

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

Form #3

Do Not Mark In This Box

FILED

2015 JUL 27 P 3:03

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Department of Health and Human Resources/Bureau for Public Health TITLE NUMBER: 64

CITE AUTHORITY: W.Va. Code § 19-35-4.

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 102

TITLE OF RULE BEING PROPOSED: FARMERS MARKET VENDORS

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

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Farmer's Market Vendors

Type of Rule: Legislative Interpretive Procedural

Agency: W. Va. Department of Health and Human Resources - Bureau for Public Health

Address: 350 Capitol Street, Rm 702
Charleston, WV 25301

Phone Number: 304.365.4122 Email: brian.j.skinner@wv.gov

Fiscal Note Summary

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

This is a new rule based on legislation passed during the 2015 Legislative Session requiring a rule to be promulgated for Farmer's Market Vendors. There will be no fiscal impact to the state with the implementation of this rule.

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	0.00	0.00	0.00

Rule Title: Farmer's Market Vendors

Rule Title: _____

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

N/A

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.

N/A

Date:

7/27/2015

Signature of Agency Head or Authorized Representative

Karen Z Bow

TITLE 64

LEGISLATIVE RULE
BUREAU FOR PUBLIC HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

SERIES 102

FARMERS MARKET VENDORS

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SECRETARY OF STATE

64-102-1. General.

1.1. *Scope.* -- This rule establishes the requirements governing farmers market vendor permits.

1.2. *Authority.* -- The West Virginia Department of Health and Human Resources is required to propose rules for legislative approval to implement the provisions of *W.Va. Code § 19-35-1 et. seq.* after consulting with the West Virginia Department of Agriculture and considering the guidelines established in the Farmers Market Vendor Guide and Memorandum F-16, Food Permits at Farmers Markets. *W.Va. Code § 19-35-4.*

1.3. *Filing Date.* --

1.4. *Effective Date.* --

1.5. *Applicability.* -- This rule applies to persons selling farm and food products at farmers markets within the state.

1.6. *Background.* -- This rule series is mandated by the provision of Senate Bill 304, enacted during the 2015 Regular Legislative Session. The bill requires persons who desire to sell farm and food products at a farmers markets to hold a uniform farmers market vendor permit. Under current law, there is no uniform regulation of farmers markets, but instead, each local health department regulates farmers markets within its jurisdiction. The bill provides for a uniform procedure for vendors to obtain a state-wide permit. The permit is valid for one year and the annual permit fee is to be paid to the local health department in the jurisdiction in which the farmers market is located. However, the permit is also valid in all 55 counties of the state. Consequently, vendors are not required to apply to more than one local health department for a uniform farmers market vendor permit.

64-102-2. Definitions.

2.1. "Commissioner" means the Commissioner of the Bureau for Public Health or his or her lawful designee.

2.2. "Consignment farmers market" means a market in which two or more persons deliver their own farm and food products to a common location maintained by a third party that markets the vendors' products and receives a percentage share of the profits from sales, with the individual

vendor retaining ownership of the farm and food product until it is sold. Consignment farmers markets offering for sale potentially hazardous foods are regulated by 64 CSR 17 (Food Establishments Rule).

2.3. "Farm and food products" means an agriculture, horticulture, agroforestry, animal husbandry, dairy, livestock, cottage food, beekeeping or other similar product.

2.3.a. Farm and food products include, but is not limited to:

2.3.a.1. Eggs;

2.3.a.2. Meats;

2.3.a.3. Poultry;

2.3.a.4. Dairy Products that are produced in an approved food manufacturing facility;

2.3.a.5. Commercially raised and harvested fish;

2.3.a.6. Sprouted Seeds;

2.3.a.7. Agriculture, horticulture, agroforestry, animal husbandry, livestock, cottage food, beekeeping or other similar products produced in an approved food manufacturing facility which requires temperature control; and

2.3.a.8. Other foods as determined by the Commissioner on a case by case basis.

2.3.b. Farm and food products do not include:

2.3.b.1. Products that do not require an operational permit, but require a vendor to register with a local health department as required by procedures manual memo F-16. This includes:

2.3.b.1.A. Non-dietary Jams, Jellies, and Preserves;

2.3.b.1.B. Applebutter, Molasses, and Sorghum;

2.3.b.1.C. Undiluted Honey and Undiluted Maple Syrup;

2.3.b.1.D. Dehydrated Fruits and Vegetables;

2.3.b.1.E. Vinegar - Plain, Herb, or Flavored;

2.3.b.1.F. Cakes, Cookies, and Candies;

2.3.b.1.G. Fruit Pies;

2.3.b.1.H. Yeast breads, nut and fruit breads; and

2.3.b.1.I. Other similar foods at the discretion of the Commissioner.

2.3.b.2. Products that do not require an operational permit, and do not require a vendor to register with the local health department, as required by procedures manual memo F-16. This includes:

2.3.b.2.A. Whole, uncut fruits and vegetables;

2.3.b.2.B. Commercially harvested mushrooms;

2.3.b.2.C. Prepackaged foods that do not require temperature control and that are produced in an approved food manufacturing facility; and

2.3.b.2.D. Other similar foods at the discretion of the Commissioner.

2.4. "Farmers market" means:

2.4.a. A traditional farmers market;

2.4.b. An on-farm market or farm stand; and

2.4.c. An on-line farmers market.

2.5. "Farmers market vendor or vendor" means a person or entity that sells his or her farm and food products at a farmers market.

2.6. "Health Officer" means the executive officer of the local board of health or his or her lawful representative.

2.7. "Local health department" means a health department serving one or more counties or one or more municipalities or a combination thereof.

2.8. "On-farm market or farm stand" means an individual producer that sells farm and food products at his/her farm.

2.9. "On-line farmers market" means a farmers market where two or more vendors collectively market farm and food products and retain ownership of those products until they are sold.

2.10. "Person" means an individual, partnership, association, syndicate, company, firm, trust, corporation, institution, department, division, bureau, agency, or any entity recognized by law.

2.11. "Traditional farmers market" means a farmers market where two or more vendors gather to sell farm and food products directly to the consumer at a fixed location.

2.12. "Uniform farmers market vendor permit" or "permit" means a permit issued by a local health officer authorizing the permittee to sell farm and food products at a farmers market.

64-102-3. Uniform Farmers Market Vendor Permits.

3.1. A vendor who sells farm and food products at a farmers market must have a valid uniform farmers market vendor permit.

3.2. A person delivering his or her product to a consignment farmers market is exempt from the requirements of this rule series.

64-102-4. Application.

4.1. A person must apply for a uniform farmers market vendor permit with the health officer a county in which the vendor intends to sell farm and food products at a farmers market.

4.2. A permit must be approved prior to the vendor offering for sale farm and food products at a farmers market.

4.3. Application for a permit must be made in writing on a form prescribed by the commissioner, together with the applicable fee. The application must include the following information:

4.3.a. The applicant's name, mailing address, telephone number and email address;

4.3.b. The county or counties in which the applicant intends to sell farm and food products;

4.3.c. The farm and food products the applicant intends to offer for sale; and

4.3.d. The signature of the applicant or his or her authorized representative.

4.4. The application and applicable permit fee must be submitted for approval at least fifteen (15) days prior to the applicant offering for sale farm and food products at a farmers market.

4.5. Only applications that are complete will be considered. In order to be considered complete, an application must include:

4.5.a. All of the information requested by the application;

4.5.b. The applicable permit fee; and

4.5.c. The signature of the applicant or his or her authorized representative.

4.6. The applicant may submit such additional documents or information as the applicant

may consider relevant to the application and compliance with the provisions of this rule series.

4.7. In the event that an application is determined to be incomplete, the health officer will notify the applicant of the information necessary to complete the application and retain the application submitted pending receipt of the additional information.

4.8. *Fees.* The annual permit fee for applicants who intend to sell farm and food products:

4.8.a. At a farmers market(s) within the jurisdiction of one local health department is \$15.00.

4.8.b. At farmers markets within the jurisdiction of more than one local health department is \$25.00.

4.9. *Permit Issuance.* The health officer will issue a permit to an applicant who intends to offer for sale farm and food products at a farmers market in all instances where a retail food establishment permit would be required, notwithstanding any other provisions of code or rule that require a food establishment permit or any other permit from a local health department.

4.9.a. The vendor must post the uniform farmers market vendor permit in a conspicuous place and must make the permit available to a health officer upon request.

4.9.b. A permit expires at midnight on the 30th day of June following the date of issuance.

4.9.c. A permit is not transferable or assignable and automatically become invalid upon a change of ownership or upon suspension of the permit.

4.10. The health officer approving an application for a uniform farmers market vendor permit will notify all other health departments in the jurisdictions listed on the application.

4.11. Any changes in the types of farm and food products the vendor intends to offer for sale at a farmers market or the jurisdictions in which the vendor intends to operate, must be submitted to the health officer for prior approval.

4.11. A permit is subject to unannounced on-site periodic review by a health officer or his or her designee.

64-102-5. Denial, Suspension, or Revocation.

5.1 A health officer may deny approval of a uniform farmers market vendor permit for failure to meet the requirements of *W. Va. Code §§ 19-35-1 et. seq.*, as applicable, or the provisions of this rule series. If a health officer determines to deny approval of permit, the health officer will notify the applicant or vendor by a notice identifying the reasons for the determination. The notice will be delivered by either registered or certified mail.

5.2. A health officer may suspend a uniform farmers market vendor permit for failure to meet the requirements of *W.Va. Code* §§ 19-35-1 *et. seq.*, as applicable, or the provisions of this rule series. If a health officer determines to suspend a permit, the health officer will notify the applicant or vendor by a written notice identifying the reasons for the determination. The notice will be delivered in person or by either registered or certified mail.

5.3. A health officer may revoke a uniform farmers market vendor permit for repeated or serious violations of any of the requirements of *W.Va. Code* §§ 19-35-1 *et. seq.*, as applicable, or the provisions of this rule series or for interference with the health officer in the performance of his or her duties. If a health officer determines to revoke a permit, the health officer will notify the applicant or vendor by a written notice identifying the reasons for the determination. The notice will be delivered in person or by either registered or certified mail.

5.4. A health officer who suspends or revokes a permit must notify all health departments within the jurisdictions identified on the vendor permit at which the vendor is authorized to sell farm and food products at farmers markets.

5.5. A denial, suspension or revocation will become final 30 days after the delivery of the notice of denial, suspension or revocation notice unless the applicant or vendor, within that 30-day period, gives written notice of a request for a hearing. Hearings will be conducted in accordance with the Administrative Procedure Act (*W.Va. Code* §§ 29A-5-1 *et. seq.*), and the Bureau for Public Health rule series, Rules of Procedure for Contested Case Hearings and Declaratory Rulings (64 CSR 1).

5.6. A health officer may not approve or reinstate a uniform farmers market vendor permit until he or she determines by an inspection that the farmers market vendor is in compliance with all applicable provisions of this rule and any orders, rules or instructions issued by the health officer.

64-102-6. Inspections.

6.1. A health officer will inspect a farmers market vendor once every six months or twice per season for seasonal farmers markets.

6.2. A health officer will make as many additional inspections as necessary to determine satisfactory compliance with the provisions of this rule or any orders, notices, instructions or specifications issued pursuant to this rule.

6.3. A health officer will discuss the inspection report with the person in charge at the time of inspection.

TITLE 64
LEGISLATIVE RULE
BUREAU FOR PUBLIC HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 102
FARMERS MARKET VENDORS

Brief Summary of Rule: This rule establishes the requirements governing farmers market vendor permits.

Statement of Circumstances: The proposed legislative rule will implement the provisions of S.B. 304 (2015 RS) and will regulate vendors who desire to sell farm and food products at a farmers markets. The rule series will contain a uniform procedure for vendors to obtain a state-wide permit. The permit will be valid for one year and the annual permit fee is to be paid to the local health department in the jurisdiction in which the farmers market is located.

Relevant Statutes or Regulations: The West Virginia Department of Health and Human Resources is required to propose rules for legislative approval to implement the provisions of *W.Va. Code* § 19-35-1 *et. seq.* after consulting with the West Virginia Department of Agriculture and considering the guidelines established in the Farmers Market Vendor Guide and Memorandum F-16, Food Permits at Farmers Markets. *W.Va. Code* § 19-35-4.

Summary of Public Comments: The Bureau received one public comment from Tolly Peuleche, Co-President of the Pocahontas County Farmers Market (PCFM).

- The commenter indicates that the PCFM has an active program to encourage junior vendors (under the age of 18) to learn about selling products and that the PCFM believes that persons under age 18 should be exempt from the annual farmers market permit fee.
- The commenter also indicates that in general fees discourage “older vendors” also. The commenter believes that the annual permit should be valid for the period January 1 through December 31 each year rather than beginning during the middle of the market season.
- The commenter asserts that the farmers’ market permit should also permit vendors to sell farm and food products during any fair or festival. Finally, the commenter believes small farmers markets are as safe as grocery stores.

The Agency Response:

- The fee for a farmers market permit is established by statute and makes no allowance for an exemption for persons under the age of 18. *W.Va. Code* § 19-35-3(c). Consequently, the Bureau declines to make any changes to the proposed rule in response to this comment.
- The proposed rule provides that permits expire at midnight on June 30 each year. A majority of the permits issued by the Bureau and local health departments are valid for the period July 1 thru June 30. The Bureau declines to make any changes to the proposed rule in response to this comment.
- Finally, in response to the commenters request that farmers market permits should also be valid for fair and festivals, the Bureau points out that the provisions of *W.Va. Code* § 19-35-1 *et seq.* are applicable only to farmers markets. The regulation of sale of farm products at fairs and festivals is not within the scope of the enacting legislation and thus, is not a proper subject matter for inclusion in the proposed rule series.

July 21.2015

Mr. Brian J. Skinner
Director Public Health Regulations
WV Dept of Public Health Regulations
Bureau of Public Health
350 Capitol Street, Rm. 702
Charleston, WV 25301

RECEIVED

JUL 23 2015

COMMISSIONER'S OFFICE
BUREAU FOR PUBLIC HEALTH

Dear Mr. Skinner:

I am writing as an officer in a very small farmers market in Pocahontas County, The Pocahontas County Farmers Market or PCFM. I understand that your office is accepting written comments about the new regulations concerning vendor sales.

In particular, the PCFM has a very active program to encourage junior vendors (under age 18) to learn about selling various products at the market. We feel strongly that they should be exempt from paying the \$15 per year fee to the local health department for a permit to do this. These young people need all the encouragement they can get since they will be our growers, producers and vendors of the future. They often only set up 3 or 4 times per year and make very little.

In general, the fees being charged are discouraging our older vendors also. The new regulations are not friendly and scare people away. I would hope that the creators of these new rules understand the difference between small markets like ours, that may make only \$400-600 a week total divided among 4 to 10 vendors, and big urban markets.

I was a part of the WV Farmers Market Association conference call today and agree with their comments that the permit should not begin in the middle of the market season, we would certainly prefer Jan. to Jan. but definitely not July to July. We also agree with them that a vendor should be covered for doing any fair and festival if they are selling the same things as they do at a normal market.

In conclusion, I feel that small farmers markets are a whole lot safer place to buy produce and eggs and meat than any grocery store; we are all eating the stuff we grow and don't want to make ourselves sick, much less a valuable repeat customer. Along those same lines, exactly how many complaints have you had in any given year that something from a small farmers market in West Virginia has made anyone sick? It is data I feel you need to share with us all.

Thank you for your consideration of our comments and hope to hear back from you.

Sincerely,



Tolly Peuleche, Co-president PCFM

259 Hidden River Farm Road

Monterville WV 26282

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

July 31, 2015

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

Brian J. Skinner, General Counsel - Bureau for Public Health
West Virginia Department of Health and Human Resources
350 Capitol Street Room 702
Charleston, WV 25301
(304) 356-4122 – O
brian.j.skinner@wv.gov

- 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:

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

d. Attach findings and determinations and reasons:

Attached
