WEST VIRGINIA CODE CHAPTER 19 ARTICLE 11E

WV Legislature

§19-11E-1. Purpose and scope.

In 2018, the Legislature created the Joint Task Force on Milk Rules and Regulations in response to concerns about current regulation of the dairy industry in West Virginia. The Joint Task Force heard from, and collected data and other information from, dairy farmers, industry representatives, and regulators from West Virginia, other states, and the federal government. Following its review of the collected information, the Joint Task Force concluded that potential benefits and economies of scale would best be realized by transferring some or all authority to promulgate milk rules and regulations from the Department of Health to the Department of Agriculture.

It is the purpose of this article to establish the authority of the West Virginia Department of Agriculture to regulate milk and milk products within the state. It is the further purpose of this article to ensure that milk and milk products produced, manufactured, or sold in West Virginia are safe, while also ensuring that regulation is done in such a way as to foster the stability and growth of the dairy industry in West Virginia.

It is the intent of the Legislature that this article regulate the production, transportation, and sale of milk and milk products; 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 milk and milk products in interstate and intrastate commerce with a minimum of economic barriers.

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§19-11E-2. Definitions.

"Adulterated" means milk or the products manufactured from milk meeting one or several of the conditions listed in §19-11E-7 of this code.

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

"Commissioner" means the Commissioner of Agriculture of the State of West Virginia or his or her duly authorized agent.

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

"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 §19-11E-8 of this code.

"Manufacture" means pasteurizing, ultrapasteurizing, formulating, or compounding milk; or packaging or preparing said product for distribution; or other methods of preparing milk for consumption.

"Milk" means the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy mammals. The term may include the components of milk, including cream. For purposes of this article, the term "milk" does not include raw milk.

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

"Person" means any individual, partnership, association, fiduciary, firm, company, corporation, or any organized group of persons whether incorporated or not. The term "person" extends to the agents, servants, officers, and employees of the person.

"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.

"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.

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

"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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§19-11E-3. Department to regulate milk and milk products.

Effective July 1, 2019, the Department of Agriculture shall be responsible for regulating all matters addressed in the Grade "A" Pasteurized Milk Ordinance issued by the federal Food and Drug Administration. This includes, but is not limited to, inspection of milk production facilities, inspection of facilities making single-use containers for dairy products, collection and testing of milk samples, and training and certification of inspectors.

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§19-11E-4. Milk producer permits.

(a) A person may not sell milk, milk products, or manufactured dairy products within this state without having a current, valid permit from the Commissioner of Agriculture.

(b) A separate permit shall be obtained for each milk plant, milk producer, milk distributor, receiving station, transfer station, bulk tank unit, and milk tank truck cleaning facility.

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

(d) Permits shall be applied for at least 30 days before the date that the current permit expires or within 30 days of the date that the person intends to engage in business. Applications 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 an application fee. A penalty shall be added to all permits that are not applied for or renewed within the time limits set forth in this subsection.

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

(f) Within 30 days of receiving a complete application for an initial permit, the commissioner will inspect the applicant's operation to determine whether it meets the standards set forth by this code and rules promulgated pursuant thereto that would be applicable if the applicant received the permit applied for. If the applicant satisfies those requirements, the commissioner shall issue the permit.

(g) Permits shall be valid for one year.

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§19-11E-5. Licenses.

(a) Licenses shall be issued by the commissioner to certified inspectors of milk production facilities. Licenses are not transferable.

(b) Applications for 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.

(c) Licenses shall expire on June 30 following the date of issue. License renewals shall be applied for at least 15 days previous to the date when the current license expires. The commissioner may assess a penalty for licenses that are not applied for or renewed within this time limit.

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§19-11E-6. Labeling.

(a) All packages of milk or milk products shall have a label upon or affixed to the package. The label shall be legible and of a print size and style easily readable by the ordinary citizen. The information required in this section shall be on each label and shall be stated in English.

(b) The label shall contain the following information:

(1) The name of the product;

(2) The quantity of the contents;

(3) The name and address of the manufacturer, packer, or distributor: Provided, That the manufacturer’s plant code or name and address shall always appear on the label for Grade "A" products; and

(4) Such other information as the commissioner shall require by rule.

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§19-11E-7. Adulteration.

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

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

(2) 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;

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

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

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

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§19-11E-8. Authority and duties of the commissioner.

The commissioner has the power and duty to:

(1) Propose rules for legislative approval in accordance with §29A-3-1 et seq. of this code, including adopting with any necessary modifications the Grade "A" Pasteurized Milk Ordinance promulgated by the Food and Drug Administration;

(2) Adopt, promulgate, and enforce other rules for legislative approval in accordance with §29A-3-1 et seq. of this code as necessary to carry out the purpose of this article;

(3) Have access to and enter at all reasonable times all places where frozen desserts or imitation frozen desserts are manufactured, stored, held, transported, distributed, or used in the state and where records, papers, or documents relating to these transactions are kept;

(4) Inspect and photograph all places where milk is manufactured, packaged, stored, held, transported, or distributed; inspect, audit, and copy records and papers relating to the manufacturing, distribution, sampling, testing, and sale of milk; examine measuring and testing apparatus; and examine equipment used in manufacturing and transportation of milk;

(5) Sample milk, including, but not limited to, ingredients and packages that are used in the manufacture of these products and may open any package containing or believed to contain any milk or milk product or an ingredient to be used in the manufacture of milk or a milk product for the purpose of inspecting and sampling;

(6) Issue, suspend, revoke, or deny permits;

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

(8) Collect evidence, including samples, of the condition of equipment, holding tanks, storage rooms, and vehicles used, or intended to be used, in the processing, packaging, transporting, or holding of milk or milk products;

(9) Examine the labels and labeling of milk and milk products;

(10) Issue embargoes for any milk or milk product which is or is believed to be adulterated, misbranded, or that is not in compliance with this article and to cause the manufacturing and distributing of same to cease: Provided, That 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 of violation will serve the public interest:

(A) When an embargo is issued, the commissioner shall affix to such product or manufacturing device in an appropriate manner a tag or other marking giving warning that such product is under embargo;

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(B) The commissioner shall give written notice to the custodian of the product or process under embargo describing the violation and stating that the product is prohibited from being sold, offered for sale, exposed for sale, or distributed and is ordered to be held on the premises and, further, that all manufacturing processes for this product shall cease until the embargo is released. This notice shall notify the custodian of the right to request an immediate hearing under the rules adopted by the commissioner;

(C) The commissioner shall take action to seize and condemn any product that cannot be brought into compliance with this article and the rules issued under same within 90 days of notice to the custodian of the product;

(D) The commissioner may 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;

(11) Approve sampling and testing methods, and evaluate and approve official laboratories;

(12) 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;

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

(14) 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 suitable notice in writing.

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§19-11E-9. Prohibited acts.

No person may:

(1) Have in his or her possession with the intent to sell, transport, or manufacture any milk which is adulterated within the meaning of this article;

(2) Interfere with or prohibit the commissioner from performing the duties of his or her office;

(3) Fail to comply with the provisions of an embargo order issued under this article;

(4) Fail to comply with the provisions of a revocation, suspension, or denial order issued under this article;

(5) While operating in any official capacity, obtain any information under the provisions of this article that would be considered trade secrets regarding the quality, source, and disposition of milk, and use this information for his or her own personal gain;

(6) Sell milk or milk products, where required, without a valid permit as required by the provisions of this article;

(7) Conduct inspections of milk production facilities for the purpose of certifying compliance with this article without a valid inspector license, and perform those duties in a dishonest or incompetent manner, or falsify the records thereof;

(8) 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;

(9) Represent an imitation dairy product to be a milk product;

(10) Conduct a test to determine the identity, quality, purity, grade, or quantity of a dairy product in a manner that is not in accordance with the Pasteurized Milk Ordinance; or

(11) Alter or destroy the results of a test conducted to determine the identity, quality, purity, grade, or quantity of a dairy product.

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§19-11E-10. Suspension, revocation, or denial of permits or licenses.

(a) The commissioner may deny any application for a permit, license, or certificate whenever the permit, license, or certificate has been applied for fraudulently, the applicant has grossly interfered with the duties of the commissioner, the applicant is determined to be not in compliance with or not able to comply with this article, or the applicant has not otherwise satisfied the requirements of 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 or his or her designee 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 10 days before the date set for the hearing. The commissioner shall review the evidence presented at the hearing prior to issuing his or her 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

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address of the permit, license, or certificate holder at least 10 days before the date set for the hearing. 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 may 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.

(d) Whenever the commissioner suspends or revokes any permit, license, or certificate based on a health hazard, he or she shall contact the county health officer, the Bureau for Public Health, and the federal Food and Drug Administration for the county in which the health hazard exists.

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§19-11E-11. Hearings and appeals.

(a) Any person aggrieved by any action taken under this article shall have 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 90 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 60 days to the circuit court of the county in which the person’s principal place of business is located.

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§19-11E-12. Criminal penalties; civil penalties; negotiated agreements.

(a) 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 $500 nor more than $1,000, or confined in jail not more than six months, or both fined and confined. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of this article.

(b) 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.

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

(2) 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 10 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 the property is situated. The clerk of the county, upon receipt of the certified copy of the lien, shall enter it 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 or her representative to report for prosecution as a result of minor violations of the article when the commissioner believes that the public interest will be best served by a suitable notice of warning in writing.

(e) Upon application by the commissioner, 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) The prosecuting attorney of the county in which the violation occurred shall represent the Department of Agriculture to institute proceedings and to prosecute the person charged with a violation.

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§19-11E-13. Payment of fees.

All fees, penalties, or other moneys collected by the commissioner under the provisions of this article shall be paid into the Department of Agriculture's fees account.

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§19-11E-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 entities in order to carry out the purpose and provisions of this article.

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§19-11E-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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§19-11E-16. Dairy Advisory Board.

(a) The commissioner shall establish a Dairy Advisory Board within the Department of Agriculture. The purpose of that board is to advise the commissioner with respect to the status of the dairy industry in West Virginia, obstacles to manufacture, processing, and sale of milk and milk products, recommendations with respect to changes in statutes and regulation, changes in technology and processes utilized by the dairy industry, and other hindrances to growth of the industry in West Virginia.

(b) The commissioner shall, by rule, establish minimum requirements and qualifications for the members of the advisory board.

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§19-11E-17. Transfer of milk regulation authority from Department of Health to Department of Agriculture.

(a) Effective July 1, 2019, authority for the regulation, including enforcement, of Grade "A" milk is transferred to the commissioner from the Department of Health.

(b) Prior to July 1, 2019, the commissioner and the Department of Health shall enter into an agreement to provide for the orderly transition of regulatory operations from the Department of Health to the commissioner. Said agreement shall provide:

(1) For the transfer of records and equipment related to the milk regulation program to the commissioner;

(2) For the continued provision of services by staff of the Department of Health to the commissioner under the terms of the agreement;

(3) For transition, upon notice to Department of Health, of functions from the Department of Health to the commissioner; and

(4) For the completion of the transfer of all responsibilities from the Department of Health to the commissioner no later than December 31, 2019.

(c) During a period from July 1, 2019, to December 31, 2019, the Department of Health shall cooperate fully with the commissioner to ensure a smooth transition of authority, knowledge, and resources to guarantee that milk regulation in West Virginia suffers no gap or failure in regulation.

(d) All legislative rules issued by the Department of Health pursuant to its authority to regulate milk shall remain in effect until superseded by the commissioner’s regulations.

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