



# Federal Register

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**Thursday,  
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**Part II**

## **Department of Agriculture**

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**Office of Energy Policy and New Uses**

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**7 CFR Part 2902**

**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-AA26

**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 7 CFR part 2902, Guidelines for Designating Biobased Products for Federal Procurement, to add six sections to designate the following six items 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: Mobile equipment hydraulic fluids; roof coatings; water tank coatings; diesel fuel additives; penetrating lubricants; and bedding, bed linens, and towels. USDA also is establishing minimum biobased content for each of these items. Once USDA designates an item, procuring agencies are required generally to purchase biobased products within these designated items 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. However, USDA is deferring the effective date for two items (water tank coatings and bedding, bed linens, and towels) until such time that more than one manufacturer of products in these two items is identified. USDA additionally is revising section 2902.2 to add definitions for “biodegradability,” “EPA-designated recovered content product,” and “functional unit” and section 2902.8 to adopt applicable ASTM International performance tests to verify biodegradability.

**DATES:** This rule is effective April 17, 2006. However, as to water tank coatings and bedding, bed linens, and towels, Federal agencies will not be required to grant those items a preference until USDA learns of the availability of two or more manufacturers of products within that item and announces that availability in a future **Federal Register** notice.

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SW., MS-3815 Washington, DC 20250-3815; e-mail: [mduncan@oce.usda.gov](mailto:mduncan@oce.usda.gov); phone (202) 401-0461. Information regarding the Federal Biobased Products Preferred Procurement Program is available on the Internet at <http://www.biobased.oce.usda.gov>.

**SUPPLEMENTARY INFORMATION:** The information presented in this preamble is organized as follows:

- I. Authority
- II. Background
- III. Discussion of Comments
- IV. Regulatory Information
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Regulatory Flexibility Act (RFA)
  - C. Executive Order 12630: Governmental Actions and Interference with Constitutionally Protected Property Rights
  - D. Executive Order 12988: Civil Justice Reform
  - E. Executive Order 13132: Federalism
  - F. Unfunded Mandates Reform Act of 1995
  - G. Executive Order 12372: Intergovernmental Review of Federal Programs
  - H. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  - I. Paperwork Reduction Act
  - J. Government Paperwork Elimination Act Compliance

**I. Authority**

These items 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**

On July 5, 2005, USDA published in the **Federal Register** (70 FR 38612) a proposed rule to designate the following six items for the biobased products preferred procurement program: Mobile equipment hydraulic fluids; roof coatings;<sup>1</sup> water tank coatings; diesel fuel additives; penetrating lubricants; and bedding, bed linens, and towels. USDA has determined that each of these six items meets the necessary statutory requirements; that they are being produced with biobased products and that their procurement will carry out the following objectives of section 9002: To improve demand for biobased products; to spur development of the industrial base through value-added agricultural

<sup>1</sup> At proposal, this item was identified as “urethane roof coatings,” based on the specific formulation of the biobased product available at that time. USDA believes limiting this item to urethane-based roof coating is unnecessarily restrictive, especially in the light of another biobased product that has become available that is not urethane-based. Therefore, USDA is designating the more generic “roof coatings” as the item for preferred procurement under this program.

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 Federal Biobased Products Preferred Procurement Program (FB4P), 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 if one has been 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 FB4P Web site, <http://www.biobased.oce.usda.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.

Some of the biobased items designated for preferred procurement may overlap with products designated under the Environmental Protection Agency’s (EPA) Comprehensive Procurement Guidelines program for recovered content products. Where that occurs, an EPA-designated recovered content product (also known as “recycled content products” or “EPA-designated products”) has priority in Federal procurement over the qualifying biobased product. In situations where USDA believes there may be an overlap, it plans to ask manufacturers of qualifying biobased products to provide additional product and performance information to Federal agencies to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products. This information will be available on USDA’s Web site with its catalog of qualifying biobased products.

In cases where USDA believes an overlap with EPA-designated recovered content products may occur, manufacturers will be asked to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers may also be asked to provide other types of information, such as whether the product contains petroleum-based components and whether the product contains recovered

materials. Federal agencies may also ask manufacturers for information on a product's biobased content and its profile against environmental and health measures and life cycle costs (the Building for Environmental and Economic Sustainability (BEES) analysis or ASTM Standard D7075 for evaluating and reporting on environmental performance of biobased products). Such information will permit agencies to determine whether or not an overlap occurs.

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

This final rule designates three items for preferred procurement for which there may be overlap with EPA-designated recovered content products. These items are: (1) Mobile equipment hydraulic fluids, (2) roof coatings, and (3) penetrating lubricants. Qualifying products under these three items may overlap with lubricating oils containing re-refined oil and recovered content roofing materials, depending on how these products are to be used.

Since publication of the proposed rule to designate items for the FB4P, section 9002 was amended by section 943 of the Energy Policy Act of 2005, Pub. L. 109-58 (Energy Policy Act). Section 943 of the Energy Policy Act amended the definitions section of FSRIA, 7 U.S.C. 8101, by adding a definition of "procuring agency" that includes both Federal agencies and "any person contracting with any Federal agency with respect to work performed under that contract." The amendment also made Federal contractors, as well as Federal agencies, expressly subject to the procurement preference provisions of section 9002 of FSRIA. However, because this program requires agencies to incorporate the preference for biobased products into procurement specifications, the statutory amendment makes no substantive change to this

program. USDA intends to further amend the Guidelines to incorporate the new definition of "procuring agency" by publishing a notice of final rule at a later date.

In making future designations, USDA will continue to conduct market searches to identify manufacturers of 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.

USDA plans to create and chair an "interagency council," with membership selected from among Federal stakeholders to the FB4P. USDA will use this council to provide consultation in identifying the order of item designation, manufacturers producing and marketing products that fall within an item proposed for designation, performance standards used by Federal agencies evaluating products to be procured, and warranty information used by manufacturers of end user equipment and other products with regard to biobased products.

Finally, 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 FB4P 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.

### III. Discussion of Comments

USDA solicited comments on the proposed rule for 60 days ending on September 6, 2005. USDA received comments from 31 commenters by that date. The comments were from private citizens, individual companies, industry organizations, one foreign government, and various Federal agencies. With few exceptions, the commenters supported the goals of section 9002 and the designation of the six items. Most of the commenters, however, had specific questions, concerns, or recommendations regarding some aspect of the designation of these items. Several comments related to the process USDA has established for designating items, and other comments were relevant to the January 11, 2005, Guidelines for Designating Biobased Products for Federal Procurement.

Several procuring agencies expressed concerns in their comments that the effect of designating an item for which only one manufacturer of a biobased product is currently available would result in a sole source situation that would diminish competition. The two items of concern are water tank coatings and bedding, bed linens, and towels. Accordingly, while USDA is designating these items for preferred procurement, it is deferring specifying the date by which agencies must give preferred procurement to these two items under this program. For both items, a preferred procurement effective date will be identified when two or more manufacturers of products within the item have been identified. USDA actively seeks additional manufacturers of biobased products under these two items so that the items can be re-proposed for preferred procurement quickly.

Specific comments, and the USDA responses to them, are addressed below.

#### *General Comments*

*Comment:* A number of commenters stated that the **Federal Register** notice lacks detail on the names, manufacturers of the products, the performance tests, and, in the case of bedding, bed linens, and towels, the names of the biobased fibers, and that the information is not available on the Web site. Three of the commenters expressed concern over the lack of technical information in the preamble (e.g., lack of information on availability, relative price, performance and performance standards, BEES results, and environmental and public health benefits of products, as required by section 9002) and on the Web site and that, without this information, it is not possible to evaluate the effects of the proposed designations and to ascertain the technical performance of these products. One commenter stated that the preamble does not discuss how well the product performs when compared to what is available as a non-biobased alternative and, if Federal agencies cannot determine the performance characteristics of biobased products, they cannot reasonably call for them to be purchased. Another commenter was concerned that the lack of information on performance tests could lead to duplication of effort by agencies separately testing products to determine suitability and conformance with their specifications.

*Response:* USDA agrees that the information the commenters are requesting (names, manufacturers of the products, and performance tests) is useful and much of it is needed to make

decisions concerning the purchase of products within a designated item. Therefore, USDA will provide information on the standards and performance tests for those products that have been tested for purposes of designation on its FB4P Web site at the time of publishing future proposed rules, and will at the same time make that information available in the proposed rules. However, USDA has reached an agreement with manufacturers not to publish their names in the **Federal Register** when designating items. This agreement was reached to encourage manufacturers to submit products for testing to support the designation of an item. Once an item has been designated, the manufacturers of products within the designated item may elect to post their names and other contact information on the USDA FB4P Web site. USDA will also link its Web site to Defense Standardization Program and GSA-related standards lists used as guidance when procuring products. Instructions on accessing these lists on USDA's FB4P Web site will be included in its designation rules.

Further, USDA also will invite and actively encourage manufacturers of qualifying products within a designated item to post, on USDA's password-protected Web site, performance standards by which qualifying products' performances have been evaluated.

*Comment:* One commenter stated that USDA should encourage manufacturers to submit all relevant health and environmental data (key environmental attributes, environmental standards met, etc.) and post this information on the Web site.

*Response:* USDA agrees with the commenter that the posting of such information on the FB4P Web site is important. Among the information that section 2902.6 of the Guidelines requests manufacturers to post to the FB4P Web site are environmental and health benefits. Sections 2902.6 and 2902.8 additionally state that manufacturers and vendors are to provide relevant information to a procuring agency upon the agency's request concerning product characteristics, life cycle costs, and environmental and health benefits. Both the BEES analytical tool and ASTM D7075, which a manufacturer may use in lieu of the BEES analytical tool, take the environmental and health impacts, as well as other parameters, of biobased products into account.

USDA is working with manufacturers and vendors to post all this information on the FB4P Web site before a procuring agency asks for it, in order to make the preferred program more efficient. Steps

USDA has implemented, or will implement, include: Making direct contact with submitting companies through email and phone conversations to encourage completion of product listing; coordinating outreach efforts with intermediate material producers to encourage participation of their customer base; conducting targeted outreach with industry and commodity groups to educate stakeholders on the importance of providing complete product information; participating in industry conferences and meetings to educate companies on program benefits and requirements; and communicating the potential for expanded markets beyond the Federal government, to include State and local governments, as well as the general public markets. All of these efforts are intended to educate the manufacturers and other stakeholders on the benefits of this program and the need to post this information to make it available to procurement officials.

*Comment:* One commenter stated that it is illogical to require Federal agencies to purchase items, when it is only voluntary for the vendors to furnish the information for agencies to use in making the key purchase decision about the items. The commenter stated that the Web site USDA is developing to contain information on the availability, relative price, performance, and environmental and public health benefits of such products will be a useful tool for Federal agencies, but its efficacy depends on the voluntary submittal of product information by the manufacturers. The commenter, therefore, recommended that it be mandatory that manufacturers place relevant information on the Web site if the manufacturers are to participate in the preferred procurement program.

*Response:* USDA agrees that there appears to be an "illogical" aspect between "requiring" agencies to purchase biobased products within designated items, while the manufacturers "voluntarily" post on the FB4P Web site information that is needed in making purchasing decisions. USDA points out that procuring agencies are not required to purchase products if one of three conditions exist, including the inability of a product to meet performance standards. If a manufacturer fails to make this information available to a procuring agency, then the procuring agency may choose not to purchase the manufacturer's product. Thus, it is in the best interest of manufacturers and vendors to make all product performance information available to procuring agencies, whether through the

FB4P Web site or through some other means.

*Comment:* Two commenters requested that manufacturers and consumers be provided with more information on the selection of the proposed items and the process used to determine which items are likely to be designated next. One of the commenters stated that the designation process appears to be somewhat arbitrary and that manufacturers have little idea as to which products will be designated, how they will be categorized, or how they will be selected. This commenter stated that the current proposal provides little information on why USDA selected these six items, as opposed to other items currently available that will satisfy the procurement requirements. This commenter believes that manufacturers and consumers would be better served by a more transparent process.

The other commenter also stated that the process and criteria for product designation have not been communicated, which results in industry and start-up companies not knowing which products will be selected next for designation. This commenter also stated that there is very little background or rationale on why these six products were selected.

*Response:* USDA agrees that it has not provided enough information on the selection process used or the order in which USDA intends to pursue designation. USDA will correct this problem by placing information on the model used by USDA and its contractor, Iowa State University, to select items for designation on the FB4P Web site. In general, the items were developed and prioritized for designation by evaluating them against program criteria established by USDA and by gathering information from other government agencies, private industry groups, and independent manufacturers. These evaluations begin by asking the following questions about the products within an item:

- Are they cost competitive with non-biobased products?
- Do they meet industry performance standards?
- Are they readily available on the commercial market?

In addition to these primary concerns, USDA then considers the following points:

- Are there manufacturers interested in providing the necessary test information on products within a particular item?
- Are there a number of companies producing biobased products in this item?

- Are there products available in this item?
- What level of difficulty is expected when designating this item?
- Is there a Federal demand for the product?
- Are Federal procurement personnel looking for biobased products?
- Will an item create a high demand for biobased feed stocks?
- Does manufacturing of products within this item increase potential for rural development?

As noted earlier, USDA will also identify the latest set of items being considered for designation and the order in which USDA plans to pursue their designation. However, the list may change, with items being added or dropped, and the order in which items are proposed for designation is likely to change because the information necessary to designate an item may take more time to obtain than an item lower on the list. Further, as noted earlier, USDA plans to create and chair an interagency council, made up of Federal agencies, to consult with USDA with respect to identifying the order of items for future designations.

With regard to the comment concerning why these six items were selected first for designation, the preamble to the proposed rule for these six items noted that they were selected because "USDA was able to expeditiously identify and analyze these items." USDA will continue to make every effort to target those items most used by the Federal procurement sector. USDA will attempt to follow the model in prioritizing the order in which items are proposed for designation, but, to some extent, all future sets of items proposed for designation will depend on when sufficient information is made available by manufacturers of products within a designated item.

*Comment:* One commenter stated that the time frame for designating these first items has been too long, the process is overly complex and burdensome, and the paperwork burden required for manufacturers is unduly burdensome, especially for smaller manufacturers. The commenters urged USDA to quickly designate other items that will have the greatest impact on the biobased marketplace and to streamline the designation process.

A second commenter also stated that the program is taking too long in its implementation and that additional products with big marketplace impacts must be designated immediately. The commenter also stated generally that the implementation seems to be rather complex, time consuming, and expensive.

*Response:* USDA agrees that it has taken longer than planned to propose the first set of items for preferred procurement. Because information required to designate items is being submitted on a voluntary basis, USDA is working with manufacturers, as discussed earlier, to facilitate obtaining the information required to designate items more quickly.

USDA is also working with manufacturers to facilitate the process by which items are designated for preferred procurement and is striving to reduce, where feasible, the cost and burden to manufacturers associated with designating items. Efforts to accomplish this include, but are not necessarily limited to, developing a simplified BEES survey to encourage company input; funding the development of basic production data for several common agricultural feed stocks; providing assistance to manufacturers submitting BEES information to support item designation, including identifying potential sources for questionnaire data and helping manufacturers calculate specific inputs; contacting and urging material suppliers to provide necessary life-cycle, environmental, and human health data not typically maintained by end-product manufacturers; and considering the potential benefit of intermediate material BEES analysis as a means of reducing further a manufacturer's input burden (*e.g.*, a BEES analysis on a biobased polymer could possibly reduce the burden on manufacturers using that polymer to produce water bottles, thereby making the bottle manufacturer only responsible for reporting on their specific process). In addition to these actions, USDA is covering the costs of both the biobased content testing and the actual BEES analyses used in the designation of items.

USDA welcomes suggestions for further reducing the burden to manufacturers, while providing the level of information necessary to designate items.

*Comment:* One commenter stated that USDA should judge the performance of biobased materials against their intended application and avoid performance criteria that discriminate against biobased alternatives. According to the commenter, industry performance criteria may frequently discriminate against biobased alternatives when such criteria are designed in the absence of a biobased alternative. The commenter, therefore, urged USDA to consider alternative criteria when such discrimination is evident.

*Response:* USDA agrees with the commenter that the performance of

biobased materials should be judged against their intended applications and that performance criteria should not be biased against biobased alternatives. To assist procurement agencies in evaluating products within designated items against their intended applications, USDA is providing a forum on its FB4P Web site for manufacturers to publish all performance standards for their products. USDA will also be providing information on its Biobased Affirmative Procurement Program (APP), which is USDA's preferred procurement program. In the APP, USDA will provide guidance to procuring agencies on how to structure their preferred procurement program in order to carry out section 2902.4 of the Guidelines, which requires procuring agencies to reexamine their performance requirements and specifications to ensure they are not unfair against the procurement of biobased products and that they are still necessary and relevant.

*Comment:* One commenter stated that USDA needs to provide clarification on how the FB4P will take into account the international obligations of the U.S. under NAFTA and the World Trade Organization (WTO) Agreement on Government procurement. Two other commenters stated that, under NAFTA and the WTO Agreement on Government Procurement, the treatment of Canadian-sourced goods shall be no less favorable than that of U.S.-sourced goods and, therefore, no U.S. domestic preference is permitted. The commenters proposed that USDA cancel the proposed designation of these items, give preference to goods produced by signatories of NAFTA and the WTO, or modify the application of the preference so that it only applies to procurements that fall below the thresholds of NAFTA and the WTO agreement.

*Response:* Section 9002 requires Federal agencies to develop procurement programs that ensure the purchase of designated biobased products to the maximum extent practicable and that are "consistent with applicable provisions of Federal procurement law." In making such purchases, Federal agencies are to give a preference to the procurement of items "composed of the highest percentage of biobased products practicable, consistent with maintaining a satisfactory level of competition." A procurement program that treats biobased products from designated countries (as that term is defined in the Federal Acquisition Regulation (FAR) § 25.003)) no less favorably than U.S.-sourced biobased products: (1) Maintains a preference for biobased

products over non-biobased products; (2) maintains a satisfactory level of competition; and (3) ensures consistency with Federal procurement law, including Part 25 of the FAR. FAR part 25 sets out the policies and procedures for acquiring foreign products and services and implements the Buy American Act, trade agreements, and other laws and regulations regarding the acquisition of foreign products and services. Accordingly, biobased products from any designated country would receive the same preference extended to U.S.-sourced biobased products. In order to clarify and make this policy applicable to all biobased designations, USDA plans to propose a broad-based revision to the USDA biobased procurement guidelines (7 CFR part 2902) in its next proposed rule designating additional items.

*Comment:* One commenter stated that USDA should explain how it intends to be sure that biobased products are made from domestic and not imported feedstocks. The commenter provided an example in which janitorial cleaners commonly have a linear alcohol ethoxylate surfactant that can be made from plant or petrol. However, the plant-derived material is from palm kernel or coconut oil, neither of which is a U.S. domestic product. Thus, the commenter asked: (1) How will USDA verify that the organic molecules come from U.S. grown material? and (2) how will USDA be certain that, when a product can be made from a U.S. crop, it is indeed being made with a U.S. crop and not imported material (e.g., D-limonene can come from the U.S., Brazil, and other citrus growing countries)? The commenter concludes by stating that the real intent of the law is not being met by the present testing outlined in the proposed rule.

*Response:* USDA intends that manufacturers will self-certify that each product being offered as a biobased product for preferred procurement contains qualifying feedstock. As noted in the response to the previous comment, qualifying feedstocks for biobased products can be from "designated countries" as well as from the United States.

*Comment:* Two commenters stated that USDA should publish its model Biobased Products Procurement Preference Program so that agencies can understand the recommended acquisition strategy. One of the commenters stated that understanding the acquisition strategy is necessary to enable evaluation of the effects of the proposed designations on Government

procurement processes or general operations.

*Response:* USDA agrees with the commenters and is continuing to develop its policies and its Biobased APP for designated items to support its own procurement practices. USDA is also working to develop outreach and education programs, based on the USDA Biobased APP, to assist other procuring agencies in complying with the requirements of this program. USDA has issued the first generation of its Biobased APP, which includes several procurement tools, such as sample contract language for biobased procurement. As additional documents become available, USDA will publish them to the biobased Web site at <http://www.usda.gov/biobased>.

Additionally, USDA will continue to work with OFPP and the Office of the Federal Environmental Executive (OFEE) to coordinate and implement Federal biobased procurement policies.

*Comment:* One commenter urged USDA to work aggressively to bring all Federal agencies on board to implement the program within the one-year transition period indicated in the proposed rule.

Another commenter expressed concern that the one-year effective date may not be adequate, especially where product testing is needed and in particular for coatings, including roofing system coatings. The commenter recommended that USDA lengthen the implementation period to 18 months, at least for the first set of designated items, and up to 5 years for product testing and revision of performance specifications. The commenter pointed to the following as reasons for the need to extend the implementation period: The timeline for availability clauses in the FAR that are in development for biobased products; the process lengthening or even being stopped due to vendor protests, depending on the language in the FAR; the time for vendors to incorporate biobased provisions in a logical way, without the pressure to take shortcuts that could negatively affect agencies; product testing of coatings that could take several years if the procedures include corrosion or durability testing; revision of procurement specifications may require additional years to pass through various reviews and be finalized; and changes in specifications would lead to new product verifications, which require money to be allocated through the Planning, Programming, and Budgeting System process that may take several years.

*Response:* In response to the first commenter, USDA's Departmental Administration is working with OFEE

and OFPP, and through the interagency council, to assist all Federal agencies in accomplishing the goal of implementing the program in a timely manner.

The second commenter expressed concerns about the implementation period not being long enough. Agencies have one year from the effective date of the Guidelines to implement procurement preference programs for designated items. This is consistent with the legislative requirement found in Section 9002(d) of FSRIA, which states that "Federal agencies shall, within one year after the date of publication of applicable guidelines under subsection (e), or as otherwise specified in such guidelines, assure that such specifications require the use of biobased products consistent with the requirements of this section."

USDA proposed the one-year time frame in the proposed Guidelines (69 FR 70730, December 19, 2003, proposed section 2902.5), but in the Guidelines (70 FR 1792, January 11, 2005, section 2902.4(c)), USDA indicated each designated-item rulemaking would specify the time frame for each item. In the proposed designated-item rulemaking (70 FR 38612, July 5, 2005), USDA proposed a one-year time frame for each of the six items. Once the final rule is published, Federal agencies have up to one year to comply with these requirements (i.e., revise their procurement requirements and specifications for implementing the preferred purchasing of biobased products within these six items).

At the time these items are promulgated for designation, Federal agencies will have had a minimum of 18 months (from when these designated items were proposed) up to 27 months (from when the Guidelines were first proposed and these requirements were first laid out) available to them to implement these requirements. This time frame is at minimum equivalent to or longer than that requested by the commenter for this first set of designated items. It is USDA's position that this is a sufficient time frame for procuring agencies to identify biobased items meeting agency performance standards and to take the actions necessary for incorporating designated items into their preferred procurement program. USDA also notes that, from the time the Guidelines were first proposed, agencies will have longer time frames to implement these requirements for items proposed for designation in future rulemakings.

In response to the commenter's concerns about the amount of time required for product testing, USDA reemphasizes that procuring agencies

are not required to purchase biobased products that do not meet the reasonable performance requirements of the agency. In cases where biobased products have not undergone the necessary performance testing within the one-year implementation period, procuring agencies would not be expected to purchase the products. USDA will post to its FB4P Web site information on performance standards against which products have been tested. In addition, USDA will identify what tests appear to be relevant and, through working with OFEE and OFPP, what standards procuring agencies require for a given item. To help manufacturers conduct performance testing, USDA is making funds available through section 2902.9 of the Guidelines.

In conclusion and for these reasons, USDA continues to believe that a one-year effective date for the implementation of the procurement preference for the items designated in this final rulemaking is reasonable and is not extending the time frame for these requirements.

*Comment:* One commenter pointed out that the **Federal Register** notice is silent with regard to how Federal agencies should treat existing contracts, and stated that the cost of terminating contracts would make the cost for the biobased products unreasonable.

*Response:* Agencies have one year from the effective date of the Guidelines to implement procurement preference programs for designated items and the products within those designated items. Therefore, agencies should have sufficient time to plan for upcoming procurements. Agencies are not expected to terminate or modify existing contracts; however, they are encouraged to add requirements for the purchase of biobased products when options are exercised, especially to long-term contracts. This is consistent with other green procurement preference programs.

*Comment:* One commenter stated that, because the intent of section 9002 of FSRIA is largely to stimulate the production of new biobased markets and to energize emerging markets, USDA should establish a periodic review of biobased product qualification criteria and market availability of each listed item to determine when they have achieved market "maturity."

*Response:* USDA believes that the intent of section 9002 is not only to stimulate new biobased markets, but to maximize the use of biobased substitutes for petroleum-based products on a continuing basis. Given this intent, USDA believes it is unnecessary to reevaluate the status of

designated items that have reached market maturity.

*Comment:* One commenter stated that information on current usage statistics and specific potential markets for biobased products are essential to establish a baseline for an annual review of the effectiveness of agencies' preference programs.

*Response:* USDA agrees with the comment and, as owner of this program, is committed to working with OFPP and OFEE in developing a system, including reporting requirements, to monitor the effectiveness of the biobased preferred procurement program. Additionally, each agency is required to develop baselines, as appropriate, and assess the effectiveness of their individual-based preference procurement program.

*Comment:* One commenter stated that USDA should add "number or dollar value of biobased products purchased" to the Resource Conservation and Recovery Act (RCRA) or similar reports as a way to track FB4P.

*Response:* To this end, USDA has worked with OFPP and OFEE personnel to insert biobased data elements into the RCRA Data Call starting in fiscal year 2005. USDA will continue to work with OFPP and OFEE to identify methods to collect data on the dollar value of biobased products purchased.

*Comment:* One commenter stated that the **Federal Register** notice does not provide any information on the enforcement of the rules and on the possibility of citizen suits against the government. The commenter explained that punitive measures for noncompliance and the possibility of citizens' complaints and lawsuits would be problematic for agencies.

*Response:* Section 9002 does not provide USDA or anyone else with the authority for the "enforcement" of the procurement preference or for suits against the government by citizens. Without such statutory authority, USDA cannot add enforcement requirements to the preferred procurement program. However, OFPP will report to Congress on the progress, or lack thereof, that agencies are making in purchasing biobased products. This report could provide an indirect boost in encouraging procuring agencies to give the necessary preferred procurement to biobased products.

Further, given the experience of the EPA program under RCRA, which the language of section 9002 almost completely duplicates, USDA foresees little likelihood of litigation brought by the public.

*Comment:* One commenter suggested that USDA clarify whether the preferred procurement requirement is applicable

to just singular high-dollar amount, agency-wide purchases. (According to the commenter, there is little incentive to small procuring agencies because they do not have large-scale purchases.)

*Response:* The Guidelines were revised to clarify that "[t]he \$10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency." (See section 2902.3(a).) Thus, small purchases by subagencies are included in the \$10,000 cutoff.

*Comment:* One commenter requested that USDA provide an exception for "incidental purchases;" that is, purchases that are incidental to the purpose of Federal funding. The commenter referred to EPA's original procurement guidelines (48 FR 4230) and believes the same interpretation should be made for the biobased products purchasing program. To illustrate, the commenter stated that, under the incidental purchases rule, a construction contractor would not have to purchase biobased hydraulic fluid for use in its equipment because hydraulic fluid is incidental to the purpose of the construction contract, but that a contractor maintaining equipment for Federal agencies would be required to use biobased hydraulic fluids in the maintenance of the equipment. The commenter, therefore, suggested that USDA provide an exception for incidental purchases in the final rule.

*Response:* USDA agrees that "incidental purchases" are not covered by the definition of "procuring agency." 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 issued today, even though some of the monies received under the contract might be used to finance the purchase.

USDA will propose an amendment to the Guidelines at 7 CFR part 2902 to clarify that incidental purchases are excepted. Agencies may, however,

encourage contractors to purchase or test biobased products in order to further develop markets for these products.

*Comment:* One commenter stated that USDA should provide definition or guidance for what constitutes a price that is “not reasonable” compared to the cost of a non-biobased product.

*Response:* It is the responsibility of each procurement agency to establish, through its policies, cost reasonableness for any products procured under Federal contract. While the law provides the “unreasonable price” exemption, “unreasonableness” could be based on a comparison of product price, life-cycle costs, and other benefit information. USDA encourages procuring agencies to consider all facets of a product when evaluating prices.

Additionally, through the FB4P Web site and other initiatives, USDA will provide as much relevant information as possible to the individuals responsible for purchasing items and to the program officials who are developing specifications for the procurement of products and services. For example, information from the BEES analytical tool provides information on the first cost of a product and on the product’s life-cycle cost. The BEES results also provide information on the environmental and health benefits of the products, which will assist procuring agents in assessing the benefits of a product when determining the reasonableness of costs. Similar information will also be provided if the ASTM standard D7075 for evaluating and reporting on the life-cycle assessment and costs of biobased products is used.

*Comment:* One commenter questioned whether Federal agencies will be expected to provide proof if they determine that biobased alternatives do not meet established performance standards.

*Response:* Procuring agencies should follow their procurement rules and OFPP guidance on buying non-biobased products when biobased products exist and should document exceptions taken for price, performance, and availability.

#### *Designation of “Single Product” Items and Limited Number of Manufacturers*

*Comment:* Three commenters expressed concerns regarding the designation of items for which only one product has been identified or where a limited number of manufacturers have been identified. The issues and questions raised by the commenters are as follows:

- USDA needs to explain what constitutes a “sufficient” number of

products to be “adequate” for designation and how sufficient competition can be maintained where only one product is identified;

- Designating single source products would place the Government, at least initially, in a position of sole source procurements and it could place the manufacturer in the position of not being able to meet demand; and

- With a limited number of manufacturers of biobased products, there is a possibility that competition will be limited and Federal agencies will pay more for biobased alternatives.

*Response:* USDA agrees that designating items for which there is only one manufacturer of a biobased product under this item is problematic for the reasons discussed previously. Of the six biobased items proposed for designation, two (water tank coatings, and bedding, bed linens, and towels) are currently known to have a single manufacturer. USDA believes that the best way to address the problem of a single-known manufacturer of a biobased product within an item is to designate that item for preferred procurement, but to defer the effective date that procurement agencies would be required to give procurement preference until such time that there are two or more manufacturers of products within the item. Therefore, USDA is designating all six items, including items for which there is a single known manufacturer, but determination of the effective date for the single source items will be deferred indefinitely. USDA believes that it is beneficial to proceed with the designation of these two items, despite the delayed effective date, because it will encourage more manufacturers to produce products within these two items and alerts manufacturers of these items to an opportunity to sell their products. These effects, in turn, further the statutory goals of the program.

With respect to those items for which preferred procurement is being deferred, USDA will specify the item’s effective date in a future document in the **Federal Register** when it identifies two or more manufacturers of products within the item. Until such a document is published in the **Federal Register**, USDA will not permit manufacturers to post product, performance, and contact information on the FB4P Web site for those items with only one manufacturer. In future proposed designation rules under the FB4P, USDA intends to propose for designation only items for which there is more than one manufacturer.

#### *Relationship to Other Federal Programs*

*Comment:* One commenter requested that USDA and EPA work together to identify items (or products) that may be covered by section 9002 of FSRIA and by section 6002 (Comprehensive Procurement Guideline) of the Resource Conservation and Recovery Act, Pub. L. 94–580 (RCRA). The commenter pointed out that roofing materials, hydraulic fluids, and penetrating lubricants all may be qualified for procurement preference under both section 9002 of FSRIA and under section 6002 of RCRA. The commenter requested that if overlap is identified, USDA work with the Office of Federal Procurement Policy at the Office of Management and Budget (OMB), OFEE, and EPA to resolve any conflict.

Another commenter stated that USDA needs to provide additional clarification on how these two sections relate to each other, indicating that the language in the Guidelines (section 2902.3(b)) is vague.

*Response:* USDA agrees that procurement agents might find themselves in the position of having to choose between giving procurement preference to a product that qualifies for preferred procurement under section 9002 of FSRIA or to a competing product that qualifies for preferred procurement under section 6002 of RCRA and that guidance is required. USDA plans on working with the interagency council (discussed earlier in this preamble) to determine product choices amongst the various preferred procurement programs for future procurements.

To the extent that products within items designated in this notice and in future notices under section 9002 of FSRIA are alternatives to products that are to be given preferred procurement under section 6002 of RCRA, USDA acknowledges that the comprehensive procurement guidelines under section 6002 of RCRA take precedent. That is, everything else being equal about a product that qualifies for preferred procurement under section 9002 of FSRIA and a competing product that falls under section 6002 of RCRA, a procurement agent would give preference to section 6002 of RCRA when making a purchase decision between the two products. USDA believes the language in section 2902.3(b) is sufficient to determine when section 9002 yields to section 6002.

However, for performance reasons, a biobased product might be more appropriate for a given use. USDA offers the following example: If a procurement agent has the choice of purchasing



either an EPA-designated recovered content product (in this case, lubricating oil containing re-refined oil) for use as a fluid in a hydraulic system or a competing biobased mobile equipment hydraulic fluid, where both fluids are used for the same purposes and meet the same requirements, the procurement agent must give procurement preference to the EPA-designated recovered content product. If, on the other hand, a biobased hydraulic fluid can meet certain environmental or health requirements that the EPA-designating recovered content product would not meet, then the procuring agent should give purchase preference to the biobased hydraulic fluid, subject to cost, availability, and performance.

Additionally, designation of items under this program not only qualifies the item for a Federal procurement preference, but also makes biobased products under that item eligible to use the biobased label in the commercial marketplace, as authorized by FSRIA. USDA currently is developing the labeling program. Thus, duplicate designation of items under this program and the RCRA program is not inappropriate.

In conclusion, USDA does not see the need to modify the designation of items in this notice, even when products within an item would be subject to both sections. However, USDA has added language in the final rule for mobile equipment hydraulic fluids, roof coatings, and penetrating lubricants requesting manufacturers to provide information to help procuring agents identify overlap between the two programs. USDA will work with the interagency council to help identify potential overlap between the two programs in future rules.

*Comment:* One commenter stated that USDA has not provided sufficient guidance to avoid potential conflicts in implementing both the biobased and the Energy Star program for roof coatings. The commenter was specifically concerned that there is no guidance on biobased content when one is purchasing Energy Star roofing material and requested that USDA provide guidance in the final rulemaking, including information on whether the minimum biobased content changes for Energy Star roofing material. The commenter recommended that this information be provided in both the preamble and in the regulatory text.

*Response:* With the new Energy Star preferred procurement program, USDA agrees that there might be Energy Star products that procurement officials now will have to consider alongside biobased products in their procurements. Roof

coatings is an example. USDA has information on two biobased roof coating products, one of which does not meet the requirements to qualify for the Energy Star rating and one that does. Where a product does meet the Energy Star rating, it does not mean, however, that procurement officials must give preference to Energy Star products over biobased products. To the extent that procurement officials have to choose between products under different preferred procurement programs, procurement officials should look to the FAR part 23 for guidance regarding the relative priority of the various preference programs. USDA will consider whether it is appropriate to establish biobased content levels for Energy Star products that differ from those for non-Energy Star products.

#### *BEES Analysis*

*Comment:* Two commenters requested that BEES analyses be done for the materials that are to be replaced by the biobased products so that a meaningful comparison of the impacts can be performed. According to one commenter, without making such a comparison, USDA cannot claim to have fully evaluated the extent to which the products proposed for procurement preference actually contribute to the objectives of section 9002 of FSRIA. Using bedding, bed linens, and towels as an example, the commenter states that by encouraging Federal procurement of, for example, towels made of "unknown" biobased fibers, cotton may be displaced; and, without making a comparison of the fossil energy inputs (i.e., coal, oil, natural gas) needed to grow, harvest, and process cotton as compared to alternative "unknown" biobased fiber, USDA cannot know that substituting the biobased alternative for cotton will contribute to reducing national use of imported oil and natural gas, one of the stated goals.

*Response:* USDA received similar comments during the development of the Guidelines, although those comments focused on replacing petroleum-based products. As noted then, USDA agrees that it would be quite useful to be able to make a point-by-point comparison, using the same standards of measure, between a biobased and a non-biobased product prior to making a procurement decision. USDA also agrees that it would be quite useful to make a comparison between a biobased product given preferred procurement and a cotton or wool product that might not be purchased. However, under section 9002, USDA has neither the authority to require, nor

the funding for, testing of non-biobased or other products that do not qualify for preferred procurement.

Further, USDA does not believe such a comparison would make any difference in the implementation of the FB4P. The purpose of the FB4P is to open new markets for new emerging biobased products. It is possible that, in achieving this purpose for some of the designated items, biobased products may displace some products that are not qualifying biobased products (such as cotton shirts), as indicated by the commenter.

*Comment:* One commenter suggested that USDA reconsider the candidate biobased product in any case where it does not compare on an equal or better basis to existing products on key attributes, such as fossil fuel depletion or on the overall BEES score.

*Response:* The purpose of the BEES analysis is to provide information to procuring agencies to make informed decisions among biobased products within a designated item, not to disqualify biobased products from a designated item. The commenter is suggesting USDA use the overall BEES score for determining whether or not a product can be afforded preferred procurement over an existing product that scores better when analyzed using BEES. The criteria used by USDA to designate items (groups of products) are identified in FSRIA. The overall BEES score is not one of those criteria. Therefore, USDA declines the commenter's request.

*Comment:* Two commenters recommended that the BEES input data be verified by an independent party. One commenter stated that USDA appears to have relied solely on product manufacturers to supply the basic data from which the BEES score is derived, and does not appear to have performed an independent verification. The other commenter inquired as to how the quality of the data inputs to the BEES life cycle assessment tool were assessed.

*Response:* The commenters are correct in that USDA has not verified the information submitted by the manufacturers on the products submitted for the BEES analysis. That information was, and will continue to be, provided directly to a third party for analysis.

The quality of data submitted to the BEES analytical tool should be consistent with relevant and applicable ASTM or other industry test standards. In addition, USDA contractors, when requested, assist manufacturers in preparing the data to be submitted to the BEES analytical tool. Those running the BEES analytical tool are certified by the

International Organization for Standardization (ISO) (i.e., they are ISO-certified). As such, they provide a check on the reasonableness of the data submitted. USDA does not otherwise independently verify data submitted by the manufacturers.

*Comment:* One commenter pointed out that the BEES analysis provides a general assessment of environmental benefit and does not particularly focus on fossil fuel use, which is one of the principal goals of section 9002 of FSRIA. The commenter therefore recommended that consideration be given to modifying the weighting used in the BEES analysis so that the results will consistently select products that meet the program objective of substituting biobased products for fossil energy-based products.

*Response:* The BEES analytical tool includes "fossil fuel depletion" as one of its metrics. This metric looks at the amount of fossil fuel consumed in the production of a biobased product. By looking at this metric's score between products within an item, procuring agencies can choose those products that use less fossil fuel. Thus, USDA does not believe it necessary to change the weighting scheme in the BEES analytical tool to achieve the outcome desired by the commenter. To help procuring agencies interpret the BEES results, USDA is coordinating with the National Institute of Standards and Technology (NIST) to develop additional information concerning the interpretation and usefulness of BEES scores and will post this information on the FB4P Web site.

*Comment:* One commenter expressed concern that the BEES analysis is inherently limited in that it focuses on the material rather than the functionality of the material or cost of reapplying the material. For example, with coatings, BEES takes the life-cycle of the coating material into consideration, but not the impact of shorter life-cycles on the asset being protected by the coating. There is no cost consideration for shorter recoat cycles or impact on users. BEES also does not attempt to account for cost incurred if the coating, or a lubricant or hydraulic fluid, does not perform as effectively and the equipment it is protecting does not last as long.

*Response:* USDA believes that the BEES analytical tool provides useful information, even in the areas of concern identified by the commenter as discussed below, and provides USDA with the information necessary to assess products within a designated item.

First, with regard to re-applying coatings and the impact to users of such

re-applications, BEES takes into consideration the costs of "initial investment, replacement, operation, maintenance and repair, and disposal." Included in "maintenance and repair" are consideration of re-applications and the impact to users of such re-applications.

Second, the commenter states that BEES does not take into account the "functionality" of the product (i.e., whether it performs as effectively as a non-biobased product when used as directed). However, the effectiveness of a biobased product is determined using industry performance standards. Further, USDA is neither using the BEES analytical tool as a method to determine the effectiveness of a product nor to promote a product as being effective because it has been subjected to BEES.

Third, the commenter states that BEES does not take into account the shorter life-cycles on the asset (i.e., the equipment it is protecting does not last as long) being protected by the coating. The functional unit for products takes into account products used in different amounts in "equivalent service." By equating comparisons of products to "equivalent service," there is no shortening of life-cycles for the asset being coated. Thus, if a biobased coating does not last as long (i.e., frequency of repainting is higher), the functional unit accounts for that.

Fourth, the commenter states that there is no cost consideration for shorter recoat cycles. The functional unit developed under the BEES analysis accomplishes the goal of "unitizing" different recoating cycles by incorporating a time frame. For example, if differences in the useful lives of alternative products have been identified, the functional unit will include a time dimension to account for the frequency of product replacement.

*Comment:* One commenter stated that USDA needs to recognize the inherent limitations of the BEES analysis in predicting real-world effects of selection of these products, and should consider implementing a follow-up effort to gather performance information based on use of these products.

*Response:* USDA acknowledges that BEES, and any other similar analytical tool, will have certain inherent limitations in predicting real-world effects. For the biobased preferred procurement program, the goal of the BEES analytical tool is to enable comparisons between products within an item. Given this goal, inaccuracies within any one metric when compared to real-world effects are of lesser

significance to this program than would be other uses of the results.

NIST, who is responsible for the BEES analytical tool, is striving to provide the best model possible. While USDA believes NIST should take the lead in making any and all improvements to the BEES analytical tool, USDA will work with them by bringing the commenter's concerns to their attention.

*Comment:* One commenter stated that the use of BEES is potentially a barrier to entry into the marketplace because of its cost and questioned the utility of "requiring" a BEES analysis for the biobased material. The commenter also noted that it is an additional cost that is not borne by standard petroleum-based products.

*Response:* A BEES analysis is only required when USDA is obtaining information for proposing an item for designation for preferred procurement. As provided for in the Guidelines, USDA will provide some funding for BEES and performance testing of individual products with biobased content, with priority being given to products of small and emerging private business enterprises. This helps offset the cost of the BEES analysis.

USDA is requiring the BEES analysis on products because it provides important information on the cost, life-cycle cost, environmental, and human health impacts of specific products. BEES can be used across a wide variety of products and provides a means to compare products. The information it provides will be useful to procuring agencies when making procurement decisions on biobased products and for determining whether such products are available at a reasonable cost. The USDA, thus, considers the BEES analytical tool as an important component in designating items for preferred procurement.

Once an item has been designated, procuring agencies may request information from a manufacturer on the environmental and life-cycle costs of a specific product. In this situation, the manufacturer may elect to use either BEES or ASTM D7075, which is less expensive than BEES, to provide this information.

Lastly, USDA concurs with the commenter that the cost of BEES or the alternative is not also borne by petroleum-based products. However, the statute does not authorize USDA to require petroleum-based product manufacturers to provide the same information as is being required of biobased product manufacturers. The overall purpose of the statute implementing the preferred procurement program for biobased

products is to open new markets to new emerging biobased products. In doing so, it is necessary to develop environmental and life-cycle cost information to provide procuring agents with additional information when making their purchasing decisions. USDA believes that the effort required to obtain this information in exchange for procurement preference is reasonable.

*Comment:* One commenter recommended that USDA provide additional information on how BEES scores are developed and how they should be interpreted, including a discussion of the key concepts and metrics such as "functional unit" and "per capita impact", a discussion on uncertainties and limits to interpretation, as well as some guidance on determining significant differences between scores. The commenter requested this because most users of this information are not likely to have had extensive experience with life-cycle impact assessment.

A second commenter had similar concerns, stating that publishing the results of the BEES analysis without a frame of reference or guidance on how to use this information will only confuse potential users. Questions that are raised by the current presentation of the information include: (1) How were the functional units selected?, (2) How much lower does a score have to be for one product to be better than another product?, (3) How are these numbers used to make a procurement decision?, (4) What is the environmental significance of, for example, for hydraulic fluids, a total environmental score of 2.84 versus 3.22?, and (5) For items with one product, such as water tank coatings, what does a BEE's total environmental performance of 0.0083 mean?

A third commenter states that simply providing agencies with tables summarizing BEES analyses does not satisfy the statutory requirement that USDA provide agencies with information on the public health and environmental benefits of biobased products. The commenter points out that the summary tables included in the preamble do not provide useful information to agencies because the information is not provided in the context of comparisons with non-biobased goods. Examples of information that could help make a "best value" determination include the absence of toxic or hazardous constituents that are found in competing non-biobased products, biodegradability, neutral pH, and whether the product must be handled as

a hazardous or non-hazardous waste at the end of its useful life. Therefore, the commenter recommends that USDA provide narrative information and comparative reference points on the environmental and public health benefits of the designated products.

*Response:* USDA agrees that most users of the information are likely not to have had extensive experience with life-cycle impact assessments. The commenter, therefore, is requesting that USDA include in the preamble information that addresses how BEES works and how to use the BEES results. Rather than using the preamble as the tool for conveying such information, USDA believes the best way is for users to access the BEES Web site (<http://www.bfrl.nist.gov/oe/software/bees.html>) to obtain information about the technical details of and the interpretations used in the BEES analytical tool.

#### *Minimum Biobased Content*

*Comment:* One commenter was concerned about USDA setting a minimum biobased content based on a single product within an item. The commenter pointed to the Competition in Contracting Act, which prohibits agency requirements based on a particular brand name, product, or feature of a product peculiar to one manufacturer, unless it is essential to the Government's requirements. The commenter then stated that USDA needs to explain why the specified minimum content is essential to the Government's requirements or lower it so that additional sources can compete. The commenter then stated that USDA could revisit the minimum requirements in the future if and when new sources arise.

Another commenter stated that USDA should not set a minimum biobased content for an item until a representative number of products are available, because to do so could hinder other biobased products in the same product category from achieving the preferential procurement designation. This commenter recommended that a provisional designation status could be given until enough data are available on a representative number of products to set a defensible minimum biobased content. This commenter also recommended that USDA have a process for adding future products to an item after it has been designated for preferred procurement, including a mechanism for reassessing and changing the minimum biobased content for the item.

*Response:* USDA agrees that setting the minimum biobased content for a

designated item based on more than one product is in principle preferable to setting it based on a single product. However, USDA does not believe that setting a minimum biobased content based on a single product should stop the Department from designating an item as long as there are two or more manufacturers of products within the item. As more information on biobased content on products within an item becomes available, USDA will consider revising the minimum biobased content as appropriate for each item through a rulemaking process. Therefore, USDA is promulgating minimum biobased contents for each of the six items.

Because USDA believes it is preferable to base the minimum biobased content for an item on more than one product, USDA is taking steps to identify and test additional products. These steps include contacting manufacturers directly through email and phone conversations, conducting outreach to intermediate material producers to encourage their customers to participate in the program, and participating in industry conferences and meetings to educate companies on the program's benefits and the potential for expanded markets beyond the Federal government. Through these and other efforts, USDA is encouraging the submission of more products for biobased content testing.

*Comment:* Two commenters recommended that minimum biobased content be specified as a range or, if expressed as a single number, as the lower end of a range that reflects the analytical variability of the ASTM test method, which is plus or minus 3 percentage points. The commenters pointed out that by not doing so, even the product used to define the designated minimum biobased content for that item may itself not be able to qualify in the future due to no fault of its own.

*Response:* After reviewing the ASTM method, USDA agrees with the commenters that the variability within the method needs to be accounted for in setting the minimum biobased content for a designated item. USDA believes the clearest way of setting the minimum biobased content is to provide a single value rather than a range. The variability associated with the test method is identified as plus or minus 3 percentage points. Therefore, USDA has revised the proposed minimum biobased contents for five of the six proposed items in the final rule by subtracting 3 percentage points from the value proposed. By using this method, the concern expressed by the commenter that the product used to set

the minimum biobased content may fail “due to no fault of its own” is resolved.

The minimum biobased contents for these five items in the final rule are:

- Mobile equipment hydraulic fluids—44 percent;
  - Roof coatings—20 percent;<sup>2</sup>
  - Water tank coatings—59 percent;
  - Diesel fuel additives—90 percent;
- and
- Penetrating lubricants—68 percent.

For the sixth designated item (bedding, bed linens, and towels), the proposed minimum biobased content was 18 percent. This value was calculated using the tested biobased content of 37 percent for the qualifying biobased feedstock and multiplying it by the 50/50 blend in which it is used. After proposal, USDA received additional biobased content test data showing that the qualifying biobased content of the product was 28 percent rather than the 37 percent used in developing the proposed rule. USDA has, therefore, recalculated the minimum biobased content by using the 28 percent and then removing 3 percentage points to account for the test method’s variability. The resulting 25 percent was then multiplied by 0.5 to account for the 50/50 blend in the final product. The result is a minimum biobased content of 12.5 percent, which USDA rounded to 12 percent and has used in the final rule for this designated item.

*Comment:* One commenter suggested that, in addition to considering the  $\pm 3$  percent variability, the minimum level be rounded down to the nearest 5 or 10 percent. The commenter was concerned that basing the minimum biobased content on a limited number of products, or in some cases on a single product, could lead to the perception that Federal agencies are giving unfair competitive advantage to the manufacturers of those products. To illustrate this point, the commenter stated that the single product used for roof coatings immediately has a “monopoly” on preferred procurement of biobased products within that product designation. Thus, by rounding down to the nearest 5 or 10 percent, the commenter stated that the value would not be specifically attached to a single product and the product(s) used to determine the minimum biobased

<sup>2</sup> With regard to roof tank coatings, USDA had proposed a minimum biobased content of 62 percent based on a urethane-based roof coating. Since then, USDA has obtained information on another biobased roof coating with a biobased content of 23 percent. USDA believes that, based on these two products, it is reasonable and appropriate to set the minimum biobased content for this item at 20 percent (23 percent minus the 3 percentage points to account for test method variability).

content for the item would not be adversely affected by the designated minimum content requirement for that item. Also, rounding down would avoid logical legal arguments of Federal agencies providing a specific product or manufacture with an unfair competitive advantage. This commenter recommended minimum biobased content levels for each of the six proposed items as follows:

- Mobile equipment hydraulic fluids—20%
- Roof coatings—55%
- Water tank coatings—55%
- Diesel fuel additives—90%
- Penetrating lubricants—20% (or 65%)
- Bedding, bed linens, and towels—15%

*Response:* As noted in the previous response, USDA agrees that it is appropriate to take the variability of the test method into account and reduce the minimum biobased contents accordingly. Because, as discussed previously in this preamble, USDA is deferring the effective date for preferred procurement for items with only one manufacturer identified, it is unnecessary to reduce further the minimum biobased content by rounding down to the nearest 5 to 10 percent value in order to separate the value from any one manufacturer.

*Comment:* One commenter recommended that the minimum biobased content level for penetrating lubricants be lowered so as not to exclude the product that contains 26 percent biobased content. The commenter acknowledged that excluding the 26 percent product would not necessarily work contrary to the stimulus directive of the statute, but the commenter preferred to let the marketplace drive the increased biobased content for the item. The commenter noted that if USDA finds that the suggested 20 percent value for penetrating lubricants is not warranted, then a minimum of 65 percent is recommended based on the precision limitations.

*Response:* USDA agrees with the commenter about the desirability of letting the marketplace drive the use of higher biobased content products within an item. To that effect, USDA believes that it is reasonable to set minimum biobased content requirements higher than the lowest biobased content identified when (1) there are no known technical reasons to differentiate the product with the lowest biobased content from those with higher biobased content; and (2) the minimum biobased content of that product is sufficiently lower than the group of minimum

biobased contents of the other tested products that the product can be viewed as an “outlier.” This is the case for penetrating lubricants. First, USDA found no technical reason to differentiate this product from those with the higher biobased contents. Second, the biobased content of this product is 26 percent compared to the other four products’ biobased content of 71 percent or higher. USDA believes that this large difference (26 versus the next lowest content of 71 percent) qualifies the product as an “outlier.” Therefore, USDA is basing the minimum biobased content for penetrating lubricants on the product with the 71 percent biobased content. As discussed in previous responses, this value was lowered to 68 percent in the final rule to account for test method precision and was not rounded down to the nearest 5 or 10 percentage level (*i.e.*, to 65 percent).

#### *Biodegradability*

*Comment:* Eight commenters supported including the use of ASTM biodegradability standards and three of the commenters recommended specific revisions for incorporating the “percent biodegradation,” “within a certain timeframe,” and “in a specific disposal environment” into the definition of “biodegradability.” Two of the commenters stated that this was needed in order to make the definition consistent with the ASTM standards on biobased products and to ensure that manufacturers’ claims are consistent with the guidelines developed by the Federal Trade Commission (FTC), which require that manufacturers qualify, to the extent necessary, the product’s ability to degrade in the environment where it is customarily disposed and the rate and the extent of degradation.

*Response:* USDA believes that, within the context of section 2902, the definition of biodegradability is appropriate and the requirements specified in the proposal are sufficient. The FB4P does not relieve in any way a manufacturer from complying with the FTC guidelines. A biobased product included in the FB4P must follow the FTC guidelines to the same extent as any other product. Nothing in the implementation of the Guidelines for the FB4P or in the designation of items implies otherwise. Further, it is not USDA’s intent to define an acceptable level of biodegradability for biobased products.

USDA believes that, where manufacturers claim biodegradability as a feature of their product under the FB4P, such claims should be supported

using ASTM methods because it is important to ensure that procurement agents have access to reliable information regarding the products they purchase. As with other performance specifications referenced in the designation of items, there may be numerous test methods or procedures available as measures of biodegradability. However, because of the potential impact on the environment, USDA chose to limit the verification of biodegradability claims to the use of ASTM methods. Each of the ASTM standards listed in the proposed rule includes the types of qualifiers (“percent biodegradation,” “within a certain timeframe,” and “in a specific disposal environment”) recommended by the commenter. USDA believes that, rather than incorporating such qualifiers into the definition of biodegradability, it is appropriate to require the use of the applicable ASTM standards and then let the purchasing agents apply their discretion in selecting the product that best meets their needs.

*Comments Related to Specific Designated Items—Mobile Equipment Hydraulic Fluids*

*Comment:* One commenter stated that the mobile equipment hydraulic fluids item should be divided into two levels, one for specialized uses (the 24 percent biobased product), and one for general uses (with a biobased content of possibly over 80 percent). The commenter stated that they had conducted “fairly extensive” market research in the product area and found that the majority of “standard” use hydraulic fluids to be in the 90 percentile of biobased content and that the lower level biobased content products were found in more specialized applications. The commenter then stated that to ensure the greatest value to the government and to the environment, the proposed rule should emphasize the higher level content fluids to minimize the use of petroleum content.

*Response:* USDA agrees with the commenter that it is reasonable to develop two minimum biobased content requirements for this designated item. However, rather than subdividing the current designated item, USDA is revising the designated item in the final rule to apply to general purpose, or standard, mobile equipment hydraulic fluids only. USDA will “reserve” as an item for future designation mobile equipment hydraulic fluids for high performance, low pour-point markets. USDA is doing this, in part, because there is only one product in this newly created designated item and the

Department does not have BEES results for the product.

Based on the data available to it, USDA has determined that the minimum biobased content should be based on a product with a biobased content of 47 percent. After the 3 percent adjustment for precision, the minimum biobased content for this item is 44 percent. Therefore, USDA is promulgating 44 percent as the minimum biobased content for mobile equipment hydraulic fluids in general purpose applications.

*Comment:* Two commenters stated that USDA should include a specific exemption for hydraulic fluids, penetrating lubes, diesel fuel additives, and other items that are used in tactical vehicles and equipment. One of the commenters also stated that biobased hydraulic fluid should not be required in systems where failure could have catastrophic results or where high levels of cleanliness are required (cleanliness maintained below 15 microns) until more operating experience has been gained with biobased fluids in less critical applications.

The other commenter stated that it does not believe it is appropriate to apply the biobased purchasing requirement to tactical equipment unless the Department of Defense has documented that these products can meet the performance requirements for such equipment and are available in sufficient supply to meet domestic and overseas deployment needs. Therefore, the commenter recommended that USDA revise the designations of both the hydraulic fluids and the penetrating lubricants to make clear that they are for non-tactical applications only.

*Response:* USDA believes that the situations described by the commenters are of sufficient concern that it is appropriate to provide specific exemptions for certain designated items on an item-by-item basis. Therefore, USDA is exempting from the preferred procurement program the use of mobile equipment hydraulic fluids, penetrating lubricants, and diesel fuel additives when used in military equipment in combat or combat-related missions and for spacecraft systems and their launch support equipment where failures could have catastrophic consequences.

*Comments Related to Specific Designated Items—Water Tank Coatings*

*Comment:* Two commenters expressed concern over designating water tank coatings as an item for preferred procurement. One commenter asked whether the use of biobased water tank coatings had been reviewed by industry and Government organizations

responsible for public water supplies. This commenter stated that the viability of the biobased product proposed for coating water storage tanks needs to be adequately tested and approved by appropriate Government and industry groups (including obtaining NSF International (NSF) certification) to ensure that the product will not deteriorate over time and result in contamination of drinking water supplies. The second commenter stated that USDA should ensure that NSF-certified products are available before finalizing the designation of water tank coatings as a biobased procurement item.

*Response:* USDA agrees with the commenters that a water tank coating must be formulated in a manner that meets relevant and appropriate performance specifications. Therefore, USDA will work with manufacturers to allow posting of all performance tests on its FB4P Web site and with the interagency council to understand Federal purchasing.

In designating items for preferred procurement, the statute requires USDA to consider two items: (1) The availability of the item and (2) the economic and technologic feasibility of using such items, including life-cycle costs. USDA considers an item economically and technologically feasible for designation if products within that item are being offered and used in the marketplace. USDA does not consider certification of a product prior to the designation of an item a prerequisite for designation. Thus, USDA has determined that a water tank coating product within this designated item exists that meets these criteria and that this item qualifies for designation for preferred procurement.

In order for a procurement agent to give preferred procurement to a biobased water tank coating, the biobased water tank coating must comply with all relevant performance standards. Many Federal and State authorities require products that come into contact with drinking water to be certified to American National Standards Institute/NSF (ANSI/NSF) Standard 61 by an ANSI accredited certifier. Thus, water tank coatings would be certified against the (ANSI/NSF) Standard 61, if the coating is used for potable water.

With regard to the biobased water tank coating used as the basis for designation water tank coatings as an item eligible for preferred procurement, the coating in question has been certified against ANSI/NSF Standard 61. This coating was tested by the Underwriters Laboratory (UL), which is

accredited by ANSI to certify drinking water system products and components to ANSI/NSF Standard 61. Because both certification programs are accredited by ANSI, the UL's drinking water product certifications are equivalent to NSF's drinking water product certifications.

*Comments Related to Specific Designated Items—Diesel Fuel Additives*

*Comment:* One commenter questioned whether USDA intent for the "diesel fuel additive" item was to include biodiesel sold separately as a fuel additive or to include already-blended fuel such as B20. The commenter stated that further definition of the item when it is used strictly as a fuel additive is needed in terms of required properties and performance characteristics.

Another commenter stated that USDA should clarify that the designation of diesel fuel additive as a biobased product is not intended to address the use of biobased diesel when the biodiesel is used as a blendstock and recommended that section 2903.13 be clarified that this designation of diesel fuel additives is not intended to include biodiesel when used for the purposes of extending fuel supplies.

*Response:* The item being designated for preferred procurement is the diesel fuel additive and not the blended biodiesel fuel itself. USDA believes that as long as the diesel fuel additive itself is biobased and meets the minimum biobased content, it qualifies as a biobased product eligible for preferred procurement.

With regard to biodiesel (that is, neat biodiesel, often referred to as B100), USDA recognizes that the most prevalent use of B100 by far is to mix it with diesel fuel to create a blended fuel stock (e.g., B20). However, USDA does not believe this should preclude biodiesel (i.e., neat biodiesel), when used as an additive, from being a biobased product eligible for preferred procurement under this program.

USDA points out that the designation of diesel fuel additive as a product eligible for preferred procurement in no way affects the purchase of biodiesel fuel (even neat biodiesel when used as a fuel) as a means of complying with the Energy Policy Act of 1992 or with Executive Order 13149.

*Comment:* Two commenters disagreed with the designation of diesel fuel additives because they consider biodiesel to be a fuel rather than a fuel additive. One of the commenters stated they have concerns with the handling and use of biodiesel as a fuel component. This commenter also stated that biodiesel fuel blends are physically different in nature than conventional

diesel fuels and as such have different storage, handling, and use concerns from diesel fuel, and are not universal drop-in replacement fuels for conventional diesel. Lastly, this commenter stated that biodiesel is not a true additive and in fuel industry practices it is not treated as such.

The other commenter pointed out that ASTM standards for biodiesel are for its use as a fuel and do not address technical or chemical considerations for using it as an additive. This commenter also noted that biobased diesel products registered as fuel additives contain only one percent biodiesel and, therefore, if the Federal agencies purchased biobased diesel additives, they would not create a notable increase in market share for biodiesel compared to the markets created through their fuel purchases.

On the other hand, two commenters supported the designation of diesel fuel additives. One of the commenters noted that EPA recognizes biodiesel as both a fuel and a fuel additive and that several organizations have received fuel additive registrations for biodiesel. The commenter recommended that USDA clarify that the designation of diesel fuel additives will not prevent agencies that are currently using B20 from continuing to use B20 as a means of complying with the Energy Policy Act of 1992 and Executive Order 13149. The other commenter pointed to fuel tests to determine fuel lubricity and the effectiveness of small amounts of biodiesel to achieve large increases in lubricity and its flexibility in achieving increases in lubricity.

*Response:* As noted in the previous response, USDA intends for "diesel fuel additives," and not diesel fuels (including biodiesel fuels), to be afforded preferred procurement. The definition of "diesel fuel additive" in the proposed rule essentially defined biodiesel. USDA believes that definition is the primary cause of confusion as to what products were intended to be included in the proposed designated item. In the final rule, USDA has revised the definition of "diesel fuel additive" to make clear what is to be considered an additive and to make clear that biodiesel fuels are not part of the definition.

The revised definition contains three parts. The first part defines "diesel fuel additive" using the basic definition from EPA's fuel and fuel additive registration regulation. USDA believes that the definition of "additive" for the purposes of EPA registration is appropriate for defining "diesel fuel additives" under the FB4P program.

The second part of the revised definition explicitly includes neat biodiesel (B100) when used as an additive. USDA believes this is useful to make clear that there are some instances in which purchases of neat biodiesel qualify as a diesel fuel additive. In those instances where neat biodiesel is purchased to be used as an additive, it meets the requirements for a biobased diesel fuel additive within the context of this designated item. USDA believes that the purchase and use of neat biodiesel as a fuel, while obviously consistent with the goals of the FB4P program, are outside the scope of the FB4P program.

The third part of the revised definition explicitly excludes blended biodiesel fuel, such as B20, and neat biodiesel when used as a fuel. USDA believes this is also useful to make clear that the purchase of such fuels does not constitute the purchase of diesel fuel additives.

USDA believes that the revised definition sufficiently clarifies the commenters' concern about what is being given preferred procurement and that blended fuel stocks are not in any way affected by this designated item.

*Comment:* One commenter recommended that, if USDA decides to designate diesel fuel additive, the final guidance include the following elements: (1) Applicability to non-tactical vehicles and equipment only, (2) definition of diesel fuel additive, including a percentage of biodiesel content (e.g., B1, B2, or B5), (3) statement that the use of B20 fuel to meet the alternative fuel requirements under the Energy Policy Act of 1992 and Executive Order 13149 satisfies the requirement to purchase biobased diesel fuel additives, and (4) resolution of all performance issues, including biodiesel stability concerns, raised by the Federal agencies in their comments on this proposed rulemaking.

*Response:* As noted in a previous response, USDA has agreed to exclude the preferred purchase requirement for diesel fuel additives when used in military equipment for combat or combat-related missions.

With regard to the definition of diesel fuel additive, we have revised the definition to make clear which products fall within the designated item. The product itself must be used as an additive and, to qualify for preferred procurement as a biobased product, must have a biobased content of at least 90 percent. The resulting concentration once the biobased additive is mixed with the diesel fuel is not relevant to the determination of whether or not the

biobased product is to be treated as an additive.

The commenter's third recommendation relates to the interaction between the biobased preferred procurement program and the Energy Policy Act of 1992 and Executive Order 13149. USDA does not have the authority under section 9002 to give procurement preference to motor vehicle fuels. The purchase of B20 as an alternative fuel under the Energy Policy Act of 1992 and Executive Order 13149, while consistent with the overall goals of the FB4P program, would have no effect on a procuring agency's responsibility to purchase biobased diesel fuel additives, if they purchase diesel fuel additives. The item designated for preferred procurement by today's final rule is diesel fuel additives and not blended diesel fuel. Only if an agency buys a diesel fuel additive and mixes it with diesel fuel would there be a requirement that the additive be a biobased product.

With regard to the commenter's request that USDA resolve all performance issues, including biodiesel stability concerns, USDA has determined that demonstrating that certain products, such as diesel fuel additives, have achieved market penetration and are used in certain applications is a sufficient basis for designating items, and it is unnecessary for USDA to demonstrate that such products can be used in all applications prior to designating the item.

*Comment:* One commenter recommended that any product designated for preferred procurement in the diesel fuel additive category should have been tested using ASTM D6751 standards.

*Response:* USDA agrees with the commenter that, whether used as a fuel or as an additive, biodiesel should be tested using ASTM D6751 to ensure its quality. However, USDA points out that, in the final rule, the diesel fuel additive item not only includes neat biodiesel when used as a fuel additive, but also "any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to diesel fuel." In the latter case, ASTM D6751 would not be appropriate.

#### *Comments Related to Specific Designated Items—Bedding, Bed Linens, and Towels*

*Comment:* One commenter noted that USDA specifically solicited comments on the appropriateness of creating this broader item designation based only on the availability of blankets that are being produced by one manufacturer using qualifying biobased content at a

relatively low level. The commenter stated that they do not believe that this is appropriate, maintaining that the credibility of the biobased preference program is degraded when item categories are designated for which there are no products commercially available to the consumer.

Another commenter recommended that the designated item "bedding, bed linens, and towels" should be subdivided because it is too broad. The commenter recommended that designated items be narrowly focused on groups of products with similar functions. To illustrate, the commenter pointed out the diversity of functions within the "bedding, bed linens, and towels" item. According to the commenter, this diversity could result in differences in composition of the products and the selection of a "functional unit" that is not appropriate for all products.

*Response:* Section 9002(e)(1)(A) of FSRIA provides, in part, for the designation of "those items which are or can be produced with biobased products." USDA does not interpret this as a carte blanche charge to assume anything and everything can be made with biobased products and thus open the entire program to all products the Federal government procures. Based on conversation with industry, USDA believes in the instance of towels and bed linens there is sufficient evidence that the same biobased fibers currently used to manufacture blankets can be incorporated into bed linens and towels to produce biobased versions of these products. Today, USDA knows of two biobased fibers that can and/or are used in these products. One has a biobased content of 28 percent and the other has a biobased content of 100 percent.

USDA recognizes that the three types of products within this proposed designated item serve different basic functions. One of the key factors in achieving these different basic functions is how the product is woven; that is, the style of weave. For example, is the product a broad loop or a tight loop? Sheets, for example, would have a tight weave with no broad loops. While the weaves may vary, USDA believes the key point for including these products within the same item is that they are or can be made with the same basic types of biobased fibers. Furthermore, USDA does not believe it reasonable to project an outcome that a procuring agency would be put in the position of buying towels that have a higher biobased content instead of the blankets with a lower biobased content because towels and blankets have different performance characteristics.

With regard to the functional unit, the functional unit identified for the tested product is "one blanket" of certain dimensions. As BEES information is developed on bed linens and towels, USDA will identify different functional units for these products as appropriate (e.g., one towel, one sheet). USDA does not believe procuring agencies would try to compare blankets with towels based on the functional unit of "one blanket."

For these reasons, USDA believes it is reasonable and appropriate to designate bed linens and towels for preferred procurement and has decided not to subdivide this item, as requested by the commenter, into three separate categories.

*Comment:* Two commenters supported the designation of "bedding, bed linens, and towels." Three other commenters stated that USDA needs to provide more information about whether the biobased fibers used in the "bedding, bed linens, and towels" designated item meet the precautions and infection control procedures established by the Centers for Disease Control (CDC) and, if they do not, the designation should exclude applications in healthcare facilities. The commenters stated that more information on the cost and durability of these products is also needed. One commenter pointed out that if blankets made with biobased fibers are heavier than those currently used, the cleaning costs could be significantly increased. One of the commenters also pointed out the lack of information about what fibers are available for these uses.

*Response:* The commenters are seeking a categorical exemption for these products when used in healthcare facilities if the products do not meet certain precautionary and infectious disease requirements of the CDC. USDA will not provide a categorical exemption for these products when used in specific situations for the four reasons discussed below.

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

2. The statute requires procuring agencies to give preference to biobased

products in designated items, but does not require the agency to purchase biobased products if one of three conditions exist, one of which addresses the performance, or lack thereof, of the biobased product. Specifically, the statute allows a procuring agency not to buy a biobased product within a designated item if the biobased product fails to meet the performance standards set forth in the applicable specifications or fails to meet the reasonable performance standards of the procuring agencies (see section 9002(c)(2)(B)). For example, polylactic acid (PLA) fibers currently are not tolerant of high heat and bleach, and products produced using these PLA fibers are not likely to meet CDC performance requirements. Thus, procuring agencies, such as the Veterans Administration, using products that need to meet CDC performance requirements would not be required, or even expected, to buy such products. Because the statute already provides the relief sought by the commenters, there is no need to include such exemptions in the rule.

3. Providing a categorical exemption could have the effect of discouraging manufacturers from developing biobased products within a designated item such as new biobased products that could meet the CDC's performance requirements, at some point in the future. USDA believes this would have an unnecessary dampening effect on potential markets for acceptable biobased products in the future.

4. Finally, USDA urges manufacturers to note the concerns raised by these commenters and recognize that extra effort on the part of manufacturers may be necessary to provide procurement agents with evidence that the manufacturer's products meet the agency's requirements. This may require manufacturers to test their products against all applicable standards and requirements for the markets (e.g., healthcare facilities) in which they wish to market their products. In addition, because procuring agencies are not required to purchase biobased products if they fail any one of the criteria that allow an agency to not purchase a biobased product within a designated item, USDA is actively working to identify and publicize relevant performance standards so that manufacturers can understand how to make their products more desirable. In addition, to make information on the performance characteristics of biobased products more accessible to the procuring agencies, USDA is working with manufacturers to post product performance information on the FB4P Web site or to provide a link to the

manufacturer's Web page where such information can readily be obtained.

While manufacturers have the responsibility to test their products against applicable agency performance requirements and specifications, in order to comply with section 2902.4 of the Guidelines, procuring agencies will have to reexamine their performance requirements and specifications to ensure that they are not biased against biobased products, that they are still necessary and relevant, and that they are not redundant.

With regards to the commenter's concern about the lack of information on what fibers are available for bedding, bed linens, and towels, information, including performance information, would be posted by the manufacturers of such fibers once the designation of the item has been finalized. Currently, USDA knows of two biobased fibers available for these uses.

*Comment:* One commenter requested clarification on how the biobased content of fibers is to be determined: Is it based on content mix after the item is manufactured or on the weight of fibers prior to manufacturing?

*Response:* In the example presented by the commenter, the biobased content is based on the content mix after the item is manufactured; that is, based on the content mix of the finished product. For bedding, bed linens, and towels, the biobased content would be calculated based on the content mix of the blanket, sheet, or towel after it is manufactured, but the biobased content must be based on qualifying biobased material. For this item, cotton, wool, linen, and silk are not qualifying material and would not be used in determining the amount of biobased material in the finished product.

Unless otherwise specified in the designation of an item, biobased content of a product within a designated item would be based on the finished product. USDA will specify the calculation to be used for each designated item within each rulemaking. For the other five items in today's rulemaking, the biobased contents are calculated based on the finished product.

*Comment:* Two commenters objected to the exclusion of natural fibers (wool and cotton) from the qualifying feedstocks that can be used in producing "bedding, bed linens, and towels."

One commenter stated that the preferred procurement program legislation was intended to substitute plant-derived products for fossil fuel-derived products, not to substitute one set of plant-derived products for another set of plant-derived products. The

commenter acknowledges that the statute does urge USDA to develop a program that encourages new biobased products and that the overall intent was to expand the use of plant matter as an industrial and fuel material, but not to substitute one type of plant matter with another.

The commenter refers to USDA statements concerning the objectives of the preferred procurement program to increase the demand for biobased products, which would in turn increase the demand for many agricultural products. The commenter then states that it is doubtful that those who wrote the legislation intended the USDA to develop programs that resulted in either the substitution of corn-derived products for cotton or wool products or the preference of synthetic fibers of any kind over natural fibers.

The commenter, therefore, recommended that either the designation of "bedding, bed linens, and towels" be withdrawn at this time or USDA abandon its insistence that biobased products are not necessarily plant-derived products (preferring the latter approach), because synthetic fibers made from plants should have to compete with natural fibers without a preference. The commenter noted that, given synthetic fibers' performance advantages, they could still be attractive even at a slightly higher price. By making such a change, the commenter maintained that the rule would focus on substituting synthetic fibers for petroleum-derived fibers, which was clearly the legislation's principal objective.

In a similar request, the second commenter wants cotton fiber to be provided equal consideration as a qualifying biobased material as other fibers. This commenter agrees that such products as bedding, bed linens, and towels made with cotton fiber can be considered mature products. The commenter then points out that these same textiles made with other natural fiber and most synthetic/man-made fibers (citing polyester, nylon, polypropylene, synthetic cellulose, and most traditional man-made fibers) should also be considered mature products. The commenter states that to consider these products made from cotton, wool, and silk as mature products and not mature products when made with other fibers is an arbitrary distinction that is not justified. The commenter, therefore, concludes that if other fibers are considered acceptable biobased materials for this category, then cotton fiber also should be an acceptable qualifying biobased material. The commenter recommends that cotton



fiber be considered a qualifying biobased material if other natural fibers and man-made fibers that are also mature products are considered acceptable biobased materials.

A third commenter stated that USDA should establish a much higher total biobased product content for bedding, bed linens, and towels, including cotton and wool.

*Response:* The legislative history of Title IX of FSRIA identified three primary objectives associated with section 9002:

1. To improve demand for biobased products;
2. To spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and
3. To enhance the Nation's energy security by substituting biobased products for fossil energy-based products derived from imported oil and natural gas.

In addition, the conference report accompanying FSRIA indicated that the intent of section 9002 "is to stimulate the production of new biobased products and to energize emerging markets for those products." It is in response to this intent that USDA continues to believe that it is appropriate to exclude mature markets from the preferred procurement program.

USDA acknowledges that the concerns expressed by the first commenter may occur; that is, as written, the preferred procurement of biobased bedding, bed linens, and towels may displace cotton and wool products with, for example, corn-derived products. To the extent they do, USDA recognizes that the program is not fully achieving the third primary objective stated for the program; that is, substituting biobased products for fossil energy-based products derived from imported oil and natural gas.

Nevertheless, USDA believes that designating cotton and wool as non-qualifying biobased feedstocks is appropriate for this designated item because it will encourage other biobased products to enter this market, stimulating the production of new biobased products and creating for these new biobased products a new market. Further, USDA stresses that similar opportunities exist for new cotton and wool products to enter markets within other designated items and strongly encourages such manufacturers to seek out these other opportunities.

With regard to the basis presented by the second commenter that other materials used to manufacture bedding,

bed lines, and towels should also be considered mature markets, but their materials are not excluded as being qualifying biobased material, USDA agrees that it is reasonable and desirable to treat "mature" natural or plant-derived fibers in these products equally. In revisiting this issue, USDA has decided to add linen and silk as mature fibers that will also be treated as non-qualifying biobased material for this designated item. Both linen and silk are natural fibers that have been in widespread use for many years and their use in products within this designated item are considered to be equal to that of cotton and wool in terms of their being "mature" materials. While linen was not specifically addressed along with cotton, wool, and silk in the Guidelines' discussion of "mature markets," it is one of the oldest known fibers, and the rationale for excluding cotton, wool, and silk also would apply to linen. Designating these fibers as "mature" and excluding them "as qualifying biobased materials" does not preclude their use in products that can receive preferred procurement. Products manufactured by blending qualifying biobased fibers with non-qualifying fibers (cotton, wool, linen, or silk) will be eligible for preferred procurement if the qualifying biobased fibers make up 12 percent or more of the final product.

Lastly, the third commenter requested that USDA set a higher minimum biobased content that included consideration of cotton and wool. For the reasons stated above, USDA has not changed its position on the inclusion of cotton and wool and, therefore, USDA has not changed the basis on which it has established the minimum biobased content for this designated item.

*Comment:* One commenter suggested that any final designation should clearly indicate which biobased fibers are included rather than designating only by exclusion. The commenter stated that understanding what specific fibers are included would allow for better assessment of environmental benefits, cost, and health-based issues, such as possible allergic reactions.

*Response:* USDA believes that it is more appropriate to identify those materials that are excluded in a designated item rather than those that are included. First, the intent of the preferred procurement program is to encourage new markets for biobased products. This means that one expects that new biobased materials would be used to develop biobased products in this item. USDA has no way to forecast what those new biobased materials would be and thus simply cannot develop a list of materials to be

included as qualifying materials. The only option is to identify those materials that are excluded. Second, materials that are being excluded are those that were "mature" in 1972. This is a finite set of materials that USDA can identify. For these reasons, the USDA identifies in the final designation those materials to be excluded as qualifying biobased materials.

*Comment:* One commenter noted that the life-cycle costs were computed based on a blanket weighing 4 pounds, but no information on the initial cost of the blanket was provided to allow the commenter to compare to what they currently pay for blankets. The commenter also noted that where there is a greater difference in blanket weight (the commenter typically uses blankets that weigh 2.5 to 3 pounds), the biobased substitute could potentially add more than \$40,000 to cleaning costs per year at any one of the commenter's hospitals.

*Response:* The initial cost of the tested biobased blanket is \$139.99, which was identified in Table 6 to the preamble under "first cost."

The blanket tested for biobased content weighed 4 pounds. USDA expects that manufacturers of biobased blankets will be able to provide blankets of less weight to meet the commenter's needs.

Finally, the commenter may find that the cost of purchasing biobased blankets is unreasonable and, as allowed under section 9002, would not be required to purchase such blankets.

*Comment:* One commenter expressed concern that the future voluntary labeling program could result in an organic cotton or wool bedspread not being able to carry the U.S.D.A. Certified Biobased Product label, but a corn- or wood-derived bedspread would be able to carry this label. The commenter stated that such an outcome would create widespread consumer confusion and result in people seeing the label, not as one signifying that the product is derived from plants, but that it is a synthetic fiber rather than a natural fiber.

*Response:* USDA appreciates the concern expressed by the commenter and will address this concern in the development of the proposed voluntary labeling program rule.

*Comment:* One commenter requested USDA to include cotton fiber when used to make other than mature textile products and cotton by-products and cottonseed oil, protein, and refining by-products when used to make biobased items as qualifying biobased materials for those biobased items afforded Federal procurement preference. The

commenter, for example, pointed out that cottonseed oil and refining by-products can be used to make hydraulic fluids and diesel fuel additives, and that cottonseed protein can be used to make roof coatings and water tank coatings.

*Response:* The rule, as proposed and as promulgated, does what the commenter is requesting; that is, cotton by-products and cottonseed oil, protein, and refining by-products when used to make biobased items are qualifying biobased materials, and cotton fiber when used to make a product other than mature textile products is a qualifying biobased material. As USDA designates additional items for preferred procurement, USDA will make determinations of whether mature markets existed in 1972 and, if so, identify those materials that do not qualify as biobased material. Unless a material is specifically identified as a material not qualifying as a biobased feedstock, such as cotton fiber has been for bedding, bed linens, and towels, the material may be used in any designated item and will be considered a qualifying biobased feedstock. Therefore, USDA does not see the need to revise the rule to address the commenter's request because the rule already accommodates the request.

#### *Warranties and Performance Specifications*

*Comment:* One commenter noted that the preamble does not address the issue of maintenance warranties and asked whether manufacturers of equipment in which biobased hydraulic fluids or diesel fuel additives are used have agreed, or will agree, to specifically state that use of these products will not void maintenance warranties.

*Response:* As time and resources allow, USDA will work with manufacturers on the issue of maintenance warranties. At this time, however, USDA does not have information available as to whether or not the manufacturers will state that the use of these products will void maintenance warranties. As information is available on warranties, USDA will make such information available on its FB4P Web site.

USDA encourages manufacturers to test their products against all relevant standards, including those that would affect maintenance warranties, and to work with original equipment manufacturers (OEMs) to ensure that the biobased products will not void maintenance warranties when used. USDA is willing to assist manufacturers of the biobased products, if they find that existing performance standards for maintenance warranties (or any other

aspect) are not relevant or appropriate for biobased products, in working with the appropriate OEMs to develop tests that are relevant and appropriate for the end uses in which the biobased products are intended.

In spite of these efforts, if there is insufficient information regarding the performance of a biobased product, including its effect on equipment maintenance warranties where applicable, USDA notes that the procurement agent would not be required to buy such a product.

#### *Designation of Materials Other Than Products*

*Comment:* Two commenters recommended that, because plastic products contain colorants, additives, resins, and other materials, USDA create a list of approved raw materials for plastic products. If a list of approved raw materials were created, manufacturers could use that list to create products that would be approved for procurement preference.

*Response:* Under section 9002 of FSRIA, USDA is required to designate "products," not raw materials, 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 of "biobased products," USDA does not believe it has the statutory authority to designate "raw materials" for preferred procurement. Therefore, USDA will not create a list of approved raw materials for plastic products or any other biobased product that is designated for preferred procurement.

*Comment:* Two commenters requested that USDA designate qualifying feedstocks (fibers, resins, and other inputs) rather than, or in addition to, individual items manufactured from biobased intermediates. One of the commenters stated that this was particularly important with the extension of the FB4P to Federal contractors (as required by the recently enacted Energy Policy Act of 2005), because businesses that contract with Federal agencies to produce finished products would be subject to the FB4P requirements.

*Response:* USDA previously considered extending preferred procurement designation to feedstocks in response to industry comments as USDA was initially developing this program. USDA determined that the

best policy would be to maintain a much tighter control on the characteristics of products, such as the environmental and health effects and biobased content of products that would qualify for preferred procurement through the process of designation item by item. By opening the designation process up to feedstocks, a wider variability of product characteristics would result. Therefore, USDA considers it to be undesirable to open the preferred procurement program to feedstock groupings and has not done so.

#### **IV. Regulatory Information**

##### *A. Executive Order 12866: Regulatory Planning and Review*

Executive Order 12866 requires agencies to determine whether a regulatory action is "significant." The Order defines a "significant regulatory action" as one that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866. The annual economic effect associated with this final rule has not been quantified because the information necessary to estimate the effect does not exist. As discussed in the preamble to the proposed rule, USDA made extensive efforts to obtain information on the Federal agencies' usage of the six designated items. These efforts were largely unsuccessful. Therefore, attempts to determine the economic impacts of this rule would necessitate estimating the anticipated market penetration of biobased products, which would entail many assumptions and, thus, be of questionable value. Also, the program allows procuring agencies the option of not purchasing biobased products if the costs are deemed "unreasonable." Under this program, the determination of "unreasonable" costs will be made by individual

agencies. USDA knows these agencies will consider such factors as price, life-cycle costs, and environmental benefits in determining whether the cost of a biobased product is determined to be "reasonable" or "unreasonable."

However, until the program is actually implemented by the various agencies, it is impossible to quantify the impact this option would have on the economic effect of the rule. Therefore, USDA relied on a qualitative assessment to reach the judgment that the annual economic effect of the designation of these six items is less than \$100 million, and likely to be substantially less than \$100 million. This judgment was based primarily on the offsetting nature of the program (an increase in biobased products purchased with a corresponding decrease in petroleum products purchased) and, secondarily, on the ability of procuring agencies not to purchase these items if costs are judged unreasonable, which would reduce the economic effect.

#### 1. Summary of Impacts

Today's 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 to begin supplying biobased materials to manufacturers of mobile equipment hydraulic fluids, roof coatings, water tank coatings, diesel fuel additives, penetrating lubricants, and bedding, bed linens, and towels and to begin supplying these products made with biobased materials to Federal agencies and their contractors. In addition, other businesses, including small businesses, that do not directly contract with procuring agencies may be affected positively by the increased demand for these biobased materials and products. However, other businesses that manufacture and supply only non-qualifying products and do not offer a biobased alternative product may experience a decrease in demand for their products. Thus, this rule will likely increase the demand for biobased products, while decreasing the demand for non-qualifying products. It is anticipated that this will create a largely "offsetting" economic impact.

USDA is unable to determine the number of businesses, including small businesses, that may be adversely affected by this rule. If a business currently supplies mobile equipment hydraulic fluids, roof coatings, water tank coatings, diesel fuel additives, penetrating lubricants, or bedding, bed linens, and towels to a procuring agency

and those products do not qualify as biobased products, the rule may reduce that company's ability to compete for future contracts. However, the rule will not affect existing purchase orders, nor will it preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Thus, many businesses, including small businesses, that market to Federal agencies and their contractors have the option of modifying their product lines to meet the new biobased specifications.

#### 2. Summary of Benefits

The designation of these six items 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. By purchasing these biobased products, procuring agencies can increase opportunities for all of these benefits. On a national and regional level, this rule can result in expanding and strengthening markets for biobased materials used in these six items. However, 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. USDA, however, anticipates the annual economic effect of the designation of these six items to be substantially below the \$100 million threshold. In addition, this rule does not: Create serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

#### 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 six items to determine whether its actions would have a significant impact on a substantial number of small entities. Because the Federal Biobased Products Preferred Procurement Program in 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 biobased 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 six items 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 in alphabetical order definitions for "biodegradability," "EPA-designated recovered content product," and "functional unit" to § 2902.2 to read as follows:

**§ 2902.2 Definitions.**

\* \* \* \* \*

*Biodegradability.* A quantitative measure of the extent to which a material is capable of being decomposed by biological agents, especially bacteria.

\* \* \* \* \*

*EPA-designated recovered content product.* A product, designated under the Resource Conservation and Recovery Act, that is subject to Federal procurement as specified in section 6002 of the Solid Waste Disposal Act (42 U.S.C. 6962), whereby Federal agencies must give preferred procurement to those products composed of the highest percentage of recovered materials practicable, subject to availability, cost, and performance.

\* \* \* \* \*

*Functional unit.* A measure of product technical performance that provides a common reference to which all environmental and economic impacts of the product are scaled. This reference is necessary to ensure comparability of performance results across competing products. Comparability of results is critical when competing product alternatives are being assessed to ensure that such comparisons are made on a common basis. For example, the functional unit for competing interior paint products may be defined as "protecting one square foot of interior wall surface for 50 years."

\* \* \* \* \*

■ 3. Add paragraph (c) to § 2902.8 to read as follows:

**§ 2902.8 Determining life cycle costs, environmental and health benefits, and performance.**

\* \* \* \* \*

(c) *Biodegradability information.* If biodegradability is claimed by the manufacturer of a qualifying biobased product as a characteristic of that product, USDA requires that, if requested by procuring agencies, these claims be verified using the appropriate, product-specific ASTM biodegradability

standard(s). Such testing must be conducted by an ASTM/ISO-compliant laboratory. The procuring official will decide whether biodegradability data must be brand-name specific in the case of products that are essentially of the same formulation. ASTM biodegradability standards include:

(1) D5338 "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials Under Controlled Composting Conditions";

(2) D5864 "Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants or Their Components";

(3) D6006 "Standard Guide for Assessing Biodegradability of Hydraulic Fluids";

(4) D6400 "Standard Specification for Compostable Plastics" and the standards cited therein;

(5) D6139 "Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants or Their Components Using the Gledhill Shake Flask";

(6) D6868 "Standard Specification for Biodegradable Plastics Used as Coatings on Paper and Other Compostable Substrates"; and

(7) D7081 "Standard Specification for Non-Floating Biodegradable Plastics in the Marine Environment."

\* \* \* \* \*

■ 4. Add §§ 2902.10 through 2902.15 to subpart B to read as follows:

**§ 2902.10 Mobile equipment hydraulic fluids.**

(a) *Definition.* Hydraulic fluids formulated for general use in non-stationary equipment, such as tractors, end loaders, or backhoes.

(b) *Minimum biobased content.* The minimum biobased content is 44 percent and 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 effective date.* No later than March 16, 2007, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased mobile equipment hydraulic 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 mobile equipment hydraulic fluids.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product:

Re-refined Lubricating Oils. USDA is requesting that manufacturers of these qualifying biobased products provide information on the USDA Web site of qualifying biobased products about the intended uses of the product, whether or not the product contains petroleum-based ingredients, re-refined oil, and/or any other recovered material, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated lubricating oils containing re-refined oil and which product should be afforded the preference in purchasing.

(e) *Exemptions.* The following applications are exempt for the preferred procurement requirement for this item:

(1) Military equipment: Product or system designed or procured for combat or combat-related missions.

(2) Spacecraft systems and launch support equipment.

**§ 2902.11 Roof coatings.**

(a) *Definition.* Coatings formulated for use in commercial roof deck systems to provide a single-coat monolith coating system.

(b) *Minimum biobased content.* The minimum biobased content is 20 percent and shall be based on the entire product.

(c) *Preference effective date.* No later than March 16, 2007, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased roof coatings. 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 roof coatings.

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

should be afforded the preference in purchasing.

**§ 2902.12 Water tank coatings.**

(a) *Definition.* Coatings formulated for use in potable water storage systems.

(b) *Minimum biobased content.* The minimum biobased content is 59 percent and shall be based on the entire product.

(c) *Preference effective date.* Determination of the effective date for this item is deferred until USDA identifies two or more manufacturers of biobased water tank coatings. At that time, USDA will publish a document in the **Federal Register** announcing that Federal agencies have one year from the date of the publication to give procurement preference to water tank coatings.

**§ 2902.13 Diesel fuel additives.**

(a) *Definition.* (1) Any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to diesel fuel (including any added to a motor vehicle's fuel system) and that is not intentionally removed prior to sale or use.

(2) Neat biodiesel, also referred to as B100, when used as an additive. Diesel fuel additive does not mean neat biodiesel when used as a fuel or blended biodiesel fuel (e.g., B20).

(b) *Minimum biobased content.* The minimum biobased content is 90 percent and 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 effective date.* No later than March 16, 2007, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased diesel fuel additives. 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 diesel fuel additives.

(d) *Exemptions.* The following applications are exempt for the preferred procurement requirement for this item:

(1) Military equipment: Product or system designed or procured for combat or combat-related missions.

(2) Spacecraft systems and launch support equipment.

**§ 2902.14 Penetrating lubricants.**

(a) *Definition.* Products formulated to provide light lubrication and corrosion resistance in close tolerant internal and external applications including frozen

nuts and bolts, power tools, gears, valves, chains, and cables.

(b) *Minimum biobased content.* The minimum biobased content is 68 percent and 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 effective date.* No later than March 16, 2007, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased penetrating 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 penetrating lubricants.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product: Re-refined Lubricating Oils. USDA is requesting that manufacturers of these qualifying biobased products provide information on the USDA Web site of qualifying biobased products about the intended uses of the product, whether

or not the product contains petroleum-based ingredients, re-refined oil, and/or any other recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated lubricating oils containing re-refined oil and which product should be afforded the preference in purchasing.

(e) *Exemptions.* The following applications are exempt for the preferred procurement requirement for this item:

(1) Military equipment: Product or system designed or procured for combat or combat-related missions.

(2) Spacecraft systems and launch support equipment.

#### **§ 2902.15 Bedding, bed linens, and towels.**

(a) *Definition.* (1) Bedding is that group of woven cloth products used as coverings on a bed. Bedding includes products such as blankets, bedspreads, comforters, and quilts.

(2) Bed linens are woven cloth sheets and pillowcases used in bedding.

(3) Towels are woven cloth products used primarily for drying and wiping.

(b) *Minimum biobased content.* The minimum biobased content is 12 percent and shall be based on the amount of qualifying biobased carbon in the finished product as a percent of the weight (mass) of the total organic carbon in the finished product. The 12 percent biobased content must be of a qualifying biobased feedstock. Cotton, wool, linen, and silk are not qualifying biobased feedstocks for the purpose of determining the biobased content of bedding, bed linens, and towels.

(c) *Preference effective date.* Determination of the effective date for this item is deferred until USDA identifies two or more manufacturers of biobased bedding, bed linens, and towels. At that time, USDA will publish a document in the **Federal Register** announcing that Federal agencies have one year from the date of the publication to give procurement preference to bedding, bed linens, and towels.

Dated: March 7, 2006.

**Keith Collins,**

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