

United States' rights means rights in real property including the right to enforce the terms of the conservation easement deed and take sole title to the conservation easement deed.

■ 3. Section 1491.4 is amended by revising paragraph (a), redesignating paragraphs (d)(4) and (d)(5) as (d)(5) and (d)(6), adding new paragraph (d)(4), and revising paragraph (e) to read as follows:

§ 1491.4 Program Requirements.

(a) Under FRPP, the Secretary, on behalf of CCC, shall purchase conservation easements, in partnership with eligible entities, from landowners who voluntarily wish to protect their farm and ranch lands from conversion to nonagricultural uses. Eligible entities submit applications to NRCS State Offices to partner with NRCS to acquire conservation easements on farm and ranch land. NRCS enters into cooperative agreements with selected entities and provides funds for up to 50 percent of the appraised market value for the easement purchase. In return, the entity agrees to acquire, hold, manage, and enforce the easement. A United States' rights clause must also be included in each FRPP funded easement deed for the protection of the Federal investment, and the United States must be named as a grantee on each FRPP funded easement deed.

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(d) * * *

(4) For a farm to be considered eligible, the forest land of a farm cannot exceed two-thirds of the easement area.

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(e) Prior to FRPP fund disbursement, the value of the conservation easement must be appraised. Appraisals must be completed and signed by a State-certified general appraiser and must contain a disclosure statement by the appraiser. The appraisal must conform to the Uniform Standards of Professional Appraisal Practices and the Uniform Appraisal Standards for Federal Land Acquisitions. In addition, NRCS may require an eligible entity to obtain an appraisal using NRCS appraisal instructions in order to ensure the accuracy of the conservation easement appraisal upon which the NRCS contribution towards fair market value is based.

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■ 4. Section 1491.22 is amended by revising paragraph (d) and adding a new paragraph (i) to read as follows:

§ 1491.22 Conservation easement deeds.

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(d) The conservation easement deed must identify the United States as a

grantee with rights as set forth in the deed. Among the rights that the United States acquires in each conservation easement is the right to enforce the terms of the easement under specified conditions and the right to assume sole title to the conservation easement should the grantee abandon or attempt to terminate the conservation easement.

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(i) Impervious surfaces shall not exceed 2 percent of the FRPP easement area, excluding NRCS-approved conservation practices. However, the NRCS State Conservationist may waive the 2 percent impervious surface limitation on a parcel-by-parcel basis, provided no more than six percent of the easement area is covered by impervious surfaces. The NRCS State Conservationist must consider, at a minimum, population density, the ratio of open prime and important soil versus impervious surfaces on the easement area, and parcel size when deciding whether to waive the two percent limitation. All FRPP easements must include language limiting the amount of impervious surfaces within the easement area.

■ 5. Section 1491.30 is amended by adding a new paragraph (g) and by revising paragraphs (b) and (e) to read as follows:

§ 1491.30 Violations and remedies.

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(b) In the event that the grantee/partner fails to enforce any of the terms of the conservation easement, as determined in the sole discretion of the Secretary of the United States Department of Agriculture, the Secretary and his or her successors or assigns may exercise the United States' rights to enforce the terms of the conservation easement through any and all authorities available under Federal or State law. In the event that the grantee/partner attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests in the conservation easement without the prior consent of the Secretary and, if applicable, payment of consideration to the United States, then, at the option of the Secretary, all right, title, and interest in the conservation easement shall become vested solely in the United States of America.

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(e) The conservation easement deed must include an indemnification clause requiring the landowner (grantor) to indemnify and hold harmless the United States from any liability arising

from or related to the property enrolled in FRPP.

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(g) In the event NRCS determines it must exercise the United States' right to enforce the terms of or take title to the conservation easement, NRCS will provide written notice by certified mail to the grantee at the grantee's last known address. The notice will set forth the nature of the noncompliance by the grantee and a 60-day period to cure. If the grantee fails to cure within the 60-day period, the United States will take the action specified under the notice. The United States reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation easement deed or the conservation values it seeks to protect.

Signed in Washington, DC, on July 19, 2006.

Bruce I. Knight,

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

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DEPARTMENT OF AGRICULTURE

7 CFR Part 2902

RIN 0503-AA26

Office of Energy Policy and New Uses; Designation of Biobased Items for Federal Procurement

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

ACTION: Interim final rule with comment period.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending 7 CFR part 2902, Guidelines for Designating Biobased Products for Federal Procurement, to be consistent with the statutory changes to section 9002 of the Farm Security and Rural Investment Act (FSRIA) that were effected when the Energy Policy Act of 2005 was signed into law on August 8, 2005. In addition, USDA amends part 2902 in order to clarify that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. Finally, this rule amends part 2902 to clarify the USDA intent to exclude from the preferred procurement program biobased products that are merely incidental to Federal funding. The amendment is issued as an immediately effective interim rule, with opportunity for public comment.

DATES: This rule is effective July 27, 2006.

Comment Date: Submit comments on or before August 28, 2006.

ADDRESSES: Please submit any comments, or a notice of intent to submit comments, identified by "Amendments to Guidelines" or Regulatory Information Number (RIN) 0503-AA26, by any of the following methods:

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

- Agency Web site: <http://www.biobased.oce.usda.gov>. Follow the instructions for submitting comments.

- E-mail: fb4p@oce.usda.gov. Include RIN number 0503-AA26 and "Amendments to Guidelines" on the subject line. Please include your name and address in your message.

- Mail/commercial/hand delivery: Mail or deliver your comments to: Marvin Duncan, USDA, Office of the Chief Economist, Office of Energy Policy and New Uses, Room 4059, South Building, 1400 Independence Avenue, SW., MS-3815, Washington, DC 20250-3815.

- 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) 401-4133 (TDD).

FOR FURTHER INFORMATION CONTACT: Marvin Duncan, USDA, Office of the Chief Economist, Office of Energy Policy and New Uses, Room 4059, South Building, 1400 Independence Avenue, SW., MS-3815, Washington, DC 20250-3815; e-mail: mduncan@oce.usda.gov; phone (202) 401-0461.

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

- I. Authority
- II. Background
- III. Summary of Changes
- IV. Regulatory Information
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights
 - C. Executive Order 12988: Civil Justice Reform
 - D. Executive Order 13132: Federalism
 - E. Unfunded Mandates Reform Act of 1995
 - F. Executive Order 12372: Intergovernmental Review of Federal Programs
 - G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

I. Authority

The Guidelines for Designating Biobased Products for Federal Procurement (the Guidelines) are established under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102 (referred to in this document as "section 9002"), as amended by the Energy Policy Act of 2005 (Pub. L. 109-58).

II. Background

As originally enacted, section 9002 provides for the preferred procurement of biobased products by Federal agencies. USDA proposed guidelines for implementing this preferred procurement program on December 19, 2003 (68 FR 70730-70746). The Guidelines were promulgated on January 11, 2005 (70 FR 1792), and are contained in 7 CFR part 2902, "Guidelines for Designating Biobased Products for Federal Procurement."

The Guidelines identify various procedures Federal agencies are required to follow in implementing the requirements of section 9002. They were modeled in part on the "Comprehensive Procurement Guidelines for Products Containing Recovered Materials (40 CFR part 247), which the Environmental Protection Agency (EPA) issued pursuant to the Resource Conservation Recovery Act ("RCRA"), 40 U.S.C. 6962. The RCRA guideline states that it does not apply to purchases of designated items that are merely incidental to Federal funding. A similar statement relating to the purchase of biobased products was inadvertently omitted from part 2902, although it is USDA's intent to follow the same policy of removing incidental purchases from the scope of the biobased preferred procurement program.

On August 8, 2005, the Energy Policy Act of 2005 was signed into law. Sections 205 and 943 of the Energy Policy Act revised section 9002 of FSRIA, as follows: Section 205 provides that, in addition to biobased products with the highest available biobased content, procuring agencies are to give procurement preference to products that comply with regulations issued under 42 U.S.C. 6914b-1, which addresses plastic ring beverage containers made of naturally degradable material. Section 943 of the Energy Policy Act of 2005 adds to the definitions section of FSRIA, 7 U.S.C. 8101, a definition of "procuring agency," which includes both Federal agencies and "any person contracting with any Federal agency with respect to work performed under that contract." In addition, section 943 of the Energy

Policy Act of 2005 amends subsections within section 9002 of FSRIA by replacing the term "Federal agencies" with "procuring agencies." These changes have the effect of making Federal contractors expressly subject to the procurement preference provisions of section 9002 of FSRIA.

On March 16, 2006, USDA published a final rule (71 FR 13686) designating six items within which biobased products will be afforded the procurement preference, as required by section 9002 of FSRIA. In the final rule, USDA responded to a comment that questioned how USDA intends to implement the preference program consistent with the United States' international trade obligations. The response in the final rule stated that "biobased products from any designated country [as defined in Federal Acquisition Regulation section 25.003] would receive the same preference extended to U.S.-sourced biobased products. In order to clarify and make this policy applicable to all biobased designations, USDA plans to propose a broad-based revision to the USDA biobased procurement guidelines (7 CFR part 2902)." 71 FR 13690.

The purpose of this interim final rule, therefore, is three-fold: (1) To revise the Guidelines (i.e., 7 CFR part 2902) to make them consistent with the changes to section 9002 of FSRIA as the result of the Energy Policy Act of 2005, (2) to ensure the Guidelines are consistent with existing policy concerning incidental purchases, and (3) to clarify existing USDA policy regarding the equal treatment by procuring agencies of certain non-domestic biobased products. Because the interim final rule responds to a statutory amendment that became effective August 8, 2005, and because it codifies USDA policy as already stated in the first final rule designating biobased products, the interim final rule is effective immediately.

III. Summary of Changes

USDA is amending five sections of 7 CFR part 2902, as described below.

A. 7 CFR 2902.1—Purpose

As promulgated, the Guidelines applied to Federal agencies. In response to section 943(a)(2) of the Energy Policy Act, USDA is amending 7 CFR 2902.1(a) and (b) to replace the term "Federal agencies" with "procuring agencies." The effect of these changes is to broaden the purpose and scope of the procurement program to include "procuring agencies;" that is, to include contractors of Federal agencies as well as Federal agencies.

B. 7 CFR 2902.2—Definitions

USDA is amending the definitions section by adding the definition for “procuring agency,” as stated in section 943(a)(1)(B) of the Energy Policy Act. The definition of “procuring agency” covers both Federal agencies and “any person contracting with any Federal agency with respect to work performed under the contract.”

C. 7 CFR 2902.3—Applicability to Federal Procurement

In response to section 943(a)(2) of the Energy Policy Act, USDA is amending 7 CFR 2902.3(a) by replacing the first two occurrences of “Federal agencies” with “procuring agencies” in the first sentence of the paragraph. In the first instance, this change makes the guidelines applicable to “all procurement actions by procuring agencies involving items designated by USDA in this part,” not just to Federal agencies. In the second instance, the change broadens the applicability of the \$10,000 threshold value to both Federal agencies and their contractors. Both of these changes are the result of revisions to section 9002 as contained in the Energy Policy Act.

USDA is not changing the other occurrence of “Federal agencies” and “Federal agency” in the last sentence in 7 CFR 2902.3(a) because the sentence is applicable only at the Federal agency level; that is, the \$10,000 threshold value applies to Federal agencies as a whole rather than to agency subgroups, such as regional offices of subagencies of a larger Federal department or agency. Similarly, purchases made by contractors under contract with a Federal agency would be included in the total value of products purchased by the Federal agency.

In response to section 943(a)(2) of the Energy Policy Act, USDA is amending 7 CFR 2902.3(b) to apply to “procuring agencies” rather than to “Federal agencies.” This paragraph states that these guidelines do not apply for any procurement that is subject to section 6002 of the Solid Waste Disposal Act as amended by the Resource Conservation Recovery Act of 1976. The non-applicability of these guidelines applies equally to procurements made by Federal contractors and by Federal agencies. Therefore, USDA is changing the term “Federal agencies” to “procuring agencies.”

In response to section 943(a)(2) of the Energy Policy Act, USDA is amending 7 CFR 2902.3(c) to apply to “procuring agencies” rather than to “Federal agencies.” This paragraph addresses the requirement to purchase products

within designated items with the highest biobased contents unless such products are not reasonably priced, are not readily available, or do not meet specified or reasonable performance standards. This requirement and the exceptions to the purchase of biobased products are equally applicable to Federal contractors and to Federal agencies. Therefore, USDA is revising this paragraph to make it applicable to “procuring agencies.”

In response to section 205 of the Energy Policy Act of 2005, USDA is amending 7 CFR 2902.3(c) to require procuring agencies to also give a preference to items that comply with regulations issued under 42 U.S.C. 6914b–1 (section 103 of Pub. L. 100–556). (Section 6914b–1 requires the Administrator of the U.S. Environmental Protection Agency to require, by regulation, that any plastic ring beverage container “intended for use in the United States shall be made of naturally degradable material which, when discarded, decomposes within a period established by such regulation.”)

Finally, USDA is amending section 2902.3 to add paragraph (d), in order to ensure that the preferred procurement program will be implemented consistent with similar guidelines issued under RCRA by the EPA. Specifically, the new paragraph will clarify that the Guidelines do not apply to purchases of biobased items that are not the direct result of contracts with procuring agencies (i.e., incidental purchases).

D. 7 CFR 2902.4—Procurement Programs

In the final rule designating six items under the biobased preferred procurement program (71 FR 13686), USDA proposed a broad-based revision to the Guidelines that would clarify its policy of implementing the program consistent with the United States’ international trade obligations. USDA now carries out that proposal by adding to section 2902.4 a new subparagraph (b)(3), which requires Federal agencies to give equal consideration under the preferred procurement program to biobased products from “designated countries.” As defined in the Federal Acquisition Regulation section 25.003, “designated countries” include, for example, countries that have entered into specific trade agreements with the United States or offer reciprocal equal treatment to U.S.-sourced goods.

E. 7 CFR 2902.8—Determining Life Cycle Costs, Environmental And Health Benefits, And Performance

In response to section 943(a)(2) of the Energy Policy Act, USDA is amending 7

CFR 2302.8(b) to refer to “procuring agencies” rather than to “Federal agencies.” The subject paragraph requires agencies to rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards when assessing the performance of qualifying biobased products. The reliance on these results is equally applicable to Federal contractors making procurement decisions under contracts to a Federal agency and to the procuring agents within a Federal agency. Therefore, USDA is changing the term “Federal agencies” to “procuring agencies” in 7 CFR 2302.8(b).

IV. Regulatory Information

A. Executive Order 12866: Regulatory Planning and Review

This rule has been reviewed under Executive Order 12866. It has been determined that this interim final rule, which amends the Guidelines, is not a “significant regulatory action” under the terms of Executive Order 12866, because its purpose is only to implement the statutory amendments to FSRIA. Therefore, this interim final rule has not been reviewed by the Office of Management and Budget (OMB).

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

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

C. Executive Order 12988: Civil Justice Reform

This interim final 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.

D. Executive Order 13132: Federalism

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

E. Unfunded Mandates Reform Act of 1995

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

F. 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.

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

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

List of Subjects in 7 CFR Part 2902

Biobased products, Procurement.

■ For the reasons set forth in the preamble, the Department amends 7 CFR part 2902 as follows:

Department of Agriculture

PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

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

Authority: 7 U.S.C. 8102.

■ 2. Section 2902.1 is revised to read as follows:

§ 2902.1 Purpose and scope.

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

(b) *Scope.* The guidelines in this part designate items that are or can be

produced with biobased products and whose procurement by procuring agencies will carry out the objectives of section 9002 of FSRIA.

■ 3. Section 2902.2 is amended by adding, in alphabetical order, the definition of "procuring agency" to read as follows:

§ 2902.2 Definitions.

* * * * *

"Procuring agency" means any Federal agency that is using Federal funds for procurement or any person contracting with any Federal agency with respect to work performed under the contract.

* * * * *

■ 4. Section 2902.3 is revised to read as follows:

§ 2902.3 Applicability to Federal procurements

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

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

(c) *Procuring items composed of highest percentage of biobased products.* FSRIA section 9002(c)(1) requires procuring agencies to procure designated items composed of the highest percentage of biobased products practicable or such items that comply with the regulations issued under section 103 of Public Law 100–556 (42 U.S.C. 6914b–1), consistent with maintaining a satisfactory level of competition, considering these guidelines. Procuring agencies may decide not to procure such items if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

(d) This guideline does not apply to purchases of designated items that are unrelated to or incidental to Federal funding; *i.e.*, not the direct result of a contract or agreement with persons supplying items to a procuring agency or providing support services that include the supply or use of items.

■ 5. Section 2902.4 is amended by adding paragraph (b)(3) to read as follows:

§ 2902.4 Procurement programs.

* * * * *

(b) * * *

(3) In implementing the preference program, Federal agencies shall treat as eligible for the preference biobased products from "designated countries," as that term is defined in section 25.003 of the Federal Acquisition Regulation, provided that those products otherwise meet all requirements for participation in the preference program.

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■ 6. Section 2902.8 is amended by revising paragraph (b) to read as follows:

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

* * * * *

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

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Dated: July 21, 2006.

Joseph Glauber,

Deputy Chief Economist, U.S. Department of Agriculture.

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