



OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

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Betty Ireland
Secretary of State

OFFICE OF THE
SECRETARY OF STATE

June 19, 2007

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Department of Agriculture

RULE: Amendments, 61CSR4B, Frozen Desserts and Imitation Frozen Desserts

DATE FILED AS AN EMERGENCY RULE: June 13, 2007

DECISION NO. 5-07

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.


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Secretary of State

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EMERGENCY RULE DECISION
(ERD 5-07)

AGENCY: West Virginia Department of Agriculture
RULE: Amendment, 61CSR4B, Frozen Desserts and Imitation Frozen Desserts

FILED AS AN EMERGENCY RULE: June 13, 2007

- par. 1 The West Virginia Department of Agriculture (Agriculture) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 Agriculture filed this emergency rule with supporting documents with the Secretary of State June 13, 2007 and with the LRMRC June 13, 2007.
- par. 7 It is the determination of the Secretary of State that Agriculture has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §19-11B-10 reads:

The commissioner has the power and duty to:

- (a) Adopt, promulgate and enforce rules to carry out the purpose of this article;*
(b) Have access to and enter at all reasonable times all places where frozen desserts or imitation frozen desserts are manufactured, stored, held, transported, distributed or used in the state and where records, papers or documents relating to these transactions are kept;

- (c) Inspect and photograph all places where frozen desserts or imitation frozen desserts are manufactured, packaged, stored, held, transported or distributed; inspect, audit and copy records and papers relating to the manufacturing, distribution, sampling, testing and sale of frozen desserts or imitation frozen desserts; examine measuring and testing apparatus; and examine equipment used in manufacturing and transportation of frozen desserts or imitation frozen desserts, except that inspections performed under authority of the provisions of article seven, chapter sixteen of this code will not be duplicated;*
- (d) Sample frozen desserts or imitation frozen desserts, including, but not limited to, ingredients and packages that are used in the manufacture of these products and may open any package containing or believed to contain any frozen dessert or imitation frozen dessert or an ingredient to be used in the manufacture of a frozen dessert or imitation frozen dessert for the purpose of inspecting and sampling;*
- (e) Issue, suspend, revoke or deny permits;*
- (f) Collect fees and expend moneys under the terms of this article;*
- (g) Collect evidence, including samples, of the condition of equipment, holding tanks, storage rooms and vehicles used, or intended to be used, in the processing, packaging, transporting or holding of frozen desserts or imitation frozen desserts;*
- (h) Examine the labels and labeling of frozen desserts and imitation frozen desserts;*
- (I) Issue embargoes for any product which is or is believed to be adulterated, misbranded or that is not in compliance with this article and to cause the manufacturing and distributing of same to cease. Nothing in this article may be construed as requiring the commissioner to issue embargoes for minor violations of this article when he or she believes that a written notice of violation will serve the public interest.*
- (1) When an embargo is issued, the commissioner shall affix to such product or manufacturing device in an appropriate manner a tag or other marking giving warning that such product is under embargo.*
- (2) The commissioner shall give written notice to the custodian of the product or process under embargo describing the violation and stating that the product is prohibited from being sold, offered for sale, exposed for sale or distributed and is ordered to be held on the premises and, further, that all manufacturing processes for this product shall cease until the embargo is released. This notice shall notify the custodian of the right to request an immediate hearing under the rules adopted by the commissioner.*
- (3) The commissioner shall take action to seize and condemn any product that cannot be brought into compliance with this article and the rules issued under same within ninety days of notice to the custodian of the product.*
- (4) The commissioner has the authority to issue an embargo against a perishable product, even if the practical result is to bring about the involuntary disposal of the product. The commissioner shall exercise this power using all reasonable means to determine if the product is adulterated or otherwise not in compliance with this article in as short a time frame as possible and shall promptly lift the embargo order if the product is found to be in compliance with this article;*
- (j) Establish, maintain and make provision for frozen dessert and imitation frozen dessert testing facilities; to establish reasonable fees for such tests and to incur such expenses as may be necessary to maintain and operate these facilities;*

(k) Approve sampling and testing methods, and evaluate and approve official laboratories;
(l) Obtain from any state court an order directing any person to submit to inspection and sampling subsequent to the refusal of any person to allow inspection and sampling;
(m) Conduct hearings as provided by this article; and
(n) Assess civil penalties and refer violations to a court of competent jurisdiction: Provided, That the commissioner is not required to report for prosecution minor violations of the article when he or she believes that the public interest will be best served by a suitable notice in writing.

par. 9 It is the determination of the Secretary of State that Agriculture has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by Agriculture are as follows:

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.

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.

par. 13

It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "preservation of public peace, health or welfare"

par. 14

This decision shall be cited as Emergency Rule Decision 5-07 or ERD 5-07 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Department of Agriculture, the Attorney General and the Legislative Rule Making Review Committee.


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