

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #7

Do Not Mark In This Box
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FILED

2007 JUN 13 PM 3:48

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Department of Agriculture TITLE NUMBER: 61

CITE AUTHORITY: 19-11B-10

EMERGENCY 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 RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SEE ATTACHMENT

Use additional sheets if necessary


Authorized Signature

EMERGENCY RULE QUESTIONNAIRE

DATE: June 6, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* West Virginia Department of Agriculture
1900 Kanawha Blvd., East
Charleston, WV 25305
Herma Johnson 558-2227

EMERGENCY RULE TITLE: Frozen Desserts and Imitation Frozen Desserts (Title 61-4B)

1. Date of filing June 13, 2007

2. Statutory authority for promulgating emergency rule:
Amends current legislative rule

3. Date of filing of proposed legislative rule: June 13, 2007

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Amends current legislative rule

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
~~See attached facts and circumstances statement~~

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

~~N/A~~

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

~~See attached facts and circumstances statement~~

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

Phone Number: 558-2227 Herma Johnson Email: hjohnson@ag.state.wv.us

Fiscal Note Summary

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

By adopting the 17th Edition of the Standard Methods For The Examination of Dairy Products we will eliminate additional cost of time, travel and shipping of a second set of samples due to late delivery by either the US Postal Service, United Parcel Service or FedEx. Under the current 16th Edition of the Standard Methods for the Examination of Dairy Products frozen dessert samples not received and analysis started within 36 hours must be rejected.

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			
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____



State of West Virginia
DEPARTMENT OF AGRICULTURE
Gus R. Douglass, Commissioner

Janet L. Fisher
Deputy Commissioner

Steve Hannah
Deputy Commissioner

**FACTS AND CIRCUMSTANCES
CONSTITUTING THE EMERGENCY RULE**

**Frozen Desserts and Imitation Frozen Desserts
Title 61 – Series 4B**

The West Virginia Department of Agriculture propose to adopt the 17th Edition of the "Standard Methods for the Examination of Dairy Products" published by the American Public Health Association. We currently are operating under the 16th Edition. Adopting the 17th Edition will allow the delivery of frozen dessert samples to be analyzed within 48 hours compared to the current 36 hour time frame.

Under the Frozen Desserts and Imitation Frozen Desserts Rule, we are charged by the legislature to complete inspections, collect and perform laboratory analysis on frozen dessert samples (semi-frozen soft serve ice cream and mix) in West Virginia. These samples represent soft serve ice cream from firms such as Wendy's, McDonalds, Dairy Queen, etc. Field Staff collect and ship their samples the same day through U. S. Mail Service, United Parcel Service or FedEx. Under the 16th Edition of the Standard Methods for the Examination of Dairy Products, samples must arrive at the laboratory so that microbiological analyses can begin within 36 hours of original collection. Should the samples not arrive the following day, they must be rejected. Samples are analyzed to determine Coliform Bacteria, Standard Plate Count and Butterfat. Whether it is a routine sample collection or a follow-up from a previous violation, the time frame is of the utmost importance. Rejection of samples, due to late delivery service, causes delays in assessing whether a firm is manufacturing a product with potentially high bacteria counts, delays potential postponement of timely regulatory action, such as a shut down or suspension orders, and these delays also lengthen the timeline for firms to resume production after corrective action is taken.

The American Public Health Association has determined that microbiological analyses can begin within 48 hours of original collection as long as the samples are received with a temperature range of 32 to 40 degrees Fahrenheit.

**West Virginia Department of Agriculture
Facts and Circumstances Constituting an Emergency
Frozen Desserts and Imitation Frozen Desserts
Title 61 – Series 4B
Page 2**

We are entering the summer months during which seasonal operations such as fairs and festivals open for business. This is also the time of year when extra soft serve units are utilized in most all established firms accounting for numerous additional samples. The unit's compressors must work harder to keep correct temperature of the product in the unit as well as additional summer help is utilized in these firms. The violation rate during summer months tends to run higher due to these conditions. Lose of samples, particularly during this time of year, result in frozen dessert sampling havoc. Our Regulatory Officers must then return to the same firm for sample collection instead of moving to the next firm. Regulatory Officers have a short window of opportunity for sampling product offered for sale at fairs and festivals. Should the samples be lost during shipping, we would not have the opportunity to collect from that particular operator, thus, resampling is impossible. If firms frozen dessert products are not sampled and analyzed for total bacteria and coliform bacteria counts the health and welfare of the citizens of West Virginia, in particular children and the elderly, could be jeopardized, as they are the most susceptible to this type of bacteria. High bacteria counts may result in diarrhea, vomiting, abdominal pain and headache that may affect everyone.

We also propose to reduce the temperature product may be held under refrigeration. Our current rule states 45 degrees Fahrenheit and we propose to lower this to 41 degrees Fahrenheit to coincide with the Health Department rules and the U.S. Public Health Service Food Code. Lowering the temperature allows for uniformity throughout the industry and contributes toward a safer product. Product held at lower temperatures also helps eliminate the growth of a host of bacteria such as Salmonella, Streptococcus and Staphylococcus aureus which effect dairy products. Symptoms from foods with these bacteria result in diarrhea, vomiting, abdominal pain and headache. Lowering this temperature will contribute to better health and welfare of the citizens of West Virginia.



State of West Virginia
DEPARTMENT OF AGRICULTURE
Gus R. Douglass, Commissioner

Janet L. Fisher
Deputy Commissioner

Steve Hannah
Deputy Commissioner

SUMMARY OF PROPOSED RULE

**FROZEN DESSERTS AND IMITATION FROZEN DESSERTS
TITLE 61 – SERIES 4B**

61-4B-2. Incorporation by Reference

2.1.c Changed from 16th to 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., 2005.

61-4B-9. Manufacturing Conditions.

9.5. Change temperature from 45°F to 41°F.

61-4B-10. Prohibited Acts.

10.2.a. Change temperature from 45°F to 41°F.

10.4 Change temperature from 45°F to 41°F.



State of West Virginia
DEPARTMENT OF AGRICULTURE
Gus R. Douglass, Commissioner

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**FACTS AND CIRCUMSTANCES
CONSTITUTING THE EMERGENCY RULE**

**Frozen Desserts and Imitation Frozen Desserts
Title 61 – Series 4B**

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Under the Frozen Desserts and Imitation Frozen Desserts Rule we are charged by the legislature to complete inspections, collect and perform laboratory analysis on frozen dessert samples (semi-frozen soft serve ice cream and mix) in West Virginia. These samples represent soft serve ice cream from firms such as Wendy's, McDonalds, Dairy Queen, etc. Field Staff collect and ship their samples the same day through U. S. Mail Service, United Parcel Service or FedEx. Under the 16th Edition of the Standard Methods for the Examination of Dairy Products, samples must arrive at the laboratory so that microbiological analyses can begin within 36 hours of original collection. Should the samples not arrive the following day, they must be rejected. Samples are analyzed to determine Coliform Bacteria, Standard Plate Count and Butterfat. Whether it is a routine sample collection or a follow-up from a previous violation, the time frame is of the utmost importance. Rejection of samples, due to late delivery service, causes delays in assessing whether a firm is manufacturing a product with potentially high bacteria counts, delays potential postponement of timely regulatory action, such as a shut down or suspension orders, and these delays also lengthen the timeline for firms to resume production after corrective action is taken.

The American Public Health Association has determined that microbiological analyses can begin within 48 hours of original collection as long as the samples are received with a temperature range of 32 to 40 degrees Fahrenheit.

We also propose to reduce the temperature product may be held under refrigeration. Our current rule states 45 degrees Fahrenheit and we propose to lower this to 41 degrees Fahrenheit to coincide with the Health Department rules and the U.S. Public Health Service Food Code. Lowering the temperature allows for uniformity throughout the industry and contributes toward a safer product.

Rule Title: Frozen Desserts and Imitation Frozen Desserts

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

There are no changes in the fees.

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.

The rule is being amended to adopt the 17th Edition of the Standard Methods for the Examination of Dairy Products and to change the temperature at which product may be held.

Date: June 13, 2007

Signature of Agency Head or Authorized Representative

Stinnett

TITLE 61
LEGISLATIVE RULE
DEPARTMENT OF AGRICULTURE

SERIES 4B
FROZEN DESSERTS AND IMITATION FROZEN DESSERTS

FILED
2007 JUN 13 PM 3:40

OFFICE OF THE CLERK
SECRETARY OF STATE

§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 30, 2004

1.4. Effective Date. -- July 1, 2004.

§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. ~~16th~~ 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;

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 45 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 ~~45~~ 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 ~~45~~ 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 ~~45~~ 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 $\pm .15\%$. 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.

§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.