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Subject: DoD Comments to RIN 0503-AA32, "Proposed Designation of Items"

Please see the attached coordinated Department of Defense comments to round 4 of the USDA Proposed Designation of Items, RIN 0503-AA32.

If you have any questions please let me know. I can be reached via email at david.asiello@osd.mil or at the following address:

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Thank you,
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Department of Defense Comments on the Designation of Biobased Items for Federal Procurement Proposed Rule
USDA Rulemaking RIN # 0503-AA32 "Proposed Designation of Items"

1. **Proposed Requirement:** USDA proposes to designate wood and concrete sealers intended to protect wood and/or concrete from damage caused by insects, moisture, and decaying fungi and to make surfaces water resistant.

Comment: USDA should designate sealers for wood and sealers for concrete separately. Sealers for wood should also be separately designated from fungicides for wood. Nomenclature should if possible conform to that in 40 CFR Part 59 (National VOC Emission Standards for Architectural Coatings).

Discussion: Architectural coating products must meet the volatile organic compound limits of 40 CFR Part 59. That regulation defines "waterproofing sealer and treatment" separately from "wood preservative" and also separately defines "concrete protective coating."

- Concrete protective coating means a high-build coating, formulated and recommended, for application in a single coat over concrete, plaster, or other cementitious surfaces. These coatings are formulated to be primerless, one-coat systems that can be applied over form oils and/or uncured concrete. These coatings prevent spalling of concrete in freezing temperatures by providing long-term protection from water and chloride ion intrusion.
- Waterproofing sealer and treatment means a coating formulated and recommended for application to a porous substrate for the primary purpose of preventing the penetration of water.
- Wood preservative means a coating formulated and recommended to protect exposed wood from decay or insect attack, registered with the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Section 136, et seq.).

40 CFR 59, Subpart D, Appendix A, Table 1 specifies allowed VOC limits:

- Concrete protective coating (400 grams VOC allowed per liter)
- Sealers (400 grams VOC allowed per liter) (if the product also meets the definition for a quick dry sealer, (450 grams per liter)
- Wood Preservatives (550 if below ground, or if clear or semitransparent, (or 350 if opaque)

Typically, paint and sealing products are substrate-specific. Designating two substrates under one item increases the potential for confusion, complicates compliance with architectural coating VOC regulations, and has no advantage over designating them separately. When procuring architectural coatings, DoD typically makes reference to commercial item descriptions based on Master Painter Institute (MPI) specifications. These specifications will typically address products intended for application to concrete substrates separately from products for application to wood. Biobased product vendors should be encouraged to conform any paint or sealant products to these specifications to facilitate purchasing. In our experience, we would rarely apply a product to concrete solely for water resistance. More typically, sealers are applied that also provide resistance to oil and gasoline. In our experience,

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we would rarely apply a product to wood, e.g., to wood decking, that did not also confer slip resistance. This implies that procurement of the sealing products - as USDA is contemplating the definition - might not result in significant amounts of federal purchasing activity.

Recommendations: Designate wood sealers and concrete sealers separately.

2. **Proposed Requirement:** USDA proposes that this designation apply only to neat oils and not to water emulsions.

Comment: The applicability should be clarified to indicate that the designation only applies to neat oils, and not water emulsions, or products intended to be emulsified with water prior to use.

Discussion: Some products are sold “neat” but are formulated to be emulsifiable and are intended to be mixed with water prior to use.

Recommendation: Use the following language: “This item applies only to neat oils, not to water emulsions or products intended to be emulsified with water prior to use.”

3. **Proposed Requirement:** . In a separate rulemaking, USDA issued an interim final rule in the July 27, 2006 Federal Register that clarified that the procurement guidelines do not apply to purchases of designated items that are unrelated to or incidental to Federal funding.

Comment: “Incidental to federal funding” should be defined or clarified.

Discussion: No definition of purchases that are “incidental to federal funding” is provided. Because the Energy Policy Act of 2005 extended the biobased procurement preference program applicability to contractors of the federal government, the question of what constitutes an incidental purchase becomes important and could benefit from additional clarification, either through regulations or guidance, to ensure federal agencies take a consistent approach. This area seems inherently open to a range of interpretation. For example, one could logically conclude that in a contract which requires submission of a report in paper format, the paper and the recycled material content of the paper would be incidental to the purpose of the contract, i.e., the reporting effort. However, the Federal Acquisition Regulations (FAR) actually contains a specific contract clause, 52.204-4, to “encourage” contractors to submit paper documents, such as offers, letters, or reports, printed or copied double-sided on 30% postconsumer recycled content paper. Other examples, provided by the office of the Federal Environmental Executive, include the following:

- In a painting contract, although costs of preparation and application outweigh the cost of the paint, the paint itself is *not* considered incidental and the agency is supposed to ask for recycled content latex paint unless the paint doesn't meet its performance needs.
- There are examples where the use of paint would be incidental, such as repainting of a building or room as part of a larger renovation contract.
- In a biobased example, the fact that a construction contractor needs to use hydraulic fluid to maintain its heavy equipment is incidental to the purpose of its contract - to construct a building or other structure.

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While these examples are helpful, there are still areas open to interpretation. Since most grounds-keeping and janitorial work on federal facilities is performed under contract, and in particular since USDA is designating items such as cleaning products, it would be helpful to address whether or not products procured under these types of contracts are incidental. If clarification or tests of applicability are provided, our preference would be that they be in the regulatory text. Provision of separate guidance is less preferable.

Recommendation: Provide some additional regulatory language indicating when procurement is considered incidental to federal funding. The following is offered as an example.

Unless a material procurement meet all three of the following tests it would be considered incidental to the purpose of the contract:

- (1) The biobased material item is ultimately delivered to the federal government, or is consumed on the government facility as part of performing the contract.
 - (2) The biobased material is not a subcomponent of a commercially available manufactured item (for example the hydraulic fluid provided in a piece of equipment) unless the industry provides for procuring the item with a biobased component option.
 - (3) The presence of absence of the biobased material can reasonably be determined from technical data sheets or other available product information.
4. **Comment:** It is impossible for USDA to determine if the items they have included in their listings are used in combat or combat-related activities, or for that matter in Aerospace applications. USDA does not have the visibility of the broad range of products used in design and prototyping processes; production manufacturing (both in manufacturing processes and in component configuration); system, subsystem and component operations; and system, subsystem, and component maintenance.
- Recommendation:** It is recommended that USDA exempt all products that are specified for systems, subsystems and components in combat or combat-related material and processes. DoD should encourage the use of bio-based products for those applications that are not specified assuming the biobased product will meet all specified performance requirements. This should apply to government operations and government operations under contracts or other instruments.
5. **Comment:** USDA has stated that it is inappropriate to apply the requirement unless DOD has documented that such products can meet the performance requirements for such equipment and are available in sufficient supply to meet domestic and overseas deployment needs.
- Recommendation:** Experiences to date have reinforced that it is not practical at this time to conduct the testing and evaluation necessary for such performance documentation for all products used in combat. It is recommended that the rule continue to reflect or include exemptions for all items used in products and systems designed or procured for combat or combat-related missions in sections 2902.37,

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2902.39, 2902.40, and 2902.42. Sections 2902.36, 2902.38, 2902.41, 2902.43, 2902.44 and 2902.45 may at some future time be found to require a combat exemption for a specialized use we have not been able to determine at this time. We suggest that

the goals of the biobased preference program are better served if the focus in DOD is on product used for more conventional purposes (similar to commercially available items), rather than extending the requirements to combat uses. DoD is being very proactive in encouraging the use of bio-based products through both policy and research and development investments related to combat uses, however we are not in a position to support USDA selection of materials at this time.