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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

[Docket No. USDA–2021–0009]

RIN 0503–AA74

Production or Disclosure of Official Information in Legal Proceedings

AGENCY: Office of the Secretary, USDA.

ACTION: Direct final rule.

SUMMARY: We are revising our regulations regarding the production or disclosure of official information in legal proceedings (referred to as *Touhy* regulations). These regulations are being updated to promote consistent processing of *Touhy* requests among U.S. Department of Agriculture (USDA or Department) agencies; clarify the responsibilities of all parties in the *Touhy* process; and provide additional information about criteria that USDA agencies should consider in the *Touhy* process.

DATES: This rule will be effective on April 29, 2022, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before March 30, 2022. If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal Register** withdrawing this rule before the effective date.

ADDRESSES: You may submit comments or written notice of intent to submit adverse comments using the Federal eRulemaking Portal. Go to <http://www.regulations.gov> and search for docket number USDA–2021–0009.

FOR FURTHER INFORMATION CONTACT: Karen Carrington Fletcher, Senior Counsel, Office of the General Counsel, USDA, 1400 Independence Ave. SW, Room 103–W, Washington, DC 20250; karen.fletcher@usda.gov; (202) 720–0944.

SUPPLEMENTARY INFORMATION:

Background

Under 5 U.S.C. 301, the “Housekeeping Statute,” and in response to a demand for official information that arises out of a legal proceeding, many agencies have regulations governing the production of official information and employee testimony relating to official information. Known as *Touhy* regulations, these regulations usually prohibit unauthorized disclosures of official information by employees. These regulations also establish procedures for agencies responding to subpoenas for official information or employee testimony relating to official information. (See *United States ex rel. v. Touhy v. Ragen*, 340 U.S. 462 (1951)).

Currently, the Department’s *Touhy* regulations are located at 7 CFR part 1, subpart K (§§ 1.210 to 1.219). Those regulations were established in 1990 and have not been amended since 1993. This direct final rule revises subpart K in its entirety, with the new regulations spanning §§ 1.210 through 1.224. The revised regulations are presented in a question-and-answer format to enhance clarity and readability.

The Department is amending its *Touhy* regulations to: (1) Promote consistent processing of *Touhy* requests among USDA agencies; (2) clarify the responsibilities of all parties in the *Touhy* process; and (3) provide additional information about criteria that USDA agencies should consider in the *Touhy* process. A discussion of certain specific changes follows.

The revised regulations set forth the procedures to be followed with respect to a demand seeking official information or employee testimony relating to official information for use in a legal proceeding. The revised regulations also set forth certain definitions that were not used in the existing regulations. The revised regulations define:

- The term “demand” to mean any effort or attempt to obtain, for use in a legal proceeding, official information or testimony relating to official information, including any request, order, subpoena, or other command, as well as any informal or other attempt (by any method) to obtain official information, or testimony relating to official information, by an attorney, investigator, or others.

- The term “legal proceeding” to mean all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, or other tribunals. This phrase includes all phases of discovery as well as formal or informal requests by attorneys or others involved in legal proceedings.

- The term “official information” to mean all information of any kind, however stored, that is in the custody and control of the Department or relates to information in the custody and control of the Department, or information or knowledge acquired by a Department employee as part of the employee’s official duties or because of the employee’s official status with the Department.

- The term “Department” to mean the United States Department of Agriculture, its constituent agencies, and Department officials authorized to decide whether to allow disclosures of official information or testimony relating to official information in response to a demand.

- The term “employee” to mean all employees or officers of the Department, including individuals who are or have been appointed by the Department, or who are or have been subject to the Department’s supervision, jurisdiction, or control, including individuals hired through contractual agreements by or on behalf of the Department, or performing services under such agreements for the Department, such as consultants, contractors, subcontractors, and their employees or other personnel. Also included in the definition are former Department employees where the demand seeks testimony relating to official information acquired while the person was an employee of the Department.

- The term “testimony” to mean any written or oral statement by an employee, including personal appearances in court or at depositions, interviews, or informal inquiries in person or by telephone, responses to written interrogatories or other written statements such as reports, declarations, or affidavits, or any response involving more than the delivery of documents.

- The term “appropriate Department official” to mean the head of a Department agency.

• The term “Office of the General Counsel” to mean the Office of the General Counsel of the Department.

• The term “United States” to mean the Federal Government, its departments, and its agencies.

The revised regulations explicitly state that the following matters are not covered by the regulations:

- Congressional requests and subpoenas seeking official information or employee testimony relating to official information;
- Federal court civil proceedings in which the United States is a party;
- Federal administrative proceedings in which the Department is a party;
- The disclosure of official information or employee testimony relating to official information provided to other Federal agencies in connection with a legal proceeding conducted on behalf of or in defense of the United States or a legal proceeding in which the United States has an interest; and
- Employees who testify on their own time or in approved leave status as private citizens about facts or events that are unrelated to official business.

The revised regulations outline the responsibilities for those involved in the *Touhy* process, *i.e.*, the parties submitting a demand to Department agencies, Department employees who receive a demand, and Department agencies deciding whether to grant or deny a demand.

Parties who submit a demand are to provide the following to the Department:

- Information about the underlying legal proceeding, including copies of the complaint and any relevant pleadings;
- The identity of the Department employee whose testimony is sought and a detailed summary about the relevance of the employee’s testimony to the underlying legal proceeding;
- If the demand seeks documents or other materials, a description of the requested official information sought and a detailed summary about its relevance to the underlying legal proceeding;
- An explanation of the unavailability of the requested official information or employee testimony through other sources; and
- An explanation of how each of the factors set forth in 7 CFR 1.220(a) apply to their demand.

The revised regulations require that this information must be submitted at least 14 calendar days before the official information or employee testimony is needed and further require the submission of the above information even if parties serve a subpoena on the Department or a Department employee.

A demand may not be granted if a party fails to follow the instructions set forth in the regulations.

Department employees who receive a demand are to:

- Inform their supervisors about the demand so the supervisors may inform an appropriate Department official and the Office of the General Counsel; and
- If appropriate Department officials deny the demand in accordance with the requirements of this regulation, refrain from providing official information and/or testimony in response to the demand.

Employees may be subject to disciplinary action, including termination, if they provide official information or testimony relating to official information pursuant to a demand without approval from appropriate Department officials.

The revised regulations provide that the Department will consider the following criteria when evaluating a demand:

- Whether complying with the demand would be unduly burdensome, disproportionate to the needs of the case, or otherwise inappropriate under the applicable rules of discovery or rules of procedure governing the legal proceeding underlying the demand;
- Whether complying with the demand is appropriate under the relevant substantive law concerning privilege or disclosure of information;
- The public interest;
- The need to conserve the time and expense of Department employees for conducting official business;
- The need to avoid spending the resources of the United States for non-Federal government purposes;
- The need to maintain impartiality between private litigants in cases in which a substantial Department interest is not involved;
- Whether complying with the demand would adversely affect the Department’s mission and duties;
- The need to avoid involving the Department in issues unrelated to its mission; and
- Any other factor relevant to the interests of the Department.

In comparison with the existing regulations, the above-referenced factors provide additional detail regarding the considerations that the Department will weigh in deciding whether to grant or deny a demand. The existing regulations list only three factors for Department officials to consider in determining whether to authorize an employee’s appearance in a legal proceeding where the Government is not a party. These above-referenced factors apply to all demands for official information or

testimony relating to official information.

The revised regulations provide that a demand will be denied if a Department official determines that producing employee testimony or official information would result in:

- Violating a statute, rule of procedure, regulation, or executive order;
- Revealing classified information;
- Revealing confidential commercial or financial information or trade secrets without the owner’s consent;
- Revealing the internal deliberative processes of the Executive Branch or other privileged information; or
- Potentially impeding or prejudicing an on-going law enforcement investigation.

The revised regulations clarify the role of USDA’s Office of the General Counsel (OGC) and Counsel to the Inspector General in the *Touhy* process and describe how OGC may interact with a party that submits a demand. The proposed regulations also ensure that OGC reviews and concurs with any *Touhy* decision.

Finally, the revised regulations set forth conditions that the Department may place on producing official information or authorizing employee testimony in response to a demand. Specifically, the Department may:

- Require the parties in the legal proceeding underlying the demand obtain a protective order or execute a confidentiality agreement to limit access to the official information or testimony provided;
- Limit the scope of the subject matter areas of the permitted testimony;
- Prescribe the manner, time, location, and duration of any testimony provided by deposition; and
- Impose any other condition deemed to be in the best interests of the United States.

Dates

We are publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, on April 29, 2022, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before March 30, 2022.

Adverse comments are comments that suggest the rule should not be adopted or that suggest the rule should be changed.

If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal**

Register withdrawing this rule before the effective date. We will then publish a proposed rule for public comment.

If we receive no written adverse comments or written notice of intent to submit adverse comments within 30 days of publication of this direct final rule, this direct final rule will become effective 60 days following its publication.

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget has determined that this regulatory action does not require a significance designation under Executive Order 12866, Regulatory Planning and Review.

The regulations revised by this rule relate to the internal management of USDA insofar as they address the receipt and handling of requests for the production or disclosure of official information in legal proceedings. As such, it is for the use of Department personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person. Therefore, we expect the economic impact of this rule, if any, to be minimal and, accordingly, this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

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

List of Subjects in 7 CFR Part 1

Administrative practice and procedure, Antitrust, Claims, Cooperatives, Courts, Equal access to justice, Fraud, Freedom of information, Government employees, Indemnity payments, Lawyers, Motion pictures, Penalties, Privacy.

Accordingly, we are amending 7 CFR part 1 as follows:

PART 1—ADMINISTRATIVE REGULATIONS

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

Authority: 5 U.S.C. 301, unless otherwise noted.

- 2. Revise subpart K to read as follows:

Subpart K—Production or Disclosure of Official Information in Legal Proceedings

Sec.

General Information

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General Information

§ 1.210 What does this subpart cover?

(a) This subpart sets forth the procedures to be followed with respect to demands seeking official information or employee testimony relating to official information for use in a legal proceeding.

(b) This subpart does not apply to:

- (1) Congressional requests or subpoenas for official information or testimony relating to official information;
- (2) Federal court civil proceedings in which the United States is a party;
- (3) Federal administrative proceedings in which the Department is a party;
- (4) The disclosure of official information or testimony relating to official information provided to other Federal agencies, including United States Department of Justice attorneys, in connection with a legal proceeding conducted on behalf of or in defense of the United States or a legal proceeding

in which the United States has an interest; and

(5) Employees who testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department.

(c) Nothing in this subpart affects the rights, procedures, or Department regulations governing requests for, and release of, records under the Freedom of Information Act (FOIA, 5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), or the Government in the Sunshine Act (5 U.S.C. 552b).

(d) Nothing in this subpart affects procedures governing requests for authentication or certified copies of records under § 1.10.

(e) Nothing in this subpart permits the Department or employees to disclose official information or give testimony relating to official information if the disclosure or testimony is protected or prohibited by statute or other applicable law.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to waive the sovereign immunity of the United States or create any enforceable right or benefit against the United States.

§ 1.211 Definitions that apply to this subpart.

For the purpose of this subpart:

(a) The term "demand" means any effort or attempt to obtain, for use in a legal proceeding, official information or testimony relating to official information, including any request, order, subpoena, or other command, as well as any informal or other attempt (by any method) to obtain official information, or testimony relating to official information, by an attorney, investigator, or others.

(b) The term "Department" means the United States Department of Agriculture, its constituent agencies, and Department officials authorized to decide whether to allow disclosures of official information or testimony relating to official information in response to demands.

(c) The term "appropriate Department official" means the head of a Department agency or office.

(d) The term "employee" means all employees or officers of the Department, including individuals who are or have been appointed by the Department, or who are or have been subject to the Department's supervision, jurisdiction, or control, including individuals hired through contractual agreements by or on behalf of the Department, or performing services under such agreements for the

Department, such as consultants, contractors, subcontractors, and their employees or other personnel. Also included in the definition are former Department employees where the demand seeks testimony relating to official information acquired while the person was an employee of the Department.

(e) The term “legal proceeding” means all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, or other tribunals. This phrase includes all phases of discovery as well as formal or informal requests by attorneys or others involved in legal proceedings.

(f) The term “Office of the General Counsel” means the Office of the General Counsel of the Department.

(g) The term “official information” means all information of any kind, however stored, that is in the custody and control of the Department or relates to information in the custody and control of the Department, or information or knowledge acquired by a Department employee as part of the employee’s official duties or because of the employee’s official status with the Department.

(h) The term “testimony” means any written or oral statement by an employee, including personal appearances in court or at depositions, interviews, or informal inquiries in person or by telephone, responses to written interrogatories or other written statements such as reports, declarations, or affidavits, or any response involving more than the de-livery of documents.

(i) The term “United States” means the Federal Government, its departments, and its agencies.

§ 1.212 What is the Department’s policy on providing official information or testimony relating to official information in response to a demand?

(a) It is the Department’s general policy not to allow its employees to provide official information or testimony relating to official information in response to a demand. However, the Department will consider a demand submitted in accordance with this subpart and issue a decision to grant or deny the demand.

(b) No employee may provide official information or testimony relating to official information in response to a demand unless authorized by the Department in accordance with this subpart. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). An employee who fails to comply with this

regulation may be subject to disciplinary action up to and including removal.

Responsibilities if Making a Demand

§ 1.213 How can I obtain official information or testimony relating to official information in response to my demand?

You must submit a demand in accordance with this subpart (*see United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)). The appropriate Department official, in consultation with the Office of the General Counsel, will consider your demand in accordance with this subpart. The Counsel to the Inspector General will consider and make any final determinations regarding all demands seeking official information or employee testimony from the Office of Inspector General.

§ 1.214 What information must I include with my demand?

Your demand must include the following information, if applicable:

(a) The caption of the legal proceeding underlying your demand, including the docket number and the name of the court or other authority involved;

(b) The parties to the legal proceeding underlying your demand and any known relationships they have to the Department’s mission or programs;

(c) A copy of the complaint or equivalent document setting forth the assertions in the legal proceeding underlying your demand;

(d) The identity of the employee whose testimony is sought and an affidavit or declaration under 28 U.S.C. 1746 or, if such an affidavit or declaration is not feasible, a written statement by you or your attorney, setting forth a reasonably detailed summary of the testimony sought and its relevance to the legal proceeding underlying your demand. Any authorization the Department decides to grant for testimony by an employee shall be limited to testimony within the scope of the summary provided;

(e) If the demand seeks documents or other materials to be obtained or inspected, a de-scription of the official information and the relevance to the legal proceeding underlying your demand;

(f) A written description of all prior decisions, orders, or pending motions in the legal proceeding underlying your demand that bear on the relevance of the official information or testimony you seek;

(g) A showing that the desired official information or testimony is not reasonably available from any other source, including a showing that no

document could be provided and used in lieu of testimony; and

(h) An explanation of how each of the Department’s considerations set forth in § 1.220(a) apply to your demand.

§ 1.215 How soon before I need the official information or testimony relating to official information should I submit my demand?

You must submit your demand, including all information identified in § 1.214, at least 14 calendar days before the date when you need the official information or testimony relating to official information.

§ 1.216 If I serve a subpoena, must I also submit information in accordance with § 1.214?

Yes. A subpoena shall be served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure, as appropriate. If you serve a subpoena, including a subpoena *duces tecum*, together with the subpoena you must also submit information in accordance with § 1.214. If you serve a subpoena on the Department or a Department employee before submitting information in accordance with § 1.214 of this subpart, the Department may oppose the subpoena on the grounds that you failed to follow the requirements of this subpart.

§ 1.217 Where must I send my demand?

(a) Except for subpoenas served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure as appropriate, you must send your demand, including all information required by § 1.214 of this subpart, to:

(1) The Office of the General Counsel at 1400 Independence Avenue SW, Washington, DC 20250, Attention: “Touhy Demands,” or by electronic mail to OGC_Touhy_Demands@usda.gov; and

(2) The United States Department of Agriculture agency office from which the official information or testimony is sought.

(b) Notwithstanding paragraph (a) of this section, a demand for Office of Inspector General information or testimony must be sent to the Counsel to the Inspector General, United States Department of Agriculture, Attention: “Touhy Demands,” at 1400 Independence Avenue SW, Mail Stop 2308, Washington, DC 20250–2308; by facsimile to (202) 690–1528; or by electronic mail to OIG.TOUHY-DEMANDS@oig.usda.gov.

§ 1.218 How much will I be charged?

(a) In the event that a demand is granted, the Department may charge reasonable fees. The appropriate Department official will determine all fees, if any, associated with this subpart and shall timely notify you of the fees, particularly those that are to be paid in advance.

(b) When a demand is granted under this subchapter to permit an employee to testify, you must pay the witness the fee and expenses, including any travel related costs, prescribed for attendance by the applicable rule of court. If no such fees are prescribed, the local Federal district court rule relating to witness fees for the Federal district court closest to where the witness appears will apply.

(c) When a demand is granted under this subchapter to produce documents, blueprints, electronic tapes, or other official information, the fees to be charged and paid prior to production shall be calculated as provided in Department regulations implementing the fee provisions of the FOIA.

Responsibilities of the Department**§ 1.219 How will the Department process my demand?**

(a) The appropriate Department official, in consultation with the Office of the General Counsel, will consider your demand, and decide whether to grant or deny it. An Office of the General Counsel attorney or Department official may negotiate with you or your representative to refine or limit your demand. All demands for Office of Inspector General information or testimony will be processed by the Counsel to the Inspector General.

(b) Any decision in response to your demand will be limited to the scope of information requested in accordance with the requirements of this subpart.

(c) If you fail to follow the requirements of this subpart, the Department may decide not to grant your demand. If the Department determines that your demand is not complete, the Department may require that you provide additional information before your demand will be considered.

(d) If your demand is complete, the Department will consider it by applying the criteria under § 1.220.

§ 1.220 The Department's considerations in deciding whether to grant or deny a demand.

(a) In deciding whether to grant or deny a demand, the appropriate Department official should consider the following factors:

(1) Whether compliance with the demand would be unduly burdensome,

disproportionate to the needs of the case, or otherwise inappropriate under the applicable rules of discovery or rules of procedure governing the legal proceeding underlying the demand;

(2) Whether compliance with the demand is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time and expense of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for non-Federal government purposes;

(6) The need to maintain impartiality between private litigants in cases in which a substantial Department interest is not implicated;

(7) Whether compliance with the demand would have an adverse effect on the Department's mission and duties;

(8) The need to avoid involving the Department in issues not related to its mission; and

(9) Any other factor the Department determines to be relevant to the interests of the Department.

(b) A demand will not be granted if the disclosure of official information or employee testimony relating to official information:

(1) Would violate a statute or a rule of procedure;

(2) Would violate a regulation or executive order;

(3) Would reveal information properly classified in the interest of national security;

(4) Would reveal confidential commercial or financial information or trade secrets in the absence of the owner's consent;

(5) Would reveal the internal deliberative processes of the Executive Branch or other privileged information; or

(6) Would potentially impede or prejudice an on-going law enforcement investigation.

§ 1.221 In responding to my demand, what conditions or restrictions may the Department impose on the production of official information or testimony relating to official information?

In responding to a demand, the Department may, at its discretion, impose conditions or restrictions on the production of official information or testimony relating to official information. Such conditions or restrictions may include the following:

(a) A requirement that the parties to the legal proceeding underlying your demand obtain a protective order or execute a confidentiality agreement to limit access to, and limit any further

disclosure of, official information or testimony provided;

(b) A limitation on the subject matter areas of the permitted testimony;

(c) A requirement that the manner, time, location, and duration of any testimony be prescribed by the Department;

(d) A requirement that the parties to the legal proceeding underlying your demand agree that a transcript of the permitted testimony be kept under seal or will only be used or only made available in the particular legal proceeding underlying the demand;

(e) A requirement that you purchase an extra copy of the transcript of the employee's testimony from the court reporter and provide the Department with a copy at your expense; or

(f) Any other condition or restriction deemed to be in the best interests of the United States.

§ 1.222 Delegation authority for deciding whether to grant or deny a demand.

(a) Except as provided in paragraphs (b), (c), or (d) of this section, the appropriate department official may delegate his or her responsibilities under this subpart to employees of his or her agency as follows:

(1) In the national office of the agency, to a level no lower than two levels below the agency head;

(2) In a field component of an agency, to a level no lower than the official who heads a state office.

(b) Notwithstanding paragraph (a) of this section, the Chief of the Forest Service may delegate his or her responsibilities under this subpart as follows:

(1) In the national office of the Forest Service, to a level no lower than a Deputy Chief of the Forest Service;

(2) In a field component of the Forest Service, to a level no lower than a Regional Forester or Station Director.

(c) Notwithstanding paragraph (a) of this section, the General Counsel may delegate his or her responsibilities under this subpart as follows:

(1) In the national office of the Office of the General Counsel, to a level no lower than an Assistant General Counsel;

(2) In the field component of the Office of the General Counsel, to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys who report to them.

(d) Notwithstanding paragraph (a) of this section, the Counsel to the Inspector General may delegate his or her responsibility under this subpart to the Deputy Counsel or an Assistant Counsel.

Responsibilities of Department Employees

§ 1.223 What must I, as an employee, do upon receiving a demand?

(a)(1) If you receive a demand, you must immediately notify your supervisor, who must in turn notify the appropriate Department official. Either your supervisor or the appropriate Department official must notify the Office of the General Counsel contact for your region or division for assistance with issuing the proper response.

(2) Demands for Office of Inspector General official information or testimony should be forwarded immediately to the Counsel to the Inspector General.

(b)(1) The appropriate Department official will decide whether to grant or deny the demand. Before a decision granting or denying a demand is made, the Office of the General Counsel contact for your region or division must be consulted for advice. All decisions granting or denying a demand must be in writing and must receive Office of the General Counsel concurrence prior to issuance. Absent Office of the General Counsel concurrence, a demand decision cannot be issued.

(2) The Counsel to the Inspector General will decide whether to grant or deny a demand for Office of Inspector General information and testimony.

(c) In the event that the appropriate Department official decides to deny the demand, the decision shall state that you are not authorized to provide official information or testimony and, if applicable, that you will not personally appear in response to the demand.

§ 1.224 What must I, as an employee, do upon becoming aware that a court or other authority has ordered compliance with a demand?

(a) If you become aware that a court or other authority has ordered compliance with a demand, you must promptly notify your supervisor, who must in turn notify the Office of the General Counsel for your region or division.

(b) In the case of compliance orders involving a demand for Office of Inspector General information and testimony, promptly forward them to your supervisor and the Counsel to the Inspector General.

Dated: September 2, 2021.

David Grahn,

Principal Deputy General Counsel, United States Department of Agriculture.

[FR Doc. 2022-03880 Filed 2-25-22; 8:45 am]

BILLING CODE 3410-90-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS-NOP-19-0106; NOP-19-03]

RIN 0581-AD98

National Organic Program; Amendments to the National List of Allowed and Prohibited Substances (2022 Sunset)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the United States Department of Agriculture's (USDA) organic regulations to implement recommendations from the National Organic Standards Board (NOSB). The rule prohibits fourteen nonorganic ingredients, which are currently allowed in the manufacture of organic processed products. The rule also prohibits two substances (vitamin B₁ and procaine), which are currently allowed in organic crop and livestock production. Finally, the rule renews an allowance for two substances (oxytocin and sucrose octanoate esters) in organic production.

DATES:

Effective Date: This rule is effective on March 30, 2022.

Compliance Dates: The compliance date for the amendments that remove vitamin B₁ and procaine from the National List is March 15, 2023. The compliance date for all other amendments that remove substances from the National List is March 15, 2024. Products in the stream of commerce after the compliance date that are labeled as "organic" or "made with organic (specified ingredients or food group(s))" may contain substances removed in this final rule if manufactured prior to the compliance date. The final rule renews an allowance for two substances (oxytocin and sucrose octanoate esters) in organic production. This rule maintains the current regulatory structure with regard to these two substances upon publication for up to five years.

FOR FURTHER INFORMATION CONTACT:

Jared Clark, Standards Division, National Organic Program. Telephone: (202) 720-3252 or Email: Jared.Clark@usda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Secretary of Agriculture ("Secretary") established the Agricultural Marketing Service's (AMS) National Organic Program (NOP) and the USDA organic regulations (65 FR 80547). Within the USDA organic regulations (7 CFR part 205) is the National List of Allowed and Prohibited Substances (or "National List"). The National List identifies the synthetic substances that may be used in organic crop and livestock production as well as the nonsynthetic (natural) substances that may not be used. It also identifies the nonorganic substances that may be used in or on processed organic products.

AMS is finalizing 16 amendments to the National List in accordance with the procedures detailed in the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6524). OFPA establishes what may be included on the National List and the procedures that the USDA must follow to amend the National List (7 U.S.C. 6517). OFPA also describes the NOSB's responsibilities in proposing amendments to the National List, including the criteria for evaluating amendments to the National List (7 U.S.C. 6518).

To remain on the National List, substances must be: (1) Reviewed every five years by the NOSB, a 15-member federal advisory committee; and (2) renewed by the Secretary (7 U.S.C. 6517(e)). This action of NOSB review and USDA renewal is commonly referred to as the "sunset review" or "sunset process." AMS published information about this process in the **Federal Register** on September 16, 2013 (78 FR 56811). The sunset date (*i.e.*, the date by which the Secretary must renew a substance for the listing to remain valid on the National List) for each substance is included in the NOP Program Handbook (document NOP 5611).

The removal of substances from the National List addresses National Organic Standards Board (NOSB) recommendations submitted to the Secretary after the conclusion of the NOSB's public meetings on October 29, 2015; November 2, 2017; October 26, 2018; and October 30, 2020.

During a 60-day comment period that closed on October 25, 2021, AMS received 60 comments on the proposed rule. See below for a discussion of the comments received and AMS's responses to comments. Comments on the proposed rule can also be viewed through [Regulations.gov](https://www.regulations.gov). Use the search area on the homepage at <https://www.regulations.gov> to enter a keyword,