

**DEPARTMENT OF AGRICULTURE****Office of Procurement and Property Management****7 CFR Part 3201**

RIN 0599-AA15

**Designation of Product Categories for Federal Procurement****AGENCY:** Office of Procurement and Property Management, USDA.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Department of Agriculture (USDA) is proposing to amend the Guidelines for Designating Biobased Products for Federal Procurement (Guidelines) to add 12 sections that will designate the following product categories within which biobased products would be afforded Federal procurement preference: Agricultural spray adjuvants; animal cleaning products; deodorants; dethatcher products; fuel conditioners; leather, vinyl, and rubber care products; lotions and moisturizers; shaving products; specialty precision cleaners and solvents; sun care products; wastewater systems coatings; and water clarifying agents. USDA is also proposing minimum biobased contents for each of these product categories.

**DATES:** USDA will accept public comments on this proposed rule until August 6, 2012.

**ADDRESSES:** You may submit comments by any of the following methods. All submissions received must include the agency name and Regulatory Information Number (RIN). The RIN for this rulemaking is 0599-AA15. Also, please identify submittals as pertaining to the "Proposed Designation of Product Categories."

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* [biopreferred@usda.gov](mailto:biopreferred@usda.gov). Include RIN number 0599-AA15 and "Proposed Designation of Product Categories" on the subject line. Please include your name and address in your message.

- *Mail/commercial/hand delivery:* Mail or deliver your comments to: Ron Buckhalt, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW., Washington, DC 20024.

- Persons with disabilities who require alternative means for communication for regulatory information (Braille, large print, audiotape, etc.) should contact the

USDA Target Center at (202) 720-2600 (voice) and (202) 690-0942 (TTY).

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

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

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**I. Authority**

The designation of these product categories is proposed under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102 (referred to in this document as "section 9002").

**II. Background**

Section 9002 provides for the preferred procurement of biobased products by Federal procuring agencies and is referred to hereafter in this **Federal Register** notice as the "Federal

preferred procurement program." The definition of "procuring agency" in section 9002 includes both Federal agencies and "a person that is a party to a contract with any Federal agency, with respect to work performed under such a contract." Thus, Federal contractors, as well as Federal agencies, are expressly subject to the procurement preference provisions of section 9002.

The term "product category" is used in the designation process to mean a generic grouping of specific products that perform a similar function, such as the various brands of shaving products or deodorants. Once USDA designates a product category, procuring agencies are required generally to purchase biobased products within these designated product categories where the purchase price of the procurement product exceeds \$10,000 or where the quantity of such products or the functionally equivalent products purchased over the preceding fiscal year equaled \$10,000 or more. Procuring agencies must procure biobased products within each product category unless they determine that products within a product category are not reasonably available within a reasonable period of time, fail to meet the reasonable performance standards of the procuring agencies, or are available only at an unreasonable price. As stated in 7 CFR Part 3201—"Guidelines for Designating Biobased Products for Federal Procurement" (Guidelines), biobased products that are merely incidental to Federal funding are excluded from the Federal preferred procurement program; that is, the requirements to purchase biobased products do not apply to such purchases if they are unrelated to or incidental to the purpose of the Federal contract. In implementing the Federal preferred procurement program for biobased products, procuring agencies should follow their procurement rules and Office of Federal Procurement Policy guidance on buying non-biobased products when biobased products exist and should document exceptions taken for price, performance, and availability.

USDA recognizes that the performance needs for a given application are important criteria in making procurement decisions. USDA is not requiring procuring agencies to limit their choices to biobased products that fall under the product categories proposed for designation in this proposed rule. Rather, the effect of the designation of the product categories is to require procuring agencies to determine their performance needs, determine whether there are qualified biobased products that fall under the designated product categories that meet

the reasonable performance standards for those needs, and purchase such qualified biobased products to the maximum extent practicable as required by section 9002.

Section 9002(a)(3)(B) requires USDA to provide information to procuring agencies on the availability, relative price, performance, and environmental and public health benefits of such products and to recommend, where appropriate, the minimum level of biobased content to be contained in the procured products.

**Subcategorization.** Most of the product categories USDA is considering for designation for Federal preferred procurement cover a wide range of products. For some product categories, there are subgroups of products that meet different requirements, uses and/or different performance specifications. For example, within the product category “hand cleaners and sanitizers,” products that are used in medical offices may be required to meet performance specifications for sanitizing, while other products that are intended for general purpose hand washing may not need to meet these specifications. Where such subgroups exist, USDA intends to create subcategories. Thus, for example, for the product category “hand cleaners and sanitizers,” USDA determined in an earlier rulemaking that it was reasonable to create a “hand cleaner” subcategory and a “hand sanitizer” subcategory. Sanitizing specifications are applicable to the latter subcategory, but not the former. In sum, USDA looks at the products within each product category to evaluate whether there are groups of products within the category that have different characteristics or that meet different performance specifications and, where USDA finds these types of differences, it intends to create subcategories with the minimum biobased content based on the tested products within the subcategory.

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

justify the designation of a subcategory, the subcategory will be designated through the proposed and final rulemaking process.

USDA is not proposing to subcategorize any of the product categories being proposed for designation in today’s action. However, public comments and additional data are being requested for several of the product categories and subcategories may be created in a future rulemaking.

**Minimum Biobased Contents.** The minimum biobased contents being proposed with today’s rule are based on products for which USDA has biobased content test data. Because the submission of product samples for biobased content testing is on a strictly voluntary basis, USDA was able to obtain samples only from those manufacturers who volunteered to invest the resources required to submit the samples. USDA has, however, begun to receive biobased content data associated with manufacturer’s applications for certification to use the USDA Certified Biobased Product label. As discussed later in this preamble, these test results will also be considered when proposing the minimum biobased content levels for designated product categories.

In addition to considering the biobased content test data for each product category, USDA also considers other factors including product performance information. USDA evaluates this information to determine whether some products that may have a lower biobased content also have unique performance or applicability attributes that would justify setting the minimum biobased content at a level that would include these products. For example, a lubricant product that has a lower biobased content than others within a product category but is formulated to perform over a wider temperature range than the other products may be more desirable to Federal agencies. Thus, it would be beneficial to set the minimum biobased content for the product category at a level that would include the product with superior performance features.

USDA also considers the overall range of the tested biobased contents within a product category, groupings of similar values, and breaks (significant gaps between two groups of values) in the biobased content test data array. For example, the biobased contents of 13 tested products within a product category being proposed for designation today range from 12 to 100 percent, as follows: 12, 15, 53, 64, 74, 74, 86, 87, 87, 88, 90, 93, and 100. Because this is a very wide range, and because there is

a significant gap in the data between the 12 percent biobased product and the 53 percent biobased product, USDA reviewed the product literature to determine whether subcategories could be created within this product category. USDA found that the available product information did not justify subcategorization. Further, USDA did not find any performance claims that would justify setting the minimum biobased content based on the 12 percent biobased content product. Thus, USDA is proposing to set the minimum biobased content for this product category based on the product with a tested biobased content of 53 percent. USDA believes that this evaluation process allows it to establish minimum biobased contents based on a broad set of factors to assist the Federal procurement community in its decisions to purchase biobased products.

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

USDA anticipates that the minimum biobased content of a product category that is based on a single product is more likely to change as additional products within that category are identified and tested. In today’s proposed rule, none of the proposed minimum biobased contents is based on a single tested product.

Where USDA receives additional biobased content test data for products within these proposed product categories during the public comment period, USDA will take that information into consideration when establishing the minimum biobased content when the product categories are designated in the final rulemaking.

*Overlap with EPA’s Comprehensive Procurement Guideline program for recovered content products under the Resource Conservation and Recovery Act (RCRA) Section 6002.* Some of the products that are within biobased product categories designated for Federal preferred procurement under this program may also be within categories the Environmental Protection Agency (EPA) has designated under the

EPA's Comprehensive Procurement Guideline (CPG) for products containing recovered materials. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to make additional product and performance information available to Federal agencies conducting market research to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products. Manufacturers are asked to provide information highlighting the sustainable features of their biobased products and to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains fossil energy-based components (including petroleum, coal, and natural gas) and whether the product contains recovered materials. Federal agencies also may review available information on a product's biobased content and its profile against environmental and health measures and life-cycle costs (the ASTM Standard D7075, "Standard Practice for Evaluating and Reporting Environmental Performance of Biobased Products," or the Building for Environmental and Economic Sustainability (BEES) analysis for evaluating and reporting on environmental performance of biobased products). Federal agencies may then use this information to make purchasing decisions based on the sustainability features of the products. Detailed information on ASTM Standard D7075, and other ASTM standards, can be found on ASTM's Web site at <http://www.astm.org>. Information on the BEES analytical tool can be found on the Web site <http://www.bfrl.nist.gov/oaee/software/bees.html>.

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

jeopardize the intended end use of the product.

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

USDA does not believe that any of the product categories being proposed for Federal preferred procurement in today's rulemaking overlap with an EPA-designated recovered content product. However, interested readers may obtain more information on EPA's CPG products by accessing EPA's Web site <http://www.epa.gov/epaoswer/non-hw/procure/products.htm> and then clicking on the appropriate product name.

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

Procuring agencies should note that not all biobased products are "environmentally preferable." For example, unless cleaning products contain no or reduced levels of metals and toxic and hazardous constituents, they can be harmful to aquatic life, the environment, and/or workers. Household cleaning products that are formulated to be disinfectants are required, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), to be registered with EPA and must meet specific labeling requirements

warning of the potential risks associated with misuse of such products. When purchasing environmentally preferable cleaning products, many Federal agencies specify that products must meet Green Seal standards for institutional cleaning products or that the products have been reformulated in accordance with recommendations from the EPA's Design for the Environment (DfE) program. Both the Green Seal standards and the DfE program identify chemicals of concern in cleaning products. These include zinc and other metals, formaldehyde, ammonia, alkyl phenol ethoxylates, ethylene glycol, and volatile organic compounds. In addition, both require that cleaning products have neutral or less caustic pH.

In contrast, some biobased products may be more environmentally preferable than some products that meet Green Seal standards for institutional cleaning products or that have been reformulated in accordance with EPA's DfE program. To fully compare products, one must look at the "cradle-to-grave" impacts of the manufacture, use, and disposal of products. Biobased products that will be available for Federal preferred procurement under this program have been assessed as to their "cradle-to-grave" impacts.

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

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

*Other Federal Preferred Procurement Programs.* Federal procurement officials should also note that biobased products may be available for purchase by

Federal agencies through the AbilityOne Program (formerly known as the Javits-Wagner-O'Day (JWOD) program). Under this program, members of organizations including the National Industries for the Blind (NIB) and NISH offer products and services for preferred procurement by Federal agencies. A search of the AbilityOne Program's online catalog ([www.abilityone.gov](http://www.abilityone.gov)) indicated that five of the product categories being proposed today (deodorants; leather, vinyl, and rubber care products; lotions and moisturizers; specialty precision cleaners and solvents; and sun care products) are available through the AbilityOne Program. While there is no specific product within these product categories identified in the AbilityOne online catalog as being a biobased product, it is possible that such biobased products are available or will be available in the future. Also, because additional categories of products are frequently added to the AbilityOne Program, it is possible that biobased products within other product categories being proposed for designation today may be available through the AbilityOne Program in the future. Procurement of biobased products through the AbilityOne Program would further the objectives of both the AbilityOne Program and the Federal preferred procurement program.

**Outreach.** To augment its own research, USDA consults with industry and Federal stakeholders to the Federal preferred procurement program during the development of the rulemaking packages for the designation of product categories. USDA consults with stakeholders to gather information used in determining the order of product category designation and in identifying: Manufacturers producing and marketing products that fall within a product category proposed for designation; performance standards used by Federal agencies evaluating products to be procured; and warranty information used by manufacturers of end user equipment and other products with regard to biobased products.

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

USDA has developed a preliminary list of product categories for future designation and has posted this

preliminary list on the BioPreferred Web site. While this list presents an initial prioritization of product categories for designation, USDA cannot identify with certainty which product categories will be presented in each of the future rulemakings. In response to comments from other Federal agencies, USDA intends to give increased priority to those product categories that contain the highest biobased content. In addition, as the program matures, manufacturers of biobased products within some industry segments have become more responsive to USDA's requests for technical information than those in other segments. Thus, product categories with high biobased content and for which sufficient technical information can be obtained quickly may be added or moved up on the prioritization list. USDA intends to update the list of product categories for future designation on the Biopreferred Web site every six months, or more often if significant changes are made to the list.

### III. Summary of Today's Proposed Rule

USDA is proposing to designate the following product categories for Federal preferred procurement: Agricultural spray adjuvants; animal cleaning products; deodorants; dethatcher products; fuel conditioners; leather, vinyl, and rubber care products; lotions and moisturizers; shaving products; specialty precision cleaners and solvents; sun care products; wastewater systems coatings; and water clarifying agents. USDA is also proposing a minimum biobased content for each of these product categories. Lastly, USDA is proposing a date by which Federal agencies must incorporate these designated product categories into their procurement specifications (see Section IV.D).

In today's proposed rule, USDA is providing information on its findings as to the availability, economic and technical feasibility, environmental and public health benefits, and life-cycle costs for each of the designated product categories. Information on the availability, relative price, performance, and environmental and public health benefits of individual products within each of these product categories is not presented in this notice. Further, USDA has reached an understanding with manufacturers not to publish their names in conjunction with specific product data published in the **Federal Register** when designating product categories. This understanding was reached to encourage manufacturers to submit products for testing to support the designation of a product category.

Once a product category has been designated, USDA will encourage the manufacturers of products within the product category to voluntarily make their names and other contact information available for the BioPreferred Web site.

**Warranties.** Some of the product categories being proposed for designation today may affect original equipment manufacturers' (OEMs) warranties for equipment in which the product categories are used. For example, the manufacturer of a piece of equipment that requires lubrication typically includes a list of recommended lubricants in the owner/operators manual that accompanies the equipment when purchased. If the purchaser of the equipment uses a lubricant (including a biobased lubricant) that is not among the lubricants recommended by the equipment manufacturer, the manufacturer may cite that as a reason not to honor the warranty on the equipment. At this time, USDA does not have information available as to the extent that OEMs have included, or will include, biobased products among their recommended lubricants (or other similar operating components). This does not necessarily mean that use of biobased products will void warranties, only that USDA does not currently have such information. USDA is requesting comments and information on this topic, but cannot be held responsible if damage were to occur. USDA encourages manufacturers of biobased products to test their products against all relevant standards, including those that affect warranties, and to work with OEMs to ensure that biobased products are accepted and recommended for use. Whenever manufacturers of biobased products find that existing performance standards for warranties are not relevant or appropriate for biobased products, USDA is willing to assist them in working with the appropriate OEMs to develop tests that are relevant and appropriate for the end uses in which biobased products are intended. In addition to outreach to biobased product manufacturers and Federal Agencies, USDA will, as time and resources allow, work with OEMs on addressing any effect the use of biobased products may have on their warranties. If, in spite of these efforts, there is insufficient information regarding the use of a biobased product and its effect on warranties, the procurement agent would not be required to buy such a product. As information is available on warranties,

USDA will make such information available on the BioPreferred Web site.

*Additional Information.* USDA is working with manufacturers and vendors to make all relevant product and manufacturer contact information available on the BioPreferred Web site before a procuring agency asks for it, in order to make the Federal preferred procurement program more efficient. Steps USDA has implemented, or will implement, include: Making direct contact with submitting companies through email and phone conversations to encourage completion of product listing; coordinating outreach efforts with intermediate material producers to encourage participation of their customer base; conducting targeted outreach with industry and commodity groups to educate stakeholders on the importance of providing complete product information; participating in industry conferences and meetings to educate companies on program benefits and requirements; and communicating the potential for expanded markets beyond the Federal government, to include State and local governments, as well as the general public markets. Section V provides instructions to agencies on how to obtain this information on products within these product categories through the following Web site: <http://www.biopreferred.gov>.

*Comments.* USDA invites comment on the proposed designation of these product categories, including the definition, proposed minimum biobased content, and any of the relevant analyses performed during the selection of these product categories. In addition, USDA invites comments and information in the following areas:

1. We have attempted to identify relevant and appropriate performance standards and other relevant measures of performance for each of the proposed product categories. If you know of other such standards or relevant measures of performance for any of the proposed product categories, USDA requests that you submit information identifying such standards and measures, including their name (and other identifying information as necessary), identifying who is using the standard/measure, and describing the circumstances under which the product is being used.

2. Many biobased products within the product categories being proposed for designation will have positive environmental and human health attributes. USDA is seeking comments on such attributes in order to provide additional information on the BioPreferred Web site. This information will then be available to Federal

procuring agencies and will assist them in making informed sustainable procurement decisions. When possible, please provide appropriate documentation to support the environmental and human health attributes you describe.

3. Several product categories (e.g., agricultural spray adjuvants, animal cleaning products, deodorants, leather, vinyl, and rubber care products, sun care products, and wastewater systems coatings) have wide ranges of tested biobased contents. For the reasons discussed later in this preamble, USDA is proposing a minimum biobased content for most of these product categories that would allow many of the tested products to be eligible for Federal preferred procurement. USDA welcomes comments on the appropriateness of the proposed minimum biobased contents for these product categories and whether there are potential subcategories within the product categories that should be considered.

4. As discussed above, the effect that the use of biobased products may have on original equipment manufacturers' warranties is uncertain. USDA requests comments and supporting information on any aspect of this issue.

5. Today's proposed rule is expected to have both positive and negative impacts on individual businesses, including small businesses. USDA anticipates that the biobased Federal preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the proposed designated biobased product categories to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. Because USDA has been unable to determine the number of businesses, including small businesses, that may be adversely affected by today's proposed rule, USDA requests comment on how many small entities may be affected by this rule and on the nature and extent of that effect.

All comments should be submitted as directed in the **ADDRESSES** section above.

To assist you in developing your comments, the background information used in proposing these product categories for designation has been posted on the BioPreferred Web site. The background information can be located by clicking on the "Federal Procurement Preference" link on the right side of the BioPreferred Web site's

home page (<http://www.biopreferred.gov>) and then on the "Rules and Regulations" link. At the next screen, click on the Supporting Documentation link under Round 9 Designation under the Proposed Regulations section.

#### **IV. Designation of Product Categories, Minimum Biobased Contents, and Time Frame**

##### *A. Background*

In order to designate product categories for Federal preferred procurement, section 9002 requires USDA to consider: (1) The availability of biobased products within the product categories and (2) the economic and technological feasibility of using those products, including the life-cycle costs of the products.

In considering a product's availability, USDA uses several sources of information. USDA performs Internet searches, contacts trade associations (such as the Bio organization) and commodity groups, searches the Thomas Register (a database, used as a resource for finding companies and products manufactured in North America, containing over 173,000 entries), and contacts manufacturers and vendors to identify those manufacturers and vendors with biobased products within product categories being considered for designation. USDA uses the results of these same searches to determine if a product category is generally available.

In considering a product category's economic and technological feasibility, USDA examines evidence pointing to the general commercial use of a product and its life-cycle cost and performance characteristics. This information is obtained from the sources used to assess a product's availability. Commercial use, in turn, is evidenced by any manufacturer and vendor information on the availability, relative prices, and performance of their products as well as by evidence of a product being purchased by a procuring agency or other entity, where available. In sum, USDA considers a product category economically and technologically feasible for purposes of designation if products within that product category are being offered and used in the marketplace.

In considering the life-cycle costs of product categories proposed for designation, USDA has obtained the necessary input information (on a voluntary basis) from manufacturers of biobased products and has used the BEES analytical tool to analyze individual products within each

proposed product category. The BEES analytical tool measures the environmental performance and the economic performance of a product. The environmental performance scores, impact values, and economic performance results for products within the Round 9 designated product categories analyzed using the BEES analytical tool can be found on the BioPreferred Web site (<http://www.biopreferred.gov>) under the Supporting Documentation link mentioned above.

In addition to the BEES analytical tool, manufacturers wishing to make similar life-cycle information available may choose to use the ASTM Standard D7075 analysis. The ASTM Standard D7075 product analysis includes information on environmental performance, human health impacts, and economic performance. USDA is working with manufacturers and vendors to make this information available on the BioPreferred Web site in order to make the Federal preferred procurement program more efficient.

As discussed earlier, USDA has also implemented, or will implement, several other steps intended to educate the manufacturers and other stakeholders on the benefits of this program and the need to make this information, including manufacturer contact information, available on the BioPreferred Web site in order to then make it available to procurement officials. Additional information on specific products within the product categories proposed for designation may also be obtained directly from the manufacturers of the products. USDA has also provided a link on the BioPreferred Web site to a document that offers useful information to manufacturers and vendors who wish to position their businesses as BioPreferred vendors to the Federal Government. This document can be accessed by clicking on the “Sell Biobased Products” tab on the right side of the home page of the BioPreferred Web site, then on the “Resources for Business” tab under “Related Topics” on the right side of the next page, and then on the document titled “Selling Biobased Products to the Federal Government” in the middle of the page.

USDA recognizes that information related to the functional performance of biobased products is a primary factor in making the decision to purchase these products. USDA is gathering information on industry standard test methods and performance standards that manufacturers are using to evaluate the functional performance of their products. (Test methods are procedures

used to provide information on a certain attribute of a product. For example, a test method might determine how many bacteria are killed. Performance standards identify the level at which a product must perform in order for it to be “acceptable” to the entity that set the performance standard. For example, a performance standard might require that a certain percentage (e.g., 95 percent) of the bacteria must be killed through the use of the product.) The primary sources of information on these test methods and performance standards are manufacturers of biobased products within these product categories. Additional test methods and performance standards are also identified during meetings of the Interagency council and during the review process for each proposed rule. We have listed, under the detailed discussion of each product category proposed for designation (presented in Section IV.B), the functional performance test methods, performance standards, product certifications, and other measures of performance associated with the functional aspects of products identified during the development of this **Federal Register** notice for these product categories.

While this process identifies many of the relevant test methods and standards, USDA recognizes that those identified herein do not represent all of the methods and standards that may be applicable for a product category or for any individual product within the category. As noted earlier in this preamble, USDA is requesting identification of other relevant performance standards and measures of performance. As the program becomes fully implemented, these and other additional relevant performance standards will be available on the BioPreferred Web site.

In gathering information relevant to the analyses discussed above for this proposed rule, USDA has made extensive efforts to contact and request information and product samples within the product categories proposed for designation. For product information, USDA has attempted to contact representatives of the manufacturers of biobased products identified by the Federal preferred procurement program. For product samples on which to conduct biobased content tests and BEES analysis, USDA has attempted to obtain samples and BEES input information for at least five different suppliers of products within each product category in today's proposed rule. However, because the submission of information and samples is on a strictly voluntary basis, USDA was able

to obtain information and samples only from those manufacturers who volunteered to invest the resources required to gather and submit the information and samples. The data presented are all the data that were submitted in response to USDA requests for information from manufacturers of the products within the product categories proposed for designation. While USDA would prefer to have complete data on the full range of products within each product category, the data that were submitted support designation of the product categories in today's proposed rule.

To propose a product category for designation, USDA must have sufficient information on a sufficient number of products within the category to be able to assess its availability and its economic and technological feasibility, including its life-cycle costs. For some product categories, there may be numerous products available. For others, there may be very few products currently available. Given the infancy of the market for some product categories, it is expected that categories with only a single product will be identified. Further, 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 has determined it is appropriate to designate a product category or subcategory for Federal preferred procurement even when there is only a single product with a single supplier, though this will generally occur once other products with high biobased content and two or more producers are first designated. However, USDA has also determined that in such situations it is appropriate to defer the effective Federal preferred procurement date until such time that more than one supplier is identified in order to provide choice to procuring agencies. Similarly, the documented availability, benefits, and life-cycle costs of even a very small percentage of all products that may exist within a product category are also considered sufficient to support designation.

#### *B. Product Categories Proposed for Designation*

USDA uses a model (as summarized below) to identify and prioritize product categories for designation. Through this model, USDA has identified over 100 product categories for potential designation under the Federal preferred procurement program. A list of these product categories and information on the model can be accessed on the BioPreferred Web site at <http://www.biopreferred.gov>.

In general, product categories are developed and prioritized for designation by evaluating them against program criteria established by USDA and by gathering information from other government agencies, private industry groups, and manufacturers. These evaluations begin by looking at the cost, performance, and availability of products within each product category. USDA then considers the following points:

- Are there manufacturers interested in providing the necessary test information on products within a particular product category?
- Are there a number of manufacturers producing biobased products in this product category?
- Are there products available in this product category?
- What level of difficulty is expected when designating this product category?
- Is there Federal demand for the product?
- Are Federal procurement personnel looking for biobased products?
- Will a product category create a high demand for biobased feed stock?
- Does manufacturing of products within this product category increase potential for rural development?

After completing this evaluation, USDA prioritizes the list of product categories for designation. USDA then gathers information on products within the highest priority product categories and, as sufficient information becomes available for a group of product categories, a new rulemaking package is developed to designate the product categories within that group. USDA points out that the list of product categories may change, with some being added or dropped, and that the order in which they are proposed for designation is likely to change because the information necessary to designate a product category may take more time to obtain than one lower on the list.

In today's proposed rule, USDA is proposing to designate the following product categories for the Federal preferred procurement program: Agricultural spray adjuvants; animal cleaning products; deodorants; dethatcher products; fuel conditioners; leather, vinyl, and rubber care products; lotions and moisturizers; shaving products; specialty precision cleaners and solvents; sun care products; wastewater systems coatings; and water clarifying agents. USDA has determined that each of these product categories meets the necessary statutory requirements—namely, that they are being produced with biobased products and that their procurement by procuring

agencies will carry out the following objectives of section 9002:

- To increase demand for biobased products, which would in turn increase demand for agricultural commodities that can serve as feedstocks for the production of biobased products;
- To spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and
- To enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

Further, USDA has sufficient information on these product categories to determine their availability and to conduct the requisite analyses to determine their biobased content and their economic and technological feasibility, including life-cycle costs.

*Exemptions.* Products exempt from the biobased procurement preference are military equipment, defined as any product or system designed or procured for combat or combat-related missions, and spacecraft systems and launch support equipment. However, agencies may purchase biobased products wherever performance, availability and reasonable price indicates that such purchases are justified.

Although each product category in today's proposed rule would be exempt from the procurement preference requirement when used in spacecraft systems or launch support application or in military equipment used in combat and combat-related applications, this exemption does not extend to contractors performing work other than direct maintenance and support of the spacecraft or launch support equipment or combat or combat-related missions. For example, if a contractor is applying a dethatcher product to the lawn around an office building on a military base, the dethatcher the contractor purchases and uses on the lawn should be a qualifying biobased dethatcher. The exemption does apply, however, if the product being purchased by the contractor is for use in combat or combat-related missions or for use in space or launch applications. After reviewing the regulatory requirement and the relevant contract, where contractors have any questions on the exemption, they should contact the cognizant contracting officer.

USDA points out that it is not the intent of these exemptions to imply that biobased products are inferior to non-biobased products. If manufacturers of biobased products can meet the concerns of these two agencies, USDA is willing to reconsider such exemptions

on an case-by-case basis. Any changes to the current exemptions would be announced in a proposed rule amendment with an opportunity for public comment.

Each of the proposed designated product categories are discussed in the following sections.

#### 1. Agricultural Spray Adjuvants (Minimum Biobased Content 50 Percent)<sup>1</sup>

Agricultural spray adjuvants are products mixed in the spray tank with the herbicide, pesticide, or fertilizer formulas that will improve the efficiency and the effectiveness of the chemicals including sticking agents, wetting agents, etc.

USDA identified 30 manufacturers and suppliers of 62 agricultural spray adjuvants. These 30 manufacturers and suppliers do not necessarily include all manufacturers of agricultural spray adjuvants, merely those identified during USDA information gathering activities. Relevant product information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified three test methods (as shown below) used in evaluating products within this product category. While there may be additional test methods, as well as performance standards, product certifications, and other measures of performance, applicable to products within this product category, the three test methods identified by the manufacturers are:

#### Test Methods

- 29 CFR 1910.1200; Occupational Safety Health Standards Section 1200—Hazard Communication
- VOCs; California Air Resources Board Method 310
- ASTM D790; Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical Insulating Materials

USDA contacted procurement officials with various policy-making and procuring agencies in an effort to gather information on the purchases of agricultural spray adjuvants, as well as information on products within the other 11 product categories proposed for designation today. These agencies included GSA, several offices within the DLA, OFEE, USDA Departmental Administration, the National Park Service, EPA, a Department of Energy laboratory, and OMB. Communications

<sup>1</sup> Additional information on the determination of minimum biobased contents is presented in Section IV.C of this preamble.

with these Federal officials led to the conclusion that obtaining current usage statistics and specific potential markets within the Federal government for biobased products within the 12 proposed designated product categories is not possible at this time.

Most of the contacted officials reported that procurement data are appropriately reported in higher level groupings of Federal Supply Codes<sup>2</sup> for materials and supplies, which is higher level coding than the proposed designated product categories. Using terms that best match the product categories in today's proposed rule, USDA queried the GSA database for Federal purchases of products within today's proposed product categories. The results indicate purchases of products within product categories in today's proposed rule. The results of this inquiry can be found in the background information for Round 9, which is posted on the BioPreferred Web site. Also, the purchasing of such materials as part of contracted services and with individual purchase cards used to purchase products locally leads to less accurate data on purchases of specific products.

USDA also investigated the Web site *FEDBIZOPPS.gov*, a site which lists Federal contract purchase opportunities and awards greater than \$25,000. The information provided on this Web site, however, is for broad categories of services and products rather than the specific types of products that are included in today's proposed rule. Therefore, USDA has been unable to obtain data on the amount of agricultural spray adjuvants purchased by procuring agencies. However, Federal agencies routinely perform, or contract for, agricultural, lawn, and landscaping services involving the use of such products. Thus, they have a need for agricultural spray adjuvants and for services that use these products. Designation of agricultural spray adjuvants will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics, have been collected on 21 agricultural spray adjuvants. Analyses of the environmental and human health benefits and the life-cycle

costs of agricultural spray adjuvants were performed for one of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

## 2. Animal Cleaning Products (Minimum Biobased Content 57 Percent)

Animal cleaning products are products designed to clean, condition, or remove substances from animal hair or other parts of an animal.

USDA identified 85 manufacturers and suppliers of 329 animal cleaning products. The 85 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased animal cleaning products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified one test method (as shown below) used in evaluating products within this product category. While there may be additional test methods, as well as performance standards, product certifications, and other measures of performance, applicable to products within this product category, the one test method identified by the manufacturers is:

### Test Method

- 29 CFR 1910.1200; EPA FIFRA 25b Minimum Risk Pesticide Exempt

USDA attempted to gather data on the potential market for animal cleaning products within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies routinely perform, or procure contract services to perform, the types of cleaning activities that use these products. Thus, they have a need for animal cleaning products and for services that require the use of animal cleaning products. Designation of animal cleaning products will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics, have been collected on 15 animal cleaning products. Analyses of the environmental and human health benefits and the life-cycle costs of animal cleaning products were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9,

which is posted on the BioPreferred Web site.

## 3. Deodorants (Minimum Biobased Content 73 Percent)

Deodorants are products for inhibiting or masking perspiration and other body odors and that are often combined with an antiperspirant.

USDA identified 37 manufacturers and suppliers of 82 different deodorants. These 37 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased deodorants, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for deodorants within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, several Federal agencies operate housing and medical care facilities where deodorants are used or sold. In addition, Federal agencies may contract for services involving the use of such products. Thus, they have a need for deodorants and for services that require the use of deodorants. Designation of deodorants will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 10 deodorant products. Analyses of the environmental and human health benefits and the life-cycle costs of deodorants were performed for one of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

<sup>2</sup> The Federal Supply Code (FSC) is a four-digit code used by government buying offices to classify and identify, in broad terms, the products and supplies that the government buys and uses. The FSC is the first four digits in the much more detailed 13-digit National Stock Number (NSN) that is assigned to all government purchases for purposes of identification and inventory control.

#### 4. Dethatchers (Minimum Biobased Content 87 Percent)

Dethatchers are products used to remove non-decomposed plant material accumulated in grassy areas.

USDA identified 13 manufacturers and suppliers of 14 dethatchers. These 13 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased dethatchers, merely those identified during USDA information gathering activities.

Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for dethatchers within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies routinely maintain, or procure contract services to maintain, office and residential facility landscapes where dethatchers are used. Thus, they have a need for these products. Designation of dethatchers will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on six dethatchers. Analyses of the environmental and human health benefits and the life-cycle costs of dethatchers were performed for three of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 5. Fuel Conditioners (Minimum Biobased Content 64 Percent)

Fuel conditioners are products formulated to improve the performance and efficiency of engines by providing

benefits such as removing accumulated deposits, increasing lubricity, removing moisture, increasing the cetane number, and/or preventing microbial growths within the fuel system.

USDA identified 13 manufacturers and suppliers of 25 fuel conditioner products. These 13 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased fuel conditioner products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified six test methods (as shown below) used in evaluating products within this product category. While there may be additional test methods, as well as performance standards, product certifications, and other measures of performance, applicable to products within this product category, the six test methods identified by the manufacturers are:

##### Test Methods

- Environmental Protection Agency 40 CFR 79.23 Fuel Additive
- ASTM International D1094 Standard Test Method for Water Reaction of Aviation Fuels
- ASTM International D2274 Standard Test Method for Oxidation Stability of Distillate Fuel Oil (Accelerated Method)
- ASTM International D6078 Standard Test Method for Evaluating Lubricity of Diesel Fuels by the Scuffing Load Ball-on-Cylinder Lubricity Evaluator (SLBOCLE)
- ASTM International D665 Standard Test Method for Rust-Preventing Characteristics of Inhibited Mineral Oil in the Presence of Water
- Cummins Engine Company L10 Injector Depositing Test Detergency. A standard used to indicate of the ability of a product to provide injector cleanliness and can be used to discriminate fuel/fuel additive quality

USDA attempted to gather data on the potential market for fuel conditioner products within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies routinely operate, or procure contract services to operate, motor vehicles and other equipment where fuel conditioners are used. Thus, they have a need for these products. Designation of fuel conditioner products will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 23 fuel conditioner products. Analyses of the environmental and human health benefits and the life-cycle costs of fuel conditioner products were performed for three of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 6. Leather, Vinyl, and Rubber Care Products (Minimum Biobased Content 55 Percent)

Leather, vinyl, and rubber care products are products that help clean, nourish, protect, and restore leather, vinyl, and rubber surfaces including cleaners, conditioners, protectants, polishes, waxes, etc.

USDA identified 36 manufacturers and suppliers of 79 leather, vinyl, and rubber care products. These 36 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of leather, vinyl, and rubber care products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified two test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the two test methods identified by manufacturers are:

##### Test Methods

- ASTM D4488; Standard Guide for Testing Cleaning Performance of Products Intended for Use on Resilient Flooring and Washable Walls
- GS-37; Green Seal Environmental Standard for General-Purpose, Bathroom, Glass, and Carpet Cleaners Used for Industrial and Institutional Purposes

USDA attempted to gather data on the potential market for leather, vinyl, and rubber care products within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies routinely procure leather, vinyl, and rubber care products, or contract with services that procure these products.

Thus, they have a need for leather, vinyl, and rubber care products and for services that require the use of leather, vinyl, and rubber care products.

Designation of leather, vinyl, and rubber care products will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on seven leather, vinyl, and rubber care products. Analyses of the environmental and human health benefits and the life-cycle costs of biobased leather, vinyl, and rubber care products were performed for two products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 7. Lotions and Moisturizers (Minimum Biobased Content 59 Percent)

Lotions and moisturizers are creams and oils used to soften and treat damaged skin.

USDA identified 230 manufacturers and suppliers of 888 lotions and moisturizers. These 230 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of lotions and moisturizers, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified two test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the two test methods identified by manufacturers are:

#### Test Methods

- ASTM International E1207 Standard Practice for The Sensory Evaluation of Auxiliary Deodorancy
- ASTM International E1909 Standard Guide for Time-Intensity Evaluation of Sensory Attributes

USDA attempted to gather data on the potential market for lotions and moisturizers within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, Federal agencies procure lotions and moisturizers for use in medical care or similar types of facilities, or they procure the services that use these products. Thus, they have

a need for lotions and moisturizers and for services that require the use of lotions and moisturizers. Designation of lotions and moisturizers will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 133 lotions and moisturizers. Analyses of the environmental and human health benefits and the life-cycle costs of biobased lotions and moisturizers were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 8. Shaving Products (Minimum Biobased Content 92 Percent)

Shaving products are products designed for every step of the shaving process, including shaving creams, gels, soaps, lotions, and aftershave balms.

USDA identified 71 manufacturers of 640 biobased shaving products. The 71 manufacturers do not necessarily include all manufacturers of biobased shaving products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for shaving products within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, Federal medical care facilities use, and procure services that use, shaving products. Thus, they have a need for shaving products and for services that require the use of shaving products. Designation of shaving products will promote the

use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 10 shaving products. Analyses of the environmental and human health benefits and the life-cycle costs of biobased shaving products were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 9. Specialty Precision Cleaners and Solvents (Minimum Biobased Content 56 Percent)

Specialty precision cleaners and solvents are cleaners and solvents used in specialty applications. These materials may be used in either neat solution, diluted with water, or in hand wiping applications.

USDA identified 22 manufacturers and suppliers of 30 specialty precision cleaners and solvents. These 22 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of specialty precision cleaners and solvents, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified two test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the two test methods identified by manufacturers are:

#### Test Methods

- ASTM F1110 Standard Test Method for Sandwich Corrosion Test
- ASTM F519 Standard Test Method for Mechanical Hydrogen Embrittlement Evaluation of Plating Processes and Service Environments

USDA attempted to gather data on the potential market for specialty precision cleaners and solvents within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies purchase and maintain equipment that requires specialty precision cleaners and solvents, or contract with services that procure these products. Thus, they have a need for specialty precision cleaners and solvents and for services

that require the use of specialty precision cleaners and solvents. Designation of specialty precision cleaners and solvents will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 11 specialty precision cleaners and solvents. Analyses of the environmental and human health benefits and the life-cycle costs of biobased specialty precision cleaners and solvents were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 10. Sun Care Products (Minimum Biobased Content 53 Percent)

Sun care products are topical products, including sunscreens, sun blocks, and suntan lotions that absorb or reflect the sun's ultraviolet radiation to protect the skin.

USDA identified 47 manufacturers and suppliers of 206 different biobased sun care products. These 47 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased sun care products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified one test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the one test method identified by manufacturers is:

##### Test Methods

- 21 CFR part 352 21 CFR part 352 Sun Protection Factor Monogram

USDA attempted to gather data on the potential market for sun care products within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, some Federal agencies provide medical or other personnel care activities that require the use of sun care products. In addition, Federal agencies may procure medical care and other similar services that require the use of sun care products. Thus, they have a need for sun care products and for services that

require the use of such products. Designation of sun care products will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 13 sun care products. Analyses of the environmental and human health benefits and the life-cycle costs of biobased sun care products were performed for two of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 11. Wastewater Systems Coatings (Minimum Biobased Content 47 Percent)

Wastewater systems coatings are coatings that protect wastewater containment tanks, liners, roofing, flooring, joint caulking, manholes and related structures from corrosion. Protective coatings may cover the entire system or be used to fill cracks in systems.

USDA identified four manufacturers and suppliers of six wastewater systems coatings. These four manufacturers and suppliers do not necessarily include all manufacturers and suppliers of wastewater systems coatings, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified seven test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the seven test methods identified by manufacturers are:

##### Test Methods

- ASTM D2240; Standard Test Method for Rubber Property—Durometer Hardness
- ASTM D412; Standard Test Methods for Vulcanized Rubber and Thermoplastic Elastomers-Tension
- ASTM D624; Standard Test Method for Tear Strength of Conventional Vulcanized Rubber and Thermoplastic Elastomers
- ASTM D4060; Standard Test Method for Abrasion Resistance of Organic Coatings by the Taber Abraser

- ASTM D638; Standard Test Method for Tensile Properties of Plastics
- ASTM D792; Standard Test Methods for Density and Specific Gravity (Relative Density) of Plastics by Displacement
- ASTM E96; Standard Test Methods for Water Vapor Transmission of Materials

USDA attempted to gather data on the potential market for wastewater systems coatings within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies are responsible for maintaining wastewater systems and routinely procure wastewater systems coatings, or contract with services that procure these products. Thus, they have a need for wastewater systems coatings and for services that require the use of wastewater systems coatings. Designation of wastewater systems coatings will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on three wastewater systems coatings. Analyses of the environmental and human health benefits and the life-cycle costs of biobased wastewater systems coatings were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### 12. Water Clarifying Agents (Minimum Biobased Content 92 Percent)

Water clarifying agents are products designed to clarify and improve the quality of water by reducing contaminants such as excess nitrates, nitrates, phosphates, ammonia, and built-up sludge from decaying waste and other organic matter. These products are typically used in lakes, coves, decorative ponds, and aquaculture operations.

USDA identified 18 manufacturers and suppliers of 39 water clarifying agents. The 18 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased water clarifying agents, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified three test

methods (as shown below) used in evaluating products within this product category. While there may be additional test methods, as well as performance standards, product certifications, and other measures of performance, applicable to products within this product category, the three test methods identified by the manufacturers are:

#### Test Methods

- ATCC Biosafety Level 1; Minimal potential for causing diseases in humans, plants, animals and aquatic life
- NSF Cat. 61; Pretreatment of Potable Water Sources
- EPA/600/4-90/027; Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms

USDA attempted to gather data on the potential market for water clarifying agents within the Federal government as discussed in the section on agricultural spray adjuvants. These attempts were largely unsuccessful. However, many Federal agencies routinely perform, or procure contract services to perform, maintenance, reclamation, or research activities on bodies of water where these products are used. Thus, they have a need for water clarifying agents and for services that require the use of water clarifying agents. Designation of water clarifying agents will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics, have been collected on 11 water clarifying agents. Analyses of the environmental and human health benefits and the life-cycle costs of water clarifying agents were performed for one product using the BEEs analytical tool. The results of those analyses are presented in the background information for Round 9, which is posted on the BioPreferred Web site.

#### C. Minimum Biobased Contents

USDA has determined that setting a minimum biobased content for designated product categories is appropriate. Establishing a minimum biobased content will encourage competition among manufacturers to develop products with higher biobased contents and will prevent products with de minimis biobased content from being purchased as a means of satisfying the requirements of section 9002. USDA believes that it is in the best interest of the Federal preferred procurement program for minimum biobased contents to be set at levels that will realistically allow products to possess

the necessary performance attributes and allow them to compete with non-biobased products in performance and economics. Setting the minimum biobased content for a product category at a level met by several of the tested products will provide more products from which procurement officials may choose, will encourage the most widespread usage of biobased products by procuring agencies, and is expected to accomplish the objectives of section 9002.

As discussed in Section IV.A of this preamble, USDA relied primarily on manufacturers' voluntary submission of information and product samples to support the proposed designation of these product categories. However, in selecting the proposed minimum biobased content for each product category, USDA also considered the biobased content of several products for which manufacturers have requested certification to use the USDA Certified Biobased Product label. USDA considered these data points to be valid and useful in setting the proposed minimum biobased content because the labeling program specifies that the reported biobased content must be determined by a third-party testing entity that is ISO 9001 conformant. Thus, the biobased content data presented in the following paragraphs includes test results from the labeling portion of the BioPreferred program as well as the test results from all of the product samples that were submitted for analysis under the Federal biobased products preferred procurement program.

As a result of public comments received on the first designated product categories rulemaking proposal, USDA decided to account for the slight imprecision in the analytical method used to determine biobased content of products when establishing the minimum biobased content. Thus, rather than establishing the minimum biobased content for a product category at the tested biobased content of the product selected as the basis for the minimum value, USDA is establishing the minimum biobased content at a level three (3) percentage points less than the tested value. USDA believes that this adjustment is appropriate to account for the expected variations in analytical results.

USDA encourages procuring agencies to seek products with the highest biobased content that is practicable in all of the proposed designated product categories. To assist the procuring agencies in determining which products have the highest biobased content, USDA will update the information in

the biobased products catalog to include the biobased content of each product. Those products within each product category that have the highest biobased content will be listed first and others will be listed in descending order. USDA is specifically requesting comments on the proposed minimum biobased contents and also requests additional data that can be used to re-evaluate the appropriateness of the proposed minimum biobased contents. As the market for biobased products develops and USDA obtains additional biobased content data, it will re-evaluate the established minimum biobased contents of designated product categories and consider raising them whenever justified.

The following paragraphs summarize the information that USDA used to propose minimum biobased contents within each proposed designated product category.

#### 1. Agricultural Spray Adjuvants

Thirteen of the 62 biobased agricultural spray adjuvants have been tested for biobased content using ASTM D6866.<sup>3</sup> The biobased contents of these 13 biobased agricultural spray adjuvants range from 12 to 100 percent, as follows: 12, 15, 53, 64, 74, 74, 86, 87, 87, 88, 90, 93, and 100. Because there is a significant break between the values for the products with the 15 percent and the 53 percent biobased contents, USDA considered the need to subcategorize this product category. However, USDA found that there was not sufficient information on the performance or applicability of the products with the lowest biobased contents to justify creating a subcategory based on those two products. Because the biobased contents of the remaining 11 products are spread over the range of 53 to 100 without any significant gaps or breaks in the data, USDA is proposing to set the minimum biobased content for agricultural spray adjuvants at 50 percent, based on the product with a tested biobased content of 53 percent.

USDA requests additional information on potential subcategories within this product category. USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on

<sup>3</sup> ASTM D6866, "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis," is used to distinguish between carbon from fossil resources (non-biobased carbon) and carbon from renewable sources (biobased carbon). The biobased content is expressed as the percentage of total carbon that is biobased carbon.

formulation, performance, or applicability.

#### 2. Animal Cleaning Products

Seven of the 329 biobased animal cleaning products identified have been tested for biobased content using ASTM D6866. The biobased contents of these 7 biobased animal cleaning products range from 60 percent to 97 percent, as follows: 60, 63, 69, 74, 74, 77, and 97 percent. Because there is a significant break between the values for the two products with the highest biobased contents, USDA considered the need to subcategorize this product category. However, USDA found that there was not sufficient information on the performance or applicability of the product with the highest biobased content to justify creating a subcategory based on that single product. Because the biobased contents of the remaining 5 products are within a narrow range, USDA is proposing to set the minimum biobased content for animal cleaning products at 57 percent, based on the product with a tested biobased content of 60 percent.

#### 3. Deodorants

Seven of the 82 identified biobased deodorants identified have been tested for biobased content using ASTM D6866. The biobased contents of these 7 biobased deodorant products range from 25 percent to 100 percent, as follows: 25, 25, 30, 76, 98, 99, and 100 percent. There are two significant breaks in the range of data, one between the 30 and 76 percent biobased products and another between the 76 and 98 percent biobased products. USDA evaluated the available product information to determine if there were sufficient differences in formulation, performance, or applicability between these products to justify subcategorization. However, USDA did not find sufficient information to justify subcategories within the product category. USDA also did not find any features of the three lowest biobased content products that would justify setting the minimum biobased content at a level that would include these products. The 4 remaining products all have biobased contents above 75 percent. Therefore, USDA is proposing to set the minimum biobased content for this product category at 73 percent, based on the product with the tested biobased content of 76 percent, the lowest of the 4 remaining products within the product category.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing

subcategories based on formulation, performance, or applicability.

#### 4. Dethatchers

Six of the 14 biobased dethatchers identified have been tested for biobased content using ASTM D6866. The biobased contents of these 6 biobased dethatchers range from 6 percent to 100 percent, as follows: 6, 10, 35, 90, 98, and 100 percent. There are two significant breaks in the range of data, one between the 10 and 35 percent biobased products and another between the 35 and 90 percent biobased products. USDA evaluated the available product information to determine if there were sufficient differences in formulation, performance, or applicability between these products to justify subcategorization. However, USDA did not find sufficient information to justify subcategories within the product category. USDA also did not find any features of the three lowest biobased content products that would justify setting the minimum biobased content at a level that would include these products. Therefore, USDA is proposing to set the minimum biobased content for this product category at 87 percent, based on the product with the lowest biobased content of the 3 remaining products within the product category.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

#### 5. Fuel Conditioners

Eight of the 25 biobased fuel conditioners identified have been tested for biobased content using ASTM D6866. The biobased contents of these 8 biobased fuel conditioners range from 28 percent to 96 percent, as follows: 28, 38, 49, 67, 75, 77, 89, and 96 percent.

There is a significant break in the data between the 49 percent biobased product and the 67 percent biobased product. USDA evaluated the available product information to determine if there were sufficient differences in formulation, performance, or applicability between these two product groups to justify subcategorization. However, USDA did not find sufficient information to justify subcategories within the product category. USDA also did not find any features of the 28, 38, or 49 percent biobased content products that would justify setting the minimum biobased content at a level that would include these products. Therefore, USDA is proposing to set the minimum biobased content for this product

category at 64 percent, based on the product with the lowest biobased content of those products in the group of products with the higher tested biobased content.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

#### 6. Leather, Vinyl, and Rubber Care Products

Six of the 79 biobased leather, vinyl, and rubber care products identified have been tested for biobased content using ASTM D6866. The biobased contents of these 6 biobased leather, vinyl, and rubber care products range from 8 percent to 88 percent, as follows: 8, 28, 58, 62, 70, and 88 percent. There are two significant breaks in the range of data, one between the 8 and 28 percent biobased products and another between the 28 and 58 percent biobased products. USDA evaluated the available product information to determine if there were sufficient differences in formulation, performance, or applicability between these products to justify subcategorization. However, USDA did not find sufficient information to justify subcategories within the product category. USDA also did not find any features of the two lowest biobased content products that would justify setting the minimum biobased content at a level that would include these products. The remaining 4 products have biobased contents ranging from 58 to 88 percent, and there are no significant breaks in the range of data nor are there obvious performance or applicability claims that distinguish one product from the others. Therefore, USDA is proposing to set the minimum biobased content for this product category at 55 percent, based on the product with the lowest biobased content of the 4 remaining products within the product category.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

#### 7. Lotions and Moisturizers

Twenty-seven of the 888 biobased lotions and moisturizers identified have been tested for biobased content using ASTM D6866. The biobased contents of these 27 biobased lotions and moisturizers range from 37 to 100 percent, as follows: 37, 47, 62, 66, 66,

72, 73, 80, 84, 85, 87, 88, 89, 89, 90, 91, 94, 94, 94, 95, 95, 95, 95, 97, 99, 100, and 100 percent. There is a significant break in the data between the 47 percent biobased product and the 62 percent biobased product. USDA could find no distinguishing features claimed for the products with 37 and 47 percent biobased contents that would lead to setting the minimum biobased content at such a low level. The biobased contents of the remaining 25 products are reasonably evenly distributed between 62 and 100 percent. USDA did not find any performance claims or other features that would justify creating subcategories for this product category. Because there are no obvious breaks in the data for the 25 products with biobased contents above 62 percent, USDA is proposing to set the minimum biobased content for this product category at 59 percent based on the product with a tested biobased content of 62 percent.

#### 8. Shaving Products

Five of the 640 biobased shaving products identified have been tested for biobased content using ASTM D6866. The biobased contents of these 5 biobased shaving products range from 40 to 100 percent, as follows: 40, 95, 99, 99, and 100 percent. USDA found no performance or applicability claims to justify setting the minimum biobased content for this product category based on the 40 percent product. Because of the narrow range and the very high tested biobased content of the four remaining products, USDA is proposing to set the minimum biobased content for shaving products at 92 percent, based on the product with a tested biobased content of 95 percent.

#### 9. Specialty Precision Cleaners and Solvents

Nine of the 30 biobased specialty precision cleaners and solvents identified have been tested for biobased content using ASTM D6866. The biobased contents of these 9 biobased specialty precision cleaners and solvents range from 59 percent to 100 percent, as follows: 59, 61, 69, 74, 76, 80, 82, 96, and 100 percent. USDA reviewed the product information available for this product category and found that the performance of the product with a tested biobased content of 59 percent has been demonstrated using numerous aircraft industry standards. Because the manufacturers of the other products tested do not make such performance claims for their products, USDA is proposing to set the minimum biobased content for this product category at 56 percent. USDA

will continue to gather performance information for products within this product category and, if sufficient information is obtained, will consider raising the minimum biobased content for the final rule.

#### 10. Sun Care Products

Eighteen of the 206 biobased sun care products identified have been tested for biobased content using ASTM D6866. The biobased contents of these 18 biobased sun care products range from 56 to 99 percent, as follows: 56, 62, 63, 70, 71, 81, 82, 97, 99, 99, 99, 99, 99, 100, 100, 100, and 100 percent. The only significant break in the range of data is between the 82 and 97 percent products. Because 7 of the 18 data points are well below the 97 to 100 percent level of the 11 products above the break, USDA is not proposing to set the minimum biobased content based on these products. Because the biobased contents of the remaining 7 products are within a fairly narrow range, USDA is proposing to set the minimum biobased content for sun care products at 53 percent, based on the product with a tested biobased content of 56 percent.

#### 11. Wastewater Systems Coatings

Five of the six biobased wastewater systems coatings identified have been tested for biobased content using ASTM D6866. The biobased contents of these 5 biobased wastewater systems coatings are 34, 50, 62, 62, and 64 percent. Because of the significant gap between the 34 percent biobased product and the 50 percent product, USDA evaluated the available product information to determine if there were sufficient differences in formulation, performance, or applicability between the products to justify subcategorization. However, USDA did not find sufficient information to justify subcategories within the product category. USDA also did not find any features of the 34 percent biobased content product that would justify setting the minimum biobased content at a level that would include this product. Therefore, USDA is proposing to set the minimum biobased content for this product category at 47 percent, based on the product with the 50 percent biobased content.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

#### 12. Water Clarifying Agents

Ten of the 39 biobased water clarifying agents identified have been tested for biobased content using ASTM D6866. The biobased contents of these 10 biobased water clarifying agents range from 95 percent to 100 percent, as follows: 95, 98, 98, 98, 99, 99, 100, 100, and 100 percent. Because the biobased contents of these 10 products are all very high and they are within a narrow range, USDA is proposing to set the minimum biobased content for water clarifying agents at 92 percent, based on the product with a tested biobased content of 95 percent.

#### *D. Compliance Date for Procurement Preference and Incorporation Into Specifications*

USDA intends for the final rule to take effect thirty (30) days after publication of the final rule. However, as proposed, procuring agencies would have a one-year transition period, starting from the date of publication of the final rule, before the procurement preference for biobased products within a designated product category would take effect.

USDA is proposing a one-year period before the procurement preferences would take effect because it recognizes that Federal agencies will need time to incorporate the preferences into procurement documents and to revise existing standardized specifications. Both section 9002(a)(3) and 7 CFR 3201(c) explicitly acknowledge the need for Federal agencies to have sufficient time to revise the affected specifications to give preference to biobased products when purchasing products within the designated product categories. Procuring agencies will need time to evaluate the economic and technological feasibility of the available biobased products for their agency-specific uses and for compliance with agency-specific requirements, including manufacturers' warranties for machinery in which the biobased products would be used.

By the time these product categories are promulgated for designation, Federal agencies will have had a minimum of 18 months (from the date of this **Federal Register** notice), and much longer considering when the Guidelines were first proposed and these requirements were first laid out, to implement these requirements.

For these reasons, USDA proposes that the mandatory preference for biobased products under the designated product categories take effect one year after promulgation of the final rule. The one-year period provides these agencies

with ample time to evaluate the economic and technological feasibility of biobased products for a specific use and to revise the specifications accordingly. However, some agencies may be able to complete these processes more expeditiously, and not all uses will require extensive analysis or revision of existing specifications. Although it is allowing up to one year, USDA encourages procuring agencies to implement the procurement preferences as early as practicable for procurement actions involving any of the designated product categories.

#### **V. Where can agencies get more information on these USDA-designated product categories?**

Information used to develop this proposed rule can be found in the background information for Round 9, which is posted on the BioPreferred Web site located at: <http://www.biopreferred.gov>. At the BioPreferred Web site, click on the “Federal Procurement Preference” link on the right side of the page and then on the “Rules and Regulations” link. At the next screen, click on the Supporting Documentation link under Round 9 Designation Product Categories under the Proposed Regulations section.

Further, once the product category designations in today’s proposal become final, manufacturers and vendors voluntarily may make available information on specific products, including product and contact information, for posting by the Agency on the BioPreferred Web site. USDA has begun performing periodic audits of the information displayed on the BioPreferred Web site and, where questions arise, is contacting the manufacturer or vendor to verify, correct, or remove incorrect or out-of-date information. Procuring agencies should contact the manufacturers and vendors directly to discuss specific needs and to obtain detailed information on the availability and prices of biobased products meeting those needs.

By accessing the BioPreferred Web site, agencies will also be able to obtain the voluntarily-posted information on each product concerning: Relative price; life-cycle costs; hot links directly to a manufacturer’s or vendor’s Web site (if available); performance standards (industry, government, military, ASTM/ISO) that the product has been tested against; and environmental and public health information from the BEES analysis or the alternative analysis embedded in the ASTM Standard D7075, “Standard Practice for Evaluating and Reporting

Environmental Performance of Biobased Products.”

#### **VI. Regulatory Information**

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Executive Order 12866, as supplemented by Executive Order 13563, requires agencies to determine whether a regulatory action is “significant.” The Order defines a “significant regulatory action” as one that is likely to result in a rule that may: “(1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

Today’s proposed rule has been determined by the Office of Management and Budget to be not significant for purposes of Executive Order 12866. We are not able to quantify the annual economic effect associated with today’s proposed rule. As discussed earlier in this preamble, USDA made extensive efforts to obtain information on the Federal agencies’ usage within the 12 designated product categories. These efforts were largely unsuccessful. Therefore, attempts to determine the economic impacts of today’s proposed rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing products within designated product categories if price is “unreasonable,” the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of today’s proposed rule. Consideration was also given to the fact that agencies may choose not to procure products within designated product categories due to unreasonable price.

#### **1. Summary of Impacts**

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

#### **2. Benefits of the Proposed Rule**

The designation of these product categories provides the benefits outlined in the objectives of section 9002; to increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products, and to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities. On a national and regional level, today’s proposed rule can result in expanding and strengthening markets for biobased materials used in these product categories.

#### **3. Costs of the Proposed Rule**

Like the benefits, the costs of today’s proposed rule have not been quantified. Two types of costs are involved: Costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Pre-award procurement costs for Federal agencies may rise minimally as the contracting officials conduct market research to evaluate the performance,

availability and price reasonableness of preferred products before making a purchase.

*B. Regulatory Flexibility Act (RFA)*

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

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

USDA anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of product categories for Federal preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers.

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

The Federal preferred procurement program may decrease opportunities for businesses that manufacture or sell non-

biobased products or provide components for the manufacturing of such products. Most manufacturers of non-biobased products within the product categories being proposed for designation for Federal preferred procurement in this rule are expected to be included under the following NAICS codes: 325320 (pesticide and other agricultural chemicals manufacturing), 325411 (medicinal and botanical manufacturing), 325412 (pharmaceutical preparation manufacturing), 325510 (paint and coating manufacturing), 325612 (polish and other sanitation goods manufacturing), and 325620 (toilet preparation manufacturing). USDA obtained information on these six NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 3,756 companies within these 6 NAICS categories and that these companies own a total of about 4,374 establishments. Thus, the average number of establishments per company is about 1.2. The Census data also reported that of the 4,374 individual establishments, about 4,258 (97.3 percent) have fewer than 500 employees. USDA also found that the overall average number of employees per company among these industries is about 92 and that the pharmaceutical preparation manufacturing segment (with an average of about 250) is the only segment reporting an average of more than 100 employees per company. Thus, nearly all of the businesses fall within the Small Business Administration's definition of a small business (less than 500 employees, in most NAICS categories).

USDA does not have data on the potential adverse impacts on manufacturers of non-biobased products within the product categories being designated, but believes that the impact will not be significant. Most of the product categories being proposed for designation in this rulemaking are typical consumer products widely used by the general public and by industrial/commercial establishments that are not subject to this rulemaking. Thus, USDA believes that the number of small businesses manufacturing non-biobased products within the product categories being designated and selling significant quantities of those products to government agencies affected by this rulemaking to be relatively low. Also, this proposed rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased products when biobased products do not meet the availability, performance,

or reasonable price criteria. This proposed rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials.

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

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

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

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

*D. Executive Order 12988: Civil Justice Reform*

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

*E. Executive Order 13132: Federalism*

This proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this proposed 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 proposed rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, for State, local, and tribal governments, or the private sector.

Therefore, a statement under section 202 of UMRA is not required.

**G. Executive Order 12372: Intergovernmental Review of Federal Programs**

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

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

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

**I. Paperwork Reduction Act**

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

**J. E-Government Act Compliance**

USDA is committed to compliance with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for Federal preferred procurement under each designated product category. For information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205-4008.

**List of Subjects in 7 CFR Part 3201**

Biobased products, Procurement.

For the reasons stated in the preamble, the Department of Agriculture proposes to amend 7 CFR chapter XXXII as follows:

**CHAPTER XXXII—OFFICE OF PROCUREMENT AND PROPERTY MANAGEMENT**

**PART 3201—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT**

1. The authority citation for part 3201 continues to read as follows:

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

2. Add §§ 3201.88 through 3201.99 to subpart B to read as follows:

Sec.

- 3201.88 Agricultural spray adjuvants.
- 3201.89 Animal cleaning products.
- 3201.90 Deodorants.
- 3201.91 Dethatcher products.
- 3201.92 Fuel conditioners.
- 3201.93 Leather, vinyl, and rubber care products.
- 3201.94 Lotions and moisturizers.
- 3201.95 Shaving products.
- 3201.96 Specialty precision cleaners and solvents.
- 3201.97 Sun care products.
- 3201.98 Wastewater systems coatings.
- 3201.99 Water clarifying agents.

**§ 3201.88 Agricultural spray adjuvants.**

(a) **Definition.** Products mixed in the spray tank with the herbicide, pesticide, or fertilizer formulas that will improve the efficiency and the effectiveness of the chemicals, including sticking agents, wetting agents, etc.

(b) **Minimum biobased content.** The Federal preferred procurement product must have a minimum biobased content of at least 50 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) **Preference compliance date.** No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased agricultural spray adjuvants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased agricultural spray adjuvants.

**§ 3201.89 Animal cleaning products.**

(a) **Definition.** Products designed to clean, condition, or remove substances from animal hair or other parts of an animal.

(b) **Minimum biobased content.** The Federal preferred procurement product must have a minimum biobased content of at least 57 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) **Preference compliance date.** No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased animal cleaning products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased animal cleaning products.

**§ 3201.90 Deodorants.**

(a) **Definition.** Products that are designed for inhibiting or masking perspiration and other body odors and that are often combined with an antiperspirant.

(b) **Minimum biobased content.** The Federal preferred procurement product must have a minimum biobased content of at least 73 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) **Preference compliance date.** No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased deodorants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased deodorants.

**§ 3201.91 Dethatchers.**

(a) **Definition.** Products used to remove non-decomposed plant material accumulated in grassy areas.

(b) **Minimum biobased content.** The Federal preferred procurement product must have a minimum biobased content of at least 87 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) **Preference compliance date.** No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased dethatchers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased dethatchers.

**§ 3201.92 Fuel conditioners.**

(a) **Definition.** Products formulated to improve the performance and efficiency

of engines by providing benefits such as removing accumulated deposits, increasing lubricity, removing moisture, increasing the cetane number, and/or preventing microbial growths within the fuel system.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 64 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased fuel conditioners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased fuel conditioners.

#### **§ 3201.93 Leather, vinyl, and rubber care products.**

(a) *Definition.* Products that help clean, nourish, protect, and restore leather, vinyl, and rubber surfaces, including cleaners, conditioners, protectants, polishes, waxes, etc.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 55 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased leather, vinyl, and rubber care products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased leather, vinyl, and rubber care products.

#### **§ 3201.94 Lotions and moisturizers.**

(a) *Definition.* Creams and oils used to soften and treat damaged skin.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 59 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased lotions and moisturizers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased lotions and moisturizers.

#### **§ 3201.95 Shaving products.**

(a) *Definition.* Products designed for every step of the shaving process, including shaving creams, gels, soaps, lotions, and aftershave balms.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 92 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased shaving products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased shaving products.

#### **§ 3201.96 Specialty precision cleaners and solvents.**

(a) *Definition.* Cleaners and solvents used in specialty applications. These materials may be used in neat solution, diluted with water, or in hand wiping applications.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 56 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased specialty precision cleaners and solvents. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased specialty precision cleaners and solvents.

#### **§ 3201.97 Sun care products.**

(a) *Definition.* Products including sunscreens, sun blocks, and suntan lotions that are topical products that absorb or reflect the sun's ultraviolet radiation to protect the skin.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 53 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased sun care products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased sun care products.

#### **§ 3201.98 Wastewater systems coatings.**

(a) *Definition.* Coatings that protect wastewater containment tanks, liners, roofing, flooring, joint caulking, manholes and related structures from corrosion. Protective coatings may cover the entire system or be used to fill cracks in systems.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 47 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased wastewater systems coatings. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased wastewater systems coatings.

#### **§ 3201.99 Water clarifying agents.**

(a) *Definition.* Products designed to clarify and improve the quality of water by reducing contaminants such as excess nitrites, nitrates, phosphates, ammonia, and built-up sludge from decaying waste and other organic matter.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 92 percent, which shall be

based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with

this part, will give a procurement preference for qualifying biobased water clarifying agents. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require

the use of biobased water clarifying agents.

Dated: May 22, 2012.

**Pearlie S. Reed,**

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

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