DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503–AA31

Designation of Biobased Items for Federal Procurement

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending the guidelines for designating biobased products for Federal procurement, to add ten sections to designate items, including subcategories, within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002. USDA also is establishing a minimum biobased content for each of these items and subcategories.

DATES: This rule is effective June 13, 2008.

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

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

I. Authority

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

II. Background

As part of the Federal Procurement of Biobased Products, USDA published on August 17, 2006, a proposed rule in the **Federal Register** (FR) for the purpose of designating a total of 10 items for the preferred procurement of biobased products by Federal agencies (referred hereafter in this FR notice as the ''preferred procurement program''). This proposed rule can be found at 71 FR 47590. This rulemaking is referred to in this preamble as Round 3 (RIN 0503–AA31).

The Round 3 proposed rule proposed designating the following items, including their subcategories, for the preferred procurement program: 2-cycle engine oils; lip care products; non-durable films; [1] stationary equipment hydraulic fluids; disposable cutlery; [2] glass cleaners; greases, including food grade greases, multipurpose greases, rail track greases, truck greases, and greases not elsewhere specified as subcategories; dust suppressants; carpets; and carpet and upholstery cleaners.

Today's final rule designates the following 10 items, including subcategories, within which biobased products will be afforded Federal procurement preference: 2-cycle engine oils; lip care products; films, including semi-durable films and non-durable films as subcategories; stationary equipment hydraulic fluids; disposable cutlery; glass cleaners; greases, including food grade greases, multipurpose greases, rail track greases, truck greases, and greases not elsewhere specified as its subcategories; dust suppressants; carpets; and carpet and upholstery cleaners, including spot removers and general purpose cleaners as subcategories. USDA has determined that each of the items, including the subcategories within them, being designated under today's rulemaking meets the necessary statutory requirements; that they are being produced with biobased products; and that their procurement will carry out the following objectives of section 9002: To improve demand for biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

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

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

[1] At proposal, this item was identified as ''biodegradable films.'' Based on comments received, and as explained in this preamble, USDA has renamed this item as ''films'' and combined it with the proposed item ''durable films'' that was included in the October 11, 2006 Round 4 proposal (71 FR 59862).

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

In sum, USDA looks at the products within each item to evaluate whether there are groups of products within the item that meet different performance specifications and, where USDA finds this type of difference, it intends to create subcategories.

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

Within today's rulemaking, USDA has created subcategories within three items—films, greases, and carpet and upholstery cleaners. For films, the subcategories are semi-durable films and non-durable films. For greases, the subcategories are: Food grade greases, multipurpose greases, rail track greases, truck greases, and greases not elsewhere specified. For carpet and upholstery cleaners, the subcategories are spot removers and general purpose cleaners.

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

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

USDA anticipates that the minimum biobased content of an item or subcategory that is based on a single product is more likely to change as additional products in those items and subcategories are identified and tested. In today's rulemaking, none of the minimum biobased contents are based on a single tested product.

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

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

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

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

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

This final rule designates three items for preferred procurement for which there may be overlap with EPA-designated recovered content products. These items are: (1) Films in the semi-durable films subcategory, (2) stationary equipment hydraulic fluids and (3) carpets. Depending on how they are to be used, qualifying products under

these three items may overlap, respectively, with the EPA-designated recovered content products ''plastic trash bags,'' ''re-refined lubricating oil,'' and ''carpets (polyester).'' EPA provides recovered materials content recommendations for these three recovered content products in a Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations for each of these CPG products can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

EPA is proposing to designate nylon carpets as a recovered content product. If and when EPA finalizes designation of nylon carpets as a recovered content product, then carpets would have the potential to overlap with these types of carpets as well as the currently EPA-designated recovered content polyester carpets.

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

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

III. Summary of Changes

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

Item names. The names for two of the 10 items were revised. ''Biodegradable Films'' is now ''Films.'' ''Biodegradable Cutlery'' is now ''Disposable Cutlery.''

Item Definitions. The definitions of six of the 10 items were revised to varying degrees. These six items are: 2-cycle engine oils; films; stationary equipment hydraulic fluids; disposable cutlery; greases; and carpets.

Subcategories. In addition to finalizing the proposed subcategories under the ''greases'' item, subcategories were created for two items. The item that was proposed as ''biodegradable films'' and the proposed item ''durable films'' that was included in the October 11, 2006, Round 4 proposal (71 FR 59862) were combined as two subcategories (semi-durable films and non-durable films) under an item named ''films.'' The carpet and upholstery cleaners item was subcategorized into (1) spot removers and (2) general purpose cleaners.

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

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

For 2-cycle engine oils, the proposed minimum biobased content of 7 percent was changed to 34 percent.

For the films item (proposed as ''biodegradable films''), the proposed minimum biobased content of 22 percent was changed to 45 percent for the semi-durable films subcategory and 85 percent for the non-durable films subcategory.

For the stationary equipment hydraulic fluids, the proposed minimum biobased content of 46 percent was changed to 44 percent.

For the disposable cutlery item (proposed as ''biodegradable cutlery''), the proposed minimum biobased content of 33 percent was changed to 48 percent.

For glass cleaners, the proposed minimum biobased content of 23 percent was changed to 49 percent.

For the greases item, the proposed 73 percent minimum biobased content for the multipurpose greases subcategory was changed to 72 percent and the proposed 72 percent minimum biobased content for the truck greases subcategory was changed to 71 percent.

For dust suppressants, the proposed minimum biobased content of 66 percent was changed to 85 percent.

For the proposed carpet and upholstery cleaners item the proposed minimum biobased content of 34 percent was changed to 54 percent for the general purpose cleaners subcategory and the minimum biobased content for the spot removers subcategory was set at 7 percent.

Overlap with EPA CPG products. For the items stationary equipment hydraulic fluids and carpets, potential overlap with EPA CPG products was added to the final rule. Then, for both items that may overlap with EPA CPG products (re-refined lubricating oils and polyester carpets), a note was added to facilitate finding information on the two EPA CPG products.

IV. Discussion of Comments

USDA solicited comments on the proposed rule for 60 days ending on October 16, 2006. 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.

The comments contained in this **Federal Register** (FR) notice address general and specific comments related to Round 3 items. In addition to the information provided in the responses to public comments presented in this preamble, USDA has prepared a technical support document titled ''Technical Support for Final Rule—Round 3 Designated Items,'' which contains documentation of USDA's efforts to research and respond to public comments. The technical support document is available on the BioPreferred Web site. The technical support document can be located by clicking on the Proposed and Final Regulations link on the left side of the BioPreferred Web site's home page (*http://www.biopreferred.gov*). Click on Supporting Documentation under Round 3 Designation under Final Rules. This will bring you to the link to the technical support document.

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

technical support document as the result of general comments received on both Rounds 2 and 3. The technical support document for Round 3 includes additional information as identified in the remainder of this preamble.

General Comments

Minimum Biobased Content

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

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

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

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

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

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

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

As a result of the re-evaluation, many of the proposed minimum biobased contents have been revised for the final rule. These revisions will be presented and discussed in the item specific sections later in this preamble. For two items, USDA reviewed the biobased content data but did not find sufficient justification for revising the proposed minimum biobased content level. For lip care products, 8 biobased content test results were available (85, 86, 88, 88, 92, 93, 98, and 100 percent). Because this is a narrow range of data points, USDA proposed setting the minimum biobased content based on the product with a biobased content of 85 percent. Subtracting the three percentage points to allow for testing variability results in a minimum biobased content of 82 percent for this item. No public comments or additional data were received to support changing the proposed level. As a result, the proposed minimum biobased content of 82 percent was retained for the final rule.

For the carpets designated item, USDA reviewed the biobased content data (10, 10, 23, 24, 31, 35, and 37 percent) and found that the biobased content of the products that have been tested increases as the ''weight'' of the carpet increases. In most of these products the biobased material is used as the carpet backing and the thicker the backing, the higher the biobased content. The product with 37 percent biobased content also has a small amount of biobased material incorporated into the carpet face. USDA considered the possibility of creating subcategories within this item based on performance features (such as durability) but does not have sufficient data to justify subcategorization at this time. Because there are no significant breaks in the range of data points and the overall range is small, USDA has retained the proposed 7 percent minimum biobased content for this item. USDA will continue to gather information on this item and will consider creating subcategories in a future rulemaking.

Biobased Content Testing

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

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

Information on Designated Items

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

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

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

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

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

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

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

Comment: One commenter suggested that USDA take reasonable steps to ensure that the information that is offered to government agencies and that is provided on the government's Web site be objective and accurate. The commenter states that, while USDA's preference for using data and certifications that come from consensus standards organizations is commendable, it does not alleviate this concern. According to the commenter, there appears to be no current mechanism to verify accuracy and that USDA's request ''When possible, please provide appropriate documentation to support the environmental and human health attributes you describe'' alone appears to be insufficient to ensure fairness.

Response: USDA agrees with the commenter that the information made available to government agencies concerning biobased products needs to be objective and accurate. To address this situation, USDA is requiring manufacturers to provide documentation for information that will be posted directly on the BioPreferred Web site. If, in the opinion of USDA, such claims cannot be sufficiently supported, they will not be posted on the BioPreferred Web site. A manufacturer is still allowed to post such ''undocumented'' claims on their own Web sites, as any other manufacturer of any other product can do. USDA is not responsible for the information posted on a manufacturer's Web site. Thus, information obtained from the manufacturer's Web site needs to be considered in this context. Because USDA makes this distinction in the information it allows to be posted on the BioPreferred Web site, USDA disagrees with the commenter that this mechanism results in ''unfair'' results.

The second step that USDA plans to implement to help ensure the accuracy of the information posted on the BioPreferred Web site is an audit program. Under this audit program, USDA will randomly select products for sampling to ensure the accuracy of the information on selected products. The size of the BioPreferred Program, however, makes it difficult for USDA to reasonably verify every claim on every product. Thus, USDA must rely on an audit program.

Lastly, USDA notes that, by requiring the biobased content on products to be determined in an ISO-compliant facility, USDA is reasonably ensuring the accuracy of the reported biobased content. In conclusion, USDA believes the above steps meet the commenter's concerns.

Biobased Polymers

Comment: One commenter requested that USDA evaluate and address the effect that biobased polymers will have on current recycling streams and markets. According to the commenter, to the best of their knowledge, no technology exists to screen out biobased products during the recycling process and the presence of a small fraction of biobased polymers in the recycling stream may result in unintended consequences to the recycling infrastructure.

Response: The purpose of the BioPreferred Program is to encourage the purchase of biobased products, including products that are commonly recycled. However, like the commenter, USDA is concerned that such products are disposed of in an environmentally responsible manner. USDA has consulted with EPA and with representatives of the Association of Post-Consumer Plastic Recyclers

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

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

APCPR also pointed out that biobased polymers used for other applications, such as ''clam shell'' containers and other therma-form products, do not present a problem for the recycling of those products. They also noted that composting in commercial composting operations is a viable alternative to the recycling of biobased polymers. USDA encourages procuring agents and those involved in recycling to provide education material to potential purchasers and users on environmentally preferred disposal of such products. The APCPR Web site (*http://www.plasticsrecycling.org*) presents technical information on plastics recycling and procuring agents are urged to visit the site for more information. In addition, USDA will post relevant information in this regard on the BioPreferred Web site to assist manufacturers, purchasers, and users become aware of the potential impacts of biobased plastics on recycling and on the preferred disposable methods for such products.

Purchase of Biobased Products

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

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

Item Specific Comments

2-Cycle Engine Oils

Comment: One commenter stated that the definition of 2-cycle engine oil needed to be modified to make it clearer as to what products are within the item designation.

Response: USDA appreciates the need expressed by the commenter to have clearly defined items to identify which products are included in the item. USDA has modified the definition slightly to be clearer that products in this item are ''designed for use in 2-cycle engines'' and that such products provide lubrication and/or other properties beneficial to 2-cycle engines.

Comment: Two commenters stated that the list of performance standards shown for 2-cycle engine oils were not the applicable performance standards. The commenters referred to the standards set by four standard-setting organizations—the National Marine Manufacturers Association (NMMA), American Petroleum Institute (API), Japanese Automobile Standards Organization (JASO), and International Standards Organization (ISO). The commenters pointed out that the only relevant standard for outboard motors is the one set by the NMMA. The commenters felt that to continue to include 2-cycle engine oils that do not meet or exceed standards set by these four organizations would result in engine failure and a bad reputation for products within this item designation. The commenters, therefore, recommended that only those 2-cycle engine oils that meet one or more of the standards set by those four organizations be included in the preferred procurement program.

One of the commenters further recommended that the level of criteria be included so that purchasers can buy products according to the level of performance needed.

Response: USDA thanks the commenters for the information concerning the standards being set by the four organizations identified by the commenters. USDA agrees that purchasers of 2-cycle engine oils need to be aware of these standards when purchasing any 2-cycle engine oil, including biobased 2-cycle engine oils. USDA believes the best way to provide this information is to make it available on the BioPreferred Web site. USDA disagrees that such standards need to be incorporated into the rule for these products because to do so, in part, would place restrictions on the manufacturers of biobased 2-cycle engine oils that do not exist for manufacturers of non-biobased 2-cycle engine oils. Although USDA believes that it would be beneficial to the manufacturer of any product to be able to demonstrate that their products meet or exceed applicable performance standards, USDA does not believe that it should force biobased product manufacturers, by regulation, to test against all applicable performance standards prior to marketing their products. USDA believes this is unnecessary because purchasing agencies should not buy biobased 2-cycle engine oils or, for that matter, petroleum-based 2-cycle engine oils if

they do not meet the agency's specifications or performance standards.

Comment: Three commenters stated that the proposed minimum biobased content of 7 percent for 2-cycle engine oils was too low. One of the commenters recommended a minimum biobased content of 30 percent. According to this commenter, there are a variety of 2-cycle engine oils with renewable contents in the 30 to 50 percent range that meet the applicable performance standards and that are commercially available from different manufacturers.

The second commenter recommended that the minimum biobased content for 2-cycle engine oils be at least 50 percent. This commenter expressed concerned that at this low biobased content, 2-cycle engine oils would not even pass the ASTM–D5864 Biodegradable Classification and that European Union 2-cycle engine oils are at least biodegradable.

The third commenter suggested that, based on the data in the background information, USDA recommend multiple content levels reflecting differences in product use.

All three commenters expressed concern that petroleum companies would add just enough biobased oils to their products to qualify for preferred procurement. One of the commenters stated that this would ruin biobased manufacturers in this particular market and another stated that this would be contrary to the objectives of the Farm Security and Rural Investment Act.

Response: As discussed earlier in this preamble, USDA re-evaluated the proposed minimum biobased content for all of the proposed items. Based on the re-evaluation of the biobased content data, the minimum biobased content for 2-cycle engine oils has been set at 34 percent. The biobased content for products that have been tested are: 37, 39, 60, 77, and 78 percent. At proposal, the minimum biobased content of 7 percent was based on a product that was described as being formulated to meet specific Japanese performance standards for small engines. Since proposal, this product has been withdrawn by its manufacturer and is no longer available.

Because there is a significant break in the data between the 39 percent product and the 60 percent product, USDA considered the possibility of establishing subcategories within this item. The two products with 37 and 39 percent biobased content have shown that they meet certain small engine performance specifications and biodegradability standards, while such information is not available for the products with the higher biobased contents. At this time, however, USDA has not received sufficient information related to small engine performance specifications to justify subcategorizing this item. USDA will continue to collect performance information and will consider subcategorizing this item through future rulemakings as additional information is made available.

Based on the presently available information, USDA believes that setting a minimum biobased content to allow procuring agencies to select products at this lower biobased content level is desirable. USDA will continue to gather additional information on the performance of other products within this item. If verification is obtained that products with significantly higher biobased contents can meet the performance and biodegradability standards offered by the products with lower biobased contents, USDA will also consider raising the minimum biobased content for this item in a future rulemaking. As additional information becomes available, USDA will also consider creating subcategories within this item at a later date based on features such as biodegradability.

Because biodegradability can be an important attribute for 2-cycle engine oils used in marine environments, USDA continues to encourage all manufacturers of 2-cycle engine oils, and other biobased products, to provide as much information as possible concerning biodegradability and other beneficial characteristics of their products. The ASTM method mentioned by the one commenter (ASTM–5864) is a test method that can be used to determine the level of biodegradability. The availability of such information will assist procuring agencies in selecting biobased products that meet particular needs, such as biodegradability.

Lip Care Products

Comment: One commenter pointed out that there is no standard for lip care balm.

Response: USDA appreciates the commenter's review of, and comment on, the proposed designated item. USDA agrees with the commenter that no performance standards for lip balm have been identified. USDA points out, however, that the lack of identified performance standards is not relevant to the designation of an item for preferred procurement. In order to designate items for preferred procurement, section 9002 of FSRIA requires USDA to consider: (1) The availability of items; and (2) the economic and technological feasibility of using the items, including the life cycle costs of the items. If and when performance standards and other relevant measures of performance are identified for this item, USDA will provide such information on the BioPreferred Web site.

Films (Formerly Biodegradable Films)

Comment: One commenter stated that the definition for biodegradable films was vague and needed clarification. The commenter assumed that, based on the proposed definition, the designated item includes non-durable films intended to be used once before being discarded. The commenter then asked: How will the ''durable films'' item to be proposed at a later date be differentiated from this item? The commenter recommended that this item be retitled ''disposable bags, wrappings and liners.''

Response: USDA agrees with the commenter that the name for this item should not refer to ''biodegradable'' films. USDA has renamed this item as ''films'' and has an included a non-durable films subcategory for the products that were in the ''biodegradable films'' item at proposal. USDA also proposed, under a separate rulemaking, designating an item named ''durable films'' and has now included under the new ''films'' item a subcategory for the products that were in that proposed item. USDA has revised the definitions in the final rule for the ''semi-durable films'' subcategory to make it clearer as to the types of products it covers as opposed to those films that would be covered by the ''non-durable films'' subcategory. For example, USDA has revised the definition to clearly state that non-durable films are intended for single use before being discarded, as suggested by the commenter.

Comment: One commenter recommended that, based on the data in the background information, the minimum biobased content for this item be set based on the products with tested biobased contents of either 52 or 62 percent, rather than on the product with a tested biobased content of 25 percent, which resulted in the proposed minimum biobased content of 22 percent. The commenter then stated that USDA should obtain information to justify the claim made in the preamble that Federal agencies need products with a longer shelf-life, thereby supporting the 22 percent content recommendation.

Response: As discussed above, USDA has established two subcategories for this item, one for semi-durable films and one for non-durable films. For the semi-durable films subcategory, USDA has biobased content data for 11 products (25, 48, 49, 52, 62, 62, 62, 62,

62, 62, and 64 percent biobased). Because there is a significant break in the data between the 25 percent product and the 48 percent product, USDA investigated the product information available for the 25 percent product to determine if it offered characteristics not offered by the other products. USDA found that there were no performance claims for this product that distinguished it from the products with a higher biobased content. The biobased content for the remaining products were within a narrow range and no performance or applicability information was available to further divide the products within the subcategory. Therefore, the minimum biobased content has been set at 45 percent for this subcategory, based on the product with the tested biobased content of 48 percent.

For the non-durable films subcategory, the tested biobased contents are: 88, 89, 90, 94, and 96 percent. The data points are within a narrow range and no information was available to further divide the products within the subcategory. USDA is, therefore setting the minimum biobased content for non-durable films at 85 percent, based on the product with a biobased content of 88 percent.

Stationary Equipment Hydraulic Fluids

Comment: One commenter requested that USDA designate as a subcategory hydraulic oil used in mobile equipment for preferred procurement.

Response: USDA has already designated mobile hydraulic fluids under the first group of products designated for preferred procurement. The commenter is referred to the March 16, 2006, **Federal Register** notice (71 FR 13686). To help avoid such confusion, USDA will try in future proposals to group similar items together within a rulemaking.

Comment: Two commenters stated that the definition of stationary equipment hydraulic fluids was somewhat unclear and needed to be modified. One of the commenters suggested the following definition: Fluids used in stationary hydraulic equipment systems that have various mechanical parts, such as cylinders, pumps, valves, pistons, and gears, that are used for the transmission of power (and also for lubrication and/or wear, rust, or oxidation protection).

Response: USDA appreciates the commenters' suggested revisions to the proposed definition of this designated item and has incorporated the suggestions into the definition in the final rule.

Comment: Two commenters addressed the proposed minimum biobased content for stationary equipment hydraulic fluids. One commenter agreed with the proposed minimum biobased content of 46 percent. The other commenter felt that, based on the data in the background information, the proposed content was too low and should be based on the product with a tested biobased content of 64 percent. This commenter also stated that, if the lower content levels reflect products used for different applications than those with higher content levels, then USDA should provide separate content recommendations.

Response: The 48 biobased content data points in this data set range from 47 percent to 100 percent. USDA's re-evaluation of the biobased content data for this item did not identify any significant breaks in the range nor was there data available to support subcategorization. Because of the very wide range of applications in which these products are used, USDA was unable to identify discreet subcategories without significant overlaps in the biobased contents among the subcategories. USDA is setting the minimum biobased content for this item at 44 percent, based on the product with a tested biobased content of 47 percent, because the products at this end of the range are believed to offer performance characteristics, such as the ability to be used in low temperature applications, not offered by some of the products with a higher biobased content. USDA will continue to gather additional information for this item and will consider creating subcategories based on product performance and/or applicability if sufficient supporting documentation can be obtained.

Comment: One commenter stated that, as a practical matter, the overlap with biobased hydraulic fluids and EPA-designated recovered content lubricating oils is likely to be limited because most re-refined oil is being used for motor/engine oil, not hydraulic fluids. The commenter stated that DLA's re-refined oil program is focused on motor/engine oil and not hydraulic fluids and that a check of the DLA Web site does not indicate any standards for, or purchase contract for, re-refined hydraulic fluid. Further, according to the commenter, most of the re-refined oil vendors listed in EPA's CPG supplier database are selling re-refined motor/engine oil, with only one or two companies on the list appearing to sell re-refined hydraulic fluids. The commenter believes that market factors are directing the current supply of re-refined base oil stock into the engine oil segment, which probably makes sense given the size of that market.

Based on these factors, the commenter believes that it is entirely possible that Federal buyers may have a difficult time finding and, with very limited choices, buying re-refined hydraulic fluids. The commenter believes that buyers wanting to replace petroleum-based hydraulic fluid products may find biobased hydraulic fluids more available in the marketplace than re-refined hydraulics. The commenter noted that, in situations where there are concerns for spills, readily biodegradable biobased hydraulic oil would be a better choice based on performance.

Finally, the commenter stated that if more re-refined base stock oil becomes available in the market place, it is possible that manufacturers of hydraulic fluids could use a combination of vegetable oils and re-refined oil base stock to meet both biobased content and CPG Guidelines.

Response: USDA believes that the commenter makes some very good and valid observations concerning the potential for, or lack of, overlap between biobased hydraulic fluids for stationary equipment and EPA-designated recovered content re-refined lubricating oil. However, USDA continues to believe there is a potential for overlap and that to identify such potential is still worthwhile. Furthermore, USDA appreciates the point raised by the commenter concerning the potential preference to be shown to biobased hydraulic fluids over EPA-designated recovered content products where biodegradability may be an issue in the use of the fluid. In such instances, the biobased fluid may be able to meet the need to be biodegradable while the non-biobased fluid cannot.

Disposable Cutlery (Formerly Biodegradable Cutlery)

Comment: One commenter asked why this biobased item was also ''biodegradable.'' Another commenter pointed out that the other ''biodegradable'' items referenced ASTM D6400 in their definitions and asked whether cutlery should also reference ASTM D6400 instead of ASTM D5338.

Response: The products covered by this item were intended to be disposable cutlery, with preferred procurement to be given to biobased disposable cutlery. Further, it was USDA's intent that preferred procurement is given to biobased disposable cutlery that is also biodegradable. As discussed earlier in this preamble, where disposability considerations are equally important as

performance characteristics, USDA plans on requiring biodegradability for products within the designated item if there are established biodegradability standards. Some of the manufacturers of products within this item claim biodegradability as a feature of their products. However, USDA has not been successful in obtaining sufficient evidence that these products provide acceptable levels of performance. Thus, USDA does not believe that, at this time, biodegradability should be a requirement that products in this item must meet to qualify for preferred procurement. However, USDA will continue to investigate the performance of biodegradable disposable cutlery and, if sufficient evidence of acceptable performance is obtained, USDA will amend the designation of disposable cutlery to add biodegradability as a requirement for this item. USDA also continues to urge procuring agencies to consider biodegradability as a desirable feature of products within this item and to purchase biodegradable biobased disposable cutlery to the extent that these products meet their performance needs.

USDA agrees with the commenter that ASTM D6400 should be the primary test method for demonstrating the biodegradability of biobased cutlery. However, there may be other biobased formulations for which ASTM D6400 would not be the appropriate test method for demonstrating biodegradability. For example, if the cutlery is to be disposed of in a marine environment, the appropriate test method would be ASTM D7081. Thus, while biodegradability is not a requirement for products within this item, manufacturers wishing to demonstrate biodegradability are encouraged to use the most appropriate ASTM test methods.

Lastly, USDA notes that disposable cutlery needs to be composted rather than landfilled in order for the cutlery to biodegrade and that they need to be composted in commercial composting facilities in order to be exposed to the proper temperature and moisture requirements for composting. Composting these products in a ''backyard'' compost pile will not necessarily result in the complete biodegradation of the product.

Comment: One commenter stated that the information provided in the Performance Standards document does not indicate whether biodegradable cutlery will perform when used for eating. A second commenter noted that biobased cutlery, if purchased, may not initially replace the combat-tested utensil, heavy duty, long handled spoon in the Meal, Ready-To-Eat without extensive DoD review, testing, field test and approval from U.S. Army Natick, ACES, Surgeon General and the Military Services. The second commenter also noted that applying the procurement preference rule to this combat-related product would not result in the multiplied effect across the economy that they would expect in the cutlery similar to that used in restaurants across the nation.

Response: USDA agrees with the points made by the commenters. USDA was unable to identify any performance standards relevant to disposable cutlery and encourages the development of such to assist in the evaluation of such products. Without such standards as a guide, the performance of biobased cutlery may be unknown in any one situation. USDA does know through real-world experience that the performance of biobased cutlery will vary depending on its formulation and on the particular environment in which it is used.

With regard to the second commenter, USDA notes that, for the reasons provided earlier in this preamble, the final rule does not require preferred procurement for disposable cutlery purchased for use in combat or combat-related missions. If and when biobased cutlery is demonstrated to meet all of the performance requirements of DoD in tactical situations, USDA reserves the right to withdraw such exemptions for disposable cutlery. Should that situation occur, USDA appreciates the fact that purchase of biobased cutlery may be more limited for combat-related purchases than for general restaurant purchases, but the statute for this program is aimed at Federal agency purchases and not for private enterprise purchases.

Comment: Two commenters recommended that USDA set the minimum biobased content near 100 percent given the availability of products in this item containing 100 percent biobased content. One of the commenters stated that 33 percent is too low. A third commenter expressed concern with the direction of the biobased content for cutlery based on their experience. The commenter stated that they are likely to start procuring 50 percent biobased cutlery even though a superior 100 percent biobased utensil already exists. This commenter asked ''What are practical ways the Federal Government can find and place incentives in its policies for contractors to develop biobased products with the greatest degree (high percent) of biobased content, and measure its success in this regard?''

Response: USDA appreciates the fact that some biobased cutlery can be made with nearly 100 percent biobased content, such as in the production of spoons based on PLA. However, the performance variability of currently available biobased cutlery under different food environments (for example, hot soups and drinks) is well known and this variability is associated directly with biobased content. Purchasers of biobased cutlery need to take into account such performance aspects, even if they occur in a trial-and-error mode as there are no performance standards established for this item. To account for these different applications, a wider range of biobased content cutlery should be made available. USDA currently has biobased content test data on six samples of products within this item (36, 49, 51, 73, 97, and 100 percent). As discussed earlier, USDA has re-evaluated the biobased content data and the proposed minimum biobased contents for all of the proposed items. In reviewing the data for this item, USDA found that the product with the 49 percent biobased content is currently being reformulated by its manufacturer and, thus, it will not be considered in setting the minimum biobased content. Within the remaining data, there are breaks in the data between the 36 and 51 percent products, the 51 and 73 percent products, and the 73 and 97 percent products. USDA did not have sufficient data on the performance of products within these groups to justify creating subcategories. However, USDA is aware that there does appear to be a correlation between biobased content and performance with high temperature food and beverages. That is, the higher biobased content products do not generally perform as well in high temperature applications. As a result, USDA is setting the minimum biobased content for this item at 48 percent, based on the product with a tested biobased content of 51 percent. USDA believes that setting the minimum biobased content at this level will allow products with acceptable high temperature performance characteristics to receive the procurement preference.

As more information is developed on the biobased content of products within this item and on the associated performance of those products, USDA will revisit this item to determine if the minimum biobased content needs to be revised or if it is appropriate to develop subcategories. USDA will also continue to investigate the performance of biodegradable disposable cutlery and, if sufficient evidence of acceptable

performance is obtained, USDA will amend the designation of disposable cutlery to add biodegradability as a requirement for this item.

Glass Cleaners

Comment: One commenter stated that they were concerned that USDA's collection methods were deficient because so few products formed the basis of the proposed rule. The commenter referred to a California Air Resources Board (CARB) survey, which identified 127 aerosol glass cleaners sold in the state of California alone. The commenter, therefore, recommended that USDA conduct a very thorough evaluation of glass cleaners. The commenter also stated that the BEES and biobased contents obtained may not be representative of all products on the market, representing instead only a small subset of products. The commenter recommended that the rulemaking demonstrate that the products evaluated are representative of the market and appear to have been overlooked in USDA's initial investigation.

Response: USDA appreciates the information concerning the CARB study, which covered both biobased and non-biobased products. Because one of the purposes of the BioPreferred Program is to identify biobased products for potential preferred procurement, USDA's product investigation efforts did not seek out non-biobased products. USDA identified, at proposal, 16 manufacturers of biobased products within this item, with 19 biobased products being marketed.

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

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

Comment: One commenter stated that some of the products investigated under glass cleaners do not seem to fit the proposed definition. For example, one product description states: ''* * * (product) is for use on bathroom mirrors, goggles, or any lens surface where confined areas tend to mist or fog. Forms an invisible shield, or film, that keeps mirrors, car windows, glass, goggles, lenses and plastic, free from mist, steam, or fogging.'' The commenter, therefore, recommended that the category be clearly defined and restricted to glass cleaners only. The commenter also recommended that the definition be refined based on their input.

Response: USDA has re-examined the products identified under the glass cleaner item designation. The product identified by the commenter also performs a glass cleaning function. Thus, USDA believes that it is reasonable to retain this particular product as a product under this item. However, USDA agrees in principle with the commenter that the information provided on products under each item should be only for products that are within the definition of the item designated for preferred procurement. Therefore, USDA will review products within all items designated to make sure this occurs. Because the product questioned by the commenter still falls within the intended group of products defined by this item, USDA has determined that it is unnecessary to redefine the item in the final rule.

Comment: One commenter recommended that the standard for performance should not be restricted to the U.S. Navy #NASEA 6840 and Green Seal (GS) GS–37 methods, but must include other methods such as the EPA Design for the Environment performance standards, or other science-based performance criteria. The commenter then stated that all test methods should be thoroughly researched and evaluated and, if relevant, included in the proposed rule.

Response: USDA points out that the performance standards and test methods that are reported in the preamble are neither requirements nor the entire universe of relevant and applicable performance standards for glass cleaners. The reported performance standards and test methods are those that have been used and reported by manufacturers of biobased glass cleaners. While it is not necessary to identify all test methods and performance standards that are applicable to an item in order to designate that item for preferred procurement, USDA encourages the provision of additional information on other relevant and appropriate test methods and performance standards for glass cleaners and will post relevant information on the BioPreferred Web site.

With regard to the comment on the Design for the Environment (DfE), the DfE Formulator program is not a standard per se, but an industry partnership program designed to help manufacturers design products with better environmental profiles. The DfE program provides recognition to participating companies and products that have ''passed'' the DfE criteria. The DfE review process focuses primarily on health and environmental criteria, and has reviewed both glass cleaners and carpet cleaners, two items within this rulemaking. The DfE program does include relevant performance standards, such as ASTM and CSMA standards, for cleaning products. Relevant industry standards for cleaners identified through DfE include: SSPA Method DCC09 for cleaning, streaking, and smearing for glass cleaners; ASTM D488 for soil removal on relevant substrates for general purpose cleaners; CSMA DCC–03 and AATCC test method 171–1995 for carpet cleaners; and ASTM D5345 for soil removing for washroom cleaners. For more information on the DfE program, visit *http://epa.gov/dfe/pubs/projects/formulat/formpart.htm*. Appendix A of the document Technical Support for Final Rule—Round 3 Designated Items, which can be accessed on the BioPreferred Web Site, contains a draft document of the DfE Formulator Program.

Comment: One commenter stated that the minimum biobased content for glass cleaners, based on the data in the background information, should be 52 percent, not the proposed 23 percent. The commenter also stated that if USDA decides to retain the 23 percent level, that this level appears to be erroneous and should be 26 percent because the data in the background information shows products with biobased contents ranging from 29 to 100 percent. Therefore, the content level should be 26 percent, not 23 percent.

Response: At proposal, USDA had biobased content test data on four glass cleaners. The biobased contents were 29, 52, 67, and 100 percent. As pointed out by the commenter, the range of reported biobased contents for tested products is 29 to 100 percent and, using the rationale presented at proposal, the minimum biobased content should have been set at 26 percent. At one point during the evaluation of this item USDA

had information on a product with a tested biobased content of 26 percent. However, this product was withdrawn from consideration. USDA inadvertently failed to revise the minimum biobased content for this item when that product was withdrawn.

USDA has reevaluated the proposed minimum biobased content based on the additional data and on public comments. At this time, USDA has biobased content data for 12 tested products (5, 16, 26, 27, 29, 52, 61, 67, 76, 81, 98, and 100 percent biobased content) within this item. There is a significant break in the range of data points between the 29 percent and the 52 percent products. USDA considered whether the products with biobased contents below this break and those above it could be included in two separate subcategories. USDA found that there was not sufficient information on product performance or applicability to justify creating subcategories. As a result the minimum biobased content for this item has been set at 49 percent based on the product with a tested biobased content of 52 percent. As more information is developed on the biobased content of products within this item and on the associated performance of those products, USDA will revisit this item to determine if the minimum biobased content needs to be revised or if it is appropriate to develop subcategories.

Greases

Comment: One commenter stated that the definitions of greases, multipurpose grease, rail track greases, and greases not elsewhere specified need to be modified to make them better understood. Another commenter pointed out that the definition of greases was ''fine as far as it goes,'' but pointed out that there are greases that are thickened with polymers and other forms of solids. The commenter pointed to a class of grease thickened with Polyurea (this type of grease is found in the drive axles on front wheel drive cars) and noted that this was a very large market.

Response: USDA agrees that the various other compounds cited by the one commenter can be constituents in the formulation of a biobased grease. While the definition proposed for ''greases'' did not preclude these other substances, USDA has modified the definition slightly to accommodate the commenter's suggestion.

With regard to the definitions of multipurpose grease and rail track grease, USDA continues to believe that the proposed definitions are sufficient to define the types of greases that are covered by the two items. Therefore, USDA did not make any changes to these two definitions.

With regard to greases not elsewhere specified, USDA has also not changed the definition from what was proposed. Products that fall within this category are greases that cannot be classified under any of the other four subcategory definitions. USDA believes that the proposed definition is clear on this. As additional information becomes available on other types of greases, USDA will consider additional subcategories, thereby reducing the number of grease products that would fall into the ''greases not elsewhere specified'' subcategory by default (see the following comment and response).

Comment: One commenter recommended that USDA add additional subcategories for: (1) Heavy duty grease with EP (Extreme performance) additives for the very heavy loaded joints often found in heavy duty earthmoving equipment, (2) water resistant grease, and (3) greases for very high and very low temperatures. The commenter recognized that these subcategories would need to be investigated before minimum biobased contents could be established, but encouraged USDA to establish the subcategories because the need for these types of greases exist.

Response: USDA appreciates the commenter's suggestion for additional grease subcategories and will seek to collect information on these suggested subcategories for potential future designation. In the meantime, USDA notes that such greases would qualify for preferred procurement under the ''Greases not elsewhere specified'' subcategory if they meet the minimum biobased content of 75 percent set for the ''greases not elsewhere specified'' subcategory.

Comment: Two commenters submitted comments on the proposed minimum biobased content for greases. One commenter supported the provision of multiple biobased contents depending on the use of a grease product, but felt that, based on the information in the background document, it is not possible to determine whether some of the recommended content levels should be higher. Therefore, the commenter requested that USDA re-characterize the background data by use (e.g., food grade, multipurpose, rail track, etc.).

In addition, the commenter requested that for greases that will be exposed directly to the environment, such as rail track greases, USDA conduct further research and determine whether a higher biobased content level and a biodegradability requirement are appropriate in order to minimize adverse impacts on the environment.

The second commenter felt that most of the proposed minimum biobased contents were too high and that one was too low. The commenter recommended the following minimum biobased contents:

Food grade grease: 40 percent (vs. proposed 42 percent);

Multipurpose grease: 40 percent (vs. proposed 73 percent);

Rail track grease: 50 percent at least (vs. proposed 30 percent);

Truck grease: 50 percent (vs. proposed 72 percent); and

Greases not elsewhere specified: 50 percent (vs. proposed 75 percent).

This commenter also stated that, for four of the greases (i.e., multipurpose, food grade, truck, and greases not elsewhere specified), they would not be able to get the proper additives to make a high performance multipurpose or food grade grease or certain of their other greases because the required additives and thickeners are not biobased at this time.

Response: USDA agrees that the information in the background documentation could have made clearer which grease products were included in which grease subcategory. USDA has reorganized the background information to make this clear. Additional details on the subcategorization and the biobased contents for products within this item can be found in Chapter 2.0 of the document ''Technical Support for Final Rule—Round 3 Designated Items,'' which is available on the BioPreferred Web site.

USDA has re-evaluated the minimum biobased contents for each of the subcategories in this item. For the food grade greases subcategory only three data points are available (45, 62, and 95) and no further subcategorization can be supported by the data. Thus, the minimum biobased content remains at 42 percent, as proposed. For the multi-purpose greases subcategory, the tested biobased contents are all within a narrow range (75, 76, 76, and 76 percent). The minimum biobased content is set at 72 percent based on the product with the 75 percent biobased content, which is a new test data point received after proposal. For the truck greases subcategory, the tested biobased contents are also within a narrow range (74, 75, 77, and 77 percent). The minimum biobased content is set at 71 percent based on the product with the 74 percent biobased content, which is a new test data point received after proposal. For the greases not elsewhere specified subcategory, the tested biobased contents are somewhat more

widely spread than the previous subcategories but are still within a reasonably close range (78, 87, 95, and 96 percent). USDA found no justification in the data to support further subdividing this subcategory and the minimum biobased content remains at the proposed level of 75 percent.

For rail track greases, the tested biobased contents are 33, 33, 39, 51, 66, and 66 percent and USDA has identified only two manufacturers of rail track greases. One manufacturer produces two rail track greases for use in cold temperature (both at 33 percent biobased content), two multi-season/all season rail track greases (39 percent and 51 percent biobased content), and one summer rail track grease (66 percent biobased content). The other manufacturer produces a rail track grease that can be used under a wide range of temperatures.

USDA believes that with sufficient information it would make sense to subdivide rail track greases. Based on the current information, USDA could subdivide rail track greases into three subcategories—winter/arctic greases, all season greases, and summer greases. If this were done, the minimum biobased contents would be, respectively, 30, 36, and 63 percent. Because only one manufacturer has been identified to date for two of these three potential subcategories, USDA would defer the effective preferred procurement dates for two of the three subcategories (i.e., for winter rail track greases and summer rail track greases).

USDA does not believe that the above option is in the best interest of the BioPreferred Program at this time. Instead, USDA believes that the preferred procurement program under the BioPreferred Program is better served at this time by not subcategorizing rail track greases. By establishing a minimum biobased content at 30 percent (as proposed), all rail track greases would be available for preferred procurement (i.e., there would be no deferred effective dates for preferred procurement). This option allows the purchasing agency at least two manufacturers from which to select their product to meet their needs. If a purchasing agency needs a ''summer'' rail track grease, the purchasing agency would not select a winter or arctic rail track grease, but instead would have the option of selecting one of the ''all season'' rail track greases or a summer grease. Similarly, if a purchasing agency needs a ''winter'' rail track grease, it would have the option of selecting one of the winter rail track greases or one of the ''all season'' rail track greases. Thus, USDA is setting the minimum biobased content for rail track greases at 30 percent, as was proposed. As additional information is obtained on more biobased rail track grease products, USDA will re-evaluate this subcategory with regard to further subcategorization and the minimum biobased content.

Lastly, one of the commenters requested that USDA consider whether biodegradability should be included as a requirement for greases, in particularly for rail track greases. USDA agrees with the commenter that the level of biodegradability should be considered when purchasing greases or other products that may be released into the environment during their use or disposal. As discussed earlier in this preamble, USDA is requiring biodegradability as a prerequisite for some designated items when concern about the disposal of the items is a key criterion. USDA believes, however, that performance is the key factor in a purchaser's decision as to which product within this designated item to purchase. In the case of items where USDA judges performance to be the key decision-making factor for purchasers, USDA will not require biodegradability as a prerequisite for participation in the preferred procurement program. Therefore, USDA is not requiring biodegradability as a requirement for greases.

Dust Suppressants

Comment: One commenter stated that the OSHA Hazard Communication Standard for dust suppressants does not convey whether the product does, in fact, suppress dust.

Response: USDA agrees with the commenter. This OSHA standard, which was cited in the background document for one of the manufacturer's products, is designed to ensure that information about health and physical hazards of chemicals and associated protective measures is disseminated to people in the workplace, and does not address performance standards for these products. Therefore, when evaluating the performance of dust suppressants, this particular standard is not relevant.

Although USDA received no public comments related to the proposed minimum biobased content for dust suppressants, the proposed value was re-evaluated as part of USDA's review of all biobased content data. For this item, five biobased content tests were available (69, 88, 89, 98, and 100 percent). Because there is a significant break in the data between the 69 percent product and the 88 percent product, USDA reviewed the product performance information to determine if there was sufficient justification for creating subcategories or for setting the minimum biobased content based on the one product with a biobased content below 88 percent. No unique performance characteristics or applications were identified that would justify either subcategorization or setting the minimum biobased content based on the 69 percent product. Therefore, the minimum biobased content for this item is set at 85 percent, based on the product with the 88 percent tested biobased content.

Carpets

Comment: One commenter proposed the following definition for carpet to better reflect the various ways carpets are made: Floor coverings composed of woven, tufted, or knitted fiber and a backing system.

Response: USDA agrees with the commenter and has revised the definition accordingly in the final rule.

Comment: One commenter asked if any of the tested carpet samples had biobased content in the face. The commenter pointed out that a carpet manufactured by Interface had 15 percent biobased content in its face.

Response: One of the carpet samples evaluated by USDA did have biobased material in the carpet face. The biobased content of this sample was 37 percent.

Comment: Four commenters suggested that USDA set minimum biobased content requirements separately for backing and face used in carpets. A fifth commenter suggested that for now USDA proceed as proposed, but that USDA continue to collect additional biobased content data on carpet backing and carpet face fiber as these products become available, because carpet fiber and carpet backing can come from very different biobased material sources and it may make sense in the future to treat them separately.

One commenter suggested setting separate minimum biobased content requirements for backing and face because the technology to produce biobased backings is considerably advanced over that of face fiber. In situations where a Federal buyer may be able to use a natural fiber faced carpet product, the commenter recommended that this be encouraged separately.

One of the other commenters suggested that USDA create three subcategories as follows:

Fiber face (broadloom)—materials that are used to make the face of carpet produced in widths generally wider than six feet.

Fiber face (modular)—materials that are used to make the face of carpet produced in squares generally varying

in measurements from 18 inches to 36 inches.

Backing Systems—includes primary, secondary and attached cushion.

According to this commenter, such an approach would be compatible with the way Federal agencies make carpet purchasing decisions; that is, in selecting carpets, agencies have to decide if they want broadloom or carpet tile, and then what type of face fiber (e.g., polyester, nylon, wool), type of pile (e.g., cut, loop), the weight of the face, the color and pattern, and the backing systems. All of these aspects of a carpet have to fit together to achieve the performance that the purchaser needs. Further, because buyers assemble a set of specifications when they purchase carpet, having subcategories of designated biobased item for carpet would better inform potential buyers about the availability of biobased content in various parts of the carpet construction and in various carpet types (e.g., broadloom and tiles).

Response: USDA has not changed the definition of the designated item for the final rule. USDA acknowledges that the commenters have provided valid reasons why subcategorization of this designated item may be appropriate at some point. However, given the current state of development of biobased products within this designated item, USDA does not believe that sufficient data are available to support such a subcategorization. USDA will continue to gather and review information that could be used to support subcategorization of this designated item and the establishment of different minimum biobased content requirements in the future.

Comment: One commenter felt that the proposed minimum biobased content (7 percent) was reasonable at this time, while two commenters recommend that the minimum biobased content for carpets be raised. One commenter stated that setting the initial minimum biobased content based on the lower end of the samples tested to date will provide more potential products and will encourage more widespread use of biobased products. The commenter pointed out that carpet containing biobased material is still very much in a development stage and the proposed level should help stimulate more development of biobased carpets.

The two other commenters recommended raising the minimum biobased content to a minimum of 50 percent. These commenters felt that such a minimum level was necessary for many of the proposed items in order to further the goal of the program.

Response: USDA reviewed the biobased content data for carpets (10, 10, 23, 24, 31, 35, and 37 percent) and found that the biobased content of the products that have been tested increases as the ''weight'' of the carpet increases. In most of these products the biobased material is used as the carpet backing and the thicker the backing, the higher the biobased content. The product with 37 percent biobased content also has a small amount of biobased material incorporated into the carpet face. USDA considered the possibility of creating subcategories within this item based on performance features (such as durability) but does not have sufficient data to justify subcategorization at this time. Because there are no significant breaks in the range of data points and the overall range is small, USDA has retained the proposed 7 percent minimum biobased content for this item. USDA will continue to gather information on this item and will consider creating subcategories in a future rulemaking.

Comment: One commenter stated that the Standard Title column in the Performance Standards document for carpeting does not address how well the carpet will wear. Another commenter stated that NSF International's Sustainable Carpet Assessment Draft Standard (Draft Standard NSF 140–2005) should be mentioned. The commenter pointed out that this has been published as a draft ANSI standard, and products can be certified to the draft standard. The commenter also pointed out that the state of California has adopted the gold and platinum levels of certification under this standard as their state purchasing specification.

Response: USDA has not identified applicable performance standards for carpet wear. However, ASTM D3181 has been identified as a test method that can be used to measure carpet wear. While this method does not specify an ''acceptable'' level of performance, it does define a standardized test procedure that can be used to develop carpet wear data that can then be used to compare expected wear between different carpet samples. USDA will add information on both the ASTM D3181 test method and the NSF International's Sustainable Carpet Assessment Draft Standard (Draft Standard NSF 140–2005) to the information available on the BioPreferred Web site for this designated item.

Comment: Three commenters urged USDA to have biobased procurement preference take priority over recycled content preference for carpets where carpet backing is made from recycled polyvinyl chloride (PVC). One of the commenters made this request because, according to the commenter, PVC has serious health impacts throughout its life cycle—notably the production of dioxin in manufacture and disposal and release of phthalates. This commenter pointed out that (1) dioxin reduction is a goal that the U.S. government has committed to through its signing of the Stockholm Treaty on Persistent Organic Pollutants and (2) neither issue is captured and compared by BEES analyses.

The other two commenters similarly stated that the production of PVC has serious environmental health impacts that are not captured in the BEES analysis (such as dioxin production, reproductive toxicity, and neurotoxicity). The commenters stated that this is one clear case where biobased materials are preferable to recycled content.

A fourth commenter noted that the CPG Guidelines for carpet currently apply only to: (1) Carpet with a polyester face, and (2) separate detached ''cushion'' placed under the carpet during installation. Therefore, according to the commenter, there currently would not be an overlap between CPG guidelines for polyester face and detached cushion and biobased content in carpet backing systems (including attached cushion). The commenter also made numerous other points, presented in the remainder of this paragraph, concerning the relationship between the CPG program and the preferred procurement program under the BioPreferred Program. The commenter stated that EPA's proposed CPG guidelines for nylon carpet face and backing with a recovered vinyl material content would not overlap or conflict with biobased content in a carpet's polyurethane backing system (including attached cushion). Furthermore, EPA Guidelines would not require a buyer to purchase a carpet with a vinyl backing just because it is a CPG item. EPA has stated that a CPG recommendation does not preclude a procuring agency from purchasing carpet made of other materials (e.g., polyurethane backing system versus vinyl backing). For performance reasons, a Federal buyer may specify a polyurethane backing system because it has a number of performance advantages. For polyurethane laminate, these include preventing delamination and increasing product life, lower VOC levels, being compatible with low VOC adhesives used in installation, and creating a function liquid barrier for ease of cleaning (including the possibility of wick-back staining and adverse

moisture effects). Attached polyurethane cushion offers the additional benefits of lessening standing and walking fatigue by reducing heel strike and leg muscle response, reducing excess workplace sounds, resisting crushing and extending carpet life, and increasing thermal insulation. Furthermore, there are polyurethane backing systems commercially available that contain both biobased and recycled/recovered material. In addition, it would be possible to make a carpet that had a face with recycled/recovered fiber content and a backing system with biobased content.

Finally, a fifth commenter stated that EPA proposed a designation for nylon carpet, is working on finalizing that designation, and requested that USDA check on the status of EPA's final rule for nylon carpet and adjust the above preamble and regulation language for the final rule accordingly.

Response: USDA does not have the statutory authority to require that a preference be given to a biobased product over a competing recycled content product. However, USDA agrees that there are cases where the manufacture, use, and disposal of biobased products results in an overall benefit to the environment when compared to recycled content products. In the information that USDA has provided in the preamble to the proposed rule (71 FR 47591), we point out that Federal agencies may ask manufacturers for information on a product's environmental and human health measures as determined by the BEES analysis. They can then use this information to make a more informed decision on which product meets their goals and needs. In sum, USDA encourages Federal agencies to consider the overall environmental and human health impacts when evaluating the performance of recycled content products and biobased products.

USDA also points out that there may be cases where the specific features of the two products eliminates the ''appearance'' of an overlap between biobased and recycled content products. As one commenter notes, the CPG guidelines for recycled content carpet apply to carpet with a polyester face and a separate detached cushion. The biobased carpets upon which USDA designation of the item is based primarily used the biobased material in the carpet backing. Also, as the commenter points out, there may be important performance considerations in choosing a carpet ''system.'' Thus, even though there may be the appearance of an overlap between the two preference programs, Federal agencies may not find a conflict once all of their performance criteria have been considered.

Prior to publishing this notice, USDA checked the status of the EPA's proposed designation of nylon carpet for the CPG program. As of the date of publication of this notice, EPA had not finalized the designation of nylon carpet.

Carpet and Upholstery Cleaners

Comment: One commenter stated that the proposed minimum biobased content of 34 percent for carpet upholstery cleaners is low and suggested that the word ''biobased'' implies a minimum biobased content of 51 percent.

Response: Where there is no other information available, USDA believes that it is not unreasonable to consider products as ''biobased'' if they are composed predominantly of biobased materials; that is, at least 50 percent of the product is biobased. However, for some products a 50 or 51 percent minimum biobased content may result in a product that is not viable. Furthermore, a 50 or 51 percent minimum biobased content could discourage the development of new biobased products or the continued development of existing biobased products.

During the investigation of potential items for designation, USDA has identified many items where biobased product development has not reached the point where these products can be manufactured successfully with a biobased content of greater than 50 percent. USDA believes that the designation of items where biobased products exist, even at the lower levels such as in the carpet and upholstery cleaners item, will not only create a demand for the existing products but will encourage the development of additional products with higher biobased contents.

USDA has re-evaluated the products within this item and has decided that the creation of two subcategories within this item is justified. Three of the 12 products for which USDA has information are described and marketed as ''spot'' or ''stain'' removers and the other nine products are marketed simply as carpet and upholstery cleaners, or general purpose cleaners. The tested biobased contents of the spot removers are 10, 15, and 19 percent. USDA has set the minimum biobased content for the spot removers subcategory at 7 percent, based on the product with a tested biobased content of 10 percent, because the range of the data points is so narrow.

For the general purpose cleaners subcategory, the tested biobased contents are 37, 54, 57, 66, 67, 79, 80, 82, and 98 percent. USDA reviewed the product information to determine whether specific performance or applicability features were claimed by any of the products. The two products with 57 and 66 percent biobased content were found to be formulated without any volatile organic compounds (VOC), while many of the other products were not. Because the absence of VOC is considered to be a desirable feature, and because no other significant performance features were found, USDA decided to set the minimum biobased content at a level that these two products would meet. Therefore, USDA has set the minimum biobased content at 54 percent based on the product with a tested biobased content of 57 percent. As new products are developed and as existing products are reformulated with higher biobased contents, USDA will continue to gather and review data and assess the possibility of raising the minimum biobased content for these subcategories.

Comment: One commenter noted that the Green Seal standard for industrial and institutional cleaners (GS 37) includes carpet cleaners and should be mentioned.

Response: USDA appreciates the information provided by the commenter and will add the information on GS 37 to the list of applicable test methods and performance standards found on the BioPreferred Web site for this item.

Comment: One commenter provided information on health and environmental aspects of carpet cleaning in response to USDA's request for such information on any of the proposed designated items. Most of the information provided by the commenter dealt with water versus dry cleaning methods.

Response: USDA appreciates the information provided by the commenter and will review it for potential addition to the technical information on carpet and upholstery cleaners on the BioPreferred Web site.

V. Regulatory Information

A. Executive Order 12866: Regulatory Planning and Review

This action has been determined significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. We are not able to quantify the annual economic effect associated with this final rule. As discussed in the proposed rule, USDA made extensive efforts to obtain information on the

Federal agencies' usage within the ten designated items, including their subcategories. These efforts were largely unsuccessful. Therefore attempts to quantify the economic impact of this rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing designated items if costs are ''unreasonable,'' the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of this rulemaking. This assessment was based primarily on the offsetting nature of the program (an increase in biobased products purchased with a corresponding decrease in petroleum products purchased). Consideration was also given to the fact that agencies may choose not to procure designated items due to unreasonable costs.

1. Summary of Impacts

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

2. Benefits of the Rule

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

3. Costs of the Rule

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

B. Regulatory Flexibility Act (RFA)

When an agency issues a final rule following a proposed rule, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601–612) requires the agency to prepare a final regulatory flexibility analysis. 5 U.S.C. 604. However, the requirement for a final regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

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

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

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

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

increased industry competitiveness worldwide, thereby, creating opportunities for small entities.

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

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

D. Executive Order 12988: Civil Justice Reform

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

E. Executive Order 13132: Federalism

This rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

F. Unfunded Mandates Reform Act of 1995

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

G. Executive Order 12372: Intergovernmental Review of Federal Programs

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

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

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

I. Paperwork Reduction Act

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

J. Government Paperwork Elimination Act Compliance

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

List of Subjects in 7 CFR Part 2902

Biobased products, Procurement.

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

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

PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

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

Authority: 7 U.S.C. 8102.

■ 2. Add §§ 2902.25 through 2902.34 to subpart B to read as follows:

§ 2902.25 2-Cycle engine oils.

(a) *Definition.* Lubricants designed for use in 2-cycle engines to provide lubrication, decreased spark plug fouling, reduced deposit formation, and/or reduced engine wear.

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

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased 2-cycle engine oils. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased 2-cycle engine oils.

§ 2902.26 Lip care products.

(a) *Definition.* Personal care products formulated to replenish the moisture and/or prevent drying of the lips.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 82 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased lip 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 lip care products.

§ 2902.27 Films.

(a) *Definition.* (1) Products that are used in packaging, wrappings, linings, and other similar applications.

(2) Films for which preferred procurement applies are:

(i) *Semi-durable films.* Films that are designed to resist water, ammonia, and other compounds, to be re-used, and to not readily biodegrade. Products in this item are typically used in the production of bags and packaging materials.

(ii) *Non-durable films.* Films that are intended for single use for short-term storage or protection before being discarded. Non-durable films that are designed to have longer lives when used are included in this item.

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

(1) Semi-durable films—45 percent.

(2) Non-durable films—85 percent.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased semi-durable and non-durable films. 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 semi-durable and non-durable films.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying products within the semi-durable films subcategory may overlap with the EPA-designated recovered content product: Plastic trash bags. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any 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 plastic trash bags and which product should be afforded the preference in purchasing.

Note to paragraph (d): Biobased semi-durable film products within this designated item can compete with plastic trash bag products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated plastic trash bags 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 247.16. EPA provides recovered materials content recommendations for plastic trash bags in the May 1, 1995, Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations can be found on EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.28 Stationary equipment hydraulic fluids.

(a) *Definition.* Fluids formulated for use in stationary hydraulic equipment systems that have various mechanical parts, such as cylinders, pumps, valves, pistons, and gears, that are used for the transmission of power (and also for lubrication and/or wear, rust, and oxidation protection).

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 44 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased stationary 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 stationary 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 EPA-designated recovered content product: Re-refined lubricating oils. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains 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 re-refined lubricating oils and which product should be afforded the preference in purchasing.

Note to paragraph (d): Stationary equipment hydraulic fluid products within this designated item can compete with hydraulic fluid products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated re-refined lubricating oils 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 247.11. EPA provides recovered materials content recommendations for re-refined lubricating oils in the May 1, 1995, Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.29 Disposable cutlery.

(a) *Definition.* Hand-held, disposable utensils designed for one-time use in eating food.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 48 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

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

§ 2902.30 Glass cleaners.

(a) *Definition.* Cleaning products designed specifically for use in cleaning glass surfaces, such as windows, mirrors, car windows, and computer monitors.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 49 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. If the finished product is to be diluted before use, the biobased content of the cleaner must be determined before dilution.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased glass 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 glass cleaners.

§ 2902.31 Greases.

(a) *Definitions.* (1) Lubricants composed of oils thickened to a semisolid or solid consistency using soaps, polymers or other solids, or other thickeners.

(2) Greases for which preferred procurement applies are:

(i) *Food grade greases.* Lubricants that are designed for use on food-processing equipment as a protective anti-rust film, as a release agent on gaskets or seals of tank closures, or on machine parts and equipment in locations in which there is exposure of the lubricated part to food.

(ii) *Multipurpose greases.* Lubricants that are designed for general use.

(iii) *Rail track greases.* Lubricants that are designed for use on railroad tracks or heavy crane tracks.

(iv) *Truck greases.* Lubricants that are designed for use on the fifth wheel of tractor trailer trucks onto which the semi-trailer rests and pivots.

(v) *Greases not elsewhere specified.* Lubricants that meet the general

definition of greases as defined in paragraph (a)(1) of this section, but are not otherwise covered by paragraphs (a)(2)(i) through (iv) of this section.

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

(1) Food grade grease—42 percent.

(2) Multipurpose grease—72 percent.

(3) Rail track grease—30 percent.

(4) Truck grease—71 percent.

(5) Greases not elsewhere specified—75 percent.

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

§ 2902.32 Dust suppressants.

(a) *Definition.* Products formulated to reduce or eliminate the spread of dust associated with gravel roads, dirt parking lots, or similar sources of dust, including products used in equivalent indoor applications.

(b) *Minimum biobased content.* The preferred procurement product must have a biobased content of at least 85 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. If the finished product is to be diluted before use, the biobased content of the suppressant must be determined before dilution.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased dust suppressants. 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 dust suppressants.

§ 2902.33 Carpets.

(a) *Definition.* Floor coverings composed of woven, tufted, or knitted fiber and a backing system.

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

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

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the EPA-designated recovered content product: Carpets (polyester). USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any 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 carpets (polyester) and which product should be afforded the preference in purchasing.

Note to paragraph (d): Biobased carpets within this designated item can compete with polyester carpet products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated carpets (polyester) containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.12. EPA provides recovered materials content recommendations for carpets (polyester) in the May 1, 1995, Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations can be found on EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

§ 2902.34 Carpet and upholstery cleaners.

(a) *Definition.* (1) Cleaning products formulated specifically for use in cleaning carpets and upholstery, through a dry or wet process, found in locations such as houses, cars, and workplaces.

(2) Carpet and upholstery cleaners for which preferred procurement applies are:

(i) *General purpose cleaners.* Carpet and upholstery cleaners formulated for use in cleaning large areas such as the carpet in an entire room or the upholstery on an entire piece of furniture.

(ii) *Spot removers.* Carpet and upholstery cleaners formulated for use in removing spots or stains in a small confined area.

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

(1) General purpose cleaners—54 percent.

(2) Spot removers—7 percent.

(c) *Preference compliance date.* No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased carpet and upholstery 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 carpet and upholstery cleaners.

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Harry Baumes,

Associate Director, Office of Energy Policy and New Uses, U.S. Department of Agriculture.

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