

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #3

**Do Not Mark In this Box**

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Aug. 8, 1991  
ADMINISTRATIVE LAW DIVISION.

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

AGENCY: Agriculture TITLE NUMBER: 61

CITE AUTHORITY 19-11B

AMENDMENT TO AN EXISTING RULE: YES  NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: ---

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 4B

TITLE OF RULE BEING PROPOSED: Frozen Desserts and Imitation Frozen Desserts

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Summary of the Commercial Feed Rule  
Title 61 Series 4B

This rule establishes definitions and standards of identity for frozen desserts and imitation frozen desserts, provides guidance on the persons that require a permit, provides for the requirement for independent testing by manufacturers, gives labeling provisions, establishes conditions of misbranding and adulteration, establishes manufacturing conditions, prohibited acts, provides standards for the health of animals that provide milk, establishes approved sampling and testing methods, establishes the procedure for approval of laboratories for performing official tests, provides for an enforcement policy, and guidelines for cleaning and sanitizing equipment for manufacturing.

Statement of the Circumstances  
Title 61 Series 4B

This is a new rule that is proposed to provide regulations for the enforcement of the Frozen Desserts and Imitation Frozen Desserts Law that was enacted by the Seventieth Legislature.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Frozen Desserts and Imitation Frozen Desserts

Legislative Rule

West Virginia Department of Agriculture  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305-0170

Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	0	0	0	0	0
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2.) Explanation of the above estimates:

There is no anticipated increase to the cost to the state with the implementation of these rules because no significant changes to the current program are proposed. These rules primarily move the current program to the status of regulations.

It is expected that the development of the independent laboratories in this state for bacteriological testing will allow for a reduction in the cost to the state. It is expected that this development will take at least 2 years, therefore the reduction in cost is not shown in these figures.

3.) Objectives of these rules:

The objective of these rules are to develop the operating procedures for implementing the new Frozen Desserts and Imitation Frozen Desserts Law. The rules specify the manufacturing requirements, specify the enforcement policy, set parameters for the approval of laboratories, and adds conditions for adulteration, misbranding and prohibited acts in addition to those specified by law.

Frozen Desserts and Imitation Frozen Desserts

4.) Explanation of Overall Economic Impact of Proposed Rule.

A.) Economic Impact on State Government:

The initial implementation of this program will not be radically different than the current program. Therefore the initial costs to state government are not expected to be different. The costs involved with the approval of laboratories are to be reimbursed to the agency, therefore there will be no costs involved to the government with this process. As laboratories are approved and used by the industry, the cost to state government will decrease, as fewer inspections and samples will be taken by the agency.

B.) Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

The economic impact on the frozen dessert industry will involve the costs to obtain independent lab tests on a biannual basis. The estimated cost is between \$18 and \$30 per sample.

Several freezers (approximately 10) currently in use are believed to be not able to meet the standards for equipment specified in these regulations and will need to be replaced within the next 5 years.

A few operators will need to change their formulation for mix as these rules will prohibit the use of unpasteurized eggs for health considerations. There will be no substantial cost involved in this change.

The provisions for animal health are those currently in effect for the Grade A milk program and are not expected to have an effect on the industry.

C.) Economic Impact on Citizens/Public at Large:

The public at large will be not be impacted to a significant degree. The increased costs that each operator bears for independent lab tests may involve an insignificant increase in the cost of the product to the customer.

Date: 10-26-91

Signature of Agency Head or Authorized Representative

*Clare Benedict*

DATE: August 8, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Department of Agriculture

LEGISLATIVE RULE TITLE: Frozen Desserts and Imitation Frozen Desserts

1. Authorizing statute(s) citation 19-11B

2. a. Date filed in State Register with Notice of Hearing:

June 26, 1991

b. What other notice, including advertising, did you give of the hearing?

Sent copies to 26 people (list attached) press

release sent to all newspapers in the state.

c. Date of hearing(s): July 29, 1991 10am

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X

No comments received                     

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

August 8, 1991

f. Name and phone number(s) of agency person(s) to contact for additional information:

Barbara Smith 348-2226

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

\_\_\_\_\_

\_\_\_\_\_

b. Date of hearing: \_\_\_\_\_

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

\_\_\_\_\_

d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_

TITLE 61  
LEGISLATIVE RULE  
DEPARTMENT OF AGRICULTURE

SERIES 4B  
FROZEN DESSERTS AND IMITATION FROZEN DESSERTS

**§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 - §19-11B

1.3. Filing Date -

1.4. Effective Date -

1.5. This regulation is a new legislative rule.

**§61-4B-2. Incorporation by Reference**

2.1. Title 21 Code of Federal Regulations (April 1, 1990)

2.2. Title 40 Code of Federal Regulations (July 1, 1990)

2.3. National Sanitation Foundation Standard 6 for Dispensing Freezers as adopted by The NSF Board of Trustees, revised February 1989; published by the National Sanitation Foundation, 3475 Plymouth Road, P.O. Box 1468, Ann Arbor, Michigan 48106.

2.4. 15th edition of the "Standard Methods for the Examination of Dairy Products" published by the American Public Health Association, 1015 Eighteenth Street, N.W., Washington, D.C. 20036.

2.5. 15th edition and supplements to the "Official Methods of Analysis" published by the Association of Official Analytical Chemists, Suite 400, 2200 Wilson Boulevard, Arlington, Virginia 22201.

2.6. 6th edition and supplements to the "U.S. Food and Drug Administration Bacteriological Analytical Manual" published by the Association of Official Analytical Chemists, Suite 400, 2200 Wilson Boulevard, Arlington, Virginia 22201.

**§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" shall include 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 requires immediate action.

3.6. "Sterilized" means the condition achieved by the application of heat, chemical sterilant(s) or other treatment deemed 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 establishes 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 shall only apply to the mix prior to culturing. Frozen yogurt, exclusive of any flavoring, contains not less than 3.25% milkfat, not less than 8.25% milk solids not fat, and has 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, contains not less than 3.25% milkfat and 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. Individuals, churches, fraternal organizations and other organizations manufacturing frozen desserts or imitation frozen desserts to members of their group or their guests on an intermittent and infrequent basis are exempt from the requirement to obtain a permit when the product is given away.

#### **§61-4B-6. Labeling**

6.1. Any package, of whatever form, shall have a complete label attached whenever distributed.

6.1.a. Product sold at the place of manufacturing in packages that are not completely closed at the time of sale are exempt from the label requirements for quantity and for the name and address of the manufacturer, packer or distributor.

6.1.b. Product sold at the place of manufacturing in packages that are placed in packages when the customer orders it is exempt from all labeling requirements.

6.1.c. Product sold in containers used for dipping product to consumers where the product will not be offered for sale to the ultimate consumer is exempt from the label requirements for name and address of the packer, manufacturer and distributor if the product is identified by plant number or other system to the place where manufactured. The product is also exempt from the requirements for brand name and quantity, if the quantity is clearly indicated on the invoice.

6.2. Each product that is labeled on the outside of a multi-

unit container shall not require labeling of each individual package inside the container, as long as each individual package remains within the labeled multi-unit container during distribution.

6.3. The use of the term "home made" or "farm made" is limited to those products that are actually manufactured in the home or on the farm, except that the word "Homemade" may be used as a brand name.

6.4. The use of the term "lowfat" shall be used in the name of the product to indicate that the product meets all requirements for the food as defined or contained in a standard of identity except that the product contains not less than 0.5% nor more than 2.0% milkfat. This designation may not be used as a qualifier for the product "ice cream".

6.5. The use of the term "nonfat" shall be used in the name of the product to indicate that the product meets all requirements for the food as defined or in a standard of identity except that the product contains less than 0.5% milkfat. This designation may not be used as a qualifier for the product "ice cream".

6.6. The label shall contain the following information:

6.6.a. The brand name, if any, and the product name. The product name shall be the name established in the definition or the standard of identity 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.

6.6.b. Quantity shall be 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.

6.6.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 company whose name appears on the label, the name shall be qualified by a phrase that reveals the company's connection with the food; such as "Manufactured for \_\_\_\_\_", or "Distributed by \_\_\_\_\_".

6.6.d. A lot designation or code date to provide identification of the product with a specific production time-period. If the name on the label is not the manufacturer, the lot

designation or code date shall identify the manufacturer in addition to a specific production time-period.

6.7. The name of the product on a menu, sign or any other advertising shall clearly reflect the accurate name of the product.

6.8. If ingredient statements or nutritional claims are made on the product label or in labeling, the requirements of 21 CFR Part 101 must be met.

#### **§61-4B-7. Misbranded**

7.1. Any frozen dessert or imitation frozen dessert referred to in this article shall be considered misbranded if:

7.1.a. its container is so made, formed, or filled as to be misleading; or

7.1.b. it purports to be or is represented as a food for which a definition or standard of identity has been prescribed by this article or rule and its quality falls below such standard; or

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 necessary to fully inform purchasers as to its value for such uses.

#### **§61-4B-8. Adulteration**

8.1. A frozen dessert or imitation frozen dessert shall be deemed adulterated if:

8.1.a. any substance has been added thereto or mixed or packed therewith 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 other chemical with these properties. The presence of any sanitizer residue caused as a normal consequence of sanitizing the equipment when standard industry practices are used shall not be considered an adulterant;

8.1.c. the bacterial counts except for sterile hermetically sealed products, exceeds a count of 50,000 per gram for the standard plate count and 10 per gram for the coliform group count;

8.1.d. the bacterial counts for sterile hermetically sealed product exceeds <1 per gram for standard plate count and <1 per gram for the coliform group;

8.1.e. the manufacturing conditions designated by these rules are not met;

8.1.f. the zone shown in the Bacillus sterothermophilus test is greater than or equal to 16mm, indicating adulteration with beta-lactam antibiotics; or

8.1.g. pathogenic bacteria are in the product.

8.2. Tolerances for the presence of pesticide residues shall be those designated in 40CFR Part 185; for the presence of antibiotics shall be those designated in 21CFR Part 556 and for unavoidable poisonous or deleterious substances shall be those designated in 21CFR 109.30. Laboratory tolerances for the method used will be added to these tolerances.

#### **§61-4B-9. Manufacturing conditions**

9.1. The entire establishment, including fixtures, furnishings, machinery, apparatus, implements, utensils, receptacles and all equipment used to manufacture, store, keep, handle, distribute or serve frozen desserts or imitation frozen desserts shall be maintained, operated and stored in a clean and sanitary manner.

9.2. The equipment, utensils, containers and piping shall be constructed of a smooth, nontoxic, impervious, corrosion-resistant material and fabricated in such a manner that there is no contamination of the products handled therein. Such equipment shall be easily sanitized. Freezers shall be designed, installed and operated in accordance with the criteria set forth in Standard 6 adopted by the NSF Board of Trustees or as otherwise approved by the commissioner.

9.2.a. If equipment does not meet the standards outlined above, the permittee or manufacturer may petition the commissioner to allow for the use of the equipment. The petition will outline the materials used in the manufacture of the equipment and their resistance to wear and corrosion under the conditions of intended use, the ability of the machine to be completely sanitized when assembled for use, the ability of sanitizer to be self draining after complete assembly, and the procedures for cleaning, including the procedures for disassembly. The commissioner may ask for additional information, if necessary, to determine the suitability of the equipment for its intended purpose.

9.2.b. All equipment put in use after the effective date of this rule shall comply with these standards. Equipment in use on the effective date of this rule that does not meet the conditions set forth in this subsection shall be allowed to be used for five years from the effective date of this rule.

9.3. All equipment shall be kept in good working order and condition at all times that it is used to manufacture product.

9.4. All equipment shall be installed so that no solution used in cleaning or sanitizing shall remain inside the equipment in substantial amounts after the draining process.

9.5. Manufacturing equipment containing frozen desserts, imitation frozen desserts or residues of these products shall be completely disassembled and cleaned within two hours of the time that the equipment has reached or exceeded a temperature of 45°F or when any condition causing, or likely to cause, adulteration has occurred. Equipment designed to achieve a daily heat treatment for reduction of viable bacteria shall be exempt from this provision regarding temperature but not the provision regarding adulteration.

9.6. Wash tanks adequate to wash and sanitize all equipment parts and utensils shall be provided 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 freezer or the utensils placed in it.

9.7. A hand washing facility with running hot and cold water, soap and individual towels or a mechanical hand dryer shall be available at all times in the vicinity of the freezer when producing product, except for those manufacturers operating at fairs, outings, carnivals and other affairs of short duration, where the use of single service cleaning towels will be allowed.

9.8. Proper, suitable and adequate toilets and lavatories will be available for each person involved in the manufacturing operation.

9.9. No person having any contagious or infectious disease shall be employed 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. Intermediate containers, such as pails or pouring containers in which mix comes in contact shall be washed and rinsed prior to use and sanitized immediately before use.

9.11. Storage of non-perishables shall not be in locker rooms, toilet rooms or their vestibules, garbage rooms or mechanical rooms.

#### **§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 be prohibited from offering for sale at the point of manufacture any soft-serve frozen desserts or imitation frozen desserts due to the product temperature exceeding 0°F as long as the temperature of the product has not exceeded a temperature of 45°F.

10.3. No person may be prohibited from offering for sale at retail any frozen dessert or imitation frozen dessert that exceeds a temperature of 0°F as long as that product is held in small quantities for the purpose of softening the product for dipping purposes and the product has not exceeded a temperature of 45°F at any time.

10.4. No person may be prohibited from using 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 is minimal.

10.5. No person may produce any frozen desserts and imitation frozen desserts in equipment that has not been sanitized.

10.6. 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°F or that is likely to cause adulteration of the product produced when it is used.

10.7. No person may use any spilled, overflowed and leaked products in manufacturing any frozen dessert or imitation frozen dessert.

10.8. No person may reconstitute powdered mixes with non-potable water or in an unsanitary manner. Such product shall be cooled to a temperature of 35-40°F within 4 hours after reconstituting.

10.9. No person may thaw frozen mixes in such a manner that any portion of the product will be above 40°F for more than thirty minutes.

10.10. No person may use steel wool or metal sponges for cleaning equipment and utensils used for manufacturing.

#### §61-4B-11. Animal Health

11.1. All frozen desserts or imitation frozen desserts shall be made from milk products or milk-derived ingredients from herds which are located in a Modified Accredited Tuberculosis 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.

11.2. All frozen desserts or imitation frozen desserts 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. Located in a Certified Brucellosis-free Area as defined by the U.S. Department of Agriculture and enrolled in the testing program for such areas;

11.2.b. Meet U.S. Department of Agriculture requirements for an individually certified Brucellosis-free herd;

11.2.c. Participating in a milk ring testing program at least four times per year at approximately 90 day intervals, and all herds with positive milk ring test results shall have the entire herd blood tested within 30 days from the date of the laboratory ring tests; or

11.2.d. Have an individual blood agglutination test annually with an allowable maximum grace period not exceeding 2 months.

#### **§61-4B-12. Approved sampling and testing methods**

12.1. Procedures for the collection and holding of official 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 Standard Methods for the Examination of Dairy Products, the Official Methods of Analysis, or procedures referenced in 21CFR whichever is applicable to the product being tested.

12.2. The Roese-Gottlieb Fat Extraction Method of testing for milkfat is adopted as the approved method for determining milkfat content of frozen desserts and imitation frozen desserts and is approved for all milkfat testing.

12.2.a. Milkfat tolerances for lowfat and nonfat products shall be  $\pm .15\%$ . Tolerances for the method will be added to this tolerance.

12.3. 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.

12.4. The testing methods for drug residues in product shall be those listed in 21CFR Part 556 where applicable.

#### **§61-4B-13. Approved laboratories**

13.1. Laboratories wishing to be approved under provisions of this article shall make application by letter to the commissioner. The application shall list the name and address of the laboratory, the owners, the laboratory director, and the names of the individuals that will be collecting the official samples. In addition, the application shall specify the methods for analysis, give a listing of the equipment used in the analysis, the quality control and quality assurance measures for sample collection, handling and testing, and methods of record keeping and notification. Other information supporting the application may be given as supporting documents.

13.1.a. The commissioner shall have sixty days to review the application, make an inspection of the facility, if necessary, and approve or deny the application.

13.1.b. The approval shall be for a two year period, however the commissioner may request information supporting the continued approval of the laboratory in the interim.

13.1.c. The laboratory may make amendments to their application at any time. Amendments are subject to review by the commissioner.

13.2. The commissioner may make inspections of the approved laboratory at any time for cause.

13.3. The commissioner may suspend the approval of the laboratory at any time for cause. The laboratory may not test official samples under the provisions of this article during the time that the approval is suspended.

13.4. All official samples collected under the authority of this article shall be randomly scheduled and collected by a sampler who is listed under the terms of the approval of the laboratory. The laboratory will have a variance of four weeks from when a sample is requested in order to schedule a sample collection in a random manner. Evidence of collection of samples in a randomly scheduled manner will be submitted to the commissioner when requested in order to substantiate this requirement.

13.5. Approved laboratories shall report all official analytical test results to the commissioner and to the permittee no later than five working days after the test was completed for non-adulterated products, and within twenty-four hours for adulterated products.

13.5.a. All reports shall contain, the time, date, temperature of product when collected, name of the person collecting the official sample(s), the place where the sample(s) were collected, the test results, analytical information to support the quality control, name of the laboratory performing the work,

and the signature of the laboratory director.

13.6. Test results reported to the commissioner and the permittee shall be kept on file by these persons for at least two years. Reports shall be available for inspection.

**§61-4B-14. Enforcement policy**

14.1. The commissioner may institute charges against the permittee and/or the distributor of the mix used to manufacture the products.

14.2. If over 30% of the samples of mix from unopened containers are violative for a distributor within a three month period, then all remaining violations for unopened containers of mix shall be charged to the distributor until five official samples taken on different days are all non-violative. No violations will be charged to the distributor until at least 3 samples have been collected from that distributor during the three month period.

14.3. Whenever one of the last five consecutive official sample(s) taken on separate days within a one year period are found to be adulterated or misbranded, the commissioner shall send a written notice thereof to the person concerned. This notice shall notify the person of the enforcement policy.

14.4. Whenever two of the last five consecutive official sample(s) taken on separate days within a one year period are found to be adulterated or misbranded the commissioner shall send a written notice thereof to the person concerned. This notice shall notify the person concerned that a Level 1 suspension order is contemplated or in effect, the length of the suspension, give the reasons for the suspension and offer the person concerned an opportunity to request a hearing in this matter. If the violation can be identified with one part of a manufacturing operation, then the suspension will cover only that part of the operation and will be specified in the suspension order.

14.4.a. A Level 1 suspension order shall remain in effect for the time period specified in the order, beginning from the time when the order is received by the permittee. After this time period, the permit will be automatically reinstated.

14.4.a.A. The Level 1 suspension order will remain in effect for three working days (96 hours) except that the order will remain in effect for one working day (24 hours) if there is an official sample result in the permittee's file that has been taken by an approved laboratory within the 7 months previous to taking the sample resulting in the suspension order, as demonstration of the permittee's good faith efforts to comply with the law.

14.4.a.B. Until April 1, 1992 all Level 1 suspension orders will be for 24 hours. This will give time for laboratories to become approved and for permittee to arrange for testing to be performed.

14.4.b. The commissioner shall collect additional official sample(s) within 21 days of the sending of such notice, but shall not sample before the lapse of 7 days from the sending of such notice.

14.5. Whenever three of the last five consecutive official sample(s) taken on separate days within a one year period are found to be adulterated or misbranded the commissioner shall send a written notice thereof to the person concerned. This notice shall notify the person concerned that a Suspension of the Frozen Desserts Manufacturers Permit is contemplated or in effect, the length of the suspension, give the reasons for the suspension and offer the person concerned an opportunity to request a hearing in this matter.

14.5.a. A Suspension of the Frozen Desserts Manufacturers Permit shall remain in effect until the permittee submits and the commissioner accepts a written plan of correction and request for a reinstatement of the permit.

14.5.b. The commissioner shall have seven days from the date of receipt of this application to respond in the case of bacterial violations and fourteen days if the suspension is for other types of adulteration. The response shall accept or deny the application and will give the terms and conditions under which the permit will be reinstated.

14.5.c. The commissioner shall collect additional official sample(s) within 21 days of the reinstatement of the permit, but shall not sample before the lapse of 3 days from the date of reinstatement.

14.6. If two Level 1 suspensions occur within a twelve month period, then a hearing will be held to determine if the Frozen Desserts Permit should be revoked.

14.7. All suspensions for adulteration due to bacteria shall be summary suspensions.

14.8. Persons who manufacture on an intermittent or infrequent basis, such that the standard enforcement policy cannot apply, will enter into a consent agreement with the commissioner for correction of the violation(s) as a substitute for the standard policy.

14.9. Whenever an antibiotic or pesticide residue test is found to be above tolerance, the interested person(s) shall be

notified immediately, an investigation shall be made to determine the cause, and the cause shall be corrected before the manufacturing and distribution of the product may resume.

14.10. 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 will consider the facts of each case when making a decision on an exemption.

14.11 The commissioner may apply the enforcement policy in a liberal manner in cases where no product served to the public has been found to be violative.

14.12 The commissioner may suspend the standard enforcement policy in cases where such action is necessary to protect the public health.

#### **§61-4B-15. Cleaning and sanitizing**

15.1. Procedures for cleaning and sanitizing equipment and utensils that come in contact with frozen desserts and imitation frozen desserts shall be in substantial compliance with these guidelines.

15.1.a. Thoroughly rinse all equipment used during the manufacturing process with lukewarm water until the water runs clear.

15.1.b. Use a suitable detergent designed to remove the product from the equipment on all surfaces, including inside the freezer. The cleaning process will be sufficient to remove all product and lubricant residues and should be performed in hot (approximately 120°F) water.

15.1.c. 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 product.

15.1.d. Prior to use, do 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, hold the freezer draw tube open to allow all remaining sanitizer to be removed from the machine.

15.1.f. The occasional use of an acidic milkstone remover is highly recommended.

:frozen.reg

## FROZEN DESSERTS AND IMITATION FROZEN DESSERTS REGULATIONS

### SUMMARY OF THE WRITTEN AND ORAL COMMENTS RECEIVED

One written comment was received from Mr. Jerry M. Coyne, Ex. Sec. of the North East Store Owners Association. Ten people, not counting WVDA employees, were present at the hearing held on July 29, 1991. These persons are listed in the hearing transcript. Eight persons commented regarding the rule.

There was an objection to the suspension of the entire Frozen Desserts Permit with the receipt of a second notice expressed by 4 persons. There was a suggestion that only a particular machine or barrel of that machine be suspended, if only that are were found to be violative.

There was an objection to the mandatory use of independent laboratories for testing purposes that would increase the cost of doing business to each operator expressed by 5 persons who are Dairy Queen operators. They indicated that it is getting harder and harder to make a profit and that they did not feel that they should be policing their own firms.

Two persons said that more laws and regulations were not necessary.

Two persons said that they did not feel that twice a year mandatory testing was enough to determine that non-violative product was being produced. Both of these persons had a concern over the cost to their business for this testing.

One person said that they were concerned that a suspension would be assessed if only the mix sample was violative, and no finished products, sold to the public, were found to be violative.

One person objected to the exemption for obtaining a permit given to individuals, churches, fraternal organizations and other organizations manufacturing frozen desserts to members of their group and guests on an intermittent and infrequent basis (when the product is not sold). This person said that the requirement should be applied equally to all.

## FROZEN DESSERTS AND IMITATION FROZEN DESSERTS REGULATIONS

### SUMMARY OF THE COMMENTS RECEIVED FROM BORDEN

On August 6 written comments on the rule were received from Borden, Inc., Dairy Division.

The comments questioned the provisions for labeling lowfat and nonfat products, bulk ice cream for dipping and listing sweeteners.

The company questioned the provisions for testing each barrel of the machines and stated that each finished product should be tested.

The company questioned the enforcement policy, the 3 out of 5 concept, the drug residue provisions, the ability to take effective action when the public health was in danger due to drug residues, pathogenic bacteria, etc.

## FROZEN DESSERTS AND IMITATION FROZEN DESSERTS REGULATIONS

### AGENCY RESPONSE TO THE COMMENTS AND MODIFICATIONS MADE

#### Response

The agency has agreed to make the use of official samples taken by independent laboratories an optional item, instead of mandatory. The agency has decided to make the use of independent test results as evidence of a good faith effort by a firm to comply with the law and therefore has modified the enforcement policy to allow for a 24 hour suspension vs. a 96 hour suspension when independent tests are in the files.

The agency has agreed to suspend the operation of the portion of the manufacturing process that is found to be violative, instead of all manufacturing operations at a "second notice" stage.

The use of independent labs is optional, and the firm may use them as often as they wish, therefore, the objection that twice a year is not often enough is a moot point.

The agency has agreed to apply the enforcement policy in a liberal manner when no finished product is found to be violative so that a firm will not be in suspension if only the mix was found to be in violation.

The agency did not agree that organizations manufacturing product on an intermittent basis to their members or guests, without selling the product should be required to obtain a permit to manufacture product.

The agency did not agree that the concerns regarding lowfat and nonfat labeling were correct. The agency did agree that the provision regarding labeling for % saccharin was not in uniformity with other states and has removed this provision. The agency did give some exemptions to full labeling for bulk frozen desserts containers.

The agency did not agree that the testing of each barrel of a machine was onerous and did not make a change in this area.

The agency did not agree that the objections to the 3 out of 5 policy, drug residue provisions were valid, as these were adequately addressed in the proposed rule.

The agency did agree that there needed to be a provision to give the commissioner options with the enforcement policy in the interests of public health.

Modifications

Sub-section 3.3 The agency added the words "cows and goats" to this definition to make clear that the definition in the law (cows and goats) was included in the definition in the regulation that included "sheep"

Part 4.3.b. The agency deleted this section as the requirement to state the % saccharin content would have been a constraint on interstate trade.

Sub-sections 5.2 and 5.3 were deleted as the mandatory use of independent laboratories to take official samples was deleted.

Part 6.1.c. The agency added this section to allow for partial labeling of bulk containers of frozen desserts that is marketed for dipping (and not to the ultimate consumer).

Sub-section 6.3 was modified to allow for the use of "Homemade" in the brand name to allow for the continued marketing of a national brand of product in this state.

Sub-section 9.5 was modified by adding the words "containing frozen desserts, imitation frozen desserts or residues of these products" to make clear the intention that dirty equipment needs to be cleaned quickly.

Sub-section 9.10 was modified slightly to make clear that the mix containers need to be washed and rinsed at some time prior to use, and sanitized immediately before use.

Sub-section 10.7 was modified by changing the phrase "...manufacturing equipment..." to "...manufacturing any frozen dessert..."

Sub-section 13.3 was modified by removing the phrase "with a suspended approval" and adding the phrase "during the time that the approval is suspended"

Sub-section 13.4 was modified to indicate that all official samples need to be taken in a randomly scheduled manner and that the laboratory may be asked for information regarding their scheduling.

Sub-section 13.5 was modified by changing the phrase "...report all required..." to "...report all official..."

Sub-sections 14.3, 14.4 and 14.5 were modified by including violations due to misbranding in addition to adulteration.

Agency response  
Page Three

Sub-section 14.4 was additionally modified by adding the provision to suspend only the portion of the operation found to be violative, if that portion can be identified.

Part 14.4.a. was modified by removing the time period for a suspension to sub-part 14.4.a.A.

Sub-part 14.4.a.A. and 14.4.a.B. are new.

Sub-sections 14.11 and 14.12 are new.

WEST VIRGINIA DEPARTMENT OF AGRICULTURE PUBLIC HEARING FOR 1 Hayden Dewey

Page 1 of 2

Date 7-29-91

NAME	ADDRESS	AFFILIATION	DO YOU WISH TO SPEAK?
Bob Taylor	PO Box 287 W Mann St Hillsville PA 16132	Biotec	No
May Myers	100 BB Allen Rd Sycamoreville WV 25320	TCBY Logart	Yes/No
Thorne Bowser	P.O. Box 113 New Bedford, PA 16140	Microbac Laboratories	<del>Yes</del>
Dad Gable	RT 1 Box 81 Aurora PA 16006	DD	
TIF JAMES on Training - DORADO	517 WEST WYOMING ST CHAS INDIANAPOLIS IN 46202	Avery Press	Y/A
Miss Stevenson, J. Ferguson	PO Box 6219 BFD WV	HARDY	
John M. W. Fox	1905 Mason Ave Mullens WV 25781	D.G.	
Leonard M. Anderson (page 2 of 2 - one signature)	RT 7 Box 6 Fenton WV 25951	D.A.	
John P. Wilson	2015 River Rd N Mullens WV	DD	

FROZEN DESSERTS AND IMITATION FROZEN DESSERTS REGULATIONS

Hearing  
July 29, 1991 10:00 a.m.

Participants present:

Barbara J. Smith, Hearing Examiner, WVDA  
Cliff Bargeloh, Field Inspector, WVDA  
Paula J. Moore, Administrative Assistant, WVDA

Leonard Anderson (Sen), Dairy Queen, Hinton, West Virginia  
Florence Bowser, Micro-Bac Laboratories, New Bedford, Pennsylvania  
Don Crumbaker, Dairy Queen, Aurora, West Virginia  
Jim Ferguson, Dermox, Inc. of WV, Bluefield, West Virginia  
Jeff Haynes, Dairy Queen, Charleston, West Virginia  
Mary Myers, TCBY Yogurt, Parkersburg, West Virginia  
Bob Taylor, Biotec, Hillsville, Pennsylvania  
John Traurig, Hardee's Food Systems, Inc., Scott Depot, West Virginia  
Ivan M. Wilcox, Dairy Queen, Mullens, West Virginia  
John R. Wilcox, Dairy Queen, Mullens, West Virginia

P R O C E E D I N G S

MS. SMITH: First of all, I want to thank all of you for coming, because I think participation in the regulatory process and law-making process by the public is very important. We do the best we can to make a law and regulations that we think are for the good of the public and industry, but there are times when there are other comments that need to be heard.

This hearing is called to take oral comments on the proposed rule for the Frozen Desserts and Imitation Frozen Desserts. The date and the time of the hearing is July 29, 1991 at 10:00 a.m.

The notice of the hearing was filed in the Secretary of State's Office on June 26, 1991 and published in Volume 8, Number 25 of the State Register. This rule was also accepted as an emergency rule on June 26, 1991.

The rule establishes definitions and standards of identity for frozen desserts and imitation frozen desserts; provides guidance for the persons that require a permit; provides for the requirement for independent testing by manufacturers; gives labeling provisions; establishes conditions of misbranding, labeling and adulteration; establishes manufacturing conditions, prohibited acts; provides standards for the health of animals that provide milk; establishes approved sampling and testing methods; establishes the procedure for approval of

laboratories for performing official tests; provides for an enforcement policy and guidelines for cleaning and sanitizing equipment for manufacturing.

The rule is based on a law called Frozen Desserts and Imitation Frozen Desserts Law that was effective June 5, 1991. My name is Barbara Smith. I am the Director of Compliance and I am the hearing officer. In the back of the room is Paula Moore. She is my administrative assistant. We have one other Department of Agriculture employee here, Cliff Bargeloh, who is an agricultural inspector.

I would like to give a little introduction into what happens in the rule-making process. After this hearing, a transcript of all the oral comments will be prepared. We will review all of the oral and written comments that we have received. The agency must take all of the comments into account. Whether we agree or not, we must prepare a statement on whether we agree or not agree and the reasons why. We also have the chance to amend the rule before we send it on to the next step. If the rule is changed, there will be an amendment made before the re-filing.

The proposal, as amended, or originally proposed, along with all of the comments received is filed with the Secretary of State and with the Legislative Rule-Making Review Committee. This committee reviews all of the documents, holds their own committee meetings, which are also public, and recommends to the Legislature that the rule should be passed or not. Once it goes through the committee, then if it is passed by that committee, then it will go in front of the Legislature and considered by the full Legislature in the spring.

All of the comments will be limited to the proposed rule. During this hearing, there will be an opportunity only for comments and there will be no debate on the comments. If you have any questions about this after the hearing, there will be an opportunity. You can stay later and ask me some questions or we can have some discussion there. Of course, because we are running a transcript, all comments will part of the public record.

If there were a lot of people, I would reserve the limit of time

during the discussion. I think with just the few people here, you can say anything that you wish to say.

Mary Myers? You are the first person who signed up here and wanted to make a comment. Because we are recording it, would you come forward? You can either stand at the podium or sit right here, whichever you feel more comfortable at, because I do need to get the microphone close to you.

This is Mary Myers. She is with the TCBY Yogurt in Parkersburg, West Virginia.

MS. MYERS: My comment was not understanding totally what the article or what it is intended. We were considering some outside people to come in and test the yogurt and send it directly to the Agriculture Commissioner. Is that going to be accepted? That is what we were trying to find out, if that in West Virginia will be accepted like other states have.

MS. SMITH: If that is your question, if I would, I will take the other comments and then once the hearing is over, then we will --

MS. MYERS: We will deal with the questions. The comment that I have is the guidelines we have -- I have an article now that says the first day -- I mean your first notice, then they will come back and test again and do your second notice and then they can close your business for three days. If yogurt is your only means of product that you are selling, of course, your doors would be completely closed. Being a yogurt store, that would be what we would do. The store would be completely closed.

Then after the third thing then what I understood was that it would probably be closed for seven calendar days, getting your comments back, a letter of why it is wrong and what we intend to do back to the Commissioner and then a response back. My comment is, if we are having a problem with one machine in a three-machine store, can we not just down one machine? That is my only comment.

MS. SMITH: Thank you. Florence, do you have something that you would like to say?

For the record, we have got a couple of extra people who have come in. The hearing is to take comments on the rule only. Once the hearing is over,

if you have any questions or want to make some additional informal comments, that is all right, too.

Florence, did you have something you would like to say?

MS. BOWSER: Being in the laboratory business, would our Pennsylvania certification be as an approval for service in West Virginia?

(Pause.)

MS. SMITH: Bob, you did not want to make a comment?

MR. TAYLOR: No.

MS. SMITH: You can change your mind, you know.

MR. TAYLOR: Maybe later. I am listening.

MS. SMITH: All right, okay. Don, did you want to make a comment?

MR. CRUMBAKER: Well, I did not particularly know. I left it blank.

MS. SMITH: Okay, well, that is certainly up to you.

MR. CRUMBAKER: Do you want me to make comments now?

MS. SMITH: Well, we are at the point where you could make a comment now. This hearing is to get comments that we prepare for the Legislative Rule-Making Committee, so we can prepare it for the Legislature. All of the comments that you make are a part of the public record, which we must maintain for five years by law. We will make a transcript of this and we have to keep your comments on file, so now is your chance.

MR. CRUMBAKER: This looks like this was prepared to go before the Legislature, right?

MS. SMITH: This is part of the official filing that we must do. What you have in your hand is the record that we file for public notice.

MR. CRUMBAKER: Are you going to change that?

MS. SMITH: We may. This is the hearing -- we have got a couple more people coming in. Would you please sign in, gentlemen?

Don, if you would like to make a comment, you may. If not, we will go on to the next person.

MR. CRUMBAKER: You can go on to the next person.

MS. SMITH: Jeff, did you want to make a comment?

MR. HAYNES: Not right now, I do not think.

MS. SMITH: All right. Gentlemen, you are here just in time, if you want to make a comment.

(Pause.)

You gentlemen from Hardee's, did you want to make a comment?

MR. FERGUSON: Well, I am not quite sure of this new law. If you could kind of clarify that for me, I would appreciate it.

MS. SMITH: You all were not here at the start of the hearing. What I said was, we would take official comments, which we must make a transcript for. Once everyone was through making official comments, I would recess the hearing. We will take questions and we could have a discussion. Then after that point, if anyone wants to make any additional comments, I will reconvene the hearing.

Is there anyone who wants to make an official comment at this time? If not, then I will close this hearing and continue it until after the comment period is done.

(Hearing recessed from 10:20 a.m.  
to 10:55 a.m.)

MS. SMITH: It is now 10:55 a.m. and we have had a discussion and had a chance to informally take questions and answer some items and have comments. I believe that there are some people here who would like to make some additional comments. I will just ask each person in the room if they have some additional comments that they would like to make. Bob Taylor?

MR. TAYLOR: No.

MS. SMITH: Mary Myers?

MS. MYERS: No.

MS. SMITH: Florence Bowser?

MS. BOWSER: No.

MS. SMITH: Don Crumbaker?

MR. CRUMBAKER: Oh, yes, I expect I had better.

MS. SMITH: If you do, please come up here and either stand at the podium or sit so that we can get you on record.

MR. CRUMBAKER: My name is Don Crumbaker and I represent Dairy Queen. Dairy Queen has just celebrated her 50th anniversary and we have a fairly good track record as far as health and sanitation. Some stores are not as good as others, but I have never known of any serious illnesses from Dairy Queens. We have been packaging dilly bars for fifty years and we have been packaging and running these soft serve machines for fifty years. I certainly do not think we need to start a new testing agency -- set up a whole new industry, as described at this hearing, to test our mix and only do it two times a year. That would be strictly a spot-check and would not tell you what it was three weeks later, two weeks later. It is just a good spot check, but I do not think we need a whole new industry to test mix in this state.

I will just jump from the testing real quick to packaging. I think the same thing applies in packaging. Dairy Queen has been making dilly bars and ice cream in packages, and even cakes and logs for almost fifty years. We have had no problems with bacteria. We work hard to keep our machines clean and we do not need any more regulations. Thank you.

MS. SMITH: Thank you, Don. Jeff Haynes?

MR. HAYNES: I do not know if this comment has already been made. It may have been made earlier, but my concern was with the fact that you can lose your permit or your permit can be suspended if you have trouble with one machine. I think if you have trouble with a machine, that is fine, but you should quarantine that single machine or somehow shut down that one machine. If you are having no problems with your other machines, you should be able to continue use with those. I think something should be looked at to change that provision.

MS. SMITH: Thank you. John Traurig?

MR. TRAUIG: I have a concern that two times a year is probably not enough testing to make an actual difference. Yet, I have a concern that when the testing develops, I know that there is a free market and supposedly those prices will be as low as possible, but that there be a mandatory cap fixed so that once you contract for testing that, at least annually, you know that those costs will not go up.

Also, there should be a way to tag a specific product, which the previous gentleman brought up. A specific product, a specific machine or even a specific side of a machine and tag that not to be reused or for retest and not put an operator totally out of business on what may be their entire product line.

There should also be a mechanism for an automatic retest if a cooler sample is bad, which may not be an operator problem, which may be a dairy problem. The operator should not be held liable for that if a retest can be done and demonstrate that their machines are not at fault.

MS. SMITH: Thank you. Jim Ferguson?

MR. FERGUSON: My comment is that this is becoming increasingly difficult to make a profit serving frozen dairy products. As the gentleman stated earlier, we just do not need any more regulations. Thank you.

MS. SMITH: Ivan Wilcox?

MR. I. WILCOX: I am Ivan Wilcox. I am the President of the Northeastern Store Owners' Association and also an individual store owner. I pretty much concur with what Jeff Haynes and Don Crumbaker have stated. It would just be a similar comment to make the same. It is also good to note that we have contacted a predominant number of our board and just about everybody contacted is opposed to the charging, getting into the policing for ourselves and having to pay for our own samples.

It seems that it is getting to be a trend and that we are getting hit from all phases of government. We are the most inspected public retailer I suppose there is. We get inspected by the franchise owner. We get inspected by the Agriculture Department. We get inspected by the County Health, the city people. You could just go on and on. It looks to me like we are just inspected to death.

As they stated, we do put out a very palatable and a clean product. Occasionally, somebody is going to have a problem, whether it be an employee or what, and we are as anxious as any of the aforementioned people would be to clean this problem up. We would work with anybody, but it just seems to me like the fees and the inspections are just getting unbearable. It is almost better to be

out of business.

MS. SMITH: Thank you, Ivan. Senator Anderson?

SENATOR ANDERSON: I am Leonard Anderson. I am the Vice President of the Northeastern Store Owners' Association. I also own a Dairy Queen, but I would concur with Mr. Haynes, Mr. Crumbaker and Mr. Wilcox. I think all of the comments that have been said today, I do not know of anything else that I can add, except I might ask all of you, the comments that you do make, I wish you would send me a copy of your comments, because this will have to go before the Legislature, again, rules and regs. I will try to work with Barbara, the Commissioner and Brenda Harper to get this resolved, the problems you have, and see if we cannot come to a compromise. Thank you.

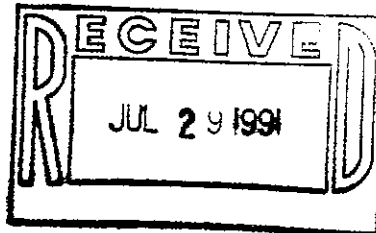
MS. SMITH: John?

MR. J. WILCOX: Everything has been said.

MS. SMITH: Well, if everyone has said what they need to say, this hearing is adjourned. Thank you all for coming.

(Hearing adjourned at 11:00 a.m.)

Company <i>Dept. of Agriculture</i>	Company <i>JERRY W. COYNE</i>
Location <i>Charleston WV</i>	Location <i>DAIRY QUEEN</i>
Fax #	Dept. Charge
Telephone # <i>348-3594</i>	Telephone # <i>304-763-6380</i>
Comments <i>please copy Mr. Bendat</i>	Original Disposition: <input type="checkbox"/> Destroy <input type="checkbox"/> Return <input type="checkbox"/> Call for pickup



NORTHEASTERN STORE OWNERS  
 WV. DAIRY QUEEN  
 2137 SHOWERS LANE  
 MARTINSBURG, WV 25401  
 304-263-1876

July 28, 1991

Barbara J. Smith, Director, Compliance Division  
 WV Dept. of Agriculture  
 1900 Kanawha Blvd., E  
 Charleston, WV 25305-0170

RE: Public Hearing: 7/29/91 Title # 61 - 4B

Dear Mrs. Smith:

On behalf of the Dairy Queen stores in WV, We do protest the new rules regarding the Dairy Queen stores being required to increase their costs by paying for their own lab tests.

WHY should we become a policing force?

The increased cost that each operator bears for independent lab tests involving an insignificant increase in cost to the customer is an absurd statement on behalf of a state employee.

As most Dairy Queens are small businesses in small towns in WV, it has become very difficult to make a profit.

Regarding 5.1: if the law is important enough to be required, then no organization should be exempt, as many of the groups are competition to us..

As for my business, I have 6 barrels in two of my stores, and I want a sample going in and out the front. Twelve times \$60/\$70 starts to add up fast.

I believe the department of Agriculture must continue to do their own policing.

THE LAW AS IT STANDS, IS NOT HOW YOU PRESENTED IT TO OUR GROUP IN CHARLESTON IN SENATOR ANDERSON'S OFFICE IN FEBRUARY.

Yours very truly,

*Jerry W. Coyne*  
 JERRY W. COYNE  
 EX. SECY. N.E.S.O.  
 cc: Dairy Queen Stores, WV



IF IT'S BORDEN-IT'S  
GOT TO BE GOOD

BORDEN, INC.  
DAIRY DIVISION

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August 6, 1991

Barbara J. Smith  
Director, Compliance Division  
WV Department of Agriculture  
State Capitol  
Charleston, WV 25305

RE: COMMENTS ON WV PROPOSED RULE FOR FROZEN DESSERTS

Dear Ms. Smith:

We have attached for your review our comments on the proposed rules for enforcing the current Frozen Dessert/Imitation Frozen Dessert Law.

If you have any questions concerning these comments, please give me a call.

Yours very truly,

BORDEN, INC.  
VALLEY BELL DIVISION

  
Les Seidner

LS:mj

Enclosure

508 ROANE ST.  
CHARLESTON, WV 25302  
(304) 344-2511

August 6, 1991

COMMENTS ON WV PROPOSED RULE  
FOR FROZEN DESSERTS

- 4.2 Are any provisions made for lowfat or nonfat frozen yogurts?
- 4.3 In other states the sweeteners are listed on the ingredient label. Why is saccharine required to be listed in % when other sweeteners are not? This should not be required.
- ? 5.2 Freezer barrels should not be required to be tested separately since the barrels are combined to fill a single package. This is an unnecessary expense for the manufacturer. Enforcement should be targeted to product in the package offered for sale.
- 6.1 How does this apply to bulk ice cream for dipping stores?
- 6.4/6.5 Appears to prohibit lowfat or nonfat ice cream. Is this the intent?
- 8.1c Suggest that a 3 out of 5 standard be considered to be in agreement with Grade A standards.
- 8.1f Suggest animal drug residues not exceed safe levels as determined by FDA and as tested by AOAC approved methods.
- 9.5 ---Re-write to preclude clean equipment that has not been used. IE: Clean equipment that has been washed more than two hours prior to use would exceed 45°F and should not need to be "disassembled and cleaned".
- 14.4/14.5 States that "whenever two of the last five consecutive official samples taken on separate days within a one year period are found to be adulterated". Since Sections 8.1a - 8.1g define adulteration as sanitizer present, high bacteria counts, beta-lactum antibiotics, or pathogenic bacteria, it would appear that these conditions are permitted 2 out of 5 times. Clearly this is not what is intended. This should apply to bacterial tests only.
- 14.9 This section addresses antibiotic or pesticide residue testing but is somewhat unclear.

List of the persons to whom the Frozen Desserts Regulations  
were sent on June 28, 1991

Mr. Mark Matrozza  
Microbac Laboratories, Inc.  
4580 McKnight Road  
Pittsburgh, PA 15237

Roche Biomedical  
Locust Ave.  
Fairmont, WV 26554

Touchstone Labs  
112 14th St.  
Wheeling, WV 26003

Dr. Frank L. Binder  
Microbiological Consultants, Inc.  
1675 Ritter Blvd.  
Huntington, WV 25701

Mr. Robert Taylor  
Biotec, Inc.  
P.O. Box 283, W. Main St  
Hillsville, PA 16132

Ms. Nancy Albert  
Quality Assurance Laboratory, Inc.  
319 Merchant St.  
Ambridge, PA 15003

Mr. Thomas M. Davis  
Environmental Systems Service, Ltd  
5111 College Ave.  
College Park, MD 20740

Mr. Ivan Wilcox, President  
North East Store Owners, Assn.  
c/o Dairy Queen - Mullens  
1905 Moran Ave.  
Mullens, WV 25882

Mr. Jack L. Legg  
Dairy Queen - Nitro  
3601 36th Street  
Nitro, WV 25143

Mr. Les Seidner  
Borden, Inc.  
508 Roane Street  
Charleston, WV 25302

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Frozen Desserts List  
June 27, 1991

Mr. Paul Smith, secretary  
West Virginia Dairy Products Assn.  
Box 6108, Room 1054  
Ag. Sciences Building  
Morgantown, WV 26506-6108

Mr. Jerry Coyne  
North East Store Owners Assn  
2137 Showers Lane  
Martinsburg, WV 25401

Mr. Jeff Haynes  
Dairy Queen - Big Chimney  
105 Winchester Drive  
Culloden, WV 25510

Mr. Phil Jones  
Assistant Division Director  
Office of Environmental Services  
Public Health Sanitation Division  
1900 Kanawha Blvd., East  
Building 3, Room 560  
Charleston, WV 25305

Mr. Jack Stonestreet  
Dairy Queen - Hurricane  
2455 US Route 60  
Hurricane, WV 25526

Mr. Eric Wood, owner  
Charleston Service and Equipment  
P.O. Box 917  
Big Chimney, WV 25302

Mr. James G. Mains, owner  
Guardian Food Service Co.  
P.O. Box U  
Buckhannon, WV 26201

Mr. Mike Giannirakis, owner  
Dairy Queen - Weirton  
3801 Main St.  
Weirton, WV 26062

Mr. Don R. Crumbacher, owner  
Dairy Queen - Aurora  
Rt 1, Box 81  
Aurora, WV 26705

Page Three  
Frozen Desserts List  
June 27, 1991

Mr. Steve Hannah, Exec. Sec.  
West Virginia Farm Bureau  
One Red Rock Road  
Buckhannon, WV 26201

Mr. Fred Butler  
WV Farm Bureau  
Rt 2, Box 159  
Inwood, WV 25428

Mr. Sam Cook  
Broughton Foods Company  
P.O. Box 656  
Marietta, Ohio 45750

The Honorable Leonard Anderson  
Rt 87, Box 6  
Hinton, WV 25951

George Carenbauer  
Steptoe and Johnson  
PO Box 1588  
Charleston, WV 25326

sent 7-18-91

Terry Nemesk  
c/o McDonald's  
1000 Division St.  
Parkersburg, WV 26101

sent 7-24-91

Jack Allison  
1304 S. Eisenhower Drive  
Beckley, WV 25801

:froz.lst

JUL 08 1991



Cleve Benedict  
Commissioner of Agriculture

# NEWS RELEASE

July 8, 1991

Charleston, West Virginia 25305

## Public hearings scheduled for new regulations

Agriculture Commissioner Cleve Benedict announced a series of public hearings on new regulations and encouraged public participation in the process.

Benedict said the public hearings give the West Virginia Department of Agriculture (WVDA) the opportunity to modify regulations after taking public input into consideration.

In addition to the public hearings, written comments will be accepted until the time of the hearing. The public hearings will be held on the following days:

July 12, 1 p.m.	Licensing of Pesticide Business
July 12, 3 p.m.	Regulations to Govern Aerial Application of Herbicides to Right of Way
July 29, 10 a.m.	Frozen Desserts and Imitation Frozen Desserts
July 29, 2 p.m.	Commercial Feed
July 30, 10 a.m.	Assessment of Civil Penalties for Consent Agreement or Negotiated Settlements (Pesticides)
July 30, 1 p.m.	Certified Pesticide Applicator
July 31, 10 a.m.	Licensing of Livestock Dealers
August 1, 10 a.m.	Disposal of Dead Poultry

All hearings will be held in the J. T. Johnson Conference Room in Building 2 of the Guthrie Agricultural Center, Charleston, W.Va., except for the Disposal of Dead Poultry hearing. The Dead Poultry hearing will be held at the Moorefield Agricultural Center.

Comment period deadlines for the following regulations (there are no public hearings) will be July 29 at noon:

Plant Pest Act  
West Virginia Apiary Law of 1991  
Animal Disease Control

For more information on how to comment on the new regulations, contact Barbara Smith, Director of Compliance, WVDA, at 304/348-2226.

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