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OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1305

RIN 0348-AB35

Release of Official Information, and Testimony by OMB Personnel as Witnesses, In Litigation

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to be followed by the Office of Management and Budget (OMB) staff when, in litigation (including administrative proceedings), a subpoena, order or other demand of a court or other authority is issued for the production or disclosure of: Any material contained in the files of OMB; any information relating to materials contained in the files of OMB; or any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status. Many agencies have issued regulations of this kind in the past in order to establish procedures to respond to such demands in an orderly and consistent manner.

EFFECTIVE DATE: June 30, 1997.

FOR FURTHER INFORMATION CONTACT: Steven Aitken, Assistant General Counsel, Office of Management and Budget, at (202) 395-4728.

SUPPLEMENTARY INFORMATION: On December 17, 1996 (61 FR 66232), OMB requested public comment on proposed regulations which set forth the procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand of a court or other authority is issued for the production or disclosure

of: Any material contained in the files of OMB; any information relating to materials contained in the files of OMB; or any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status. Such regulations were upheld by the Supreme Court in its decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). This regulation establishes procedures to respond to such demands in an orderly and consistent manner.

No public comments were received in response to the December 1996 proposed rule. No changes have been made to the proposed rule, which is being adopted.

The proposed OMB "*Touhy*" regulation, which is set forth below, will be placed in a new Part 1305 in OMB's regulations, which are found at 5 CFR Chapter III.

Paperwork Reduction Act

As part of the notice of proposed rulemaking, OMB published a request for comments concerning the collection of information contained in §§ 1305.3(a), 1305.3(b), and 1305.4 of the proposed rule. See 61 FR 66232. OMB received no comments regarding the collection of information. The sponsoring office in OMB also submitted an analysis of the information collection to the Office of Information and Regulatory Affairs (OIRA) in OMB for review in accordance with section 3507(d) of the Paperwork Reduction Act of 1995. See 44 U.S.C. 3507(d). OIRA, acting for OMB, assigned a control number, 0348-0056, and approved the information collection without conditions with an expiration date of February 28, 2000. Potential respondents are not required to respond to the collection of information unless the regulation collecting the information displays a currently valid control number assigned by OMB. See, *id.*, 3512(a). The final rule does not modify the approved information collection.

Regulatory Flexibility Act, Unfunded Mandates Reform Act, and Executive Orders 12866 and 12875

For purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the final rule will not have a significant economic effect on a substantial number of small entities; the final rule addresses

only the procedures to be followed in the production or disclosure of OMB materials and information in litigation. For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Orders No. 12866 and 12875, the final rule will not significantly or uniquely affect small governments, and will not result in increased expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more. Finally, the final rule is not a "major rule" under 5 U.S.C. Chapter 8; the rule will not have any of the effects set forth in 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1305

Administrative practice and procedure.

Issued in Washington, D.C., May 19, 1997.

Franklin D. Raines,
Director.

For the reasons set forth in the preamble, OMB amends 5 CFR chapter III by adding a new part 1305 to read as follows:

PART 1305—RELEASE OF OFFICIAL INFORMATION, AND TESTIMONY BY OMB PERSONNEL AS WITNESSES, IN LITIGATION

Sec.

1305.1 Purpose and scope.

1305.2 Production prohibited unless approved.

1305.3 Procedures in the event of a demand for disclosure.

1305.4 Procedure in the event of an adverse ruling.

1305.5 No private right of action.

Authority: 31 U.S.C. 502.

§ 1305.1 Purpose and scope.

This part contains the regulations of the Office of Management and Budget (OMB) concerning procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand (hereinafter in this part referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of OMB;

(b) Any information relating to materials contained in the files of OMB; or

(c) Any information or material acquired by any person while such person was an employee of OMB as a

part of the performance of the person's official duties or because of the person's official status.

§ 1305.2 Production prohibited unless approved.

No employee or former employee of OMB shall, in response to a demand of a court or other authority, produce any material contained in the files of OMB, disclose any information relating to materials contained in the files of OMB, or disclose any information or produce any material acquired as part of the performance of the person's official duties, or because of the person's official status, without the prior approval of the General Counsel.

§ 1305.3 Procedures in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of OMB for the production of material or the disclosure of information described in § 1305.2, he shall immediately notify the General Counsel. If possible, the General Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If information or material is sought by a demand in any case or matter in which OMB is not a party, an affidavit (or, if that is not feasible, a statement by the party seeking the information or material, or by his attorney) setting forth a summary of the information or material sought and its relevance to the proceeding, must be submitted before a decision is made as to whether materials will be produced or permission to testify or otherwise provide information will be granted. Any authorization for testimony by a present or former employee of OMB shall be limited to the scope of the demand as summarized in such statement.

(c) If response to a demand is required before instructions from the General Counsel are received, an attorney designated for that purpose by OMB shall appear, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the General Counsel.

(Approved by the Office of Management and Budget under control number 0348-0056)

§ 1305.4 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1305.3(c) pending receipt of instructions from the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)). (Approved by the Office of Management and Budget under control number 0348-0056)

§ 1305.5 No private right of action.

This part is intended only to provide guidance for the internal operations of OMB, and is not intended to, and does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

[FR Doc. 97-13964 Filed 5-29-97; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 97-038-1]

Gypsy Moth Generally Infested Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the gypsy moth quarantine and regulations by adding Wisconsin to the list of States quarantined because of gypsy moth and by adding areas in Ohio, Virginia, West Virginia, and Wisconsin to the list of generally infested areas. These changes affect 2 areas in Ohio, 8 areas in Virginia, 1 area in West Virginia, and 4 areas in Wisconsin. These actions are necessary in order to impose certain restrictions on the interstate movement of regulated articles to prevent the artificial spread of gypsy moth.

DATES: Interim rule effective May 30, 1997. Consideration will be given only to comments received on or before July 29, 1997.

ADDRESSES: Please send an original and three copies of your comments to

Docket No. 97-038-1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comments refer to Docket No. 97-038-1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Coanne E. O'Hern, Operations Officer, Domestic and Emergency Programs, PPQ, APHIS, suite 4C10, 4700 River Road Unit 134, Riverdale, MD 20737-1236, (301) 734-8247, or e-mail cohern@aphis.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The gypsy moth, *Lymantria dispar* (Linnaeus), is a destructive pest of forest trees. The gypsy moth regulations (contained in 7 CFR 301.45 through 301.45-12, and referred to below as the regulations), quarantine certain States because of the gypsy moth, and restrict the interstate movement of certain articles from generally infested areas in the quarantined States to prevent the artificial spread of the gypsy moth.

In accordance with § 301.45-2 of the regulations, generally infested areas are, with certain exceptions, those areas in which a gypsy moth general infestation has been found by an inspector, or each portion of a State which the Administrator deems necessary to regulate because of its proximity to infestation or its inseparability for quarantine enforcement purposes from infested localities. Less than an entire State will be designated as a generally infested area only if: (1) The State has adopted and is enforcing a quarantine or regulation which imposes restrictions on the intrastate movement of the regulated articles which are substantially the same as those which are imposed with respect to the interstate movement of such articles; and, (2) the designation of less than the entire State as a generally infested area will be adequate to prevent the artificial interstate spread of infestations of the gypsy moth.

Designation of Areas as Generally Infested Areas

We are amending § 301.45(a) of the regulations by adding Wisconsin to the list of States quarantined because of gypsy moth. We are also amending