WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Agriculture

TITLE-SERIES: 61-10

RULE TYPE: Legislative

Amendment to Existing Rule: Yes

Repeal of existing rule: No

RULE NAME: Fresh Food Act

CITE STATUTORY AUTHORITY: §19-37-3

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/29/2021 12:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Beth Southern

ADDRESS: WV Dept. of Agriculture

1900 Kanawha Boulevard, East Charleston, WV 25305

EMAIL: bsouthern@wvda.us

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

outlines the rules and regulation of the WV Fresh Food Act

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

Definitions, and amending public policy

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

At this time we are uncertain of the data

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

At this time we are uncertain of the data

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

At this time we are uncertain of the data

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

n/a at this time

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Norman Bailey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 61
LEGISLATIVE RULE
DEPARTMENT OF AGRICULTURE

SERIES 10
FRESH FOOD ACT

§61-10-1. General.

1.1. Scope. -- The purpose of this law is to establish ~~This rule outlines the~~ rules and regulations for enforcement and administration of the West Virginia Fresh Food Act, with a goal of increasing the availability of locally-grown foods, developing a market for locally-grown foods, encouraging state-funded institutions to engage in agricultural activities, and spurring self-sufficiency and economic independence.

1.2. Authority. -- West Virginia Code §19-37-3

1.3. Filing Date. – ~~April 8, 2020~~

1.4. Effective Date. – ~~April 8, 2020~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force and effect ~~on April 8, 2025~~ ten years from its effective date.

§61-10-2. Definitions.

2.1. "Commissioner" means the West Virginia Commissioner of Agriculture, or his or her designee.

2.2. "Department" means the West Virginia Department of Agriculture.

2.3. "Fiscal year" means the period from July 1 to June 30 of each year, and corresponds to the time of the state budget adopted by the West Virginia Legislature.

2.4. "Fresh Food Act" or "Act" means the West Virginia Fresh Food Act, codified at W. Va. Code §§19-37-1 *et seq*.

2.5. "Meat" means beef, sheep, goat, venison, fish or other farm-raised animal, other than poultry.

2.6. "Milk or other dairy products" means and includes fluid milk produced by one or more healthy hooved lactating mammals and all products produced from milk with a standard of identity provided for in 21 CFR Part 131. For purposes of this rule, cheese and other related cheese products shall be included as a milk product.

~~2.5.~~ 2.7. "Minimal Processing" means modifications of raw agricultural products that do not change the fundamental characteristics of the product. Examples include, but are not limited to, refrigerating, freezing, peeling, slicing, dicing, cutting, chopping, shucking, grinding, forming ground products into patties without any additives or fillers, drying, dehydrating, washing, packaging, vacuum packing and bagging, adding ascorbic acid or other preservatives to prevent oxidation, butchering livestock and poultry and cleaning fish.

2.8. "Poultry" means any farm-raised bird.

2.9. "Processing" means washing, cleaning, milling, cutting, chopping, heating, pasteurizing, blanching, cooking, canning, freezing, drying, dehydrating, mixing, packaging or other procedures that alter the food from its natural state. This may include the addition of other ingredients to the food, such as preservatives, flavors, nutrients and other food additives or substances approved for use in food products, such as salt, sugars and fats. The term "processing" does not include "minimal processing" for purposes of qualifying as a West Virginia food or West Virginia product.

2.10. "Produce" means minimally processed fruits, vegetables, nuts, legumes or similar products.

~~2.6.~~ 2.11. "State-funded Institutions" means facilities, ventures or organizations, such as, but not limited to, schools, colleges, correctional facilities, governmental agencies and state parks, that receive state funding. For purposes of this rule, each department, division, agency, board, commission, or other unit or sub-unit of government is considered to be a separate state-funded institution.

~~2.7. "West Virginia foods" means any combination of West Virginia meat, West Virginia poultry, West Virginia produce, or other West Virginia products as identified in this rule.~~

~~2.8.~~ 2.12. "West Virginia food distributor" means an individual or business entity with a legal presence in West Virginia that transports, aggregates or resells West Virginia produce, meat or poultry.

~~2.9. "West Virginia meat" means beef, sheep, goat, venison, fish or other farm-raised animal, other than poultry, that has spent at least half of its life before slaughter within the geographical borders of West Virginia~~.

~~2.10. "West Virginia poultry" means any farm-raised bird that has spent at least half of its life before slaughter within the geographical borders of West Virginia~~.

~~2.11. "West Virginia produce" means minimally processed fruits, vegetables, nuts, legumes or similar products that are grown within the geographical borders of West Virginia.~~

~~2.12.~~ 2.13. ~~"West Virginia products"~~ "West Virginia foods" means food products, including but not limited to meat, poultry, produce, milk, or other dairy products, that are either totally grown, ~~or~~ produced, or processed in West Virginia, or which have at least 50% of the total value added ~~by further processing~~ in West Virginia by in-state producers. Products that have been certified as part of the Department's West Virginia Grown program are presumed to qualify for this designation.

~~2.13.~~ 2.14. "West Virginia Producer" means an individual, farm or business entity that produces or processes West Virginia foods within the state of West Virginia.

§61-10-3. State-Funded Institution Liaisons.

3.1. No later than September 1, 2019, each state-funded institution shall appoint an individual to serve as primary liaison to the Department for purposes of providing information to monitor and ensure compliance with the Fresh Food Act.

3.1.a. An individual may serve as the primary liaison for one or more state-funded institutions, so long as he or she has access to the required information to perform the functions of the role.

3.1.b. Each state-funded institution shall annually review and, if necessary, update its primary liaison with the Department.

3.1.c. Compliance with this registration requirement is a prerequisite for a state-funded institution to obtain a phase-in waiver from full compliance with the requirements of the Act for Fiscal Year 2020, as provided in section 6.2 below.

3.2. A state-funded institution is exempt from this requirement only if the state-funded institution has not purchased, either directly or indirectly, food in the immediately preceding ten years.

3.2.a. To qualify for this exemption, the state-funded institution must notify the Department of their claimed eligibility no later than September 1, 2019.

3.2.b. The Department retains final authority to determine whether a state-funded institution is eligible for this exemption.

§61-10-4. Initial Submission of Information.

4.1. No later than January 1, 2020, each state-funded institution shall submit to the Department all contracts or agreements for food, or for which food was an element (such as a conference agreement or other service agreement) entered into by the state-funded institution in the preceding three completed fiscal years.

4.2. No later than March 31, 2020, each state-funded institution shall submit, in a form provided by the Department, the following analysis of the contracts and agreements submitted pursuant to section 4.1:

4.2.a. A calculation detailing the percentage of West Virginia foods that were purchased annually over the preceding three years;

4.2.b. The types of West Virginia foods that were purchased as part of those contracts or agreements;

4.2.c. Any efforts taken to solicit or obtain West Virginia ~~products~~ foods as part of those contracts or agreements; and

4.2.d. Contact information for each entity with which a contract or agreement was made.

§61-10-5. Requirements for State-funded Institutions.

5.1. Beginning July 1, 2019, all state-funded institutions are required to purchase a minimum of five percent of its food from in-state producers.

5.2. No later than August 31, 2020, and by August 31 of each year thereafter, each state-funded institution shall submit to the Department a food purchasing report, on a form provided by WVDA, the following information for the prior fiscal year:

5.2.a. The total amount spent, either directly or indirectly, on the purchase of food;

5.2.b. The quantity, and reasonable cash value, of ~~West Virginia produce, West Virginia meat, and West Virginia poultry~~ the produce, meat, and poultry grown or raised by the institution which shall count toward its required purchase percentage of West Virginia foods;

5.2.c. The percentage, as a share of dollars spent, of food purchased over the past fiscal year that satisfied the West Virginia foods requirement;

5.2.d. Prior fiscal year documentation detailing expenditures on all food purchased; and

5.2.e. Any other information requested by the Commissioner.

5.3. A state-funded institution that qualifies for a phase-in waiver, as provided by section 6.2 of this rule, shall be eligible to phase in its compliance with the requirements of the Fresh Food Act on the following schedule:

5.3.a. For Fiscal Year 2021 beginning on July 1, 2020, each state-funded institution shall purchase at least one percent (1%) West Virginia food.

5.3.b. For Fiscal Year 2022 beginning on July 1, 2021, each state-funded institution shall purchase at least two percent (2%) West Virginia food.

5.3.c. For Fiscal Year 2023 beginning on July 1, 2022, each state-funded institution shall purchase at least three percent (3%) West Virginia food.

5.3.d. For Fiscal Year 2024 beginning on July 1, 2023, each state-funded Institution shall purchase at least four percent (4%) West Virginia food.

5.3.e. For Fiscal Year 2025 beginning on July 1, 2024, each state-funded Institution shall purchase at least five percent (5%) West Virginia food.

§61-10-6. Waiver Applications.

6.1. The Commissioner shall have the sole authority to grant waivers to institutions in certain circumstances. Two types of waivers are recognized:

6.1.a. Phase-in waivers, which will authorize a state-funded institution to gradually increase its purchase of West Virginia food, as provided in section 5.3 of this rule; and

6.1.b. Waivers from the annual purchase requirements, which will authorize a state-funded institution to obtain a retroactive waiver from the requirements of the Fresh Food Act.

6.2. A state-funded institution shall be eligible for a phase-in waiver if the following requirements are met:

6.2.a. A primary liaison is identified, and regularly updated, as required by section 3.1;

6.2.b. All information is submitted as required by sections 4.1 and 4.2; and

6.2.c. Annual reports required by section 5.2 are submitted timely.

6.3. A state-funded institution shall be eligible for a waiver from the annual purchase requirements for a particular year.

6.3.a. The following circumstances may qualify a state-funded institution for a waiver:

6.3.a.1. The state-funded institution has made a good faith effort to increase the percentage of West Virginia Food it purchases;

6.3.a.2. The state-funded institution cannot secure an adequate supply of food from West Virginia producers after making diligent efforts to do so; or

6.3.a.3. Other extenuating circumstances, as determined by the Commissioner, prevent the state-funded institution from meeting the local purchasing requirements.

6.3.b. To be eligible for a waiver, the state-funded institution must submit the following information, on or before July 31 following the fiscal year for which the waiver is sought:

6.3.b.1. The purchasing report form required by section 5.2 of this rule;

6.3.b.2. A description of the circumstances that give rise to the request for a waiver;

6.3.b.3. An explanation of the efforts taken by the state-funded institution to comply with the requirements of the Fresh Food Act;

6.3.b.4. A plan to increase the percentage of West Virginia food purchased in the next fiscal year;

6.3.b.5. Documentation supporting the waiver application; and

6.3.b.6. Any additional information requested by the Commissioner.

6.3.c. No state-funded institution shall be eligible for a fiscal year waiver if it has not satisfied all the requirements set forth in section 6.2 of this rule for the phase-in waiver.

6.4. A state-funded institution seeking a waiver pursuant to this section shall petition the Commissioner, on a form provided by the Department, submit information necessary to demonstrate its eligibility, along with any additional information or documentation required by the Commissioner.

6.4.a. Upon receipt of a petition from a state-funded institution, the Commissioner shall review the request and provide a written response within sixty (60) days of receipt.

6.4.b. A state-funded institution that receives an adverse determination from the Commissioner shall have the right to request a second review of its application, either in writing or via a hearing before the Commissioner or his or her designee, to reconsider the decision. Such request must be received within fifteen (15) days of the adverse determination.

6.4.c. The decision of the Commissioner, either after the expiration of the time to petition for a second review or following the final decision following a second review, shall be considered final. State-funded institutions are not eligible for administrative appeals as set forth in W. Va. Code §29A-5-1 *et seq*.

6.5. A state-funded institution that has qualified for a waiver pursuant to section 6.3 of this rule shall be required, during the next fiscal year immediately following the year for which the waiver was granted, to cooperate and collaborate with the Department in an effort to improve the state-funded institution's ability to increase its purchase of West Virginia food. Application for, and granting of, a waiver is expressly conditioned upon agreement to this requirement.

§61-10-7. Enforcement of the Fresh Food Act with State-Funded Institutions.

7.1. The Commissioner has authority to enforce the provisions of this rule and the Fresh Food Act.

7.2. If a state-funded institution is determined to be in violation of the requirements of the Fresh Food Act and has not obtained a waiver from the Commissioner, the Commissioner has the authority to require a state-funded institution to:

7.2.a. Submit to additional and ongoing oversight by the Department;

7.2.b. Obtain Department approval prior to entering into any contracts that involve the purchase of food;

7.2.c. Pay a fine commensurate with the good faith, or lack thereof, demonstrated by the state-funded institution in attempting to comply with the requirements of the Fresh Food Act; or

7.2.d. Engage in any other conduct reasonably believed by the Commissioner to improve the ability of the state-funded institution to comply with the requirements of the Fresh Food Act in future years.

7.3. State-funded institutions determined by the Commissioner have insufficient reason to be granted a waiver pursuant to section 6 of this rule shall be considered to be in violation of the Act.

7.4. The Department may ~~produce~~ prepare and provide to the West Virginia Legislature an annual report on the implementation of the Fresh Food Act, including:

7.4.a. A list of state-funded institutions in violation of the Act;

7.4.b. A list of waivers provided, and the reason such waivers were granted;

7.4.c. A list of waiver applications that were denied or refused; and

7.4.d. Any other information deemed relevant by the Commissioner of Agriculture.

§61-10-8. Enforcement Against West Virginia Producers and Sellers of West Virginia ~~Products~~ Foods.

8.1. The Commissioner has authority to review purchases and investigate the eligibility of products identified as qualifying as West Virginia ~~food~~ foods.

8.2. Any seller who fraudulently misrepresents the geographical source of food sold to a state-funded institution, or otherwise engages in deception or other disqualifying practices, shall be barred from participating in the West Virginia Fresh Food Act and its enforcement.

8.3. Upon a conclusion that a producer has violated the provisions of section 5.2, the Commissioner shall make products sold by that producer ineligible to be considered West Virginia foods.

8.3.a. The period of ineligibility shall be for a minimum of one year from the date on which the order is issued.

8.3.b. Upon the conclusion of the ineligibility period, the producer may petition the Commissioner for reinstatement into the program.

8.3.c. The Commissioner shall have the sole discretion to effect reinstatement or to continue to bar a seller that has engaged in fraud.

8.3.d. The Commissioner may consider the totality of the circumstances in using his or her discretion to grant or deny the petition for reinstatement into the West Virginia Fresh Food Program.

8.4. Upon disqualification of products from a producer, or upon the end of their period of disqualification, the Commissioner shall notify the producer liaisons for each state-funded institution to advise them of the action.

8.5. A producer aggrieved by the decision of the Commissioner may petition for reconsideration of the decision, either through a written submission or via a hearing before the Commissioner or his or her designee.

8.5.a. Such request must be received within fifteen (15) days of receipt of the Commissioner's adverse determination.

8.5.b. The decision of the Commissioner, either after the expiration of the time to petition for a second review or following the final decision following a second review, shall be considered final. State-funded institutions are not eligible for administrative appeals as set forth in W. Va. Code §29A-5-1 *et seq*.

§61-10-9. Construction of Rules to Further Public Policy.

9.1. These rules shall be construed broadly to further the public policy set forth in the Fresh Food Act. In the event of question of eligibility or any form of ambiguity, the Commissioner of Agriculture has the authority to decide if identifying the proposed food as a West Virginia food will benefit the West Virginia agricultural economy.

9.2. These rules shall not be construed to allow West Virginia entities to resell products produced or grown outside of West Virginia's borders that have been subject to only minimal processing in order to satisfy the provisions of the Fresh Food Act.

9.3. These rules shall not be construed to prevent producers from purchasing agricultural inputs from out-of-state vendors. Inputs may include but are not limited to feed, seed, fertilizer, plugs, seedlings, chicks, livestock, or other inputs for West Virginia ~~products~~ foods.

9.4. ~~West Virginia producers may engage in, or contract for, Minimal Processing prior to sale.~~ Any contract for the purchase of food entered into by a state institution must contain a provision requiring five percent of the food purchased be West Virginia foods.

9.4.a. If a state entity has qualified for the phase-in waiver established in section 6.2, the contract may also include such phase-in.

9.4.b. Inclusion of phase-in language by a state institution that has not qualified for the phase-in waiver will constitute a violation of the Act.

9.5. Any state institution or contractor providing food to a state institution may seek assistance or guidance from the Department concerning whether certain foods or products qualify as West Virginia foods.

9.5.a. In the event of question of eligibility or any form of ambiguity, the Commissioner has the authority to decide if the proposed products is of benefit to the West Virginia agricultural economy.

9.5.b. State institutions and contracting entities may solicit the assistance of the Department with sourcing West Virginia foods. Requesting assistance does not obligate the Department to identify food sources, nor does it relieve the state institution of the obligation to comply with the Act.

9.5.c. The Department may assess state institutions or contracting entities a fee based on Department time and resources spent assisting the state institution or contracting entity.

~~9.5.~~ 9.6. These rules do not relieve in-state producers from any other requirements mandated by the West Virginia Tax Department, the West Virginia Secretary of State, the State Purchasing Division, or any other applicable legal authority.