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Exempt Action Final Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation(s)	2 VAC 5-490
Regulation title(s)	Regulations Governing Grade "A" Milk
Action title	Amendment to lower permissible somatic cell and bacteria counts
Final agency action date	March 21, 2019
Date this document prepared	March 21, 2019

While a regulatory action may be exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the *Code of Virginia*, the agency is still encouraged to provide information to the public on the Regulatory Town Hall using this form. However, the agency may still be required to comply with the Virginia Register Act, Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

2 VAC 5-490, Regulations Governing Grade "A" Milk, details the standards that must be adhered to and the processing requirements necessary for milk to be considered grade A in Virginia. In May 2018, the Virginia State Dairymen's Association submitted to the Board of Agriculture and Consumer Services (Board) a Petition for Rulemaking requesting amendments to this regulation to lower the allowable counts of bacteria per milliliter and somatic cells per milliliter for milk to qualify as grade A. The Board considered and granted the petition at its meeting on July 24, 2018. At this meeting, the Board also adopted the proposed amendments and authorized staff to utilize the exempt regulatory process prescribed in Va. Code § 3.2-5206 to amend this regulation.

Subdivision A 3 of 2 VAC 5-490-50 currently provides that, to qualify for use in the commercial preparation of certain grade A milk or milk products, the bacteria count of the raw milk used shall not exceed 100,000 bacteria per milliliter of milk prior to commingling with any other milk...”. The proposed amendments will reduce the maximum bacteria count to 50,000 bacteria per milliliter of raw cow’s milk. This subdivision also currently provides that, “The somatic cell count of raw cow’s milk, raw water buffalo’s milk, or raw sheep’s milk shall not exceed 750,000 somatic cells per milliliter.” The proposed amendments will reduce the maximum somatic cell count for raw cow’s milk to 500,000 per milliliter of milk.

Lowering the allowable somatic cell and bacteria counts in raw cow’s milk seeking to qualify as grade A milk will result in a safer and higher-quality product for consumers and may lead to the availability of new markets for milk and milk products produced in Virginia. Many producers are currently producing grade A milk from raw cow’s milk that is in compliance with the proposed somatic cell and bacteria counts and would likely support the proposed regulatory amendments.

Statutory Authority and Exemption from Administrative Process Act

The Board is authorized by § 3.2-5206 of the Code of Virginia to establish definitions and standards of quality and identity and to adopt and enforce regulations dealing with the issuance of permits, production, importation, processing, grading, labeling, and sanitary standards for milk, milk products, and those products manufactured or sold in semblance to or as substitutes for milk or milk products. Any regulation adopted pursuant to § 3.2-5206 shall, unless a later effective date is specified in the regulation, be effective upon filing with the Registrar of Regulations, who shall publish the regulation as a final regulation in the Virginia Register of Regulations. Neither the provisions of the Administrative Process Act (Va Code § 2.2-4000 *et seq.*) nor public participation guidelines adopted pursuant thereto shall apply to the adoption of any regulation pursuant to § 3.2-5206. Prior to promulgating any regulation pursuant to § 3.2-5206, the Board shall publish a notice of opportunity to comment in the Virginia Register of Regulations. The notice of opportunity to comment shall be made at least 90 days in advance of the last date prescribed in the notice for submittals of public comment. The legislative review provisions of § 2.2-4014 shall apply to the promulgation or final adoption process of regulations under section § 3.2-5206. The Board shall consider and keep on file all public comments received for any regulation adopted pursuant to § 3.2-5206.

The required public comment period began on October 1, 2018, and ended on December 30, 2018.

Commenter	Comment	Agency response
Steven & Harold Burton Wainbur Farm (via email)	Opposes lowering allowable bacterial and somatic cell counts for cow’s milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Allen Martin Maple Lane Dairy (via mail)	Opposes lowering allowable bacterial and somatic cell counts for cow’s milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Bernard Koogler Spring-Run Holsteins Dayton, VA 22821 (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow’s milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Daniel Deal VA Tech MPA (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow’s milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the

		Board of Agriculture and Consumer Services.
Parker Mabe Mabe Farms, VA Tech (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Stephanie Collins VA Tech (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Glen & Matt Proehl Proehl Dairy Farm (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Wayne Turner Turner Dairy LLC (via Town Hall website)	Opposes lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Jackie Klippenstein Senior Vice President, Industry & Leg. Affairs Dairy Farmers of America (via email)	Supports lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Tony Banks Senior Asst. Director, Commodity/Marketing Dept. Virginia Farm Bureau Federation (via mail)	Supports lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Eric Paulson Executive Secretary VA State Dairymen's Association (via email and Town Hall website)	Supports lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Kyle Shreve Executive Director Virginia Agribusiness Council (via email)	Supports lowering allowable bacterial and somatic cell counts for cow's milk	This comment is relevant to the issue at hand and will be presented to and taken under consideration by the Board of Agriculture and Consumer Services.
Cynthia Wilson Lovers Retreat Dairy (via Town Hall website)	Opposes lowering allowable somatic cell and bacteria counts for goat's milk	The proposed amendments were further amended to clarify that the changes to the allowable bacteria and somatic cell counts apply only to cow's milk. The allowable somatic cell and bacteria counts for goat's milk will not be amended.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, internal staff review, petition for rulemaking, periodic review, board decision, etc.). "Mandate" is defined as "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Section 3.2-109 of the Code of Virginia (Code) establishes the Board of Agriculture and Consumer Services as a policy board and authorizes the Board to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

This regulatory change was initiated in response to a petition for rulemaking submitted to the Board by the Virginia State Dairymen's Association in May 2018, requesting the proposed amendments to this regulation.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On March 21, 2019, the Board of Agriculture and Consumer Services adopted as final amendments to 2 VAC 5-490, Regulations Covering Grade "A" Milk.

Periodic Review Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the proposed stage, please indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.

In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

This form is not being used to report the result of a periodic or small business impact review.

Section 2.2-4007.1 E and F of the Code of Virginia

1. There is a continued need for this regulation in order to ensure that Virginia milk producers and shippers comply with federal milk standards and with the standards established by the National

Conference on Interstate Milk Shippers (NCIMS). Compliance with this regulation is required in order for the Virginia Department of Agriculture and Consumer Services to permit dairy farmers to sell milk to intra- and interstate markets and dairy processors to sell finished product grade A fluid milk and dairy products into intra- and interstate commerce.

2. The agency received a total of 13 public comments on the proposed revisions to the regulation. Nine comments were in opposition to the proposed revisions and four were in support.
3. The regulation is not overly complex; it is easily understandable and is closely aligned with the federal Pasteurized Milk Ordinance.
4. The regulation does not overlap, duplicate, or conflict with federal or state law or regulations.
5. The regulation was last amended in 2015. During this time, technological developments have not altered the basic nature of the dairy industry. However, the proposed amendments to the regulation reflect technological developments that allow, and economic conditions that demand, a lower allowable bacterial and somatic cell counts for raw cow's milk, which may lead to the availability of new markets for milk and milk products produced in Virginia.