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Designation of Biobased Items for Federal Procurement; Final Rule

DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503–AA32

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 eight sections to designate items, including subcategories, within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002. USDA also is establishing minimum biobased content for each of these items and subcategories.

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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V. Regulatory Information
A. Executive Order 12866: Regulatory Planning and Review
B. Regulatory Flexibility Act (RFA)
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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 October 11, 2006, a proposed rule in the **Federal Register** (FR) for the purpose of designating a total of 10 items for the preferred procurement of biobased products by Federal agencies (referred hereafter in this FR notice as the ''preferred procurement program''). This proposed rule can be found at 71 FR 59862. This rulemaking is referred to in this preamble as Round 4 (RIN 0503–AA32).

The Round 4 proposed rule proposed designating the following ten items, including their subcategories, for the preferred procurement program: Bathroom and spa cleaners; [1] clothing products; [2] concrete and asphalt release fluids; general purpose de-icers; [3] durable plastic films; [4] firearm lubricants; floor strippers; laundry products, including pretreatment/spot removers and general purpose laundry products as subcategories; metalworking fluids—straight oils; [5] and wood and concrete sealers.

Today's final rule designates the following eight items, including subcategories, within which biobased products will be afforded Federal procurement preference: Bathroom and spa cleaners; concrete and asphalt release fluids; general purpose de-icers; firearm lubricants; floor strippers; laundry products, including pretreatment/spot removers and general purpose laundry products as subcategories; metalworking fluids, including straight oils, general purpose soluble, semi-synthetic, and synthetic oils, and high performance soluble, semi-synthetic, and synthetic oils as subcategories; and wood and concrete sealers, including penetrating liquid sealers and membrane concrete sealers as subcategories. USDA has determined that each of the items, including the subcategories within them, being designated under today's rulemaking 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 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 designated item ''hand cleaners and sanitizers,'' some products are required to meet performance specifications for

[1] At proposal this item was named ''bath and tile cleaners.'' Based on public comments received, and as explained in section IV of this preamble, USDA has renamed this item as ''bathroom and spa cleaners.''

[2] Based on public comments received, and as explained in section IV of this preamble, this proposed item has been withdrawn from the final rule.

[3] At proposal this item was named ''de-icers.'' Based on public comments received, and as explained in this preamble, USDA has renamed this item as ''general purpose de-icers.''

[4] Based on public comments received, and as explained in section IV of this preamble, this proposed item is now a subcategory under the designated item ''films,'' which is included in the Round 3 final rulemaking.

[5] At proposal this item was named ''cutting, drilling, and tapping oils.'' Based on public comments received, and as explained in section IV of this preamble, USDA has renamed this item as ''metalworking fluids'' and has included three subcategories.

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 designated item ''hand cleaners and sanitizers,'' USDA determined that it was reasonable to create a ''hand cleaner'' subcategory and a ''hand sanitizer'' subcategory. Sanitizing specifications would be applicable to the later 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—laundry products, metalworking fluids, and wood and concrete sealers. For laundry products, the subcategories are: (1) Pretreatment/spot removers and (2) general purpose laundry products. For metalworking fluids, the subcategories are: (1) Straight oils, (2) general purpose soluble, semi-synthetic, and synthetic oils, and (3) high performance soluble, semi-synthetic, and synthetic oils. For wood and concrete sealers, the subcategories are: (1) Penetrating liquid sealers and (2) membrane concrete sealers.

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, USDA must rely on biobased product manufacturers to voluntarily submit product information and, in some cases, USDA has been able to obtain biobased content data for only a single product within a designated item. As USDA obtains additional data on the biobased contents for products within these eight 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, none of the minimum biobased contents 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.

Preference compliance date. Because USDA has identified only one manufacturer of products within the high performance soluble, semi-synthetic, and synthetic oils 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 metalworking fluids in the high performance soluble, semi-synthetic, and synthetic oils subcategory.

Future Designations. In making future designations, USDA will continue to conduct market searches to identify manufacturers of biobased products within 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 earlier item designation rules, 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 those final rules in the **Federal Register**, and in response to comments from the Department of Defense (DoD) (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, which will apply to all items designated for the procurement preference. These ''blanket'' exemptions can be found in subpart A of part 2902. Because these blanket exemptions are included in subpart A of part 2902, it is unnecessary to repeat them in the individual item designations. Accordingly, in order to avoid repetition, this final rule removes all the exemption references contained in individual item designations.

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.

Item withdrawn. The proposed ''clothing products'' item has been withdrawn from the group of items being designated for preferred procurement in today's final rulemaking. USDA has determined that sufficient data are not available to support the designation of this item at this time. At proposal, USDA had information on clothing products made of polylactic acid (PLA), one type of

biobased synthetic fiber. USDA is also aware that other types of biobased synthetic fibers could be used for clothing products but does not have sufficient information to include these products in the evaluation of this item. Because there is potentially a wide variation in the biobased contents, performance, and life cycle costs between clothing products made of PLA and those made of other biobased synthetic fibers, USDA believes that the designation of this item should be delayed until additional products can be obtained and analyzed.

Item names. The names for four of the proposed items were revised. ''Bath and tile cleaners'' is now ''bathroom and spa cleaners.'' ''De-icers'' is now ''general purpose de-icers.'' ''Durable plastic films'' was renamed ''durable films'' and is now a subcategory under the designated item ''films,'' which is included in the Round 3 final rulemaking. ''Cutting, drilling and tapping oils'' was renamed ''metalworking fluids—straight oils'' and is now a subcategory under the designated item ''metalworking fluids'' in today's final rulemaking.

Item definitions. Except for ''concrete and asphalt release fluids'' and ''floor strippers,'' the definitions for the other items were modified to varying degrees. The definitions for metalworking fluids and wood and concrete sealers were modified in order to address the addition of subcategories (as discussed in the following paragraph).

Subcategories. In addition to finalizing the proposed subcategories under the ''laundry products'' item, subcategories were created for two items. Metalworking fluids was subcategorized into (1) straight oils, (2) general purpose soluble, semi-synthetic, and synthetic oils and (3) high performance soluble, semi-synthetic, and synthetic oils. Wood and concrete sealers was subcategorized into (1) penetrating liquid sealers and (2) membrane concrete sealers.

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 general purpose de-icers, the minimum biobased content was changed from 97 percent to 93 percent.

For floor strippers, the minimum biobased content was changed from 79 percent to 78 percent.

For laundry products, the minimum biobased content of the pretreatment/spot removers subcategory was changed from 8 percent to 46 percent.

For metalworking fluids, the minimum biobased content for the high performance soluble, semi-synthetic, and synthetic oils subcategory was set at 40 percent and the minimum biobased content for the general purpose soluble, semi-synthetic, and synthetic oils subcategory was set at 57 percent. For the straight oils subcategory, the minimum biobased content was set at 66 percent.

For wood and concrete sealers, the proposed minimum biobased content of 79 percent was retained for the penetrating liquid sealers subcategory and the minimum biobased content for the membrane concrete sealers subcategory was set at 11 percent.

Preference compliance date. For the high performance soluble, semi-synthetic, and synthetic metalworking fluids subcategory, the preference compliance date is deferred until USDA identifies two or more manufacturers in the 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 high performance soluble, semi-synthetic, and synthetic metalworking fluids.

IV. Discussion of Comments

USDA solicited comments on the proposed rule for 60 days ending on December 11, 2006. USDA received comments from 11 commenters by that date. The comments were from individual manufacturers, trade organizations, and Federal agencies.

The comments contained in this **Federal Register** notice address general comments related to the preferred procurement program under the BioPreferred Program and specific comments related to Round 4 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 4 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 4 Designation under Final Rules. This will bring you to the link to the technical support document.

The technical support document includes, but is not limited to: (1) Information on whether the standards presented in the preamble to the proposed rule are test methods, performance standards, or ''other'' (e.g., a certification by a trade association or council, a classification system) (Chapter 1.0), (2) BEES impact values for each item (Appendix A), and (3) a tabular and graphical presentation of the BEES environmental performance scores for each item (Appendix B). This information is being presented in the technical support document as the result of general comments received on the proposed rules for Rounds 2 and 3. The technical support document for Round 4 includes additional information as identified in the remainder of this preamble.

General Comments

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.

Minimum Biobased Content

Comment: Several commenters have expressed concern 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 three items, USDA reviewed the biobased content data but did not find sufficient justification for revising the proposed minimum biobased content level. For bathroom and spa cleaners item, 8 biobased content test results were available (16, 77, 78, 82, 83, 98, 99, and 100 percent). With the exception of the 16 percent product, this is a fairly narrow range of data points with a noticeable break between the 83 percent and the 98 percent products. USDA investigated the 16 percent product but could find no basis for creating a subcategory or for considering setting the minimum biobased content based on this product. At proposal, USDA found that the products with 77 and 83 percent biobased content met Green Chemical Specifications that the remaining products do not claim to meet. In order to include these products in the preferred procurement program, USDA proposed setting the minimum biobased content at 74 percent, based on the product with a biobased content of 77 percent. No public comments or additional data were received to support changing the proposed level. As a result, the proposed minimum biobased content of 74 percent was retained for the final rule.

For the concrete and asphalt release fluids item, USDA reviewed the biobased content data (90, 91, 92, 93, 94, 94, 96, 96, and 98 percent) and found that because the range of the data points is so narrow and does not include any breaks, there is no justification for revising the proposed 87 percent minimum biobased content.

For the firearm lubricants item, USDA proposed a minimum biobased content of 49 percent. Three biobased content data points (52, 53, 95) are available. USDA considered subcategorizing this item into two subcategories (general purpose and cold weather) but decided that not enough data were available to justify the subcategorization. The manufacturer of one of the three products claims that the product is formulated for use in cold weather applications, but the other products are also described as unique performance products. Because of the uncertainty regarding product performance claims, USDA has decided to set the minimum biobased content of the item at 49 percent, as proposed, and to continue to gather information that will be used in considering subcategorization in a future rulemaking.

Terminology

Comment: One commenter stated that the biobased products procurement program, as proposed, may create a confusing picture of what the program is intended to cover because the terms ''biobased,'' ''biodegradable,'' and ''compostable'' are used at times interchangeably. The commenter asked whether Federal purchasing agents understand the term ''biobased'' and that a biobased product is not necessarily biodegradable. The commenter pointed out that compostability most often only occurs when a product that is designed to be compostable is properly managed in a composting facility. According to the commenter, there are very limited numbers of commercial composting facilities in the U.S. The commenter also asked why some of the biobased items are designated as ''biodegradable'' and others are 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. In simple terms, ''biodegradable'' generally means a product is capable of decomposing into simple compounds under natural conditions (either aerobic or anaerobic) by microorganisms. ''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. Therefore, all biodegradable products would be compostable, but not all compostable products are biodegradable.

As discussed earlier in this preamble, USDA believes that the relationship between performance and biodegradability of an item must be considered before biodegradability is included as a prerequisite for a designated item to receive preferred

procurement under the BioPreferred Program. In the case of items where USDA judges performance to be the key decision-making factor for purchasers, USDA will not require biodegradability as a prerequisite for receiving preferred procurement. In the case of items where USDA judges disposal to be as important as performance, USDA will require biodegradability as a prerequisite for receiving preferred procurement. This is why some items will be required to be biodegradable and others will not in order to receive preferred procurement under the BioPreferred Program. Although USDA is not requiring products in any of the items and subcategories being designated in today's rulemaking to be biodegradable, USDA intends to promote biobased products that are also biodegradable as part of the BioPreferred Program.

Prequalification of Biobased Materials

Comment: Two 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 prequalified 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 designate ''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.

Overlap With EPA's Comprehensive Procurement Guideline (CPG)

Comment: Two commenters recommended that USDA's Guidelines Designating Biobased Products for Federal Procurement 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. USDA believes that the discussion on overlap is more meaningful when presented in individual notices for designated items where such overlap exists or may exist.

Environmental and Health Information

Comment: Two 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 encourages 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.

Purchase of Biobased Products by Federal Agencies

Comment: One commenter recommended that information on the following products be provided in the final rule for the benefit of Federal agency purchasers implementing both this round of biobased products and earlier biobased product designations: BioRenewables Glass Cleaner, NSN 7930–00–NIB–0331 (2 liter) and 7930–00–NIB–0330 (gallon); BioRenewables Restroom Cleaner, NSN 7930–00–NIB–0437; BioRenewables Graffiti Remover SAC, NSN 7930–00–NIB–0433 (quart) and 7930–00–NIB–0434 (gallon); BioRenewables Waterless Hand Cleaner, NSN 8520–00–NIB–0093; BioRenewables Waterless Plus Hand Cleaner, NSN 8520–00–NIB–0094; TriBase Multi Purpose Cleaner, NSN 7930–00–NIB–0329; Lite'n Foamy Sunflower Fresh foaming hand, hair, and body wash.

Response: USDA will include these products, offered through the National Industries for the Blind, in the product information provided on the BioPreferred Web site. Also note that the National Stock Numbers (NSN) provided by the commenter have changed since the comment was submitted. The revised NSN for the products are as follows: BioRenewables Glass Cleaner, NSN 7930–01–555–2898 (32 oz) and 7930–01–555–3384 (gallon); BioRenewables Restroom Cleaner, NSN 7930–01–555–2900 (32 oz); BioRenewables Graffiti Remover SAC, NSN 7930–01–555–3382 (32 oz) and 7930–01–555–2899 (gallon); TriBase Multi Purpose Cleaner, NSN 7930–01–555–2901 (gallon); Lite'n Foamy Sunflower Fresh foaming hand, hair, and body wash, NSN 8520–01–555–2903.

Comment: One commenter urged USDA to clarify in the final rule that it is not requiring procuring agencies to limit their choices to biobased products that fall under the items for designation in this proposed rule in order to avoid the unintended consequence of severely limiting product selection and material selection options. The commenter pointed out that a product should be reasonably available, meet USDA's requirements for performance for the

application intended and be available at a reasonable price.

Response: USDA agrees with the commenter that Federal agencies are not limited to considering biobased products when making purchasing decisions under the BioPreferred Program for biobased products. Even though biobased products are given preferred procurement, purchasing agencies can buy other competing products when biobased products are not readily available, are not available at a reasonable cost, or do not meet Agency performance standards. USDA believes that this is clearly stated for the current rulemaking and will continue to make it clear in future rulemakings as well.

Information Accuracy

Comment: One commenter, noting that USDA stated that its attempts to gather data were ''largely unsuccessful,'' urged USDA to re-examine and improve upon its prior efforts to gather complete, technically sound information on products within designated items and to use that information to further refine the program in the future.

Response: USDA uses the phrase ''largely unsuccessful'' in the context of its efforts to obtain information on the amount of products within designated items that Federal agencies are using (for example, see section IV.A, Executive Order 12866 in this preamble) and not on the information associated with the products within each item. Information on the usage of products would assist USDA to make estimates of the potential economic impact of the rule.

USDA has in place a procedure to gather technical information on products within each item it proposed for designation. As USDA proposes additional items for designation, it seeks to improve this process with each successive rulemaking to ensure the information it has is technically sound. One area in which USDA is using the improved information is in the development of subcategories within items. There will always be some uncertainty in the data obtained, but USDA will continue to propose items for designation for preferred procurement with the data it has in hand. USDA encourages the provision of additional information on products within items prior to their being designated for preferred procurement. The items being considered for preferred procurement can be found on the BioPreferred Web site.

Publicly Available Information

Comment: One commenter suggested that the data that form the basis for USDA's decisions and their source be available to the public. The commenter noted, as one example, that USDA intends to post public comments on the ''positive environmental and human health attributes'' of products on its Web site, and make the comments available to Federal procurement agencies to ''* * * assist them in making 'best value' purchasing decisions.''

Response: Since the first round of six items were designated for preferred procurement, USDA has provided significantly more data on each item being proposed for preferred procurement on the BioPreferred Web site. At the BioPreferred Web site, technical information is provided on products within the items. The BioPreferred Web site can be accessed by the public at *http://www.biopreferred.gov*.

USDA is concerned that the commenter might believe that USDA is using comments received on the ''positive'' attributes of biobased products as a basis for designating an item for preferred procurement, while ignoring potential ''negative'' attributes. This is not the case. The availability of information on the environmental and health attributes and life costs of items is part of the basis for proposing an item for preferred procurement. USDA is using the BEES analysis, which is ''neutral'' in regards to whether an environmental impact of a biobased product is ''positive'' or ''negative,'' to provide some of this information.

Finally, the statute authorizing the preferred procurement program for biobased products requires USDA to, in part, provide information on ''environmental and health benefits'' of such materials and items. Thus, USDA has a statutory obligation to make such information on the positive environmental and human health attributes available.

One way USDA is implementing this requirement is by posting public comments on the positive environmental and human health attributes of products on the BioPreferred Web site. Given the infancy of most biobased product markets, this type of information is often not generally known and providing access to such information, provided it is documented, is important to the success of the BioPreferred Program. If such information is anecdotal, it will be so indicated.

Recycling

Comment: Several commenters were concerned about the effect of biobased products on existing recycling operations.

One commenter requested that USDA evaluate and address the effect that biobased polymers used for durable films will have on current recycling streams and markets. According to the commenter, to the best of their knowledge, no technology exists to screen out biobased products during the recycling process.

Another commenter voiced concern over the introduction of biobased plastics, such as PLA, into the recycling stream because such products cannot be mixed with conventional plastics, such as PET, because the materials are not compatible for recycling processes. The commenter noted that PLA itself can be recycled, but that the recycling industry infrastructure is not currently configured to implement segregation collection and recycling of PLA plastics and there are no well-established manufacture buy-back type programs to incentivize and facilitate local or regional composting and recycling to turn PLA back into PLA.

The third commenter noted that the impacts of interest for the presence of biopolymers are on (1) the reclamation process and (2) on the appearance and functionality of the recycled PET and HDPE plastic products. The commenter then provided technical detail on the characteristics of biobased polymers and PET and HDPE to illustrate the reasons why such recycling incompatibility exists. This commenter then made the following conclusions: (1) Biopolymers are unlikely to justify an independent recycling business any time soon; (2) Biopolymers could be a technical nuisance to HDPE reclaimers, creating a yield loss with some economic cost; (3) Biopolymers could be a technical problem for PET reclaimers, creating degraded PET product quality and serious economic cost; (4) Biopolymers may be an opportunity for current reclaimers if the value exceeds costs and the presence does not disrupt current operations. Until critical mass is achieved, biopolymers will likely represent some level of cost and technical challenges to reclaimers and must pay their own way in collection, sorting, and processing. The third commenter stated that biopolymers should target product applications not currently included for recycling. Some biopolymers are targeted for packaging applications that are not typically recycled, such as food storage containers, bowls, and blister packaging.

These packages may become included with bales of bottles destined for recycling. Some parties have advocated the use of biopolymers for packaging applications such as juice and other beverage containers that are frequently recycled. As such, the impact of the USDA program on existing recycling streams and programs needs to be considered.

Response: The purpose of the BioPreferred Program is to encourage the purchase of biobased products, including products that are commonly recycled. However, 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 stated that to be successfully recycled a significant critical mass must be reached and that many resins, including various biopolymers, are not and are not likely soon to be present in sufficient quantities to justify free-standing recycling. The commenter believes that each resin must be self-supporting and not rely on subsidy from other resins for successful recycling. According to the commenter, although PVC is normally removed from the PET recycle stream as a matter of course, considerable development would be needed to make this possibility a working reality for other polymer bottles. If the ''other'' polymer, be it a biopolymer or petroleum-derived polymer, is not removed, then the impacts of potential contamination must be considered. Like many variants in the recycling stream, the effects of inclusion of ''other'' resins starts as a nuisance, rises to a problem with higher levels of occurrence, and finally becomes an opportunity when critical mass is achieved.

Response: As discussed in the response to the previous comment, USDA recognizes the challenges presented to the plastic resin recycling industry by the increased use of biopolymers. USDA will post relevant information on the BioPreferred Web site to assist manufacturers, purchasers, and users become aware of the potential impacts and the preferred disposable methods for biopolymer-based products.

Comment: One commenter made several recommendations on how USDA should address recycling in the purchase of biobased packaging materials.

First, the commenter recommended that USDA stress that it is not requiring procuring agencies to limit their choices to biopolymer-based packaging that is incompatible with current reclamation. The commenter believes that to do so is consistent with other guidance USDA provides with regard to other ''green'' programs.

Second, the commenter also recommended that, beyond the life cycle of the product itself, USDA ask agencies to consider the impact of the introduction of a new or non-traditional polymer for a specific application on existing recycling streams. The commenter believes that containers being recycled are as valuable to sustainability as containers being made of renewable material.

Third, for the reason stated above, the commenter further asked that USDA establish sustainable solid waste management (i.e., recycling) as one of the product performance standards for procuring agencies to request information on and consider. The commenter considers that the definition of sustainable solid waste management must include the economic ability of items to be processed for recycling and sold profitably. Similarly, an item that meets sustainable solid waste management criteria must not significantly degrade the ongoing, successful recycling of other items. In closing, the commenter stated that packaging material should be selected if it meets the functional and aesthetic requirements for the intended application, is commercially available and competitively priced, and does not disrupt existing, sustainable solid waste management programs.

Response: While USDA is concerned with all aspects of the BioPreferred Program, its statutory authority does not extend to include regulating the disposal, recovery, or recycling of biobased products. USDA encourages Federal procuring agencies to consider the impact that proper disposal of biobased products may have when they

are making decisions on the purchase of such products. As discussed in the previous responses, USDA will attempt to provide information on the disposal of biobased products to procuring agencies via its BioPreferred Web site.

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 Department of Defense (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. The commenter therefore recommended that the rule continue to reflect or include exemptions for all items used in products and systems designed or procured for combat or combat-related missions in sections 2902.37, 2902.39, 2902.40, and 2902.42. Sections 2902.36, 2902.38, 2902.41, 2902.43, 2902.44, and 2902.45 may at some future time be found to require a combat exemption for a specialized use we have not been able to determine at this time. The commenter suggested that the goals of the biobased preference program are better served if the focus in DoD is on product used for more conventional purposes (similar to commercially available items), rather than extending the requirements to combat uses. The commenter stated that DoD is being very proactive in encouraging the use of biobased products through both policy and research and development investments related to combat uses, however DoD is not in a position to support USDA selection of materials at this time.

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. This discussion has included whether there is a need for an exemption and, if so, whether an exemption should be on an item-by-item basis or whether a ''blanket'' exemption should be implemented. After such discussions, USDA is exempting from preferred procurement all items used in products or systems designed or procured for combat or combat-related missions. 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 tactical 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 DoD in tactical situations.

Comment: Two commenters 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. The commenters note that they are aware of applications in the clothing (military uniforms and other clothing) and de-icers (airport runways) where the introduction of a biobased ingredient into these products could result in not only equal performance but potentially enhanced performance. The commenters state that performance testing is currently in progress to support the intended uses for these products. Recognizing that the biobased products industry is in its infancy, the commenters believe that proposing exemptions for critical performance applications because there is a current lack of performance testing data to support some of these applications is both unnecessary, as discussed above, and counter to the intent of the Farm Bill of using federal procurement to pull biobased products into the marketplace.

Response: USDA agrees with the commenters 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.

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.

Biobased Content Testing

Comment: One commenter recommended that the ASTM active standard 06866–06 (standard test methods for determining the biobased content of natural range materials using radiocarbon and isotope ratio mass spectrometry analysis) replace the historical D6866–04.

Response: USDA agrees that the most recent and active ASTM standard needs to be used. In order to minimize the need to update the regulation, USDA has decided to simply refer to the base ASTM designation (in this case, ASTM 6866) and drop the year designation (in this case, the –04) and instead specify in the final rule that the ''current version'' of ASTM D6866 be used for determining biobased content.

Incidental Funding

Comment: One commenter noted that under a separate rulemaking USDA clarified that the procurement guidelines do not apply to purchases of designated items that are unrelated to or incidental to Federal funding. The commenter stated that ''incidental to federal funding'' should be defined or clarified. According to the commenter, because the Energy Policy Act of 2005 extended the biobased procurement preference program applicability to contractors of the federal government, the question of what constitutes an

incidental purchase becomes important and could benefit from additional clarification, either through regulations or guidance, to ensure federal agencies take a consistent approach. This area seems inherently open to a range of interpretation. For example, one could logically conclude that in a contract that requires submission of a report in paper format, the paper and the recycled material content of the paper would be incidental to the purpose of the contract (i.e., the reporting effort). However, the Federal Acquisition Regulations (FAR) actually contains a specific contract clause, 52.204–4, to ''encourage'' contractors to submit paper documents, such as offers, letters, or reports, printed or copied double-sided on 30 percent post-consumer recycled content paper. The commenter then provided other examples, which were identified to them by the Office of the Federal Environmental Executive.

In conclusion, the commenter recommended that USDA provide some additional regulatory language indicating when procurement is considered incidental to federal funding. The commenter offered the following example. Unless a material procurement meets all three of the following tests it would be considered incidental to the purpose of the contract: (1) The biobased material item is ultimately delivered to the federal government, or is consumed on the government facility as part of performing the contract; (2) The biobased material is not a subcomponent of a commercially available manufactured item (for example, the hydraulic fluid provided in a piece of equipment) unless the industry provides for procuring the item with a biobased component option; and (3) The presence or absence of the biobased material can reasonably be determined from technical data sheets or other available product information.

Response: The definition of ''procuring agency'' in FSRIA section 9001, as amended by the Energy Policy Act of 2005, makes it clear that the requirements of section 9002 apply to ''indirect purchases'' (i.e., purchases by contractors). However, the requirements to purchase biobased products do not apply to such purchases if they are unrelated to or incidental to the purpose of the Federal contract. For example, when a construction contractor purchases hydraulic fluid for maintenance service of construction equipment being used in the performance of a Federal building construction contract, that purchase is incidental to the purpose of the construction contract. The hydraulic fluid purchase would not be subject to the requirements of section 9002 or the guidelines, even though some of the monies received under the contract might be used to finance the purchase. USDA issued an Interim Final Rule on July 27, 2006 (71 FR 42572) amending the Guidelines at 7 CFR part 2902 to clarify that incidental purchases are excepted. Agencies may, however, encourage contractors to investigate biobased products in order to further develop markets for these products.

Need for Program

Comment: One commenter questioned the need for ''another mandatory preference program.'' According to the commenter, the proposed rule is ''diametrically opposed'' to the Federal Acquisition Reform Act, which is supposed to simplify the Government acquisition process. The commenter concludes that ''unless the manufacturers and vendors of the items listed in the proposed rule can price them competitively (since unreasonable price is an exception to the rule), no [contracting officer] worth their weight will give the program a second look.''

Response: USDA respectfully disagrees with the commenter's assessment of the need and possible outcome of the BioPreferred Program. The Congressional intent in establishing the statutory requirements of section 9002 were clearly spelled out in section 9002 and the subsequent Guidelines. The BioPreferred Program is not intended to make Federal procurement more complicated, only to ensure that procuring agencies give preference to biobased products that meet the cost, performance, and availability criteria. USDA is confident that manufacturers of biobased products will strive to develop and market products that meet these criteria, including cost competitive biobased products.

Qualifying Products and Country of Origin

Comment: One commenter expressed concern about the inability to verify that feedstocks (e.g., palm or palm kernel oil or tallows) used in surfactants originate from domestic sources or from designated countries. According to the commenter, the major sources of palm and palm kernel oil are Malaysia and the Philippines, neither of which is on the FAR list of designated countries and, to their knowledge, there is no production of palm or palm kernel oil in the U.S. or designated countries. Therefore, USDA should not assume feedstocks for biobased products are produced in the U.S. or in FAR-designated countries. The commenter, in referring to the inability of the ASTM D6866 to determine the country of origin of feedstock, stated that feedstock manufacturers will need to certify that the biobased material is produced in the U.S. or in FAR designated countries, and thus is a ''qualifying feedstock,'' and USDA will have to develop a monitoring process to ensure the accuracy of this self-certification.

Response: The commenter is correct in stating that manufacturers will need to self-certify that the biobased material in their qualifying products is produced in the U.S. or in FAR-designated countries. Manufacturers will be required to self-certify that their products meet the minimum biobased content for the designated item under which their product falls and that the product is produced from qualifying feedstock. USDA plans to develop an audit program to monitor compliance with both self-certifications.

Benefits of Rule Not Realized

Comment: One commenter stated that because most surfactants are produced using feedstocks that are not grown in the U.S. or in FAR-designated countries and because substitution of petrochemical-based surfactants such as LAS for biobased surfactants does not necessarily result in lower energy requirements, the proposed rule will neither provide the benefits of increasing domestic production of biobased products nor enhance U.S. energy security.

Response: USDA is aware that not all biobased products within every designated item will yield across-the-board gains in meeting the goals of the BioPreferred Program. The manufacture and use of some biobased products may result in significant reductions in the use of petroleum-derived feedstocks, thus resulting in an ''energy'' savings. The products addressed by the commenter may not yield these savings. However, USDA believes that the designation of items for preferred procurement will provide an incentive for manufacturers to research and develop biobased products that will qualify for the procurement preference. As the markets for additional biobased products develop, there will be added motivation for producers of feedstock materials (such as surfactants) to develop qualifying materials.

Item Specific Comments

Bathroom and Spa Cleaners (Formerly Bath and Tile Cleaners)

Comment: One commenter, in referring to the proposal statement concerning the need for Federal

agencies to compare the cradle-to-grave impacts of the manufacture, use, and disposal of biobased and non-biobased products, pointed out that cradle-to-grave assessments of petrochemical- and oleochemical-based (biobased) surfactants (cleaning agents) used in this item have been conducted using life-cycle inventory and risk assessment methodologies (Pittinger *et al.*, 1993). The commenter also referred to other, more extensive studies conducted in Europe. The commenter pointed out that these assessments found no consistent advantage for biobased versus non-biobased feedstock sources because all surfactants consume energy and raw materials in production and transportation and all release environmental emissions. The commenter then stated that risk assessments found no advantage to oleochemical feedstocks because these risk assessments demonstrate low environmental and health risk for the major surfactants and no major differences in the structures of the surfactants that can be produced with either oleochemical or petrochemical feedstocks, and thus no difference in biodegradation, ecotoxicity, or environmental safety.

A second commenter expressed concern that the applicable life-cycle studies which demonstrate no clear advantage for cleaning product ingredients derived from renewable resources were not referenced and recommended that these studies be considered for inclusion.

Response: As discussed in the response to the previous comment, USDA recognizes that the benefits of various biobased products are not the same. USDA has adopted the BEES life-cycle analysis as a means of providing purchasing agencies with information on the potential benefits and impacts of products within designated items. USDA will also post on the BioPreferred Web site any additional life-cycle studies that are identified. However, USDA has a statutory requirement to designate items for preferred procurement even though the life-cycle benefits of certain feedstock materials (such as surfactants) may be neutral or even less positive for some aspects of the analysis compared to petroleum-based products.

Comment: One commenter recommended that the following two standards developed by ASTM International be included in the ruling—D5343–061, Guide for Evaluating Cleaning Performance of Ceramic Tile Cleaners and D4488–951, Guide for Testing Cleaning Performance of Products Intended for Use on Resilient Flooring and Washable Walls.

Response: USDA will add these two ASTM standards to the list of performance standards identified on the BioPreferred Web site as applicable to the bath and tile cleaners designated item.

Comment: One commenter was concerned that USDA had overlooked many bath and tile cleaners and referred to a California Air Resources Board (CARB) survey which identified 338 tile cleaners sold in California. The commenter was very concerned that USDA's data collection methods are deficient and recommended that USDA conduct a very thorough evaluation of tile cleaners before finalizing the designation of biobased products. 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 for these products.

Response: USDA appreciates the information concerning the CARB study, which covered both biobased and non-biobased products. Because one of the purposes 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 16 manufacturers of biobased products within this item, with 29 biobased products being marketed. The range of biobased contents among the eight tested products is from 16 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 BioPreferred Program. A list of such items can be found on the BioPreferred Web site.

Comment: One commenter was concerned that not all of the products identified in the background information were appropriate to the definition of bath and tile cleaners and recommended that the category be clearly defined and restricted to bath and tile cleaners only. Products identified by the commenter were one described as a ''(product) that eliminates the need to add chemicals to hot tub and spa water'' and four described as toilet bowl cleaners.

Response: USDA acknowledges that some of the products listed in this item may not appear to be traditional ''bath and tile cleaners,'' as the category was described at proposal. After re-examining the products associated with this item, USDA believes that this group of products is better described as ''bathroom and spa cleaners.'' By defining this group of products as ''bathroom and spa cleaners,'' the four toilet bowl products identified by the commenter are more recognizably included in this item. With regard to the product referred to by the commenter as one that ''eliminates the need to add chemicals to hot tub and spa water,'' USDA notes that this product is intended to prevent residue buildup, a function of the eliminated chemicals. It is USDA's view that products that reduce the amount of cleaning required (e.g., by preventing buildup of residue) are properly included in this item.

On a general note, USDA points out that the manufacturers of the various products evaluated for each item decide where and how their products are marketed. Thus, if a manufacturer chooses to submit a product under a given item during the designation process for that item, USDA generally accepts that the manufacturer markets that product under that item. Ultimately, it is the responsibility of the purchasers to decide whether a given product will meet their needs.

Comment: One commenter recommended that this item be subdivided into at least two subcategories. According to the commenter, the formulation, concentration, product form, and other attributes of any product will be dependent on intended use and should be categorized as such. Therefore, the commenter recommended that ''General Purpose'' cleaners not be considered under this proposed rule because of their use in many cleaning scenarios.

Response: In considering the commenter's request to subcategorize

this item, USDA points out that this item (renamed ''bathroom and spa cleaners'' as discussed in the previous response) covers a wide variety of surfaces to be cleaned. Many products that fall within this item are designed to clean a wide variety of surfaces, while others are designed to clean more specific types of surfaces (e.g., fiberglass shower stalls). In addition, the range of biobased contents for all of the tested products (with the exception of the one product with a tested biobased content of 16 percent) is from 77 to 100 percent. USDA sees little benefit to subcategorizing this item when the proposed minimum biobased content of 74 percent (77 percent minus the 3 percentage points to account for test method variability) will allow all but one of the tested products to participate in the preferred procurement program. Therefore, USDA has decided not to subcategorize the item at this time. As additional information on products within this item is obtained, USDA will revisit the commenter's suggestion to subcategorize this item.

Clothing Products

Comment: Two commenters supported the proposed minimum biobased content of 6 percent for this item, stating that this minimum biobased content will help stimulate the continued development of biobased clothing products, which is still in a development stage as evidenced by the identification of only 3 manufacturers and 5 individual biobased products within this item. Both commenters suggested that obtaining more data for clothing products will help USDA to subcategorize this item and to set minimum biobased contents on a subcategory level.

Response: USDA thanks the commenters for their comments and their interest in the BioPreferred Program. As discussed earlier, USDA has decided to withdraw the clothing products item from this rulemaking. USDA will continue to gather data on biobased clothing products as more products are developed. When USDA obtains adequate data to support the designation of clothing products, to evaluate the need for subcategories with the item, and to establish the appropriate minimum biobased content for the item, another proposal notice will be published.

General Purpose De-Icers (Formerly De-Icers)

Comment: One commenter stated that USDA's proposal to set the minimum biobased content for de-icer products is not appropriate at this time. The commenter noted that USDA defined de-icers as ''agents that aid in the removal of snow and ice.'' According to the commenter, because of their different applications, higher performance de-icers are formulated to meet very specific performance requirements. These formulations are often based on performance standards, not only to de-ice, but also to meet other safety and equipment related needs. As such, these higher performance de-icers are usually blends of materials. The commenter concluded by stating that setting a minimum biobased content at 97 percent (essentially a 100 percent biobased product material) will exclude many applications for de-icers that contain or will contain biobased materials and products.

Response: USDA has revised the name of this item to clearly indicate that products that fall within this item are de-icers that are used in ''general purpose applications'' and not in specialized applications, such as the de-icing of airplanes and airport runways. To make the current designated item clearer in its intended coverage, USDA has added ''general purpose'' to the designated item name and references general purpose applications in the definition.

USDA has also revised the minimum biobased content for this item based on the receipt of additional biobased content data since proposal. The biobased contents of the sampled products are now 76, 96, 100, 100, and 100 percent. There is a significant break in the data between the 76 percent and the 96 percent products. USDA investigated the 76 percent product but did not find any performance or applicability claims that would justify creating a subcategory or setting the minimum biobased content based on that product. USDA is, therefore, setting the minimum biobased content for this item at 93 percent, rather than the 97 percent that was proposed. As noted earlier in this preamble, as USDA obtains more information on the biobased contents of other general purpose de-icer products, USDA will evaluate whether or not to revise the minimum biobased content for general purpose de-icers and, if appropriate, propose a change in the minimum biobased content.

USDA agrees with the commenter that de-icers used to de-ice airplanes and airport runways are specialized de-icers and should not be grouped with general purpose de-icers. As noted above, USDA is designating this item under today's rulemaking as ''general purpose de-icers'' and is specifically excluding from this item at this time de-icer products used to de-ice airplanes or airport runways. As suggested by the commenter, USDA will consider creating at a later date one or more subcategories within this item to address unique performance applications as information on de-icer products designed for those applications is available. If and when USDA designates specialized de-icers for preferred procurement, USDA will revise this item as necessary, which may require renaming the item and creating specific categories to cover general purpose de-icers and one or more subcategories, as needed, to cover specialized de-icers.

Lastly, USDA has revised the definition of de-icers to clarify that the item is referring to chemical de-icers, which can include such products as salts and fluids (e.g., alcohols). The item does not include mechanical methods (e.g., scraping) or methods that involve the application of heat (e.g., electric heating elements buried underneath surfaces).

Durable Plastic Films

Comment: One commenter stated that the definition of durable plastic films is vague and needs clarification.

Response: USDA reviewed the definition of the durable films item and the products intended to fall within the item and those that fall within non-durable films, an item proposed for designation for preferred procurement under another rulemaking on August 17, 2006 (Round 3, 71 FR 47590). USDA has decided to combine these two proposed items into one item named ''films'' with a subcategory for semi-durable films and a subcategory for non-durable films. The films designated item is included in the Round 3 final rulemaking. The key differentiation between the non-durable films and the semi-durable films subcategories is that the former are products that are designed and intended for single use, while the latter are designed and intended for reuse. USDA has added this ''re-use'' characteristic to the definition of semi-durable film.

Finally, USDA has dropped ''plastic'' from the name of this item. In the proposal notice for this item, this item was referred to as both ''durable films'' and ''durable plastic films.'' The intent was not to limit this item to ''durable plastic films.'' Therefore, USDA has dropped ''plastic'' from the name of this item.

Comment: One commenter stated that durable (plastic) films, which overlaps with the EPA-designated recovered content product: Plastic trash bags, is overly broad and needs more subcategories, similar to EPA's CPG

program. The commenter stated that this was needed because the minimum biobased content was set based on the testing of two products, but that the appropriate biobased content must be taken into account to ensure its performance and durability.

Two other commenters also stated that USDA needs to establish subcategories first and then establish a minimum biobased content for each of these subcategories. These two commenters were also concerned about the establishment of a minimum biobased content based on only two samples, which the commenters do not believe is representative of the many applications of the products within this item. The commenters stated that this category covers many applications and the selection of specific polymers used to make these films is very dependent on performance requirements for the specific application. The commenters pointed out as an example that durable plastic films are used for higher performance applications such as packaging for food and to achieve these performance requirements, durable films are often made from composites or layers of polymer films in order to meet the required barrier properties, resulting in multi-ingredient, multi-layered films. The commenters believe that setting a high minimum biobased content such as 61 percent will exclude these higher performance applications for the biobased polymers that will be used in these applications and that the minimum biobased content for some of these subcategories will be substantially lower than the one USDA is proposing. Therefore, the commenters believe that USDA's proposal to set the minimum biobased content for durable plastic films is not appropriate at this time.

Further, one commenter stated that USDA should not be setting, at this time, a minimum biobased content level for a product category as complex and diverse as durable plastic films. The commenter stated that USDA needs to establish appropriate subcategories for durable plastic films and then establish minimum biobased contents for each of these subcategories. The other option, according to this commenter, is to significantly lower the minimum biobased content level so higher performance films that contain biobased polymers can be considered for preferential procurement.

Response: USDA appreciates the potential complexity of the various products that this item covers, as described by the commenters, and, as discussed in the previous response, has established two subcategories within the films item.

Firearm Lubricants

Comment: One commenter recommended that USDA set two content levels for this item, one for general purpose and one for cold weather applications. The commenter stated that information in the preamble indicated that these two products had different formulations. The commenter also referred to the statute under which Federal agencies are to purchase USDA-designated biobased products containing the highest percentage of biobased products practicable. According to the commenter, it follows that USDA should recommend minimum biobased contents that are the highest practicable and, for this item, USDA should therefore either recommend a higher minimum biobased content or recommend multiple content levels based on differences in product usage or other characteristics.

Response: USDA agrees with the commenter that this item is a likely candidate for subcategorization. However, as discussed earlier in this preamble, USDA does not have sufficient information related to product formulation and performance to justify subcategorization at this time. Also, because only one manufacturer of a product that is described as a cold weather lubricant has been identified, the effective procurement date for that subcategory, if sufficient data were available to justify creating a subcategory, would be deferred until at least one additional manufacturer is identified. USDA will continue to gather information for this item and will create subcategories within the item in a future rulemaking if sufficient justification can be obtained.

Laundry Products

Comment: One commenter, in referring to the proposal statement concerning the need for Federal agencies to compare the cradle-to-grave impacts of the manufacture, use, and disposal of biobased and non-biobased products, pointed out that cradle-to-grave assessments of petrochemical and oleochemical-based (biobased) surfactants (cleaning agents) used in this item have been conducted using life-cycle inventory and risk assessment methodologies (Pittinger *et al.*, 1993). The commenter also referred to other, more extensive studies conducted in Europe. The commenter pointed out that these assessments found no consistent advantage for biobased versus non-biobased feedstock sources because all surfactants consume energy and raw materials in production and transportation and all release environmental emissions. The commenter then stated that risk assessments found no advantage to oleochemical feedstocks because these risk assessments demonstrate low environmental and health risk for the major surfactants and no major differences in the structures of the surfactants that can be produced with either oleochemical or petrochemical feedstocks, and thus no difference in biodegradation, ecotoxicity, or environmental safety.

Response: This commenter's concerns have been addressed by USDA in the section of this preamble that presents comments and responses related to the designated item for bathroom and spa cleaners.

Comment: One commenter recommended that the statement referring to the ''* * * skin-irritating residues and * * * toxic chemicals'' in the definition of this item be omitted from the ruling, as this statement has no bearing on the final ruling.

Response: USDA agrees with the commenter that the referenced statement is not needed in the rulemaking language and has removed it from the definition.

Comment: One commenter recommended the following ASTM guides be included in the ruling: D2960–51, Guide for Controlled Laundering Test Using Naturally Soiled Fabrics and Household Appliances; D5237–051, Guide for Evaluating Fabric Softeners; and D5548–0051, Guide for Evaluating Color Transfer or Color Loss of Dyed Fabrics in Laundering. The commenter also recommended that the American Home Appliance Manufacturers standards be included. According to the commenter, these ASTM standards are designed, approved, and used by laundry product manufacturers to evaluate product performance.

Response: USDA thanks the commenter for their input to the designation process and will add the information provided by the commenter to the list of test methods and performance standards for laundry products on the BioPreferred Web site.

Comment: One commenter recommended that USDA subcategorize laundry products by each of the product descriptions—(1) Laundry detergents, (2) bleach, (3) starch, (4) stain remover, (5) fabric softeners, etc. According to the commenter, the proposed subcategories of ''general purpose'' products and ''pretreatment/spot removers'' do not accurately reflect the differences in formulations, product form, and intended use of the various laundry products. The commenter also

recommended that fabric softeners be divided into washer and dryer products because of the differences in delivery system (liquid penetration versus deposition through a heated tumbling dryer).

Response: USDA agrees with the commenter that this item should be subcategorized and, based on current performance information, has retained the two proposed subcategories in the final rule. Under this rulemaking, USDA has created two subcategories: (1) Pretreatment/spot removers and (2) general purpose laundry products. USDA anticipates creating additional subcategories once sufficient information is obtained. USDA encourages the provision of additional information on other laundry products for which manufacturers believe additional subcategories should be developed.

For the two subcategories being designated in this rulemaking, USDA is setting the minimum biobased contents as follows:

For pretreatment/spot removers, USDA has 6 biobased content test results (11, 19, 49, 54, 54, and 83 percent). There are two significant breaks in the range of data, one between the 19 percent product and the 49 percent product and another between the 54 percent product and the 83 percent product. USDA found no product performance features to justify setting the minimum biobased content on the products with 11 and 19 percent biobased content. USDA also chose not to set the minimum biobased content on the one product with 83 percent biobased content because doing so would significantly limit the available product choices for federal procuring agencies. Because the majority of the remaining products were clustered around the middle of the range, USDA is setting the minimum biobased content for the pretreatment/spot removers subcategory at 46 percent.

For general purpose laundry products, four products were tested. Their biobased contents were 37, 39, 40, and 46 percent. USDA is setting the minimum biobased content for general purpose laundry products subcategory at 34 percent because the range of the data is narrow and there are no breaks in the data that would indicate that further subcategorization is justified.

As additional information is obtained, USDA will revisit this item to determine whether the minimum biobased content for either subcategory should be changed or if additional subcategories should be developed.

Additional information can be found in Chapter 3.0 of the Technical Support for Final Rule—Round 4 Designated Items, which can be found on the BioPreferred Web site.

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 two CARB surveys which identified 92 laundry detergents, 360 spot removers, 56 prewash products, 68 brighteners, 47 detergent boosters, and 21 fabric wash products for sale in the state of California alone. The commenter was very concerned that USDA's data collection methods are deficient and recommended that USDA conduct a very thorough evaluation of laundry products. The commenter also stated that the BEES and biobased contents obtained may not be representative of all products on the market, as only five products were evaluated for biobased content and one for BEES analysis. The commenter recommended that testing be performed on at least one proposed category to accurately reflect the market for these products.

Response: USDA appreciates the information concerning the CARB study, which covered both biobased and non-biobased products. Because one of the purposes 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 17 different manufacturers of biobased products within this item (including both subcategories), with 45 biobased products being marketed.

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. Even with the subcategorization of this item in the final designation, USDA does not know whether or not the biobased contents it has obtained are or are not 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 BioPreferred Program. A list of such items can be found on the BioPreferred Web site.

Comment: One commenter was concerned that not all of the products identified in the background information were appropriate to the definition of laundry products and recommended that the category be clearly defined and restricted to laundry products only. The commenter identified one product whose product's description states, ''(product) for all your soft household surfaces, closets and storage areas. It is all natural with light but long-lasting fragrance for freshness on your carpets, sofas, draperies, etc. It is excellent when used to freshen drawers and closets.''

Response: USDA acknowledges that some of the products listed in this item may not appear to be traditional ''laundry products.'' The product referred to by the commenter is also described as a product that ''can be used as a fabric freshener when ironing.'' This product would not fall within the two subcategories being created under this rulemaking. However, if USDA were to create a ''fabric freshener'' subcategory under Laundry Products, such an item would be appropriately included.

On a general note, as mentioned earlier in this preamble, USDA points out that the manufacturers of the various products evaluated for each item decide where and how their products are marketed. Thus, if a manufacturer chooses to submit a product under a given item during the designation process for that item, USDA generally accepts that the manufacturer markets that product under that item. Ultimately, it is the responsibility of the purchasers to decide whether a given product will meet their needs.

Metalworking Fluids (Formerly Cutting, Drilling, and Tapping Oils)

Comment: One commenter recommended that USDA set two content levels for this item for various uses or viscosities. The commenter stated that information in the preamble and in the background information posted on the BioPreferred Web site indicated that the differences in biobased content reflected differences in use or viscosity. The commenter also referred to the statute under which Federal agencies are to purchase USDA-designated biobased products

containing the highest percentage of biobased products practicable. According to the commenter, it follows that USDA should recommend minimum biobased contents that are the highest practicable and, for this item, USDA should therefore either recommend a higher minimum biobased content or recommend multiple content levels based on differences in product usage or other characteristics.

One commenter stated that some products originally included in the metalworking fluids item are sold ''neat,'' but are formulated to be emulsifiable and are intended to be mixed with water prior to use. The commenter, therefore, recommended that the definition be revised to use the following language: ''This item applies only to neat oils, not to water emulsions or products intended to be emulsified with water prior to use.''

One commenter suggested that, based on the data in the background information, the minimum biobased content for proposed metalworking fluids item should be higher than the proposed 40 percent or that USDA establish multiple content levels reflecting differences in product use. Alternatively, the commenter suggested that USDA consider recommending a range, similar to the ranges the EPA recommends for recycled content products.

Response: As a result of these comments received on the proposed cutting, drilling, and tapping oils item and the Round 2 proposed metalworking fluids item, USDA has combined the two proposed items into a single item with subcategories. The following paragraphs present USDA's rationale for this change.

First, USDA notes that metalworking fluids are generally classified into four types: Straight oils, soluble oils (also called emulsified oils), semi-synthetic fluids, and synthetic fluids. (The source of these classifications came from the Occupational Safety and Health Administration's ''Metalworking Fluids: Safety and Health Best Practices'' Manual. See Appendix C in the document Technical Support for Final Rule—Round 4 Designated Items, which can be found on the BioPreferred Web site.) Of these, only straight oils are designed not to be diluted with water prior to use. To account for the four types of metalworking fluids, USDA has divided them into two groups of products. One group includes straight oils, which are used in metalworking operations where lubrication rather than cooling is the primary concern. Such metalworking operations include cutting, drilling, and tapping. The other group of products includes soluble, semi-synthetic, and synthetic oils that are formulated to be diluted with water prior to use.

Second, USDA re-examined the products contained in each of the proposed items. Almost all of the products within the proposed cutting, drilling, and tapping oils item are straight oils designed to be used to perform multiple metalworking operations, including cutting, drilling, and/or tapping. (See Chapter 4.0 of the Technical Support for Final Rule—Round 4 Designated Items, which can be found on the BioPreferred Web site.) In other words, these straight oil metalworking fluids are inherently multipurpose straight oils. Their particular formulations are not directly related to their intended use. Therefore, USDA does not believe it is reasonable to try to further subcategorize these straight oil products based on various uses or formulation, including viscosity, as suggested by the commenter.

USDA reviewed the products within the soluble, semi-synthetic, and synthetic oils group of products and agrees with the commenter's recommendation that these products be divided into two subcategories. Based on the variations in types of metal (e.g., steel versus aluminum) and processes (e.g., grinding versus cutting) that may be encountered in operations that use these metalworking fluids, USDA has divided soluble, semi-synthetic, and synthetic oils into two subcategories—''high performance'' and ''general purpose.'' USDA believes that by establishing these two subcategories of soluble, semi-synthetic, and synthetic oils, qualifying biobased products will be available to cover the range of procuring agencies' needs.

Third, USDA has set the minimum biobased contents for the three subcategories of metalworking fluids as follows. For the straight oils subcategory of metalworking fluids, USDA has biobased content data for 12 products, as follows: 69, 76, 76, 78, 87, 89, 94, 94, 96, 98, 100, and 100 percent. Because the range of these values is fairly narrow and because there are no obvious breaks in the data, USDA set the minimum biobased content at 66 percent, based on the 69 percent biobased product. For the general purpose soluble, semi-synthetic, and synthetic oils subcategory of metalworking fluids, USDA has biobased content for 14 products, as follows: 60, 66, 67, 67, 76, 77, 77, 79, 80, 84, 90, 98, 98, and 100 percent. As with the straight oils subcategory, there were no readily identifiable breaks in the data that would indicate a need for further subcategorizing these products. Therefore, USDA has set the minimum biobased content for this subcategory at 57 percent, based on the 60 percent biobased product. For the high performance soluble, semi-synthetic, and synthetic oils subcategory of metalworking fluids, the minimum biobased content was set at 40 percent because both of the tested products have biobased contents of 43 percent.

Wood and Concrete Sealers

Comment: One commenter stated that this item should be split into two categories—one for wood sealers and one for concrete sealers—and should use nomenclature, if possible, that conforms with that found in 40 CFR part 59, National VOC Emission Standards for Architectural Coatings. According to the commenter, 40 CFR Part 59 defines ''waterproofing sealer and treatment'' separately from ''wood preservative'' and also separately defines ''concrete protective coating.'' The commenter provided the following definitions:

- Concrete protective coating means a high-build coating, formulated and recommended for application in a single coat over concrete, plaster, or other cementitious surfaces. These coatings are formulated to be primerless, one-coat systems that can be applied over form oils and/or uncured concrete. These coatings prevent splitting of concrete in freezing temperatures by providing long-term protection from water and chloride ion intrusion.
- Waterproofing sealer and treatment means a coating formulated and recommended for application to a porous substrate for the primary purpose of preventing the penetration of water. Wood preservative means a coating formulated and recommended to protect exposed wood from decay or insect attack, registered with the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136, *et seq.*).

Typically, paint and sealing products are substrate-specific. Designating two substrates under one item increases the potential for confusion, complicates compliance with architectural coating VOC regulations, and has no advantage over designating them separately. When procuring architectural coatings, the commenter typically makes reference to commercial item descriptions based on Master Painter Institute (MPI) specifications. These specifications will typically address products intended for application to concrete substrates separately from products for application to wood. Biobased product vendors should be encouraged to conform any paint or sealant products to these specifications to facilitate purchasing. In

the commenter's experience, they would rarely apply a product to concrete solely for water resistance. More typically, sealers are applied that also provide resistance to oil and gasoline. The commenter also stated that, based on their experience, they would rarely apply a product to wood (e.g., to wood decking) that did not also confer slip resistance. This implies that procurement of the sealing products—as USDA is contemplating the definition—might not result in significant amounts of federal purchasing activity.

Response: At proposal, USDA had biobased content data on products designed for sealing wood, concrete, or both. Specifically, the biobased content data showed wood sealers with tested biobased contents of 82, 91, and 91 percent; a concrete sealer with a biobased content of 82 percent; and a wood and concrete sealer with a biobased content of 82 percent. Based on this data, USDA proposed a minimum biobased content of 79 percent for the item.

The products tested at proposal for their biobased contents were all formulated to work as penetrating liquids. Since proposal, USDA has obtained biobased content test results for several products formulated to work as membrane-type sealers and to be used for masonry substrates. The biobased contents for these products are 14, 22, 23, and 62 percent. Given the apparent difference in biobased content between the two formulations of sealers, USDA has developed two subcategories within this item based on product formulation rather than on substrate. These two subcategories are: (1) penetrating liquids and (2) membrane concrete sealers.

For the penetrating liquids subcategory, the current biobased content data points are 82, 82, 85, 88, and 91 percent. Because the range of these data points is very narrow and because three of the four data points are between 82 and 85 percent, USDA is setting a minimum biobased content of 79 percent for the penetrating liquids subcategory based on the 82 percent products.

For the membrane concrete sealers, the biobased content data points are 14, 22, 23, and 62 percent. There is a significant break in the data between the 23 percent product and the 62 percent product. USDA investigated the 62 percent product but does not have sufficient product performance information to support further subcategorization. Because three of the four data points range from 14 percent to 23 percent, and no further subcategorization can be supported, the minimum biobased content for the membrane concrete sealers subcategory is set at 11 percent.

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 eight 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 procure designated items due to unreasonable costs.

1. Summary of Impacts

This rulemaking is expected to have both positive and negative impacts to 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 eight 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. Add §§ 2902.35 through 2902.42 to subpart B to read as follows:

§ 2902.35 Bathroom and spa cleaners.

(a) *Definition.* Products that are designed to clean and/or prevent deposits on surfaces found in bathrooms and spas including, but not necessarily limited to, bath tubs and spas, shower stalls, shower doors, shower curtains, and bathroom walls, floors, doors, and counter and sink tops. Products in this item may be designed to be applied to a specific type of surface or to multiple surface types. They are available both in concentrated and ready-to-use forms.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 74 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 bathroom and spa cleaners. 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 bathroom and spa cleaners.

§ 2902.36 Concrete and asphalt release fluids.

(a) *Definition.* Products that are designed to provide a lubricating barrier between the composite surface materials (e.g., concrete or asphalt) and the container (e.g., wood or metal forms, truck beds, roller surfaces).

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 87 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 concrete and asphalt release fluids. 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 concrete and asphalt release fluids.

§ 2902.37 General purpose de-icers.

(a) *Definition.* Chemical products (e.g., salt, fluids) that are designed to aid in the removal of snow and/or ice, and/or in the prevention of the buildup of snow and/or ice, in general use applications by lowering the freezing point of water. Specialized de-icer products, such as those used to de-ice aircraft and airport runways, are not included.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 93 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 general purpose de-icers. 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 general purpose de-icers.

§ 2902.38 Firearm lubricants.

(a) *Definition.* Lubricants that are designed for use in firearms to reduce the friction and wear between the moving parts of a firearm, and to keep the weapon clean and prevent the formation of deposits that could cause the weapon to jam.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 49 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 firearm lubricants. 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 firearm lubricants.

§ 2902.39 Floor strippers.

(a) *Definition.* Products that are formulated to loosen waxes, resins, or varnishes from floor surfaces. They can be in either liquid or gel form, and may also be used with or without mechanical assistance.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 78 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 floor strippers. 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 floor strippers.

§ 2902.40 Laundry products.

(a) *Definitions.* (1) Products that are designed to clean, condition, or otherwise affect the quality of the laundered material. Such products include but are not limited to laundry detergents, bleach, stain removers, and fabric softeners.

(2) Laundry products for which preferred procurement applies are:

(i) *Pretreatment/spot removers.* These are laundry products specifically used to pretreat laundry to assist in the removal of spots and stains during laundering.

(ii) *General purpose laundry products.* These are laundry products used for regular cleaning activities.

(b) *Minimum biobased content.* The minimum biobased content 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 for the preferred procurement product are:

(1) Pretreatment/spot removers—46 percent.

(2) General purpose laundry products—34 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 laundry products. 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 laundry products.

§ 2902.41 Metalworking fluids.

(a) *Definition.* (1) Fluids that are designed to provide cooling, lubrication, corrosion prevention, and reduced wear on the contact parts of machinery used for metalworking operations such as cutting, drilling, grinding, machining, and tapping.

(2) Metalworking fluids for which preferred procurement applies are:

(i) *Straight oils.* Metalworking fluids that are not diluted with water prior to use and are generally used for metalworking processes that require lubrication rather than cooling.

(ii) *General purpose soluble, semi-synthetic, and synthetic oils.* Metalworking fluids formulated for use in a re-circulating fluid system to provide cooling, lubrication, and corrosion prevention when applied to metal feedstock during normal grinding and machining operations.

(iii) *High performance soluble, semi-synthetic, and synthetic oils.* Metalworking fluids formulated for use in a re-circulating fluid system to provide cooling, lubrication, and corrosion prevention when applied to metal feedstock during grinding and machining operations involving unusually high temperatures or corrosion potential.

(b) *Minimum biobased content.* The minimum biobased content 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 for the preferred procurement product are:

(1) Straight oils—66 percent.

(2) General purpose soluble, semi-synthetic, and synthetic oils—57 percent.

(3) High performance soluble, semi-synthetic, and synthetic oils—40 percent.

(c) *Preference compliance date.* (1) *Straight oils.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased metalworking fluids—straight oils. 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 metalworking fluids—straight oils.

(2) *General purpose soluble, semi-synthetic, and synthetic oils.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased metalworking fluids—general purpose soluble, semi-synthetic, and synthetic oils. 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 metalworking fluids—general purpose soluble, semi-synthetic, and synthetic oils.

(3) *High performance soluble, semi-synthetic, and synthetic oils.* Determination of the preference compliance date for metalworking fluids—high performance soluble, semi-synthetic, and synthetic oils is deferred until USDA identifies two or more manufacturers of biobased products within this subcategory. 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 metalworking fluids—high performance soluble, semi-synthetic, and synthetic oils.

§ 2902.42 Wood and concrete sealers.

(a) *Definition.* (1) Products that are penetrating liquids formulated to protect wood and/or concrete, including masonry and fiber cement siding, from damage caused by insects, moisture, and decaying fungi and to make surfaces water resistant.

(2) Wood and concrete sealers for which preferred procurement applies are:

(i) *Penetrating liquids.* Wood and concrete sealers that are formulated to penetrate the outer surface of the substrate.

(ii) *Membrane concrete sealers.* Concrete sealers that are formulated to form a protective layer on the surface of the substrate.

(b) *Minimum biobased content.* The minimum biobased content 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 for the preferred procurement product are:

(1) Penetrating liquids—79 percent.

(2) Membrane concrete sealers—11 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 wood and concrete sealers. 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 wood and concrete sealers.

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