

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

2019 JUL 29 P 2:04

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia Department of Agriculture TITLE NUMBER: 61

CITE AUTHORITY: 19-11B

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 4B

TITLE OF RULE BEING AMENDED: Frozen Desserts and Imitation Frozen Desserts

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 29, 2014

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Department of Agriculture
1900 Kanawha Blvd., East
Charleston, WV 25305

LEGISLATIVE RULE TITLE: Frozen Desserts and Imitation Frozen Desserts

1. Authorizing statute(s) citation 19-11B

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 27, 2014 - Public Comment Period

b. What other notice, including advertising, did you give of the hearing?
Mail a copy of the proposed changes to all firms registered with the Department of Agriculture.
Approximately 630 firms

c. Date of Public Hearing(s) or Public Comment Period ended:
July 28, 2014 at 4:00 PM

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 29, 2014

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Herma Johnson, Director
Regulatory and Environmental Affairs
1900 Kanawha Blvd., East
Charleston, WV 25305
304-558-2227
hjohnson@wvda.us

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

Johnson, Herma

From: jeff haynes, NESO <nesonews@gmail.com>
Sent: Wednesday, July 09, 2014 9:51 AM
To: Johnson, Herma
Subject: Re: Proposed Enforcement Policy Change 61-4b-14

Herma,

Thank you so much.

Jeff

On 7/9/2014 9:06 AM, Johnson, Herma wrote:

> Jeff,

>

> In the current rule it was not spelled out as to how a hearing would take place, only that an hearing could/would be held. We needed to clarify the hearing process.

>

> Also, we did a mass mailing and when the names and addresses were merged, the program insert the name of the company within the actual rule itself. This was a mistake in the mailing. The rule was filed with no individual names. Attached is a copy of the rule. We did not realize this until we started receiving calls from firms.

>

> Hope all is going well with you and should you have any further questions, let me know.

>

> Thanks Herma

>

> Herma Johnson, Director

> Regulatory and Environmental Affairs

> West Virginia Department of Agriculture

> 1900 Kanawha Blvd., East

> Charleston, WV 25305

> 304-558-2227 Office

> 304-558-3594 Fax

> hjohnson@ag.state.wv.us

>

> -----Original Message-----

> From: jeff haynes, NESO [<mailto:nesonews@gmail.com>]

> Sent: Wednesday, July 09, 2014 8:58 AM

> To: Johnson, Herma

> Subject: Proposed Enforcement Policy Change 61-4b-14

>

> Herma,

>

> Hello, hope you are well.

>

> I was forwarded a copy of the proposed changes in 61-4b-14.

>

> Honestly, I am not sure what the proposed changes are compared to the current regs. I went on your website to review the current regs, but was unable to find the current regs that address this topic. I was hoping you could clarify what the differences are.

>

> I know that the WV operators have received a copy of the document, but am wondering if it is something that NESO needs to also shed light onto to make our members aware.

>

> Thank you in advance, and I hope to see you again at one of our upcoming conventions. We will be in Pittsburgh in January of 2015.

>

> Jeff Haynes

> NESO Executive Secretary

> North Eastern Store Owners, INC.

> 317 East Maplewood Estates

> Scott Depot WV 25560

> 304 610 1338 voice / text

>

>

>

>

Johnson, Herma

From: Linton, Chad
Sent: Monday, July 14, 2014 11:37 AM
To: Linda Wise
Cc: Johnson, Herma; Dransfield, Chuck
Subject: RE: 30 day notices

Linda,

This was just a notice that the West Virginia Department of Agriculture is making an update to our current regulations and is asking for any comments on the suggested changes. This was not a notice of violation or nonpayment. I am sorry for the confusion, and see that you are current on all permits. Thanks for checking and if you wanted to comment on the new legislation, please feel free to do so. Sorry again for the confusion.

Chad S. Linton, Assistant Director
Regulatory and Environmental Affairs Division
West Virginia Department of Agriculture
1900 Kanawha Blvd.; East
Charleston, WV 25305
304 558-2227 ext. 4045 Office
304-558-3594 Fax
clinton@wvda.us

From: Linda Wise [<mailto:Linda.Wise@mail.wvu.edu>]
Sent: Thursday, July 10, 2014 6:17 AM
To: Linton, Chad
Subject: 30 day notices

I was sent a "Notice of 30 Day Public Comment Period" notice of our frozen desserts, but we WVU Dining Services, Have renewed all of our permits. I have a copy of them all.

Please reply back to us. I can send you scanned copies of all I have.

THANKS! Linda Wise

Linda Wise
Office Administrator

West Virginia University
Dining Services
G-18 Bennett Tower
PO Box 6430
Morgantown, WV 26506-6430

Phone: 304-293-2096 ext. 1
Fax: 304-293-2384



Regulatory & Environmental Affairs Division
West Virginia Department of Agriculture
1900 Kanawha Blvd. E., Charleston, WV 25305
304-558-2208

Walt Helmick
Commissioner

Herma Johnson
Director

Summary of Proposed Rule
Frozen Desserts and Imitation Frozen Desserts
Title 61-Series 4B

14.15. Hearings.

14.15.a. If a violator requests an informal hearing the compliance officer shall schedule a hearing in accordance with the following procedures:

14.15.a.1. The compliance officer shall notify any authorized representative of the Commissioner who was involved in the inspection of the violation bringing about the informal hearing, and the violator of the time and place of the informal hearing. In scheduling the location of the informal hearing, the compliance shall consider the location of the violation and the violator. The compliance office may schedule the hearing anywhere in the State of West Virginia.

14.15.a.2. The compliance officer shall notify the parties at least fifteen (15) calendar days prior to the time of the hearing; and

14.15.a.3. The compliance officer may continue the informal hearing only for good cause shown.

14.15.b. **Informal Hearing Procedures.** An informal hearing, as provided by this Rule, is intended to be an informal discussion of the facts which gave rise to the issuance of a notice of violation. The hearing officer shall conduct the hearing in the following manner:

14.15.b.1. The hearing officer shall not discuss the case "ex parte" with either the enforcement officer or other department employees involved in the case;

14.15.b.2. The hearing office shall not strictly apply The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence

14.15.b.3. All testimony and evidence at a hearing shall be recorded by mechanical means, which may include the use of tape recordings. The mechanical record shall be maintained for ninety (90) days from the date of the hearing and a transcript shall be made available to the aggrieved party.

14.15.b.4. Within thirty (30) calendar days following the informal hearing, the hearing officer shall issue and furnish a written decision affirming or dismissing the initial violation and give reason for his or hers decision.

14.15.a.4. Any party who feels aggrieved of the suspension, revocation or denial order may appear within sixty (60) days to the circuit court of the county in which the person has located its principal place of business.

14.15.a.5. At any formal review proceedings which may occur later, no evidence, as to any statement made by one party at the informal hearing, may be introduced as evidence by another party, not may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.



**Regulatory & Environmental Affairs Division
West Virginia Department of Agriculture**

1900 Kanawha Blvd. E., Charleston, WV 25305
304-558-2208

Walt Helmick
Commissioner

Herma Johnson
Director

**Statement of Circumstances
Frozen Desserts and Imitation Frozen Desserts
Title 61-Series 4B**

The West Virginia Department of Agriculture is proposing to clarify the hearing procedures for the Frozen Desserts and Imitation Frozen Desserts Rule.

A handwritten signature in cursive script, reading "Walt Helmick".

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Frozen Desserts and Imitation Frozen Desserts

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia Department of Agriculture

Address: 1900 Kanawha Blvd., East
Charleston, WV 25305
Herma Johnson, Director

Phone Number: 304-558-2227 Email: hjohnson@wvda.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

There is no proposed increase in fees. The proposed change is to better clarify the hearing procedures.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues			

Rule Title: Frozen Desserts and Imitation Frozen Desserts

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

No proposed fee increase. The proposed changes better clarify hearing procedures.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: 6-25-14

Signature of Agency Head or Authorized Representative

Walt Delmonico

**TITLE 61
LEGISLATIVE RULE
DEPARTMENT OF AGRICULTURE**

7/1 2008 P 2:04
SECRETARY OF AGRICULTURE

**SERIES 4B
FROZEN DESSERTS AND IMITATION FROZEN DESSERTS**

§61-4B-1. General.

1.1. Scope. -- This rule establishes the requirements governing the manufacture and distribution of frozen desserts and imitation frozen desserts.

1.2. Authority. -- W. Va. Code §19-11B-10.

1.3. Filing Date. -- ~~April 8, 2008.~~

1.4. Effective Date. -- ~~July 1, 2008.~~

§61-4B-2. Incorporation by Reference.

2.1. The following documents are adopted in their entirety:

2.1.a. Title 21 Code of Federal Regulations (April 1, 2003).

2.1.b. Title 40 Code of Federal Regulations (July 1, 2002).

2.1.c. 17th edition of the "Standard Methods for the Examination of Dairy Products" published by the American Public Health Association, 1015 Fifteenth Street, N.W., Washington, D.C. 20005.

2.1.d. 17th Edition and supplements to the Official Methods of Analysis of AOAC International (formerly known as the Association of Official Analytical Chemists), published by AOAC International, 481 North Frederick Avenue, Suite 500, Gaithersburg, Maryland 20877-2417.

2.1.e. 8th Edition and supplements to the "U.S. Food and Drug Administration Bacteriological Analytical Manual" published by AOAC International, 481 North Frederick Avenue, Suite 500, Gaithersburg, Maryland 20877-2417.

2.1.f. Grade "A" Pasteurized Milk Ordinance, 2001, published by the Food and Drug Administration 200 "C" Street, SW, Washington, D.C. 20204.

§61-4B-3. Definitions.

3.1. "Active cultures" means microorganisms in the viable state that are added to a product to produce characteristic qualities in the finished product.

3.2. "Hermetically sealed container" means a container that is designed and intended to be secure against the entry of microorganisms and thereby maintain the commercial sterility of its contents after processing.

3.3. "Milk products" includes products made from the milk products from a cow, goat or sheep.

3.4. "Product" means a frozen dessert or imitation frozen dessert.

3.5. "Summary suspensions" are suspensions issued in cases where conditions constituting a hazard to the public health, safety or welfare require immediate action.

3.6. "Sterilized" means the condition achieved by the application of heat, chemical sterilants or other treatment considered appropriate by the commissioner that renders the product or equipment free of viable microorganisms.

§61-4B-4. Definitions and Standards of Identity.

4.1. The provisions of 21 CFR Part 135 establish standards of identity for ice cream, frozen custard, french ice cream, french custard ice cream, goat's milk ice cream, goat's milk frozen custard, goat's milk french ice cream, ice milk, goat's milk ice milk, mellorine, fruit sherbet and non-fruit sherbet.

4.2. Frozen yogurt is the food which is prepared by freezing while stirring a mix consisting of the ingredients permitted in ice cream. All dairy ingredients shall be pasteurized or ultrapasteurized. Safe and suitable sweetening agents may be used. Such ingredients are cultured after pasteurization by one or more strains of *Lactobacillus bulgaricus* and *Streptococcus thermophilus*. Fruit, nuts or other flavoring materials may be added before or after the mix is pasteurized and cultured. The standard plate count requirement for frozen desserts applies only to the mix prior to culturing. Frozen yogurt, exclusive of any flavoring, shall contain not less than 3.25% milkfat, not less than 8.25% milk solids not fat, and have a titratable acidity of not less than 0.3% expressed as lactic acid. This characteristic acidity is developed as a result of the bacterial activity, and no heat or bacteriostatic treatment, other than refrigeration, which results in destruction or partial destruction of the organisms, shall be applied to the product after such culturing. Frozen yogurt finished product shall weigh not less than 5 pounds per gallon. On the label the strains of bacteria may be collectively referred to as yogurt culture. The name of the food is frozen yogurt.

4.3. Frozen dietary dairy dessert is a frozen dessert prepared for persons who wish to restrict their intake of ordinary sweetening ingredients. It is produced by freezing while stirring a pasteurized mix consisting of the ingredients permitted in ice cream. It shall contain no sugars other than those naturally present in the milk solids or flavoring agents which have been added. It may contain edible carbohydrates other than sugars. The name of the food is frozen dietary dairy dessert.

4.3.a. The statement "Contains ___% milkfat" shall be placed prominently on the label. The blank shall be filled in with the percentage of milkfat in the product.

4.4. Milkshake is the food which is prepared by freezing while stirring a pasteurized mix consisting of the ingredients permitted in ice cream. Safe and suitable sweetening agents may be used. Caseinates may be added. Milkshakes, exclusive of any flavoring, shall not contain less than 3.25% milkfat and shall contain not less than 13.25% milk solids not fat. The name of the food is milkshake.

§61-4B-5. Frozen Dessert Manufacturer Permit.

5.1. The Commissioner shall issue a 'frozen desserts manufacturer permit' to each manufacturer of frozen desserts or imitation frozen desserts. Permits shall be issued for each place of operation and are not transferable with respect to persons or locations. The permit may be applied to the operation of several freezers at one location. Each mobile unit shall be considered as operating at one location.

5.2. Individuals, churches, fraternal organizations and other organizations manufacturing product for members of their group or their guests on an intermittent and infrequent basis are exempt from the permitting requirements of W. Va. Code §19-11B-3.

5.3. A manufacturer shall apply on forms supplied by the commissioner and provide any information considered necessary by the commissioner. A manufacturer shall apply for the permit at least fifteen days before the date that the current permit expires or within fifteen days of the date that the person intends to engage in business. The application shall be accompanied by a fee of thirty-five dollars (\$35.00). The Commissioner shall add a penalty of \$100.00 to all permits that are not applied for or renewed within this time limit. The permits expire of the thirty-first day of March following the date of issue.

5.4. The manufacturer shall place the permit prominently at the place of operation.

§61-4B-6. Labeling.

6.1. Any person distributing product in a package of any form shall attach a label with the following information, except as provided in subsection 6.5 of this rule:

6.1.a. The brand name, if any, and the product name. The product name is the name established in the definition or the standard of identity, as described in section 4 of this rule, or a name that accurately identifies and describes the product. The name shall not be so similar to the name of any other food so as to be confusing to the average consumer;

6.1.b. The quantity of the product in the container expressed in pounds, ounces, gallons, pints, quarts or fluid ounces. A combination of numerical count and weight may be used for multi-unit packages. In addition to these units, metric declarations may be

used. All statements of quantity shall be accurate with reasonable variations due to packaging allowed;

6.1.c. The name and address of the manufacturer, packer or distributor. The address shall include the city, state and zip code. A street address is required to identify the firm when there are several firms of that name in that city or if the street address is not available through a city or telephone directory. When the product is not manufactured by the firm whose name appears on the label, the name shall be qualified by a phrase that reveals the firm's connection with the food such as "Manufactured for _____" or "Distributed by _____";

6.1.d. A lot designation or code date to provide identification of the product. In addition, if the name on the label is not the manufacturer, the lot designation or code date shall identify the manufacturer.

6.1.d.A. In the case of mix being sold to a retailer, the product shall have a use by date on the container or the retailer shall be advised in writing by the distributor of how to calculate the use by date from the manufacture date or lot code on the containers; and

6.1.e. If ingredient statements or nutritional claims are made on the product label or in labeling, the requirements of 21 CFR, Part 101, as incorporated by reference in section 2 of this rule, must be met.

6.2. No person may use a product name on a menu, sign or any other advertising unless that name clearly reflects the accurate name of the product.

6.3. A manufacturer or distributor may use descriptors, such as "free," "light," "reduced," "less," "lower," etc., in conjunction with a standard of identity listed in section 4 of this rule and as outlined in 21 CFR, Part 101 adopted by reference in §61-4B-2.1.a. of this rule.

6.4. A manufacturer or distributor shall not distribute any package, of whatever form, without a complete label attached except for:

6.4.a. Product sold at the place of manufacturing in any package that is not completely closed when offered for sale or that is closed at the time of sale. This product is exempt from the label requirements of W. Va. Code §19-11B-4 and of this section for quantity and for the name and address of the manufacturer, packer or distributor;

6.4.b. Product sold at the place of manufacturing that is placed in a package after the customer orders the product. This product is exempt from all labeling requirements of W. Va. Code §19-11B-4 and of this section of the rule;

6.4.c. Product sold in a container from which product is dipped, and commonly known as a "bulk container," and where the product is not offered for sale to the ultimate consumer in the bulk container. This product is exempt from the label requirements of

W. Va. Code §19-11B-4 and of this section for the name and address of the packer, manufacturer or distributor, provided that the product label identifies the manufacturing location by means of a plant number or other means. The product is also exempt from the label requirements of W. Va. Code §19-11B-4 for the product name and quantity of the contents, provided that the quantity of contents of the size container(s) sold and the product name(s) are clearly indicated on the invoice; or,

6.4.d. Product packaged in units sold in a multi-unit container, provided that each individual unit remains within the multi-unit container during distribution and the multi-unit container is labeled according to the requirements of W. Va. Code §19-11B-4 and of this section of the rule.

§61-4B-7. Misbranded.

7.1. Any product referred to in W. Va. Code §19-11B-1 et seq. or this rule is misbranded if:

7.1.a. Its container is so made, formed, labeled or filled as to be misleading;

7.1.b. It purports to be or is represented as a food for which a definition or standard of identity has been prescribed in section 4 of this rule and its quality does not meet the requirements of the definition or standard of identity;

7.1.c. It purports to be or is represented as a food for special dietary uses, unless its label bears such information concerning its dietary properties as is necessary to fully inform the purchaser as to its value for such uses, or

7.1.d. It does not meet the minimum labeling requirements for 21 CFR Part 101 "Nutritional Labeling".

§61-4B-8. Adulteration.

8.1. A product is adulterated if:

8.1.a. Any substance has been added to the product or mixed or packed with the product so as to make it appear of greater value than it is, and the substance is not clearly noted in the ingredient statement or by other means on the label;

8.1.b. Any bactericidal substance has been added to the product, such as a sanitizer, preservative or any other chemical with bactericidal properties. A product is not adulterated due to the presence of any sanitizer residue where the residue is caused as a normal consequence of sanitizing the equipment while using standard industry practices;

4

8.1.c. The bacterial counts, except for sterile hermetically sealed products, exceed a count of 50,000 per gram for the standard plate count and/or 10 per gram for the coliform group count;

8.1.d. The bacterial counts for sterile hermetically sealed product exceed <1 per gram for standard plate count and/or <1 per gram for the coliform group;

8.1.e. The manufacturing conditions designated by this rule are not met; or

8.1.f. Pathogenic bacteria are in the product.

8.2. Tolerances for the presence of pesticide residues, antibiotics, and unavoidable poisonous or deleterious substances are those tolerances designated in 40 CFR, Part 180, as adopted by reference in section 2 of this rule.

§61-4B-9. Manufacturing Conditions.

9.1. The entire manufacturing establishment, including fixtures, furnishings, machinery, apparatus, implements, utensils, receptacles and all equipment used to manufacture, store, keep, handle, distribute or serve product shall be maintained, operated and stored in a clean and sanitary manner by the manufacturer.

9.2. All equipment, utensils, containers and piping used by a manufacturer shall be constructed of a smooth, nontoxic, impervious, corrosion-resistant material and fabricated in such a manner that there could be no contamination of the products handled therein. All equipment shall be capable of being easily sanitized.

9.3. The manufacturer shall keep all equipment in good working order and condition at all times that the equipment is used to manufacture a product.

9.4. The manufacturer shall install all equipment so that no solution used in cleaning or sanitizing will remain inside the equipment in substantial amounts after the draining process.

9.5. The manufacturer shall completely disassemble and clean all equipment that contains product or residues of product within two hours of the time that the equipment has reached or exceeded a temperature of 41°F or when any condition causing, or likely to cause, adulteration of the product has occurred. Equipment designed to achieve a daily heat treatment for reduction of viable bacteria is exempt from the provisions of this subsection regarding temperature but not the provision of section 8 of this rule regarding any condition that has caused or is likely to cause adulteration.

9.6. The manufacturer shall provide wash tanks of adequate size to wash and sanitize all equipment parts and utensils at the location where the manufacturing takes place or in reasonable proximity to it. The condition of the wash tanks shall not cause adulteration of the equipment parts or the utensils placed in it.

9.7. The manufacturer shall provide a hand-washing facility with running hot and cold water, soap and individual towels or a mechanical hand dryer at all times in the vicinity of the freezer when it is producing a product, except for those manufacturers operating at fairs, outings, carnivals and other affairs of short duration, who may use single-service cleaning towels.

9.8. The manufacturer shall make available to each person involved in the manufacturing operation proper, suitable and adequate toilets and lavatories for each person involved in the manufacturing operation.

9.9. The manufacturer shall not employ any person that has any contagious or infectious disease in or about the manufacturing operation. The clothing habits and conduct of the employees shall be conducive to and promote cleanliness and sanitization.

9.10. The manufacturer shall clean and sanitize all intermediate containers, such as pails or pouring containers, in which mix comes in contact immediately prior to their use.

9.11. The manufacturer shall not store perishables or non-perishables in locker rooms, toilet rooms or their vestibules, garbage rooms or mechanical rooms.

9.12. The manufacturer shall have a written cleaning and sanitizing guide for the type of equipment used to manufacture product at its facility.

9.13. The manufacturer manufacturing products which permit the self service of frozen desserts by the customer shall comply with the following provisions to protect the product from contamination by the public:

9.13.a. Hoppers, reservoirs and similar frozen dessert mix holding devices to which the public has easy access shall be secured by a method acceptable to the Department to prevent entry by the public; and

9.13.b. Dispensing nozzles on dispensing freezers shall be protected from incidental contact by the customer by installation of a barrier or shield in front of the nozzle.

§61-4B-10. Prohibited Acts.

10.1. No person may use non-pasteurized eggs or egg products in any product unless the product is pasteurized subsequent to the addition of the eggs or egg products.

10.2. No person may offer for sale, transport or distribute frozen product that has been allowed to exceed a temperature of 0°F, except that:

10.2.a. A manufacturer may offer for sale at the point of manufacture a soft-serve type frozen product whose temperature has not exceeded 41°F at any time; and

10.2.b. A person may offer for sale at retail any frozen product that is held in small quantities for the purpose of softening the product so that it can be dipped as long as that product temperature is not allowed to exceed 41°F at any time.

10.3. No person may produce any product in equipment that has not been sanitized.

10.4. No person may use a product that is drained from the freezer at the end of a production run, called rerun, that has been allowed to exceed a temperature of 41°F or that is likely to cause adulteration of the product produced when it is used.

10.5. No person may use any spilled, overflowed and/or leaked products in manufacturing any other product.

10.6. No person may reconstitute powdered mixes with non-potable water or in an unsanitary manner. Reconstituted powdered mixes shall be cooled to a temperature of 35-40°F within four (4) hours after reconstituting.

10.7. No person may thaw frozen mixes in such a manner that any portion of the product exceeds 50°F.

10.8. No person may use steel wool or metal sponges for cleaning equipment and utensils used for manufacturing.

10.9. No person may use any method for sanitizing that adversely affects the equipment, dairy product or the health of the consumers consuming the product. However, the commissioner will not prohibit the use of chemicals commonly used in the industry for cleaning and sanitizing dairy equipment using normal industry practices due to the causing of corrosion of the equipment, as long as the corrosion caused by such use is minimal.

10.10. No person may offer for sale a mix product or a frozen dessert manufactured from a mix product having an expired sell-by or use-by code date.

§61-4B-11. Animal Health.

11.1. All products shall be made from milk products or milk-derived ingredients from herds which are located in a Modified Accredited Tuberculosis Area, Modified Accredited Advanced Tuberculosis Area or a Tuberculosis Free Area as determined by the U.S. Department of Agriculture, Provided, that herds located in an area that fails to maintain such accredited status shall have been accredited by the U.S. Department of Agriculture as tuberculosis free, or shall have passed an annual tuberculosis test that is performed by a veterinarian accredited by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service.

11.2. All products shall be made from milk products or milk-derived ingredients from herds which are under a brucellosis eradication program which meets one of the following conditions:

11.2.a. The herd is located in a Certified Brucellosis Free Area as defined by the U.S. Department of Agriculture and enrolled in the testing program for such area;

11.2.b. The herd meets the U.S. Department of Agriculture requirements for an individually Certified Brucellosis Free Herd;

11.2.c. The herd is participating in a milk ring testing program at least four times per year at approximately ninety (90) day intervals, and any herd where any animal has a positive milk ring test shall have all animals that are producing milk, or that have recently produced milk, tested with the milk ring test within thirty (30) days from the date of the laboratory ring tests; or

11.2.d. The herd has had an individual blood agglutination test annually with an allowable maximum grace period not exceeding two months.

§61-4B-12. Powers and Duties of the Commissioner.

12.1. The commissioner shall inspect and sample product from all frozen desserts and imitation frozen desserts manufacturers within the limits of his or her resources.

12.2. The commissioner recommends that each frozen dessert and imitation frozen dessert manufacturer supplement the sampling performed by the commissioner with tests by an independent laboratory.

12.3. All products from frozen dessert and imitation frozen dessert manufacturers taken by the commissioner for testing are considered official product samples.

12.3.a. The commissioner may have service samples taken of frozen desserts or imitation frozen desserts, which would be considered unofficial.

12.4. The commissioner will consider only official samples when applying the enforcement policy.

§61-4B-13. Approved Sampling and Testing Methods.

13.1. Procedures for the collection and holding of official product samples, the selection and preparation of apparatus, media and reagents, and the analytical procedures, incubation, reading and reporting of results shall be in compliance with the standards set forth in the Standard Methods for the Examination of Dairy Products, the Official Methods of Analysis or procedures referenced in 21 CFR Part 135, all adopted by reference in section 2 of this rule, or other methods as approved by the commissioner, whichever method is applicable to the product being tested.

13.2. The Roesse-Gottlieb Fat Extraction Method of testing for milkfat is adopted as the approved method for determining the milkfat content of product and is approved for all milkfat testing.

13.2.a. Milkfat tolerances for lowfat and nonfat products are Tolerances for the method will be added to this tolerance.

13.3. Aseptically processed products packaged in hermetically sealed containers shall be opened in accordance with procedures published in the U.S. Food and Drug Administration Bacteriological Analytical Manual, as adopted by reference in section 2 of this rule.

13.4. The testing of products for drug residues shall include any of those residues listed in 21 CFR Part 556, and shall use methods adopted by reference in section 2 of this rule.

§61-4B-14. Enforcement Policy.

14.1. The commissioner may assess a violation of W. Va. Code §§19-11B-1 et seq. or of this rule against the manufacturer of product and/or the distributor of the mix used to manufacture the product.

14.2. The commissioner will assess any violations of W. Va. Code §§19-11B-1 et seq. or of this rule to the distributor for mix sampled from unopened containers. The company will not be assessed additional cumulative notices of violations until the commissioner has determined that the firm has had adequate notice of the previous notice, generally ten days from the mailing of the notice of violation.

14.3. Whenever one of the last five consecutive official product samples taken on separate days within a one year period are found to be adulterated or misbranded, the commissioner shall send a written "First Notice" to the manufacturer or distributor whichever is appropriate. This notice shall notify the manufacturer or distributor of the violation of W. Va. Code §§19-11B-1 et seq. or of this rule and the enforcement policy established by this section of the rule.

14.4. Whenever two of the last five consecutive official product samples taken on separate days within a one year period are found to be adulterated or misbranded, the commissioner shall send a written "Second Notice" to the manufacturer or distributor whichever is appropriate.

14.4.a. The commissioner shall collect additional official product samples within 21 days of the sending of a Second Notice to the manufacturer or distributor, but shall not collect product samples before the lapse of seven (7) days from the sending of a Second Notice.

14.5. Whenever three of the last five consecutive official product samples taken on separate days within a one year period are found to be adulterated or misbranded the commissioner shall send a written "Third Notice" to the manufacturer or distributor whichever is appropriate.

14.5.a. The commissioner shall collect additional official product samples within 21 days of the sending of the Third Notice to the manufacturer or distributor, but shall not collect additional product samples before the lapse of seven (7) days from the date of sending of the Third Notice.

14.6. The commissioner will issue a "Shut-Down Order" for a period of twenty-four (24) hours to a manufacturer or distributor when the record of the firm indicates that effective action has not been taken to correct the causes of the violations, for instance when three out of the last five samples from the same machine are violative. The

commissioner will normally issue a "Shut-Down Order" with the "Third Notice". The "Shut-Down Order" will give the reasons for the Order, state the portion of the manufacturing or distributing operation that is prohibited from operating while the Order is in effect, give conditions of the Order, state the length of time that the Shut-Down Order will be in effect and specify a time and place for a hearing to be held in this matter. Except that in the case where the public health, safety or welfare is at risk, the commissioner will issue an Immediate Shut-Down Order and give notice to the manufacturer or distributor under the provisions of subdivision 15.6.a. of this rule.

14.6.a. The commissioner will issue an Immediate Shut-Down Order without giving the manufacturer or distributor the opportunity to be heard where there is a hazard to the public health, safety or welfare. In these cases, the manufacturer or distributor will be given the opportunity to request a hearing before the commissioner after the notification of the Order is received by the manufacturer or distributor. All Shut-Down Orders issued due to non-compliance with subdivisions 8.1.c., 8.1.d. or 8.1.g. of this rule are considered to involve a risk to the public health, safety or welfare.

14.6.b. The manufacturer or distributor are responsible for causing all operations covered by the Shut-Down Order to cease and for following all other conditions of the Order. At the end of the period of the order, the manufacturer or distributor may resume operations without further action by the commissioner.

14.7. If after a Shut-Down Order has been issued the commissioner finds that effective corrective action has not been taken, he or she may issue a suspension of the Frozen Desserts Manufacturer Permit. The suspension shall state the time that the suspension will become effective, give the reasons for the suspension and specify a time and place for a hearing to be held in this matter. Except that in the case of a summary suspension, the commissioner will give the manufacturer the opportunity to request a hearing in this matter subsequent to the notification of the suspension.

14.7.a. All suspensions due to non-conformance to subdivisions 8.1.c., 8.1.d. or 8.1.g. of this rule are summary suspensions.

14.7.b. A suspension of the Frozen Desserts Manufacturer Permit remains in effect until the manufacturer submits and the commissioner accepts a written plan of correction and a request for a reinstatement of the permit.

14.7.c. The commissioner has seven (7) days from the date of receipt of a written plan of correction and a request for the reinstatement of the permit to respond to a suspension in the case of violations of subdivisions 8.1.c., 8.1.d. or 8.1.g. of this rule and fourteen days to respond for all other violations of W. Va. Code §§19-11B-1 et seq. or this rule. The commissioner shall accept or deny the application for a reinstatement of the permit and shall give the terms and conditions under which the permit will be reinstated.

14.8. If the commissioner finds that after the firm has resumed production following a suspension of their Frozen Desserts Manufacturer Permit that effective corrective

action has not been taken, then the commissioner shall hold a hearing to determine if the Frozen Desserts Manufacturer Permit should be revoked.

14.9. Persons who manufacture a product on an intermittent or infrequent basis, so that the standard enforcement policy cannot apply, shall enter into a consent agreement with the commissioner for correction of all items found to be not in conformance with W. Va. Code §§19-11B-1 et seq. or this rule.

14.10. Whenever an antibiotic or pesticide residue test is found to be above tolerance, the commissioner shall notify the manufacturer and/or distributor immediately of this fact and shall begin an investigation to determine the cause of the residue. The commissioner shall require that any person found to be responsible for the residue shall correct the cause of the residue prior to the resumption of the manufacturing or distribution of the product.

14.11. A person who performs a recall by voluntarily removing product from sale and distribution in an effective manner, so as to limit the potential harm to the health and well-being of the public, may be eligible for exemptions from the normal enforcement policy. The commissioner shall consider the facts of each case when making a decision on an exemption.

14.12. The commissioner may apply the enforcement policy in a liberal manner in cases where all official product sample results that involve a product in the form actually sold to the public have been found to be in conformance with W. Va. Code §§19-11B-1 et seq. or this rule.

14.13. The commissioner may suspend the standard enforcement policy in cases where such action is necessary to protect the public health, safety or welfare.

14.14. The commissioner will only collect resamples from machines that were shown to be producing violative product the previous visit, except for resamples needed to check that the non-violative status is being maintained according to the following schedule:

14.14.a. After a First Notice and one non-violative sample, resamples will be taken five (5) to six (6) months after the non-violative sample.

14.14.b. After a Second Notice and one non-violative sample, resamples will be taken three (3) to four (4) months after the non-violative sample.

14.14.c. Other resamples may be considered necessary to determine that the non-violative status is being maintained.

14.15. Hearings.

14.15.a. If a violator requests an informal hearing the compliance officer shall schedule a hearing in accordance with the following procedures:

14.15.a.1. The compliance officer shall notify any authorized representative of the Commissioner who was involved in the inspection of the violation bringing about the informal hearing, and the violator of the time and place of the informal hearing. In scheduling the location of the informal hearing, the compliance shall consider the location of the violation and the violator. The compliance office may schedule the hearing anywhere in the State of West Virginia.

14.15.a.2. The compliance officer shall notify the parties at least fifteen (15) calendar days prior to the time of the hearing; and

14.15.a.3. The compliance officer may continue the informal hearing only for good cause shown.

14.15.b. Informal Hearing Procedures. An informal hearing, as provided by this Rule, is intended to be an informal discussion of the facts which gave rise to the issuance of a notice of violation. The hearing officer shall conduct the hearing in the following manner:

14.15.b.1. The hearing officer shall not discuss the case "ex parte" with either the enforcement officer or other department employees involved in the case;

14.15.b.2. The hearing office shall not strictly apply The West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence

14.15.b.3. All testimony and evidence at a hearing shall be recorded by mechanical means, which may include the use of tape recordings. The mechanical record shall be maintained for ninety (90) days from the date of the hearing and a transcript shall be made available to the aggrieved party.

14.15.b.4. Within thirty (30) calendar days following the informal hearing, the hearing officer shall issue and furnish a written decision affirming or dismissing the initial violation and give reason for his or hers decision.

14.15.a.4. Any party who feels aggrieved of the suspension, revocation or denial order may appear within sixty (60) days to the circuit court of the county in which the person has located its principal place of business.

14.15.a.5. At any formal review proceedings which may occur later, no evidence, as to any statement made by one party at the informal hearing, may be introduced as evidence by another party, not may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.

§61-4B-15. Cleaning and Sanitizing.

15.1. Procedures used for cleaning and sanitizing equipment and utensils that come in contact with product shall substantially comply with the guidelines set forth in this section.

15.1.a. The manufacturer shall thoroughly rinse all equipment used during the manufacturing process with lukewarm water until the water runs clear.

15.1.b. The manufacturer shall use a suitable detergent designed to remove the product from all surfaces of the equipment, including inside the freezer. The cleaning process must be sufficient to remove all product and lubricant residues and should be performed in water temperatures recommended in the machine's owner's manual.

15.1.c. The manufacturer shall sanitize all clean surfaces that are likely to come in contact with product with a suitable bactericidal chemical before use for manufacturing or storage of a product.

15.1.d. Prior to use, the manufacturer will not handle or expose to the air any portion of equipment or containers that have been sanitized.

15.1.e. When adding mix to the freezer after sanitizing, the manufacturer will hold the freezer draw tube open to allow all remaining sanitizer to be removed from the machine.

15.1.f. The manufacturer is encouraged to use an acidic milkstone remover occasionally.