



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

7/25/2022 12:48:39 PM

Office of West Virginia
Secretary Of State

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

AGENCY: Agriculture TITLE-SERIES: 61-38
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 61-38 Farmers Markets

PRIMARY CONTACT

NAME: Jennifer Greenlief
ADDRESS: West Virginia Department Of Agriculture
1900 Kanawha Boulevard East
Charleston, WV 25305
EMAIL: jgreenlief@wvda.us
PHONE NUMBER: 304-558-3200

CITE STATUTORY AUTHORITY: §19-35-4

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The department shall propose emergency or legislative rules for approval in accordance with the provisions of §29A-3-1 et seq. of this code for the purposes of implementing this article, including the setting of any fees.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/24/2022

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED:

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

n/a

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

Legislative rule establishes the framework for regulations of farmers markets and farmers market vendors, including registration, permitting, inspection, and labeling. Also establishes requirements for sampling at farmers markets and sets forth procedures for enforcement and hearings.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

Adding on-farm market, adding freeze dried definition, fresh uncut produce requirements, safe handling instructions, date and lot codes for potentially hazardous foods.

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

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

There is no economic impact at this time.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

There is no economic impact at this time.

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

There is not economic impact at this time.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 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

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 38
FARMERS MARKETS

§61-38-1. General.

1.1. Scope. - This legislative rule establishes the framework for regulation of farmers markets and farmers market vendors, including registration, permitting, inspection, and labeling. This rule also establishes requirements for sampling at farmers markets and sets forth procedures for enforcement and hearings.

1.2. Authority. -- W. Va. Code §19-35-4

1.3. Filing Date. -- ~~April 25, 2022~~

1.4. Effective Date. -- ~~April 25, 2022~~

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect on August 1, 2032.

1.6. Controlling authority. -- If a dispute arises over the applicable rules for a farmers market or farmers market vendor, the determination of the Department of Agriculture controls.

§61-38-2. Incorporated by Reference.

2.1 The Farmers Market Vendor Guide, published by the West Virginia Department of Agriculture, is hereby incorporated by reference.

2.2 Regulatory Guidance for Best Practices, Cottage Foods current, published by the Association of Food and Drug Officials, is hereby incorporated by reference.

§61-38-3. Definitions.

3.1. "Acidified foods" means low-acid foods to which acid or acid foods are added with a water activity of greater than 0.85 and a finished equilibrium of pH 4.6 or below. Acidified foods are considered potentially hazardous foods.

3.2. "Commercial kitchen" means a permitted manufacturing facility, or food establishment designed for food production and food safety and eligible for interstate commerce.

3.3. "Commercially harvested mushrooms" means specific mushroom species purposely planted, cultivated and harvested for the purpose of food production either by germinated spawn or cloning.

3.4. "Commissioner" means the Commissioner of the West Virginia Department of Agriculture.

3.5. "Community kitchen" means a kitchen that is used by community members for preparing foods,

and is considered a non-permitted kitchen.

3.6. "Community supported agriculture" means a system that connects growers and consumers through a subscription model to provide access to the harvest of a farm or group of farms.

3.6. "Farm and food product" means any agriculture, horticulture, agroforestry, animal husbandry, dairy, livestock, beekeeping, or other similar product, and includes potentially hazardous foods and non-potentially hazardous food produced or manufactured there from.

3.7. "Farm kitchen" means an on-premise food preparation facility manufacturing items for sale at a qualified farmers market for direct consumer purchase, and is considered a non-permitted kitchen.

~~3.8. "Farm stand" means a single vendor farmers market operated by an individual not located on a farm and not necessarily at a fixed location.~~

~~3.9.~~ 3.8. "Farmers market" means:

~~3.9.a.~~ 3.8.a. A traditional farmers market in which two or more vendors gather to sell a farm and food products directly to consumers at a fixed location;

~~3.9.b.~~ 3.8.b. ~~An on farm market or~~ A farm stand run by an individual producer that sells a farm and food product, not necessarily conducted at a fixed location;

3.8.c. An on-farm market on a vendor's farm property;

~~3.9.c.~~ 3.8.d. An online farmers market in which two or more where vendors collectively market a farm and food products digitally and retain ownership of these products until they are sold;

~~3.9.d.~~ 3.8.e. A consignment farmers market in which two or more vendors deliver their own farm and food products to a common location maintained by a third party that markets the vendor's 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. A consignment farmers market may also be mobile, or in a stationary location;

~~3.9.e.~~ 3.8.f. A mobile farmers market in which two or more vendors sell farm and food products direct to consumers from a mobile unit;

~~3.9.f.~~ 3.8.g. An area within a fair or festival at which farm and food products are sold; or

~~3.9.g.~~ 3.8.h. Any other form of farmers market approved by the commissioner.

~~3.10.~~ 3.9. "Farmers market vendor" or "vendor" means a person or entity that sells farm and food products at a farmers market.

~~3.11.~~ 3.10. "Fermented products" means food processed through the conversion of carbohydrates to alcohol or organic acids using microorganisms under anaerobic conditions.

~~3.12.~~ 3.11. "Food sampling" means a small portion of food product that is offered to consumers.

~~3.13.~~ "Home kitchen" means a kitchen located in a residence, and is a non-permitted kitchen and

~~that is not permitted by the WVDHHR or a county health department under its jurisdiction.~~

3.12. "Freeze-dried" means that food has been subjected to a process in which water is removed from a product after it is frozen and placed under a vacuum, allowing the ice to change directly from a solid phase to a vapor. The freeze-drying process consists of three separate processes: freezing, primary drying, and secondary drying.

~~3.14.~~ 3.13. "Kitchen" means a room or area in which food is prepared, produced, packaged, or cooked.

~~3.15.~~ 3.14. "Label" means a panel or panels found on a package food item.

3.16. ~~3.15.~~ "Local health department" means a health department serving one or more counties or one or more municipalities or a combination thereof.

3.17. ~~3.16.~~ "Low-acid canned food" means any food (other than alcoholic beverages) with a finished equilibrium pH greater than 4.6 and a water activity greater than 0.85, excluding tomatoes and tomato products having a finished equilibrium pH less than 4.7.

~~3.18. "Mobile Farmers Market" means a farmers market in which two or more vendors sell farm and food products direct to consumers from a mobile unit.~~

~~3.19.~~ 3.17. "Non-potentially hazardous food" means a food item that does not require time/temperature controls for safety to limit pathogenic microorganism growth or toxin formation.

~~3.20. "On Farm Market" means a location on a vendor's farm property. This location must register with the WVDA as a farmers market pursuant to this rule.~~

~~3.21. "Online farmers market" means a farmers market in which two or more vendors collectively market farm and food products digitally and retain ownership of those products until they are delivered by the vendor to the consumer.~~

~~3.22.~~ 3.18. "Pickled products" means a food product that has been processed for preservation either through an anaerobic fermentation in brine or immersion in vinegar.

~~3.23.~~ 3.19. "Potentially hazardous foods" means any food item that requires time/temperature control or other protocols for safety to limit pathogenic microorganism growth or toxin formation.

~~3.24.~~ 3.20. "Process authority" means a person who has been recognized by the Association of Food and Drug Officials as having expert knowledge of thermal processing requirements for low-acid foods packaged in hermetically sealed containers or has expert knowledge in the acidification and processing of acidified foods and is found in the food processing authorities directory.

~~3.25.~~ 3.21. "Sanitize" means to adequately treat cleaned surfaces by a process that is effective in destroying vegetative cells of pathogens, and in substantially reducing numbers of other undesirable microorganisms, but without adversely affecting the product or its safety for the consumer.

~~3.26.~~ 3.22. "Uncut produce" means fruits and vegetables that have not been cut beyond field harvest and are offered for sale as a whole item.

~~3.27.~~ 3.23. "WVDA" or "the Department" means the West Virginia Department of Agriculture.

§61-38-4. Farmers Market Registration.

- 4.1. All farmers markets shall register with the WVDA on a form provided by the Commissioner.
- 4.2. Farmers market registrations are effective from April 1 through March 31 of the following year.
- 4.3. All applications for farmers market registrations must be received by March 1. If applications are received after the March 1 deadline, the applicant will be charged a late fee of \$20.
- 4.4. Farmers market registrations shall be displayed in a conspicuous location while the market is in operation.

§61-38-5. Requirements for Specific Farmers Market Types.

5.1. A consignment farmers market is required to register as a farmers market pursuant to section 4 of this rule.

5.1.a. A consignment farmers market must obtain a food establishment permit from the appropriate local health department.

5.1.b. If the Department determines that a registrant qualifies as a consignment farmers market, it shall require the registrant to provide a copy of a valid food establishment permit before accepting its registration.

5.2. If an entity is applying as a farmers market at a fair or festival, the following apply:

5.2.a. The farmers market registration must be received by the Department before the start of the fair or festival.

5.2.b. The entity must also be registered with the fair or festival. A farmers market registration does not replace the need to register with the fair or festival.

5.3. If an entity wishes to register as a farmers market but does not qualify as one of the pre-defined categories of farmers markets detailed in section 3.9.a through 3.9.f of this rule, the applicant shall submit additional information with its application to help the Commissioner determine why the entity should be considered a farmers market. Upon receipt of the information, the Commissioner shall review and make a determination. If the Commissioner determines that the entity should properly be considered a farmers market, a registration shall be issued by the Department.

§61-38-6. Permitted and Prohibited Foods at Farmers Markets.

6.1. All non-potentially hazardous farm and food products may be sold at farmers markets without a farmers market vendor permit. These include, but are not limited to:

6.1.a. Breads;

6.1.b. Cakes;

6.1.c. Candies;

6.1.d. Honey;

6.1.e. Tree syrup;

6.1.f. Apple butter;

6.1.g. Molasses;

6.1.h. Standardized, nondietary jams and jellies;

6.1.i. Dehydrated fruits and vegetables;

6.1.j. Whole uncut produce. Any vendor selling fresh uncut produce in West Virginia at a farmers market must complete a Produce Affidavit form, prepared by the Commissioner, annual and submit to the Department: Provided, That this requirement shall no longer have any force or effect if the Department no longer receives funding from the Federal Food and Drug Administration (FDA) to enforce the Food Safety Modernization Act (FSMA);

6.1.k. Commercially harvested mushrooms on the approved species list found in the West Virginia Farmers Market Vendor Guide;

6.1.l. Canned, whole, or chopped tomatoes;

6.1.m. Tomato sauce; and

6.1.n. Tomato juice having a finished equilibrium of pH 4.6 or below; and

6.1.o. Other non-potentially hazardous foods, as specified in the West Virginia Farmers Market Vendor Guide.

6.2. The following potentially hazardous farm and food products may be sold at farmers markets if a vendor permit has been obtained:

6.2.a. Canned acidified foods, including but not limited to:

6.2.a.1. Pickled products;

6.2.a.2. Sauces, such as hot sauce, marinara, or spaghetti sauce;

6.2.a.3. Salsas;

6.2.a.4. Fermented products;

6.2.a.5. Acidified fruits and vegetables;

6.2.a.6. Acidified condiments; and

6.2.a.7. Non-standardized jams and jellies;

6.2.b. Meat;

6.2.c. Poultry;

6.2.d. Fish;

6.2.e. Milk and dairy products, including cheese;

6.2.f. Cut produce; ~~and~~

6.2.g. All farm and food products that are required to be time- or temperature-controlled or employ other protocols for safety to limit pathogenic microorganism growth or toxin formation; and

6.2.h. Any freeze-dried foods.

6.3. Eggs may be sold at farmers markets without obtaining either a vendor permit or a food establishment permit, provided that the seller holds a Small Egg Producer Permit issued by the Department.

6.4. The following foods are not permitted to be sold at a farmers market:

6.4.a. Wild-harvested mushrooms; and

6.4.b. Sprouted seeds.

§61-38-7. Labeling.

7.1. All food products made or packaged in West Virginia for direct, non-wholesale, purchase by consumers - whether made in a commercial kitchen inspected by WVDHHR or local health departments under its jurisdiction, or made in a non-commercial home, farm or community kitchen – shall carry product labels, regardless of whether the product is potentially hazardous or non-potentially hazardous.

7.2. Labeling of dairy products, eggs, and meat or meat-containing products are regulated by other authorities and are not included in this section.

7.3. Labeling shall generally conform to U.S. Food and Drug Administration rules and guidance unless specifically noted.

7.4. Required label elements shall be of a size and style that is easily legible to the average person and shall consist of:

7.4.a. Statement of identity, which is the common name of the product.

7.4.b. Company name of producer, packer, or distributor. Unless the name given is the actual producer, the name must be accompanied by a statement noting the relation to the product.

7.4.c. City, state and zip code of the producer, packer, or distributor.

7.4.d. Ingredients listed in descending order from greatest weight to least. Single ingredient

61CSR38

products shall include an ingredient list to ensure consumers that it is the only ingredient in the product. The ingredient list shall begin with "Ingredients:" followed by the list.

7.4.e. Net contents or numerical count located in bottom third of the primary label panel in standard U.S. measures, followed by the metric equivalent in parentheses. Honey shall be measured by weight. Syrups shall be measured by liquid volume.

7.4.f. A statement of any of the major food allergens contained in the product, as specified by U.S. Food and Drug Administration. The statement shall be placed directly below the ingredient list and shall begin with "Contains" followed by the allergens. The current allergens are milk, egg, fish, crustacean shellfish, tree nuts, peanuts, wheat, and soybeans. Products that contain tree nuts, fish, or crustacean shellfish must also declare the specific type of allergen in parentheses following the broader category of allergen. Beginning Jan. 1, 2023, sesame will also be considered a major allergen and must be included in allergen statements.

7.4.g. Safe handling instructions such as freezing or refrigeration requirements and minimum safe heating temperatures when applicable.

7.4.h. Any date or lot codes that are required elsewhere in these rules for potentially hazardous foods.

7.5. Products made in a home, farm, or community kitchen, in addition to the elements listed in 7.4, are subject to the following additional rules:

7.5.a. Product labels must include the following statement: "This product was made in a non-commercial kitchen that may not be subject to inspection and may contain cross-contact allergens not included in the allergen statement."

7.5.b. Non-potentially hazardous products may include hand-written net content statements if they remain legible to the average person.

7.5.c. Non-potentially hazardous products shall carry a label affixed to the package, or labeling requirements may be satisfied by:

7.5.c.1. Display of a placard showing the label information at the point of sale if the item is not packaged or displayed in a bulk container;

7.5.c.2. Providing label information on a receipt or other document; or

7.5.c.3. Publishing the label information on an internet site if the product is sold online.

7.6. Food producers shall submit product labels and any associated forms or fees to WVDA for review for the following products and in the following circumstances:

7.6.a. Foods products intended for direct consumption by the purchaser that are made or packaged in a commercial kitchen inspected by WVDHHR or a county health department under its jurisdiction.

7.6.b. Food products made or packaged in a non-permitted home, farm or community kitchen that are potentially hazardous.

§61-38-8. Requirements for the sale of Potentially Hazardous Foods at Farmers Markets.

8.1. A producer of canned acidified foods, as defined in section 6.2.a of this rule, must satisfy the following requirements:

8.1.a. The producer must have the process for preparing and preserving the products approved by a process control authority recognized by WVDA prior to selling the products, and must be obtained in a manner approved by the WVDA, as provided in the West Virginia Farmers Market Vendor Guide.

8.1.b. The producer must keep records to demonstrate the source of the produce in the producer's canned acidified foods. Recordkeeping shall include, but not be limited to:

8.1.b.1. Name of product;

8.1.b.2. Number of units prepared;

8.1.b.3. Record of raw ingredients used and vendor from which ingredients were sourced;

8.1.b.4. Date/Lot code; and

8.1.b.5. Where product/lot was distributed.

8.1.c. If the producer has a private water supply, he or she must have the supply tested prior to permitting and at least annually thereafter and demonstrate through a written record of testing for coliform bacteria to signify that the water supply is potable. The WVDA may require more frequent testing, or additional testing, if circumstances dictate that such testing is necessary to ensure food safety.

8.1.c.1. Maximum coliform levels shall be <1cfu/100mL.

8.1.c.2. For municipal water sources, a certificate of testing must be available for review and the person utilizing the kitchen for preparation of potentially hazardous foods should verify use during potentially hazardous food production if more than one water source is present.

8.1.c.3. WVDA may establish additional water quality standards in order to meet state water quality guidelines.

8.1.d. The producer must submit proof of or having completed Better Process Control School or other higher-level food safety training, as defined in section 8.6 of this rule.

8.2. A seller of meat, poultry, or fish must obtain a vendor permit from the Department. To be eligible for a vendor permit, the seller must comply with all registration, licensure, and permitting requirements for the sale of meat, poultry, or fish that have been established by the Department.

8.3. A seller of milk and dairy products must obtain a vendor permit from the Department.

8.3.a. To be eligible for a vendor permit to sell milk and dairy products, the seller must comply with all registration, licensure, and permitting requirements for the sale of milk and dairy products

that have been established by the Department.

8.3.b. If the seller is applying for a permit to sell cheese or cheese products, he or she must hold either a Food Manufacturing Permit issued by the Department of Health and Human Resources Bureau for Public Health, or qualify for the exemption set forth in W. Va. Code §19-11D-1 *et seq.*

8.4. A seller of the following potentially hazardous foods must obtain a vendor permit from the Department. To be eligible for a vendor permit, the applicant must submit proof of holding a Food Handler's Card or having completed other higher-level safety training, as defined in section 8.6 of this rule:

8.4.a. Cut Produce;

8.4.b. Baked goods that require time and temperature control;

8.4.c. Infused foods, such as honeys or syrups that have additional flavors or ingredients added;

8.4.d. Condiments; and

8.4.e. All other potentially hazardous foods.

8.5. A seller of potentially hazardous foods prepared in a facility that is inspected or certified by the Federal Food and Drug Administration (FDA), USDA, WVDHHR or local health departments ~~under its jurisdiction~~, that has been issued a Food Manufacturing Permit from the Department of Health and Human Resources, Bureau for Public Health, must obtain a vendor permit from the Department to sell at a farmers market. To be eligible for a vendor permit, the applicant must submit proof of inspection or certification by FDA or USDA or a copy of the Food Manufacturing Permit with his or her vendor permit application. For vendors obtaining a vendor permit via this subsection, the vendor permit fee is waived.

8.6. Persons engaged in production of potentially hazardous foods identified in sections 8.1 and 8.4 of this rule for sale at farmers markets shall attend and keep current one or more of the following and provide documentation of successful completion of the scope of curriculum from a WVDA-approved food-safety course:

8.6.a. ServSafe Food Handler Course offered by the National Restaurant Association;

8.6.b. Better Process Control School;

8.6.c. Acidified Foods Manufacturing School;

8.6.d. Good manufacturing practices (GMP) certificate program; or

8.6.e. Other curriculum approved by the WVDA.

~~8.5.~~ 8.7. A home, community, farm, or commercial kitchen may be used by a potentially hazardous foods vendor. The WVDA reserves the right to limit the preparation and preservation of a particular potentially hazardous food to a certain type of kitchen to ensure food safety.

~~8.6.~~ 8.8. A seller of hemp products that are required to be registered pursuant to 61 C.S.R. 30 may, in lieu of registering his or her selling location at each farmers market, obtain a vendor permit to sell

those products at farmers markets.

~~8.6.a.~~ 8.8.a. To qualify for a vendor permit, the seller must provide a copy of his or her hemp license or product registrations for the products he or she will sell at farmers markets.

~~8.6.b.~~ 8.8.b. Obtaining a vendor permit to sell hemp products at farmers markets does not relieve a seller of the requirement to register hemp products with the Department or the requirement to register other selling locations with the Department pursuant to 61 C.S.R. 30.

~~8.7.~~ 8.9. The Commissioner may enter into agreements with other States to certify and permit out-of-state vendors to sell at farmers markets.

§61-38-9. Vendor Permit Process.

9.1. Vendors required to obtain a farmers market vendor permit shall apply with the WVDA on a form provided by the Commissioner, which shall include, at a minimum, the following information:

9.1.a. Applicant's name, mailing address, phone number, and email address;

9.1.b. Type of products being sold;

9.1.c. Physical location of growing field(s);

9.1.d. Information about the markets where vendor anticipates selling products, including:

9.1.d.1. Name of markets;

9.1.d.2. Location of markets; and

9.1.d.3. Dates when vendor plans to participate in market;

9.1.e. Satisfactory information to determine that the food vendor has complied, or is compliant, with the requirements of section 8 of this rule; and

9.1.f. Any other information deemed relevant by the Commissioner.

9.2. Farmers market vendor permits are valid from April 1 through March 31 of the following year.

9.3. Farmers market vendor permit applications are due on March 1 each year and may be submitted in advance of that deadline.

9.3.a. The annual application fee for a farmers market vendor permit is \$35.

9.3.b. Farmers market vendor permit applications that are received after March 1 shall be assessed a late fee of \$20.

9.3.c. A farmers market vendor permit shall state what products the vendor permit covers. Only those products that have been approved by WVDA may be sold by the holder of a farmers market vendor permit.

9.4. Farmers market vendor permits shall be displayed in a conspicuous manner at the point of sale.

9.5. A farmers market vendor who is not required to obtain a farmers market vendor permit may obtain, upon request, a determination from the Department concerning the specific requirements that must be satisfied for a vendor to sell a particular farm or food product.

§61-38-10. Inspections of Farmers Markets.

10.1. Inspections of farmers markets shall be conducted by the WVDA. Local health departments may inspect a farmers market or vendor kitchen to investigate a foodborne outbreak. All inspections conducted at farmers markets or vendor kitchen by local health departments shall be performed in consultation with the WVDA. All farmers market or vendor complaints received by local health shall be forwarded to the WVDA immediately.

10.2. Farmers market inspections shall occur, at a minimum, once every three years. Inspections by the WVDA shall include, but are not limited to:

10.2.a. Display of current registration;

10.2.b. Current list of vendors; and

10.2.c. Compliance with sampling requirements listed in the West Virginia Farmers Market Vendor Guide.

10.3. The local health department in the jurisdiction of the farmers market location may invoke a cessation of production, if they have reason to believe that an imminent health hazard exists until it deems that the hazardous situation has been addressed to the satisfaction of the local health department and the WVDA. The local health department shall only invoke cessation of production in consultation with the WVDA. All inspections and investigations of potential imminent health hazards shall be conducted jointly.

§61-38-11. Inspections of Potentially Hazardous Food Kitchens.

11.1. Kitchen inspections for farm and food products that require a farmers market vendor permit shall be conducted by a WVDA representative upon the initial application and after renewal of the annual application. Non-compliance violations may result in additional inspections.

11.2. Potentially hazardous food vendors will be charged \$27 per hour, excluding travel hours, for inspections, which will be billed directly to the potentially hazardous food vendor.

11.2.a. Inspection costs will be assessed for both the annual inspection, as well as any follow up inspections after a violation has occurred.

11.3. During a kitchen inspection, the Department WVDA will minimally inspect to ensure the following:

11.3.a. That only the specific foods identified on the farmers market vendor permit are being produced in the kitchen during the time of production of those foods;

11.3.b. That the permitted food operation understands that no person other than the vendor

61CSR38

permit holder, or a person under his or her direct supervision, may be engaged in the processing, preparing, packaging, or handling of any potentially hazardous food products or be in the home kitchen during the preparation, packaging, or handling of any potentially hazardous food products;

11.3.c. That no preparation, packaging, or handling of potentially hazardous food products is occurring in the home kitchen concurrent with any other domestic activities, such as home meal preparation, dishwashing, clothes washing or ironing, kitchen cleaning, or guest entertainment. Preparation activities and routine home activities must be clearly separated by time;

11.3.d. That no infants, small children, or pets are in the home kitchen during the preparation, packaging, or handling of any potentially hazardous food products:

11.3.e. That kitchen equipment and utensils being used to produce food products, can be properly cleaned and sanitized;

11.3.f. That all food contact surfaces, equipment, and utensils used for the preparation, packaging, or handling of any potentially hazardous food products are washed, rinsed, and sanitized before each use;

11.3.g. That all food, food preparation, equipment, and storage areas are free of rodents and insects;

11.3.h. That no persons involved in the preparation and packaging of potentially hazardous food products:

11.3.h.1. Are working with exposed food, cleaning equipment, utensils, and linens; or working with unwrapped single-service or single-use articles while experiencing the following symptoms:

11.3.h.1.1. Vomiting;

11.3.h.1.2. Diarrhea;

11.3.h.1.3. Jaundice; or

11.3.h.1.4. Sore throat with fever;

11.2.h.2. Has a lesion containing pus, such as a boil or infected wound, that is open or draining and is:

11.2.h.2.1. On the hands or wrists, unless an impermeable cover such as single-use gloves protect the lesion;

11.2.h.2.2. On exposed portions of the arms, unless the lesion is protected by an impermeable cover: or

11.2.h.2.3. On other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage; or

11.2.h.3. Has symptoms of any of the following illnesses as diagnosed by a health

practitioner:

- 11.2.h.3.1. *Norovirus*;
- 11.2.h.3.2. *Hepatitis A*;
- 11.2.h.3.3. *Shigella spp*;
- 11.2.h.3.4. Shiga toxin producing *E. coli*; or
- 11.2.h.3.5. *Salmonella* .

§61-38-12. Local Permit Requirements.

12.1. Except for consignment farmers markets, no permit is required for a farmers market or a farmers market vendor selling food and farm products.

12.2. Farmers market vendors shall be subject to any state or federal rules and regulations that apply to certain farm and food products sold at farmers markets or at a consignment farmers market under the Food Safety Modernization Act, 21 U.S.C. §§ 2201 *et seq.*, and interstate commerce regulations. The Department is solely responsible for enforcing these regulations.

§61-38-13. Sampling.

13.1. All sampling shall be performed in consultation with the WVDA. The WVDA allows the distribution of samples at Farmers Markets provided that:

13.1.a. The farmers market ensures that vendors are following the guidance established in the West Virginia Farmers Market Vendor Guide and

13.1.b. A representative of the farmers market participates in a WVDA-approved training course identified in subsection 8.4 of this rule on an annual basis.

13.2. Sampling stations for foods shall minimally ensure the following, with additional information available in the West Virginia Farmers Market Vendor Guide:

13.2.a. A hand washing station should be easily accessible for all food handlers;

13.2.b. Sanitary procedures are followed;

13.2.c. Proper food storage temperatures are maintained;

13.2.d. Appropriate tools for dispensing samples are used;

13.2.e. Adequate trash receptacles are available for trash generated from sampling and should be covered and emptied frequently; and

13.2.f. Samples are not exposed to environmental contaminants or pests.

13.3. A vendor is subject to food collection and inspection by the WVDA if a consumer complaint

has been received. A vendor is subject to food sampling and inspection by the local health department in the jurisdiction in which the farmers market is located if the local health department determines that the vendor's food product is misbranded or adulterated, or if a consumer complaint has been received: *Provided*, That all sampling and inspection shall be performed in consultation with the Department of Agriculture.

13.4. For the purpose of this rule, chef demonstrations at markets and food prepared during these events are considered samples and must be served in an approved manner.

§61-38-14. Enforcement.

14.1. The Commissioner may assess a violation of W. Va. Code §19-35-1 *et. seq.* or of this rule.

14.2. If a violation has been committed by either the farmers market or the vendor, or an item is found to be adulterated or misbranded, the Commissioner shall send a written "First Notice" to the vendor permit holder. This notice shall notify the vendor permit holder that a violation of W. Va. Code §19-35-1 *et. seq.* of this rule and the enforcement policy established by this section of the rule. A second inspection shall occur after the notification has been sent.

14.3. If a violation has been committed during the second inspection, the Commissioner shall send a written "Second Notice" to the vendor permit holder. The registrant must develop a written plan to correct the violation(s) and implement it within 7 days after the Second Notice has been sent out.

14.4. A third inspection shall occur after the receipt and acceptance of the written plan of correction.

14.5. If a violation has been committed during the third inspection, the Commissioner will issue an immediate "Suspension of Permit." The "Suspension of Permit" order will give the reason of the order, state the length of time that the Suspension of Permit order will be in effect, and specify a time and place for a hearing to be held in the matter.

14.6. The suspension shall state the time that the suspension will be effective, give the reason of the suspension, and specify a time and a place for a hearing to be held in the matter, except in the case of a summary suspension. The Commissioner may give the manufacturer the opportunity to request a hearing in this matter subsequent to the notification of the suspension.

14.6.a. The suspension shall remain in effect until the vendor permit holder submits, and the Commissioner accepts, a written plan of correction and a request for a reinstatement of the permit.

14.6.b. The Commissioner has ten (10) business days from the date or receipt of a written plan of correction and request for the reinstatement of the permit to respond. 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.

14.6.c. If the Commissioner finds that after the vendor permit holder has resumed operations following a suspension of their Farmers Market Registration or Farmers Market Vendor Permit that effective corrective actions have not been taken, the Commissioner shall hold a hearing to determine if the Farmers Market Permit or the Farmers Market Vendor Permit should be revoked.

14.7. A person who performs a recall by voluntarily removing product from sale or 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.

14.8. The Commissioner may suspend the standard enforcement policy in cases where such action is necessary to protect the public health, safety, and welfare.

§61-38-15. Hearings.

15.1. If a violator requests an informal hearing or the Commissioner schedules an informal hearing, the compliance officer shall schedule a hearing in accordance with the following procedures:

15.1.a. The compliance officer shall notify any authorized representative of the Commissioner who was involved in the inspection which discovered the violation which is the subject of the hearing, and the violator of the time and place of the informal hearing;

15.1.b. The compliance officer shall notify the parties at least ten (10) business days prior to the time of the hearing; and

15.1.c. The compliance officer may continue the informal hearing only for good cause shown.

15.2. An informal hearing is intended to be an information discussion of the facts which gave rise to the issuance of a notice of violations. The hearing officers shall conduct the hearing in the following manner:

15.2.a. The hearing officer shall not discuss the case "ex parte" with either the compliance officer or other WVDA employees involved in the case.

15.2.b. All testimony and evidence at a hearing shall be recorded. The record shall be maintained for ninety (90) days from the date of the hearing, and the WVDA shall make a transcript of the hearing available to the aggrieved party.

15.2.c. Within thirty (30) days following the informal hearing, the hearing officer shall issue and furnish a written decision affirming or dismissing the initial notice of violation and reason(s) for his or her decision.

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

15.4. At any formal review proceedings which may occur later, any evidence, as to any statement made by one party at the informal hearing, may not be introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement was available as competent evidence independent of its introduction during the informal hearing.