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[FR Doc. 2011-18533 Filed 7-21-11; 8:45 am]

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DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****7 CFR Parts 301 and 319**

[Docket No. APHIS-2010-0127]

RIN 0579-AD34

Movement of Hass Avocados From Areas Where Mediterranean Fruit Fly or South American Fruit Fly Exist**AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Final rule.

SUMMARY: We are amending the regulations to relieve certain restrictions regarding the movement of fresh Hass variety avocados. Specifically, we are amending our domestic regulations to provide for the interstate movement of Hass avocados from Mediterranean fruit fly quarantined areas in the United States with a certificate if the fruit is safeguarded after harvest in accordance with specific measures. We are also amending our foreign quarantine regulations to remove trapping requirements for Mediterranean fruit fly for Hass avocados imported from the State of Michoacán, Mexico, requirements for treatment or origin from an area free of Mediterranean fruit fly for Hass avocados imported from Peru, and requirements for trapping or origin from an area free of South American fruit fly for Hass avocados imported from Peru. These actions are warranted in light of research demonstrating the limited host status of Hass avocados to Mediterranean fruit fly and South American fruit fly. By amending both our domestic and foreign quarantine regulations, we are making them consistent with each other and relieving restrictions for Mexican and Peruvian Hass avocado producers. In addition, this action provides a means for Hass avocados to be moved interstate if the avocados originate from a Mediterranean fruit fly quarantined area in the United States.

DATES: *Effective Date:* July 22, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Tony Román, Import Specialist, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-0627.

SUPPLEMENTARY INFORMATION:**Background**

The domestic fruit fly regulations, contained in 7 CFR 301.32 through 301.32-10 (referred to below as the domestic regulations), were established to prevent the spread of certain fruit fly species, including *Ceratitis capitata* (Mediterranean fruit fly), into noninfested areas of the United States. The regulations designate soil and many fruits, nuts, vegetables, and berries as regulated articles and impose restrictions on the interstate movement of those regulated articles from regulated areas.

Avocado, *Persea americana* (including the variety Hass), is listed as a regulated article for Mediterranean fruit fly, melon fruit fly (*Bactrocera cucurbitae*), Mexican fruit fly (*Anastrepha ludens*), Oriental fruit fly (*Bactrocera dorsalis*), peach fruit fly (*Anastrepha zonata*), and sapote fruit fly (*Anastrepha serpentina*) in the regulations. Because avocados are listed as regulated articles, they may not be moved interstate from an area quarantined for one of those fruit flies unless the movement is authorized by a certificate or limited permit. In general, avocados may be eligible for a certificate if a bait spray is applied to the production site beginning prior to harvest and continuing through the end of harvest or if a post-harvest irradiation treatment is applied to the fruit. To be eligible for a limited permit, a regulated article must be moved to a specific destination for specialized handling, utilization, or processing or for treatment and meet all other applicable provisions of the regulations. For Hass avocados moving interstate from any Mexican fruit fly or sapote fruit fly quarantined area, the avocados may be moved interstate under certificate if the fruit is safeguarded after harvest in accordance with specific measures set out in § 301.32-4(d). We have determined that Hass avocados are a host for Mexican fruit fly and sapote fruit fly only after harvest; these measures are designed to prevent Hass avocados harvested in a quarantined area from being infested with these fruit flies after harvest. Avocados handled in accordance with these measures are thus allowed to move from the quarantined area without further restriction under the certificate.

The regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56-1 through 319.56-50, referred to below as the import regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the

introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The requirements for importing Hass variety avocados into the United States from Michoacán, Mexico, are described in § 319.56-30. Those requirements include pest surveys and pest risk-reducing practices, treatment, packinghouse procedures, inspection, and shipping procedures. Although Mediterranean fruit fly is not known to be present in Michoacán, Mexico, the regulations require that trapping be conducted for Mediterranean fruit fly and that any fruit fly finds are reported to the Animal and Plant Health Inspection Service (APHIS).

The regulations in § 319.56-50 allow the importation into the continental United States of Hass avocados from Peru provided, among other things, that the avocados originate from an area free of Mediterranean fruit fly or that the avocados have been treated for Mediterranean fruit fly in accordance with our phytosanitary treatment regulations in 7 CFR part 305. In addition, the regulations in § 319.56-50 require that the avocados must either originate from an area within Peru that is free of South American fruit fly or an area with low pest prevalence for South American fruit fly and where trapping for South American fruit fly is conducted.

On April 4, 2011, we published in the **Federal Register** (76 FR 18419-18421, Docket No. APHIS-2010-0127) a proposal¹ to amend our domestic quarantine regulations to provide for the interstate movement of Hass avocados from Mediterranean fruit fly quarantined areas in the United States with a certificate if the fruit is safeguarded after harvest in accordance with specific measures. We also proposed to amend our foreign quarantine regulations to remove trapping requirements for Mediterranean fruit fly for Hass avocados imported from Michoacán, Mexico, the treatment requirements and origin restrictions for Mediterranean fruit fly for imported Hass avocados from Peru, and the trapping requirements and origin restrictions for South American fruit fly for imported Hass avocados from Peru. These proposed actions were intended to make our domestic and foreign requirements for movement of Hass avocados consistent with each other, relieve restrictions for Mexican and Peruvian

¹ To view the proposed rule, the commodity import evaluation document, and the comments we received, go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0127>.

Hass avocado producers, and provide an alternative means for Hass avocados to be moved interstate if the avocados originate from a Mediterranean fruit fly quarantined area in the United States.

We solicited comments concerning our proposal for 30 days ending May 4, 2011. We reopened and extended the deadline for comments until May 18, 2011, in a document published in the **Federal Register** on May 9, 2011 (76 FR 26654–26655). We received 30 comments by that date. They were from private citizens, customs brokers, trade associations, a State department of agriculture, growers, industry groups, chambers of commerce, ports, and foreign governments. The majority of commenters supported the proposed rule. Several commenters submitted comments that were not germane to the rule. The issues raised by the other commenters are discussed below.

One commenter stated that, because Hass avocados have been proven to be limited hosts for South American fruit fly and Mediterranean fruit fly, APHIS should relieve movement restrictions on Hass avocados from all countries with Mediterranean fruit fly and South American fruit fly that ship Hass avocados to the United States. The commenter stated that this would fulfill our bilateral and multilateral sanitary and phytosanitary agreements.

Currently, Hass avocados are allowed entry into the United States from the State of Michoacán, Mexico, and Peru under the regulations in §§ 319.56–30 and 319.56–50, respectively. In addition, Hass avocados are allowed entry into the United States from Chile administratively, provided that the avocados originate from an area free of the Mediterranean fruit fly or that the avocados have been treated by either cold treatment or fumigation with methyl bromide. Because we recognize Chile as free of Mediterranean fruit fly and South American fruit fly, we did not mention Chile in our proposed rule; however, we are also relieving movement restrictions on Hass avocados from Chile due to Mediterranean fruit fly, should Mediterranean fruit fly be reintroduced to Chile. In the event that another country where Mediterranean fruit fly and South American fruit fly are present is authorized to export Hass avocados to the United States, we will not impose movement restrictions associated with those fruit flies, except for post-harvest safeguarding as described in the proposed rule.

One commenter expressed concern that Peru's research protocol and findings, particularly with respect to the host status of Hass avocados for South American fruit fly, were not subjected to

peer review. The commenter further stated that the NPPO of Peru should conduct additional experiments to test host susceptibility to South American fruit fly using fruit of varying degrees of maturity from stressed trees. The commenter cited the abandonment of the regulatory protocol allowing the movement of Sharwil variety avocados from Hawaii to the continental United States due to repeated finds of Oriental fruit fly larva within avocado fruit during drought conditions.

While Peru's report on the host status of Hass avocado for South American fruit fly was not peer-reviewed, their research corroborated current literature, including peer-reviewed research conducted by Martin Aluja *et al.*,² concluding that, under most circumstances, Hass avocados are generally poor hosts for *Anastrepha* spp. fruit flies. As stated in the commodity import evaluation document published in connection with the proposed rule, APHIS does not consider South American fruit fly to infest Hass avocados in Mexico, but we included it in the pest list for Hass avocados from Peru due to a lack of host records and data. Peru subsequently conducted a study on host status and came to the conclusion that Hass avocados in Peru are not hosts to South American fruit fly. As stated in our commodity import evaluation document, the main risk of fruit fly infestation is from avocado fruit outside of the normal population, *i.e.*, fruit that is left to become overripe on the tree, injured or damaged fruit, fruit picked up from the ground, picked fruit left in the field for days, and fruit that is the wrong cultivar. Therefore, we have determined that Hass avocados are conditional nonhosts for Mediterranean fruit fly and South American fruit fly. We have encouraged Peru to submit the data they submitted to us regarding the host status of Hass avocado to South American fruit fly for publication in a peer-reviewed journal.

The commenter is correct that the regulatory protocol allowing Sharwil avocados to be moved to the continental United States from Hawaii was abandoned due to repeated finds of Oriental fruit fly larva within avocado fruit. However, the situation within Hawaii was fundamentally different than the situation within Peru for several reasons, not the least of which is the different fruit fly species and avocado varieties involved.

² Aluja, M., F. Diaz-Fleischer and J. Arredondo. 2004. Nonhost Status of Commercial *Persea americana* 'Hass' to *Anastrepha ludens*, *Anastrepha obliqua*, *Anastrepha serpentina*, and *Anastrepha striata* (Diptera: Tephritidae) in Mexico. *J. Econ. Entomol.* 97(2): 293–309.

Apart from variety-host interactions, other factors indicate that the problems with interstate movement of Sharwil variety avocados are not likely to occur in Hass variety avocados. For example, the exocarp of the Hass avocado fruit provides a barrier to infestation by fruit flies that may not be offered by the exocarp of other varieties of avocados. In general, drought conditions may increase incidences of fruit fly infestation of avocados, in particular due to an increase in a specific type of peduncle damage called girdling. However, unlike Sharwil avocados in Hawaii, it has been shown that Hass avocados in Mexico that experience girdling do not reach a size conducive to export (see footnote 2). Therefore, they are not likely to be included in commercial shipments. In addition, it is unlikely that avocado trees in Peru would undergo drought stress because the avocado groves there are irrigated. Mature ripe fruit, including Hass avocados, are also more susceptible to insect infestation than immature or "green" fruit; the greater distance that Peruvian Hass avocados must travel to reach the United States means that mature ripe Hass avocados would not be packed for export to the United States, as they would spoil by the time they arrived on the export market.

One commenter asked what sort of oversight APHIS would have over our Hass avocado import programs and what resources will be made available to ensure that the provisions in the regulations are carried out.

As signatories to the International Plant Protection Convention, the national plant protection organizations (NPPO) of Mexico, Peru, and Chile are obligated to fulfill their responsibilities for importation of Hass avocados. In addition, we have APHIS employees stationed in countries throughout the world, including Mexico, Peru, and Chile, to monitor import program activities. We have conducted site visits as part of developing our import requirements and found the NPPOs of Mexico, Peru, and Chile to have the necessary resources and capacity to implement them. In addition, all Hass avocado shipments are subject to inspection at the port of entry, which may include fruit cutting to ensure freedom from quarantine pests. This inspection serves as a check on the effectiveness of the required mitigations.

One commenter suggested that each avocado importer provide a bond that could be used to pay for mitigating potential pest outbreaks as a result of the importation.

We do not consider such a bond requirement to be practical, largely

because no country in the world requires the indemnification of agricultural products offered for importation; if the United States were to set a precedent and require such indemnification, it would be only a matter of time before our domestic agricultural producers would be required to put up similar bonds for their exports. Any grower or farmer has little control over his or her produce once it has left the grove or farm, let alone once it has been exported to another nation. Finally, requiring such indemnification would run counter to our obligations under current international trade agreements and would certainly be subject to challenge by our trading partners. For these reasons, the use of such bonds is considered impractical. In addition, as our import requirements are sufficient to mitigate the risk of pest introduction via the importation of Hass avocados, we do not believe that such a requirement would be necessary in any case.

Several commenters expressed concern regarding the impact of the proposed rule on U.S. avocado producers. One commenter pointed to a historical decrease in U.S. avocado acreage and stated that increasing U.S. regulatory constraints and water costs as well as lower-priced foreign imports have accelerated the decline in avocado acreage in recent years. The commenter further stated that lowering the costs borne by foreign producers and allowing unlimited foreign imports will drive domestic avocado producers out of business, resulting in the permanent loss of the domestic avocado industry, which will have an adverse economic effect for businesses connected with the domestic avocado industry. In addition, the commenter stated that communities in the United States where avocados are currently grown would suffer from fallowed farm land. The commenter recommended that, before additional Peruvian avocados are imported, a far-reaching and comprehensive economic impact analysis be prepared, preferably by an independent third party, to evaluate the impacts to the U.S. avocado industry and the effects of additional pressures.

While the commenter is correct that U.S. avocado acreage has declined in the past 25 years, many factors could contribute to that decline, including the increasing opportunity cost of avocado production and the conversion of avocado groves to residential or commercial lots. In addition, despite a decrease in avocado acreage, avocado production has remained approximately the same over that period. While APHIS

does not place specific limits on imports of agricultural products generally, APHIS does allow imports to occur only after pest risks are investigated and appropriate mitigation measures are in place.

This rule will allow foreign producers to realize cost savings, and may increase imports. However, we have determined that the domestic avocado industry will not be significantly adversely affected by this rule. Avocados from Chile, Mexico, and Peru are currently allowed importation into the United States and, in the case of Mexico and Chile, have been allowed into the United States for a number of years. Despite this, the U.S. avocado industry is still very active and there have been no introductions of pests that can be traced to avocado imports in the United States.

APHIS does realize that additional imports may place downward pressure on domestic Hass avocado prices, but it also may mean greater availability and potentially greater demand by consumers for all avocados, imported and domestic alike.

Should domestic avocado production decline as a result of this rule, some land may be removed from avocado production. However, fallowing land implies that opportunity cost of avocado production land is zero. On the contrary, the land will be put to a use that provides the owner with the highest return, which could include noneconomic considerations. We would also like to emphasize that, by allowing imports to occur under reasonable science-based restrictions, we advocate for a more accessible world market for U.S. exports as well.

The additional areas of study suggested by the commenter are beyond the requirements of the Regulatory Flexibility Act, which requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions and to prepare and make available for public comment a regulatory flexibility analysis that describes expected impacts of a rule on small entities. In addition, we believe a study of that scope is not warranted given that this rule was not intended to allow additional avocados into the United States but to relieve restrictions, which we have deemed no longer necessary, on the importation of Hass avocados already allowed entry.

Another commenter stated that, because there are no domestic areas quarantined for the presence of Mediterranean fruit fly, it is not a benefit to U.S. producers to remove restrictions on the interstate movement of Hass avocados for Mediterranean fruit

fly. The commenter further expressed concern regarding the economic impact of the rule on small entities and recommended that APHIS consult an economic report put out by the University of California, Davis, Department of Agricultural and Resource Economics, in 2004 regarding how to offset price impacts from imported avocados.

While the commenter is correct that there are currently no areas within the United States quarantined for Mediterranean fruit fly, we proposed to remove restrictions on the movement of Hass avocados due to Mediterranean fruit fly if, in the future, areas of the United States were to be quarantined for Mediterranean fruit fly. Since 2005, there have been 13 Mediterranean fruit fly outbreaks in the United States. The last outbreak of Mediterranean fruit fly in California was in 2009, and it affected avocado production areas. As stated previously, avocados from Chile, Mexico, and Peru are already allowed entry into the United States; the final rule merely relieves restrictions on the movement of Hass avocados we have determined are not necessary in light of research demonstrating the limited host status of Hass avocados and South American fruit fly.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. The shipping season for Hass avocados from Mexico, Peru, and Chile is in progress. Making this rule effective immediately will allow interested producers and others in the marketing chain to benefit during this year's shipping season. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Within the United States, avocado fruit is primarily produced in California, Hawaii, and Florida. There were approximately 8,200 farms producing avocados in those States in 2007. About 180,000 metric tons (MT) of avocados were produced annually in the United States over a 20-year period beginning in the 1990–1991 season. There is an occasional fluctuation with an occasional higher or lower production amount than other years; the variance in avocado production can be attributed to various circumstances including inclement weather.

Currently, the costs associated with the Mediterranean fruit fly mitigation measures on Hass avocados from Mexico and Peru have increased the cost of imported avocados for consumers. Removing requirements for treatment, trapping, and origin restrictions for Hass avocados from Mexico and Peru due to Mediterranean fruit fly and South American fruit fly will reduce the cost associated with mitigation for producers, and in consequence, likely lower the cost of imported avocados for U.S. consumers.

The impact of the rule on Hass avocado fruit operations in California, Hawaii, and Florida will depend on the volume and season of increased Hass avocado imports from Mexico and Peru, the volume and season of continental U.S. production, the volume and season of imports from other countries, as well as U.S. consumption and export levels. Consumer demand for avocados has increased greatly in the past decade. Imports of Hass avocados increased from 56,000 MT in 2001 to a high of 420,000 MT in 2009.

The countries affected by the mitigation treatment changes in this rule already export Hass avocados to the United States. It is worth noting that the increase in imports of Hass avocados has occurred over the last 10 years while U.S. domestic avocado production quantities and values have remained relatively stable. It would appear that the domestic market for avocados continues to expand to absorb both increasing imports and existing domestic production rather than new avocado imports displacing either domestic production or existing

imports. It therefore does not appear that the current increasing level of imports has had a significant impact on a substantial number of small avocado producers or importers.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR parts 301 and 319 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

- 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

§ 301.32–4 [Amended].

- 2. In § 301.32–4, paragraph (d) introductory text is amended by removing the word “Mexican” and adding the words “Mediterranean, Mexican,” in its place.

PART 319—FOREIGN QUARANTINE NOTICES

- 3. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701 7772, and 7781 7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

§ 319.56–30 [Amended].

- 4. Section 319.56–30 is amended by removing paragraph (c)(1)(iii).
- 5. Section 319.56–50 is amended as follows:
 - a. By revising paragraphs (b)(1) and (b)(2) to read as set forth below.
 - b. By removing paragraphs (d) and (e) and redesignating paragraphs (f) through (j) as paragraphs (d) through (h), respectively.
 - c. By revising newly redesignated paragraph (g) to read as set forth below.
 - d. In newly redesignated paragraph (h) introductory text, by removing the words “In addition:” and by removing newly redesignated paragraphs (h)(1) through (h)(3).

§ 319.56–50 Hass avocados from Peru.

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(b) * * * (1) The NPPO of Peru must visit and inspect registered places of production monthly, starting at least 2 months before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements of paragraphs (c) and (e) of this section and follow pest control guidelines, when necessary, to reduce quarantine pest populations. Any personnel conducting trapping and pest surveys under paragraph (d) of this section must be trained and supervised by the NPPO of Peru. APHIS may monitor the places of production if necessary.

(2) In addition to conducting fruit inspections at the packinghouses, the NPPO of Peru must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of paragraph (f) of this section.

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(g) *NPPO of Peru inspection.* Following any post-harvest processing, inspectors from the NPPO of Peru must inspect a biometric sample of fruit from each place of production at a rate to be determined by APHIS. The inspectors must visually inspect for the quarantine pests listed in the introductory text of this section and must cut fruit to inspect for *S. catenifer*. If any quarantine pests are detected in this inspection, the place of production where the infested avocados were grown will immediately be suspended from the export program until an investigation has been

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

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

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

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

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Office of Energy Policy and New Uses

7 CFR Part 2902

RIN 0503-AA36

Designation of Biobased Items for Federal Procurement

AGENCY: Departmental Management, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending the Guidelines for Designating Biobased Products for Federal Procurement, to add 14 sections to designate items within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008 (referred to in this document as “section 9002”). USDA is also establishing minimum biobased contents for each of these items.

DATES: This rule is effective August 22, 2011.

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

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

- I. Authority
- II. Background
- III. Summary of Changes
- IV. Discussion of Public Comments
- V. Regulatory Information
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Regulatory Flexibility Act (RFA)
 - C. Executive Order 12630: Governmental Actions and Interference With

Constitutionally Protected Property Rights

D. Executive Order 12988: Civil Justice Reform

E. Executive Order 13132: Federalism

F. Unfunded Mandates Reform Act of 1995

G. Executive Order 12372:

Intergovernmental Review of Federal Programs

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

I. Paperwork Reduction Act

J. E-Government Act

K. Congressional Review Act

I. Authority

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

II. Background

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

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

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

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

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

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

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