

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 496

BY SENATORS SYPOLT, SMITH, AND MARONEY

[Introduced January 31, 2019; Referred
to the Committee on Government Organization]

1 A BILL to repeal §16-7-5a of the Code of West Virginia, 1931, as amended; to amend and reenact
 2 §16-7-5 of said code; and to amend said code by adding thereto a new article, designated
 3 §19-11E-1, §19-11E-2, §19-11E-3, §19-11E-4, §19-11E-5, §19-11E-6, §19-11E-7, §19-
 4 11E-8, §19-11E-9, §19-11E-10, §19-11E-11, §19-11E-12, §19-11E-13, §19-11E-14, §19-
 5 11E-15, §19-11E-16, and §19-11E-17, all relating generally to transferring authority to
 6 regulate milk from the Department of Health and Human Resources to the Department of
 7 Agriculture.

Be it enacted by the Legislature of West Virginia:

CHAPTER 16. PUBLIC HEALTH.

ARTICLE 7. PURE FOOD AND DRUGS.

§16-7-5. Regulations by State board of health as to milk and milk products.

1 The West Virginia board of health shall adopt regulations to provide clean and safe milk
 2 and fresh milk products, and, when promulgated, these regulations shall be the minimum
 3 requirements to be enforced by local health authorities throughout the state: *Provided*, That
 4 except in any case where the milk or milk product involved creates, or appears to create, an
 5 imminent hazard to the public health, or in any case of a willful refusal to permit an authorized
 6 inspection, that any regulations promulgated by the board of health shall provide that prior to any
 7 suspension or revocation of a permit issued to any dairy farm, milk plant, receiving station, transfer
 8 station and distribution station, the holder of such permit shall be served with a written notice to
 9 suspend or revoke such permit, which notice shall specify with particularity the violations in
 10 question and afford the holder reasonable opportunity to correct such violations: *Provided*,
 11 *however*, That the proposed order to deny, suspend or revoke a permit ~~shall~~ may not be effective
 12 until notice in writing has been delivered to the holder of such permit who shall have 48 hours
 13 therefrom in which to make application to the county health officer for a hearing thereon. The
 14 county health officer shall, within 72 hours of receipt of such application, give a notice in writing

15 to the holder of such permit setting forth the time and place of the hearing and proceed to a
 16 hearing to ascertain the facts of such violation and upon evidence presented at ~~such~~ the hearing
 17 shall affirm, modify or rescind the proposed order to suspend. A copy of ~~such~~ the regulations shall
 18 be furnished to the commissioner of agriculture for his or her guidance in performing any duties
 19 with relation to milk and milk products imposed on him or her by law.

20 Effective July 1, 2019, the Board of Health may no longer adopt regulations to provide
 21 clean and safe milk and fresh milk products. Effective July 1, 2019, all authority to regulate milk
 22 and milk products shall be transferred to the Department of Agriculture.

§16-7-5a. Joint Task Force on Milk Rules and Regulations.

1 **[Repealed.]**

CHAPTER 19. AGRICULTURE.

ARTICLE 11E. MILK AND MILK PRODUCTS.

§19-11E-1. Purpose and scope.

1 In 2018, the Legislature created the Joint Task Force on Milk Rules and Regulations in
 2 response to concerns about current regulation of the dairy industry in West Virginia. The Joint
 3 Task Force heard from, and collected data and other information from, dairy farmers, industry
 4 representatives, and regulators from West Virginia, other states, and the federal government.
 5 Following its review of the collected information, the Joint Task Force concluded that potential
 6 benefits and economies of scale would best be realized by transferring some or all authority to
 7 promulgate milk rules and regulations from the Department of Health and Human Resources to
 8 the Department of Agriculture.

9 It is the purpose of this article to establish the authority of the West Virginia Department
 10 of Agriculture to regulate milk and milk products within the state. It is the further purpose of this
 11 article to ensure that milk and milk products produced, manufactured, or sold in West Virginia are
 12 safe, while also ensuring that regulation is done in such a way to foster the stability and growth of

13 the dairy industry in West Virginia.

14 It is the intent of the Legislature that this article regulate the production, transportation,
15 and sale of milk and milk products; confer powers and impose duties upon the Commissioner of
16 Agriculture; prescribe penalties; and provide for the enforcement thereof.

17 Furthermore, except where otherwise indicated, it is the intent of the Legislature that this
18 article substantially conform with the federal regulations promulgated under the authority of the
19 United States Secretary of Health and Human Services in order to provide for the movement of
20 milk and milk products in interstate and intrastate commerce with a minimum of economic barriers.

§19-11E-2. Definitions.

1 “Adulterated” means milk or the products manufactured from milk meeting one or several
2 of the conditions listed in §19-11E-7 of this code.

3 “Clean” means the condition where no residue remains on a surface that will, or is likely
4 to, cause adulteration or other contamination.

5 “Commissioner” means the Commissioner of Agriculture of the State of West Virginia or
6 his or her duly authorized agent.

7 “Distribute” means the act of transporting, holding for sale, offering for sale, selling,
8 bartering, parceling out, giving, or otherwise disposing of milk.

9 “Embargo” means an order to withdraw milk from distribution. An embargo shall detain
10 such milk or milk product and prohibit the transportation or distribution of milk as provided in §19-
11 11E-8 of this code.

12 “Manufacture” means pasteurizing, ultrapasteurizing, formulating or compounding milk or
13 packaging or preparing said product for distribution.

14 “Milk” means the lacteal secretion, practically free from colostrum, obtained by the
15 complete milking of one or more healthy mammals. The term may include the components of milk,
16 including cream.

17 “Milk producer” means any person who operates a dairy farm and who provides, sells, or

18 offers milk for sale.

19 “Person” means any individual, partnership, association, fiduciary, firm, company,
20 corporation, or any organized group of persons whether incorporated or not. The term “person”
21 extends to the agents, servants, officers, and employees of the person.

22 “Receiving station” means any place, premises, or establishment where milk in
23 unpackaged form is received, collected, handled, stored, or cooled and prepared for further
24 transporting.

25 “Transport” means the movement of milk or milk products from one facility to another in a
26 manner that maintains adequate temperatures and protects the product from freezing
27 temperatures, exposure to the sun, and from sources of contamination.

28 “Transfer station” means any place, premises or establishment where milk is transferred
29 directly from one transport tank to another.

30 “Transport tank” means any tank which is used for the pickup of milk or the transportation
31 of milk to or from any milk producer, dairy plant, receiving station, or transfer station.

§19-11E-3. Department to regulate milk and milk products.

1 Effective July 1, 2019, the Department of Agriculture shall be responsible for regulating all
2 matters addressed in the Grade “A” Pasteurized Milk Ordinance issued by the federal Food and
3 Drug Administration. This includes, but is not limited to, inspection of milk production facilities,
4 inspection of facilities making single-use containers for dairy products, collection and testing of
5 milk samples, and training and certification of inspectors.

§19-11E-4. Milk producer permits.

1 (a) A person may not sell milk, milk products or manufactured dairy products within this
2 state without having a current, valid permit from the Commissioner of Agriculture.

3 (b) Separate permitting. A separate permit shall be obtained for each milk plant, milk
4 producer, milk distributor, receiving station, transfer station, bulk tank unit and milk tank truck
5 cleaning facility.

6 (c) Permits are not transferable with respect to persons or locations.

7 (d) Permits shall be applied for at least 30 days before the date that the current permit
8 expires or within 30 days of the date that the person intends to engage in business. Applications
9 for all permits shall be made on forms supplied by the commissioner and provide such information
10 as may be considered reasonably necessary by the commissioner. All applications shall be
11 accompanied by an application fee. A penalty shall be added to all permits that are not applied
12 for or renewed within the time limits set forth in this subsection.

13 (e) Permits shall be posted prominently at the place of operation.

14 (f) Requirements for initial issuance of permit. Within 30 days of receiving a complete
15 application for an initial permit, the commissioner will inspect the applicant's operation to
16 determine whether it meets the standards set forth by this code and rules promulgated pursuant
17 thereto that would be applicable if the applicant received the permit applied for. If the applicant
18 satisfies those requirements, the commissioner shall issue the permit.

19 (g) Permits shall be valid for one year.

§19-11E-5. Licenses.

1 (a) Licenses shall be issued by the commissioner to certified inspectors of milk production
2 facilities. Licenses are not transferable.

3 (b) Applications for licenses shall be made on forms supplied by the commissioner and
4 shall provide such information as may be considered reasonably necessary by the commissioner
5 for the administration of this article. Applications for licensure shall be accompanied by a fee
6 prescribed by the commissioner.

7 (c) Licenses shall expire on June 30th following the date of issue. License renewals shall
8 be applied for at least 15 days previous to the date when the current license expires. The
9 commissioner may assess a penalty for licenses that are not applied for or renewed within this
10 time limit.

§19-11E-6. Labeling.

1 (a) All packages of milk or milk products shall have a label upon or affixed to the package.
 2 The label shall be legible and of a print size and style easily readable by the ordinary citizen. The
 3 information required in this section shall be on each label and shall be stated in English.

4 (b) The label shall contain the following information:

5 (1) The name of the product;

6 (2) The quantity of the contents;

7 (3) The name and address of the manufacturer, packer or distributor: *Provided*, That the
 8 manufacturer’s plant code or name and address shall always appear on the label for Grade “A”
 9 products; and

10 (4) Such other information as the commissioner shall require by rule.

§19-11E-7. Adulteration.

1 Any milk or any milk products are considered adulterated within the meaning of this article
 2 if:

3 (1) They bear or contain any poisonous or deleterious substance or compound in a
 4 quantity which may render it injurious to health;

5 (2) They bear or contain any added poisonous or deleterious substance for which no safe
 6 tolerance has been established by state or federal law or regulation or which is found in the
 7 product in excess of an established tolerance;

8 (3) They are or have been produced, transported, or held under unsanitary conditions;

9 (4) They contain any substance added thereto so as to make them appear better or of a
 10 greater value than they are; or

11 (5) They meet or have met other conditions of adulteration as established by rule.

§19-11E-8. Authority and duties of the commissioner.

1 The commissioner has the power and duty to:

2 (1) Propose rules for legislative approval in accordance with §29A-3-1 *et seq.* of this code,
 3 including adopting with any necessary modifications the Grade “A” Pasteurized Milk Ordinance

4 promulgated by the Food and Drug Administration;

5 (2) Adopt, promulgate, and enforce, other rules for legislative approval in accordance with
6 §29A-3-1 et seq. of this code, as necessary to carry out the purpose of this article;

7 (3) Have access to and enter at all reasonable times all places where frozen desserts or
8 imitation frozen desserts are manufactured, stored, held, transported, distributed or used in the
9 state and where records, papers or documents relating to these transactions are kept;

10 (4) Inspect and photograph all places where milk is manufactured, packaged, stored, held,
11 transported or distributed; inspect, audit and copy records and papers relating to the
12 manufacturing, distribution, sampling, testing and sale of milk; examine measuring and testing
13 apparatus; and examine equipment used in manufacturing and transportation of milk;

14 (5) Sample milk, including, but not limited to, ingredients and packages that are used in
15 the manufacture of these products and may open any package containing or believed to contain
16 any milk or milk product or an ingredient to be used in the manufacture of milk or a milk product
17 for the purpose of inspecting and sampling;

18 (6) Issue, suspend, revoke or deny permits;

19 (7) Collect fees and expend moneys under the terms of this article;

20 (8) Collect evidence, including samples, of the condition of equipment, holding tanks,
21 storage rooms and vehicles used, or intended to be used, in the processing, packaging,
22 transporting or holding of milk or milk products;

23 (9) Examine the labels and labeling of milk and milk products;

24 (10) Issue embargoes for any milk or milk product which is or is believed to be adulterated,
25 misbranded or that is not in compliance with this article and to cause the manufacturing and
26 distributing of same to cease: *Provided*, That nothing in this article may be construed as requiring
27 the commissioner to issue embargoes for minor violations of this article when he or she believes
28 that a written notice of violation will serve the public interest.

29 (A) When an embargo is issued, the commissioner shall affix to such product or

30 manufacturing device in an appropriate manner a tag or other marking giving warning that such
31 product is under embargo.

32 (B) The commissioner shall give written notice to the custodian of the product or process
33 under embargo describing the violation and stating that the product is prohibited from being sold,
34 offered for sale, exposed for sale or distributed and is ordered to be held on the premises and,
35 further, that all manufacturing processes for this product shall cease until the embargo is released.
36 This notice shall notify the custodian of the right to request an immediate hearing under the rules
37 adopted by the commissioner.

38 (C) The commissioner shall take action to seize and condemn any product that cannot be
39 brought into compliance with this article and the rules issued under same within 90 days of notice
40 to the custodian of the product.

41 (D) The commissioner may issue an embargo against a perishable product, even if the
42 practical result is to bring about the involuntary disposal of the product. The commissioner shall
43 exercise this power using all reasonable means to determine if the product is adulterated or
44 otherwise not in compliance with this article in as short a time frame as possible and shall promptly
45 lift the embargo order if the product is found to be in compliance with this article;

46 (11) Approve sampling and testing methods, and evaluate and approve official
47 laboratories;

48 (12) Obtain from any state court an order directing any person to submit to inspection and
49 sampling subsequent to the refusal of any person to allow inspection and sampling;

50 (13) Conduct hearings as provided by this article; and

51 (14) Assess civil penalties and refer violations to a court of competent jurisdiction;

52 Provided, That the commissioner is not required to report for prosecution minor violations of the
53 article when he or she believes that the public interest will be best served by a suitable notice in
54 writing.

§19-11E-9. Prohibited acts.

1 No person may:

2 (a) Have in his or her possession with the intent to sell, transport, or manufacture any milk
3 which is adulterated within the meaning of this article.

4 (b) Interfere with or prohibit the commissioner from performing the duties of his or her
5 office.

6 (c) Fail to comply with the provisions of an embargo order issued under this article.

7 (d) Fail to comply with the provisions of a revocation, suspension or denial order issued
8 under this article.

9 (e) While operating in any official capacity, may obtain any information under the
10 provisions of this article that would be considered trade secrets regarding the quality, source and
11 disposition of milk, may use this information to his or her own personal gain.

12 (f) Sell milk or milk products, where required, without a valid permit as required by the
13 provisions of this article.

14 (g) Conduct inspections of milk production facilities for the purpose of certifying
15 compliance with this article without a valid inspector license, and may not perform those duties in
16 a dishonest or incompetent manner, or falsify the records thereof.

17 (h) Sell, offer for sale or expose for sale any milk that is from a herd that does not meet
18 the requirements for animal health as set by rule under this article.

19 (i) Represent an imitation dairy product to be a milk product.

20 (j) Conduct a test to determine the identity, quality, purity, grade, or quantity of a dairy
21 product in a manner that is not in accordance with the PMO.

22 (k) Alter or destroy the results of a test conducted to determine the identity, quality, purity,
23 grade, or quantity of a dairy product.

§19-11E-10. Suspension, revocation, or denial of permits or licenses.

1 (a) The commissioner may deny any application for a permit, license or certificate
2 whenever the permit, license or certificate has been applied for fraudulently, the applicant has

3 grossly interfered with the duties of the commissioner, the applicant is determined to be not in
4 compliance with or not able to comply with this article, or the applicant has not otherwise satisfied
5 the requirements of this article.

6 (b) The commissioner may suspend a permit, license or certificate whenever a health
7 hazard exists, the permit, license, or certificate has been obtained fraudulently, the holder has
8 grossly interfered with the duties of the commissioner or it is determined that the permit, license
9 or certificate holder is dishonest, deceitful, incompetent or not in compliance with or is unable to
10 comply with this article. A person whose permit, license or certificate has been suspended shall
11 discontinue operations covered by the permit, license or certificate during the period of the
12 suspension. The commissioner may issue a summary suspension in cases where violations of
13 this article constitute a hazard to the public health, safety or welfare where the public interest
14 requires immediate action.

15 (1) Except for summary suspensions, the commissioner or his or her designee shall give
16 written notice to the person(s) affected by the pending suspension, stating that he or she
17 contemplates suspension of the permit, license or certificate and giving reasons therefor. The
18 suspension notice shall appoint a time and place for hearing and shall be mailed by certified mail
19 to the business address of the permit, license, or certificate holder at least 10 days before the
20 date set for the hearing. The commissioner shall review the evidence presented at the hearing
21 prior to issuing his decision.

22 (2) All summary suspensions shall be followed by a notice of suspension, the reasons
23 therefor, and an opportunity for a hearing in accordance with this article.

24 (3) At the end of the period of suspension, the permit, license or certificate holder may
25 resume operations without reapplication for a permit, license or certificate.

26 (c) The commissioner may revoke any permit, license or certificate issued under this
27 article whenever a health hazard exists, the permit, license or certificate has been obtained
28 fraudulently, the holder has grossly interfered with the duties of the commissioner or it is

29 determined that the holder is dishonest, deceitful, incompetent or not in compliance with or is
30 unable to comply with this article. Any person whose permit, license or certificate has been
31 revoked shall immediately discontinue all operations covered under the permit, license or
32 certificate.

33 (1) Before revoking any permit, license or certificate, the commissioner shall give written
34 notice to the persons affected, stating that the revocation of the permit, license or certificate is
35 being contemplated and giving reasons therefor. The revocation notice shall appoint a time and
36 place for hearing and shall be mailed by certified mail to the business address of the permit,
37 license or certificate holder at least 10 days before the date set for the hearing. The commissioner
38 shall review the evidence presented at the hearing prior to issuing his decision.

39 (2) At the end of the period of revocation a new permit, license or certificate may not be
40 issued without the filing of an application, payment of the required fee and compliance with all
41 conditions that the commissioner shall require for the reissuing of such permit, license or
42 certificate.

43 (d) Whenever the commissioner suspends or revokes any permit, license, or certificate
44 based on a health hazard, he or she shall contact the county health officer, the Bureau for Public
45 Health, and the Federal Food and Drug Administration for the county in which the health hazard
46 exists.

§19-11E-11. Hearings and appeals.

1 (a) Any person aggrieved by any action taken under this article shall have the opportunity
2 for a hearing before the commissioner under the rules promulgated by the commissioner.

3 (b) Hearings shall be conducted according to procedures set forth by rule.

4 (c) All the testimony and evidence at a hearing shall be recorded by mechanical means,
5 which may include the use of tape recordings. The mechanical record shall be maintained for 90
6 days from the date of the hearing and a transcript shall be made available to the aggrieved party.

7 (d) Any party who feels aggrieved of the suspension, revocation or denial order may

8 appeal within 60 days to the circuit court of the county in which the person's principal place of
9 business is located.

§19-11E-12. Criminal penalties; civil penalties; negotiated agreements.

1 (a) Any person violating any provision of this article or rules adopted hereunder is guilty of
2 a misdemeanor and, upon conviction thereof, shall be fined not less than \$100 nor more than
3 \$500 for the first offense, and for the second or subsequent offense shall be fined not less than
4 \$500 nor more than \$1,000, or confined in jail not more than six months, or both fined and
5 confined. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of
6 this article.

7 (b) Any person violating a provision of this article or rules adopted hereunder may be
8 assessed a civil penalty by the commissioner. In determining the amount of any civil penalty, the
9 commissioner shall give due consideration to the history of previous violations of any person, the
10 seriousness of the violation, including any irreparable harm to the environment, any hazards to
11 the health and safety of the public and any economic damages to the public and the demonstrated
12 good faith of any person charged in attempting to achieve compliance with this article before and
13 after written notification of the violation.

14 (1) The commissioner may assess a civil penalty of up to \$1,000 for any violation.

15 (2) The civil penalty is payable to the State of West Virginia and is collectible in any manner
16 now or hereafter provided for collection of debt. If any person liable to pay the civil penalty neglects
17 or refuses to pay the same, the amount of the civil penalty, together with interest at 10 percent, is
18 a lien in favor of the State of West Virginia upon the property, both real and personal, of such a
19 person after the same has been entered and docketed to record in the county where the property
20 is situated. The clerk of the county, upon receipt of the certified copy of the lien, shall enter it to
21 record without requiring the payment of costs as a condition precedent to recording.

22 (c) Notwithstanding any other provision of law to the contrary, the commissioner may
23 promulgate and adopt rules which permit consent agreements or negotiated settlements for the

24 civil penalties assessed as a result of violation of the provisions of this article.

25 (d) Nothing in this article may be construed as requiring the commissioner or his or her
26 representative to report for prosecution as a result of minor violations of the article when the
27 commissioner believes that the public interest will be best served by a suitable notice of warning
28 in writing.

29 (e) Upon application by the commissioner, the circuit court of the county in which the
30 violation is occurring, has occurred or is about to occur, as the case may be, may grant a
31 temporary or permanent injunction restraining any person from violating or continuing to violate
32 any of the provisions of this article or any rule promulgated under this article, notwithstanding the
33 existence of other remedies at law. Any such injunction shall be issued without bond.

34 (f) No state court may allow for the recovery of damages for any administrative action
35 taken, if the court finds that there was a probable cause for the action.

36 (g) The prosecuting attorney of the county in which the violation occurred shall represent
37 the Department of Agriculture, to institute proceedings and to prosecute the person charged with
38 a violation.

§19-11E-13. Payment of fees.

1 All fees, penalties or other moneys collected by the commissioner under the provisions of
2 this article shall be paid into a special account and expended upon the order of the commissioner
3 for the purpose of the enforcement and administration of this article.

§19-11E-14. Cooperation with other entities.

1 The commissioner may cooperate with and enter into agreements with governmental
2 agencies of this state, other states, agencies of the federal government, agencies of foreign
3 governments and private entities in order to carry out the purpose and provisions of this article.

§19-11E-15. Confidentiality of trade secrets.

1 The commissioner may not make public information which contains or relates to trade
2 secrets, commercial or financial information obtained from a person or privileged or confidential

3 information: *Provided*, That when revealing the information is necessary to carry out the
 4 provisions of this article, this information may be revealed, subject to a protective order, to any
 5 federal, state or local agency consultant; or may be revealed, subject to a protective order, at a
 6 closed hearing or in findings of fact issued by the commissioner.

§19-11E-16. Dairy Advisory Board.

1 (a) The commissioner shall establish a Milk Advisory Board within the Department of
 2 Agriculture. The purpose of that board is to advise the commissioner with respect to the status of
 3 dairy industry in West Virginia, obstacles to manufacture, processing, and sale of milk and milk
 4 products, recommendations with respect to changes in statutes and regulation, changes in
 5 technology and processes utilized by the dairy industry, and other hindrances to growth of the
 6 industry in West Virginia.

7 (b) The commissioner shall, by rule, establish minimum requirements and qualifications
 8 for the members of the Advisory Board.

§19-11E-17. Transfer of milk regulation authority from Department of Health and Human Resources to Department of Agriculture.

1 (a) Effective July 1, 2019, authority for the regulation of Grade A Milk is hereby
 2 transferred to WVDA from DHHR.

3 (b) Prior to July 1, 2019, WVDA and DHHR shall enter into an Agreement to provide for
 4 the orderly transition of regulatory operations from DHHR to WVDA. Said agreement shall
 5 provide:

6 (1) For the transfer of records and equipment related to the milk regulation program to
 7 WVDA;

8 (2) For the continued provision of services by staff of DHHR to WVDA under the terms of
 9 the agreement;

10 (3) For transition, upon notice to DHHR, of functions from DHHR to WVDA; and

11 (4) For the completion of the transfer of all responsibilities from DHHR to WVDA no later
12 than July 1, 2020.

13 (c) During a period from July 1, 2019, to June 30, 2020, DHHR shall cooperate fully with
14 WVDA to ensure a smooth transition of authority, knowledge, and resources to guarantee that
15 milk regulation in West Virginia suffers no gap or failure in regulation.

16 (d) All legislative rules issued by DHHR pursuant to its authority to regulate milk shall
17 remain in effect until July 1, 2020, or until earlier superseded by WVDA regulations.

NOTE: The purpose of this bill is to transfer regulation of milk and milk products from the Department of Health and Human Resources to the Department of Agriculture. This bill contains the recommendation of the Joint Task Force on Milk Rules and Regulations.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.