-hw/procure/products/paperbrd.htm*.

Comment: One commenter suggested that biodegradable containers that replace single-use disposable containers that are not now recycled (such as polystyrene take-out containers) are preferable and deserve to be given procurement preference.

Response: As noted in the previous response, USDA has renamed this item as ''disposable containers.'' By doing so, preferred procurement will be given to disposable containers that are both biobased and biodegradable. This meets the commenter's request.

Comment: One commenter believes that the requirement to meet ASTM D6400 ''Standard Specifications for Compostable Plastics'' is not an appropriate definition for the category of Biodegradable Containers for inclusion on the Biobased Products List. According to the commenter, this test methodology is relatively new and not widely used or accepted at this time. The commenter also stated that the cost requirements for this test may make it unaffordable to many small or start-up businesses, making it a significant barrier to inclusion on the list. The commenter indicated that there are many alternative compost test methodologies, including full-scale testing conducted by the USDA Agricultural Research Service, which was conducted in conjunction with the Department of the Interior, the Environmental Protection Agency and the General Services Administration. The commenter felt that this work needed to be considered in defining this category. The commenter then stated the current definition could exclude products with large amounts of biobased materials that could significantly expand the use of biobased materials even though such products would not be compostable according to the ASTM D6400 test. Such an outcome, according to the commenter, would be counter to the goals of the project. The commenter noted that the other nine categories in this rulemaking do not include such a requirement.

Response: As stated in a response to another comment, the intent of this designated item is to give preferred procurement to biobased containers that are also biodegradable over disposable containers and not to give preferred procurement to biodegradable, biobased containers over biodegradable containers. To implement this intent, USDA has renamed the item to ''disposable containers'' and has added the requirement that the biobased versions of disposable containers be demonstrated to be biodegradable. The proposed rule included reference to ASTM D6400 as the method for determining whether or not a container is biodegradable. USDA agrees that some biobased versions of disposable containers may not be found to be biodegradable using ASTM D6400 because of their composition, but may be found to be biodegradable under other, equivalent test methods. Therefore, in recognition of this, the final rule requires the use of ASTM D6400 or other applicable and appropriate standard for biodegradability to demonstrate that a biobased container is also biodegradable.

Comment: Two commenters requested that the definition of biodegradable containers specifically exclude beverage bottles. According to the commenters, the current infrastructure to compost biodegradable containers and other biodegradable products is not yet developed and available in most U.S. communities and, thus, biodegradable beverage bottles that replace poly(ethylene terephthalate) (PET) or high-density polyethylene (HDPE) bottles are not necessarily preferable as these displace a product for which an established recycling infrastructure exists. The commenters claim that biodegradable beverage bottles in today's recycling infrastructure would end up neither composted nor recycled but in the reject stream of almost all recycling facilities in the U.S. The commenters then state that, if the USDA procurement program were to increase demand for biodegradable beverage bottles, this would have severe negative economic repercussions for well-established plastic bottle recyclers.

Response: The purpose of the BioPreferred Program is to encourage the purchase of biobased products, including, if they qualify, soda bottles. Like the commenter, USDA is concerned that such products are disposed of in an environmentally responsible manner. USDA has consulted with EPA and with representatives of the Association of Post-Consumer Plastic Recyclers (APCPR) to discuss this issue. APCPR explained that their primary concern with attempts to place PLA or other biobased plastics in existing recycling streams related to the negative impacts that these biobased plastics have on the recycling of PET. They pointed out that over seven billion pounds of PET are used annually in the country and that the recycling of PET has been adopted on a large-scale basis. There are two primary concerns related to the introduction of biobased plastics into the PET recycling stream. First, the presence of biobased plastics even in very small amounts (less than 1 percent) causes the resulting recycled plastic to lose the clarity which is demanded in the largest market for these products (''soda'' and water bottles). Even a slight haze in the final product is unacceptable to the bottling industry. The second concern relates to the actual recycling technology. PET is separated from HDPE and other petroleum-based plastics by floatation. PET floats in water and the others do not. Most biobased plastics also float, however, making the separation of PET from biobased plastics using floatation technology impossible. Thus, if there are biobased plastics in the recycling stream they remain with the PET stream. Following separation, the PET is shredded and then placed in dryers to remove the moisture. Because biobased plastics melt at a temperature that is much lower than the melting temperature of PET, the biobased plastics tend to melt in the PET dryers. Recyclers have indicated that the presence of even 0.1 percent of biobased plastics in the shredded stream can cause the dryers to ''gum up'' and results in the rejection of the contaminated PET.

APCPR pointed out that an optical-type technology for separating biobased plastics from PET is available, but that it is very expensive. Because there is currently such a small amount of biobased plastics available for recycling, there is no economic incentive for recyclers to purchase the equipment necessary to separate it from PET. APCPR further explained that for the recycling of biobased plastics to become economically viable there needs to be both a readily available supply of used material and a significant market for the recovered plastic, neither of which exists today.

APCPR also pointed out that biobased polymers used for other applications, such as ''clam shell'' containers and other therma-form products, do not present a problem for the recycling of those products. They also noted that composting in commercial composting operations is a viable alternative to the recycling of biobased polymers.

USDA encourages procuring agents and those involved in recycling to provide education material to potential

purchasers and users on environmentally preferred disposal of such products. The APCPR Web site (*http://www.plasticsrecycling.org*) presents technical information on plastics recycling and procuring agents are urged to visit the site for more information. In addition, USDA will post relevant information in this regard on the BioPreferred Web site to assist manufacturers, purchasers, and users become aware of the potential impacts of biobased plastics on recycling and on the preferred disposable methods for such products.

Comment: One commenter asked USDA to confirm whether biodegradable containers include products made with polylactic acid (PLA). If it does, the commenter suggested that EPA discuss the impact of mixing used PLA products with other plastics in recycling operations. The commenter pointed out that PLA can be a minor contaminant if mixed with fossil fuel based plastics such as PET and users of PLA products might inadvertently put used products in traditional recycling collection systems, because the products may appear similar to other types of plastic. The commenter suggested that users be advised instead to either compost their PLA products or work with PLA manufacturers to return the material back to them for recycling.

Response: USDA confirms that a biodegradable container made from PLA would qualify as a biobased product under this item. As discussed in the previous response, USDA is concerned that any product that affects recycling adversely be disposed of properly. Therefore, USDA encourages the commenter and those involved in recycling to provide education material to potential purchasers and users on environmentally preferred disposal of such products. To the extent that an existing market for recycled bottles changes, USDA believes this creates an opportunity for a new market for the recycling of biodegradable containers.

Comment: Three commenters recommended lowering the minimum biobased content for biodegradable containers. One commenter recommended lowering the minimum biobased content from 96 percent to 72 percent, and one commenter recommended lowering it to 85 percent. The third commenter did not offer a specific recommendation as an alternative biobased content.

In support of their recommendation of 72 percent, the first commenter stated that their product has a biobased content of 75 percent, but had not been tested in time to be part of the data set used for the proposed rule, although its BEES analysis had been used. The commenter stated that by setting the minimum biobased content at 72 percent, the goal of inclusion of high performing biobased products to maximize the use of these materials will be better met.

The second commenter supported their recommendation (85 percent) by stating that this segment of the market is still very new, as evidenced by the fact that only 6 containers were found and only 2 provided biobased percentages. The commenter stated that an 85 percent minimum is still significantly higher than that of biodegradable films and cutlery and that the lower threshold should enable the properties of these materials to be expanded and for more applications to be marketed. The commenter then stated that USDA can always raise the minimum contents in the future as the market becomes more fully developed.

The third commenter expressed concern that a 96 percent minimum biobased content would severely limit the product selection options for containers. This commenter pointed out that suitable containers with biobased contents ranging from 45 to 80 percent are under development and should be commercially viable in 2007, including two products that the commenter is currently working on. The commenter also referred to a new class of biobased containers incorporating PLA based solutions that would add toughness to the containers. The commenter, therefore, requested USDA to refrain from setting a minimum biobased content of 96 percent for biodegradable containers in favor of setting the biobased content at a lower level, thereby increasing the number of potential products and materials that would be available. The commenter concluded by stating that by implementing the 96 percent limit proposed, the only current material would be PLA, which is in very short supply and is very limited in terms of usage because of heat resistance and impact resistance.

Response: At the time USDA investigated this item for designation, biobased content data were available for two products, which had biobased contents of 99 and 100 percent. Since the publication of the proposed rule, the first commenter has provided a sample that has a tested biobased content of 75 percent. USDA has also obtained biobased content test results for products with 29, 32, and 98 percent biobased content. Thus, the data set for this item is now 29, 32, 75, 98, 99, and 100 percent biobased contents. Because there is a significant break between the 32 percent product and the 75 percent product, USDA reviewed the available product information to determine if there was any justification for creating two subcategories within this item. USDA is aware that some biobased disposable containers provide improved performance characteristics when compared with others when used in high temperature/moisture applications. At this time, however, USDA does not have sufficient product performance information to establish subcategories. USDA will continue to gather information on this item and, if sufficient product performance data can be obtained, will consider creating subcategories in a future rulemaking. USDA is setting the minimum biobased content for this item at 72 percent based on the product with a tested biobased content of 75 percent.

Additional details on the products within this item can be found in the document ''Technical Support for Final Rule—Round 2 Designated Items,'' which is available on the BioPreferred Web site.

Comment: One commenter suggested that, in addition to the BEES analysis, food safety and product integrity needs to be incorporated in product choice. According to the commenter, biobased biodegradable containers produced from natural starch-based or synthetic corn-based feedstock have their limits on what food products can be safely packaged in them. The commenter pointed out that this item does not take variability of foods into account, such as hot coffee, high moisture foods, or acidic condiments when prescribing biodegradable containers under this rule. The commenter concluded by stating that food packaging made from biomass is still experimental and there remain considerable data gaps on its feasibility.

Response: While USDA agrees with the commenter that some biobased biodegradable containers will perform better under certain circumstances than others, there are products within this item that are being used in the market place. Thus, USDA disagrees with the characterization of biobased containers as ''experimental,'' although there are some products still being developed in this item as well as in other items. As more products are developed within this item, USDA will make information available on the BioPreferred Web site to improve the data available to procuring agencies. Finally, the statute allows purchasers to not give preferred procurement if a biobased product fails to meet applicable performance standards.

Fertilizers

Comment: One commenter stated that the definition of fertilizers appears to cover both biobased and chemical fertilizers and asked if this was correct.

Response: The commenter is correct—the definition of fertilizers covers both biobased and chemical fertilizers.

Comment: One commenter asked if a hypothetical product that contains 10 percent total organic carbon by weight, and 90 percent other materials would qualify as a fertilizer as long as a minimum 71 percent of the weight of the total organic carbon component is qualifying biobased carbon.

Response: The commenter is correct—such a hypothetical product would qualify as a fertilizer and would be afforded preferred procurement as long as its biobased content met or exceeded the minimum biobased content for fertilizers.

Comment: One commenter suggested USDA rename the item ''biobased fertilizers,'' to distinguish it from other types (e.g., inorganic, biosolids) fertilizers. Otherwise, for example, it appears that any type of fertilizers could be used in organic farming.

Response: Under this item, the intent is to provide preferred procurement for fertilizers that are biobased. Such biobased fertilizers would replace ''fertilizers,'' not biobased fertilizers. The name and definition of this item, therefore, must remain ''fertilizers.''

Biobased fertilizers may contain chemical and synthetic products and even recycled hazardous materials. Therefore, some biobased fertilizers may be incompatible with those that can be used in organic farming. In addition, if a biobased fertilizer contains recycled hazardous wastes, the fertilizer would need to meet applicable land disposal restriction standards for any hazardous constituents they contain, as required under 40 CFR 266.20(d).

Comment: One commenter asked whether these products are blends of both biobased and chemical components or whether they mostly consist of biobased components. The commenter suggested adding a discussion regarding what other types of materials could be in the fertilizers along with the ''waste'' or ''recovered'' biobased components (e.g., chemical/synthetic ingredients).

Response: In response to the commenter's questions, most biobased fertilizers are likely to consist mostly of biobased components, but they can be made from blends of both biobased and chemical components. USDA has added additional information to the definition of fertilizer in the final rule to identify types of material that may be found in fertilizers.

Comment: One commenter asked whether the biobased carbon in these fertilizers is always recovered, or is it ever virgin. The commenter stated that if it's always recovered, then there will always be overlap (i.e., not ''in some cases'' as stated in proposed § 2902.22(d), but there will never be an issue since buying this product will simultaneously satisfy both statutes. The commenter suggested that USDA note in the preamble that if any of the fertilizers in question are made from recycled hazardous wastes, the fertilizer products would need to meet applicable land disposal restriction standards for any hazardous constituents they contain, as required under 40 CFR 266.20(d).

Response: At this time, USDA is unaware of any biobased fertilizers made from virgin materials. USDA agrees, therefore, that ''in some cases'' is incorrect based on our current knowledge. USDA also agrees with the commenter that this is irrelevant to the overlap concern because buying a biobased fertilizer satisfies both programs. With regard to the commenter's second point concerning the potential for fertilizers being made with recycled hazardous waste and thus not being able to meet applicable land disposal restriction standards, while this is not applicable to biobased fertilizers alone, USDA will post such information on the BioPreferred Web site. In addition, USDA has added a note in the final rule concerning the potential effect of fertilizers that contain recycled hazardous material.

Comment: One commenter stated that text in the preamble implied that EPA has finalized the designation for fertilizers under the CPG program. Because EPA has not done so at this time, the commenter requested that USDA check with EPA on the status of fertilizers before finalizing the designation. If EPA has not finalized the designation of fertilizers for the CPG program, EPA suggested that USDA use the word ''proposed'' when referring to fertilizers in the context of the CPG program. The commenter also stated that if the EPA final rule for fertilizers does not get finalized prior to the promulgation of this designated item, then USDA should delete proposed § 2902.22(d) altogether, and instead address this issue solely in the preamble. The commenter provided suggested language (e.g., Overlap will not be an issue for fertilizers unless and until EPA finalizes the CPG designation for fertilizers made from recovered organic materials, in which case. * * *'')

Response: EPA finalized the designation of ''fertilizer made from recovered organic materials'' on September 14, 2007. As a result, paragraph (d) of section 2902.22 was retained in the final rule.

Sorbents

As part of USDA's re-evaluation of the proposed minimum biobased contents in this regulation, USDA examined the proposed level of 52 percent for the sorbents item. Biobased content data are available for 11 products within this item, as follows: 55, 78, 92, 94, 97, 99, 100, 100, 100, 100, and 100 percent. As the data range shows, there are significant breaks in the tested biobased contents between the 55 percent product and the 78 percent product, and between the 78 percent product and the 92 percent product. Based on the information available, no obvious performance features justified subcategorizing or including the lower biobased content items in the final designation. In addition, USDA identified a grouping of products with biobased contents above 92 percent. This grouping would afford the Federal procurement community with numerous product options at the higher level of biobased content.

Therefore, USDA has set the minimum biobased content for this item at 89 percent, based on the item with a tested biobased content of 92 percent. As with other designated items, USDA will continue to gather information on this item and, if information justifying subcategorization is obtained, will create subcategories within this item in a future rulemaking.

Graffiti and Grease Removers

Comment: One commenter suggested that the Green Seal standard for degreasers (GS–34) be mentioned as a relevant environmental standard for this item.

Response: USDA agrees that such information can be useful and will add information on the Green Seal standard for degreasers (GS–34) to the performance information available on the BioPreferred Web site for this designated item.

Comment: One commenter stated that the minimum biobased content for grease and graffiti removers should be 38 percent (not 21 percent) based on the data in the background information. The commenter then stated that if the lower content levels reflect products used for different applications than those with higher content levels, then USDA

should provide separate content recommendations.

Response: Since proposal, USDA has obtained biobased content test results for several additional products within this item. Also, the product with 24 percent biobased content that was used as the basis for the proposed minimum biobased content is no longer offered by its manufacturer. The biobased content data set for this item now contains 19 test results, as follows: 37, 38, 44, 52, 53, 55, 58, 60, 61, 61, 63, 75, 77, 79, 89, 90, 94, 95, and 100. USDA evaluated the available product information for this item and set the minimum biobased content at 34 percent. Even though there is a wide range of biobased contents within this item, USDA was unable to identify any significant break points or product groupings within the data. Also, as explained in the proposal preamble, graffiti and grease removers are formulated to remove a wide variety of paints and other marking materials, as well as grease, from many types of surfaces and using several different application techniques. For example, some graffiti and grease removers are sold as concentrates to be mixed with water, while others are designed to be used as purchased; some are designed to be sprayed on with power washers, while others are designed to be applied with brushes; and some are designed to provide a foaming action, while others are not. USDA considered creating subcategories for this item based on product performance claims, formulation, and/or application techniques but did not have sufficient data to do so at this time. USDA will, however, continue to gather and evaluate product information for this item and will develop subcategories in a future rulemaking if sufficient justification can be obtained. Because of the wide range in product characteristics, USDA is proposing to set the minimum biobased content at a level that will include all of the products sampled.

Amendments to 7 CFR Part 2902

USDA is making technical amendments to three sections in subpart B to:

- Update the reference to the Web site from the ''USDA Web site'' to the ''BioPreferred Web site;''
- Revise the text, as necessary, concerning requesting information on the types of materials contained in the product to include biobased ingredients; and
- Add a note to refer the user to the potential overlap with EPA recovered material content products and where such products are designated in the Code of Federal Regulations.

These technical amendments update these three paragraphs to conform to the most recent language being used in subsequently promulgated sections under subpart B, including those sections in today's rulemaking.

V. Regulatory Information

A. Executive Order 12866: Regulatory Planning and Review

This action has been determined significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. We are not able to quantify the annual economic effect associated with this final rule. As discussed in the proposed rule, USDA made extensive efforts to obtain information on the Federal agencies' usage within the nine designated items, including their subcategories. These efforts were largely unsuccessful. Therefore attempts to quantify the economic impact of this rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing designated items if costs are ''unreasonable,'' the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of this rulemaking. This assessment was based primarily on the offsetting nature of the program (an increase in biobased products purchased with a corresponding decrease in petroleum products purchased). Consideration was also given to the fact that agencies may choose not to procure designated items due to unreasonable costs.

1. Summary of Impacts

This rulemaking is expected to have both positive and negative impacts on individual businesses, including small businesses. USDA anticipates that the biobased preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the designated biobased items to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. USDA is unable to determine the number of businesses, including small businesses, that may be adversely affected by this rule. The rule, however, will not affect existing purchase orders, nor will it preclude businesses from modifying their product lines to meet new requirements for designated biobased products. Because the extent to which procuring agencies will find the performance and costs of biobased products acceptable is unknown, it is impossible to quantify the actual economic effect of the rule.

2. Benefits of the Rule

The designation of these nine items, including their subcategories, provides the benefits outlined in the objectives of section 9002: To increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas; and to substitute products with a possibly more benign or beneficial environmental impact, as compared to the use of fossil energy-based products. On a national and regional level, this rule can result in expanding and strengthening markets for biobased materials used in these items.

3. Costs of the Rule

Like the benefits, the costs of this rule have not been quantified. Two types of costs are involved: Costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Procurement costs for Federal agencies may rise as they evaluate the availability and relative cost of preferred products before making a purchase.

B. Regulatory Flexibility Act (RFA)

When an agency issues a final rule following a proposed rule, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601–612) requires the agency to prepare a final regulatory flexibility analysis. 5 U.S.C. 604. However, the requirement for a final regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a

significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

USDA evaluated the potential impacts of its designation of these items to determine whether its actions would have a significant impact on a substantial number of small entities. Because the Federal Procurement of Biobased Products under section 9002 of FSRIA applies only to Federal agencies and their contractors, small governmental (city, county, etc.) agencies are not affected. Thus, this rule will not have a significant economic impact on small governmental jurisdictions. USDA anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of items for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers. Conversely, the preferred procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, this rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased items under certain conditions relating to the availability, performance, or cost of biobased items. This rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Thus, the economic impacts of this rule are not expected to be significant.

The intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products. Because the program is still in its infancy, however, it is unknown how many businesses will ultimately be affected. While USDA has no data on the number of small businesses that may choose to develop and market products within the items and their subcategories designated by this rulemaking, the number is expected to be small. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses affected by this rulemaking is not expected to be substantial.

After considering the economic impacts of this rule on small entities, USDA certifies that this action will not have a significant economic impact on a substantial number of small entities.

While not a factor relevant to determining whether the rule will have a significant impact for RFA purposes, USDA has concluded that the effect of the rule will be to provide positive opportunities to businesses engaged in the manufacture of these biobased products. Purchase and use of these biobased products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies. Technological innovation associated with the use of biobased materials can translate into economic growth and increased industry competitiveness worldwide, thereby, creating opportunities for small entities.

C. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that would have implications for these rights.

D. Executive Order 12988: Civil Justice Reform

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

E. Executive Order 13132: Federalism

This rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this 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.

F. Unfunded Mandates Reform Act of 1995

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under section 202 of UMRA is not required.

G. Executive Order 12372: Intergovernmental Review of Federal Programs

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

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

Today's rule does not significantly or uniquely affect ''one or more Indian tribes, * * * the relationship between the Federal Government and Indian tribes, or * * * the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Thus, no further action is required under Executive Order 13175.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection under this rule is currently approved under OMB control number 0503–0011.

J. Government Paperwork Elimination Act Compliance

The Office of Energy Policy and New Uses is committed to compliance with the Government Paperwork Elimination Act (GPEA) (44 U.S.C. 3504 note), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for preferred procurement under each designated item. For information pertinent to GPEA compliance related to this rule, please contact Marvin Duncan at (202) 401–0461.

List of Subjects in 7 CFR Part 2902

Biobased products, Procurement.

■ For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR chapter XXIX as follows:

CHAPTER XXIX—OFFICE OF ENERGY POLICY AND NEW USES, DEPARTMENT OF AGRICULTURE

PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

■ 1. The authority citation for part 2902 continues to read as follows:

Authority: 7 U.S.C. 8102.

■ 2. Amend § 2902.3 by adding paragraph (e) to read as follows:

§ 2902.3 Applicability to Federal procurements.

* * * * *

(e) *Exemptions*. The following applications are exempt from the preferred procurement requirements of this part:

(1) Military equipment: Products or systems designed or procured for combat or combat-related missions.

(2) Spacecraft systems and launch support equipment.

■ 3. Amend § 2902.10 by removing paragraph (e) and revising paragraph (d) to read as follows:

§ 2902.10 Mobile equipment hydraulic fluids.

* * * * *

(d) *Determining overlap with an EPA-designated recovered content product*. Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product: Re-refined Lubricating Oils. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains petroleum-based ingredients, re-refined oil, and/or any other recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated lubricating oils containing re-refined oil and which product should be afforded the preference in purchasing.

Note to paragraph (d): Mobile equipment hydraulic fluid products within this designated item can compete with similar lubricating oils containing re-refined oil. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated lubricating oils containing re-refined oil as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.11.

■ 4. Amend § 2902.11 by revising paragraph (d) to read as follows:

§ 2902.11 Roof coatings.

* * * * *

(d) *Determining overlap with an EPA-designated recovered content product*. Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product: Roofing Materials. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any type of recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with recovered content roofing materials and which product should be afforded the preference in purchasing.

Note to paragraph (d): Roof coating products within this designated item can compete with similar roofing material products. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated roofing material containing recycled material as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.12.

§ 2902.13 [Amended]

■ 5. Amend § 2902.13 by removing paragraph (d).

■ 6. Amend § 2902.14 by removing paragraph (e) and revising paragraph (d) to read as follows:

§ 2902.14 Penetrating lubricants.

* * * * *

(d) *Determining overlap with an EPA-designated recovered content product*. Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product: Re-refined Lubricating Oils. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains petroleum-based ingredients, re-refined oil, and/or any other recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated lubricating oils containing re-refined oil and which product should be afforded the preference in purchasing.

Note to paragraph (d): Penetrating lubricant products within this designated item can compete with similar re-refined lubricating oil products. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated re-refined lubricating oils containing recycled material as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.11.

■ 7. Add §§ 2902.16 through 2902.24 to subpart B to read as follows:

§ 2902.16 Adhesive and mastic removers.

(a) *Definition*. Solvent products formulated for use in removing asbestos, carpet, and tile mastics as well as adhesive materials, including glue, tape, and gum, from various surface types.

(b) *Minimum biobased content*. The preferred procurement product must have a biobased content of at least 58 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date*. No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased adhesive and mastic removers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased adhesive and mastic removers.

§ 2902.17 Plastic insulating foam for residential and commercial construction.

(a) *Definition*. Spray-in-place plastic foam products designed to provide a sealed thermal barrier for residential or commercial construction applications.

(b) *Minimum biobased content*. The preferred procurement product must have a biobased content of at least 7 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date*. No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased plastic insulating foam for residential and commercial

construction. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased plastic insulating foam for residential and commercial construction.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the EPA-designated recovered content product: Building Insulation. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated building insulation and which product should be afforded the preference in purchasing.

Note to paragraph (d): Biobased insulating products within this designated item can compete with similar insulating products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated building insulation containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.12. EPA provides recovered materials content recommendations for building insulation products in the Recovered Materials Advisory Notice (RMAN) published for these products. The RMAN recommendations can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.18 Hand cleaners and sanitizers.

(a) *Definitions.* (1) *Hand cleaners.* Products formulated for personal care use in removing a variety of different soils, greases, and similar substances from human hands with or without the use of water.

(2) *Hand sanitizers.* Products formulated for personal care use in removing bacteria from human hands with or without the use of water. Personal care products that are formulated for use in removing a variety of different soils, greases and similar substances and bacteria from human hands with or without the use of water are classified as hand sanitizers for the purposes of this rule.

(b) *Minimum biobased content.* The minimum biobased content requirement for all hand cleaners and/or sanitizers shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents are:

(1) Hand cleaners—64 percent.

(2) Hand sanitizers (including hand cleaners and sanitizers)—73 percent.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased hand cleaners and sanitizers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased hand cleaners and sanitizers.

§ 2902.19 Composite panels.

(a) *Definitions.* (1) *Plastic lumber composite panels.* Engineered products suitable for non-structural outdoor needs such as exterior signs, trash can holders, and dimensional letters.

(2) *Acoustical composite panels.* Engineered products designed for use as structural and sound deadening material suitable for office partitions and doors.

(3) *Interior panels.* Engineered products designed specifically for interior applications and providing a surface that is impact-, scratch-, and wear-resistant and that does not absorb or retain moisture.

(4) *Structural interior panels.* Engineered products designed for use in structural construction applications, including cabinetry, casework, paneling, and decorative panels.

(5) *Structural wall panels.* Engineered products designed for use in structural walls, curtain walls, floors and flat roofs in commercial buildings.

(b) *Minimum biobased content.* The minimum biobased content requirement for all composite panels shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents are:

(1) Plastic lumber composite panels—23 percent.

(2) Acoustical composite panels—37 percent.

(3) Interior panels—55 percent.

(4) Structural interior panels—89 percent.

(5) Structural wall panels—94 percent.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased composite panels. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased composite panels.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content products: Laminated Paperboard and Structural Fiberboard; Shower and Restroom Dividers; and Signage. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated laminated paperboard, structural fiberboard, shower and restroom dividers, and signage, and which product should be afforded the preference in purchasing.

Note to paragraph (d): Composite panel products within this designated item can be made with recycled material. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated laminated paperboard and structural fiberboard, shower and restroom dividers, and signage containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.12. EPA provides recovered materials content recommendations for laminated paperboard and structural fiberboard, shower and restroom dividers, and signage in the Recovered Materials Advisory Notice (RMAN) published for these products. The RMAN recommendations can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.20 Fluid-filled transformers.

(a) *Definition.* (1) *Synthetic ester-based fluid-filled transformers.* Electric power transformers that are designed to utilize a synthetic ester-based dielectric (non-conducting) fluid to provide insulating and cooling properties.

(2) *Vegetable oil-based fluid-filled transformers.* Electric power transformers that are designed to utilize a vegetable oil-based dielectric (non-conducting) fluid to provide insulating and cooling properties.

(b) *Minimum biobased content.* The minimum biobased content requirement for all fluid-filled transformers shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents are:

(1) Synthetic ester-based fluid-filled transformers—66 percent.

(2) Vegetable oil-based fluid-filled transformers—95 percent.

(c) *Preference compliance date.* (1) *Synthetic ester-based fluid-filled transformers.* Determination of the compliance date for synthetic ester-based fluid-filled transformers is deferred until USDA identifies two or more manufacturers of synthetic ester-based fluid-filled transformers. At that time, USDA will publish a document in the **Federal Register** announcing that Federal agencies have one year from the date of publication to give procurement preference to biobased synthetic ester-based fluid-filled transformers.

(2) *Vegetable oil-based fluid-filled transformers.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased vegetable oil-based fluid-filled transformers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased vegetable oil-based fluid-filled transformers.

§ 2902.21 Disposable containers.

(a) *Definition.* Products designed to be used for temporary storage or transportation of materials including, but not limited to, food items.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 72 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Biodegradability.* At the time a manufacturer offers a product under this item for Federal purchase under the BioPreferred Program, the preferred procurement product must be capable of meeting the current version of ASTM D6400 if disposed of in a non-marine environment, the current version of ASTM D7081 if disposed of in a marine environment, or other appropriate and applicable standard for biodegradability.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the EPA-designated recovered content product: Paper and Paper Products. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated paper and paper products and which product should be afforded the preference in purchasing.

Note to paragraph (d): Disposable containers can include boxes and packaging made from paper. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated paper and paper products containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.10. EPA provides recovered materials content recommendations for paper and paper products in the Recovered Materials Advisory Notice (RMAN) published for these products. The RMAN recommendations can be found on EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

(e) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased disposable containers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased disposable containers.

§ 2902.22 Fertilizers.

(a) *Definition.* Products formulated or processed to provide nutrients for plant growth and/or beneficial bacteria to convert nutrients into plant usable forms. Biobased fertilizers, which are likely to consist mostly of biobased components, may include both biobased and chemical components.

Note to paragraph (a): Biobased fertilizers, as well as other fertilizers, may be made with recycled hazardous waste. Such fertilizers need to meet applicable land disposal restriction standards for any hazardous constituents they contain, as required under 40 CFR 266.20(d).

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 71 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased fertilizers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased fertilizers.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the EPA-designated recovered content product: Fertilizer. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated fertilizer product and which product should be afforded the preference in purchasing.

Note to paragraph (d): Fertilizers within this designated item can be made with recycled materials. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated fertilizers containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.15. EPA provides recovered materials content recommendations for fertilizers in the Recovered Materials Advisory Notice (RMAN) published for these products. The RMAN recommendations can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.23 Sorbents.

(a) *Definition.* Materials formulated for use in the cleanup and

bioremediation of oil and chemical spills, the disposal of liquid materials, or the prevention of leakage or leaching in maintenance applications, shop floors, and fuel storage areas.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 89 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased sorbents. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased sorbents.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the EPA-designated recovered content product: Sorbents. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated sorbents and which product should be afforded the preference in purchasing.

Note to paragraph (d): Sorbents within this designated item can be made with recycled materials. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated sorbents containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.17. EPA provides recovered materials content recommendations for sorbents in the Recovered Materials Advisory Notice (RMAN) published for these products. The RMAN recommendations can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.24 Graffiti and grease removers.

(a) *Definition.* Industrial solvent products formulated to remove automotive, industrial, or kitchen soils and oils, including grease, paint, and other coatings, from hard surfaces.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 34 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. If the finished product is to be diluted before use, the biobased content of the remover must be determined before dilution.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying graffiti and grease removers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased graffiti and grease removers.

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