

conducted by APHIS and the NPPO of Peru and appropriate mitigations have been implemented.

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Done in Washington, DC, this 19th day of July 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011-18707 Filed 7-20-11; 4:15 pm]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Office of Energy Policy and New Uses

#### 7 CFR Part 2902

**RIN 0503-AA36**

#### Designation of Biobased Items for Federal Procurement

**AGENCY:** Departmental Management, USDA.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) is amending the Guidelines for Designating Biobased Products for Federal Procurement, to add 14 sections to designate 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, as amended by the Food, Conservation, and Energy Act of 2008 (referred to in this document as “section 9002”). USDA is also establishing minimum biobased contents for each of these items.

**DATES:** This rule is effective August 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ron Buckhalt, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW., Washington, DC 20024; e-mail: [biopreferred@usda.gov](mailto:biopreferred@usda.gov); phone (202) 205-4008. Information regarding the Federal biobased preferred procurement program (one part of the BioPreferred Program) is available on the Internet at <http://www.biopreferred.gov>.

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

- I. Authority
- II. Background
- III. Summary of Changes
- IV. Discussion of Public Comments
- V. 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. E-Government Act
- K. Congressional Review Act

#### I. Authority

These items are designated under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102 (referred to in this document as “section 9002”).

#### II. Background

As part of the BioPreferred Program, USDA published, on November 23, 2010, a proposed rule in the **Federal Register** (FR) for the purpose of designating a total of 14 items for the preferred procurement of biobased products by Federal agencies (referred to hereafter in this FR notice as the “preferred procurement program”). This proposed rule can be found at 75 FR 71492. This rulemaking is referred to in this preamble as Round 7 (RIN 0503-AA36).

In the proposed rule, USDA proposed designating the following 14 items for the preferred procurement program: Animal repellents; bath products; bioremediation materials; compost activators and accelerators; concrete and asphalt cleaners; cuts, burns, and abrasions ointments; dishwashing products; erosion control materials; floor cleaners and protectors; hair care products, including shampoos and conditioners as subcategories; interior paints and coatings; oven and grill cleaners; slide way lubricants; and thermal shipping containers, including durable and non-durable thermal shipping containers as subcategories.

Today’s final rule designates the proposed items within which biobased products will be afforded Federal procurement preference. USDA has determined that each of the items being designated under today’s rulemaking meets the necessary statutory requirements; that they are being produced with biobased products; and that their procurement will carry out the following objectives of section 9002: to improve demand for biobased products; to spur development of the industrial base through value-added agricultural

processing and manufacturing in rural communities; and to enhance the Nation’s energy security by substituting biobased products for products derived from imported oil and natural gas.

When USDA designates by rulemaking an item (a generic grouping of products) for preferred procurement under the BioPreferred Program, manufacturers of all products under the umbrella of that item, that meet the requirements to qualify for preferred procurement, can claim that status for their products. To qualify for preferred procurement, a product must be within a designated item and must contain at least the minimum biobased content established for the designated item. When the designation of specific items is finalized, USDA will invite the manufacturers and vendors of these qualifying products to post information on the product, contacts, and performance testing on its BioPreferred Web site, <http://www.biopreferred.gov>. Procuring agencies will be able to utilize this Web site as one tool to determine the availability of qualifying biobased products under a designated item. Once USDA designates an item, procuring agencies are required generally to purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or of functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more.

**Subcategorization.** Most of the items USDA is considering for designation for preferred procurement cover a wide range of products. For some items, there are subgroups of products within the item that meet different requirements, uses and/or different performance specifications. Where such subgroups exist, USDA intends to create subcategories within the designated items. In sum, USDA looks at the products within each item category to evaluate whether there are subgroups of products within the item that have different characteristics or that meet different performance specifications and, where USDA finds these types of differences, it intends to create subcategories with the minimum biobased content based on the tested products within the subcategory.

For some items, however, USDA may not have sufficient information at the time of designation to create subcategories within an item. In such instances, USDA may either designate the item without creating subcategories (*i.e.*, defer the creation of subcategories) or designate one subcategory and defer designation of other subcategories

within the item until additional information is obtained. Once USDA has received sufficient additional information to justify the designation of a subcategory, the subcategory will be designated through the proposed and final rulemaking process.

Within today's final rule, USDA has subcategorized three of the items being designated. The first item is hair care products and the subcategories are (1) shampoo products, and (2) conditioner products. The second item is interior paints and coatings and the subcategories are (1) interior latex and waterborne alkyd paints and coatings, and (2) interior oil-based and solventborne alkyd paints and coatings. The third item is thermal shipping containers and the subcategories are (1) durable thermal shipping containers, and (2) non-durable thermal shipping containers.

**Minimum Biobased Contents.** The minimum biobased contents being established with today's rulemaking are based on products for which USDA has biobased content test data. Because the submission of product samples for biobased content testing is on a strictly voluntary basis, USDA was able to obtain samples only from those manufacturers who volunteered to invest the resources required to submit the samples.

In addition to considering the biobased content test data for each item, USDA also considers other factors including public comments received on the proposed minimum biobased contents and product performance information. USDA also considers the overall range of the tested biobased contents within an item, groupings of similar values, and breaks (significant gaps between two groups of values) in the biobased content test data array. USDA evaluates this information to determine whether some products that may have a lower biobased content also have unique performance or applicability attributes that would justify setting the minimum biobased content at a level that would include these products. USDA believes that this evaluation process allows it to establish minimum biobased contents based on a broad set of factors to assist the Federal procurement community in its decisions to purchase biobased products.

USDA makes every effort to obtain biobased content test data on multiple products within each item. For most designated items, USDA has biobased content test data on more than one product within a designated item. However, in some cases, USDA has been able to obtain biobased content data for only a single product within a

designated item. As USDA obtains additional data on the biobased contents for products within these designated items and their subcategories, USDA will evaluate whether the minimum biobased content for a designated item or subcategory will be revised.

USDA anticipates that the minimum biobased content of an item that is based on a single product is more likely to change as additional products within that designated item are identified and tested. In today's final rule, the minimum biobased contents for both subcategories under the thermal shipping containers designated item are based on a single tested product. Given that only three biobased products have been identified in this item, and only one manufacturer of products within each subcategory supplied a sample for testing, USDA believes it is reasonable to set minimum biobased contents for these subcategories based on the single data point for each subcategory.

**Overlap with EPA's Comprehensive Procurement Guideline program for recovered content products under the Resource Conservation and Recovery Act (RCRA) Section 6002.** Some of the products that are biobased items designated for preferred procurement under the preferred procurement program may also be items the Environmental Protection Agency (EPA) has designated under the EPA's Comprehensive Procurement Guideline (CPG) for products containing recovered materials. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to make additional product and performance information available to Federal agencies conducting market research 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. Manufacturers are asked to provide information highlighting the sustainable features of their biobased products and to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains fossil energy-based components (including petroleum, coal, and natural gas) and whether the product contains recovered materials. Federal agencies also may ask manufacturers for information on a product's biobased content and its profile against environmental and health measures and life-cycle costs (the ASTM Standard

D7075, "Standard Practice for Evaluating and Reporting Environmental Performance of Biobased Products," or the Building for Environmental and Economic Sustainability (BEES) analysis for evaluating and reporting on environmental performance of biobased products). Federal agencies may then use this information to make purchasing decisions based on the sustainability features of the products. Detailed information on ASTM Standard D7075, and other ASTM standards, can be found on ASTM's Web site at <http://www.astm.org>. Information on the BEES analytical tool can be found on the Web site <http://www.bfrl.nist.gov/oe/software/bees.html>.

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

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

This final rule designates one item for preferred procurement for which there may be overlap with an EPA-designated recovered content product. The interior latex and waterborne alkyd subcategory within the interior paints and coatings item may overlap with the EPA-

designated recovered content products “reprocessed latex paints” and “consolidated latex paints.” EPA provides recovered materials content recommendations for these recovered content products in a Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations for these CPG products can be found by accessing EPA’s Web site <http://www.epa.gov/epaoswer/non-hw/procure/products.htm> and then clicking on the appropriate product name.

*Federal Government Purchase of Sustainable Products.* The Federal government’s sustainable purchasing program includes the following three statutory preference programs for designated products: The BioPreferred Program, the Environmental Protection Agency’s Comprehensive Procurement Guideline for products containing recovered materials, and the Environmentally Preferable Purchasing program. The Office of the Federal Environmental Executive (OFEE) and the Office of Management and Budget (OMB) encourage agencies to implement these components comprehensively when purchasing products and services.

Procuring agencies should note that not all biobased products are “environmentally preferable.” For example, unless cleaning products contain no or reduced levels of metals and toxic and hazardous constituents, they can be harmful to aquatic life, the environment, and/or workers. Household cleaning products that are formulated to be disinfectants are required, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), to be registered with EPA and must meet specific labeling requirements warning of the potential risks associated with misuse of such products. When purchasing environmentally preferable cleaning products, many Federal agencies specify that products must meet Green Seal standards for institutional cleaning products or that the products have been reformulated in accordance with recommendations from the EPA’s Design for the Environment (DfE) program. Both the Green Seal standards and the DfE program identify chemicals of concern in cleaning products. These include zinc and other metals, formaldehyde, ammonia, alkyl phenol ethoxylates, ethylene glycol, and volatile organic compounds (VOC). In addition, both require that cleaning products have neutral or less caustic pH.

In contrast, some biobased products may be more environmentally preferable than some products that meet Green Seal standards for institutional cleaning products or that have been reformulated

in accordance with EPA’s DfE program. To fully compare products, one must look at the “cradle-to-grave” impacts of the manufacture, use, and disposal of products. Biobased products that will be available for preferred procurement under this program have been assessed as to their “cradle-to-grave” impacts.

One consideration of a product’s impact on the environment is whether (and to what degree) it introduces new fossil carbon into the atmosphere. Fossil carbon is derived from non-renewable sources (typically fossil fuels such as coal and oil), whereas renewable biomass carbon is derived from renewable sources (biomass). Qualifying biobased products offer the user the opportunity to manage the carbon cycle and reduce the introduction of new fossil carbon into the atmosphere.

Manufacturers of qualifying biobased products designated under the preferred procurement program will be able to provide, at the request of Federal agencies, factual information on environmental and human health effects of their products, including the results of the ASTM D7075, or the comparable BEES analysis which examines 12 different environmental parameters, including human health. Therefore, USDA encourages Federal procurement agencies to consider that USDA has already examined all available information on the environmental and human health effects of biopreferred products, when making their purchasing decisions.

*Other Preferred Procurement Programs.* Federal procurement officials should also note that biobased products may be available for purchase by Federal agencies through the AbilityOne Program (formerly known as the Javits-Wagner-O’Day (JWOD) program). Under this program, members of organizations including the National Industries for the Blind (NIB) and the National Institute for the Severely Handicapped (NISH) offer products and services for preferred procurement by Federal agencies. A search of the AbilityOne Program’s online catalog ([www.abilityone.gov](http://www.abilityone.gov)) indicated that four of the items being designated today (concrete and asphalt cleaners, dishwashing detergent, floor cleaners and protectors, and hair care products) are available through the AbilityOne Program. While there is no specific product within these items identified in the AbilityOne online catalog as being a biobased product, it is possible that such biobased products are available or will be available in the future. Also, because additional categories of products are frequently added to the AbilityOne Program, it is possible that biobased products within

other items being designated today may be available through the AbilityOne Program in the future. Procurement of biobased products through the AbilityOne Program would further the objectives of both the AbilityOne Program and the preferred procurement program.

*Outreach.* To augment its own research, USDA consults with industry and Federal stakeholders to the preferred procurement program during the development of the rulemaking packages for the designation of items. USDA consults with stakeholders to gather information used in determining the order of item designation and in identifying: 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.

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

In the preamble to the first six items designated for preferred procurement (71 FR 13686, March 16, 2006), USDA stated that it planned to identify approximately 10 items in each future rulemaking. In an effort to finalize the designation of more items in a shorter time period, USDA now plans to increase the number of items in each rulemaking, whenever possible. Thus, today’s final rulemaking designates 14 items for preferred procurement.

USDA has developed a preliminary list of items for future designation and has posted this preliminary list on the BioPreferred Web site. While this list presents an initial prioritization of items for designation, USDA cannot identify with certainty which items will be presented in each of the future rulemakings. In response to comments from other Federal agencies, USDA intends to give increased priority to those items that contain the highest biobased content. In addition, as the program matures, manufacturers of biobased products within some industry segments have become more responsive to USDA’s requests for technical information than those in other segments. Thus, items with high biobased content and for which

sufficient technical information can be obtained quickly may be added or moved up on the prioritization list. USDA intends to update the list of items for future designation on the BioPreferred Web site every six months, or more often if significant changes are made to the list.

### III. Summary of Changes

As a result of the comments received on the proposed rule, USDA has made several changes in finalizing the proposed rule. These changes are summarized in the remainder of this section. A summary of each comment received, and USDA's response to the comment, is presented in section IV.

The definitions of three proposed items were revised to avoid potential overlap with previously designated items. The definition of the bath products designated item was revised to specifically exclude products marketed as hand cleaners and/or hand sanitizers. The definition of the concrete and asphalt cleaners designated item was revised to include only those products marketed for use in commercial or residential construction or industrial applications. The definition of the floor cleaners and protectors designated item was revised to include only those products marketed specifically for use on industrial, commercial, and/or residential flooring.

The proposed item interior paints and coatings was subcategorized. The subcategories are (1) interior latex and waterborne alkyd paints and coatings, and (2) interior oil-based and solventborne alkyd paints and coatings.

The discussion of potential overlap with the EPA recovered content product re-refined lubricating oil was removed from the slide way lubricants.

### IV. Discussion of Public Comments

USDA solicited comments on the proposed rule for 60 days ending on January 24, 2011. USDA received comments from five commenters by that date. The comments were from three Federal government agencies and two biobased product manufacturers.

In the remainder of this section, USDA first addresses two general comments that relate to the overall designation process. Comments related to the designation of specific items are presented next, followed by USDA's response to those comments.

#### General

*Comment:* One commenter stated that the BioPreferred Web site might imply to some that the listed products have been tested and meet all Federal requirements, when the primary test of

concern is for biobased content. The commenter stated that, in numerous cases, the products have not been tested/evaluated for DoD applications. The commenter suggested that there should be some type of statement on the Web site explaining that the item type meets USDA requirements but not necessarily those of any other component of the Federal government.

*Response:* USDA agrees with the commenter that the functional performance of biobased products is of great concern to procuring agencies and that such performance is not guaranteed as a part of the designation process. USDA attempts to gather performance information from biobased product manufacturers during the designation process, but does not have the statutory authority to require manufacturers to provide such information. The absence of industry standards listed in association with a catalog entry simply indicates that the company has elected not to provide any information about performance testing associated with their products. Purchasing officials interested in performance data associated with a specific product are encouraged to contact the listed contacts for further information. USDA will consider the feasibility of including a symbol in the catalog (when the performance standards record is null) so that purchasing officials can quickly see which products have testing standards associated with their products.

#### New Product Category

*Comment:* One commenter believes that it is important to have a product category designation for automotive motor oils. The commenter states that there are categories for 2-cycle engine oil, and bar and chain lubricant, which are typically petroleum-based products. The commenter believes there would be significant benefit in designating automotive motor oils as a product category in the next round. The commenter stated that this could lead to the creation of more effective and environmentally friendly motor oil from biobased materials.

*Response:* USDA thanks the commenter for the recommendation and is willing to work with the commenter to obtain valid information regarding the potential for establishing a product category for automotive motor oils. USDA would be especially interested in obtaining information related to performance characteristics of biobased automotive motor oils, including documentation of successful performance testing by recognized testing organizations such as ASTM and SAE.

#### Animal Repellents

*Comment:* One commenter stated that Federal agencies are implementing integrated pest management (IPM) in place of the use of pesticides. The commenter recommends USDA address whether the use of biobased animal repellents is consistent with Federal IPM efforts.

*Response:* USDA contacted Dr. Martin Draper, the National Program Leader—Plant Pathology, of USDA's National Institute of Food and Agriculture to discuss whether the use of biobased animal repellents is consistent with Federal IPM programs. Dr. Draper stated that IPM encourages the use of diverse methods of mitigating pest pressures, in most cases reducing pesticide use. He further stated that biorational pesticides and biological controls would be welcome and encouraged within the constructs of IPM. He stated that IPM programs are focused on efficacious products and strategies that optimize economic advantage while reducing potential deleterious effects on the environment and human health and that if the products that can do that are biobased, all the better. He further stated that pest repellents would be included as a component of IPM if that was an appropriate strategy. According to Dr. Draper, exclusion, the best option in managing vertebrate pests, is impractical or illegal in some cases. In those cases, repellents become very important in the management of some very damaging pests. Dr. Draper concluded by saying that he did not see where the use of biobased animal repellents would be a conflict with IPM programs.

#### Bath Products

*Comment:* One commenter believes that the proposed designation of bath products overlaps with the previous designation of hand cleaners. The commenter stated that manufacturers and purchasers need clear guidance as to which biobased content level applies, as the recommended minimum biobased content level for hand cleaners is slightly higher than that proposed for bath products. The commenter further recommends that USDA provide a clear definition of bath products that distinguishes it from hand cleaners.

*Response:* USDA does not believe that the designation of bath products overlaps significantly with the previous designation of hand cleaners and sanitizers. Hand cleaners and sanitizers are defined as products formulated exclusively for use as human hand personal care products. Bath products, as defined, are personal hygiene

products, including soaps and other cleansers. However, USDA does agree that there may be some confusion regarding these differences and has amended the definition of bath products to state that these exclude products that are specifically marketed as “hand cleaners” and/or “hand sanitizer” products.

#### *Bioremediation Materials and Compost Activators and Accelerators*

*Comment:* One commenter stated that the designation of bioremediation materials and compost activators could lead to unnecessary addition of biobased components to these products in order to qualify for Federal procurement preference.

The commenter stated that a review of the Technical Support Document indicates that the overwhelming majority of the products identified within these two product categories consist of active biological microorganism cultures. The commenter further noted that some product descriptions also indicate that the product contains nutrients or organic materials. However, the active ingredient is typically a culture of microorganisms.

Thus, according to the commenter, developing a formula for sale to the government by adding more biobased organic materials that simply dilute the microbiological active ingredient is a logical response to USDA’s contemplated biobased content minimum. The commenter stated that the result of a “successful” USDA designation in this area might be simply the wasting of biobased products into the compost pile or into soils being remediated. The commenter further stated that the addition of biobased organic materials would also increase the use of packaging materials, fuels, etc. for product transport, having a negative effect on the environment.

The commenter also noted that neither of these product classes appears to have standardized tests to determine product effectiveness—which increases the difficulty to the government to avoid procurement of diluted products prepared to satisfy a biobased content mandate.

The commenter recommends that the “bioremediation materials” product category and the “compost activators and accelerators” product category not be designated under the biobased procurement preference program.

*Response:* USDA disagrees with the commenter’s recommendation that bioremediation materials and compost activators and accelerators not be included in the biobased procurement

preference program. Based on the information collected prior to proposing these items for designation, available products within these two items are almost universally high in biobased content. Also, because the microorganisms that are the active ingredients in the products would be counted as biobased content, reducing the percentage of the microorganisms in the product and increasing the biobased nutrient, or carrier, content would not increase the overall biobased content of a product. In addition, reformulating the product to include fewer microorganisms would tend to hurt the performance of the product. Thus, manufacturers would have no reason to add inactive biobased ingredients to increase the biobased content of the products. USDA held a meeting with the commenter to clarify the comments/responses and explain the rationale for finalizing the designation of these two items, but did not make any changes in the final rule.

#### *Concrete and Asphalt Cleaners*

*Comment:* One commenter stated that the proposed designation of concrete and asphalt cleaners overlaps with the previously designated graffiti remover. The commenter believes that guidance is needed as to which biobased content applies, as the proposed minimum biobased content level for graffiti remover is significantly lower than that for the concrete and asphalt cleaners. The commenter further stated that concrete and asphalt cleaners should be clearly distinguished from graffiti remover.

*Response:* USDA reviewed the product information collected on both the proposed concrete and asphalt cleaners item and the previously designated graffiti remover item to investigate clarifications that could be made to the definitions. Based on the product descriptions provided by manufacturers, USDA found that products within the proposed concrete and asphalt cleaners item were predominantly described as being intended for use in construction or industrial applications. Graffiti and grease remover products were generally described as being intended for use in janitorial and/or institutional applications. USDA has, therefore, clarified the definition of concrete and asphalt cleaners to specify that products within this item include only those marketed for use in construction or industrial applications.

*Comment:* One commenter, in reference to the Boeing Spec D6–17487P listed in connection with the proposed concrete and asphalt cleaners item,

asked if proprietary standards like these are readily available to the purchasing agencies. The commenter stated that, if so, their Hazardous Minimization/Green Products Community would like access to them.

*Response:* USDA does not have access to individual performance specifications such as Boeing Specification D6–17487P. USDA suggests that interested parties contact biobased product vendors/manufacturers, or the entity that established the performance standard, directly regarding access to their specifications.

#### *Dishwashing Products*

*Comment:* One commenter, in reference to the Boeing Spec D6–7127 listed in connection with the proposed dishwashing products item, asked if proprietary standards like these are readily available to purchasing agencies. The commenter stated that, if so, their Hazardous Minimization/Green Products Community would like access to them.

*Response:* As stated in the response to a similar comment related to the concrete and asphalt cleaners item, USDA does not have access to individual performance standards and recommends that interested parties contact biobased product vendors/manufacturers, or the entity that established the performance standard.

#### *Floor Cleaners and Protectors*

*Comment:* One commenter believes that the proposed designation of floor cleaners and protectors overlaps with the previous designation of bathroom and spa cleaners, as both types of products can be used to clean similar surfaces. The commenter believes that guidance is needed as to which biobased content applies, as the proposed minimum biobased content level for floor cleaners is slightly higher than that recommended for bathroom cleaning products. The commenter further stated that a definition of floor cleaners that clearly distinguishes it from bathroom cleaners is needed.

*Response:* USDA has revised the definition of the proposed floor cleaners and protectors item to specify that products within this item are marketed specifically for use on industrial, commercial, and/or residential flooring. USDA agrees with the commenter that some products that are marketed within the previously designated bathroom and spa cleaners item may be used on floors. Those products are generally marketed as multi-surface cleaners formulated specifically for use in bathrooms and spa areas. By specifying that applicable floor cleaner and protector products are

those marketed specifically for use on flooring, USDA believes that most overlay issues will be eliminated.

#### *Hair Care Products*

*Comment:* One commenter recommends that USDA create a category of “personal care products,” with bath products, hand cleaners, and hair care products listed as subsets. Each item should be clearly defined to be distinguishable from each other.

*Response:* USDA agrees with the commenter that some of the proposed and previously designated items include products that are functionally similar and could be more clearly defined to avoid overlap. USDA has developed the designation rulemakings in several individual “rounds” as new product information was gathered. In addition, biobased product manufacturers have continued to introduce biobased alternatives that are marketed in an increasing variety of applications, especially in the category of “multi-purpose” cleaners and lubricants. USDA recognizes that the potential for many biobased products to be marketed under multiple designated items continues to increase. On one hand, this is encouraging because it means that biobased alternatives are becoming more widespread and more marketable. On the other hand, it means that some of the items that were designated early in the process are not organized and defined in the most practical way. Once the initial designation of those items for which information is readily available has been completed, USDA intends to revisit the entire list of designated items and undertake a reorganization to streamline and clarify the items and update the minimum biobased content requirements, as applicable.

#### *Interior Paints and Coatings*

*Comment:* One commenter proposes that this item designation be subcategorized based on differences in the requirements, uses, and performance specifications. Based on the USDA definition of subgroups, the commenter believes two subgroups exist for interior paints and coatings, “interior latex and latex-hybrid paints and coatings” and “interior oil-based and alkyd paints and coatings.” Because significantly different technologies and chemistries are used to meet the requirements, uses, and performance specific to each of these subgroups, different minimum biobased content levels should be set for each of these.

The commenter stated that coatings within the first proposed subcategory, interior latex and latex-hybrid paints and coatings, are carried in water and

are capable of meeting all national and regional VOC regulations. The commenter also stated that it is important that procurement officers have biobased options capable of meeting the VOC regulations in their particular region. The commenter stated that they currently sell products that would fall into this subcategory and can provide them to the USDA for biobased content testing. The commenter recommended that a minimum level of approximately 20 percent biobased carbon would be appropriate for the latex and latex hybrid-paints and coatings subcategory.

According to the commenter, latex paint is the dominant coating type used in the interior paint and coatings market; used for typical painting projects, such as wall paint. The commenter stated that users of latex paints have very specific performance expectations, including fast drying times and low odor. The commenter noted that these are very important factors, because the paint cost accounts for only about 20–30 percent of the total paint-job cost, with the majority of costs being related to labor. Faster drying paints significantly reduce labor costs and allow office buildings and other interior spaces to be quickly returned to service after painting. These coatings are also carried in water which results in low odor, low VOC and significantly lower contribution to indoor air quality issues.

The commenter also stated that subcategorization of interior latex and latex-hybrid paint and coatings will also provide the requested clarity on the potential overlap that was identified by the USDA, with the EPA’s Resource Conservation and Recovery Act (RCRA). By subcategorizing in this manner, there is no overlap for applications that require a paint from the “interior oil-based and alkyd paint and coatings” subcategory. The commenter stated that, in the case of applications requiring paint from the “interior latex and latex-hybrid paints and coatings” subcategory, the decision between a biobased latex paint (USDA BioPreferred) or reprocessed/consolidated latex paint (EPA RCRA) can be made by the procurement officer based on price, availability, and performance considerations.

The commenter stated that the second proposed subcategory, interior oil-based and alkyd paints and coatings are defined by the ACA as “a paint that contains drying oil, oil varnish or oil-modified resin as the film-forming ingredient.” The commenter explained that an alkyd resin is defined by the ACA as “synthetic resin modified with

oil.” Thus, alkyd paints and coatings are defined as “coatings that contains alkyd resins in the binder.” The commenter also stated that these coatings typically are carried in a natural or synthetic solvent and therefore may not meet VOC regulations in certain geographical regions.

The commenter stated that the coating HC84–0015 tested by the USDA qualifies for this subcategory and the coatings Q14G–0009, Q14G–0013, and Q14G–0002, may qualify for this subcategory as well. The commenter agrees with a 67 percent biobased content level for this subcategory.

The commenter explained that interior alkyd and oil-based paints in the U.S. market are typically used for trim paint and as wood primers, especially where tannin blocking is specifically required. The commenter stated that users of alkyd and oil-based paints have very specific performance expectations and that these coatings are used on trim specifically for their hardness, smooth application, tannin blocking ability, and the ability to achieve substantially higher gloss levels. They can also be used for wall coatings when this type of performance is required. In contrast to latex and latex hybrid, these types of coatings are slow to dry and often have some odor associated with them.

The commenter recommended the following changes to the proposed designation of biobased interior paints and coatings for preferred Federal procurement:

The subcategories should be based on their differentiated use and performance specifications. Allowing for the inclusion of latex paints will lead to wider adoption and use of biobased products in the interior paints and coatings category.

The commenter believes that a level of 67 percent biobased content is appropriate for the interior oil-based and alkyd paints and coatings subcategory, but the level for the interior latex and latex-hybrid paints and coatings should be approximately 20 percent biobased carbon content.

The commenter also stated that the 100 percent biobased content level found in product MXF6–0004 should not be used to determine the minimum biobased content for interior paints and coatings or either of the proposed subcategories because this type of coating is not feasible for use and this product was not tested for biobased content as it is intended to be used. The commenter stated that, when used as instructed by the manufacture in the product description, the biobased content of the full painting system will

be significantly lower. While the milk-paint base itself is biobased, according to the product description provided by the USDA, it requires mixing with an adhesive in order to adhere to non-porous surfaces (e.g. any previously painted surfaces). Milk-paint manufactures also typically recommend using an acrylic top-coat for durability. The commenter stated that, since the adhesive is a necessary part of the "coating" to insure adhesion to the substrate, it must be included in any determination of biobased content.

*Response:* USDA considered the information provided by the commenter, reviewed the data previously collected on this proposed item, and also researched other coating-related information available on the Internet. USDA agrees with the commenter that the proposed item should include at least two subcategories based on two fundamentally different coating technologies.

USDA found that within the broad category of interior paints and coatings all products can be categorized at the highest level as either waterborne or solventborne. As the names imply, the products can be divided into those that use water as the "carrier" liquid and those that use a solvent other than water (e.g., typically petroleum-based solvents). Waterborne coatings have traditionally been formulated as an emulsion of petroleum based acrylic resins in water. These coatings were low in VOC content, but did not contain biobased components. Solventborne coatings have traditionally been formulated as plant based (soy, linseed, castor) alkyd resins in petroleum based solvents. These coatings have a much higher VOC content, but do include a biobased component.

Recent advances in coating technology have resulted in the formulation of waterborne coatings that include varying levels of plant based alkyd resins. Thus, there are now biobased alternatives within both the waterborne and solventborne coating types. While solventborne alkyd coatings still generally contain a much higher biobased content, waterborne coatings with a significant biobased content are becoming increasingly popular. The commenter reported selling a line of waterborne coating products with at least 20 percent biobased content. USDA also contacted a major resin manufacturer who confirmed that their products are used in waterborne alkyd coatings containing biobased contents in the 20 to 30 percent range.

USDA agrees with the commenter that other types of coatings, such as the milk-paint discussed by the commenter, are not generally representative of the coating technologies that dominate the interior coatings market. While various other types of coating technologies are available, their use is very specialized and the volumes that would potentially be purchased by Federal procurement officials is negligible compared to waterborne and solventborne coatings. USDA has, therefore, not considered these specialty coatings in establishing subcategories for this item. However, to the extent that any of these specialty coatings fall within the subcategories established in today's final rule, they would be eligible for the same consideration for preferred procurement as more traditional coatings.

For the reasons presented above, USDA has decided to create two subcategories within the interior paints and coatings item. USDA recognizes that there are many factors for purchasing officials to consider when purchasing interior paints and coatings. Procurement decisions must be made considering applicable VOC regulations as well as a long list of necessary coating performance characteristics. Creating two subcategories within the interior paints and coatings item allows USDA to acknowledge the differences between the two basic coating types and also to set minimum biobased contents that are representative of each type. In the final rule, the two subcategories are: (1) Interior latex and waterborne alkyd paints and coatings, and (2) interior oil-based and solventborne alkyd paints and coatings. The minimum biobased content of the first subcategory is 20 percent and the minimum biobased content of the second subcategory is 67 percent. USDA believes that these minimum biobased contents will result in procuring officials being able to select from a sufficiently large number of products to ensure that their performance needs can be met.

*Comment:* One commenter stated that, under E.O. 13423 and 13514, Federal agencies are using interior paints with no or low VOC content as part of their high performance sustainable building efforts. For some agencies, the use of no- or low-VOC paints is necessary to help meet air non-attainment area requirements. USDA should address the VOC content of biobased paints and whether the use of these products is consistent with agency efforts to reduce their use of VOC-containing products.

*Response:* As discussed in the response to the previous comment, USDA has subcategorized the interior paints and coatings item into two

subcategories. The two subcategories can generally be described as being either waterborne (the latex and waterborne alkyds subcategory) or solventborne (the oil-based and solventborne alkyds subcategory). Waterborne coatings, as the name implies, use water as the carrier for the resins and pigments. Solventborne coatings use an organic solvent (typically a petroleum-derived solvent) as the carrier. The vast majority of coatings used in the interior paints and coatings market are waterborne coatings and one of the primary driving factors in the emergence of waterborne technology was the low organic solvent content of these coatings. Not only do these coatings meet VOC requirements, they are fast drying and low in odor. Solventborne coatings are typically used as primers and for wood trim, cabinets, and furniture. They are used primarily for their hardness, smooth application, and higher gloss levels. Because they contain organic solvents, however, these coatings may not meet VOC regulations in some geographical regions.

USDA agrees with the commenter that the use of low VOC coatings is an important consideration in many Federal agency's environmental programs. USDA recommends that purchasing officials first consider the performance and environmental concerns when deciding whether to purchase waterborne or solventborne coatings. Once that decision is made, purchasing officials must determine whether the available biobased alternatives within each coating type meet their performance and cost criteria.

#### *Slide Way Lubricants*

*Comment:* One commenter stated that the proposed designation of slide way lubricants does not overlap with EPA's designation of re-refined lubricating oils. The commenter stated that the EPA designation applies to engine lubricants, hydraulic fluids, and gear oils.

*Response:* USDA thanks the commenter for the comment. USDA reconsidered the potential for an overlap and agrees that slide way lubricants do not overlap with EPA's designated re-refined lubricating oil. USDA has removed the discussion of the potential overlap for this item from the final rule.

#### *Thermal Shipping Containers*

*Comment:* One commenter stated that this proposed category has two subcategories with only one manufacturer and that USDA is proposing to defer the compliance date until additional manufacturers are identified. The commenter suggests that

in future rounds it may be preferable to hold off designating an item until more than one manufacturer is identified.

*Response:* Section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), states that USDA shall “\* \* \* designate those items (including finished products) that are or can be produced with biobased products (including biobased products for which there is only a single product or manufacturer in the category) that will be subject to the preference described in paragraph (2) \* \* \*”. Thus, USDA does not agree that it should defer designating an item until more than one manufacturer is identified.

## V. 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.”

Today’s final rule has been determined by the Office of Management and Budget to be not significant for purposes of Executive Order 12866. We are not able to quantify the annual economic effect associated with today’s final rule. As discussed earlier in this preamble, USDA made extensive efforts to obtain information on the Federal agencies’ usage within the 14 designated items, including their subcategories. These efforts were largely unsuccessful. Therefore, attempts to determine the economic impacts of today’s final rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing designated items if price is “unreasonable,” the product is not

readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of today’s final rule. Consideration was also given to the fact that agencies may choose not to procure designated items due to unreasonable price.

#### 1. Summary of Impacts

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

#### 2. Benefits of the Final Rule

The designation of these 14 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, and to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities. On a national and regional level, today’s final rule can result in expanding and strengthening markets for biobased materials used in these items.

#### 3. Costs of the Final Rule

Like the benefits, the costs of today’s final rule have not been quantified. Two types of costs are involved: Costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the

preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Pre-award procurement costs for Federal agencies may rise minimally as the contracting officials conduct market research to evaluate the performance, availability and price reasonableness of preferred products before making a purchase.

### B. Regulatory Flexibility Act (RFA)

The RFA, 5 U.S.C. 601–602, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

USDA evaluated the potential impacts of its designation of these items to determine whether its actions would have a significant impact on a substantial number of small entities. Because the preferred procurement program established under section 9002 applies only to Federal agencies and their contractors, small governmental (city, county, *etc.*) agencies are not affected. Thus, the proposal, if promulgated, 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.

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 biobased products within the 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 manufacturing biobased products affected by this rulemaking is not expected to be substantial.

The preferred procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. Most manufacturers of non-biobased products within the items being designated for preferred procurement in this rule are expected to be included under the following NAICS codes: 324191 (petroleum lubricating oil and grease manufacturing), 325320 (pesticide and other agricultural chemical manufacturing), 325412 (pharmaceutical preparation manufacturing), 325510 (paint and coating manufacturing), 325611 (soap and other detergent manufacturing), 325612 (polish and other sanitation goods manufacturing), 325620 (toilet preparation manufacturing), 325998 (other miscellaneous chemical products and preparation manufacturing), 326150 (urethane and other foam product manufacturing), and 314999 (other miscellaneous textile mill products). USDA obtained information on these 10 NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 8,092 companies within these 10 NAICS categories and that these companies own a total of about 9,255 establishments. Thus, the average number of establishments per company is about 1.1. The Census data also reported that of the 9,255 individual establishments, about 9,119 (98.5 percent) have fewer than 500 employees. USDA also found that the overall average number of employees per company among these industries is about 58, with only one segment reporting an average of more than 100 employees (the pharmaceutical preparation industry segment at about 250 employees per company). Thus, nearly all of the businesses fall within the Small Business Administration's definition of a small business (fewer than 500 employees, in most NAICS categories).

USDA does not have data on the potential adverse impacts on manufacturers of non-biobased products within the items being designated, but believes that the impact will not be significant. Most of the items being designated in this rulemaking are typical consumer products widely used by the general public and by industrial/commercial establishments that are not subject to this rulemaking. Thus, USDA

believes that the number of small businesses manufacturing non-biobased products within the items being designated and selling significant quantities of those products to government agencies affected by this rulemaking to be relatively low. Also, this final rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased items when biobased items do not meet the availability, performance, or reasonable price criteria. This final rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials.

After considering the economic impacts of this final 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 final 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.

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

This final 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 final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this final 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 final 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 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 final 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 final rule is currently approved under OMB control number 0503–0011.

#### *J. E-Government Act Compliance*

USDA is committed to compliance with the E-Government Act, 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 E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205–4008.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, that includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. USDA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**.

**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****PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT**

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

**Authority:** 7 U.S.C. 8102.

■ 2. Add §§ 2902.61 through 2902.74 to subpart B to read as follows:

- 2902.61 Animal repellents.
- 2902.62 Bath products.
- 2902.63 Bioremediation materials.
- 2902.64 Compost activators and accelerators.
- 2902.65 Concrete and asphalt cleaners.
- 2902.66 Cuts, burns, and abrasions ointments.
- 2902.67 Dishwashing products.
- 2902.68 Erosion control materials.
- 2902.69 Floor cleaners and protectors.
- 2902.70 Hair care products.
- 2902.71 Interior paints and coatings.
- 2902.72 Oven and grill cleaners.
- 2902.73 Slide way lubricants.
- 2902.74 Thermal shipping containers.

**§ 2902.61 Animal repellents.**

(a) *Definition.* Products used to aid in deterring animals that cause destruction to plants and/or property.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 79 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part,

will give a procurement preference for qualifying biobased animal repellents. 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 animal repellents.

**§ 2902.62 Bath products.**

(a) *Definition.* Personal hygiene products including bar soaps, liquids, or gels that are referred to as body washes, body shampoos, or cleansing lotions, but excluding products marketed as hand cleaners and/or hand sanitizers.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 61 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased bath products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased bath products.

**§ 2902.63 Bioremediation materials.**

(a) *Definition.* Dry or liquid solutions (including those containing bacteria or other microbes but not including sorbent materials) used to clean oil, fuel, and other hazardous spill sites.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 86 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased bioremediation materials. 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 bioremediation materials.

**§ 2902.64 Compost activators and accelerators.**

(a) *Definition.* Products in liquid or powder form designed to be applied to compost piles to aid in speeding up the composting process and to ensure successful compost that is ready for consumer use.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 95 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased compost activators and accelerators. 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 compost activators and accelerators.

**§ 2902.65 Concrete and asphalt cleaners.**

(a) *Definition.* Chemicals used in concrete etching as well as to remove petroleum-based soils, lubricants, paints, mastics, organic soils, rust, and dirt from concrete, asphalt, stone and other hard porous surfaces. Products within this item include only those marketed for use in commercial or residential construction or industrial applications.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 70 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased concrete and asphalt cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased concrete and asphalt cleaners.

**§ 2902.66 Cuts, burns, and abrasions ointments.**

(a) *Definition.* Products designed to aid in the healing and sanitizing of scratches, cuts, bruises, abrasions, sun damaged skin, tattoos, rashes and other skin conditions.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 84 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased cuts, burns, and abrasions ointments. 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 cuts, burns, and abrasions ointments.

#### § 2902.67 Dishwashing products.

(a) *Definition.* Soaps and detergents used for cleaning and clean rinsing of tableware in either hand washing or dishwashing.

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

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased dishwashing products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased dishwashing products.

#### § 2902.68 Erosion control materials.

(a) *Definition.* Woven or non-woven fiber materials manufactured for use on construction, demolition, or other sites to prevent wind or water erosion of loose earth surfaces, which may be combined with seed and/or fertilizer to promote growth.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 77 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased erosion control materials. 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 erosion control materials.

#### § 2902.69 Floor cleaners and protectors.

(a) *Definition.* Cleaning solutions for either direct application or use in floor scrubbers for wood, vinyl, tile, or similar hard surface floors. Products within this item are marketed specifically for use on industrial, commercial, and/or residential flooring.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 77 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased floor cleaners and protectors. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased floor cleaners and protectors.

#### § 2902.70 Hair care products.

(a) *Definitions.* (1) Personal hygiene products specifically formulated for hair cleaning and treating applications, including shampoos and conditioners.

(2) Hair care products for which Federal preferred procurement applies are:

(i) *Shampoos.* These are products whose primary purpose is cleaning hair. Products that contain both shampoos and conditioners are included in this subcategory because the primary purpose of these products is cleaning the hair.

(ii) *Conditioners.* These are products whose primary purpose is treating hair to improve the overall condition of hair.

(b) *Minimum biobased content.* The minimum biobased content for all hair care products shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) Shampoos—66 percent.

(2) Conditioners—78 percent.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased hair care products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant

specifications require the use of biobased hair care products.

#### § 2902.71 Interior paints and coatings.

(a) *Definition.* (1) Pigmented liquids, formulated for use indoors, that dry to form a film and provide protection and added color to the objects or surfaces to which they are applied.

(2) Interior paints and coatings products for which Federal preferred procurement applies are:

(i) Interior latex and waterborne alkyd paints and coatings.

(ii) Interior oil-based and solventborne alkyd paints and coatings.

(b) *Minimum biobased content.* The minimum biobased content for all interior paints and coatings products shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) Interior latex and waterborne alkyd paints and coatings—20 percent.

(2) Interior oil-based and solventborne alkyd paints and coatings—67 percent.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased interior paints and 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 interior paints and coatings.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products within the interior latex and waterborne alkyd paints and coatings subcategory may, in some cases, overlap with the EPA-designated recovered content products: Reprocessed latex paints and consolidated latex paints. 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, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated reprocessed latex paints and consolidated latex paints and which product should be afforded the preference in purchasing.

Note to paragraph (d): Biobased interior latex and waterborne alkyd paints and coatings products within this subcategory can compete with similar reprocessed latex paint and consolidated latex paint products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated reprocessed latex paints and consolidated latex paints containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.12.

#### § 2902.72 Oven and grill cleaners.

(a) *Definition.* Liquid or gel cleaning agents used on high temperature cooking surfaces such as barbecues, smokers, grills, stoves, and ovens to soften and loosen charred food, grease, and residue.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 66 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased oven and grill cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased oven and grill cleaners.

#### § 2902.73 Slide way lubricants.

(a) *Definition.* Products used to provide lubrication and eliminate stick-slip and table chatter by reducing friction between mating surfaces, or slides, found in machine tools.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 74 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than July 23, 2012, procuring agencies, in accordance with this part, will give a procurement preference for

qualifying biobased slide way 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 slide way lubricants.

#### § 2902.74 Thermal shipping containers.

(a) *Definitions.* (1) Insulated containers designed for shipping temperature-sensitive materials.

(2) Thermal shipping containers for which Federal preferred procurement applies are:

(i) *Durable thermal shipping container.* These are thermal shipping containers that are designed to be reused over an extended period of time.

(ii) *Non-durable thermal shipping containers.* These are thermal shipping containers that are designed to be used once.

(b) *Minimum biobased content.* The minimum biobased content for all thermal shipping container products shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) Durable thermal shipping containers—21 percent.

(2) Non-durable thermal shipping containers—82 percent.

(c) *Preference compliance date*—(1) *Durable thermal shipping containers.* Determination of the preference compliance date for durable thermal shipping containers is deferred until USDA identifies two or more manufacturers of biobased durable thermal shipping containers. At that time, USDA will publish a document in the **Federal Register** announcing that Federal agencies have one year from the date of publication to give procurement preference to biobased durable thermal shipping containers.

(2) *Non-durable thermal shipping containers.* Determination of the preference compliance date for non-durable thermal shipping containers is deferred until USDA identifies two or more manufacturers of biobased non-durable thermal shipping containers. At that time, USDA will publish a document in the **Federal Register** announcing that Federal agencies have one year from the date of publication to give procurement preference to biobased

non-durable thermal shipping containers.

Dated: July 15, 2011.

**Pearlie S. Reed,**

*Assistant Secretary for Administration, U.S. Department of Agriculture.*

[FR Doc. 2011-18478 Filed 7-21-11; 8:45 am]

BILLING CODE 3410-93-P

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### 10 CFR Part 1703

#### FOIA Fee Schedule Update

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Establishment of FOIA Fee Schedule.

**SUMMARY:** The Defense Nuclear Facilities Safety Board is publishing its Freedom of Information Act (FOIA) Fee Schedule Update pursuant to the Board's regulations.

**DATES:** *Effective Date:* July 29, 2011.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The FOIA requires each Federal agency covered by the Act to specify a schedule of fees applicable to processing of requests for agency records. 5 U.S.C. 552(a)(4)(A)(i). On May 16, 2011 the Board published for comment in the **Federal Register** its Proposed FOIA Fee Schedule, 76 FR 28194. In response to the notice, one comment was received regarding excessive fees. The Board's 2010 and 2011 FOIA fee schedules are the same; there is no proposed increase.

The Board is now establishing the Fee Schedule. Pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations, the Board's General Manager will update the FOIA Fee Schedule once every 12 months. The previous Fee Schedule Update was published in the **Federal Register** and went into effect on June 15, 2010, 75 FR 39629.

#### Board Action

Accordingly, the Board issues the following schedule of updated fees for services performed in response to FOIA requests: