

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1991

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Committee Substitute for
SENATE BILL NO. 381

(By Senator Hawse)

PASSED March 7, 1991

In Effect 90 days from Passage

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COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 381

(By SENATOR HAWSE, *original sponsor*)

[Passed March 7, 1991; in effect ninety days from passage.]

AN ACT to amend and reenact articles eleven and eleven-a, chapter nineteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said chapter by adding thereto two new articles, designated articles eleven-b and twenty-eight, all relating to bulk milk trade law; purpose; definitions; permit for the purchase of milk; certificates of proficiency; licenses; purchase of milk; adulteration; prohibited acts; powers and duties of commissioner; suspension, revocation or denial of permits, licenses and certificates of proficiency; hearings and appeals; criminal penalties; civil penalties; negotiated agreement; payment of fees; cooperation with other entities; confidentiality of trade secrets; dairy products and imitation dairy products standards law; purpose; definitions; permits; labeling; adulteration; misbranded; prohibited acts; approved sampling and testing methods; approved laboratories; powers and duties of commissioner; suspension, revocation or denial of permits; hearings and appeals; criminal penalties; civil penalties; negotiated agreement; payment of fees; cooperation with other entities; confidentiality of trade secrets;

frozen desserts and imitation frozen desserts law; purpose; definitions; frozen dessert manufacturer permit; labeling; adulteration; misbranded; prohibited acts; approved sampling and testing methods; approved laboratories; powers and duties of commissioner; suspension, revocation or denial of permits; hearings and appeals; criminal penalties; civil penalties; negotiated agreement; payment of fees; cooperation with other entities; confidentiality of trade secrets; and moving the article relating to vitamin and mineral enrichment of flour and bread to a new place in the chapter to allow all articles relating to milk and milk products to be sequentially grouped together.

Be it enacted by the Legislature of West Virginia:

That articles eleven and eleven-a, chapter nineteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said chapter be further amended by adding thereto two new articles, designated articles eleven-b and twenty-eight, all to read as follows:

ARTICLE 11. BULK MILK TRADE LAW.

§19-11-1. Purpose.

1 It is the intent of the Legislature that this article
2 regulate the purchase of milk on the basis of weight,
3 measure or components in the milk; confer powers
4 and impose duties upon the commissioner of agricul-
5 ture; prescribe penalties; and provide for the enforce-
6 ment thereof.

7 Furthermore, except where otherwise indicated it is
8 the intent of the Legislature that this article substan-
9 tially conform with the federal regulations promul-
10 gated under the authority of the United States secre-
11 tary of health and human services in order to provide
12 for the movement of bulk milk, cream and the pro-
13 ducts manufactured from milk and cream in interstate
14 and intrastate commerce with a minimum of economic
15 barriers.

§19-11-2. Definitions.

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

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

7 (c) "Certified weigher and sampler" means any
8 person who has passed an examination in milk weigh-
9 ing and sampling conducted by the commissioner.

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

13 (e) "Commissioner" means the commissioner of
14 agriculture of the state of West Virginia or his or her
15 duly authorized agent.

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

19 (g) "Dairy plant" means any place, premises, or
20 establishment where milk is collected, handled, pro-
21 cessed, stored, pasteurized or prepared for further
22 distribution.

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

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

31 (j) "Manufacture" means pasteurizing, ultrapasteu-
32 rizing, formulating or compounding milk or packaging
33 or preparing said product for distribution.

34 (k) "Milk" means the normal lacteal secretion,
35 practically free from colostrum, obtained by the
36 complete milking of one or more healthy cows or goats

37 prior to pasteurization or ultrapasteurization. The
38 term may include the components of milk, including
39 cream.

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

41 (m) "Milk producer" means any person who oper-
42 ates a dairy farm and who provides, sells or offers
43 milk for sale.

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

46 (o) "Person" means any individual, partnership,
47 association, fiduciary, firm, company, corporation, or
48 any organized group of persons whether incorporated
49 or not. The term person extends to the agents, ser-
50 vants, officers and employees of the person.

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

55 (q) "Sanitization" means the application of any
56 effective method or substance to a clean surface for
57 the destruction of pathogens, and of other organisms
58 as far as practicable. Such treatment shall not adverse-
59 ly affect the equipment, the milk or the health of the
60 consumers consuming the milk or milk products
61 manufactured in the equipment and shall be a method
62 acceptable to the commissioner.

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

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

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

73 (u) "Transport tank" means any tank which is used

74 for the pickup of milk or the transportation of milk to
75 or from any milk producer, dairy plant, receiving
76 station, or transfer station.

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

1 (a) A “permit for the purchase of milk” shall be
2 issued by the commissioner to each place of operation
3 of each person receiving or buying milk on the basis
4 of the components in the product or weight or mea-
5 sure regardless of the method of settlement, except
6 that transfer stations are exempt from this provision.
7 The permit shall expire on the thirty-first day of
8 March following date of issue.

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

11 (c) Permits shall be applied for at least fifteen days
12 before the date that the current permit expires or
13 within fifteen days of the date that the person intends
14 to engage in business. Application for all permits shall
15 be made on forms supplied by the commissioner and
16 provide such information as may be considered rea-
17 sonably necessary by the commissioner. All applica-
18 tions shall be accompanied by a fee of fifteen dollars.
19 A penalty of two dollars shall be added to all permits
20 that are not applied for or renewed within the time
21 limits set forth in this subsection.

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

§19-11-4. Certificates of proficiency.

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

4 (b) Persons requesting an examination shall pay an
5 examination fee of fifteen dollars at the time of the
6 request. Requests for certification for several tests at
7 one time shall be covered under one examination fee.
8 Reexaminations or examinations for additional tests
9 subsequent to the issuing of a certificate will require
10 an additional fee of fifteen dollars. Only persons of

11 good character shall be allowed to take this examina-
12 tion. Examinations shall be given within thirty days of
13 the request and at the time and place that the commis-
14 sioner shall designate.

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

19 (d) The examination to test milk shall cover the
20 skills needed to test, weigh, measure and sample milk
21 for the purpose of establishing a price based on the
22 components or the weight or measure of the product.
23 The examination will test the proficiency of perform-
24 ing the Babcock test and all other testing methods
25 used by that person for determination of the compo-
26 nents of milk. The certificate of proficiency shall state
27 which testing methods the applicant will be certified
28 to perform. Testers will have eight months from the
29 effective date of this article to obtain certificates for
30 specific tests and licenses shall be issued under the
31 former certificates during this time period.

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

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

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

47 (h) If the examination to test milk is given at a site
48 that requires travel to an out-of-state location, the
49 expenses incurred by the commissioner to travel to

50 the location shall be paid by the person requesting the
51 examination.

§19-11-5. Licenses.

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

5 (b) Licenses shall expire on the thirtieth day of June
6 following date of issue: *Provided*, That weighers and
7 samplers licenses issued with an expiration date of the
8 thirty-first day of December, one thousand nine
9 hundred ninety-one shall be extended, at no additional
10 fee, through the thirtieth day of June, one thousand
11 nine hundred ninety-two. Applications for all licenses
12 shall be made on forms supplied by the commissioner
13 and shall provide such information as may be consid-
14 ered reasonably necessary by the commissioner for the
15 administration of this article. Licenses shall be applied
16 for at least fifteen days previous to the date when the
17 current license expires or at least five days before the
18 person intends to do business, except for persons who
19 operate a laboratory for the testing of milk where the
20 initial application shall be made at least thirty days
21 before the person intends to do business to allow for
22 on-site inspection prior to issuing the license. The
23 application for licenses shall be accompanied by a fee
24 of ten dollars. A penalty of two dollars shall be added
25 to all licenses that are not applied for or renewed
26 within this time limit.

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

35 (d) A "milk tester license" shall be issued to persons
36 who determine the weight, measure or components of
37 milk for the purpose of establishing a purchase price

38 for such milk. The license will cover the performance
39 of each test used to determine the purchase price as
40 listed on the person's certificate of proficiency. No test
41 method may be used under provisions of this license
42 until the person has obtained a certificate of profi-
43 ciency for that test.

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

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

§19-11-6. Purchase of milk.

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

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

7 (c) Each person obtaining a sample of milk for the
8 purpose of establishing a purchase price shall immedi-
9 ately record the sample data on the receipt. The
10 receipt shall contain the milk producer's name or
11 number, the date and time of the sample, the temper-
12 ature of the product, the measuring rod reading, the
13 calculated weight, the name of the employer of the
14 weigher and sampler and the signature of the weigher
15 and sampler. A copy of the receipt shall be left with
16 the milk producer, or seller, at the time of obtaining
17 the sample.

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

21 (e) Only testing methods approved by the commis-
22 sioner may be used. The Babcock method or other
23 method approved by the commissioner shall be the
24 reference method to establish calibration of other milk

25 fat test methods.

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

40 (g) Each person testing milk for its components shall
41 retain the remainder of the sample when the commis-
42 sioner so requests for the purpose of verifying sample
43 results.

44 (h) Each person providing payment to a milk pro-
45 ducer or seller of milk on the basis of component
46 content or weight or measure shall provide to the milk
47 producer or seller at each time of payment a state-
48 ment showing for each milk producer or seller the pay
49 period, total weight or measure of milk received
50 during this period, and the average content of the
51 component(s) of the milk used to establish the pur-
52 chase price; except that this statement format shall not
53 apply to sales between milk cooperatives and purchas-
54 ers of milk from cooperatives. Nothing in this require-
55 ment may prohibit persons purchasing or receiving
56 milk from giving a more detailed report to the milk
57 producer or seller.

§19-11-7. Adulteration.

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

3 (a) They bear or contain any poisonous or deleteri-
4 ous substance or compound in a quantity which may
5 render it injurious to health;

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

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

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

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

§19-11-8. Prohibited acts.

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

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

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

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

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

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

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

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

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

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

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

1 The commissioner has the power and duty to:

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

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

11 (c) Inspect and photograph all places where milk
12 produced in this state is stored, purchased on the basis
13 of weight or measure or component content, trans-

14 ferred, transported, held or used; inspect, audit and
15 copy records and papers relating to these activities and
16 the sampling, testing and purchase of milk; examine
17 measuring and testing apparatus; examine milk and
18 milk samples and examine equipment used in holding
19 and transporting milk, except that inspections per-
20 formed under authority of the provisions of article
21 seven, chapter sixteen of this code will not be
22 duplicated;

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

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

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

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

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

35 (i) Give examinations for proficiency in the weigh-
36 ing, sampling and testing of milk;

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

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

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

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

56 (3) The commissioner may take action to seize and
57 condemn any product that is not brought into com-
58 pliance with this article and the rules issued under
59 this article within ninety days of the notice to the
60 custodian of the product.

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

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

76 (l) Conduct all sampling and testing using methods
77 set forth in the fifteenth edition of and supplement to
78 the Official Methods of Analysis of the Association of
79 Official Analytical Chemists, published by the Associ-
80 ation of Official Analytical Chemists; or the fifteenth
81 edition of the Standard Methods for the Examination
82 of Dairy Products, published by the American Public
83 Health Association, Inc.; or methods approved by the
84 commissioner;

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

89 (n) Investigate complaints, showing good cause, that
90 the weighing and sampling or the testing of the raw

91 bulk milk is incorrect, inaccurate or performed in a
92 deceitful manner;

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

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

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

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

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

23 (1) Except for summary suspensions, the commis-
24 sioner shall give written notice to the person(s)
25 affected by the pending suspension, stating that he or
26 she contemplates suspension of the permit, license or
27 certificate and giving reasons therefor. The suspension
28 notice shall appoint a time and place for hearing and

29 shall be mailed by certified mail to the business
30 address of the permit, license, or certificate holder at
31 least ten days before the date set for the hearing. The
32 commissioner shall review the evidence presented at
33 the hearing prior to issuing his decision.

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

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

42 (c) The commissioner may revoke any permit,
43 license or certificate issued under this article when-
44 ever a health hazard exists, the permit, license or
45 certificate has been obtained fraudulently, the holder
46 has grossly interfered with the duties of the commis-
47 sioner or it is determined that the holder is dishonest,
48 deceitful, incompetent or not in compliance with or is
49 unable to comply with this article. Any person whose
50 permit, license or certificate has been revoked shall
51 immediately discontinue all operations covered under
52 the permit, license or certificate.

53 (1) Before revoking any permit, license or certificate,
54 the commissioner shall give written notice to the
55 persons affected, stating that the revocation of the
56 permit, license or certificate is being contemplated and
57 giving reasons therefor. The revocation notice shall
58 appoint a time and place for hearing and shall be
59 mailed by certified mail to the business address of the
60 permit, license or certificate holder at least ten days
61 before the date set for the hearing. The commissioner
62 shall review the evidence presented at the hearing
63 prior to issuing his decision.

64 (2) At the end of the period of revocation a new
65 permit, license or certificate will not be issued without
66 the filing of an application, payment of the required
67 fee and compliance with all conditions that the com-
68 missioner shall require for the reissuing of such

69 permit, license or certificate.

§19-11-11. Hearings and appeals.

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

5 (b) Hearings shall be conducted according to proce-
6 dures set forth by rule.

7 (c) All the testimony and evidence at a hearing shall
8 be recorded by mechanical means, which may include
9 the use of tape recordings. The mechanical record
10 shall be maintained for ninety days from the date of
11 the hearing and a transcript shall be made available to
12 the aggrieved party.

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

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

1 (a) *Criminal penalties.* — Any person violating any
2 provision of this article or rules adopted hereunder is
3 guilty of a misdemeanor, and, upon conviction thereof,
4 shall be fined not less than one hundred dollars nor
5 more than five hundred dollars for the first offense,
6 and for the second or subsequent offense, shall be
7 fined not less than five hundred nor more than one
8 thousand dollars, or imprisoned in the county jail not
9 more than six months, or both fined and imprisoned.
10 Magistrates have concurrent jurisdiction with circuit
11 courts to enforce the provisions of this article.

12 (b) *Civil penalties.* —

13 (1) Any person violating a provision of this article or
14 rules adopted hereunder may be assessed a civil
15 penalty by the commissioner. In determining the
16 amount of any civil penalty, the commissioner shall
17 give due consideration to the history of previous
18 violations of any person, the seriousness of the viola-

19 tion, including any irreparable harm to the environ-
20 ment, any hazards to the health and safety of the
21 public and any economic damages to the public and
22 the demonstrated good faith of any person charged in
23 attempting to achieve compliance with this article
24 before and after written notification of the violation.

25 (2) The commissioner may assess a civil penalty of
26 up to one thousand dollars for any violation.

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

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

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

51 (e) Upon application by the commissioner therefor,
52 the circuit court of the county in which the violation
53 is occurring, has occurred or is about to occur, as the
54 case may be, may grant a temporary or permanent
55 injunction restraining any person from violating or
56 continuing to violate any of the provisions of this
57 article or any rule promulgated under this article,
58 notwithstanding the existence of other remedies at

59 law. Any such injunction shall be issued without bond.

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

64 (g) It is the duty of the prosecuting attorney of the
65 county in which the violation occurred to represent
66 the department of agriculture, to institute proceedings
67 and to prosecute the person charged with such
68 violation.

§19-11-13. Payment of fees.

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

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

1 The commissioner may cooperate with and enter
2 into agreements with governmental agencies of this
3 state, other states, agencies of the federal government,
4 agencies of foreign governments, and private associa-
5 tions in order to carry out the purpose and provisions
6 of this article.

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

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

ARTICLE 11A. DAIRY PRODUCTS AND IMITATION DAIRY PRODUCTS LAW.

§19-11A-1. Purpose.

1 Advances in food technology have resulted in the
2 development of a variety of products of similar usage
3 as standardized dairy products that are so similar in
4 appearance, odor and taste that they are difficult to
5 differentiate from dairy products. Therefore, it is the
6 purpose of this article to regulate these products in
7 addition to dairy products and to regulate their
8 marketing, to protect, promote and preserve the public
9 health and general welfare, to prevent fraud and
10 deception in the manufacture and trade of products
11 covered under this article, to establish labeling
12 requirements and to establish standards of identity for
13 dairy products and imitation dairy products intended
14 primarily for human consumption.

15 Except where otherwise indicated, it is the intent of
16 the Legislature that this article substantially conform
17 with the federal regulations promulgated under the
18 authority of the United States secretary of health and
19 human services in order to provide for the movement
20 of milk products, cheeses and frozen desserts and
21 imitation dairy products in interstate and intrastate
22 commerce with a minimum of economic barriers.

§19-11A-2. Definitions.

1 (a) "Adulterated" means dairy products or imitation
2 dairy products meeting one or several of the condi-
3 tions listed in section five of this article.

4 (b) "Approved laboratory" means a laboratory
5 approved by the commissioner under section nine of
6 this article.

7 (c) "Cheese" means blue, cheddar, cottage, cream,
8 edam, gouda, gruyere, limburgere, monterey jack,
9 mozzarella, muenster, neufchatel, romano, roquefort,
10 swiss or cold-pack cheese; pasteurized blended cheese
11 whether made from cow or goat milk; and such other
12 products as established by rule as a cheese.

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

16 (e) "Commissioner" means the commissioner of
17 agriculture of the state of West Virginia or his or her
18 duly authorized agent.

19 (f) "Dairy products" means milk products, frozen
20 desserts and cheeses as defined in this article which
21 are intended for human consumption.

22 (g) "Distributor" means any person who distributes
23 dairy products or imitation dairy products. The term
24 does not include persons who are exclusively retailers.

25 (h) "Distribute" means the act of transporting,
26 holding for sale, offering for sale, selling, bartering,
27 parceling out, giving or otherwise disposing of dairy
28 products or imitation dairy products. This term does
29 not apply to a firm listed as a distributor on the label
30 if the firm is not engaged in the activities listed in this
31 subsection within the state of West Virginia.

32 (i) "Embargo" means an order to withdraw a dairy
33 product or imitation dairy product from distribution or
34 to stop a manufacturing operation. An embargo shall
35 detain such product and prohibit the manufacturing
36 process as provided in section ten of this article.

37 (j) "Freezer" means mechanical equipment used to
38 lower the temperature of a mix, with or without
39 incorporating air into the mix during the freezing
40 process. Freezers may operate on a continuous or
41 batch basis.

42 (k) "Frozen dessert" means ice cream, frozen
43 custard, French ice cream, French custard ice cream,
44 ice milk, goat's milk ice cream, goat's milk ice milk,
45 fruit sherbet, nonfruit sherbets, frozen dietary dessert,
46 frozen yogurt, frozen lowfat yogurt, milkshakes, any
47 mix used to make such frozen desserts whether
48 quiescently frozen or frozen while mixed and such
49 other products as established by rule as a frozen
50 dessert whether made with milk products from a cow
51 or goat.

52 (l) "Imitation dairy products" means products that
53 are manufactured, packaged or labeled so as to resem-
54 ble the composition, physical and sensory properties of
55 dairy products, which contain dairy products or milk-
56 derived ingredients and which are intended to be used
57 as a substitute for a dairy product.

58 (m) "Label" means the display of written, printed or
59 graphic matter upon or affixed to the package in
60 which the dairy product or imitation dairy product is
61 distributed.

62 (n) "Labeling" means all representations dissemi-
63 nated in any manner or by any means other than by
64 the label, which induce or which are likely or
65 intended to induce the purchase or use of dairy
66 products or imitation dairy products.

67 (o) "Manufacture" means pasteurizing, ultrapasteu-
68 rizing, formulating, compounding, freezing, packaging
69 or preparation for distribution of dairy products or
70 imitation dairy products.

71 (p) "Manufacturer" means any person who manu-
72 factures dairy products or imitation dairy products.

73 (q) "Milk-derived ingredients" means whey, modi-
74 fied whey products, casein, caseinates, lactose, lactal-
75 bumins and lactoglobulins used in fluid, concentrated
76 or dry form and such other ingredients established by
77 rule as a milk-derived ingredient.

78 (r) "Milk products" means milk, acidified milk,
79 cultured milk, concentrated milk, sweetened
80 condensed milk, sweetened condensed skim milk,
81 lowfat dry milk, nonfat dry milk, nonfat dry milk
82 fortified with vitamins A and D, evaporated milk,
83 evaporated skim milk, lowfat milk, acidified lowfat
84 milk, cultured lowfat milk, skim milk, acidified skim
85 milk, cultured skim milk, dry whole milk, cream, dry
86 cream, heavy cream, light cream, light whipping
87 cream, sour cream, acidified sour cream, eggnog, half-
88 and-half, sour half-and-half, acidified sour half-and-
89 half, butter, yogurt, lowfat yogurt, nonfat yogurt and
90 such other products established by rule as a milk

91 product whether made with milk products from a cow
92 or goat.

93 (s) "Milk fat" means fat in dairy products or in milk-
94 derived ingredients.

95 (t) "Misbranded" means dairy products or imitation
96 dairy products meeting one or several of the condi-
97 tions listed in section six of this article.

98 (u) "Mix" means the product that when frozen
99 produces a frozen dessert or an imitation of a frozen
100 dessert.

101 (v) "Official sample" means any sample taken in
102 accordance with the provisions of this article.

103 (w) "Package" means any container holding dairy
104 products or imitation dairy products.

105 (x) "Pasteurized" means the process of uniformly
106 heating every particle of a dairy product or imitation
107 dairy product, holding it in the heated state and
108 cooling it, in equipment under conditions of tempera-
109 ture and time that is established in the Grade "A"
110 Pasteurized Milk Ordinance, 1989 revision, published
111 by the United States department of health and human
112 services: *Provided*, That nothing contained in this
113 definition shall be construed as barring any other
114 process which may be approved by the commissioner
115 or the state director of health that results in products
116 that are free from pathogens.

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

122 (z) "Retailer" means the person who sells dairy
123 products or imitation dairy products only to the
124 ultimate consumer, who does not transport dairy
125 products or imitation dairy products in any manner
126 except between buildings on the same lot or within
127 the retail premises and who sells frozen desserts from
128 a freezer only at the firm where the freezer is located.

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

137 (bb) "Transport" means the movement from one
138 facility to another of dairy products and imitation
139 dairy products in a manner that maintains adequate
140 temperatures and protects the product from freezing
141 temperatures, exposure to the sun and from sources of
142 contamination.

143 (cc) "Ultrapasteurized" means the process of heating
144 every particle of a dairy product or imitation dairy
145 product at or above two hundred eighty degrees
146 Fahrenheit for at least two seconds either before or
147 after packaging so as to produce a product which has
148 an extended shelf life under refrigerated conditions.

§19-11A-3. Permits.

1 (a) Permits are not transferrable with respect to
2 persons or locations.

3 (b) Application for all permits shall be made on
4 forms supplied by the commissioner and shall provide
5 such information as may be considered necessary by
6 the commissioner.

7 (c) Permits shall be posted prominently at the place
8 of operation.

9 (d) A dairy products distributors permit shall be
10 issued by the commissioner to each person distributing
11 dairy products in this state, even if there is no
12 permanent location maintained in this state. Persons
13 maintaining multiple permanent locations in this state
14 or distributing into this state from several locations
15 shall obtain a permit for each location. Application
16 shall be made at least fifteen days before the date that
17 the current permit expires or within fifteen days of
18 the date that the person intends to engage in business.

19 The application shall be accompanied by a fee of
20 fifteen dollars. A penalty of two dollars shall be added
21 to all permits that are not applied for or renewed
22 within this time limit. Permits shall expire on the
23 thirty-first day of March following date of issue:
24 *Provided*, That firms that have a permit with an
25 expiration date of the thirtieth day of June, one
26 thousand nine hundred ninety-one, on the date of
27 implementation of this article shall be allowed to make
28 application for a dairy products permit for the period
29 of the first day of July, one thousand nine hundred
30 ninety-one through the thirty-first day of March, one
31 thousand nine hundred ninety-two at a fee of ten
32 dollars.

33 (e) A dairy products distributors permit is not
34 required for persons who distribute only aseptically
35 processed and hermetically sealed dairy products or
36 frozen desserts, dry dairy products or dry frozen
37 dessert mixes.

38 (f) A temporary marketing permit may be issued by
39 the commissioner for the marketing of dairy products
40 that are not covered by an established standard. The
41 temporary permit may be issued according to proce-
42 dures established by rule. Persons applying for a
43 temporary marketing permit shall have a valid dairy
44 products distributors permit. There is no fee for the
45 permit.

§19-11A-4. Labeling.

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

7 (b) The label shall contain the following information:

8 (1) The name of the product;

9 (2) The quantity of the contents;

10 (3) The name and address of the manufacturer,

11 packer or distributor: *Provided*, That the manufactur-
12 er's plant code or name and address shall always
13 appear on the label for Grade "A" products; and

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

§19-11A-5. Adulteration.

1 Any dairy product or imitation dairy product
2 referred to in this article is considered adulterated
3 within the meaning of this article if it:

4 (a) Bears or contains any poisonous or deleterious
5 substance or compound in a quantity which may
6 render it injurious to health;

7 (b) Contains any coloring substance or flavoring
8 matter that may be deleterious to health;

9 (c) Bears or contains any added poisonous or deleterious
10 substance for which no safe tolerance has been
11 established by state or federal law or regulation or
12 which is found in the product in excess of an estab-
13 lished tolerance;

14 (d) Does not meet the quality standards set forth in
15 this article;

16 (e) Is or has been manufactured under conditions
17 not in conformity with the provisions of this article;

18 (f) Is or has been produced, processed, prepared or
19 held under unsanitary conditions;

20 (g) Has not been manufactured according to the
21 provisions of the applicable standard of identity or that
22 contains pathogens after manufacture;

23 (h) Is or has been stored in a package composed, in
24 whole or in part, of any poisonous or deleterious
25 substance which may render the contents injurious to
26 health;

27 (i) Contains any substance added thereto or mixed
28 or packed therewith so as to make it appear better or
29 of greater value than it is; or

30 (j) Meets or has met other conditions of adulteration

31 as established by rule.

§19-11A-6. Misbranded.

1 Any dairy product or imitation dairy product
2 referred to in this article is considered misbranded
3 within the meaning of this article if:

4 (a) It is labeled as a product for which there is a
5 standard established by this article and it does not
6 conform to such standards;

7 (b) Its label or labeling is false or misleading in any
8 particular;

9 (c) It is not labeled in accordance with the require-
10 ments of this article;

11 (d) Any word, statement or other information
12 required by this article to appear on the label or the
13 labeling is not prominently placed thereon with such
14 conspicuousness as compared with other words, state-
15 ments, designs or devices in the labeling and in such
16 terms as to render it likely to be read or understood
17 by the ordinary person under customary conditions of
18 purchase and use;

19 (e) Damage or inferiority has been concealed by any
20 means; or

21 (f) It meets or has met other conditions of misbrand-
22 ing as established by rule.

§19-11A-7. Prohibited acts.

1 (a) No person may distribute, sell, offer for sale, hold
2 for sale or have in his possession with the intent to sell
3 any dairy product or imitation dairy product which is
4 adulterated or misbranded within the meaning of this
5 article.

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

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

10 (d) No person may fail to comply with the provisions
11 of a revocation, suspension or denial order issued

12 under this article.

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

19 (f) No person may bring into, send into or receive
20 into this state, distribute within this state or have in
21 storage dairy products without a valid dairy products
22 distributors permit, except that retailers are exempt
23 from this requirement.

24 (g) No person may distribute, sell, offer for sale, hold
25 for sale or have in their possession with intent to sell,
26 a dairy product or imitation dairy product in a
27 container if the whole or any part of the item(s)
28 required by this article to be on the label have been
29 altered, mutilated, destroyed, obliterated, removed,
30 concealed, replaced or otherwise falsely represented.

31 (h) No person may alter or deface any part of the
32 items required by this article to be on the label after
33 packaging.

34 (i) No person may offer for sale, transport, or
35 distribution dairy products or imitation dairy products
36 subsequent to packaging that have been allowed to
37 exceed a temperature of forty-five degrees Fahrenheit
38 for refrigerated noncultured products or zero degrees
39 Fahrenheit for frozen products, except that dairy
40 products or imitation dairy products containing active
41 cultures shall not be allowed to exceed a temperature
42 of fifty degrees Fahrenheit; and cheeses or imitations of
43 cheeses shall not be allowed to reach temperatures
44 that will allow for spoilage or mold organisms, other
45 than those mold organisms that may be in the product
46 as a result of the process used to make the product, to
47 grow on or in the product. Dairy products or imitation
48 dairy products that have been aseptically processed
49 and hermetically sealed and dry dairy products or dry
50 imitation dairy products are exempted from the
51 requirements of this subsection.

52 (j) No person may transport dairy products or
53 imitation dairy products in a vehicle that has pre-
54 viously been used to haul a chemical or foreign
55 substance unless such vehicle has been cleaned accord-
56 ing to rules promulgated by the commissioner.

57 (k) No person may sell or reprocess for human
58 consumption dairy products or imitation dairy pro-
59 ducts that are in, or have been in, broken or opened
60 retail packages that have been out of the possession of
61 the manufacturer. Nothing in this provision prohibits
62 the return of these containers to the distributor for
63 inspection purposes only.

64 (l) No person may distribute or use for human
65 consumption products manufactured from packaged
66 dairy products or imitation dairy products that have
67 been out of the possession of the manufacturer.

68 (m) No person may distribute or use dairy products
69 or imitation dairy products that have been repasteu-
70 rized subsequent to transportation in bulk, except for
71 products that have been handled in a sanitary manner
72 and maintained at forty-five degrees Farenheit or less
73 prior to repasteurization.

74 (n) No person may sell, offer for sale or expose for
75 sale any product containing milk products or milk-
76 derived products that are from a herd that does not
77 meet the requirements for animal health as set by
78 rules promulgated under this article.

79 (o) No person may sell or exchange or have in his
80 possession with intent to sell or exchange in this state,
81 any milk powder originating from any country or area
82 outside the United States with reported cases of
83 rinderpest, African swine fever or foot and mouth
84 disease unless that product is imported into this state
85 under conditions set by rules promulgated under this
86 article.

§19-11A-8. Approved sampling and testing methods.

1 (a) All sampling and testing methods shall be those
2 set forth in the fifteenth edition of and supplement to
3 the Official Methods of Analysis of the Association of

4 Official Analytical Chemists, published by the Associ-
5 ation of Official Analytical Chemists; or the fifteenth
6 edition of the Standard Methods for the Examination
7 of Dairy Products, published by the American Public
8 Health Association, Inc.; or methods approved by the
9 commissioner.

10 (b) The Babcock method or other methods approved
11 by the commissioner for determining the milk fat
12 content of dairy products shall be used as the refer-
13 ence method to establish and maintain the calibration
14 of automated testing instruments.

§19-11A-9. Approved laboratories.

1 (a) Each person who desires to have his laboratory
2 approved by the commissioner for testing official dairy
3 product or imitation dairy product samples as herein
4 provided shall first satisfy the commissioner that tests
5 to be made in such laboratory shall be conducted by
6 qualified persons, with adequate facilities and that
7 such tests are performed accurately and according to
8 methods approved by the commissioner.

9 (b) For the purpose of determining whether a
10 laboratory shall be designated as an approved labora-
11 tory the commissioner shall designate a qualified
12 person or persons to inspect the laboratory, its equip-
13 ment, facilities and personnel at the expense of the
14 applying laboratory, and thereafter may have similar
15 inspections made at the expense of the approved
16 laboratory for the purpose of determining whether or
17 not such approval should be continued.

18 (c) The commissioner may accept the test results of
19 any laboratory that has been approved under this
20 article: *Provided*, That the commissioner shall not
21 accept the test results of any approved laboratory for
22 samples manufactured, distributed or used by a firm
23 the same as or related to the approved laboratory.

§19-11A-10. Powers and duties of commissioner.

1 The commissioner has the power and duty to:

2 (a) Adopt, promulgate and enforce rules to carry out

3 the purpose of this article, including establishing
4 definitions and standards of quality and identity for
5 dairy products and imitation dairy products;

6 (b) Have access to and enter at all reasonable times
7 all places where dairy products or imitation dairy
8 products are manufactured, packaged, stored, held,
9 transported, distributed or used in this state and
10 where records, papers or documents relating to these
11 transactions are kept;

12 (c) Inspect and photograph all places where dairy
13 products or imitation dairy products are manufac-
14 tured, packaged, stored, held, transported, distributed
15 or used, inspect, audit and copy records and papers
16 relating to the manufacturing, distribution, sampling,
17 testing and sale of dairy products or imitation dairy
18 products, examine measuring and testing apparatus;
19 and examine equipment used in manufacturing and
20 transportation of dairy products or imitation dairy
21 products, except that inspections performed under
22 authority of the provisions of article seven, chapter
23 sixteen of this code will not be duplicated;

24 (d) Examine and sample dairy products or imitation
25 dairy products, including, but not limited to, ingre-
26 dients and packages that are used in the manufacture
27 of these products, and may open any package contain-
28 ing or believed to contain any dairy product or
29 imitation dairy product, or an ingredient to be used in
30 the manufacture of these products for the purpose of
31 inspecting and sampling;

32 (e) Issue, suspend, revoke or deny permits;

33 (f) Collect fees and expend moneys under the terms
34 of this article;

35 (g) Collect evidence, including samples, of the
36 condition of equipment, holding tanks, storage rooms
37 and vehicles used, or intended to be used in the
38 processing, packaging, transporting or holding of dairy
39 products or imitation dairy products;

40 (h) Examine the labels and labeling of dairy pro-
41 ducts or imitation dairy products;

42 (i) Issue embargoes for any dairy product or imita-
43 tion dairy product which is or is believed to be
44 adulterated, misbranded or that is not in compliance
45 with this article and to cause the manufacturing and
46 distributing of same to cease. Nothing in this article
47 may be construed as requiring the commissioner to
48 issue embargoes for minor violations of this article
49 when he or she believes that a written notice of the
50 violation will serve the public interest.

51 (1) When an embargo is issued, the commissioner
52 shall affix to such product or manufacturing device in
53 an appropriate manner a tag or other marking giving
54 warning that such product is under embargo.

55 (2) The commissioner shall give written notice to the
56 custodian of the product or process under embargo
57 describing the violation and stating that the product is
58 prohibited from being sold, offered for sale, exposed
59 for sale or distributed and is ordered to be held on the
60 premises and, further that all manufacturing processes
61 in the state of West Virginia for this product shall
62 cease until the embargo is released. This notice shall
63 notify the custodian of the right to request an imme-
64 diate hearing under the rules adopted by the
65 commissioner.

66 (3) The commissioner may take action to seize and
67 condemn any product that is not brought into com-
68 pliance with this article and the rules issued within
69 ninety days of the notice to the custodian of the
70 product.

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

81 (j) Establish, maintain and make provision for dairy

82 product and imitation dairy product testing facilities,
83 to establish reasonable fees for such tests and to incur
84 such expenses as may be necessary to maintain and
85 operate these facilities;

86 (k) Approve sampling and testing methods and
87 evaluate and approve official laboratories;

88 (l) Obtain from any state court an order directing
89 any person to submit to inspection and sampling
90 subsequent to the refusal of any person to allow
91 inspection and sampling;

92 (m) Conduct hearings as provided by this article;
93 and

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

§19-11A-11. Suspension, revocation or denial of permits.

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

7 (b) The commissioner may suspend a permit when-
8 ever a health hazard exists or is believed to exist, the
9 permit has been obtained fraudulently, the holder has
10 grossly interfered with the duties of the commissioner
11 or it is determined that the permit holder is dishonest,
12 deceitful, incompetent or not in compliance with or is
13 unable to comply with this article. Any person whose
14 permit has been suspended shall immediately discon-
15 tinue all operations covered under the permit. The
16 commissioner may issue a summary suspension in
17 cases where violations of this article constitute a
18 hazard to the public health, safety or welfare or where
19 the public interest requires immediate action.

20 (1) Except for summary suspensions, the commis-
21 sioner shall give written notice to the persons affected
22 of the pending suspension, stating that the suspension
23 of the permit is being contemplated and giving reasons
24 therefor. The suspension notice shall appoint a time
25 and place for hearing and shall be mailed by certified
26 mail to the business address of the permit holder at
27 least ten days before the date set for the hearing. The
28 commissioner shall review the evidence presented at
29 the hearing prior to issuing his decision.

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

34 (3) At the end of the period of suspension, the
35 permit holder may resume operations without reappli-
36 cation for a permit.

37 (c) The commissioner may revoke any permit issued
38 under this article whenever a health hazard exists, the
39 permit has been obtained fraudulently, the holder has
40 grossly interfered with the duties of the commissioner
41 or it is determined that the holder is dishonest,
42 deceitful, incompetent or not in compliance with or is
43 unable to comply with this article. Any person whose
44 permit has been revoked shall immediately discon-
45 tinue all operations covered under the permit.

46 (1) Before revoking any permit the commissioner
47 shall give written notice to the persons affected,
48 stating that the revocation of the permit is being
49 contemplated and giving reasons for the revocation.
50 The revocation notice shall appoint a time and place
51 for hearing and shall be mailed by certified mail to the
52 business address of the permit holder at least ten days
53 before the date set for the hearing. The commissioner
54 shall review the evidence presented at the hearing
55 prior to issuing his decision.

56 (2) At the end of the period of revocation the permit
57 will not be issued without an application, payment of
58 required fee and the compliance with all conditions
59 that the commissioner shall require for the reissuing

60 of such permit.

§19-11A-12. Hearings and appeals.

1 (a) Any person aggrieved by any action taken under
2 this article shall be afforded the opportunity for a
3 hearing before the commissioner under rules promul-
4 gated by the commissioner.

5 (b) Hearings shall be conducted according to proce-
6 dures set forth by rule.

7 (c) All the testimony and evidence at a hearing shall
8 be recorded by mechanical means, which may include
9 the use of tape recordings. The mechanical record
10 shall be maintained for ninety days from the date of
11 the hearing and a transcript shall be made available to
12 the aggrieved party.

13 (d) Any party who feels aggrieved of the suspension,
14 revocation or denial order may appeal within sixty
15 days to the circuit court of the county in which the
16 person has located its principal place of business or to
17 the circuit court of Kanawha County.

§19-11A-13. Criminal penalties; civil penalties; negotiated agreement.

1 (a) *Criminal penalties.* — Any person violating any
2 provision of this article or rule adopted hereunder is
3 guilty of a misdemeanor, and, upon conviction thereof,
4 shall be fined not less than one hundred dollars nor
5 more than five hundred dollars for the first offense,
6 and for the second or subsequent offense, shall be
7 fined not less than five hundred nor more than one
8 thousand dollars, or imprisoned in the county jail not
9 more than six months, or both fined and imprisoned.
10 Magistrates have concurrent jurisdiction with circuit
11 courts to enforce the provisions of this article.

12 (b) *Civil penalties.* —

13 (1) Any person violating a provision of this article or
14 rules adopted hereunder may be assessed a civil
15 penalty by the commissioner. In determining the
16 amount of any civil penalty, the commissioner shall
17 give due consideration to the history of previous

18 violations of any person, the seriousness of the viola-
19 tion, including any irreparable harm to the environ-
20 ment, any hazards to the health and safety of the
21 public and any economic damages to the public and
22 the demonstrated good faith of any person charged in
23 attempting to achieve compliance with this article
24 before and after written notification of the violation.

25 (2) The commissioner may assess a civil penalty of
26 up to one thousand dollars for a violation.

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

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

45 (d) Upon application by the commissioner for an
46 injunction, the circuit court of the county in which the
47 violation is occurring, had occurred or is about to
48 occur, as the case may be, may grant a temporary or
49 permanent injunction restraining any person from
50 violating or continuing to violate any of the provisions
51 of this article or any rule promulgated under this
52 article, notwithstanding the existence of other reme-
53 dies at law. Any such injunction shall be issued
54 without bond.

55 (e) No state court may allow for the recovery of
56 damages for any administrative action taken, if the
57 court finds that there was a probable cause for such

58 action.

59 (f) It is the duty of the prosecuting attorney of the
60 county in which the violation occurred to represent
61 the department of agriculture, to institute proceedings
62 and to prosecute the person charged with such
63 violation.

§19-11A-14. Payment of fees.

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

§19-11A-15. Cooperation with other entities.

1 The commissioner may cooperate with and enter
2 into agreements with governmental agencies of this
3 state, other states, agencies of the federal government,
4 agencies of foreign governments, and private associa-
5 tions in order to carry out the purpose and provisions
6 of this article.

§19-11A-16. Confidentiality of trade secrets.

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

**ARTICLE 11B. FROZEN DESSERTS AND IMITATION FROZEN
DESSERTS LAW.**

§19-11B-1. Purpose.

1 The legislative intent of this article is to protect,
2 promote and preserve the public health and general
3 welfare and to prevent fraud and deception in the
4 manufacture, sale, offering for sale, exposing for sale,

5 and possession with intent to sell, frozen desserts and
6 products resembling frozen desserts for human con-
7 sumption. Further, the Legislature recognizes that
8 advances in food technology have resulted in the
9 development of a variety of products of similar usage
10 as standardized frozen desserts that are so similar in
11 appearance, odor and taste that they are difficult to
12 differentiate from frozen desserts. Therefore, this
13 article shall regulate these products in addition to
14 frozen desserts, establish definitions and standards for
15 such foods or labeling requirements by rules which
16 effect their orderly marketing and insure similar
17 sanitary standards for frozen desserts and imitation
18 frozen desserts.

19 Except where otherwise indicated, it is the intent of
20 the Legislature that this article substantially conform
21 with the federal regulations promulgated under the
22 authority of the United States secretary of health and
23 human services in order to provide for the movement
24 of frozen desserts and imitation frozen desserts in
25 interstate and intrastate commerce with a minimum
26 of economic barriers.

§19-11B-2. Definitions.

1 (a) "Adulterated" means frozen desserts or imitation
2 frozen desserts meeting one or several of the condi-
3 tions listed in section five of this article.

4 (b) "Approved laboratory" means a laboratory
5 approved by the commissioner under section nine of
6 this article.

7 (c) "Clean" means the condition where no residue
8 remains on a surface that will, or is likely to, cause
9 adulteration.

10 (d) "Commissioner" means the commissioner of
11 agriculture of the state of West Virginia or his or her
12 duly authorized agent.

13 (e) "Distributor" means any person who distributes
14 frozen desserts or imitation frozen desserts. The term
15 does not include persons who are exclusively retailers
16 and who are not engaged in the transportation of

17 frozen desserts or imitation frozen desserts.

18 (f) "Distribute" means the act of transporting,
19 holding for sale, offering for sale, selling, bartering,
20 parceling out, giving or otherwise disposing of frozen
21 desserts or imitation frozen desserts.

22 (g) "Embargo" means an order to withdraw a frozen
23 dessert or imitation frozen dessert from distribution or
24 to stop a manufacturing operation as provided in
25 section ten of this article.

26 (h) "Freezer" means mechanical equipment used to
27 lower the temperature of a mix, with or without
28 incorporating air into the mix during the freezing
29 process. Freezers may operate on a continuous or
30 batch basis.

31 (i) "Frozen dessert" means ice cream, frozen cus-
32 tard, French ice cream, French custard ice cream, ice
33 milk, goat's milk ice cream, goat's milk ice milk, fruit
34 sherbet, nonfruit sherbets, frozen dietary dessert,
35 frozen yogurt, frozen lowfat yogurt, milkshakes, any
36 mix used to make such frozen desserts whether
37 quiescently frozen or frozen while mixed and such
38 other products as established by rule as a frozen
39 dessert whether made with milk products from a cow
40 or goat.

41 (j) "Imitation frozen desserts" means products that
42 are manufactured, packaged or labeled so as to resem-
43 ble the composition, physical and sensory properties of
44 frozen desserts which contain milk products or milk-
45 derived ingredients whether from a cow or a goat and
46 which are intended to be used as a substitute for a
47 frozen dessert. This term includes any mix used to
48 manufacture imitation frozen desserts.

49 (k) "Label" means the display of written, printed or
50 graphic matter upon or affixed to the package in
51 which the frozen dessert or imitation frozen dessert is
52 distributed.

53 (l) "Labeling" means all representations dissemi-
54 nated in any manner or by any means other than by
55 the label, which induce or which are likely or

56 intended to induce the purchase or use of frozen
57 desserts or imitation frozen desserts.

58 (m) "Manufacture" means pasteurizing, ultrapasteu-
59 rizing, formulating, compounding, freezing, processing
60 or packaging a mix into a frozen dessert or imitation
61 frozen dessert.

62 (n) "Manufacturer" means any person who manu-
63 factures frozen desserts or imitation frozen desserts.

64 (o) "Milk-derived ingredients" means whey, modi-
65 fied whey products, casein, caseinates, lactose, lactal-
66 bumins and lactoglobulins used in fluid, concentrated
67 or dry form and other ingredients as established by
68 rule as a milk-derived ingredient.

69 (p) "Milk products" means milk, acidified milk,
70 cultured milk, concentrated milk, sweetened
71 condensed milk, sweetened condensed skim milk,
72 lowfat dry milk, nonfat dry milk, nonfat dry milk
73 fortified with vitamins A and D, evaporated milk,
74 evaporated skim milk, lowfat milk, acidified lowfat
75 milk, cultured lowfat milk, skim milk, acidified skim
76 milk, cultured skim milk, dry whole milk, cream, dry
77 cream, heavy cream, light cream, light whipping
78 cream, sour cream, acidified sour cream, eggnog, half-
79 and-half, sour half-and-half, acidified sour half-and-
80 half, butter, yogurt, lowfat yogurt, nonfat yogurt and
81 such other products as established by rule as a milk
82 product whether made with milk products from a cow
83 or goat.

84 (q) "Milk fat" means fat in frozen desserts or
85 imitation frozen desserts.

86 (r) "Misbranded" means frozen desserts or imitation
87 frozen desserts meeting one or several of the condi-
88 tions listed in section six of this article.

89 (s) "Mix" means the product made from wholesome
90 ingredients that when frozen shall produce a frozen
91 dessert or imitation frozen dessert.

92 (t) "Official sample" means any sample taken in
93 accordance with the provisions of this article.

94 (u) "Package" means any container holding frozen
95 desserts or imitation frozen desserts.

96 (v) "Pasteurized" means the process of uniformly
97 heating every particle of a mix, holding in the heated
98 state and cooling it, in equipment under conditions of
99 temperature and time that is established in Grade "A"
100 Pasteurized Milk Ordinance, 1989 revision, published
101 by the United States department of health and human
102 services: *Provided*, That nothing contained in this
103 definition may be construed as barring any other
104 process which may be approved by the commissioner
105 or the state director of health that results in products
106 that are free from pathogens.

107 (w) "Person" means any individual, partnership,
108 association, fiduciary, firm, company, corporation or
109 any organized group of persons whether incorporated
110 or not. The term person extends to the agents, ser-
111 vants, officers and employees of the person.

112 (x) "Rerun" means a frozen dessert or imitation
113 frozen dessert that is removed from a freezer and is
114 intended to be reprocessed.

115 (y) "Retailer" means the person who sells frozen
116 desserts or imitation frozen desserts to the ultimate
117 consumer and who does not transport frozen desserts
118 or imitation frozen desserts to or from the location of
119 the freezer.

120 (z) "Sanitization" means the application of any
121 effective method or substance to a clean surface for
122 the destruction of pathogens, and other organisms as
123 far as practicable. Such treatment shall not adversely
124 affect the equipment, the dairy product or the health
125 of the consumers consuming the products manufac-
126 tured in the equipment and shall be a method accept-
127 able to the commissioner.

128 (aa) "Transport" means the movement from one
129 facility to another in a manner that maintains ade-
130 quate temperatures and protects the product from
131 freezing temperatures, exposure to the sun and from
132 sources of contamination.

133 (bb) "Ultrapasteurized" means the process of heat-
 134 ing every particle of a dairy product or mix at or
 135 above two hundred eighty degrees Fahrenheit for at
 136 least two seconds either before or after packaging so as
 137 to produce a product which has an extended shelf life
 138 under refrigerated conditions.

§19-11B-3. Frozen dessert manufacturer permit.

1 (a) A "frozen desserts manufacturer permit" shall
 2 be issued to each manufacturer of frozen desserts or
 3 imitation frozen desserts. Permits shall be issued for
 4 each place of operation and shall not be transferable
 5 with respect to persons or locations. The permit may
 6 be applied to the operation of several freezers at one
 7 location. Each mobile unit shall be considered as
 8 operating at one location.

9 (b) Application shall be made on forms supplied by
 10 the commissioner and provide such information as
 11 may be considered necessary by the commissioner.
 12 Permits shall be applied for at least fifteen days before
 13 the date that the current permit expires or within
 14 fifteen days of the date that the person intends to
 15 engage in business. The application shall be accompan-
 16 ied by a fee of twenty dollars. A penalty of two dollars
 17 shall be added to all permits that are not applied for
 18 or renewed within this time limit. The permits shall
 19 expire on the thirty-first day of March following date
 20 of issue: *Provided*, That firms that have a permit with
 21 an expiration date of the thirtieth day of June, one
 22 thousand nine hundred ninety-one, on the date of
 23 implementation of this article shall be allowed to make
 24 application for a frozen desserts manufacturer permit
 25 for the period of the first day of July, one thousand
 26 nine hundred ninety-one through the thirty-first day
 27 of March, one thousand nine hundred ninety-two at a
 28 fee of ten dollars.

29 (c) Permits shall be posted prominently at the place
 30 of operation.

§19-11B-4. Labeling.

1 (a) All packages of frozen desserts or imitation

2 frozen desserts shall have a label upon or affixed to
3 the package. The label shall be legible and of a print
4 size and style easily readable by the ordinary citizen.
5 The information required in this section shall be on
6 each label and shall be stated in English.

7 (b) The label shall contain the following information:

8 (1) The name of the product;

9 (2) The quantity of the contents;

10 (3) The name and address of the manufacturer,
11 packer or distributor; and

12 (4) Such other information as the commissioner shall
13 establish by rule.

§19-11B-5. Adulteration.

1 Any frozen dessert or imitation frozen dessert
2 referred to in this article is considered adulterated
3 within the meaning of this article if it:

4 (a) Bears or contains any poisonous or deleterious
5 substance or compound in a quantity which may
6 render it injurious to health;

7 (b) Contains any coloring substance or flavoring
8 matter that may be deleterious to health;

9 (c) Bears or contains any added poisonous or deleterious
10 substance for which no safe tolerance has been
11 established by state or federal law or regulation or in
12 excess of an established tolerance;

13 (d) Does not meet the quality standards set forth in
14 this article;

15 (e) Is or has been manufactured under conditions
16 not in conformity with the provisions of this article;

17 (f) Is or has been produced, processed, prepared or
18 held under unsanitary conditions;

19 (g) Is or has been stored in a package composed, in
20 whole or in part, of any poisonous or deleterious
21 substance which may render the contents injurious to
22 health;

23 (h) Contains any substance added thereto or mixed
24 or packed therewith so as to make it appear better or
25 of greater value than it is; or

26 (i) Meets or has met other conditions of adulteration
27 as established by rule.

§19-11B-6. Misbranded.

1 Any frozen dessert or imitation frozen dessert
2 referred to in this article is considered misbranded
3 within the meaning of this article if:

4 (a) It is labeled as a product for which there is a
5 standard established by this article and it does not
6 conform to such standards;

7 (b) Its label or labeling is false or misleading in any
8 particular;

9 (c) It is not labeled in accordance with this article;

10 (d) Any word, statement or other information
11 required by this article to appear on the label or the
12 labeling is not prominently placed thereon with such
13 conspicuousness as compared with other words, state-
14 ments, designs, or devices in the labeling and in such
15 terms as to render it likely to be read or understood
16 by the ordinary person under customary conditions of
17 purchase and use;

18 (e) If damage or inferiority has been concealed by
19 any means; or

20 (f) It meets or has met other conditions of misbrand-
21 ing as established by rule.

§19-11B-7. Prohibited acts.

1 (a) No person may distribute, sell, offer for sale, hold
2 for sale or have in his possession with the intent to sell
3 any frozen dessert or imitation frozen dessert which is
4 adulterated or misbranded within the meaning of this
5 article.

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

8 (c) No person may fail to comply with the provisions

9 of an embargo order issued under section ten of this
10 article.

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

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

20 (f) No person may dispense or manufacture frozen
21 desserts or imitation frozen desserts without a valid
22 frozen desserts manufacturer permit.

23 (g) No person may distribute, sell, offer for sale, hold
24 for sale or have in their possession with intent to sell,
25 a frozen dessert or imitation frozen dessert in a
26 container if the whole or any part of the items
27 required by this article to be on the label have been
28 altered, mutilated, destroyed, obliterated, removed,
29 concealed, replaced or otherwise falsely represented.

30 (h) No person may alter or deface any items
31 required by this article to be on the label after
32 packaging.

33 (i) No person may offer for sale, transport, or
34 distribution, frozen desserts or imitation frozen des-
35 serts subsequent to their packaging that have been
36 allowed to exceed a temperature of forty-five degrees
37 Fahrenheit for refrigerated noncultured products or
38 zero degrees Fahrenheit for frozen products, except
39 that mixes containing active cultures shall not be
40 allowed to exceed a temperature of fifty degrees
41 Fahrenheit. Mixes that have been sterilized and
42 hermetically sealed and dry mixes are exempted from
43 this provision.

44 (j) No person may haul frozen desserts or imitation
45 frozen desserts in a vehicle that has previously been
46 used to haul a chemical or foreign substance unless
47 such vehicle has been cleaned according to the rules

48 promulgated by the commissioner prior to the hauling
49 of such frozen dessert or imitation frozen dessert.

50 (k) No person may sell or reprocess frozen desserts
51 or imitation frozen desserts for human consumption
52 that are in or have been in broken or opened retail
53 packages. Nothing in this provision may prohibit the
54 return of these containers to the manufacturer or
55 distributor for inspection purposes only.

56 (l) No person may distribute or use for human
57 consumption products manufactured from returned
58 packaged frozen desserts or imitation frozen desserts.

59 (m) No person may distribute or use mix that has
60 been repasteurized subsequent to transportation in
61 bulk, except for products that have been handled in a
62 sanitary manner and maintained at forty-five degrees
63 Fahrenheit or less prior to repasteurization.

64 (n) No person may sell, offer for sale or expose for
65 sale any product containing milk products or milk-
66 derived products that are from a herd that does not
67 meet the requirements for animal health as required
68 by rules promulgated under this article.

§19-11B-8. Approved sampling and testing methods.

1 (a) All sampling and testing methods shall be those
2 set forth in the fifteenth edition of and supplement to
3 the Official Methods of Analysis of the Association of
4 Official Analytical Chemists, published by the Associ-
5 ation of Official Analytical Chemists; or the fifteenth
6 edition of the Standard Methods for the Examination
7 of Dairy Products, published by the American Public
8 Health Association, Inc.; or methods approved by the
9 commissioner as provided by rule.

10 (b) The Babcock method or other methods approved
11 by the commissioner for determining the milk fat
12 content of frozen desserts shall be used as the refer-
13 ence method to establish and maintain the calibration
14 of automated testing instruments.

§19-11B-9. Approved laboratories.

1 (a) Each person who desires to have his laboratory

2 approved by the commissioner for testing official
3 frozen dessert or imitation frozen dessert samples as
4 provided in this section shall first satisfy the commis-
5 sioner that tests to be made in such laboratory shall be
6 conducted by qualified persons with adequate facilities
7 and that such tests shall be performed accurately and
8 according to approved methods.

9 (b) For the purpose of determining whether or not
10 a laboratory shall be designated as an approved
11 laboratory the commissioner shall designate a quali-
12 fied person or persons to inspect the laboratory, its
13 equipment, facilities and personnel at the expense of
14 the applying laboratory, and thereafter may have
15 similar inspections made at the expense of the apply-
16 ing laboratory for the purpose of determining whether
17 or not such approval should be continued.

18 (c) The commissioner may accept the test results of
19 any laboratory that has been approved under this
20 article: *Provided*, That the commissioner shall not
21 accept the test results of any approved laboratory for
22 samples manufactured, distributed or used by a firm
23 related to or owned by the approved laboratory.

§19-11B-10. Powers and duties of commissioner.

1 The commissioner has the power and duty to:

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

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

10 (c) Inspect and photograph all places where frozen
11 desserts or imitation frozen desserts are manufac-
12 tured, packaged, stored, held, transported or distrib-
13 uted; inspect, audit and copy records and papers
14 relating to the manufacturing, distribution, sampling,
15 testing and sale of frozen desserts or imitation frozen
16 desserts; examine measuring and testing apparatus;

17 and examine equipment used in manufacturing and
18 transportation of frozen desserts or imitation frozen
19 desserts, except that inspections performed under
20 authority of the provisions of article seven, chapter
21 sixteen of this code will not be duplicated;

22 (d) Sample frozen desserts or imitation frozen
23 desserts, including, but not limited to, ingredients and
24 packages that are used in the manufacture of these
25 products and may open any package containing or
26 believed to contain any frozen dessert or imitation
27 frozen dessert or an ingredient to be used in the
28 manufacture of a frozen dessert or imitation frozen
29 dessert for the purpose of inspecting and sampling;

30 (e) Issue, suspend, revoke or deny permits;

31 (f) Collect fees and expend moneys under the terms
32 of this article;

33 (g) Collect evidence, including samples, of the
34 condition of equipment, holding tanks, storage rooms
35 and vehicles used, or intended to be used, in the
36 processing, packaging, transporting or holding of
37 frozen desserts or imitation frozen desserts;

38 (h) Examine the labels and labeling of frozen des-
39 serts and imitation frozen desserts;

40 (i) Issue embargoes for any product which is or is
41 believed to be adulterated, misbranded or that is not
42 in compliance with this article and to cause the
43 manufacturing and distributing of same to cease.
44 Nothing in this article may be construed as requiring
45 the commissioner to issue embargoes for minor viola-
46 tions of this article when he or she believes that a
47 written notice of violation will serve the public
48 interest.

49 (1) When an embargo is issued, the commissioner
50 shall affix to such product or manufacturing device in
51 an appropriate manner a tag or other marking giving
52 warning that such product is under embargo.

53 (2) The commissioner shall give written notice to the
54 custodian of the product or process under embargo

55 describing the violation and stating that the product is
56 prohibited from being sold, offered for sale, exposed
57 for sale or distributed and is ordered to be held on the
58 premises and, further, that all manufacturing pro-
59 cesses for this product shall cease until the embargo is
60 released. This notice shall notify the custodian of the
61 right to request an immediate hearing under the rules
62 adopted by the commissioner.

63 (3) The commissioner shall take action to seize and
64 condemn any product that cannot be brought into
65 compliance with this article and the rules issued under
66 same within ninety days of notice to the custodian of
67 the product.

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

78 (j) Establish, maintain and make provision for frozen
79 dessert and imitation frozen dessert testing facilities;
80 to establish reasonable fees for such tests and to incur
81 such expenses as may be necessary to maintain and
82 operate these facilities;

83 (k) Approve sampling and testing methods, and
84 evaluate and approve official laboratories;

85 (l) Obtain from any state court an order directing
86 any person to submit to inspection and sampling
87 subsequent to the refusal of any person to allow
88 inspection and sampling;

89 (m) Conduct hearings as provided by this article;
90 and

91 (n) Assess civil penalties and refer violations to a
92 court of competent jurisdiction: *Provided*, That the
93 commissioner is not required to report for prosecution

94 minor violations of the article when he or she believes
95 that the public interest will be best served by a
96 suitable notice in writing.

§19-11B-11. Suspension, revocation or denial of permits.

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

7 (b) The commissioner may suspend a permit when-
8 ever a health hazard exists or is believed to exist, said
9 permit has been obtained fraudulently, the holder has
10 grossly interfered with the duties of the commissioner
11 or it is determined that the permit holder is dishonest,
12 deceitful, incompetent or not in compliance with or is
13 unable to comply with the provisions of this article.
14 Any person whose permit has been suspended shall
15 immediately discontinue all operations covered under
16 the permit. The commissioner may issue a summary
17 suspension in cases where violations of this article
18 constitute a hazard to the public health, safety or
19 welfare where the public interest requires immediate
20 action.

21 (1) Except for summary suspensions, the commis-
22 sioner shall give written notice to the persons affected
23 of the pending suspension, stating that suspension of
24 the permit is being contemplated and giving reasons
25 therefor. The suspension notice shall appoint a time
26 and place for hearing and shall be mailed by certified
27 mail to the business address of the permit holder at
28 least ten days before the date set for the hearing. The
29 commissioner shall review the evidence presented at
30 the hearing prior to issuing his decision.

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

35 (3) At the end of the period of suspension, the

36 permit holder may resume operations without reappli-
37 cation for a permit.

38 (c) The commissioner may revoke any permit issued
39 under this article whenever a health hazard exists, the
40 permit has been obtained fraudulently, the holder has
41 grossly interfered with the duties of the commissioner
42 or it is determined that the holder is dishonest,
43 deceitful, incompetent or not in compliance with or is
44 unable to comply with this article. Any person whose
45 permit has been revoked shall immediately discon-
46 tinue all operations covered under the permit.

47 (1) Before revoking any permit, the commissioner
48 shall give written notice to the persons affected,
49 stating that revocation of the permit is being contem-
50 plated and giving reasons for the revocation. The
51 revocation notice shall appoint a time and place for
52 hearing and shall be mailed by certified mail to the
53 business address of the permit holder at least ten days
54 before the date set for the hearing. The commissioner
55 shall review the evidence presented at the hearing
56 prior to issuing his decision.

57 (2) At the end of the period of revocation, the permit
58 will not be issued without an application, payment of
59 the required fee and compliance with all conditions
60 that the commissioner shall require for the reissuing
61 of such permit.

§19-11B-12. Hearings and appeals.

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

5 (b) Hearings shall be conducted in accordance with
6 procedures set forth by rule.

7 (c) All the testimony and evidence at a hearing shall
8 be recorded by mechanical means, which may include
9 the use of tape recordings. The mechanical record
10 shall be maintained for ninety days from the date of
11 the hearing and a transcript shall be made available to
12 the aggrieved party.

13 (d) Any party who feels aggrieved of the suspension,
14 revocation or denial order may appeal within sixty
15 days to the circuit court of the county in which the
16 person has located its principal place of business.

§19-11B-13. Criminal penalties; civil penalties; negotiated agreement.

1 (a) *Criminal penalties.* — Any person violating any
2 provision of this article or rule adopted hereunder is
3 guilty of a misdemeanor, and, upon conviction thereof,
4 shall be fined not less than one hundred dollars nor
5 more than five hundred dollars for the first offense,
6 and for the second or subsequent offense, shall be
7 fined not less than five hundred nor more than one
8 thousand dollars, or imprisoned in the county jail not
9 more than six months, or both fined and imprisoned.
10 Magistrates have concurrent jurisdiction with circuit
11 courts to enforce the provisions of this article.

12 (b) *Civil penalties.* —

13 (1) Any person violating a provision of this article or
14 rules adopted hereunder may be assessed a civil
15 penalty by the commissioner. In determining the
16 amount of any civil penalty, the commissioner shall
17 give due consideration to the history of previous
18 violations of any person, the seriousness of the viola-
19 tion, including any irreparable harm to the environ-
20 ment, any hazards to the health and safety of the
21 public and any economic damages to the public and
22 the demonstrated good faith of any person charged in
23 attempting to achieve compliance with this article
24 before and after written notification of the violation.

25 (2) The commissioner may assess a civil penalty of
26 up to one thousand dollars for a violation.

27 (3) The civil penalty is payable to the state of West
28 Virginia and is collectible in any manner now or
29 hereafter provided for collection of debt. If any person
30 liable to pay the civil penalty neglects or refuses to pay
31 the same, the amount of the civil penalty, together
32 with interest at ten percent, is a lien in favor of the
33 state of West Virginia upon the property, both real and
34 personal, of such a person after the same has been

35 entered and docketed to record in the county where
36 such property is situated. The clerk of the county,
37 upon receipt of the certified copy of such, shall enter
38 same to record without requiring the payment of costs
39 as a condition precedent to recording.

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

45 (d) Upon application by the commissioner for an
46 injunction, the circuit court of the county in which the
47 violation is occurring, has occurred or is about to
48 occur, as the case may be, may grant a temporary or
49 permanent injunction restraining any person from
50 violating or continuing to violate any of the provisions
51 of this article or any rule promulgated under this
52 article, notwithstanding the existence of other reme-
53 dies at law. Any such injunction shall be issued
54 without bond.

55 (e) No state court may allow for the recovery of
56 damages for any administrative action taken, if the
57 court finds that there was a probable cause for such
58 action.

59 (f) It is the duty of the prosecuting attorney of the
60 county in which the violation occurred to represent
61 the department of agriculture, to institute proceedings
62 and to prosecute the person charged with such
63 violation.

§19-11B-14. Payment of fees.

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

§19-11B-15. Cooperation with other entities.

1 The commissioner may cooperate with and enter
2 into agreements with governmental agencies of this

3 state, other states, agencies of the federal government,
4 agencies of foreign governments and private associa-
5 tions in order to carry out the purpose and provisions
6 of this article.

§19-11B-16. Confidentiality of trade secrets.

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

**ARTICLE 28. VITAMIN AND MINERAL ENRICHMENT OF FLOUR
AND BREAD.**

§19-28-1. Definitions.

1 When used in this article, unless the context other-
2 wise requires:

3 (a) "Flour" includes, and is limited to, the foods
4 commonly known in the milling and baking industries
5 as (1) white flour, also known as wheat flour or plain
6 flour; (2) bromated flour; (3) self-rising flour, also
7 known as self-rising white flour or self-rising wheat
8 flour; and (4) phosphated flour, also known as phos-
9 phated white flour, or phosphated wheat flour, but
10 excludes whole wheat flour and also excludes special
11 flours not used for bread, roll, bun or biscuit baking,
12 such as specialty cake, pancake and pastry flours.

13 (b) "White bread" means any bread made with flour
14 as defined in paragraph (a) whether baked in a pan or
15 on a hearth or screen, which is commonly known or
16 usually represented and sold as white bread, including
17 Vienna bread, French bread and Italian bread.

18 (c) "Rolls" include plain white rolls and buns of the
19 semibread dough type, namely soft rolls, such as
20 hamburger rolls, hot dog rolls, Parker House rolls and

21 hard rolls, such as Vienna rolls, Kaiser rolls, but shall
22 not include yeast-raised sweet rolls or sweet buns
23 made with fillings or coatings, such as cinnamon rolls
24 or buns and butterfly rolls.

25 (d) "Commissioner" means the commissioner of
26 agriculture or his or her duly authorized agent.

27 (e) "Person" means an individual, a corporation, a
28 partnership, an association, a joint stock company, a
29 trust or any group of persons whether incorporated or
30 not, engaged in the commercial manufacture or sale of
31 flour, white bread or rolls.

**§19-28-2. Vitamin and mineral requirements for flour;
exceptions as to flour sold to distributors,
bakers or other processors.**

1 It is unlawful for any person to manufacture, mix,
2 compound, sell or offer for sale, for human consump-
3 tion in this state, flour as defined in section one of this
4 article, unless the following vitamins and minerals are
5 contained in each pound of such flour: Not less than
6 two and not more than two and five-tenths milligrams
7 of thiamine; not less than one and two-tenths and not
8 more than one and five-tenths milligrams of ribo-
9 flavin; not less than sixteen and not more than twenty
10 milligrams of niacin or niacinamide; not less than
11 thirteen and not more than sixteen and five-tenths
12 milligrams of iron; except in the case of self-rising
13 flour which in addition to the above ingredients shall
14 contain not less than five hundred and not more than
15 fifteen hundred milligrams of calcium: *Provided*, That
16 the provisions of this section do not apply to flour sold
17 to distributors, bakers or other processors, if the
18 purchaser furnishes to the seller a certificate in such
19 form as the commissioner has prescribed by rule,
20 certifying that such flour will be: (1) Resold to a
21 distributor, baker or other processor; (2) used in the
22 manufacture, mixing or compounding of flour, white
23 bread or rolls enriched to meet the requirements of
24 this article; or (3) used in the manufacture of products
25 other than flour, white bread or rolls. It is unlawful
26 for any such purchaser furnishing any such certificate

27 to use or resell the flour purchased in any manner
28 other than as prescribed in this section: *Provided,*
29 *however,* That the provisions of this section do not
30 apply to noncommercial flour manufactured by small
31 flour mills, located in this state, for persons from
32 wheat harvested in this state or to any other flour
33 produced and sold at retail by such mills.

§19-28-3. Vitamin and mineral requirements for white bread or rolls.

1 It is unlawful for any person to manufacture, bake,
2 sell or offer for sale, for human consumption in this
3 state, any white bread or rolls, as defined in section
4 one of this article, unless the following vitamins and
5 minerals are contained in each pound of such bread or
6 rolls: Not less than one and one-tenth and not more
7 than one and eight-tenths milligrams of thiamine; not
8 less than seven-tenths and not more than one and six-
9 tenths milligrams of riboflavin; not less than ten and
10 not more than fifteen milligrams of niacin; and not
11 less than eight and not more than twelve and five-
12 tenths milligrams of iron.

§19-28-4. Enforcement of article; authority and duties of commissioner.

1 (a) The commissioner is hereby charged with the
2 duty of enforcing the provisions of this article and is
3 hereby authorized and directed to make, amend or
4 rescind rules and orders for the efficient enforcement
5 of this article.

6 (b) Whenever the vitamin and mineral requirements
7 set forth in sections two and three of this article are
8 no longer in conformity with the legally established
9 standards governing the interstate shipment of
10 enriched flour and enriched white bread or enriched
11 rolls, the commissioner, in order to maintain unifor-
12 mity between the intrastate and interstate vitamin
13 and mineral requirements for the foods within the
14 provisions of this article, and to maintain and protect
15 the health of the citizens of this state, is authorized
16 and directed to modify or revise such requirements to
17 conform with amended standards governing interstate

18 shipments, and there shall be a presumption that the
19 amended standards governing interstate shipments
20 actually represent the standards which will promote
21 the health and well-being of such citizens.

22 (c) In the event of findings by the commissioner that
23 there is an existing or imminent shortage of any
24 ingredient required by section two or three of this
25 article, and that because of such shortage the sale and
26 distribution of flour or white bread or rolls may be
27 impeded by the enforcement of this article, the
28 commissioner shall issue an order, to be effective
29 immediately upon issuance, permitting the omission of
30 such ingredient from flour or white bread or rolls and,
31 if he finds it necessary or appropriate, excepting such
32 foods from labeling requirements until the further
33 order of the commissioner. Any such findings may be
34 made without hearing, on the basis of an order or of
35 factual information supplied by the appropriate fed-
36 eral agency or officer. In the absence of any such
37 order of the appropriate federal agency or factual
38 information supplied by it, the commissioner on his
39 motion may, and upon receiving the sworn statement
40 of ten or more persons subject to this article that they
41 believe such a shortage exists or is imminent shall,
42 within twenty days thereafter hold a public hearing
43 with respect thereto at which any interested person
44 may present evidence, and shall make findings based
45 upon the evidence presented.

46 Whenever the commissioner has reason to believe
47 that such shortage no longer exists, he shall hold a
48 public hearing, at which any interested person may
49 present evidence, and he shall make findings based
50 upon the evidence so presented. If his findings be that
51 such shortage no longer exists, he shall issue an order
52 to become effective not less than thirty days after date
53 of issuance, revoking such previous order: *Provided,*
54 That undisposed floor stocks of flour on hand at the
55 effective date of such revocation order, or flour
56 manufactured prior to such effective date, for sale in
57 this state may thereafter be lawfully sold or disposed
58 of.

59 (d) All orders and rules adopted by the commis-
 60 sioner pursuant to this article, and, within the limits
 61 specified by this article, shall become effective upon a
 62 date fixed by the commissioner.

63 (e) It is the duty of the commissioner to furnish to
 64 any person or organization, filing a written request for
 65 such information, a copy of any and all orders or rules,
 66 adopted pursuant to this article, at least ten days prior
 67 to the effective date of such orders or rules, and to
 68 make copies of same available to the press. In case any
 69 interested person files written objections to any
 70 proposed order or rule, the commissioner shall give an
 71 opportunity for a public hearing upon such order or
 72 rule before the same shall become effective.

73 (f) For the purpose of this article, the commissioner,
 74 or such officers or employees under his supervision as
 75 he may designate, is authorized to take samples for
 76 analysis and to conduct examinations and investiga-
 77 tions, and to enter, at reasonable times, any factory,
 78 mill, bakery, warehouse, shop or establishment where
 79 flour, white bread or rolls are manufactured, pro-
 80 cessed, packed, sold or held, or any vehicle being used
 81 for the transportation thereof, and to inspect any such
 82 place or vehicle and any flour, white bread or rolls
 83 therein and all pertinent equipment, material, con-
 84 tainers and labeling.

**§19-28-5. Penalties for violation of article; inconsistent acts
 repealed; provisions severable.**

1 Any person who violates any of the provisions of this
 2 article or the orders or rules promulgated by the
 3 commissioner is guilty of a misdemeanor, and, upon
 4 conviction thereof, shall be fined for each offense, a
 5 sum of not less than twenty-five dollars nor more than
 6 two hundred dollars, or imprisoned in the county jail
 7 not to exceed sixty days, or both fined and imprisoned.
 8 Magistrates have jurisdiction to try cases involving
 9 violations of any provision of this article, or of the
 10 orders or rules promulgated by the commissioner.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Homer Heck
.....
Chairman Senate Committee

Ernest C. Moore
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Parrell E. Adams
.....
Clerk of the Senate

Donald J. Kopp
.....
Clerk of the House of Delegates

Clayton Hendricks
.....
President of the Senate

Bob Call
.....
Speaker House of Delegates

The within *is approved* this the *20th*
day of *March*, 1991.

Yaston Caperton
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 3/14/91

Time 4:10 pm