WEST VIRGINIA CODE CHAPTER 19 ARTICLE 11

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§19-11-1. Purpose.

It is the intent of the Legislature that this article regulate the purchase of milk on the basis of weight, measure or components in the milk; confer powers and impose duties upon the commissioner of agriculture; prescribe penalties; and provide for the enforcement thereof.

Furthermore, except where otherwise indicated it is the intent of the Legislature that this article substantially conform with the federal regulations promulgated under the authority of the United States secretary of health and human services in order to provide for the movement of bulk milk, cream and the products manufactured from milk and cream in interstate and intrastate commerce with a minimum of economic barriers.

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§19-11-2. Definitions.

(a) "Adulterated" means milk or the products manufactured from milk meeting one or several of the conditions listed in section seven of this article.

(b) "Certified tester" means any person who has passed an examination in milk testing, weighing and sampling conducted by the commissioner.

(c) "Certified weigher and sampler" means any person who has passed an examination in milk weighing and sampling conducted by the commissioner.

(d) "Clean" means the condition where no residue remains on a surface that will, or is likely to, cause adulteration or other contamination.

(e) "Commissioner" means the commissioner of agriculture of the State of West Virginia or his or her duly authorized agent.

(f) "Component" means any of the constituent parts of milk in the solids-not-fat, milk fat or water portion of the milk.

(g) "Dairy plant" means any place, premises, or establishment where milk is collected, handled, processed, stored, pasteurized or prepared for further distribution.

(h) "Distribute" means the act of transporting, holding for sale, offering for sale, selling, bartering, parceling out, giving or otherwise disposing of milk.

(i) "Embargo" means an order to withdraw milk from distribution. An embargo shall detain such milk or milk product and prohibit the transportation or distribution of milk as provided in section nine of this article.

(j) "Manufacture" means pasteurizing, ultrapasteurizing, formulating or compounding milk or packaging or preparing said product for distribution.

(k) "Milk" means the normal lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows or goats prior to pasteurization or ultrapasteurization. The term may include the components of milk, including cream.

(l) "Milk fat" means fat or butterfat in milk.

(m) "Milk producer" means any person who operates a dairy farm and who provides, sells or offers milk for sale.

(n) "Milk hauler" means any person who transports milk in an unpackaged form.

(o) "Person" means any individual, partnership, association, fiduciary, firm, company, corporation, or any organized group of persons whether incorporated or not. The term

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"person" extends to the agents, servants, officers and employees of the person.

(p) "Receiving station" means any place, premises, or establishment where milk in unpackaged form is received, collected, handled, stored or cooled and prepared for further transporting.

(q) "Sanitization" means the application of any effective method or substance to a clean surface for the destruction of pathogens, and of other organisms as far as practicable. Such treatment shall not adversely affect the equipment, the milk or the health of the consumers consuming the milk or milk products manufactured in the equipment and shall be a method acceptable to the commissioner.

(r) "Solids-not-fat" means all components of milk that are not milk fat or water.

(s) "Transport" means the movement of milk or milk products from one facility to another in a manner that maintains adequate temperatures and protects the product from freezing temperatures, exposure to the sun and from sources of contamination.

(t) "Transfer station" means any place, premises or establishment where milk is transferred directly from one transport tank to another.

(u) "Transport tank" means any tank which is used for the pickup of milk or the transportation of milk to or from any milk producer, dairy plant, receiving station, or transfer station.

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§19-11-3. Permit for the purchase of milk.

(a) A "permit for the purchase of milk" shall be issued by the commissioner to each place of operation of each person receiving or buying milk on the basis of the components in the product or weight or measure regardless of the method of settlement, except that transfer stations are exempt from this provision. The permit shall expire on the thirty-first day of March following date of issue.

(b) Permits are not transferable with respect to persons or locations.

(c) Permits shall be applied for at least fifteen days before the date that the current permit expires or within fifteen days of the date that the person intends to engage in business. Application for all permits shall be made on forms supplied by the commissioner and provide such information as may be considered reasonably necessary by the commissioner. All applications shall be accompanied by a fee of $15. A penalty of $2 shall be added to all permits that are not applied for or renewed within the time limits set forth in this subsection.

(d) Permits shall be posted prominently at the place of operation.

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§19-11-4. Certificates of proficiency.

(a) Certificates of proficiency shall be issued by the commissioner to individuals who successfully pass an examination given under the terms of this article.

(b) Persons requesting an examination shall pay an examination fee of $15 at the time of the request. Requests for certification for several tests at one time shall be covered under one examination fee. Reexaminations or examinations for additional tests subsequent to the issuing of a certificate will require an additional fee of $15. Only persons of good character shall be allowed to take this examination. Examinations shall be given within thirty days of the request and at the time and place that the commissioner shall designate.

(c) The examination to weigh and sample milk shall cover the skills needed to weigh and sample milk for the purpose of establishing a price based on the components or weight or volume of the product.

(d) The examination to test milk shall cover the skills needed to test, weigh, measure and sample milk for the purpose of establishing a price based on the components or the weight or measure of the product. The examination will test the proficiency of performing the Babcock test and all other testing methods used by that person for determination of the components of milk. The certificate of proficiency shall state which testing methods the applicant will be certified to perform. Testers will have eight months from the effective date of this article to obtain certificates for specific tests and licenses shall be issued under the former certificates during this time period.

(e) Certificates shall be issued under a serial number to the person that passed the examination and shall be permanent, except that in the case where the person does not obtain a license as provided for under section five of this article for five successive years then the certificate will automatically expire.

(f) Certificates shall be posted prominently at the person's place of business.

(g) Persons who fail the examination may be issued a temporary waiver by the commissioner under terms established by rule. The temporary waiver is intended to give the person the opportunity to learn the skills needed to pass the examination. No temporary waiver will be issued if the interests of milk producers and purchasers of milk are not protected.

(h) If the examination to test milk is given at a site that requires travel to an out-of-state location, the expenses incurred by the commissioner to travel to the location shall be paid by the person requesting the examination.

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§19-11-5. Licenses.

(a) Licenses shall be issued by the commissioner to certified testers, certified weighers and samplers and to laboratories performing tests for the components of milk. Licenses are not transferable.

(b) Licenses shall expire on June 30 following date of issue: Provided, That weighers and samplers licenses issued with an expiration date of December 31, 1991, shall be extended, at no additional fee, through June 30, 1992. Applications for all licenses shall be made on forms supplied by the commissioner and shall provide such information as may be considered reasonably necessary by the commissioner for the administration of this article. Licenses shall be applied for at least fifteen days previous to the date when the current license expires or at least five days before the person intends to do business, except for persons who operate a laboratory for the testing of milk where the initial application shall be made at least thirty days before the person intends to do business to allow for on-site inspection prior to issuing the license. The application for licenses shall be accompanied by a fee of $10. A penalty of $2 shall be added to all licenses that are not applied for or renewed within this time limit.

(c) A "milk laboratory license" shall be issued to each laboratory where a licensed milk tester performs analytical operations. The license shall not be issued until the commissioner is satisfied that the tests made in such laboratory shall be conducted by qualified persons, with adequate facilities and that such tests shall be performed accurately and according to methods approved by the commissioner.

(d) A "milk tester license" shall be issued to persons who determine the weight, measure or components of milk for the purpose of establishing a purchase price for such milk. The license will cover the performance of each test used to determine the purchase price as listed on the person's certificate of proficiency. No test method may be used under provisions of this license until the person has obtained a certificate of proficiency for that test.

(e) A "milk weighers and samplers license" shall be issued to persons who weigh or sample milk for the purpose of establishing a purchase price for such milk and who are not involved in testing the components of milk.

(f) Licenses shall be posted prominently at the person's place of business.

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§19-11-6. Purchase of milk.

(a) No determination of the weight or measure of milk may be made from a milk producer's tank that is not properly calibrated and level.

(b) No determination of the weight of milk in a transport tank may be made with a device that is not accurate.

(c) Each person obtaining a sample of milk for the purpose of establishing a purchase price shall immediately record the sample data on the receipt. The receipt shall contain the milk producer's name or number, the date and time of the sample, the temperature of the product, the measuring rod reading, the calculated weight, the name of the employer of the weigher and sampler and the signature of the weigher and sampler. A copy of the receipt shall be left with the milk producer, or seller, at the time of obtaining the sample.

(d) No test on milk may be made from a sample which is in such condition as to prevent an accurate reading of the components in the product.

(e) Only testing methods approved by the commissioner may be used. The Babcock method or other method approved by the commissioner shall be the reference method to establish calibration of other milk fat test methods.

(f) Each person making tests of samples of milk for the purpose of establishing a purchase price for such milk shall cause the test results to be accurately recorded in an unalterable or verifiable manner. Each method for recording test results may be examined by the commissioner to determine that the test results are recorded in an unalterable or verifiable manner. All test results shall identify the milk producer or seller of the milk, the results of each test for the components in the product and an identification of the person doing the test. The records shall be filed at the place where the testing occurred for a minimum of one year and shall be available to the milk producer, other seller, or the commissioner upon request.

(g) Each person testing milk for its components shall retain the remainder of the sample when the commissioner so requests for the purpose of verifying sample results.

(h) Each person providing payment to a milk producer or seller of milk on the basis of component content or weight or measure shall provide to the milk producer or seller at each time of payment a statement showing for each milk producer or seller the pay period, total weight or measure of milk received during this period, and the average content of the component(s) of the milk used to establish the purchase price; except that this statement format shall not apply to sales between milk cooperatives and purchasers of milk from cooperatives. Nothing in this requirement may prohibit persons purchasing or receiving milk from giving a more detailed report to the milk producer or seller.

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§19-11-7. Adulteration.

Any milk or any milk products are considered adulterated within the meaning of this article if:

(a) They bear or contain any poisonous or deleterious substance or compound in a quantity which may render it injurious to health;

(b) They bear or contain any added poisonous or deleterious substance for which no safe tolerance has been established by state or federal law or regulation or which is found in the product in excess of an established tolerance;

(c) They are or have been produced, transported, or held under unsanitary conditions;

(d) They contain any substance added thereto so as to make them appear better or of a greater value than they are; or

(e) They meet or have met other conditions of adulteration as established by rule.

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§19-11-8. Prohibited acts.

(a) No person may have in his possession with the intent to sell, transport or manufacture any milk which is adulterated within the meaning of this article.

(b) No person may interfere with or prohibit the commissioner from performing the duties of his office.

(c) No person may fail to comply with the provisions of an embargo order issued under this article.

(d) No person may fail to comply with the provisions of a revocation, suspension or denial order issued under this article.

(e) No person who in any official capacity obtains any information under the provisions of this article that would be considered trade secrets regarding the quality, source and disposition of milk may use this information to his or her own personal gain.

(f) No person may purchase milk in this state on the basis of, or in any manner with reference to, the weight or measure or the amount of components in the product without a valid "permit for the purchase of milk" and may not establish the price on the basis of measurements or tests that have been performed in a dishonest, incompetent, or inaccurate manner, or falsify the records thereof.

(g) No person may weigh, measure, sample or test milk produced in this state for the purpose of establishing a purchase price of the product without a valid "milk tester license" and may not perform these duties in a dishonest, incompetent or inaccurate manner, falsify the records thereof, or use a testing method unless he has been certified to use that method.

(h) No person may weigh, measure or sample milk produced in this state for the purpose of establishing a purchase price of the product without a valid "milk weighers and samplers license" and may not perform these duties in a dishonest, incompetent manner or falsify the records thereof.

(i) No person may haul milk in or through this state in a tank truck that has previously been used to haul a chemical or foreign substance unless such tank truck has been cleaned and sanitized according to the rules promulgated by the commissioner prior to the hauling of such milk.

(j) No person may sell, offer for sale or expose for sale any milk that is from a herd that does not meet the requirements for animal health as set by rule under this article.

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§19-11-9. Powers and duties of commissioner.

The commissioner has the power and duty to:

(a) Adopt, promulgate and enforce rules to carry out the purpose of this article;

(b) Have access to and enter at all reasonable times all places where milk produced in this state is stored, purchased on the basis of weight or measure or component content, transferred, transported, held or used in the state and have access to all places where samples, records, papers or documents relating to these transactions are kept;

(c) Inspect and photograph all places where milk produced in this state is stored, purchased on the basis of weight or measure or component content, transferred, transported, held or used; inspect, audit and copy records and papers relating to these activities and the sampling, testing and purchase of milk; examine measuring and testing apparatus; examine milk and milk samples and examine equipment used in holding and transporting milk, except that inspections performed under authority of the provisions of article seven, chapter sixteen of this code will not be duplicated;

(d) Examine tanks, holding containers, vehicles, and processing equipment holding or intended to hold milk and collect evidence, including samples, from these areas to establish compliance with this article;

(e) Open any tank or other container containing or believed to contain milk or samples of milk, for the purpose of inspecting and sampling;

(f) Issue permits, certificates, waivers and licenses;

(g) Suspend, revoke or deny permits, licenses or certificates;

(h) Collect fees and expend moneys under the terms of this article;

(i) Give examinations for proficiency in the weighing, sampling and testing of milk;

(j) Issue embargoes for any milk which is or is believed to be adulterated or that is not in compliance with this article and to cause the transportation or distribution of the milk to cease. Nothing in this article may be construed as requiring the commissioner to issue embargoes for minor violations of this article when he or she believes that a written notice will serve the public interest.

(1) When an embargo is issued, the commissioner shall affix to such product or holding container in an appropriate manner a tag or other marking giving warning that such product is under embargo.

(2) The commissioner shall give written notice to the custodian of the product under embargo describing the violation and stating that the product is prohibited from being

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transported or distributed and is ordered to be held on the premises. This notice shall notify the custodian of the right to request an immediate hearing under the rules that the commissioner shall adopt.

(3) The commissioner may take action to seize and condemn any product that is not brought into compliance with this article and the rules issued under this article within ninety days of the notice to the custodian of the product.

(4) The commissioner has the authority to issue an embargo against a perishable product, even if the practical result is to bring about the involuntary disposal of the product. The commissioner shall exercise this power using all reasonable means to determine if the product is adulterated or otherwise not in compliance with this article in as short a time frame as possible and shall promptly lift the embargo order if the product is found to be in compliance with this article;

(k) Establish, maintain and make provision for milk testing facilities; approve testing facilities; establish reasonable fees for such tests; and incur such expenses as may be necessary to maintain and operate these facilities;

(l) Conduct all sampling and testing using methods set forth in the fifteenth edition of and supplement to the Official Methods of Analysis of the Association of Official Analytical Chemists, published by the Association of Official Analytical Chemists; or the fifteenth edition of the Standard Methods for the Examination of Dairy Products, published by the American Public Health Association, Inc.; or methods approved by the commissioner;

(m) Obtain from any state court an order directing any person to submit to inspection and sampling subsequent to the refusal of any person to allow inspection and sampling;

(n) Investigate complaints, showing good cause, that the weighing and sampling or the testing of the raw bulk milk is incorrect, inaccurate or performed in a deceitful manner;

(o) Conduct hearings as provided by this article; and

(p) Assess civil penalties and refer violations to a court of competent jurisdiction: Provided, That the commissioner is not required to report for prosecution minor violations of the article when he or she believes that the public interest will be best served by a written notice.

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§19-11-10. Suspension, revocation or denial of permits, licenses and certificates of proficiency.

(a) The commissioner may deny any application for a permit, license or certificate whenever said permit, license or certificate has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner or the applicant is determined to be not in compliance with or not able to comply with this article.

(b) The commissioner may suspend a permit, license or certificate whenever a health hazard exists, the permit, license, or certificate has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the permit, license or certificate holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with this article. A person whose permit, license or certificate has been suspended shall discontinue operations covered by the permit, license or certificate during the period of the suspension. The commissioner may issue a summary suspension in cases where violations of this article constitute a hazard to the public health, safety or welfare where the public interest requires immediate action.

(1) Except for summary suspensions, the commissioner shall give written notice to the person(s) affected by the pending suspension, stating that he or she contemplates suspension of the permit, license or certificate and giving reasons therefor. The suspension notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit, license, or certificate holder at least ten days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) All summary suspensions shall be followed by a notice of suspension, the reasons therefor, and an opportunity for a hearing in accordance with this article.

(3) At the end of the period of suspension, the permit, license or certificate holder may resume operations without reapplication for a permit, license or certificate.

(c) The commissioner may revoke any permit, license or certificate issued under this article whenever a health hazard exists, the permit, license or certificate has been obtained fraudulently, the holder has grossly interfered with the duties of the commissioner or it is determined that the holder is dishonest, deceitful, incompetent or not in compliance with or is unable to comply with this article. Any person whose permit, license or certificate has been revoked shall immediately discontinue all operations covered under the permit, license or certificate.

(1) Before revoking any permit, license or certificate, the commissioner shall give written notice to the persons affected, stating that the revocation of the permit, license or certificate is being contemplated and giving reasons therefor. The revocation notice shall appoint a time and place for hearing and shall be mailed by certified mail to the business address of the permit, license or certificate holder at least ten days before the date set for the hearing.

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The commissioner shall review the evidence presented at the hearing prior to issuing his decision.

(2) At the end of the period of revocation a new permit, license or certificate will not be issued without the filing of an application, payment of the required fee and compliance with all conditions that the commissioner shall require for the reissuing of such permit, license or certificate.

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§19-11-11. Hearings and appeals.

(a) Any person aggrieved by any action taken under this article shall be afforded the opportunity for a hearing before the commissioner under the rules promulgated by the commissioner.

(b) Hearings shall be conducted according to procedures set forth by rule.

(c) All the testimony and evidence at a hearing shall be recorded by mechanical means, which may include the use of tape recordings.

The mechanical record shall be maintained for ninety days from the date of the hearing and a transcript shall be made available to the aggrieved party.

(d) Any party who feels aggrieved of the suspension, revocation or denial order may appeal within sixty days to the circuit court of the county in which the person's principal place of business is located.

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§19-11-12. Criminal penalties; civil penalties; negotiated agreement.

(a) Criminal penalties. -- Any person violating any provision of this article or rules adopted hereunder is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $100 nor more than $500 for the first offense, and for the second or subsequent offense shall be fined not less than five hundred nor more than $1,000, or imprisoned in the county jail not more than six months, or both fined and imprisoned. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of this article.

(b) Civil penalties. --

(1) Any person violating a provision of this article or rules adopted hereunder may be assessed a civil penalty by the commissioner. In determining the amount of any civil penalty, the commissioner shall give due consideration to the history of previous violations of any person, the seriousness of the violation, including any irreparable harm to the environment, any hazards to the health and safety of the public and any economic damages to the public and the demonstrated good faith of any person charged in attempting to achieve compliance with this article before and after written notification of the violation.

(2) The commissioner may assess a civil penalty of up to $1,000 for any violation.

(3) The civil penalty is payable to the State of West Virginia and is collectible in any manner now or hereafter provided for collection of debt. If any person liable to pay the civil penalty neglects or refuses to pay the same, the amount of the civil penalty, together with interest at ten percent, is a lien in favor of the State of West Virginia upon the property, both real and personal, of such a person after the same has been entered and docketed to record in the county where such property is situated. The clerk of the county, upon receipt of the certified copy of such, shall enter same to record without requiring the payment of costs as a condition precedent to recording.

(c) Notwithstanding any other provision of law to the contrary, the commissioner may promulgate and adopt rules which permit consent agreements or negotiated settlements for the civil penalties assessed as a result of violation of the provisions of this article.

(d) Nothing in this article may be construed as requiring the commissioner or his representative to report for prosecution as a result of minor violations of the article when he believes that the public interest will be best served by a suitable notice of warning in writing.

(e) Upon application by the commissioner therefor, the circuit court of the county in which the violation is occurring, has occurred or is about to occur, as the case may be, may grant a temporary or permanent injunction restraining any person from violating or continuing to violate any of the provisions of this article or any rule promulgated under this article, notwithstanding the existence of other remedies at law. Any such injunction shall be issued without bond.

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(f) No state court may allow for the recovery of damages for any administrative action taken, if the court finds that there was a probable cause for the action.

(g) It is the duty of the prosecuting attorney of the county in which the violation occurred to represent the Department of Agriculture, to institute proceedings and to prosecute the person charged with such violation.

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§19-11-13. Payment of fees.

All fees, penalties or other moneys collected by the commissioner under the provisions of this article shall be paid into a special account and expended upon the order of the commissioner for the purpose of the enforcement and administration of this article.

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§19-11-14. Cooperation with other entities.

The commissioner may cooperate with and enter into agreements with governmental agencies of this state, other states, agencies of the federal government, agencies of foreign governments, and private associations in order to carry out the purpose and provisions of this article.

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§19-11-15. Confidentiality of trade secrets.

The commissioner may not make public information which contains or relates to trade secrets, commercial or financial information obtained from a person or privileged or confidential information: Provided, That when revealing the information is necessary to carry out the provisions of this article, this information may be revealed, subject to a protective order, to any federal, state or local agency consultant; or may be revealed, subject to a protective order, at a closed hearing or in findings of fact issued by the commissioner.

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§19-11-16.

Repealed.

Acts, 1991 Reg. Sess., Ch. 7.

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§19-11-17.

Repealed.

Acts, 1991 Reg. Sess., Ch. 7.

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