projects that promote innovative on-the-ground conservation, including pilot projects and field demonstrations of promising approaches or technologies. CIG projects are expected to lead to the transfer of conservation technologies, management systems, and innovative approaches (such as market-based systems) into NRCS technical manuals and guides, or to the private sector. Technologies and approaches eligible for funding in a project's geographic area through EQIP are not eligible for CIG funding except where the use of those technologies and approaches demonstrates clear innovation. The burden falls on the applicant to sufficiently describe the innovative features of the proposed technology or approach.

* * * * *

(e) * * *

(2) *Project eligibility.* To be eligible, projects must involve landowners who meet the eligibility requirements of § 1466.8(b)(1) through (3) of this part. Further, all agricultural producers receiving a direct or indirect payment through participation in a CIG project must meet those eligibility requirements.

* * * * *

Signed in Washington, DC, on January 3, 2005.

Bruce I. Knight,

Vice President, Commodity Credit Corporation, Chief, Natural Resources Conservation Service.

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DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503–AA26

Guidelines for Designating Biobased Products for Federal Procurement

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture is establishing guidelines for designating items made from biobased products that will be afforded Federal procurement preference, as required under section 9002 of the Farm Security and Rural Investment Act of 2002.

DATES: This rule is effective February 10, 2005.

FOR FURTHER INFORMATION CONTACT: Marvin Duncan, USDA, Office of the Chief Economist, Office of Energy Policy and New Uses, Room 361, Reporters Building, 300 Seventh Street, SW., Washington, DC 20024; e-mail: *mduncan@oce.usda.gov*; telephone (202) 401–0532. Information regarding the Federal Biobased Products Preferred Procurement Program is available on the Internet at *http://www.biobased.oce.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Authority

These guidelines are established 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. Overview of Section 9002

Section 9002 provides for preferred procurement of biobased products by Federal agencies. Federal agencies are required to purchase biobased products, as defined in regulations to implement the statute (i.e., this final rule), for all biobased products within designated items costing over $10,000 or when the quantities of functionally equivalent items purchased over the preceding fiscal year equaled $10,000 or more. Procurements by a Federal agency subject to section 6002 of the Solid Waste Disposal Act (42 U.S.C. 6962) are not subject to the requirements under section 9002 to the extent that the requirements of the two programs are inconsistent. Federal agencies must procure biobased products unless the biobased products within designated items are not reasonably available, fail to meet applicable performance standards, or are available only at an unreasonable price.

The Office of Federal Procurement Policy (OFPP) and the USDA will work in cooperation to ensure implementation of the requirements of section 9002 in the Federal Acquisition Regulation (FAR). In this document, USDA is establishing guidelines addressing the designation process, how to determine the biobased content and other attributes of specific products, and cost sharing for product testing. In addition, to provide context, these guidelines address, but do not specifically implement, the procurement specific aspects of section 9002. USDA consulted with the Environmental Protection Agency (EPA), the General Services Administration (GSA), and the Department of Commerce's National Institute of Standards and Technology (NIST) in preparing the proposed guidelines that it is finalizing in this rule.

To provide context, these guidelines include the statutory requirement that Federal agencies have in place, within one year of the publication of final guidelines, a procurement program that assures biobased products within designated items will be purchased to the maximum extent practical. Those procurement programs will have to contain a preference program for purchasing biobased products within designated items, an agency promotion program, and provisions for the annual review and monitoring of an agency's procurement program. In addition to establishing a preferred procurement program, as items are designated, Federal agencies may need time to adjust procurement practices. In accordance with section 9002(c) and (d), designation rules will specify the time frames within which such adjustments must occur.

In designating items (generic groupings of specific products such as crankcase oils or synthetic fibers) for preferred procurement, USDA will consider the availability of such items and the economic and technological feasibility of using such items, including life cycle costs. Federal agencies will be required to purchase products that fall within an item only after that item has been designated for preferred procurement. In addition, USDA will provide information to Federal agencies on the availability, relative price, performance, and environmental and public health benefits of such items and, where appropriate, will recommend the level of biobased content to be contained in the procured product. Manufacturers and vendors will be able to offer their products to Federal agencies for preferred procurement under the program when their products fall within the definition of an item that has been designated for preferred procurement and the biobased content of the products meets the standards set forth in the guidelines.

Section 9002 provides that USDA, in consultation with the Administrator of the EPA, shall establish a voluntary program authorizing producers of biobased products to use a ''U.S.D.A. Certified Biobased Product'' label. In a subsequent rulemaking, USDA intends to establish that voluntary program and provide eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label.

Section 9002 provides funds to USDA to support the testing of biobased products to carry out the provisions of

the section. This rule addresses how USDA will use these funds.

The legislative history of Title IX of FSRIA suggests that Congress had in mind three primary objectives that would apply to section 9002. The first objective is to improve demand for biobased products. This would have a number of salutary effects, one of which would be to increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products. Another important effect would be the substitution of products with a possibly more benign or beneficial environmental impact, as compared to the use of fossil energy based products.

As a second objective, Congress wants to spur the development of the industrial base through value-added agricultural processing and manufacturing in rural communities. Since biobased feedstocks are largely produced in rural settings and, in many cases because of their bulk, require pre-processing or manufacturing close to where they are grown, increased dependence on biobased products appears likely to increase the amount of pre-processing and manufacturing of biobased products in rural regions of the Nation. This trend would help to create new investment, job formation, and income generation in these rural regions.

The third objective is to enhance the Nation's energy security by substituting biobased products for fossil energy-based products derived from imported oil and natural gas. The growing dependence of the Nation on imported oil and natural gas, along with heightened concerns about political instability in some of the oil rich regions in the world, have led the Congress to place a higher priority on domestic energy and biobased product resources.

To assist manufacturers and vendors and Federal agencies in understanding the steps they will need to follow in participating in this program, USDA has included the following brief listing of steps under the item designation process, manufacturer and vendor guidance, and the procurement process.

Item Designation Process:

1. USDA gathers product data and vendors may voluntarily provide product information on:

a. Technological and economic feasibility (functional performance, commercially available, etc.).

b. Samples for testing for biobased content.

c. Information to determine environmental and public health benefits and life cycle costs (through BEES analysis).

2. USDA extrapolates the data to describe an Item.

3. USDA issues a proposed rule to designate an Item.

4. The public comments on the proposed rule.

5. USDA takes comments into consideration.

6. USDA issues a final rule designating an Item.

7. Designated Items are posted on Web site.

8. Manufacturers/vendors are invited to post on the Web site their specific product information under a designated Item.

Manufacturer and Vendor Guidance:

1. Manufacturers/vendors must certify the biobased products content of their products.

2. Manufacturers/vendors may post products on Web site and may market products with claims for:

a. Biobased products content:

(1) Must meet minimum content as defined by the designated Item description.

(2) Content must be verified upon request from Federal agency.

(3) Verification must be based on testing by an independent testing entity using ASTM D6866.

b. Life cycle cost information:

(1) Must be verified upon request from Federal agency.

(a) Verification must be based on testing by an independent testing entity using (i) BEES analysis or (ii) either a third-party analysis or an in-house analysis using ASTM D7075 standard for evaluating and reporting on environmental performance of biobased products, including life cycle costs.

c. Performance data, materials safety data sheets, etc.

d. Contact information.

Procurement Process:

1. The Federal agency identifies procurement need for a biobased product that falls within a designated item.

2. The agency conducts search for qualifying biobased products meeting this need; one tool is the informational Web site.

3. The agency issues a solicitation or uses another procurement procedure.

4. Manufacturers/vendors respond to the solicitation.

5. The agency gives preference to qualifying biobased products under a designated item.

a. Agencies have three exceptions to giving preference to biobased products:

(1) Not available within a reasonable time.

(2) Does not meet performance standards.

(3) Unreasonable price.

6. The agency makes a purchase.

The product information requirements contained in these guidelines are intended to establish standards to guide Federal agencies and manufacturers and vendors when such information is relevant in the context of a specific procurement. Other than certification of biobased content, Federal agencies should request information or verification of information only when such information will be of use to the agency in the context of the specific procurement. The discussion of product information in the guidelines is not intended to suggest that such information will be relevant to all procurements. Only self-certification of biobased content is required for all procurements of designated items.

III. Background

On December 19, 2003, USDA published in the **Federal Register** (68 FR 70730) a proposed rule to establish guidelines implementing the provisions of section 9002. As described in the proposed rule, the guidelines would be contained in a new 7 CFR part 2902, ''Guidelines for Designating Biobased Products for Federal Procurement.'' The new part would be divided into two subparts, ''Subpart A—General,'' and ''Subpart B—Biobased Product Eligibility for Federal Preference.'' Subpart A would address the purpose and scope of the guidelines and their applicability, provide guidance on product availability and procurement, define terms used in the part, and address affirmative procurement programs and USDA funding for testing. Subpart B would address communicating information on qualifying biobased products and characteristics required for obtaining designated item status, and would set out the initial categories of designated items and minimum content.

USDA solicited comments on the proposed rule for 60 days ending on February 17, 2004. USDA received 271 comments from 64 commenters by that date. The comments were from private citizens, consultants, individual companies, industry organizations and trade groups, nonprofit organizations, universities, a Member of Congress, and State and Federal agencies.

With few exceptions, the commenters supported the goals of section 9002 and the proposed guidelines, although nearly all of the commenters had specific suggestions for changes to the proposed guidelines or raised issues related to the implementation of the program. These suggestions and issues are addressed below by topic.

IV. Discussion of Comments

Many comments evidenced confusion regarding how the program would work. In an effort to address that confusion, USDA has reorganized the final rule into a more reader-friendly format. Along with the reorganization, the final rule also uses more descriptive section titles and more paragraph headings to enable readers to locate information efficiently. Because individuals commented on specific sections of the proposed rule, USDA is addressing the comments based on the section numbers of the proposed rule. However, the final rule section number is indicated after each proposed rule section number.

Applicability (Proposed Rule § 2902.2; Final Rule § 2902.3)

Paragraph (a) of Proposed Rule § 2902.2 (Final Rule § 2902.3(a)) explains that part 2902 applies to all procurements by Federal agencies of biobased products falling within items designated by USDA in this part, where the Federal agency purchases $10,000 or more worth of one of those items during the course of a fiscal year, or where the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to procuring agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger department or agency.

One commenter stated that USDA should clarify that the $10,000 trigger for purchasing biobased products is an agency-wide requirement. Similarly, another commenter stated that the $10,000 trigger for purchasing biobased products must be understood by Federal agencies to apply to the agency level and not an individual unit within an agency or credit card holder level.

In response to these comments, USDA is revising the text of § 2902.3(a) to change the word ''procuring'' to ''Federal'' and insert ''Federal'' in the phrase ''larger department or agency.'' The final rule provides that ''the $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.''

Some commenters raised points regarding the scope of the $10,000 threshold's applicability, with one commenter suggesting that USDA should educate agencies on how the $10,000 minimum purchase threshold is to be applied. With respect to who is making the purchases, one commenter stated that the $10,000 level is reasonable if it includes purchases made by contractors of the respective agency from outside vendors, and another commenter suggested that the guidelines should be applicable to State agencies and other governmental and quasi-governmental entities that receive Federal funding. With respect to what is being purchased, a fourth commenter stated that the $10,000 buying threshold for a product category is appropriate as long as it applies to the product category and not to the individual product.

With respect to educating agencies on how the $10,000 minimum purchase threshold is to be applied, USDA is developing a model procurement program that will incorporate an educational element. USDA anticipates that as the program enters its operational phase, the designation of items available for procurement will naturally tend to lend greater clarity to the program as it is practically applied. Section 9002 does not authorize extending the guidelines to State and local agencies using appropriated Federal funds to procure qualifying biobased items, or to persons contracting with such agencies with respect to work performed under such contracts. In response to the fourth commenter, the $10,000 threshold is determined at the item level, which is the level of designation, and not at the individual product level.

Some commenters recommended that Federal agencies be required to report all purchases, including government credit card purchases, subject to the $10,000 threshold on a single purchase or cumulative purchase of a single product type of $10,000 worth in the preceding year for the purposes of monitoring the program's impact and agency compliance. The resulting purchase reports could be made available in a searchable database on the program Web site to allow manufacturers to determine whether any of their products qualify for procurement preference and identify any opportunities or incentives to develop specific biobased alternatives.

As noted in the proposed rule, OFPP is required to prepare and submit a report to Congress every 2 years on the actions taken by Federal agencies in the implementation of the biobased product procurement program. OFPP's report will, of course, be a public document available for review by the public, including interested manufacturers. Also, a manufacturer seeking information that would help it to identify any opportunities or incentives to market or develop specific biobased alternatives may consult the Federal Business Opportunities Web site maintained by the GSA (*http://www.FedBizOpps.gov*), which provides, among other things, Federal agency recurring procurement forecasts.

One commenter stated that there should be ''flow down'' procurement preference to the subcontractor level, maintaining that subcontractors are often unaware of item preferences in Federal procurements and that such a ''flow down'' preference would ensure that small producers always get a bid opportunity. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement procedures for this program, which will be accomplished through the Federal Acquisition Regulation (FAR).

Paragraph (b) of Proposed Rule § 2902.2 (Final Rule § 2902.3(b) and § 2902.5(c)(1)) identifies two exceptions to the applicability of the guidelines, i.e., the guidelines do not apply to:

—Any procurement by any Federal agency that is subject to the regulations issued by the EPA under section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (40 CFR part 247), to the extent that the requirements of the guidelines are inconsistent with those regulations; or

—The procurement of motor vehicle fuels or electricity.

One commenter noted that in addition to these two exceptions to the applicability of the guidelines, paragraph (e) of Proposed Rule § 2902.11 (Final Rule § 2902.5(c)(2)) also contains an exclusion from the program for products having mature markets. The commenter suggested that all the program exclusions be located in one place.

USDA agrees with the essence of this comment. To that end, items excluded from consideration for designation are consolidated in Final Rule § 2902.5(c). However, because an inconsistency with regulations implementing Section 6002 of the Solid Waste Disposal Act is an applicability factor, and not a blanket exclusion from this program or consideration for designation, USDA has retained that provision in the applicability Section, now Final Rule § 2902.3(b). Additionally, because the regulations implementing section 6002 of the Solid Waste Disposal Act are popularly known as the RCRA regulations or RCRA guidelines, USDA revised Final Rule § 2902.3(b) to acknowledge the connection between RCRA and the Solid Waste Disposal Act.

One commenter stated that the proposed rule was ambiguous as to whether the proposed procurement

requirements constitute a mandatory purchasing program or a preferential program. This commenter asked if agencies would be required to buy only biobased products unless one of the identified circumstances applies, or would the biobased program be subject to some sort of evaluative preference that goes into the procurement decision.

Section 9002 provides for preferred procurement of biobased products by Federal agencies, and the guidelines in this final rule reflect the statutory requirement that agencies must establish a procurement preference program. In developing the required preference program, Federal agencies are expected to adopt a policy that will maximize the purchase or use of biobased products to the extent practicable, with exceptions being made only when they: (1) Are not available within a reasonable time; (2) fail to meet performance standards set forth in the applicable specifications, or the reasonable performance standards of the Federal agency; or (3) are available only at an unreasonable price. To help clarify this and other aspects of the program, USDA will develop a model procurement policy and program for designated items to support its own procurement practices. The FAR also will be amended to implement the procurement aspects of the program.

One commenter stated preferred procurement programs like the proposed program are not the most effective mechanisms for changing or driving environmental behaviors. This commenter maintained that product claims regarding environmental and performance attributes could mislead public and private sector buyers and lead to less efficient, more costly, buying practices that would not assure more environmental benefits. Based on this position, the commenter recommended that USDA reconsider the ''must procure'' aspect of the program, which goes beyond simply encouraging new markets and could lead to undue substitution of viable products.

Section 9002 sets the basic parameters for this program. USDA must consider the economic and technological feasibility of using items, including life cycle costs, in designating items under this program. Additionally, vendors must provide information about product environmental and public health benefits, if so requested by the procuring official (see Final Rule §§ 2902.6 and 2902.8).

In most situations, self-certification should be satisfactory for Federal agencies. Manufacturers and vendors are expected to verify this information only in specific procurements where a Federal agency expressly requires verification of environmental benefits, public health benefits, or life cycle costs. Such information must be verified using an analytical method authorized in these guidelines. USDA, through these guidelines, requires verification with (a) a third-party test using the NIST Building for Environmental and Economic Sustainability (BEES) analytical tool or (b) either a third-party or an in-house test using the ASTM International (ASTM) standard for evaluating and reporting on environmental performance of biobased products, including life cycle costs. Both BEES and the ASTM standard are in accordance with International Organization for Standardization (ISO) standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. Such information will empower the procuring official to consider all relevant factors and make determinations that best meet the Federal agency's needs.

USDA Guidance on Item Availability and Procurement (Proposed Rule § 2902.3; Final Rule § 2902.6)

Proposed Rule § 2902.3 (Final Rule § 2902.6) contained a discussion of the voluntary Web-based information site USDA intends to maintain for manufacturers and vendors of designated items produced with biobased products and Federal agencies. Through this Web site, USDA intends to provide access to information as to the availability, relative price, performance and environmental and public health benefits of the designated items. In the proposed rule, USDA solicited comments on the kinds of contact and product information that should be made available on the Web-based information system, as well as comments on the appropriate components of a model procurement program for biobased items.

With respect to the model procurement program, one commenter asked that, in the final rule, USDA better spell out how it will use its model procurement program or other assistance to help other Federal agencies in complying with section 9002. One suggestion made in this vein by two commenters was that USDA should provide sample solicitation and contract language that Federal agencies can insert into support services solicitations and performance-based contracts.

USDA is in the process of developing the model procurement program referred to in the proposed rule. It is the USDA intention to have the model procurement program in place prior to designation of the first items under the program. The USDA Office of Chief Economist has forwarded these comments to USDA Departmental Administration for its consideration in developing the model procurement program. With respect to the provision of sample solicitation and contract language, this comment and many similar comments reflect a misunderstanding of how these requirements will be implemented into the Federal procurement framework. To address this point in the guidelines, USDA added a new paragraph (a) in Final Rule § 2902.4 stating that: ''The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.'' The USDA Office of Chief Economist has forwarded these comments to USDA Departmental Administration for its consideration in developing the model procurement program.

One commenter was concerned that the program's procedures are too complicated for acquisitions under the Simplified Acquisition Threshold as defined in § 2.101 of the Federal Acquisition Regulation. This commenter was also concerned that procurement automation efforts would be negatively affected due to the potential need to manually procure biobased items. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement aspects of this program, which will be accomplished through the FAR.

One commenter, noting that procuring agencies will be looking for articles such as truck bed liners and chairs, not ''molded plastics and composites,'' recommended that the program Web site include links so that products that fall under designated item groupings can be cross referenced or displayed by product categories in a manner that will be useful to Federal buyers. USDA appreciates the emphasis on purchasing of end products and will take that into account in future item designation. USDA intends to design the program Web site to be as user-friendly as possible, which would include providing features such as those described by the commenter.

Two commenters suggested that USDA should work closely with the Biobased Manufacturers Association

(BMA) and use BMA's ''Biobased Supercenter'' as a model for the USDA Web-based information center. One of these commenters also suggested that USDA work with BMA to coordinate product sub-categories, classes, and codes.

USDA will work to identify opportunities to coordinate its efforts under the biobased preference program with the efforts of other public and private entities with which the program has shared or overlapping interests.

One commenter noted that procurement agencies such as the Defense Logistics Agency (DLA) are tasked with purchasing materials identified by their customers as necessary to perform the customers' mission and stated that, while DLA and similar agencies can facilitate making alternative products available and visible, the decision on product choice will rest with the end user. This commenter recommended that the final regulations provide that customers (end users) should specify biobased products when ordering from Federal Supply Schedule or prime vendor type contracts.

Section 2902.4(c) in this final rule provides that after the publication of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure within a specified time frame that their specifications require the use of that item composed of biobased products, consistent with the guidelines. USDA will specify the allowable time frame in each designation rule.

The proposed rule preamble stated, ''Information on relative price, performance, and environmental and public health benefits that USDA is required to provide to Federal agencies will be gathered from manufacturers and vendors at the individual product level. This information, to be of maximum value to Federal agencies in making procurement decisions, must be considered at an individual product level.'' One commenter objected to the notion of gathering environmental and public health information directly from vendors of biobased products. Instead, this commenter stated, USDA must establish a set of standards that must be met by vendors who want their products to qualify. The commenter asserted that, to be truly useful, those standards must address safety and health effects on workers, performance, costs (of purchase, use, and disposal), and environmental impact.

As noted in the proposed rule, we intend to gather information on the relative price, performance, and environmental and public health benefits of specific products from industry using a Web site to which manufacturers and vendors of products that fall within designated items will be invited to voluntarily provide information, including availability of the products with biobased content that they offer to Federal agencies. Final rule § 2902.6(a) also includes biobased content among the information to be provided on the Web site. The Web site will employ a standardized format with interactive capabilities that will permit manufacturers and vendors to enter information into the Web site. Final rule § 2902.6(a) clarifies that the Web site will provide instructions for the posting of information. USDA will periodically audit the information displayed on the Web site and, where questions arise, contact the manufacturer or vendor to verify, correct, or remove incorrect or out-of-date information. In addition, USDA added to Final Rule § 2902.6(a) a general requirement that manufacturers and vendors, when requested, be able to verify any relevant product characteristic information provided to Federal agencies. USDA believes that these procedures, along with the fact that the designation process for each item will provide USDA and the public with an opportunity to consider the economic and technological feasibility, including life cycle costs, of items and the types of products that would fall within each item grouping, will ensure that the factors identified by the commenter are adequately considered.

Definitions (Proposed Rule § 2902.4; Final Rule § 2902.2)

With respect to the definition of biobased product, one commenter noted the use of the term ''renewable domestic agricultural materials'' and asked for clarification of the ''domestic'' qualifier. Does it refer to the origin of the agricultural materials, or to where the agricultural materials were turned into usable feedstock? The commenter stated that agricultural materials are sourced from all around the world, and that producers may be unable to certify that a particular raw material is ''domestic.'' On this same subject, one commenter noted that in section 9002, the qualifier ''domestic'' appears to apply only to renewable agricultural materials, and not to biological products, and asked that USDA clarify whether that is indeed the case.

The statutory definition refers to ''biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.'' 7 U.S.C. 8101(2). USDA considers the qualifier ''domestic,'' as well as the qualifier ''renewable,'' to apply to both agricultural materials and forestry materials. Given that the statute refers to the materials themselves and not to, for example, domestically processed materials, USDA construes an intent to promote the use of U.S. origin agricultural and forestry materials.

Also with respect to the definition of biobased product, one commenter noted there was no reference to products manufactured primarily from ''naturally occurring microorganisms'' and asked if such products were being considered for inclusion in the program. To the extent that these products would be composed in whole or in part of biological products, such products would fall within the definition of biobased product.

One commenter stated there appeared to be an inconsistency between the definition of ''biobased content'' and the provisions of Proposed Rule § 2902.11(d)(1) (Final Rule § 2902.7(c)). The proposed definition of ''biobased content'' stated, in part, ''[t]otal product weight may be calculated exclusive of water or other inactive ingredients, fillers and diluents,'' while Proposed Rule § 2902.11(d)(1) stated ''[b]iobased content shall be determined based on the weight of the biobased material (exclusive of water and other non-active ingredients, fillers, and diluents) divided by the total weight of the product and expressed as a percentage.'' The commenter stated it was confusing as to whether total product weight is determined with or without inactive ingredients, including inorganic materials. On this same subject, another commenter stated that, in order to realistically promote the introduction of biobased products, the biobased content should—not ''may'' as in the definition—be defined exclusive of water, pigments, fillers, rheology modifiers, additives, and other inactive materials.

USDA agrees that the definition of ''biobased content'' needs clarification. In order to be consistent with the ASTM International Radioisotope Standard Method that USDA is requiring for determining and certifying biobased content, the term ''biobased content'' is defined in this final rule as the amount of biobased carbon in the material or product as a percent of the weight (mass) of the total organic carbon in the product. This calculation excludes all inorganic material in the product. USDA similarly revised Final Rule § 2902.7(c) to be consistent with the revised definition in Final Rule § 2902.2.

One commenter suggested that, to eliminate confusion, a definition of ''biodegradable'' should be added to the definitions section of the guidelines, as well as a note elsewhere in the guidelines that a biobased product is not necessarily a biodegradable product, *i.e.*, that biodegradability is a characteristic that must be addressed and qualified separately.

As biodegradability is a characteristic that will be a consideration in the designation of some items but not others, USDA does not think that it is necessary to add a definition of the term in this final rule. USDA will, however, propose to define the term in a future rulemaking when it is appropriate in the context of the item or items being considered for designation, which will give the public an opportunity to comment upon the proposed definition.

The same commenter suggested that a definition of ''total manufactured value'' be added to the guidelines to help clarify the use of the term in Proposed Rule § 2902.11.

As discussed later in this document, USDA has removed the ''5 percent of total manufactured value'' criterion from the guidelines in this final rule. Thus, it is not necessary to define the term.

One commenter stated that the definitions in the final guidelines should be inclusive rather than exclusive, thus food crops and food waste should have equal footing and utilization of agricultural and animal waste should be given equal, if not special, consideration over virgin agricultural food crops.

USDA considers the definitions in the guidelines to be inclusive. The statute and the guidelines focus on promoting the use of biobased products generally, without special emphasis on any particular class of biobased product.

In addition to the above changes made in response to specific comments, USDA is making several other minor technical or stylistic changes to the definitions of ''Biobased product,'' ''Designated item,'' and ''Sustainably managed forests.'' USDA is substituting ''USDA'' for ''Secretary'' in the definition of ''Biobased product'' to reflect the fact that the Secretary has delegated this authority within USDA and need not make such determinations personally. USDA revised the definition of ''Designated item'' to replace the term ''category'' with ''generic grouping'' because the use of the term ''category'' in the proposed rule generated confusion. In that same definition, USDA added ''biobased'' to modify ''products'' to clarify that the generic group was of ''biobased products.'' Also in that definition, because of the reorganization from the proposed rule to the final rule, USDA replaced the reference to ''§ 2902.12'' with ''subpart B.'' Regarding the definition of ''Sustainably managed forest,'' USDA added ''Refers to the'' at the beginning of the definition. Finally, in addition to these minor changes, USDA wants to clarify the origin of the definition of ''Small and emerging private business enterprise.'' That definition is based on the USDA Rural Business Service definition of the same term used in the Rural Business Enterprise Grant Program (*see* 7 CFR 1942.304).

Preferred Procurement Program (Proposed Rule § 2902.5(b); Final Rule § 2902.4(b))

Under Proposed Rule § 2902.5(b) (Final Rule 2902.4(b)(1)), agencies would be required to develop a procurement program that will assure that products that fall within designated items composed of biobased products will be purchased to the maximum extent practicable, consistent with applicable provisions of Federal procurement laws. Such programs would provide for preferential purchasing of products that fall within designated items unless the items are not available within a reasonable time, fail to meet performance standards, or are available only at an unreasonable price.

Several commenters focused on the ''unreasonable price'' criterion. Some of the commenters simply stated that USDA must provide guidance to Federal agencies as to what constitutes an ''unreasonable price'' or, conversely, what a ''reasonable price'' would be. Other commenters suggested that USDA should formulate a quantifiable ''allowable premium'' that procurement officials may pay, similar to that allowed for the purchase of recycled paper, that takes into account the socioeconomic and environmental benefits of using biobased products instead of petrochemical or mineral products. Flat 10, 15, and 20 percent premiums were suggested, as was a one percent premium for each 10 percent of biobased content.

The reasonable/unreasonable assessment, which the statute and the guidelines offer for consideration with respect to both the price of a product and the amount of time in which it would be available, is an assessment that USDA thinks must be made by the procurement official in the context of a specific procurement. Through the biobased program Web site and other initiatives, USDA will attempt to provide as much relevant information as possible for those procurement officials to consider. In the end, however, it will be agency procurement officials, acting in accordance with their agencies' particular procurement programs and the FAR, who will have to decide how to best meet the procurement needs of their agencies.

Other commenters sought a greater emphasis on value, rather than price. One of those commenters suggested that Federal agencies should be required to purchase biobased products despite initial price differentials, unless they can demonstrate through a full life-cycle analysis that the non-biobased product is a better value. Another commenter stated that USDA should clarify, quantify, and incorporate the concept of ''best value'' in its guidelines for Federal purchasing. In identifying the ''best value,'' some commenters stated, USDA should quantify the benefits of creating a new economic sector in rural America, the environmental benefits of using biobased products, and the national security and economic benefits of reduction of dependence on imported fossil fuels. One of these commenters concluded by suggesting that information by suppliers that documents ''best value'' should be included on the program Web site and a maximum allowable premium for biobased products should be set at 10 percent over a non-biobased alternative after a best value comparison.

The above comments relate to the implementation of the procurement aspects of this program, which will be accomplished through revisions to the FAR. The law provides the ''unreasonable price'' exemption, but application of this exemption will likely be based on a comparison of product price, price of alternative products, life cycle costs, and other benefits. In many, perhaps most, cases this will involve nonquantifiable determinations or determinations that can only be made by the procuring agency. Therefore, USDA believes that the degree to which such factors are incorporated into the procurement system can best be addressed through the implementing regulations in the FAR.

One commenter was concerned that the proposed program may be too cumbersome and too easily circumvented by unwilling procurement specialists. Similarly, other commenters were concerned that price and availability considerations may provide loopholes allowing purchasing agents to circumvent the original intent of section 9002 and suggested that exceptions to the purchasing requirement should be kept to a minimum. Some of these commenters stated that USDA needs to

provide explicit guidance to agencies to ensure that agencies do not use price to avoid their obligation to ''buy biobased,'' with one commenter stating that cost, in and of itself, is no excuse not to purchase biobased products. These commenters suggested that USDA guidance provide for the consideration of a variety of factors, such as product lifespan, energy savings, reduced disposal costs, reduced health and safety costs, environmental benefits, and compliance with other governmental ''green'' initiatives.

The guidelines in this final rule reflect the statutory parameters for making procurement decisions. That is, agencies must give a preference to designated biobased items unless the items:

—Are not reasonably available within a reasonable period of time;
—Fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or
—Are available only at an unreasonable price.

In addition to the statutory parameters, USDA has set forth recommended procurement practices in these guidelines. Those recommended procurement practices include acceptable standards for determining biobased content and product attributes. USDA encourages procurement officials to consider a product's life cycle costs and environmental and public health benefits when appropriate in the context of a specific procurement, but USDA is not in a position to mandate consideration of and establish specific qualifying standards for all possible products for all procurements.

Proposed Rule § 2902.5(a) (Final Rule § 2902.4(c)) stated, in part, that ''Within 1 year after the publication date of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure that their specifications require the use of designated items composed of biobased products, consistent with the guidelines in this part.'' One commenter offered that it may be possible for agencies to conduct a review of their specifications within the specified year, but that the development of new or revised specifications resulting from such reviews may not be possible within that time frame.

USDA expects that the required reviews and revisions of specifications will be an ongoing process, and certainly not a one-time effort that would overwhelm most agencies. USDA agrees with the commenter to the extent that the comment expresses that the one-year time frame might not be appropriate in all instances. To that end, USDA has revised Final Rule § 2902.4(c) to remove ''Within 1 year'', insert ''within a specified time frame'', and indicate that ''USDA will specify the allowable time frame in each designation rule.''

One commenter stated that the guidelines need to take into account the fact that more Government purchasing organizations are using methods involving long-term contracts, often in the 5- to 10-year range, in order to ensure supply continuity and realize savings. The commenter pointed out that some items that may be designated in the future will likely have non-biobased competition that is already on a long-term contract, and that the guidelines need to provide some flexibility in such cases, as changing those contracts would entail substantial time, effort, and costs. Along these same lines, one commenter stated that biobased procurement should become a mandatory feature of any new contracts or contract renewals, but simply encouraged in the context of existing contracts. These comments relate to the implementation of the procurement aspects of this program, which will be accomplished through the FAR.

Funding for Testing (Proposed Rule § 2902.6; Final Rule § 2902.9)

As discussed in the proposed rule, section 9002 provides to USDA $1 million per year for each of the fiscal years 2002 through 2007 to support the testing of biobased products to carry out the provisions of the section. Section 9002 further provides that USDA, at its discretion, may ''give priority to the testing of products for which private sector firms provide cost sharing for the testing.'' In the proposed guidelines, § 2902.6 (Final Rule § 2902.9) described the manner in which available funds for testing would be allocated and the priority-setting mechanism USDA would use to evaluate proposals for cost sharing. Under Proposed Rule § 2902.6(a) (Final Rule § 2902.9(a)), USDA will use these funds directly for biobased content testing and environmental/public health benefits testing using the BEES Analysis. Once USDA begins the cost sharing programs, USDA will provide cost sharing under Proposed Rule § 2902.6(b) (Final Rule § 2902.9(b)) for environmental and public health benefits testing, using the BEES Analysis, and for performance testing.

One commenter stated that while funding for testing was desirable, such funding should not be ''wasted on frivolous testing of products that are not already well down the path for qualification.'' This commenter stated that the funding should instead be directed toward simplifying the process so that the maximum number of vendors can perform the testing necessary to qualify products in the most cost-effective manner. The commenter encouraged USDA to use the funding to fill in limited data gaps to expedite designation of items, as discussed in the proposed rule.

USDA thinks that both the USDA-supported testing described in Proposed Rule § 2902.6(a) (Final Rule § 2902.9(a)) and the cost sharing criteria described in Proposed Rule § 2902.6(b) (Final Rule § 2902.9(b)) address directly the points raised by the commenter. With limited funding for testing, USDA is keenly aware of the need to maximize the usefulness of those resources.

With respect to the setting of priorities for the distribution of testing funds described in the proposed rule, one commenter encouraged USDA to give priority to products with a higher minimum biobased content, while another commenter stated that priority should be given to the funding of testing for products developed by small companies located in rural areas.

Once USDA has concluded that a critical mass of items has been designated, USDA will exercise its discretion to make cost sharing a more determinative factor in product testing. Paragraph (b)(3) of Final Rule § 2902.9 provides that cost-sharing proposals will be considered first for high priority products of small and emerging private business enterprises, which would include the small companies in rural areas identified by one of those commenters. Proposals for cost sharing will be prioritized, with rating points assigned based on the product's market readiness, the potential size of the market for that product in Federal agencies, the financial need for assistance of the manufacturer or vendor, the product's prospective competitiveness in the market place, and the product's likely benefit to the environment. If funds remain available, proposals from other than small and emerging private business enterprises will be considered, based on those same priority factors. These factors will allow USDA to give favorable consideration to products with higher biobased content and products developed by smaller companies.

In response to these and the previous comments, USDA reorganized and revised Final Rule § 2902.9(b)(2) and (3) to clarify these points. Final Rule

§ 2902.9(b)(2) and (3) make clear that USDA will use these criteria to rank the priority of both small and emerging private business enterprise proposals and other producer proposals. Final Rule § 2902.9(b)(3) also clarifies that USDA will consider first only ''high priority'' products of small and emerging private business enterprises before considering proposals for products of other producers of biobased items. In other words, after considering all ''high priority'' proposals for products of small and emerging private business enterprises, USDA will consider all remaining cost sharing proposals together, including both the remaining proposals for products of small and emerging private business enterprises and all proposals for products of all producers of biobased items. These clarifications help ensure that this framework will result in the efficient and cost-effective use of these funds to further the program objectives.

In addition, USDA made several minor technical revisions in Final Rule § 2902.9(b). In paragraph (b)(1), USDA revised ''testing of biobased products to carry out this program'' to reference the testing that would be funded under paragraph (b)(4) and the applicable testing standards from § 2902.8. The revised phrase reads ''life cycle costs, environmental and health benefits, and performance testing of biobased products in accordance with the standards set forth in § 2902.8 to carry out this program.'' USDA also revised paragraph (b)(4) to replace the first reference to BEES with the phrase ''life cycle costs and environmental and health benefits'' and to strike the second reference to BEES. These revisions are to make this section consistent with Final Rule § 2902.8, as discussed below.

One commenter recommended that USDA should provide opportunities for colleges and universities to gain the necessary funding to develop the capacity to conduct the performance, health effects, and environmental testing necessary for the designation of biobased products; in the future, these institutions could also perform the carbon dating and BEES analyses provided for by the guidelines.

USDA agrees that building such capacity would be consistent with the goals of section 9002. However, the funds made available under section 9002(j)(2) are ''to support testing of biobased products.'' These funds are not available for capacity building of colleges and universities, nor is the focus of section 9002 institutional capacity building. Within USDA, the Cooperative State Research, Education, and Extension Service (CSREES) mission includes capacity building. The Office of Energy Policy and New Uses (OEPNU) will discuss this comment with CSREES as part of overall USDA biobased program coordination.

Communicating Information on Qualifying Biobased Products (Proposed Rule § 2902.10; Final Rule § 2902.6)

As proposed, paragraph (a) of Proposed Rule § 2902.10 (Final Rule § 2902.6) would require that manufacturers be able to verify the biobased content in their products. The level of biobased content in a product would have to be determined using the ASTM International standard that is a Radioisotope Standard Method (D 6866) to distinguish between carbon from fossil resources and carbon from renewable sources.

Several commenters weighed in on the use of the ASTM International Radioisotope Standard Method for determining the level of biobased content in a product; however, only one of those commenters fully supported its use. While the one supportive commenter noted that the method can produce results in as little as 2 days at a cost of $305, many other commenters objected to the costs and delays that would be associated with the use of the method, especially with respect to products that are already being marketed. While several commenters referred to the testing as ''costly,'' other commenters simply stated that the costs associated with the testing were unknown and that USDA must provide more cost information before requiring such testing.

According to information USDA received from Iowa State University, which is conducting some testing under a cooperative agreement with USDA, test results could be expected in 2 to 4 weeks at a cost of $250 to $500 per sample, depending on the specific methodology used. USDA anticipates that each item designation will address minimum biobased content for that item. Therefore, manufacturers and vendors must know the biobased content of their products in order to know whether the products qualify under a designated item. Manufacturers and vendors must be able to certify that information to the procuring official. Adoption of a standard test method is necessary for the integrity of this program, providing a degree of certainty for Federal agencies, manufacturers, and vendors. A standard test method informs manufacturers and vendors of the standard against which their products and their competitors' products will be judged, and Federal procuring officials of the standard to apply, should questions arise.

It is notable that no commenters proposed alternative standard test methods. Because use of a standard test method is essential for successful program implementation, USDA considers the projected costs and testing periods associated with the ASTM International Radioisotope Standard Method to be reasonable. Additionally, given the benefits that could be expected to accrue to a manufacturer or vendor as a result of a product being eligible for the procurement preference, it would appear that a $250 to $500 investment for testing would be viewed as a worthwhile business investment.

In response to comments regarding the expense and time required for biobased content, BEES, and performance testing of specific products (the latter addressed in more detail below), USDA revised the final rule to provide alternatives to BEES, simplified the provision addressing biobased content test data for products that are essentially the same formulation and extended this concept to environmental and health effects and life cycle cost test data and in part to performance test data. Final Rule §§ 2902.7(d) and 2902.8(a) clarify that biobased content and BEES or the other ASTM biobased product standards test data need not be brand-name specific for products that are essentially the same formulation. Regarding performance test data, Final Rule § 2902.8(b) leaves to the discretion of the procuring official whether such test data must be brand-name specific. The different standard for performance test data recognizes that even minor changes to a formulation may impact critical performance characteristics, and thus the sufficiency of test data for a product that is essentially the same formulation must be determined on a case-by-case basis by the procuring official. Proposed Rule § 2902.11(d)(2) had presented this concept in a more confusing manner and as limited to biobased content testing.

Several commenters suggested that USDA should accept manufacturers' self-certification as to biobased content levels, and that the ASTM International Radioisotope Standard Method should be required only if a product's biobased content level was challenged by an agency, competitor, or consumer. To support the idea of self-certification, two of these commenters noted that RCRA regulations (40 CFR part 247) do not require affirmative tests to determine if wastes meet the toxicity characteristics of hazardous waste.

Under Proposed Rule § 2902.10(a) (Final Rule § 2902.6(a), § 2902.7(a), and

§ 2902.8) manufacturers and vendors are expected to provide relevant information to Federal agencies, upon request, with respect to product characteristics. This requirement is essentially the same as the self-certification described by the commenters. The same paragraph goes on to provide that manufacturers and vendors must be able to verify the biobased content in their products, and that the ASTM International Radioisotope Standard Method must be used to determine the level of biobased content in the product. Because biobased content is a key element in the statutory and regulatory framework, procuring officials, when necessary, must be able to request verification of biobased product content of products offered under specific procurements. Statutory requirements of this program differ from those of the program noted by the commenters. To reaffirm this position, USDA revised Final Rule § 2902.7(a) to state that ''Upon request, manufacturers and vendors must provide'' such verification information in lieu of the text in Proposed Rule § 2902.11(b) that ''Federal agencies and USDA may request''. USDA encourages Federal agencies to request such verification only when necessary.

Several commenters were concerned about the method itself. Some noted that the Radioisotope Standard Method had not yet been approved by ASTM, and stated that only consensus standards should be used. Other commenters stated that the test is new and untried and the results may not reflect actual biobased content. Two of these commenters stated that the $^{14}C/^{12}C$ ratio measurement must be used with considerable caution, if at all; if it is required, USDA must allow for test error in setting the minimum content for a product.

The Radioisotope Standard Method is now an ASTM consensus standard (ASTM D 6866), thus USDA is confident that it has moved beyond the ''new and untried'' stage. USDA added the ASTM number in the text of Final Rule § 2902.7(c). With respect to the potential for test errors, this ASTM method, like any other test, should produce results that are repeatable, and thus could be verified in the event that a manufacturer or vendor disagreed with the level of biobased content indicated in the test results.

As proposed, paragraph (b) of § 2902.10 (Final Rule 2902.8(a)) would require manufacturers and vendors to use the BEES analytical tool to provide information on life cycle costs and environmental and health benefits to Federal agencies, when asked.

Some commenters stated that the regulations should provide for the use of other appropriate analytical tools for generating life cycle costs information in addition to BEES, including life cycle costs assessments conducted by product manufacturers or their contractors. Three of these commenters appeared to be basing this suggestion on the existence of other analytical methodologies, with two suggesting ISO14040 and the third suggesting that the EPA Environmental Technology Verification (ETV) Program could be used in place of, or as a supplement to, BEES. Two other commenters suggested that additional tools should be available because, while BEES may be appropriate for some categories and items, it may not be the best alternative for all of them, with one commenter pointing to the differences between traditionally produced biobased products and those produced using biotechnology. One of those commenters stated that while quantitative methods are needed to support environmental attributes, producers should have the flexibility to choose the most appropriate tools, as long as they are scientifically based; recognized by standards organizations, such as ISO or ASTM; and include peer review to ensure accuracy. In a similar vein, one commenter suggested that manufacturers should be able to substantiate claims related to biobased product content and environmental performance themselves using ISO-compliant methodologies, with the BEES life cycle model then being applied to determine life cycle costs.

USDA, in response to public comments, has concluded that alternative methods may be used to verify environmental and health effects and life cycle costs. Manufacturers and vendors must provide the necessary information by using either (a) the BEES analytical tool along with the qualifications of the independent testing entity that performed the tests, or (b) either a third-party or an in-house conducted analysis using ASTM D7075, the standard for evaluating and reporting on environmental performance of biobased products, including life cycle assessment and cost analysis for biobased products. Both BEES and the ASTM standard are in accordance with ISO standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. USDA believes the above noted tests are particularly well suited for the needs of this program.

Several commenters objected entirely to the required use of BEES. The reasons given were: (1) BEES may require the release of confidential trade secret information; (2) BEES testing will be an undue burden on producers, especially small producers, which may eliminate some operations from participation in the program; and (3) other Federal programs, such as RCRA, do not require such testing. One commenter stated that manufacturers should be allowed to use BEES if they believed it would be useful to their own marketing efforts, but that BEES should not be required generally.

In response to these concerns, USDA offers the following: (1) The security of confidential trade secret information will be an issue between the manufacturer or vendor and the laboratory performing the BEES analysis. USDA expects that the contractual agreement between the two involved parties would address the issue of business information security. (2) In accordance with the procedures outlined in Final Rule § 2902.9, USDA will provide some funding for BEES, ASTM environmental testing, and performance testing of individual products with biobased content, with priority being given to products of small and emerging private business enterprises. (3) In designating items, section 9002 requires USDA to consider the economic and technological feasibility of using the items, including life cycle costs. Such life cycle costs can be ascertained through the use of the BEES analytical tool and the ASTM environmental testing standard.

Several commenters objected to the required use of BEES for biobased products—a requirement termed a burden by some—when there was no similar requirement for competing non-biobased products. These commenters questioned the usefulness of BEES-generated life cycle and other information in the absence of comparable information related to competing products, with one commenter stating the goal of such testing should be to compare biobased products with petroleum-based products. Another commenter suggested that some of the testing funds that would be available should be used to test established, competing products. A third commenter stated USDA should eliminate the use of BEES analyses unless competing non-biobased products are required to have BEES analyses. Finally, one commenter recognized that BEES would result in a level playing field for biobased products, but stated that biobased product manufacturers and vendors should not be required to provide more

data than other manufacturers and vendors offering products for sale to Federal agencies.

USDA agrees that it would be quite useful to be able to make a point-by-point comparison, using the same standards of measure, between a biobased and a non-biobased product prior to making a procurement decision. However, under section 9002, USDA has neither the authority to require nor the funding for the testing of non-biobased products. Even absent comparable data for non-biobased products, USDA thinks that BEES test data, or test data from the ASTM standard for evaluating and reporting on environmental performance of biobased products and the ASTM standard for life cycle cost analysis, for biobased products will have utility for the procuring officials in making procurement decisions. Test data from these two alternative sources will facilitate procuring official consideration of non-price factors, such as life cycle costs, in making procurement decisions. To that end, the final rule retains the requirement that manufacturers and vendors provide such information upon request. However, USDA encourages Federal agencies to request verification only when necessary.

Regarding the comment advocating allowing manufacturers and vendors to perform environmental attribute tests in-house, USDA is requiring in Final Rule § 2902.8(a) only that, when requested to provide environmental and health effects and life cycle test data, manufacturers and vendors use a third-party BEES analysis or either a third-party or in-house analysis using the ASTM standard for evaluating and reporting on environmental performance of biobased products. Several commenters questioned the need for manufacturers to have BEES testing conducted at the product or item level. Most of these commenters stated that BEES should not be required for each product, with some suggesting that one generic product should be allowed to serve as a standard bearer for a group of products and others suggesting that qualifications should be done by product formulations within a category.

As described in the proposed rule, USDA will compile information on the economic and technological feasibility, including life cycle costs, of biobased items from industry. Once this information is available on a sufficient number of such products within an item, the information will be evaluated and extrapolated to the generic item level for use in meeting the requirements of section 9002 that such information be considered in designating an item for preferred procurement. USDA added a new paragraph to that effect in Final Rule § 2902.5(b) in order to clarify this concept in the guidelines. Additionally, as discussed above, in the case of products that are essentially the same formulation, but marketed under different brand names, the manufacturer or vendor could apply test data from one product to other such products.

Other commenters stated that USDA itself should use BEES to provide generic information at the item level, perhaps using the testing funding discussed in Final Rule § 2902.9. Another commenter was concerned that the designation of items will be delayed due to the reluctance of manufacturers to pay the costs associated with a BEES analysis only to have other manufacturers use the resulting information for their own products, getting, in essence, a ''free ride.''

USDA is already using BEES testing to provide generic information at the item level, and is funding BEES testing for those products that it has identified as representing the best opportunity to designate items expeditiously. USDA does not think the ''free ride'' issue brought up by one commenter necessarily would discourage a manufacturer from proceeding with BEES testing or any other efforts that might be required under the program as long as that particular manufacturer had concluded that the benefits of program participation outweighed the costs.

As proposed, § 2902.10(c) (Final Rule § 2902.8(b)) would require that, in assessing performance of qualifying biobased products, Federal agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing must be conducted by a third party ASTM/ISO compliant test facility.

With respect to performance testing, one commenter cautioned that USDA needs to recognize the difference between performance specifications and product specifications. For example, motor oil has a Society of Automotive Engineers (SAE) standard, which is a product specification, not a performance specification. Thus, saying that a biobased motor oil should meet the SAE standard may not be applicable unless that standard was based on performance testing.

USDA is aware of that distinction and will work with manufacturers and testing facilities to ensure that the appropriate criteria are applied with respect to performance testing.

Another commenter was concerned that trying to determine whether a company's product meets the performance standards could add unacceptable lead-time to procurements, if the company is not required to have the necessary testing completed prior to its submission of an offer.

USDA expects that the program Web site will be the primary interface between procuring agencies and the manufacturers/vendors of biobased products; the latter will be expected to provide sufficient information regarding their products—including performance data—when they post their products on the website. This comment also relates to the implementation of the procurement aspects of this program regarding which USDA defers to OFPP.

Several commenters objected to the third-party performance testing requirements. One of those commenters stated that such testing was not required by section 9002. Several other commenters suggested that third-party testing should not be a general requirement, with manufacturers being required only to offer their own evidence and proof that their products meet or exceed Federal agency requirements. One commenter stated that third-party testing should be required only for critical applications (e.g., required for specialized lubricants, but not for landscaping material). Several other commenters suggested that testing should be required only in the event of a challenge to a manufacturer's claims.

While section 9002 may not specifically require testing, the statute requires USDA to provide such information to agencies. In this final rule, USDA has retained the requirement for manufacturers and vendors to use test results obtained from testing against industry accepted performance standards (e.g., ASTM, ISO, Military Specifications, etc.) for their product. While performance testing is not required for program participation, the final rule requires that manufacturers and vendors provide this information to Federal agencies when requested. USDA encourages Federal agencies to request such information only when necessary. USDA revised Final Rule § 2902.8(b) to require that ''Results from performance tests completed must be available to Federal agencies upon their request, along with the qualifications of the testing laboratory.'' USDA encourages third-party testing to support the integrity of this program.

Characteristics Required for Obtaining Designated Item Status (Proposed Rule § 2902.11; Final Rule § 2902.5 and § 2902.7)

As proposed, paragraph (a) of § 2902.11 would require that all qualifying items under the program have at least five percent of their total manufactured value (measured after manufacture at the location of manufacture) made up of biobased product(s). Proposed paragraph (b) (Final Rule § 2902.7(b)) went on to explain that the minimum biobased content requirements for specific items, once designated, refer to the biobased portion of the product, and not the entire item. The specific product requirements would be in addition to the five percent total manufactured value requirement in proposed paragraph (a).

Several commenters addressed the proposed ''five percent of total manufactured value'' provision. Some of those commenters requested that USDA clarify the standard, stating that readers may confuse five percent total manufactured value with five percent biobased content. Other commenters asked how the standard would be applied to components versus completed end products. One commenter asked why USDA would require two certifications from manufacturers and vendors—i.e., a self-certification with respect to the five percent of total manufactured value and a third-party certification with respect to the biobased content of a specific product—when the latter alone should suffice. Finally, one commenter stated that manufacturers and vendors do not understand the need for the five percent manufactured value test, noting that section 9002 did not require such a test and that the value will be difficult to determine.

USDA has reviewed the proposed ''five percent of total manufactured value'' provision and, after considering the comments received on the subject, has decided to remove that provision from the guidelines in this final rule. USDA retained in Final Rule § 2902.7(b) the explanation that minimum biobased content requirements refer to the biobased portion of a product, and not the entire product. However, in light of the removal of the ''five percent of total manufactured value'' provision and the revised definition of ''biobased content'' (discussed above), USDA revised Final Rule § 2902.7(b) to add the phrase ''Unless specified otherwise in the designation of a particular item,'' in order to preserve USDA flexibility should application of the minimum biobased content requirements to only the biobased portion of a product be inappropriate or insufficient for a particular item contemplated for designation. The proposed rule to designate an item will address biobased content and provide an opportunity for public comment.

Proposed paragraph (c) of § 2902.11 (Final Rule § 2902.8(a)) deals with verifying the biobased content of products by third party ASTM/ISO compliant test facilities using the ASTM International Radioisotope Standard Method. The comments received regarding the ASTM standard are discussed previously above. Similarly, the comments received regarding proposed paragraph (d) (Final Rule § 2902.7(c) and (d)), which deals with determining biobased content of products, are addressed above in the discussion regarding the definition.

Under proposed paragraph (e) of § 2902.11 (Final Rule § 2902.5(c)(2)), products having mature markets would be excluded from the program. For purposes of this program, a product would be considered to have a mature market if it fell within any of the following groups:

—Silk, cotton and wool garments, household items, and industrial or commercial products unless made with a substantial amount of biobased plastic product.
—Wood products made from traditionally-harvested forest materials.
—Products having significant national market penetration prior to 1972.

USDA received comments both for and against the exclusion of products having mature markets. The commenters who supported the exclusion agreed that the intent of section 9002 was to aid the development of new and emerging markets, and not to focus on already mature traditional markets or articles that are inherently biobased. While the commenters who opposed the exclusion did not dispute that the focus should be on developing markets, they argued that such a goal should not necessarily mean that products having more established markets should be excluded from the program. To these commenters, the goal of section 9002 was to increase overall demand for biobased products, which leaves room for the inclusion of proven, existing technology in the program. In this vein, some commenters objected to the exclusion of wood and other products from the guidelines, stating that such exclusions fail to consider the overall societal benefits resulting from the use of biobased materials over petrochemical-based materials. With respect to the exclusion of products having significant national market penetration prior to 1972, one commenter stated that the age of a product is not necessarily an indicator of its market maturity, that the 1972 cutoff is arbitrary and possibly contrary to the goals of section 9002, and that the guidelines should offer a greater degree of flexibility.

The intent of section 9002, as described in the conference report accompanying FSRIA, ''is to stimulate the production of new biobased products and to energize emerging markets for those products.'' Given that, USDA finds that it is entirely appropriate for the guidelines to exclude products having mature markets from the program. However, after considering the comments received on the subject, USDA has amended the guidelines in this final rule by removing the proposed exclusions for ''silk, cotton, and wool garments, household items, and industrial or commercial products unless made with a substantial amount of biobased plastic product'' (Proposed Rule § 2902.11(e)(1)) and ''wood products made from traditionally-harvested forest materials'' (Proposed Rule § 2902.11(e)(2)). The exclusion of certain wood products was considered unnecessary in light of the definition of ''Forestry materials'' in Final Rule § 2902.2 as ''materials derived from the practice of planting and caring for forests and the management of growing timber. Such materials must come from short rotation woody crops (less than 10 years old), sustainably managed forests, wood residues, or forest thinnings.''

Further, USDA considered the likelihood that there are biobased products that have come full circle, i.e., products that were in widespread use at some point prior to 1972 but then supplanted by petroleum-based products. To account for this, USDA has changed the ''significant national market penetration'' criterion from ''prior to 1972'' to ''in 1972.'' As explained in the proposed rule, the oil supply and price shocks that began in this country around 1972 provided the impetus for sustained serious new development of biobased alternatives to fossil-based energy and other products; in addition to that new development, there also was a return to existing, perhaps neglected or underutilized, biobased products. USDA thinks that using 1972 as a point in time standard, rather than a dividing line between two eras, can provide for the designation of some items that would otherwise be excluded.

Items and Minimum Biobased Content (Proposed Rule § 2902.12; Final Rule 2902.5(a) and Subpart B)

As discussed in the proposed rule, § 2902.12 will contain a list of items that are designated for procurement preference, as these items are designated by rule making, and will provide the minimum biobased content for each listed item. Although USDA did not propose to designate any specific items in the proposed rule, USDA did present a number of items in the preamble of the proposed rule that it identified as illustrative of the items it intends to propose for designation for preferred procurement after USDA has sufficient information on availability of the items and the economic and technological feasibility of using such items, including life cycle costs.

One commenter noted that there was no time line provided in the proposed rule for the future designation of products and asked that USDA, in the final rule, provide a prioritized ''wish list'' ranking product types in order of strategic importance to the United States and the likelihood of their acceptance under the program assuming they meet requirements of competitiveness in cost, availability, and performance.

As noted above and in the proposed rule, USDA will be unable to propose specific items for designation until it has sufficient information on availability of the items and the economic and technological feasibility of using such items, including life cycle costs. Without such information, USDA cannot speculate as to the likelihood of the designation of any item under the program. Further, given that the program is still in its infancy, it would be premature to assign any ''strategic importance'' to specific items or classes of items. The rationale and process for the designation of each item will be detailed in the proposed rule to designate that item, and will be open to public comment. USDA notes, however, that it have already has begun the preliminary work necessary to initiate rulemaking to designate several items and hopes to have that rulemaking concluded before the end of the year.

In the proposed rule, USDA specifically solicited comments on the categories and items it presented, as well as on the reasonableness of the suggested biobased content percentages. USDA received numerous comments in response to that request, along with many suggestions for additional items, categories, and subcategories. USDA appreciates the many detailed suggestions and insights offered by the commenters regarding items and biobased content percentages, the standards and specifications that should be taken into account when designating particular items, and other technical considerations related to those items; USDA will fully consider that information as we move forward with the process of designating items. Because no items are designated in this final rule, USDA will not address any of the specific, item-oriented comments that it received. However, USDA also received a number of more general comments regarding item designations and biobased content; those comments are discussed below.

In the proposed rule, USDA presented the items contemplated for future designation as being grouped according to category, with each category consisting of one or more items; each item consists of specific products offered by manufacturers and vendors. That is, an item is made up of individual products and a category consists of items. One commenter objected to this manner of arranging products, claiming that Congress intended ''item'' to refer to an actual product purchased, not to a generic grouping of products as USDA has used the word. This same commenter pointed out that ASTM's ''Standard Guide for the Determination of Biobased Content, Resource Consumption, and Environmental Profile of Materials and Products'' (ASTM D 6852) proposed a classification scheme/decision tree for biobased materials and products and suggested that USDA adopt that or a similar approach for developing its classification framework. The commenter recommended that, to refer to the generic grouping, USDA should use the terms ''biobased product group'' and ''biobased material group,'' which would accommodate what appears to be USDA's intention to designate both end products and the materials used to produce end products.

USDA does not think that there is any conflict between the statute and the proposed guidelines with respect to the use of the term ''item.'' While the statutory phrase, ''the quantity of such items or of functionally equivalent items,'' could be read as to equate ''item'' as the guidelines use ''product,'' USDA finds that the end result of either approach would be the same, i.e., the designation process will result in specific products being identified for procurement preference. For the sake of clarity, USDA has amended the definition of ''designated item'' in this final rule by replacing the word ''category'' with ''generic grouping.'' As amended, the definition reads: ''A generic grouping of products identified in Subpart B that is eligible for the procurement preference established under section 9002 of FSRIA.'' For example, hydraulic fluid for stationary uses could constitute an item. Company ABC's branded hydraulic fluid could constitute a product.

Several commenters voiced other concerns regarding the items, categories, and minimum content levels presented in the preamble of the proposed rule. As noted in the proposed rule, the items and the indicated biobased content of items contained within the categories were based on a study conducted in 2002 for the USDA Agricultural Research Service by Concurrent Technologies Corporation (CTC).

Some commenters pointed to the age of the CTC study and stated it must be updated before it can be used as the basis for describing categories. These commenters stated that the study does not reflect the current availability of items and that the categories in the study were inconsistent with the categories in the proposed rule. One commenter suggested that USDA should convene a group of industry representatives and government purchasing agents to develop a list of categories and items that will be clear both to product manufacturers and purchasing agents. Several other commenters were concerned that neither the CTC study nor the information presented by USDA in the proposed rule offered any technical basis or justification for the minimum content levels that were offered. Without a well-documented, transparent, and strong technical basis for setting minimum biobased content levels, the proposed minimum content levels appear arbitrary.

The minimum content levels in the CTC study were based on data provided by industry, academic, and government experts. In the proposed rule, USDA did not propose to designate any items; rather, the presentation of the categories, items, and minimum biobased content levels was intended to stimulate the submission of comments in those areas. As USDA will designate items using notice-and-comment rulemaking procedures, items will not be designated without (1) an explanation of the rationale for designation of an item and its proposed attributes, including minimum content levels, and (2) an opportunity for public comment upon the proposed designation and supporting information.

One commenter suggested that a standard other than minimum content be used to qualify products under the rule. Specifically, this commenter suggested that USDA use a ''total

biobased content impact equation'' that would more adequately take into account: (1) The functionality of the biobased component of a product (i.e., is the biobased component key to the functionality or an add-on?); (2) the impact of use of the product on the consumption of petroleum stocks from the perspective of product composition; and (3) the impact on rural economies through the utilization of domestic agricultural inputs.

As a practical matter, USDA thinks that biobased content should be a primary consideration, given that section 9002 requires agencies to give procurement preference to items composed of the highest percentage of biobased products practicable. However, the statute requires USDA take into account product availability, technological and economic feasibility, including life cycle costs, in designating items. USDA is also required to provide information for Federal agencies use on availability, price, performance, and environmental and public health benefits.

Another commenter stated that USDA should not set minimum biobased content levels, which can have undesirable ''floor and ceiling'' effects (i.e., the merits of products with content below the minimum level would not be considered, and manufacturers would have little incentive to exceed the minimum level). Instead, USDA should simply require that the manufacturer post the biobased content level on the product.

Section 9002 provides that USDA will, where appropriate, recommend the level of biobased material to be contained in the procured product. The process of designating items would take into account the concerns of the commenter by ensuring that issues such as biobased content vs. performance are addressed in an open, transparent fashion.

One commenter stated that, in the interest of reconciling the minimum content levels presented in the proposed rule with the BMA's self-certification system already in place, USDA should adopt just four minimum standards (15, 36, 66, or 86 percent) to be applied as appropriate. This approach would reconcile the USDA minimums to BMA minimums with only minor adjustments in most cases to the USDA minimums presented in the proposed rule and allow for the use of the four content ratings already established by BMA and used by manufacturers (i.e., BMA–25 for products ranging from 15 to 35 percent biobased content, BMA–50 for the 36 to 65 percent range, BMA–75 for the 66 to 85 percent range, and BMA–100 for products that are 86 percent biobased or better).

While the idea of adopting an existing industry classification system is appealing, USDA is bound to consider the charge in section 9002 that each Federal agency which procures any items designated in such guidelines shall, in making procurement decisions, give preference to such items composed of the highest percentage of biobased products practicable. With that in mind, using only four content ratings would mean that agencies would be unable to capture the distinction between, for example, a BMA–50 rated product with 36 percent biobased content and one with 65 percent biobased content.

One commenter recommended that one product alone should be sufficient to establish an ''item,'' citing the infancy of the biobased industry and the likelihood that, at least initially, only a single product may be available that meets the necessary performance and other requirements of a particular application.

Given that the intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products, USDA agrees with the commenter that the identification of even a single biobased product could serve to trigger the designation of an item.

One commenter suggested that the final rule should include a reasonable deadline for USDA to give manufacturers or vendors a decision on whether a product that a manufacturer or vendor has submitted to USDA for item designation has ''survived the filtering process,'' i.e., whether a particular product may be eligible or appropriate for designation. The commenter suggested a time frame not to exceed 30 days from the date of submission.

These guidelines do not establish a formal process for manufacturer or vendor initiation of designation of items. While USDA welcomes manufacturer or vendor suggestions, USDA has no formal process or deadlines to respond to such suggestions. USDA added the last sentence in Final Rule § 2902.5(a) to clarify this point. USDA will post on its Web site, *http://www.biobased.oce.usda.gov,* a pro forma list of possible items for designation. In developing this list, USDA will consider a number of factors, including, but not limited to, the cost competitiveness of an item, whether performance of the products within an item meet Federal requirements, availability of products within an item, interest by manufacturers in the preferred procurement program, and potential Federal demand for the product. USDA will be gathering information on a range of specific products that fall under an item to determine the certain characteristics of that item, to meet the statutory requirements that USDA consider availability of items and the economic and technological feasibility of using such items, including life cycle costs, when considering the designation of a given item. In this process, USDA will be seeking both that information and indication of interest in providing the information from manufacturers and vendors. To the extent that the commenter is asking USDA whether a specific product falls under a specific designated item, there is no filtering process. Where manufacturers and vendors believe their products fall under a designated item, they are free to assert coverage under the preferred procurement program when marketing the products to Federal agencies.

Two commenters urged USDA to designate only final products, not the components of those products. Both pointed out that Federal agencies purchase finished products, and suggested that designating the components of products would be confusing to purchasers and make it more difficult for them to ''buy biobased.''

Section 9002 states that, in its guidelines, USDA shall designate those items which are or can be produced with biobased products and whose procurement by procuring agencies will carry out the objectives of the statute. With that in mind, USDA agrees that the items designated should correlate to the degree possible with the products routinely purchased by Federal agencies.

One commenter urged USDA to, at least initially, focus its energies on designating items that are composed primarily of biobased material, rather than items that may have components that may have biobased content.

As noted earlier in this document, the first few years of the program will focus on identifying and testing those items that can be designated in the most expeditious manner possible. It is likely that those items will be indeed largely of the type described by the commenter.

On the subject of biobased components, one commenter cautioned against designating items that incorporate biobased feedstocks into non-degradable, non-durable applications. Such items, the commenter stated, would break the closed loop cycle that can be achieved by composting, necessitate the separation of such items from other

compostable materials such as food scraps, and create competition between such items and those items that are both biobased and biodegradable, which will only confuse the end users and harm the growth of the overall biobased sector.

USDA acknowledges the validity of the considerations raised by the commenter. In the course of designating items in the future, such considerations would play a role when compostability is a factor in the economic and technological feasibility of using such items.

Several commenters asked for clarification regarding the minimum content standard. One commenter stated that there were inconsistencies in the minimum content levels offered in the proposed rule, noting that a biobased polymer could qualify for preference when used as the sole component of an item in the plastics category, but not if it was used to produce synthetic fibers used in clothing or carpet. Another commenter used a similar example to frame the question: A minimum biobased content level is set for a durable film; is that content level for the durable film itself, or for the finished product that incorporates the durable film? Yet, another commenter further stated that USDA must make clear what products with biobased components qualify for preferred procurement.

The minimum content levels will apply to designated items. If the durable film in the one commenter's example is the designated item, then the minimum content level will apply to the durable film. If a finished product that incorporates that durable film is a designated item, then that product must meet the minimum content level for the item under which that product falls. Through subsequent proposed and final rules, USDA will designate items; qualifying products that fall under those designated items will qualify for preferred procurement.

One commenter suggested that only products having a minimum of 65 to 70 percent biobased content be eligible to be designated for preferred procurement under the program. Other commenters also sought to maximize biobased content in designated items, with one commenter stating that products with the highest biobased content—everything else being equal—must be preferred over products with lower biobased content, and the other urging USDA to eliminate all language in its rules on this program that undermine the ''highest percentage of biobased products practicable'' directive from Congress.

While the 65 to 70 percent minimum recommended by the one commenter would certainly ensure a high level of biobased content in designated items, such a high level of biobased content is not realistically obtainable for many items, which means that entire classes of articles with lower content levels would be excluded from the program. USDA fully agrees with the goals expressed by the other commenters, and does not think that the guidelines contain any provisions that would undermine section 9002's requirement to give preference to products with the highest percentage of biobased products practicable.

One commenter suggested that rather than determining biobased content on an item-by-item basis, USDA should focus on determining the biobased content of ingredients; with that information, the total biobased content of a product could simply be determined by adding the content of its ingredients. This commenter stated that the ASTM International Radioisotope Standard Method could be used to determine biobased content of ingredients, and a database of results could be maintained and used to determine quickly whether a product would qualify for designation.

Section 9002 focuses on the biobased content of the product itself. Section 9002(e) requires USDA to set forth recommended practices with respect to certification by vendors of the percentage of biobased products used and, where appropriate, recommend the level of biobased material to be contained in the procured product. Given those requirements, as a policy matter USDA has decided that the process of setting minimum content standards on an item-by-item basis described in the proposed rule and these final guidelines is necessary and practical.

One commenter stated that rather than developing a finite list of biobased products for preferred procurement, USDA should: (1) Develop standard formulas for calculating biobased content; (2) develop a biobased content label for ease of product comparison (somewhat like the USDA organic labeling system); and (3) publish regularly updated product bulletins reporting the latest in biobased product availability.

Section 9002 requires, among other things, that USDA: (1) Designate items that are or can be produced with biobased products; (2) provide information as to the availability, relative price, performance, and environmental and public health benefits of those items; and (3) in making designations, consider the availability of such items. Taken together, these requirements demand the development of a list; to the extent that such a list would be a ''living document'' subject to updates as often as appropriate, it would serve the same function as the regular bulletins suggested by the commenter. USDA's electronic information system will include information on designated items and will post information voluntarily submitted by manufacturers or vendors on the products they intend to offer for preferred procurement under each item designated.

Looking beyond the initial setting of minimum biobased content levels and designation of items, three commenters addressed the subject of subsequent adjustments to established minimum content levels. Two of those comments simply pointed out the need for USDA to create a mechanism to adjust minimum content levels for items to reflect the development of new technologies and product refinements over time, perhaps by seating a standing review committee of experts from the manufacturing, academic, public interest, government, and consumer sectors. The third commenter suggested that adjustments to minimum biobased content levels should be made no more often than once every five years. This would be sufficient time to allow products with higher biobased content to be developed while providing an adequate ''useful life'' for products meeting existing standards. Without a five-year assurance, producers may be reluctant to invest in products for fear that they may become stranded when new levels are set.

USDA currently does not anticipate the need to make the sorts of adjustments described by the commenters. Minimum content levels will be set as items are designated, and agencies will be provided with information on, among other things, the biobased content of specific products within the designated items. Section 9002 requires that agencies purchasing designated items give preference to those products that have the highest percentage of biobased products practicable. If competitive factors lead vendors to increase the biobased content of their products, those increases would not necessarily invalidate the minimum content levels expressed in the guidelines.

Three commenters addressed the relationship between minimum biobased content levels and product performance. One commenter simply stated that USDA must take into account a product's end use, and the performance necessary to function properly in that use, when setting

minimum biobased content. The other two commenters suggested that, in general, minimum percentages should be set at the lower end of a range in order for biobased products to meet necessary performance standards and be cost competitive. Still other commenters, most often referring to specific items or generic groupings of items, urged USDA to apply or reference the existing standards used by manufacturers (for example, the American Petroleum Institute (API) and SAE standards for lubricants) when preparing performance, content, and other specifications during the designation process.

USDA expects that evidence of performance will be a very important factor in Federal agencies' decisions to procure an item, and that in most cases biobased items can be manufactured with a blend of components that enable them to meet required performance standards. It is in the best interests of the program for minimum biobased content to be set at levels that will realistically allow products to possess the necessary performance attributes and allow them to compete with fossil energy based products in performance and economics. The goal of section 9002 is to promote the use of biobased products to the extent possible, and that goal would not be served by requirements for unrealistically high biobased content levels. In many cases, especially for users of high performance items in Federal agencies, formal evidence of performance may be required, and these guidelines encourage agencies to request this information from manufacturers or vendors of designated items, focusing on performance against ASTM, ISO, Federal or military specifications, or other industry performance standards.

One commenter asked if energy is produced from biomass using the gasification/steam reforming process, would that energy, if offered for sale to Federal agencies, qualify for procurement preference under the proposed program? While the commenter did not specify, it appears that the energy he is referring to is electricity. As provided by paragraph (i) of section 9002, these guidelines do not apply to the procurement of electricity.

One commenter noted that, under EPA's regulations in 40 CFR part 279, generators of used oil are not required to determine whether their oil displays any hazardous waste characteristics; however, under § 279.1 of those regulations, ''used oil'' is limited only to those spent oils that have been refined from crude or synthetic oils. Thus, oils derived from vegetable or animal sources are specifically excluded from used oil regulation, which means that generators of used bio-oils will be required to determine if those oils display any hazardous waste characteristics (which could have been acquired by the bio-oil during its usage). The commenter urged USDA to work with EPA in developing a workable and environmentally sound strategy for managing spent bio-oils before any items in this category are designated, arguing that any benefits that might be gained through conserving petroleum resources could be undermined by the more stringent hazardous waste management standards that would have to be met by users of bio-oils.

USDA agrees that it is important that these sorts of issues be addressed in order to prevent the unintended consequences highlighted by the commenter from complicating efforts to attain the goals of section 9002. However, this final rule is not the appropriate place to address the commenter's point. In an effort to address this concern, USDA will, therefore, initiate a dialog with our counterparts at EPA before designating bio-oils that could, after use, potentially be considered hazardous waste.

One commenter expressed broad and far-reaching concerns regarding the program and the proposed rule, mainly with respect to its potential negative impact on the procurement of non-biobased products in general and non-biobased plastics in particular. This commenter brought up a variety of issues on the subject, including: (1) The veracity of claims relating to the compostability/biodegradability of biobased materials, especially in light of the lack of municipal solid waste composting in the United States; (2) the potential for such claims to mislead buyers and the public into assuming that biobased materials are always environmentally preferable to non-biobased materials, especially when there appears to be little in the guidelines in the way of substantiating claims of compostability/biodegradability; (3) the potential for the proposed ''U.S.D.A. Certified Biobased Product'' label to further reinforce those mistaken consumer perceptions; (4) the potential for the program as a whole to lead consumers to neglect the broader benefits of non-biobased products; and (5) the failure of the proposed rule's economic analysis to address adequately the potential economic impact of the program's displacement of non-biobased products in the marketplace.

In designating items, USDA will consider the item's compostability and biodegradability to the extent that these factors are relevant to the economic and technological feasibility of the item, including life cycle costs. As discussed below, USDA has yet to prepare eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label. Finally, in the proposed rule's discussion of the Regulatory Flexibility Act, USDA acknowledged that the program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, USDA cannot address the potential economic effects of designating an item—positive or negative—on affected entities until it is prepared to propose that item for designation and has conducted the analyses needed to support the proposal.

Comments on Planned Labeling Program and Other Issues

In the preamble of the proposed rule, USDA discussed the provisions of section 9002 that direct USDA, in consultation with the Administrator of the EPA, to establish a voluntary program authorizing producers of biobased products to use a ''U.S.D.A. Certified Biobased Product'' label. USDA indicated that in a subsequent rulemaking it would establish that voluntary program and provide eligibility criteria and guidelines for the use of the ''U.S.D.A. Certified Biobased Product'' label.

Two commenters urged USDA to move forward as quickly as possible with the labeling aspect of the biobased program. Two other commenters, however, urged caution. These commenters raised several specific concerns about the potential impact the label could have on market and consumer perceptions—*e.g.*, an assumption that a labeled product is automatically ''better'' or ''more environmentally friendly'' than an unlabeled product—and argued that a simple label cannot adequately communicate necessary information about life cycle results, performance, and environmental health benefits. Without qualifying the claims or disclosing the relevant information, one commenter claimed, misinterpretation of the label by consumers and government purchasers is virtually assured. Another commenter stated that any products that have been subjected to a BEES analysis should be automatically eligible to use the ''U.S.D.A. Certified Biobased'' label without further analysis or rulemaking.

Section 9002 provides that USDA, in consultation with the Administrator of

the EPA, will issue criteria for determining which products may qualify to receive the label. The statute intends that those criteria will encourage the purchase of products with the maximum biobased content, and should, to the maximum extent possible, be consistent with the guidelines in this final rule. In the proposed rule, in order to signal USDA thinking on the subject, USDA described its view of the potential parameters of the labeling program. Those parameters were not definitive; indeed, numerous other considerations such as those described by the commenters will be considered as USDA drafts the criteria for determining which products may qualify to receive the label. Once drafted, the specific criteria that USDA develops in consultation with EPA will be presented in a proposed rule; the public will have a meaningful opportunity to comment upon the scope and adequacy of the criteria, and comments received will be considered before the criteria become final.

One commenter noted that the FAR will require revision in order for agencies to fully implement the new biobased content product purchasing program and encouraged USDA to coordinate with Federal agencies in preparing the draft changes to the FAR. As previously discussed, the FAR will be revised to implement the procurement aspects of the program.

One commenter stated that USDA should recognize agencies' past green purchasing efforts by recommending that agencies revise their existing plans to incorporate a biobased purchasing preference rather than creating a separate program solely for purchasing biobased products. This comment is outside the scope of this rulemaking. It relates to the implementation of the procurement aspects of this program, which will be accomplished through revisions to the FAR.

Several commenters addressed the relationship between the proposed biobased program and existing ''green'' and other purchasing initiatives already underway within the Federal Government or the private sector. These commenters stressed the need for coordination between the USDA program and others such as EPA's RCRA programs, the Department of Energy's (DOE's) Energy Star program, the consensus standards of the Green Seal organization, and the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) system for sustainable building construction. To illustrate this point, one commenter noted that EPA is considering the designation of recycled-content roofing materials under RCRA, DOE has made recommendations for energy efficient and Energy Star roofing materials, and USDA could consider the designation of biobased-content roofing materials. This commenter suggested that USDA should coordinate its designation of products with EPA and DOE, with the goal of seamlessly integrating the purchasing of biobased products into the existing green purchasing infrastructure.

Section 9002 requires specific actions on the parts of USDA, OFPP, and individual agencies. Similarly, EPA and DOE are charged with specific mandates with respect to RCRA and Energy Star. In some respects, the language of the enabling statutes that gave rise to these and similar programs may limit the extent to which the implementing agencies can coordinate these programs. USDA, to the extent practicable, will strive to coordinate the biobased preference program with existing green purchasing programs.

One commenter suggested that all compost materials, and perhaps other products in the landscaping products category, should be added to the JWOD Procurement List as ''mandatory buy'' items in order to streamline product introduction and reduce procurement costs. (JWOD refers to the Javits-Wagner-O'Day Program, a Federal employment and job training program for people who are blind and/or have severe disabilities.)

Under the JWOD Act, it is the Committee for Purchase from People Who Are Blind or Severely Disabled that is responsible for determining which commodities and services procured by the Federal Government are suitable to be furnished by qualified nonprofit agencies employing persons who are blind or have other severe disabilities. Thus it is the committee, and not USDA, that would add such items to the JWOD Procurement List.

Therefore, for the reasons given in the proposed rule and in this document, USDA adopts the proposed rule as a final rule, with the changes discussed in this document.

V. Regulatory Information

A. Executive Order 12866, Regulatory Planning and Review

It is estimated this final rule will not adversely affect or have an annual effect of $100 million or more on the economy. The actual designation of items under this program through future rulemaking actions are what will have an effect on the economy. The extent of the impact necessarily can be determined only at the time of those future rulemaking actions and will be addressed at that time. This rule does not designate any items. Each time an item is proposed for designation, USDA will evaluate the economic effect of that designation.

Furthermore, this rule will not create a serious inconsistency or otherwise interfere with prior or intended actions of another agency, will not materially alter the budgetary impact of grants or similar programs or the rights of recipients thereof, and does not raise novel legal or policy issues. For the above reasons, this rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

B. Regulatory Flexibility Act

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).

Although this program ultimately may have a direct impact on a substantial number of small entities, USDA has determined that this rule itself will not have a direct significant economic impact on a substantial number of small entities. This rule will affect directly primarily Federal agencies. Private sector manufacturers and vendors of biobased products voluntarily may provide information to USDA through the means set forth in this rule. However, the rule imposes no requirement on manufacturers and vendors to do so, and does not differentiate between manufacturers and vendors based on size. USDA does not know how many small manufacturers and vendors may opt to participate at this stage of the program.

As explained above, when USDA issues a proposed rulemaking to designate items for preferred procurement under this program, USDA will assess the anticipated impact of such designations, including the impact on small entities. USDA anticipates that this program will impact small entities which manufacture or sell biobased products. For example, once items are designated, this program will provide additional opportunities for small businesses to manufacture and sell

biobased products to Federal agencies. This program also will impact indirectly small entities that supply biobased materials to manufacturers. Additionally, this program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. Again, USDA cannot assess these anticipated impacts on small entities until USDA proposes items for designation. This rule does not designate any items.

The rule will directly impact small entities by implementing a cost-sharing program which gives first consideration to proposals for products of ''small and emerging business enterprises.'' Submission of a proposal is voluntary and not limited to small entities. The direct impact would be beneficial for those entities whose products are selected for cost sharing. Because of the limited amount of funds available for cost sharing, the ceilings on cost sharing, and the anticipated breadth of any competition (not limited to a particular manufacturing sector and open to other than small entities), USDA does not anticipate that this cost-sharing competition will have a significant economic impact on a substantial number of small entities.

Accordingly, USDA hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12630

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

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

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

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

The policies contained in this rulemaking do not have tribal implications and 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), USDA published notice of the proposed information collection with the proposed rule on December 19, 2003 (68 FR 70730). During the course of program implementation, USDA realized that it overestimated the overall average burden per respondent in that notice and underestimated the number of respondents during the first three years of item designation under the program. Therefore, USDA is republishing herein a revised proposed information collection notice. Comments addressing the revised proposed information collection should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Agriculture, Margaret Malanoski, 725 17th Street, NW., Room 10202, Washington, DC 20503. Comments should be submitted within 30 days of the date of publication of this notice. In the interim, USDA has received through emergency processing short-term information collection approval by OMB under OMB control number 0503–0011. The short-term information collection approval will expire on March 31, 2005.

Title: Guidelines for Designating Biobased Products for Preferred Procurement.

Abstract: The USDA Federal Biobased Products Preferred Procurement Program (FB4P) provides that qualifying biobased products that fall under items (generic groupings of biobased products) that have been designated for preferred procurement by rule making are required to be purchased by Federal agencies, with certain limited exceptions. USDA is required by section 9002 to gather certain information on items before it can designate them by rule making. Further, USDA also is required by section 9002 to provide certain information on qualified biobased products to Federal agencies. To meet those statutory requirements, USDA will use a number of forms to gather that information from manufacturers and vendors of biobased products. To the extent feasible, the information sought by USDA can be transmitted electronically using the Web site *http://www.biobased.oce.usda.gov*. If electronic transmission of information is not practical, USDA will provide technical assistance to support the transmission of information to USDA. The information collected will enable USDA to meet statutory information requirements that then permit USDA to designate items for preferred procurement under FB4P. Once items are designated, manufacturers and vendors of qualifying biobased products that fall under these designated items will benefit from preferred procurement by Federal agencies.

USDA currently has identified 83 potential items for designation and estimates there may be on average 30 separate products per item. Designation of items will begin after publication of this final rule for the FB4P. While it is expected that additional items will be identified over time as the biobased products industry develops and matures, it is not expected that there will be a rapid increase in the number of items beyond the number identified thus far. Because of fiscal year (FY) 2005 appropriations to support this program, USDA intends to place special emphasis on designating by rule making as many of the 83 identified items as possible during the next three fiscal years. USDA hopes to designate by rule making between 40 and 50 items during FY 2005. The balance of the currently identified items are expected to be designated by rule making during FY 2006 and FY 2007.

For designating items, USDA estimates collecting information from an average of five manufacturers per item proposed for designation. USDA estimates that each manufacturer will expend 80 hours per response to the information collection.

Once an item is designated, OEPNU will invite manufacturers and vendors of biobased products that fall under that item to post product and contact information about their qualifying

biobased products on the USDA Web site *http://www.biobased.oce.usda.gov*. This Web site will be a major source of product information for Federal agencies seeking to purchase biobased products. Information requested will include identification of products offered for preferred procurement within a designated item, contact information for the manufacturer or vendor, and demographic information about the manufacturer or vendor that will assist Federal agencies in reporting on the performance of the preferred procurement program. Additional information will be sought regarding availability; relative prices of the products; performance of the products; and environmental and public health benefits. This information may be included on the Web site or a hotlink may be established to manufacturers' or vendors' web sites to access the information. The information sought for this voluntary Web site is envisioned to be non-proprietary.

USDA estimates that it will require 4 hours per product of manufacturers' or vendors' time to post this information, and that there will be an average of 30 products per item eligible to be posted. Many items will have fewer than 30 products in the marketplace, however. Thus, for example, 30 products each from 50 items would create a burden of 6,000 hours of manufacturers' time in FY 2005. Thus, the total manufacturers' time burden for FY 2005, if 50 items are designated by rule making, would be 26,000 hours.

Beyond FY 2007, new item designations would slow dramatically and be premised on development of new biobased products that did not fit into already designated items.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 14.9 hours per response.

Respondents: Manufacturers and vendors of biobased products.

Estimated Number of Respondents: 2,905.

Estimated Number of Responses Per Respondent: One per manufacturer or vendor.

Estimated Total Annual Burden on Respondents: 14,387 hours one time only. Manufacturers and vendors are asked to respond only once per product. Thereafter, there is no ongoing annual paperwork burden on respondents.

USDA invites written comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

After receipt of notification of OMB action on this request for information collection approval, USDA will publish a notice in the **Federal Register** to inform the public of OMB's decision.

J. Government Paperwork Elimination Act Compliance

OEPNU 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. For information pertinent to GPEA compliance related to this rule, please contact Marvin Duncan at (202) 401–0532.

K. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

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

■ 1. The chapter heading of chapter XXIX is revised to read as set forth above.

■ 2. A new part 2902 is added to chapter XXIX to read as follows:

PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

Subpart A—General

Sec.
2902.1 Purpose and scope.
2902.2 Definitions.
2902.3 Applicability to Federal procurements.
2902.4 Procurement programs.
2902.5 Item designation.
2902.6 Providing product information to Federal agencies.
2902.7 Determining biobased content.
2902.8 Determining life cycle costs, environmental and health benefits, and performance.
2902.9 Funding for testing.

Subpart B—Designated Items [Reserved]

Authority: 7 U.S.C. 8102.

Subpart A—General

§ 2902.1 Purpose and scope.

(a) *Purpose.* The purpose of the guidelines in this part is to assist Federal agencies in complying with the requirements of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), Public Law 107–171, 116 Stat. 476 (7 U.S.C. 8102), as they apply to the procurement of the items designated in subpart B of this part.

(b) *Scope.* The guidelines in this part designate items that are or can be produced with biobased products and whose procurement by Federal agencies will carry out the objectives of section 9002 of FSRIA.

§ 2902.2 Definitions.

These definitions apply to this part:

Agricultural materials. Agricultural-based, including plant, animal, and marine materials, raw materials or residues used in the manufacture of commercial or industrial, nonfood/nonfeed products.

ASTM International. ASTM International, a nonprofit organization organized in 1898, is one of the largest voluntary standards development organizations in the world with about 30,000 members in over 100 different countries. ASTM provides a forum for the development and publication of voluntary consensus standards for materials, products, systems, and services.

BEES. An acronym for ''Building for Environmental and Economic Sustainability,'' an analytic tool used to determine the environmental and health benefits and life cycle costs of items, developed by the U.S. Department of Commerce National Institute of Standards and Technology, with support from the U.S. Environmental Protection Agency, Office of Pollution

Prevention and Toxics (BEES 3.0, Building for Environmental and Economic Sustainability Technical Manual and User Guide, NISTIR 6916, National Institute of Standards and Technology, U.S. Department of Commerce, October 2002). Also, see *http://www.bfrl.nist.gov/oae/software/bees_USDA.html* for a discussion of how biobased feedstocks are addressed in the BEES Analysis.

Biobased components. Any intermediary biobased materials or parts that, in combination with other components, are functional parts of the biobased product.

Biobased content. Biobased content shall be determined based on the amount of biobased carbon in the material or product as a percent of weight (mass) of the total organic carbon in the material or product.

Biobased product. A product determined by USDA to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.

Biological products. Products derived from living materials other than agricultural or forestry materials.

Designated item. A generic grouping of biobased products identified in subpart B that is eligible for the procurement preference established under section 9002 of FSRIA.

Diluent. A substance used to diminish the strength, scent, or other basic property of a substance.

Engineered wood products. Products produced with a combination of wood, food fibers and adhesives.

Federal agency. Any executive agency or independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

Filler. A substance added to a product to increase the bulk, weight, viscosity, strength, or other property.

Forest thinnings. Refers to woody materials removed from a dense forest, primarily to improve growth, enhance forest health, or recover potential mortality. (To recover potential mortality means to remove trees that are going to die in the near future.)

Forestry materials. Materials derived from the practice of planting and caring for forests and the management of growing timber. Such materials must come from short rotation woody crops (less than 10 years old), sustainably managed forests, wood residues, or forest thinnings.

Formulated product. A product that is prepared or mixed with other ingredients, according to a specified formula and includes more than one ingredient.

FSRIA. The Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 134 (7 U.S.C. 8102).

Ingredient. A component; part of a compound or mixture; may be active or inactive.

ISO. The International Organization for Standardization, a network of national standards institutes from 145 countries working in partnership with international organizations, governments, industries, business, and consumer representatives.

Neat product. A product that is made of only one ingredient and is not diluted or mixed with other substances.

Relative price. The price of a product as compared to the price of other products on the market that have similar performance characteristics.

Residues. That which remains after a part is taken, separated, removed, or designated; a remnant; a remainder; and, for this purpose, is from agricultural materials, biological products, or forestry materials.

Secretary. The Secretary of the United States Department of Agriculture.

Small and emerging private business enterprise. Any private business which will employ 50 or fewer new employees and has less than $1 million in projected annual gross revenues.

Sustainably managed forests. Refers to the practice of a land stewardship ethic that integrates the reforestation, management, growing, nurturing, and harvesting of trees for useful products while conserving soil and improving air and water quality, wildlife, fish habitat, and aesthetics.

§ 2902.3 Applicability to Federal procurements.

(a) *Applicability to procurement actions.* The guidelines in this part apply to all procurement actions by Federal agencies involving items designated by USDA in this part, where the Federal agency purchases $10,000 or more worth of one of these items during the course of a fiscal year, or where the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.

(b) *Exception for procurements subject to EPA regulations under the Solid Waste Disposal Act.* For any procurement by any Federal agency that is subject to regulations of the Administrator of the Environmental Protection Agency under section 6002 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (40 CFR part 247), these guidelines do not apply to the extent that the requirements of this part are inconsistent with such regulations.

(c) *Procuring items composed of highest percentage of biobased products.* FSRIA section 9002(c)(1) requires Federal agencies to procure designated items composed of the highest percentage of biobased products practicable, consistent with maintaining a satisfactory level of competition, considering these guidelines. Federal agencies may decide not to procure such items if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

§ 2902.4 Procurement programs.

(a) *Integration into the Federal procurement framework.* The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.

(b) *Federal agency preferred procurement programs.* (1) On or before January 11, 2006, each Federal agency shall develop a procurement program which will assure that items composed of biobased products will be purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement laws. Each procurement program shall contain:

(i) A preference program for purchasing designated items,

(ii) A promotion program to promote the preference program; and

(iii) Provisions for the annual review and monitoring of the effectiveness of the procurement program.

(2) In developing the preference program, Federal agencies shall adopt one of the following options, or a substantially equivalent alternative, as part of the procurement program:

(i) A policy of awarding contracts to the vendor offering a designated item composed of the highest percentage of biobased product practicable except when such items:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards set forth in the applicable specifications, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(ii) A policy of setting minimum biobased products content specifications in such a way as to assure that the biobased products content required is consistent with section 9002 of FSRIA and the requirements of the guidelines in this part except when such items:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards for the use to which they will be put, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(c) *Procurement specifications.* After the publication date of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure within a specified time frame that their specifications require the use of designated items composed of biobased products, consistent with the guidelines in this part. USDA will specify the allowable time frame in each designation rule. The biobased content of a designated item may vary considerably from product to product based on the mix of ingredients used in its manufacture. In procuring designated items, the percentage of biobased product content should be maximized, consistent with achieving the desired performance for the product.

§ 2902.5 Item designation.

(a) *Procedure.* Designated items are listed in subpart B. In designating items, USDA will designate items composed of generic groupings of specific products and will identify the minimum biobased content for each listed item. As items are designated for procurement preference, they will be added to subpart B. Items are generic groupings of specific products. Products are specific products offered for sale by a manufacturer or vendor. Although manufacturers and vendors may submit recommendations to USDA for future item designations at any time, USDA does not have a formal process for such submissions or for responding to such submissions.

(b) *Considerations.* In designating items, USDA will consider the availability of such items and the economic and technological feasibility of using such items, including life cycle costs. USDA will gather information on individual products within an item and extrapolate that product information to the item level for consideration in designating items. In considering these factors, USDA will use life cycle cost information only from tests using the BEES analytical method.

(c) *Exclusions.* (1) Motor vehicle fuels and electricity are excluded by statute from this program.

(2) USDA additionally will not designate items for preferred procurement that are determined to have mature markets. USDA will determine mature market status by whether the item had significant national market penetration in 1972.

§ 2902.6 Providing product information to Federal agencies.

(a) *Informational Web site.* An informational USDA Web site implementing section 9002 can be found at: *http://www.biobased.oce.usda.gov.* USDA will maintain a voluntary Web-based information site for manufacturers and vendors of designated items produced with biobased products and Federal agencies to exchange product information. This Web site will provide information as to the availability, relative price, biobased content, performance and environmental and public health benefits of the designated items. USDA encourages manufacturers and vendors to provide product, business contacts, and product information for designated items. Instructions for posting information are found on the Web site itself. USDA also encourages Federal agencies to utilize this Web site to obtain current information on designated items, contact information on manufacturers and vendors, and access to information on product characteristics relevant to procurement decisions. In addition to any information provided on the Web site, manufacturers and vendors are expected to provide relevant information to Federal agencies, upon request, with respect to product characteristics, including verification of such characteristics if requested.

(b) *Advertising, labeling and marketing claims.* Manufacturers and vendors are reminded that their advertising, labeling, and other marketing claims, including claims regarding health and environmental benefits of the product, must conform to the Federal Trade Commission Guides for the Use of Environmental Marketing Claims, 16 CFR part 260.

§ 2902.7 Determining biobased content.

(a) *Certification requirements.* For any product offered for preferred procurement, manufacturers and vendors must certify that the product meets the biobased content requirements for the designated item within which the product falls. Paragraph (c) of this section addresses how to determine biobased content. Upon request, manufacturers and vendors must provide USDA and Federal agencies information to verify biobased content for products certified to qualify for preferred procurement.

(b) *Minimum biobased content.* Unless specified otherwise in the designation of a particular item, the minimum biobased content requirements in a specific item designation refer to the biobased portion of the product, and not the entire product.

(c) *Determining biobased content.* Verification of biobased content must be based on third party ASTM/ISO compliant test facility testing using the ASTM International Radioisotope Standard Method D 6866. ASTM International Radioisotope Standard Method D 6866 determines biobased content based on the amount of biobased carbon in the material or product as percent of the weight (mass) of the total organic carbon in the material or product.

(d) *Products with the same formulation.* In the case of products that are essentially the same formulation, but marketed under a variety of brand names, biobased content test data need not be brand-name specific.

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

(a) *Providing information on life cycle costs and environmental and health benefits.* When requested by Federal agencies, manufacturers and vendors must provide information on life cycle costs and environmental and health benefits based on tests using either of two analytical approaches: The BEES analytical tool along with the qualifications of the independent testing entity that performed the tests; or either a third-party or an in-house conducted analysis using the ASTM standard for evaluating and reporting on environmental performance of biobased products D7075. Both BEES and the ASTM standard are in accordance with ISO standards, are focused on testing of biobased products, and will provide the life cycle assessment and life cycle cost information Federal agencies might require. As with biobased content, test

data using the above analytical methods need not be brand-name specific.

(b) *Performance test information.* In assessing performance of qualifying biobased products, USDA requires that Federal agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing must be conducted by an ASTM/ISO compliant laboratory. The procuring official will decide whether performance data must be brand-name specific in the case of products that are essentially of the same formulation.

§ 2902.9 Funding for testing.

(a) *USDA use of funds for biobased content and BEES testing.* USDA will use funds to support testing for biobased content and conduct of BEES testing for products within items USDA has selected to designate for preferred procurement through early regulatory action. USDA initially will focus on gathering the necessary test information on a sufficient number of products within an item (generic grouping of products) to support regulations to be promulgated to designate an item or items for preferred procurement under this program. USDA may accept cost sharing for such testing to the extent consistent with USDA product testing decisions. During this period USDA will not consider cost sharing in deciding what products to test. When USDA has concluded that a critical mass of items have been designated, USDA will exercise its discretion, in accordance with the competitive procedures outlined in paragraph (b) of this section, to allocate a portion of the available USDA testing funds to give priority to testing of products for which private sector firms provide cost sharing for the testing.

(b) *Competitive program for cost sharing for determining life cycle costs, environmental and health benefits, and performance.* (1) Subject to the availability of funds and paragraph (a) of this section, USDA will announce annually the solicitation of proposals for cost sharing for life cycle costs, environmental and health benefits, and performance testing of biobased products in accordance with the standards set forth in § 2902.8 to carry out this program. Information regarding the submission of proposals for cost sharing also will be posted on the USDA informational Web site, *http://www.biobased.oce.usda.gov.*

(2) Proposals will be evaluated and assigned a priority rating. Priority ratings will be based on the following criteria:

(i) A maximum of 25 points will be awarded a proposal based on the market readiness;

(ii) A maximum of 20 points will be awarded a proposal based on the potential size of the market for that product in Federal agencies;

(iii) A maximum of 25 points will be awarded based on the financial need for assistance of the manufacturer or vendor;

(iv) A maximum of 20 points will be awarded a proposal based on the product's prospective competitiveness in the market place;

(v) A maximum of 10 points will be awarded a proposal based on its likely benefit to the environment.

(3) Cost-sharing proposals will be considered first for high priority products of small and emerging private business enterprises. If funds remain to support further testing, USDA will consider cost sharing proposals for products of all other producers of biobased items as well as the remaining proposals for products of small and emerging private business enterprises. Proposals will be selected based on priority rating until available funds for the fiscal year are committed.

(4)(i) For products selected for life cycle costs and environmental and health benefits testing under this paragraph, USDA could provide up to 50 percent of the cost of determining the life cycle costs and environmental and health effects, up to a maximum of $5,000 of assistance per product.

(ii) For products selected for performance testing under this paragraph, USDA could provide up to 50 percent of the cost for performance testing, up to $100,000 of assistance per product for up to two performance tests (measures of performance) per product.

(5) For selected proposals, USDA will enter into agreements with and provide the funds directly to the testing entities.

(6) Proposals submitted in one fiscal year, but not selected for cost sharing of testing in that year, may be resubmitted to be considered for cost sharing in the following year.

Subpart B—Designated Items [Reserved]

Dated: January 3, 2005.

Keith Collins,

Chief Economist, Department of Agriculture.

[FR Doc. 05–399 Filed 1–10–05; 8:45 am]

BILLING CODE 3410–GL–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 27854; Amendment No. 13–32]

RIN 2120–AE84

Civil Penalty Assessment Procedures; Correction

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule; correction and technical amendment.

SUMMARY: This action makes minor editorial corrections to the final rule published in the **Federal Register** on October 4, 2004 (69 FR 59490) and technical corrections to one of the regulations it amended. That final rule adopted changed procedures concerning initiating and adjudicating an administratively assessed civil penalty against an individual acting as a pilot, flight engineer, mechanic, or repairman. Corrections include a quote and reference in the preamble, the removal of a redundant paragraph in the rule language, and several cross references to, and a typographical error in, redesignated paragraphs.

DATES: Effective January 11, 2005.

FOR FURTHER INFORMATION CONTACT: Joyce Redos, Attorney, telephone (202) 267–3137.

SUPPLEMENTARY INFORMATION: The final rule, published on October 4, 2004 (69 FR 59490), codified in Part 13 procedures relating to FAA civil penalty actions against a pilot, flight engineer, mechanic, or repairman, which are subject to review by the National Transportation Safety Board under 49 U.S.C. 46301(d)(5). The rule also made other minor modifications to the FAA's procedures for assessing civil penalties against persons other than pilots, flight engineers, mechanics or repairmen.

This publication corrects a quote and a reference in the preamble and removes a redundant section in 14 CFR 13.14. In § 13.14, paragraphs (a) and (b) are substantively identical, only set out differently. Paragraph (a) is, therefore, removed, and the paragraphs renumbered.

This publication also corrects several cross references to, and one typographical error in, redesignated paragraphs in § 13.16. The entire text of § 13.16 is republished for clarity. The first sentence in paragraph (d) is changed to add a cross reference to paragraph (c). In paragraph (d)(2), the cross reference to paragraph (e)(2)(ii) is changed to paragraph (g)(2)(ii). In