

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

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MAR 31 2 11 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: West Virginia Department of Agriculture TITLE NUMBER: 61

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: 4D

TITLE OF RULE BEING PROPOSED: _____

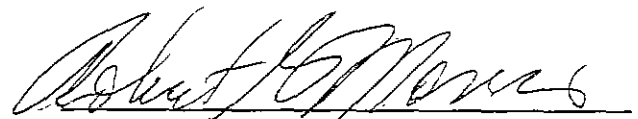
Labeling of Dairy Products for rBST or rBGH

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 64

SECTION 64-9-1(d), PASSED ON March 11, 1995

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON
June 15, 1995
THE FOLLOWING DATE: _____



AUTHORIZED SIGNATURE

FILED

TITLE 61
LEGISLATIVE RULE
WEST VIRGINIA DEPARTMENT OF AGRICULTURE

JUN 1 9 42 AM '95

SERIES 4D
LABELING OF DAIRY PRODUCTS FOR rBST OR rBGH

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE**§61-4D-1. General.**

1.1. Scope. -- This rule establishes mandatory label and labeling guidelines for persons wishing to differentiate their dairy products or frozen dessert products as having come from cows not treated with rBST. This rule is voluntary only from the respect that persons are not required to differentiate their products as coming from cows not treated with rBST.

1.2. Authority. -- W. Va. Code 19-11A-10(a) and W. Va. Code 19-11B-10(a)

1.3. Filing Date. -- March 31, 1995

1.4. Effective Date. -- June 15, 1995

1.5. This is a new legislative rule.

§61-4D-2. Definitions.

2.1. All definitions are identical to those found in W. Va. Code §19-11A-2 and W. Va. Code §19-11B-2.

2.2. "Bovine somatotropin" if the term is not otherwise modified, means a growth hormone that is produced naturally in the pituitary glands of cows.

2.3. "rBST" or recombinant bovine somatotropin means a fabricated form of bovine somatotropin and for simplicity includes the synonymous term rBGH or recombinant bovine growth hormone.

§61-4D-3. General Program and Policy.

3.1. Differentiating Dairy Products or Frozen Desserts through a label or labeling material as coming from cows treated or not treated with rBST is not mandatory. Labeling finished products as coming from cows treated with rBST is not required due to the FDA's

findings that milk from rBST treated cows is safe for human consumption. However, persons wishing to label their products as coming from cows not treated with rBST must follow the guidelines outlined in this rule.

§61-4D-4. Labeling Statement Guidelines.

4.1. Persons wishing to differentiate their frozen desserts or dairy products through a product's label or labeling by indicating that they are made with or consist of milk coming from cows not treated with rBST must use both of the following statements or something similar as long as it is not false or misleading in any particular:

4.1.a. "From cows not treated with rBST"; and,

4.1.b. "No significant difference has been shown between milk derived from rBST-treated and non-rBST-treated cows."

4.2. All labeling information as outlined in subsection 4.1 of this section must receive written approval from the Commissioner of Agriculture or his or her designee prior to its use.

§61-4D-5. Prohibited Acts.

5.1. The following list of labeling statements are prohibited due to the fact that they are either false or they may imply a compositional difference and are therefore misleading:

5.1.a. "BST Free";

5.1.b. "rBST Free"; or,

5.1.c. "From cows not treated with rBST" when this statement is used

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previous page.*

~~rBST when this statement is used~~
alone and not in conjunction with the
statement in §61-4D-4.1.b.

5.2. The list of examples in subsection 5.1 of this section is not meant to be an exhaustive list of prohibited statements. Other statements not passing the false and misleading criteria shall be declared as prohibited by the Commissioner and will not receive approval as required in section 4.2. of this rule.

§61-4D-6. Substantiation of Labeling Claims.

6.1. Since there are currently no means of differentiating analytically between naturally occurring BST and recombinant BST and since there are no measurable compositional differences, the following requirements are hereby imposed on any person wishing to label frozen desserts or dairy products according to section 4 of this rule. Each person shall:

6.1.a. maintain verifiable written documentation of herds participating in the non-rBST-supplementation program to verify this fact. The documentation must include signed certification from the manager of each herd to verify the absence of supplemental rBST use.

6.1.a.1. The documentation must include a tracking system for all herds that produced the milk as well as the milk derived ingredients which are used to make the product for which the claim is made; and

6.1.b. maintain certifications that all milk from non-rBST herds has been physically segregated from other milk during the time of herd milking, transportation, processing and final packaging with the appropriate labeling. In facilities handling milk from both rBST treated and non-rBST treated cows, records must indicate a complete wash up cycle was accomplished between the use of equipment to process milk from rBST treated cows and the subsequent use of the same equipment to process milk from non-rBST treated cows. Written documentation to verify this fact must be maintained by the person wishing to label their product as coming from cows not treated

with rBST.

6.2. All records required under this section must be made available to the Commissioner of Agriculture or his or her designated representative within 24 hours of a request.

§61-4D-7. Enforcement Policy.

7.1. The Commissioner may assess a violation of W. Va. Code §19-11A-1 et seq., W. Va. Code §19-11B-1 et seq. or of this rule against any person believed to be responsible for the violation.

7.2. The West Virginia Bureau of Public Health will assist the Commissioner of Agriculture in enforcing this rule as it applies to milk production and processing areas for which the Bureau of Public Health is responsible under West Virginia Code.

7.3. The Commissioner may take any enforcement action outlined in W. Va. Code §19-11A-13 or W. Va. Code §19-11B-13.

7.4. Any product not labeled in compliance with this rule is considered misbranded and consequently prohibited from sale and subject to enforcement action.

7.4.a. However, the Commissioner may provide a 30 day exemption in order to allow a person to correct the violation.

7.4.b. At the end of those 30 days the Commissioner shall embargo any product found in violation of this rule and proceed with further enforcement action as he or she considers necessary.

TITLE 61
LEGISLATIVE RULE
WEST VIRGINIA DEPARTMENT OF AGRICULTURE

SERIES 4D
Labeling of Dairy Products for rBST or rBGH

§61-4D-1. General

1.1 Scope. - This rule establishes mandatory label and labeling guidelines for persons wishing to differentiate their dairy products or frozen dessert products as having come from cows not treated with rBST. This rule is voluntary only from the respect that persons are not required to differentiate their products as coming from cows not treated with rBST.

1.2 Authority - WV Code 19-11A-10(a) and
WV Code 19-11B-10(a)

1.3 Filing Date. - April 5, 1995

1.4 Effective Date. - May 1, 1995

1.5 This is a new legislative rule.

§61-4D-2. Definitions

2.1 All definitions are identical to those found in WV Code §19-11A-2 and WV Code §19-11B-2.

2.2 "Bovine somatotropin" if the term is not otherwise modified, means a growth hormone that is produced naturally in the pituitary glands of cows.

2.3 "rBST" or recombinant bovine somatotropin means a fabricated form of bovine somatotropin and for simplicity includes the synonymous term rBGH or recombinant bovine growth hormone.

§61-4D-3. General Program and Policy.

1.1 Differentiating Dairy Products or Frozen Desserts through a label or labeling material as coming from cows treated or not treated with rBST is not mandatory. Labeling finished products as

coming from cows treated with rBST is not required due to the FDA's findings that milk from rBST treated cows is safe for human consumption. However, persons wishing to label their products as coming from cows not treated with rBST must follow the guidelines outlined in this rule.

§61-4D-4. Labeling Statement Guidelines

4.1 Persons wishing to differentiate their frozen desserts or dairy products through a product's label or labeling by indicating that they are made with or consist of milk coming from cows not treated with rBST must use both of the following statements or something similar as long as it is not false or misleading in any particular:

4.1.a. "From cows not treated with rBST"; and,

4.1.b. "No significant difference has been shown between milk derived from rBST-treated and non-rBST-treated cows."

4.2 All labeling information as outlined in subsection 4.1 of this section must receive written approval from the Commissioner of Agriculture or his or her designee prior to it's use.

§61-4D-5. Prohibited Acts

5.1 The following list of labeling statements are prohibited due to the fact that they are either false or they may imply a compositional difference and are therefore misleading:

5.1.a. "BST Free";

5.1.b. "rBST Free"; or,

5.1.c. "From cows not treated with rBST" when this statement is used alone and not in conjunction with the statement in §61-4D-4.1.b.

5.2 The list of examples in subsection 5.1 of this section is not meant to be an exhaustive list of prohibited statements. Other statements not passing the false and misleading criteria shall be declared as prohibited by the Commissioner and will not receive approval as required in section 4.2 of this rule.

§61-4D-6. Substantiation of Labeling Claims

6.1 Since there are currently no means of differentiating

analytically between naturally occurring BST and recombinant BST and since there are no measurable compositional differences, the following requirements are hereby imposed on any person wishing to label frozen desserts or dairy products according to section 4 of this rule. Each person shall:

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6.1.a.1 The documentation must include a tracking system for all herds that produced the milk as well as the milk derived ingredients which are used to make the product for which the claim is made; and

6.1.b. maintain certifications that all milk from non-rBST herds has been physically segregated from other milk during the time of herd milking, transportation, processing and final packaging with the appropriate labeling. In facilities handling milk from both rBST treated and non-rBST treated cows, records must indicate a complete wash up cycle was accomplished between the use of equipment to process milk from rBST treated cows and the subsequent use of the same equipment to process milk from non-rBST treated cows. Written documentation to verify this fact must be maintained by the person wishing to label their product as coming from cows not treated with rBST.

6.2 All records required under this section must be made available to the Commissioner of Agriculture or his or her designated representative within 24 hours of a request.

§61-4D-7. Enforcement Policy

7.1 The Commissioner may assess a violation of WV Code §19-11A-1 et seq., WV Code §19-11B-1 et seq. or of this rule against any person believed to be responsible for the violation.

7.2 The West Virginia Bureau of Public Health will assist the Commissioner of Agriculture in enforcing this rule as it applies to milk production and processing areas for which the Bureau of Public Health is responsible under West Virginia Code.

7.3 The Commissioner may take any enforcement action outlined in WV Code §19-11A-13 or WV Code §19-11B-13.

7.4 Any product not labeled in compliance with this rule is considered misbranded and consequently prohibited from sale and subject to enforcement action.

7.4.a. However, the Commissioner may provide a 30 day exemption in order to allow a person to correct the violation.

7.4.b At the end of those 30 days the Commissioner shall embargo any product found in violation of this rule and proceed with further enforcement action as he or she considers necessary.

61-4D

Bill-Agriculture, Dairy

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BE IT H. B. 2138

(By Delegates Gallagher, Douglas, Compton,
Linch, Faircloth and Riggs.)

(Introduced January 23, 1995; referred to the
Committee on Agriculture and Natural Resources then
the Judiciary)

10 A BILL to amend and reenact section one, article nine, chapter
11 sixty-four of the code of West Virginia, one thousand nine
12 hundred thirty-one, as amended, relating to authorizing the
13 commissioner of agriculture to promulgate legislative rules
14 relating to the labeling of dairy products for rBST or rBGH.

15 **Be it enacted by the Legislature of West Virginia:**

16 That section one, article nine, chapter sixty-four of the
17 code of West Virginia, one thousand nine hundred thirty-one, as
18 amended, be amended and reenacted, to read as follows:

19 **ARTICLE 9. AUTHORIZATION FOR MISCELLANEOUS AGENCIES AND BOARDS**
20 **TO PROMULGATE LEGISLATIVE RULES.**

21 **§64-9-1. Commissioner of agriculture.**

22 (a) The legislative rules filed in the state register on the
23 sixth day of April, one thousand nine hundred eighty-three,

1 relating to the commissioner of agriculture (schedule of charges
2 for inspection services: fruit), are authorized.

3 (b) The legislative rules filed in the state register on the
4 third day of August, one thousand nine hundred eighty-three,
5 relating to the commissioner of agriculture (licensing of
6 auctioneers), are authorized.

7 (c) The legislative rules filed in the state register on the
8 eighth day of February, one thousand nine hundred eighty-four,
9 relating to the commissioner of agriculture (conduct of beef
10 industry self-improvement assessment program referendum), are
11 authorized.

12 (d) The legislative rules filed in the state register on the
13 fourth day of June, one thousand nine hundred eighty-four,
14 relating to the commissioner of agriculture (feeding untreated
15 garbage to swine), are authorized.

16 (e) The legislative rules filed in the state register on the
17 fourth day of June, one thousand nine hundred eighty-four,
18 relating to the commissioner of agriculture (registration,
19 taxation and control of dogs), are authorized.

20 (f) The legislative rules filed in the state register on the
21 first day of November, one thousand nine hundred eighty-four,
22 relating to the commissioner of agriculture (public markets), are
23 authorized.

24 (g) The legislative rules filed in the state register on the
25 tenth day of September, one thousand nine hundred eighty-four,

1 relating to the commissioner of agriculture (noxious weed rules),
2 are authorized.

3 (h) The legislative rules filed in the state register on the
4 fourth day of June, one thousand nine hundred eighty-four,
5 relating to the commissioner of agriculture (animal disease
6 control), are authorized.

7 (i) The legislative rules filed in the state register on the
8 fifth day of January, one thousand nine hundred eighty-four,
9 relating to the commissioner of agriculture (use of certain
10 picloram products), are authorized.

11 (j) The legislative rules filed in the state register on the
12 eighth day of March, one thousand nine hundred eighty-five,
13 relating to the commissioner of agriculture (increasing certain
14 fees by rules and regulations), are authorized.

15 (k) The legislative rules filed in the state register on the
16 thirteenth day of January, one thousand nine hundred eighty-six,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the thirty-first day of January,
20 one thousand nine hundred eighty-six, relating to the
21 commissioner of agriculture (licensing of livestock dealers),
22 are authorized.

23 (l) The legislative rules filed in the state register on the
24 eighteenth day of June, one thousand nine hundred eighty-six,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the fifth day of January, one
3 thousand nine hundred eighty-seven, relating to the commissioner
4 of agriculture (West Virginia pesticide use and application act),
5 are authorized.

6 (m) The legislative rules filed in the state register on the
7 eighteenth day of August, one thousand nine hundred eighty-six,
8 modified by the director of the division of forestry of the
9 department of agriculture to meet the objections of the
10 legislative rule-making review committee and refiled in the state
11 register on the fifth day of January, one thousand nine hundred
12 eighty-seven, relating to the director of the division of
13 forestry of the department of agriculture (ginseng), are
14 authorized.

15 (n) The legislative rules filed in the state register on the
16 tenth day of April, one thousand nine hundred eighty-seven,
17 relating to the commissioner of agriculture (schedule of charges
18 for inspection services: fruit), are authorized.

19 (o) The legislative rules filed in the state register on the
20 thirteenth day of August, one thousand nine hundred eighty-seven,
21 modified by the commissioner of agriculture to meet the
22 objections of the legislative rule-making review committee and
23 refiled in the state register on the eighth day of September, one
24 thousand nine hundred eighty-seven, relating to the commissioner
25 of agriculture (animal disease control), are authorized.

1 (p) The legislative rules filed in the state register on the
2 fifteenth day of September, one thousand nine hundred
3 eighty-eight, relating to the commissioner of agriculture (sale
4 and distribution of commercial fertilizer), are authorized.

5 (q) The legislative rules filed in the state register on the
6 fifteenth day of September, one thousand nine hundred
7 eighty-eight, modified by the commissioner of agriculture to meet
8 the objections of the legislative rule-making review committee
9 and refiled in the state register on the twenty-sixth day of
10 October, one thousand nine hundred eighty-eight, relating to the
11 commissioner of agriculture (animal disease control), are
12 authorized.

13 (r) The legislative rules filed in the state register on the
14 fifteenth day of May, one thousand nine hundred eighty-nine,
15 modified by the commissioner of agriculture to meet the
16 objections of the legislative rule-making review committee and
17 refiled in the state register on the twenty-first day of August,
18 one thousand nine hundred eighty-nine, relating to the
19 commissioner of agriculture (production of milk and cream for
20 manufacturing purposes), are authorized.

21 (s) The legislative rules filed in the state register on the
22 seventh day of August, one thousand nine hundred eighty-nine,
23 modified by the commissioner of agriculture to meet the
24 objections of the legislative rule-making review committee and
25 refiled in the state register on the twenty-third day of October,

1 one thousand nine hundred eighty-nine, relating to the
2 commissioner of agriculture (animal disease control), are
3 authorized.

4 (t) The legislative rules filed in the state register on the
5 tenth day of August, one thousand nine hundred ninety, modified
6 by the commissioner of agriculture to meet the objections of the
7 legislative rule-making review committee and refiled in the state
8 register on the fifth day of October, one thousand nine hundred
9 ninety, relating to the commissioner of agriculture (meat
10 inspection), are authorized.

11 (u) The legislative rules filed in the state register on the
12 tenth day of August, one thousand nine hundred ninety, modified
13 by the commissioner of agriculture to meet the objections of the
14 legislative rule-making review committee and refiled in the state
15 register on the third day of October, one thousand nine hundred
16 ninety, relating to the commissioner of agriculture (agricultural
17 liming materials), are authorized.

18 (v) The legislative rules filed in the state register on the
19 tenth day of August, one thousand nine hundred ninety, modified
20 by the commissioner of agriculture to meet the objections of the
21 legislative rule-making review committee and refiled in the state
22 register on the third day of October, one thousand nine hundred
23 ninety, relating to the commissioner of agriculture (public
24 markets), are authorized.

1 (w) The legislative rules filed in the state register on the
2 nineteenth day of September, one thousand nine hundred ninety,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the ninth day of November, one
6 thousand nine hundred ninety, relating to the commissioner of
7 agriculture (animal disease control), are authorized.

8 (x) The legislative rules filed in the state register on the
9 eighth day of August, one thousand nine hundred ninety-one,
10 modified by the commissioner of agriculture to meet the
11 objections of the legislative rule-making review committee and
12 refiled in the state register on the twenty-fourth day of
13 September, one thousand nine hundred ninety-one, relating to the
14 commissioner of agriculture (commercial feed), are authorized
15 with the amendments set forth below:

16 On page two, after subsection 3.3., by adding a new
17 subsection, designated subsection 3.4., to read as follows:

18 "3.4. The commissioner will not assess a tonnage fee on any
19 commercial feed or feed ingredients used in the manufacture of
20 poultry contract feed.";

21 On page five, after subsection 4.3.m., by adding a new
22 subsection, designated subsection 4.3.n., to read as follows:

23 "4.3.n. The commissioner will consider poultry contract feed
24 to be customer-formula feed.";

25 And,

1 On page eight, after subsection 5.5., by adding a new
2 subsection, designated subsection 5.6., to read as follows:

3 "5.6. Poultry contract feed labels shall conform to the
4 requirements of W. Va. Code §19-14-8(d), except that:

5 5.6.a. The name of the grower or feeder will substitute for
6 the requirements for the name of the purchaser; and,

7 5.6.b. The net weight (avoir dupois) of the commercial feed
8 and each feed ingredient used in the feed shall not be required
9 to be listed."

10 (y) The legislative rules filed in the state register on the
11 fourth day of June, one thousand nine hundred ninety-one,
12 modified by the commissioner of agriculture to meet the
13 objections of the legislative rule-making review committee and
14 refiled in the state register on the second day of August, one
15 thousand nine hundred ninety-one, relating to the commissioner
16 of agriculture (wood destroying insect treatment standards), are
17 authorized.

18 (z) The legislative rules filed in the state register on the
19 twentieth day of December, one thousand nine hundred ninety,
20 modified by the commissioner of agriculture to meet the
21 objections of the legislative rule-making review committee and
22 refiled in the state register on the thirtieth day of April, one
23 thousand nine hundred ninety-one, relating to the commissioner
24 of agriculture (fee structure for the pesticide control act of
25 1990), are authorized.

1 (aa) The legislative rules filed in the state register on
2 the eighth day of August, one thousand nine hundred ninety-one,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the twelfth day of November, one
6 thousand nine hundred ninety-one, relating to the commissioner of
7 agriculture (animal disease control), are authorized.

8 (bb) The legislative rules filed in the state register on
9 the eighth day of August, one thousand nine hundred ninety-one,
10 modified by the commissioner of agriculture to meet the
11 objections of the legislative rule-making review committee and
12 refiled in the state register on the tenth day of September, one
13 thousand nine hundred ninety-one, relating to the commissioner
14 of agriculture (West Virginia plant pest act), are authorized.

15 (cc) The legislative rules filed in the state register on the
16 twenty-sixth day of July, one thousand nine hundred ninety-one,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the sixteenth day of October,
20 one thousand nine hundred ninety-one, relating to the
21 commissioner of agriculture (licensing of pesticide businesses),
22 are authorized.

23 (dd) The legislative rules filed in the state register on the
24 eighth day of August, one thousand nine hundred ninety-one,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the second day of October, one
3 thousand nine hundred ninety-one, relating to the commissioner of
4 agriculture (certified pesticide applicators), are authorized.

5 (ee) The legislative rules filed in the state register on
6 the eighth day of August, one thousand nine hundred ninety-one,
7 modified by the commissioner of agriculture to meet the
8 objections of the legislative rule-making review committee and
9 refiled in the state register on the twenty-fourth day of
10 September, one thousand nine hundred ninety-one, relating to the
11 commissioner of agriculture (assessment of civil penalties and
12 procedures for consent agreements and negotiated settlements),
13 are authorized.

14 (ff) The legislative rules filed in the state register on
15 the eighth day of August, one thousand nine hundred ninety-one,
16 modified by the commissioner of agriculture to meet the
17 objections of the legislative rule-making review committee and
18 refiled in the state register on the twenty-fourth day of
19 September, one thousand nine hundred ninety-one, relating to the
20 commissioner of agriculture (aerial application of herbicides to
21 rights-of-way), are authorized.

22 (gg) The legislative rules filed in the state register on
23 the eighth day of August, one thousand nine hundred ninety-one,
24 modified by the commissioner of agriculture to meet the
25 objections of the legislative rule-making review committee and

1 refiled in the state register on the twenty-fourth day of
2 September, one thousand nine hundred ninety-one, relating to the
3 commissioner of agriculture (frozen desserts and imitation frozen
4 desserts), are authorized, with the amendment set forth below:

5 On page twelve, by striking out all of section 15 and
6 substituting a new section 15, to read as follows:

7 "61-4B-15. Enforcement policy.

8 15.1. The commissioner may assess a violation of W. Va. Code
9 §19-11B-1 et seq. or of these rules against the manufacturer of
10 product and/or the distributor of the mix used to manufacture
11 the product.

12 15.2. The commissioner will assess any violations of W. Va.
13 Code §19-11B-1 et seq. or of this rule to the distributor for
14 mix sampled from unopened containers. The company will not be
15 assessed additional cumulative notices of violations until the
16 commissioner has determined that the firm has had adequate notice
17 of the previous notice, generally 10 days from the mailing of the
18 notice of violation.

19 15.3. Whenever one of the last five consecutive official
20 product sample(s) taken on separate days within a one year period
21 are found to be adulterated or misbranded, the commissioner shall
22 send a written "First Notice" to the manufacturer or distributor
23 whichever is appropriate. This notice shall notify the
24 manufacturer or distributor of the violation of W. Va. Code

1 §19-11B-1 et seq. or of these rules and the enforcement policy
2 established by this section of the rule.

3 15.4. Whenever two of the last five consecutive official
4 product sample(s) taken on separate days within a one year period
5 are found to be adulterated or misbranded the commissioner shall
6 send a written "Second Notice" to the manufacturer or distributor
7 whichever is appropriate.

8 15.4.a. The commissioner shall collect additional official
9 product sample(s) within 21 days of the sending of a Second
10 Notice to the manufacturer or distributor, but shall not collect
11 product samples before the lapse of 7 days from the sending of a
12 Second Notice.

13 15.5. Whenever three of the last five consecutive official
14 product sample(s) taken on separate days within a one year period
15 are found to be adulterated or misbranded the commissioner shall
16 send a written "Third Notice" to the manufacturer or distributor
17 whichever is appropriate.

18 15.5.a. The commissioner shall collect additional official
19 product sample(s) within 21 days of the sending of the Third
20 Notice to the manufacturer or distributor, but shall not collect
21 additional product samples before the lapse of 7 days from the
22 date of sending of the notice.

23 15.6. The commissioner will issue a "Shut-down Order" for a
24 period of 24 hours to a manufacturer or distributor when the
25 record of the firm indicates that effective action has not been

1 taken to correct the causes of the violations, for instance when
2 three out of the last five samples from the same machine are
3 violative. The "Shut-down Order" will normally be issued with
4 the "Third Notice". The "Shut-down Order" will give the reasons
5 for the order, state the portion of the manufacturing or
6 distributing operation that is prohibited from operating while
7 the order is in effect, give conditions of the order, state the
8 length of time that the Shut-down Order will be in effect and
9 specify a time and place for a hearing to be held in this matter.
10 Except that in the case where the public health, safety or
11 welfare is at risk, the commissioner will issue an immediate
12 Shut-down Order and give notice to the manufacturer or
13 distributor under the provisions of subdivision 15.6.a. of this
14 rule.

15 15.6.a. The commissioner will issue an immediate Shut-down
16 Order without giving the manufacturer or distributor the
17 opportunity to be heard where there is a hazard to the public
18 health, safety or welfare. In these cases, the manufacturer or
19 distributor will be given the opportunity to request a hearing
20 before the commissioner after the notification of the order is
21 received by the manufacturer or distributor. All Shut-down
22 Orders issued due to noncompliance with subdivision 8.1.c.,
23 8.1.d. or 8.1.g. of this rule are considered to involve a risk
24 to the public health, safety or welfare.

1 15.6.b. The manufacturer or distributor will be responsible
2 for causing all operations covered by the Shut-down Order to
3 cease and follow all other conditions of the order. At the end
4 of the period of the order, the manufacturer or distributor may
5 resume operations without further action by the commissioner.

6 15.7. If after a Shut-down Order has been issued the
7 commissioner finds that effective corrective action has not been
8 taken, he may issue a suspension of the Frozen Desserts
9 Manufacturer Permit. The suspension shall state the time that
10 the suspension will become effective, give the reasons for the
11 suspension and specify a time and place for a hearing to be held
12 in this matter. Except that in the case of a summary suspension
13 the commissioner will give the manufacturer the opportunity to
14 request a hearing in this matter subsequent to the notification
15 of the suspension.

16 15.7.a. All suspensions due to nonconformance to subdivision
17 8.1.c., 8.1.d. or 8.1.g. of this rule are summary suspensions.

18 15.7.b. A suspension of the Frozen Desserts Manufacturer
19 Permit remains in effect until the manufacturer submits and the
20 commissioner accepts a written plan of correction and a request
21 for a reinstatement of the permit.

22 15.7.c. The commissioner has seven days from the date of
23 receipt of this application to respond to a suspension in the
24 case of violations of subdivision 8.1.c., 8.1.d. or 8.1.g. of
25 this rule and fourteen days to respond for all other violations

1 of W. Va. Code §19-11B-1 et seq. or these rules. The
2 commissioner will accept or deny the application for a
3 reinstatement of the permit and will give the terms and
4 conditions under which the permit will be reinstated.

5 15.8. If the commissioner finds that after the firm has
6 resumed production following a suspension of their Frozen
7 Desserts Manufacturer Permit that effective corrective action
8 has not been taken, then the commissioner will hold a hearing to
9 determine if the Frozen Desserts Manufacturer Permit should be
10 revoked.

11 15.9. Persons who manufacture a product on an intermittent or
12 infrequent basis, so that the standard enforcement policy cannot
13 apply, will enter into a consent agreement with the commissioner
14 for correction of all items found to be not in conformance with
15 W. Va. Code §19-11B-1 et seq. or these rules.

16 15.10. Whenever an antibiotic or pesticide residue test is
17 found to be above tolerance, the commissioner shall notify the
18 manufacturer and/or distributor immediately of this fact and
19 shall begin an investigation to determine the cause of the
20 residue. The commissioner shall require that any person found
21 to be responsible for the residue shall correct the cause of the
22 residue prior to the resumption of the manufacturing or
23 distribution of the product.

24 15.11. A person who performs a recall by voluntarily removing
25 product from sale and distribution in an effective manner so as

1 to limit the potential harm to the health and well-being of the
2 public may be eligible for exemptions from the normal enforcement
3 policy. The commissioner shall consider the facts of each case
4 when making a decision on an exemption.

5 15.12. The commissioner may apply the enforcement policy in a
6 liberal manner in cases where all official product sample results
7 that involve a product in the form actually sold to the public
8 have been found to be in conformance with W. Va. Code §19-11B-1
9 et seq. or these rules.

10 15.13. The commissioner may suspend the standard enforcement
11 policy in cases where such action is necessary to protect the
12 public health, safety or welfare.

13 15.14. Resamples will only be taken from machines that were
14 shown to be producing violative product the previous visit,
15 except for resamples needed to check that the nonviolative status
16 is being maintained according to the following schedule:

17 15.14.a. After a first notice and one nonviolative sample,
18 resamples will be taken between 5 to 6 months after the
19 nonviolative sample.

20 15.14.b. After a second notice and one nonviolative sample,
21 resamples will be taken between 3-4 months after the nonviolative
22 sample.

23 15.14.c. Other resamples may be considered necessary to
24 determine that the nonviolative status is being maintained."

1 (hh) The legislative rules filed in the state register on
2 the eighth day of August, one thousand nine hundred ninety-one,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the twenty-fourth day of
6 September, one thousand nine hundred ninety-one, relating to the
7 commissioner of agriculture (West Virginia apiary law of 1991),
8 are authorized.

9 (ii) The legislative rules filed in the state register on
10 the eighth day of August, one thousand nine hundred ninety-one,
11 modified by the commissioner of agriculture to meet the
12 objections of the legislative rule-making review committee and
13 refiled in the state register on the twenty-fourth day of
14 September, one thousand nine hundred ninety-one, relating to the
15 commissioner of agriculture (disposal of dead poultry), are
16 authorized with the amendments set forth below:

17 On page two, section two, by adding a new subsection to read
18 as follows:

19 "2.8 'Disposal pit' means an opening dug in the ground to a
20 minimum depth of six feet, containing a minimum capacity of 150
21 cubic feet, covered with a minimum of 12 inches of dirt, and
22 provided with one or more openings for the introduction of
23 poultry. The openings shall be a minimum size of eight inches
24 square and equipped with tight lids. A disposal pit shall be
25 located in a site which will prevent contamination of the

1 groundwater or the surface water. This site should conform to
2 the standards established in this rule."

3 On page two, subsection 3.1 after the word "incinerator," by
4 adding the words "disposal pit,"

5 And,

6 On page two, by adding a new section, designated section 4,
7 to read as follows:

8 "§61-1C-4. Standards for Site Location for Disposal Pits.

9 4.1 No part of a disposal pit system shall be located in a
10 poorly drained or filled area, or in any area where seasonal
11 flooding occurs.

12 4.2 No part of a disposal pit system shall be located within
13 10 feet of a building, foundation or property line.

14 4.3 No part of a disposal pit system shall be located within
15 50 feet of a public water supply line or within 10 feet of a
16 private water supply system.

17 4.4 A disposal pit shall be located at least 50 feet from a
18 private well or groundwater supply.

19 4.5 There shall be a minimum of three feet between the bottom
20 of a disposal pit and seasonal groundwater or rock, shale or any
21 other impermeable layer.

22 4.6 The evaluation of the site for installation of a disposal
23 pit shall be based upon percolation test results. Percolation
24 tests shall be performed in the following manner:

1 4.6.1 Location - At least two holes shall be placed over the
2 selected site. The results of these two test holes will be
3 averaged.

4 4.6.2 Holes shall be dug or bored from six to eight inches
5 in diameter at the site where the disposal pit will be installed.
6 The holes should be at least 24 inches in depth.

7 4.6.3 The bottom and sides of the holes shall be scratched
8 with a sharp pointed instrument or wire brush to remove any
9 smeared soil surfaces which interfere with the absorption of
10 water into the soil.

11 4.6.4 Loose dirt shall be removed from the bottom of the test
12 holes and two inches of coarse sand or fine gravel shall be
13 placed into the holes to prevent sealing.

14 4.6.5 An eight or ten penny nail shall be placed in the wall
15 of each hole exactly six inches above the level of sand or
16 gravel.

17 4.6.6 The test hole shall be completely filled with water to
18 ground level. Water in the hole shall be kept to a depth of at
19 least 12 inches for a minimum period of four hours before
20 beginning the percolation rate measurement.

21 4.7 Percolation rate measurement - Upon completion of the
22 above, the water depth in the holes shall be adjusted to the
23 level of the nail. The number of minutes it takes for this six
24 inches of water (all the water) to be absorbed into the soil
25 shall be accurately determined. This time in minutes, divided by

1 six, gives the rate of fall per inch. The average rate of fall
2 must be between five minutes and 60 minutes."

3 (jj) The legislative rules filed in the state register on
4 the eighth day of August, one thousand nine hundred ninety-one,
5 modified by the commissioner of agriculture to meet the
6 objections of the legislative rule-making review committee and
7 refiled in the state register on the twenty-fourth day of
8 September, one thousand nine hundred ninety-one, relating to the
9 commissioner of agriculture (licensing of livestock dealers), are
10 authorized.

11 (kk) The legislative rules filed in the state register on the
12 fifteenth day of September, one thousand nine hundred ninety-two,
13 modified by the commissioner of agriculture to meet the
14 objections of the legislative rule-making review committee and
15 refiled in the state register on the eighteenth day of November,
16 one thousand nine hundred ninety-two, relating to the
17 commissioner of agriculture (commercial feed), are authorized.

18 (ll) The legislative rules filed in the state register on the
19 fifteenth day of September, one thousand nine hundred ninety-two,
20 modified by the commissioner of agriculture to meet the
21 objections of the legislative rule-making review committee and
22 refiled in the state register on the nineteenth day of February,
23 one thousand nine hundred ninety-three, relating to the
24 commissioner of agriculture (general groundwater protection rules
25 for fertilizers and manures), are authorized.

1 (mm) The legislative rules filed in the state register on the
2 fifteenth day of September, one thousand nine hundred ninety-two,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the nineteenth day of February,
6 one thousand nine hundred ninety-three, relating to the
7 commissioner of agriculture (primary and secondary containment of
8 fertilizers), are authorized with the amendments set forth below:

9 "On page five, by striking out all of subsection 5.5 and
10 inserting in lieu thereof a new subsection 5.5 to read as
11 follows: 'The operator or his licensed representative shall sign
12 and date each application under oath.'; and

13 On page eighteen, by striking out all of subsection 14.1 and
14 inserting in lieu thereof a new subsection 14.1 to read as
15 follows:

16 'All moneys for the purpose of the enforcement and
17 administration of this rule shall come from general revenue funds
18 appropriated by the legislature for that purpose. The net
19 proceeds of civil penalties collected pursuant to W. Va. Code
20 §20-5M-10a or any civil administrative penalties collected
21 pursuant to W. Va. Code §20-5M-10c will be deposited in the
22 groundwater remediation fund established in W. Va. Code §20-5M-1.
23 et seq.'".

24 (nn) The legislative rules filed in the state register on the
25 fifteenth day of September, one thousand nine hundred ninety-two,

1 modified by the commissioner of agriculture to meet the
2 objections of the legislative rule-making review committee and
3 refiled in the state register on the nineteenth day of February,
4 one thousand nine hundred ninety-three, relating to the
5 commissioner of agriculture (general groundwater protection rules
6 for pesticides), are authorized.

7 (oo) The legislative rules filed in the state register on the
8 fifteenth day of September, one thousand nine hundred ninety-two,
9 modified by the commissioner of agriculture to meet the
10 objections of the legislative rule-making review committee and
11 refiled in the state register on the nineteenth day of February,
12 one thousand nine hundred ninety-three, relating to the
13 commissioner of agriculture (bulk pesticide operational rules),
14 are authorized.

15 (pp) The legislative rules filed in the state register on the
16 fifteenth day of September, one thousand nine hundred ninety-two,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the nineteenth day of February,
20 one thousand nine hundred ninety-three, relating to the
21 commissioner of agriculture (non-bulk pesticide rules for
22 permanent operational areas), are authorized.

23 (qq) The legislative rules filed in the state register on the
24 sixteenth day of April, one thousand nine hundred ninety-three,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the twenty-sixth day of July,
3 one thousand nine hundred ninety-three, relating to the
4 commissioner of agriculture (animal disease control), are
5 authorized.

6 (rr) The legislative rules filed in the state register on
7 the third day of August, one thousand nine hundred ninety-three,
8 modified by the commissioner of agriculture to meet the
9 objections of the legislative rule-making review committee and
10 refiled in the state register on the eighth day of October, one
11 thousand nine hundred ninety-three, relating to the commissioner
12 of agriculture (auctioneers), are authorized.

13 (ss) The legislative rules filed in the state register on the
14 fifteenth day of August, one thousand nine hundred ninety-four,
15 modified by the commissioner of agriculture to meet the
16 objections of the legislative rule-making review committee and
17 refiled in the state register on the fourteenth day of October,
18 one thousand nine hundred ninety-four, relating to the
19 commissioner of agriculture (labeling of dairy products for rBST
20 or rBGH), are authorized.

21

22 NOTE: The purpose of this bill is to authorize the
23 Commissioner of Agriculture to promulgate legislative rules
24 relating to the labeling of dairy products for rBST or rBGH.

25

26 Strike-throughs indicate language that would be stricken from
27 the present law, and underscoring indicates new language that
28 would be added.



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March 27, 1995

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SB 64 authorizing, **Title 61, Series 4D, Labeling of Dairy Products fro rBST or rBGH**, passed the Legislature on **March 11, 1995**. It is was signed by the Governor on March 23, 1995.

You have sixty (60) days after the Governor signs SB 64, to final file the legislative rule with the Secretary of State's office. To final file your legislative rule, fill in the blanks on the enclosed form #6, the "Final Filing" form and file the form with our office with a promulgation history of the rule. Authorization for your legislative rule is cited in **SB 64** section **64-9-1(d)**. The agency may set the effective date of the legislative rule up to ninety (90) days from the date the legislative rule is final filed with the Secretary of State's office. Please have an authorized signature on the bottom line.

*****IMPORTANT: YOUR AGENCY MUST SUBMIT A CLEAN COPY OF THE LEGISLATIVE RULE ON DISK, WITH ALL UNDERLINING, STRIKE-THROUGHS AND HEADERS/FOOTERS TAKEN OUT, TO OUR OFFICE WHEN FINAL FILING THE RULE. THE DISK MUST BE ON A WORD PERFECT (5.1 OR 5.2 VERSION) OR WORD PERFECT COMPATIBLE COMPUTER SYSTEM 3 1/2" DOUBLE DENSITY DISK. STATE ON THE DISK THE FORMAT THE RULE IS IN AND THE TITLE IT IS FILED UNDER. THIS WILL ENABLE US TO ENTER YOUR RULES ON THE LEGISLATIVE DATA BASE. REMEMBER THE TEXT OF THE COMPUTER FILED RULE MUST BE IDENTICAL - WORD FOR WORD, COMMA FOR COMMA, WITH ALL UNDERLINING, STRIKE-THROUGHS AND HEADERS/FOOTERS TAKEN OUT, AS THE HARD COPY AUTHORIZED BY THE LEGISLATURE.**

After the final rule is entered into the legislative data base, the rule will be sent to the agency for review and proofing. Following confirmation or corrections, as the case may be, the Secretary of State shall submit to the agency a final version of the rule for their records.

If you have any questions or need any assistance, please do not hesitate to call our office.

Thank You
Administrative Law Division

SENATE BILL NO. 83

(By Senators Manchin, Anderson, Boley, Grubb and Macnaughtan)

[Introduced January 20, 1995; referred to the Committee on Agriculture; and then to the Committee on the Judiciary]

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61-4D

10 A BILL to amend and reenact section one, article nine, chapter
11 sixty-four of the code of West Virginia, one thousand nine
12 hundred thirty-one, as amended, relating to authorizing the
13 commissioner of agriculture to promulgate legislative rules
14 relating to the labeling of dairy products for rBST or rBGH.

15 Be it enacted by the Legislature of West Virginia:

16 That section one, article nine, chapter sixty-four of the
17 code of West Virginia, one thousand nine hundred thirty-one, as
18 amended, be amended and reenacted, to read as follows:

19 **ARTICLE 9. AUTHORIZATION FOR MISCELLANEOUS AGENCIES AND BOARDS**
20 **TO PROMULGATE LEGISLATIVE RULES.**

21 §64-9-1. Commissioner of agriculture.

22 (a) The legislative rules filed in the state register on the
23 sixth day of April, one thousand nine hundred eighty-three,

1 relating to the commissioner of agriculture (schedule of charges
2 for inspection services: fruit), are authorized.

3 (b) The legislative rules filed in the state register on the
4 third day of August, one thousand nine hundred eighty-three,
5 relating to the commissioner of agriculture (licensing of
6 auctioneers), are authorized.

7 (c) The legislative rules filed in the state register on the
8 eighth day of February, one thousand nine hundred eighty-four,
9 relating to the commissioner of agriculture (conduct of beef
10 industry self-improvement assessment program referendum), are
11 authorized.

12 (d) The legislative rules filed in the state register on the
13 fourth day of June, one thousand nine hundred eighty-four,
14 relating to the commissioner of agriculture (feeding untreated
15 garbage to swine), are authorized.

16 (e) The legislative rules filed in the state register on the
17 fourth day of June, one thousand nine hundred eighty-four,
18 relating to the commissioner of agriculture (registration,
19 taxation and control of dogs), are authorized.

20 (f) The legislative rules filed in the state register on the
21 first day of November, one thousand nine hundred eighty-four,
22 relating to the commissioner of agriculture (public markets), are
23 authorized.

24 (g) The legislative rules filed in the state register on the
25 tenth day of September, one thousand nine hundred eighty-four,

1 relating to the commissioner of agriculture (noxious weed rules),
2 are authorized.

3 (h) The legislative rules filed in the state register on the
4 fourth day of June, one thousand nine hundred eighty-four,
5 relating to the commissioner of agriculture (animal disease
6 control), are authorized.

7 (i) The legislative rules filed in the state register on the
8 fifth day of January, one thousand nine hundred eighty-four,
9 relating to the commissioner of agriculture (use of certain
10 picloram products), are authorized.

11 (j) The legislative rules filed in the state register on the
12 eighth day of March, one thousand nine hundred eighty-five,
13 relating to the commissioner of agriculture (increasing certain
14 fees by rules and regulations), are authorized.

15 (k) The legislative rules filed in the state register on the
16 thirteenth day of January, one thousand nine hundred eighty-six,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the thirty-first day of January,
20 one thousand nine hundred eighty-six, relating to the
21 commissioner of agriculture (licensing of livestock dealers),
22 are authorized.

23 (l) The legislative rules filed in the state register on the
24 eighteenth day of June, one thousand nine hundred eighty-six,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the fifth day of January, one
3 thousand nine hundred eighty-seven, relating to the commissioner
4 of agriculture (West Virginia pesticide use and application act),
5 are authorized.

6 (m) The legislative rules filed in the state register on the
7 eighteenth day of August, one thousand nine hundred eighty-six,
8 modified by the director of the division of forestry of the
9 department of agriculture to meet the objections of the
10 legislative rule-making review committee and refiled in the state
11 register on the fifth day of January, one thousand nine hundred
12 eighty-seven, relating to the director of the division of
13 forestry of the department of agriculture (ginseng), are
14 authorized.

15 (n) The legislative rules filed in the state register on the
16 tenth day of April, one thousand nine hundred eighty-seven,
17 relating to the commissioner of agriculture (schedule of charges
18 for inspection services: fruit), are authorized.

19 (o) The legislative rules filed in the state register on the
20 thirteenth day of August, one thousand nine hundred eighty-seven,
21 modified by the commissioner of agriculture to meet the
22 objections of the legislative rule-making review committee and
23 refiled in the state register on the eighth day of September, one
24 thousand nine hundred eighty-seven, relating to the commissioner
25 of agriculture (animal disease control), are authorized.

1 (p) The legislative rules filed in the state register on the
2 fifteenth day of September, one thousand nine hundred
3 eighty-eight, relating to the commissioner of agriculture (sale
4 and distribution of commercial fertilizer), are authorized.

5 (q) The legislative rules filed in the state register on the
6 fifteenth day of September, one thousand nine hundred
7 eighty-eight, modified by the commissioner of agriculture to meet
8 the objections of the legislative rule-making review committee
9 and refiled in the state register on the twenty-sixth day of
10 October, one thousand nine hundred eighty-eight, relating to the
11 commissioner of agriculture (animal disease control), are
12 authorized.

13 (r) The legislative rules filed in the state register on the
14 fifteenth day of May, one thousand nine hundred eighty-nine,
15 modified by the commissioner of agriculture to meet the
16 objections of the legislative rule-making review committee and
17 refiled in the state register on the twenty-first day of August,
18 one thousand nine hundred eighty-nine, relating to the
19 commissioner of agriculture (production of milk and cream for
20 manufacturing purposes), are authorized.

21 (s) The legislative rules filed in the state register on the
22 seventh day of August, one thousand nine hundred eighty-nine,
23 modified by the commissioner of agriculture to meet the
24 objections of the legislative rule-making review committee and
25 refiled in the state register on the twenty-third day of October,

1 one thousand nine hundred eighty-nine, relating to the
2 commissioner of agriculture (animal disease control), are
3 authorized.

4 (t) The legislative rules filed in the state register on the
5 tenth day of August, one thousand nine hundred ninety, modified
6 by the commissioner of agriculture to meet the objections of the
7 legislative rule-making review committee and refiled in the state
8 register on the fifth day of October, one thousand nine hundred
9 ninety, relating to the commissioner of agriculture (meat
10 inspection), are authorized.

11 (u) The legislative rules filed in the state register on the
12 tenth day of August, one thousand nine hundred ninety, modified
13 by the commissioner of agriculture to meet the objections of the
14 legislative rule-making review committee and refiled in the state
15 register on the third day of October, one thousand nine hundred
16 ninety, relating to the commissioner of agriculture (agricultural
17 liming materials), are authorized.

18 (v) The legislative rules filed in the state register on the
19 tenth day of August, one thousand nine hundred ninety, modified
20 by the commissioner of agriculture to meet the objections of the
21 legislative rule-making review committee and refiled in the state
22 register on the third day of October, one thousand nine hundred
23 ninety, relating to the commissioner of agriculture (public
24 markets), are authorized.

1 (w) The legislative rules filed in the state register on the
2 nineteenth day of September, one thousand nine hundred ninety,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the ninth day of November, one
6 thousand nine hundred ninety, relating to the commissioner of
7 agriculture (animal disease control), are authorized.

8 (x) The legislative rules filed in the state register on the
9 eighth day of August, one thousand nine hundred ninety-one,
10 modified by the commissioner of agriculture to meet the
11 objections of the legislative rule-making review committee and
12 refiled in the state register on the twenty-fourth day of
13 September, one thousand nine hundred ninety-one, relating to the
14 commissioner of agriculture (commercial feed), are authorized
15 with the amendments set forth below:

16 On page two, after subsection 3.3., by adding a new
17 subsection, designated subsection 3.4., to read as follows:

18 "3.4. The commissioner will not assess a tonnage fee on any
19 commercial feed or feed ingredients used in the manufacture of
20 poultry contract feed.";

21 On page five, after subsection 4.3.m., by adding a new
22 subsection, designated subsection 4.3.n., to read as follows:

23 "4.3.n. The commissioner will consider poultry contract feed
24 to be customer-formula feed.";

25 And,

1 On page eight, after subsection 5.5., by adding a new
2 subsection, designated subsection 5.6., to read as follows:

3 "5.6. Poultry contract feed labels shall conform to the
4 requirements of W. Va. Code §19-14-8(d), except that:

5 5.6.a. The name of the grower or feeder will substitute for
6 the requirements for the name of the purchaser; and,

7 5.6.b. The net weight (avoir dupois) of the commercial feed
8 and each feed ingredient used in the feed shall not be required
9 to be listed."

10 (y) The legislative rules filed in the state register on the
11 fourth day of June, one thousand nine hundred ninety-one,
12 modified by the commissioner of agriculture to meet the
13 objections of the legislative rule-making review committee and
14 refiled in the state register on the second day of August, one
15 thousand nine hundred ninety-one, relating to the commissioner
16 of agriculture (wood destroying insect treatment standards), are
17 authorized.

18 (z) The legislative rules filed in the state register on the
19 twentieth day of December, one thousand nine hundred ninety,
20 modified by the commissioner of agriculture to meet the
21 objections of the legislative rule-making review committee and
22 refiled in the state register on the thirtieth day of April, one
23 thousand nine hundred ninety-one, relating to the commissioner
24 of agriculture (fee structure for the pesticide control act of
25 1990), are authorized.

1 (aa) The legislative rules filed in the state register on
2 the eighth day of August, one thousand nine hundred ninety-one,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the twelfth day of November, one
6 thousand nine hundred ninety-one, relating to the commissioner of
7 agriculture (animal disease control), are authorized.

8 (bb) The legislative rules filed in the state register on
9 the eighth day of August, one thousand nine hundred ninety-one,
10 modified by the commissioner of agriculture to meet the
11 objections of the legislative rule-making review committee and
12 refiled in the state register on the tenth day of September, one
13 thousand nine hundred ninety-one, relating to the commissioner
14 of agriculture (West Virginia plant pest act), are authorized.

15 (cc) The legislative rules filed in the state register on the
16 twenty-sixth day of July, one thousand nine hundred ninety-one,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the sixteenth day of October,
20 one thousand nine hundred ninety-one, relating to the
21 commissioner of agriculture (licensing of pesticide businesses),
22 are authorized.

23 (dd) The legislative rules filed in the state register on the
24 eighth day of August, one thousand nine hundred ninety-one,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the second day of October, one
3 thousand nine hundred ninety-one, relating to the commissioner of
4 agriculture (certified pesticide applicators), are authorized.

5 (ee) The legislative rules filed in the state register on
6 the eighth day of August, one thousand nine hundred ninety-one,
7 modified by the commissioner of agriculture to meet the
8 objections of the legislative rule-making review committee and
9 refiled in the state register on the twenty-fourth day of
10 September, one thousand nine hundred ninety-one, relating to the
11 commissioner of agriculture (assessment of civil penalties and
12 procedures for consent agreements and negotiated settlements),
13 are authorized.

14 (ff) The legislative rules filed in the state register on
15 the eighth day of August, one thousand nine hundred ninety-one,
16 modified by the commissioner of agriculture to meet the
17 objections of the legislative rule-making review committee and
18 refiled in the state register on the twenty-fourth day of
19 September, one thousand nine hundred ninety-one, relating to the
20 commissioner of agriculture (aerial application of herbicides to
21 rights-of-way), are authorized.

22 (gg) The legislative rules filed in the state register on
23 the eighth day of August, one thousand nine hundred ninety-one,
24 modified by the commissioner of agriculture to meet the
25 objections of the legislative rule-making review committee and

1 refiled in the state register on the twenty-fourth day of
2 September, one thousand nine hundred ninety-one, relating to the
3 commissioner of agriculture (frozen desserts and imitation frozen
4 desserts), are authorized, with the amendment set forth below:

5 On page twelve, by striking out all of section 15 and
6 substituting a new section 15, to read as follows:

7 "61-4B-15. Enforcement policy.

8 15.1. The commissioner may assess a violation of W. Va. Code
9 §19-11B-1 et seq. or of these rules against the manufacturer of
10 product and/or the distributor of the mix used to manufacture
11 the product.

12 15.2. The commissioner will assess any violations of W. Va.
13 Code §19-11B-1 et seq. or of this rule to the distributor for
14 mix sampled from unopened containers. The company will not be
15 assessed additional cumulative notices of violations until the
16 commissioner has determined that the firm has had adequate notice
17 of the previous notice, generally 10 days from the mailing of the
18 notice of violation.

19 15.3. Whenever one of the last five consecutive official
20 product sample(s) taken on separate days within a one year period
21 are found to be adulterated or misbranded, the commissioner shall
22 send a written "First Notice" to the manufacturer or distributor
23 whichever is appropriate. This notice shall notify the
24 manufacturer or distributor of the violation of W. Va. Code

1 §19-11B-1 et seq. or of these rules and the enforcement policy
2 established by this section of the rule.

3 15.4. Whenever two of the last five consecutive official
4 product sample(s) taken on separate days within a one year period
5 are found to be adulterated or misbranded the commissioner shall
6 send a written "Second Notice" to the manufacturer or distributor
7 whichever is appropriate.

8 15.4.a. The commissioner shall collect additional official
9 product sample(s) within 21 days of the sending of a Second
10 Notice to the manufacturer or distributor, but shall not collect
11 product samples before the lapse of 7 days from the sending of a
12 Second Notice.

13 15.5. Whenever three of the last five consecutive official
14 product sample(s) taken on separate days within a one year period
15 are found to be adulterated or misbranded the commissioner shall
16 send a written "Third Notice" to the manufacturer or distributor
17 whichever is appropriate.

18 15.5.a. The commissioner shall collect additional official
19 product sample(s) within 21 days of the sending of the Third
20 Notice to the manufacturer or distributor, but shall not collect
21 additional product samples before the lapse of 7 days from the
22 date of sending of the notice.

23 15.6. The commissioner will issue a "Shut-down Order" for a
24 period of 24 hours to a manufacturer or distributor when the
25 record of the firm indicates that effective action has not been

1 taken to correct the causes of the violations, for instance when
2 three out of the last five samples from the same machine are
3 violative. The "Shut-down Order" will normally be issued with
4 the "Third Notice". The "Shut-down Order" will give the reasons
5 for the order, state the portion of the manufacturing or
6 distributing operation that is prohibited from operating while
7 the order is in effect, give conditions of the order, state the
8 length of time that the Shut-down Order will be in effect and
9 specify a time and place for a hearing to be held in this matter.
10 Except that in the case where the public health, safety or
11 welfare is at risk, the commissioner will issue an immediate
12 Shut-down Order and give notice to the manufacturer or
13 distributor under the provisions of subdivision 15.6.a. of this
14 rule.

15 15.6.a. The commissioner will issue an immediate Shut-down
16 Order without giving the manufacturer or distributor the
17 opportunity to be heard where there is a hazard to the public
18 health, safety or welfare. In these cases, the manufacturer or
19 distributor will be given the opportunity to request a hearing
20 before the commissioner after the notification of the order is
21 received by the manufacturer or distributor. All Shut-down
22 Orders issued due to noncompliance with subdivision 8.1.c.,
23 8.1.d. or 8.1.g. of this rule are considered to involve a risk
24 to the public health, safety or welfare.

1 15.6.b. The manufacturer or distributor will be responsible
2 for causing all operations covered by the Shut-down Order to
3 cease and follow all other conditions of the order. At the end
4 of the period of the order, the manufacturer or distributor may
5 resume operations without further action by the commissioner.

6 15.7. If after a Shut-down Order has been issued the
7 commissioner finds that effective corrective action has not been
8 taken, he may issue a suspension of the Frozen Desserts
9 Manufacturer Permit. The suspension shall state the time that
10 the suspension will become effective, give the reasons for the
11 suspension and specify a time and place for a hearing to be held
12 in this matter. Except that in the case of a summary suspension
13 the commissioner will give the manufacturer the opportunity to
14 request a hearing in this matter subsequent to the notification
15 of the suspension.

16 15.7.a. All suspensions due to nonconformance to subdivision
17 8.1.c., 8.1.d. or 8.1.g. of this rule are summary suspensions.

18 15.7.b. A suspension of the Frozen Desserts Manufacturer
19 Permit remains in effect until the manufacturer submits and the
20 commissioner accepts a written plan of correction and a request
21 for a reinstatement of the permit.

22 15.7.c. The commissioner has seven days from the date of
23 receipt of this application to respond to a suspension in the
24 case of violations of subdivision 8.1.c., 8.1.d. or 8.1.g. of
25 this rule and fourteen days to respond for all other violations

1 of W. Va. Code §19-11B-1 et seq. or these rules. The
2 commissioner will accept or deny the application for a
3 reinstatement of the permit and will give the terms and
4 conditions under which the permit will be reinstated.

5 15.8. If the commissioner finds that after the firm has
6 resumed production following a suspension of their Frozen
7 Desserts Manufacturer Permit that effective corrective action
8 has not been taken, then the commissioner will hold a hearing to
9 determine if the Frozen Desserts Manufacturer Permit should be
10 revoked.

11 15.9. Persons who manufacture a product on an intermittent or
12 infrequent basis, so that the standard enforcement policy cannot
13 apply, will enter into a consent agreement with the commissioner
14 for correction of all items found to be not in conformance with
15 W. Va. Code §19-11B-1 et seq. or these rules.

16 15.10. Whenever an antibiotic or pesticide residue test is
17 found to be above tolerance, the commissioner shall notify the
18 manufacturer and/or distributor immediately of this fact and
19 shall begin an investigation to determine the cause of the
20 residue. The commissioner shall require that any person found
21 to be responsible for the residue shall correct the cause of the
22 residue prior to the resumption of the manufacturing or
23 distribution of the product.

24 15.11. A person who performs a recall by voluntarily removing
25 product from sale and distribution in an effective manner so as

1 to limit the potential harm to the health and well-being of the
2 public may be eligible for exemptions from the normal enforcement
3 policy. The commissioner shall consider the facts of each case
4 when making a decision on an exemption.

5 15.12. The commissioner may apply the enforcement policy in a
6 liberal manner in cases where all official product sample results
7 that involve a product in the form actually sold to the public
8 have been found to be in conformance with W. Va. Code §19-11B-1
9 et seq. or these rules.

10 15.13. The commissioner may suspend the standard enforcement
11 policy in cases where such action is necessary to protect the
12 public health, safety or welfare.

13 15.14. Resamples will only be taken from machines that were
14 shown to be producing violative product the previous visit,
15 except for resamples needed to check that the nonviolative status
16 is being maintained according to the following schedule:

17 15.14.a. After a first notice and one nonviolative sample,
18 resamples will be taken between 5 to 6 months after the
19 nonviolative sample.

20 15.14.b. After a second notice and one nonviolative sample,
21 resamples will be taken between 3-4 months after the nonviolative
22 sample.

23 15.14.c. Other resamples may be considered necessary to
24 determine that the nonviolative status is being maintained."

1 (hh) The legislative rules filed in the state register on
2 the eighth day of August, one thousand nine hundred ninety-one,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the twenty-fourth day of
6 September, one thousand nine hundred ninety-one, relating to the
7 commissioner of agriculture (West Virginia apiary law of 1991),
8 are authorized.

9 (ii) The legislative rules filed in the state register on
10 the eighth day of August, one thousand nine hundred ninety-one,
11 modified by the commissioner of agriculture to meet the
12 objections of the legislative rule-making review committee and
13 refiled in the state register on the twenty-fourth day of
14 September, one thousand nine hundred ninety-one, relating to the
15 commissioner of agriculture (disposal of dead poultry), are
16 authorized with the amendments set forth below:

17 On page two, section two, by adding a new subsection to read
18 as follows:

19 "2.8 'Disposal pit' means an opening dug in the ground to a
20 minimum depth of six feet, containing a minimum capacity of 150
21 cubic feet, covered with a minimum of 12 inches of dirt, and
22 provided with one or more openings for the introduction of
23 poultry. The openings shall be a minimum size of eight inches
24 square and equipped with tight lids. A disposal pit shall be
25 located in a site which will prevent contamination of the

1 groundwater or the surface water. This site should conform to
2 the standards established in this rule."

3 On page two, subsection 3.1 after the word "incinerator," by
4 adding the words "disposal pit,"

5 And,

6 On page two, by adding a new section, designated section 4,
7 to read as follows:

8 "§61-1C-4. Standards for Site Location for Disposal Pits.

9 4.1 No part of a disposal pit system shall be located in a
10 poorly drained or filled area, or in any area where seasonal
11 flooding occurs.

12 4.2 No part of a disposal pit system shall be located within
13 10 feet of a building, foundation or property line.

14 4.3 No part of a disposal pit system shall be located within
15 50 feet of a public water supply line or within 10 feet of a
16 private water supply system.

17 4.4 A disposal pit shall be located at least 50 feet from a
18 private well or groundwater supply.

19 4.5 There shall be a minimum of three feet between the bottom
20 of a disposal pit and seasonal groundwater or rock, shale or any
21 other impermeable layer.

22 4.6 The evaluation of the site for installation of a disposal
23 pit shall be based upon percolation test results. Percolation
24 tests shall be performed in the following manner:

1 4.6.1 Location - At least two holes shall be placed over the
2 selected site. The results of these two test holes will be
3 averaged.

4 4.6.2 Holes shall be dug or bored from six to eight inches
5 in diameter at the site where the disposal pit will be installed.
6 The holes should be at least 24 inches in depth.

7 4.6.3 The bottom and sides of the holes shall be scratched
8 with a sharp pointed instrument or wire brush to remove any
9 smeared soil surfaces which interfere with the absorption of
10 water into the soil.

11 4.6.4 Loose dirt shall be removed from the bottom of the test
12 holes and two inches of coarse sand or fine gravel shall be
13 placed into the holes to prevent sealing.

14 4.6.5 An eight or ten penny nail shall be placed in the wall
15 of each hole exactly six inches above the level of sand or
16 gravel.

17 4.6.6 The test hole shall be completely filled with water to
18 ground level. Water in the hole shall be kept to a depth of at
19 least 12 inches for a minimum period of four hours before
20 beginning the percolation rate measurement.

21 4.7 Percolation rate measurement - Upon completion of the
22 above, the water depth in the holes shall be adjusted to the
23 level of the nail. The number of minutes it takes for this six
24 inches of water (all the water) to be absorbed into the soil
25 shall be accurately determined. This time in minutes, divided by

1 six, gives the rate of fall per inch. The average rate of fall
2 must be between five minutes and 60 minutes."

3 (jj) The legislative rules filed in the state register on
4 the eighth day of August, one thousand nine hundred ninety-one,
5 modified by the commissioner of agriculture to meet the
6 objections of the legislative rule-making review committee and
7 refiled in the state register on the twenty-fourth day of
8 September, one thousand nine hundred ninety-one, relating to the
9 commissioner of agriculture (licensing of livestock dealers), are
10 authorized.

11 (kk) The legislative rules filed in the state register on the
12 fifteenth day of September, one thousand nine hundred ninety-two,
13 modified by the commissioner of agriculture to meet the
14 objections of the legislative rule-making review committee and
15 refiled in the state register on the eighteenth day of November,
16 one thousand nine hundred ninety-two, relating to the
17 commissioner of agriculture (commercial feed), are authorized.

18 (ll) The legislative rules filed in the state register on the
19 fifteenth day of September, one thousand nine hundred ninety-two,
20 modified by the commissioner of agriculture to meet the
21 objections of the legislative rule-making review committee and
22 refiled in the state register on the nineteenth day of February,
23 one thousand nine hundred ninety-three, relating to the
24 commissioner of agriculture (general groundwater protection rules
25 for fertilizers and manures), are authorized.

1 (mm) The legislative rules filed in the state register on the
2 fifteenth day of September, one thousand nine hundred ninety-two,
3 modified by the commissioner of agriculture to meet the
4 objections of the legislative rule-making review committee and
5 refiled in the state register on the nineteenth day of February,
6 one thousand nine hundred ninety-three, relating to the
7 commissioner of agriculture (primary and secondary containment of
8 fertilizers), are authorized with the amendments set forth below:

9 "On page five, by striking out all of subsection 5.5 and
10 inserting in lieu thereof a new subsection 5.5 to read as
11 follows: 'The operator or his licensed representative shall sign
12 and date each application under oath.'; and

13 On page eighteen, by striking out all of subsection 14.1 and
14 inserting in lieu thereof a new subsection 14.1 to read as
15 follows:

16 'All moneys for the purpose of the enforcement and
17 administration of this rule shall come from general revenue funds
18 appropriated by the legislature for that purpose. The net
19 proceeds of civil penalties collected pursuant to W. Va. Code
20 §20-5M-10a or any civil administrative penalties collected
21 pursuant to W. Va. Code §20-5M-10c will be deposited in the
22 groundwater remediation fund established in W. Va. Code §20-5M-1.
23 et seq.'".

24 (nn) The legislative rules filed in the state register on the
25 fifteenth day of September, one thousand nine hundred ninety-two,

1 modified by the commissioner of agriculture to meet the
2 objections of the legislative rule-making review committee and
3 refiled in the state register on the nineteenth day of February,
4 one thousand nine hundred ninety-three, relating to the
5 commissioner of agriculture (general groundwater protection rules
6 for pesticides), are authorized.

7 (oo) The legislative rules filed in the state register on the
8 fifteenth day of September, one thousand nine hundred ninety-two,
9 modified by the commissioner of agriculture to meet the
10 objections of the legislative rule-making review committee and
11 refiled in the state register on the nineteenth day of February,
12 one thousand nine hundred ninety-three, relating to the
13 commissioner of agriculture (bulk pesticide operational rules),
14 are authorized.

15 (pp) The legislative rules filed in the state register on the
16 fifteenth day of September, one thousand nine hundred ninety-two,
17 modified by the commissioner of agriculture to meet the
18 objections of the legislative rule-making review committee and
19 refiled in the state register on the nineteenth day of February,
20 one thousand nine hundred ninety-three, relating to the
21 commissioner of agriculture (non-bulk pesticide rules for
22 permanent operational areas), are authorized.

23 (qq) The legislative rules filed in the state register on the
24 sixteenth day of April, one thousand nine hundred ninety-three,
25 modified by the commissioner of agriculture to meet the

1 objections of the legislative rule-making review committee and
2 refiled in the state register on the twenty-sixth day of July,
3 one thousand nine hundred ninety-three, relating to the
4 commissioner of agriculture (animal disease control), are
5 authorized.

6 (rr) The legislative rules filed in the state register on
7 the third day of August, one thousand nine hundred ninety-three,
8 modified by the commissioner of agriculture to meet the
9 objections of the legislative rule-making review committee and
10 refiled in the state register on the eighth day of October, one
11 thousand nine hundred ninety-three, relating to the commissioner
12 of agriculture (auctioneers), are authorized.

13 (ss) The legislative rules filed in the state register on the
14 fifteenth day of August, one thousand nine hundred ninety-four,
15 modified by the commissioner of agriculture to meet the
16 objections of the legislative rule-making review committee and
17 refiled in the state register on the fourteenth day of October,
18 one thousand nine hundred ninety-four, relating to the
19 commissioner of agriculture (labeling of dairy products for rBST
20 or rBGH), are authorized.

21

22 NOTE: The purpose of this bill is to authorize the
23 Commissioner of Agriculture to promulgate legislative rules
24 relating to the labeling of dairy products for rBST or rBGH.

25

26 Strike-throughs indicate language that would be stricken from
27 the present law, and underscoring indicates new language that
28 would be added.



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MARY P. RATLIFF
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Director, Administrative Law

DONALD R. WILKES
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(Plus all the volunteer help we can get)

FAX: (304) 558-0900

TO: Robert G. Morris

AGENCY: Agriculture

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: July 21, 1995

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 4D TITLE: 61 Agriculture

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: [Signature]

TITLE OF PERSON SIGNING: Assistant Director of Regulatory Protection

DATE: July 27, 1995

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.